Case Notes

Enforcing EU Environmental Law against Member States: Air Pollution, National Courts and the Rule of Law

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Case C-404/13, The Queen, on the application of Client Earth v Secretary of State for the Environment, Food and Rural Affairs EU:C:2014:2382, OJ C – 26 of 26.1.2015, p. 6.

When a Member State finds that the limit values cannot be respected before the deadline fixed by the Air Quality Directive and wishes to postpone that deadline for a maximum of five years, that Member State is required to make an application for the postponement of the deadline by drawing up an air quality plan demonstrating how those limits will be met before the new deadline (official headnote).

I. Facts

The Air Quality Directive (Directive 2008/50/EC) sets emission limit values for certain pollutants in ambient air. In the case of nitrogen dioxide, the limit values specified in the directive must not be exceeded after 1 January 2010 (Article 13 and Annex XI). However, the directive provides that if the limit values cannot be met in a particular zone or agglomeration before the deadline, notwithstanding the implementation of appropriate pollution abatement measures, then a Member State may postpone the deadline for compliance for a maximum period of five years (Article 22). That course of action is subject to the condition that the Member State establishes an air quality plan, in accordance with Article 23, for the zone or agglomeration to which the postponement would apply, that demonstrates how conformity with the limit values will be achieved before the revised deadline. The Member State must notify the Commission and communicate the air quality plan to it, including all relevant information necessary for the Commission to assess whether or not the relevant conditions are satisfied. Article 30 of Directive 2008/50/EC (which is entitled "Penalties") provides that Member States must lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to the directive and take all measures necessary to ensure they are implemented. The penalties provided must be effective, proportionate and dissuasive.

In the United Kingdom (UK), the limit values for nitrogen dioxide were exceeded in 2010 in 40 of the 43 zones and agglomerations established in that jurisdiction for the purposes of the Air Quality Directive. In September 2011, the UK submitted plans to the Commission, including applications for postponement of the deadline, in respect of 24 of the 40 zones or agglomerations where it expected that the limit values would be met by 1 January 2015. However, the UK did not make any application under Article 22 for an extension of the deadline for 16 zones or agglomerations (including Greater London) in respect of which the air quality plans projected that compliance with the limit values would only be achieved between 2015 and 2025.

ClientEarth, a non-governmental organisation that works to protect the environment through advocacy, litigation and research, brought judicial review proceedings in the High Court seeking *inter alia* an order requiring the Secretary of State for the Environment, Food and Rural Affairs to revise the air quality plans to ensure that they demonstrated how conformity with the nitrogen dioxide limit values would be achieved as soon as possible, and by 1 January 2015 at the latest. Both the High Court ([2011] EWHC 3623 (Admin)) and the Court of Appeal ([2012] EWCA Civ

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897) dismissed the claim. The Supreme Court subsequently granted ClientEarth leave to appeal.

On appeal, in May 2013, the Supreme Court made a declaration that the UK was in breach of its obligation to comply with the nitrogen dioxide limit values under Article 13 of Directive 2008/50/EC for the 16 zones and agglomerations in question ([2013] UKSC 25). This order opened the way "to immediate enforcement action at national or European level." The Court also found that the case raised "difficult issues of European law", determination of which required the guidance of the Court of Justice of the European Union (CJEU). The Supreme Court therefore stayed the proceedings and referred a series of questions to the CJEU for a preliminary ruling. The questions referred concerned the correct interpretation of Articles 22 and 23 of Directive 2008/50/EC and, in the event of non-compliance with Articles 13 or 22, the remedies (if any) that a national court must provide in order to comply with Article 30 of the directive (which concerns penalties) and Article 4 and/or Article 19 TEU (concerning the duty of loyal co-operation and the duty to provide effective legal remedies respectively).

It is notable that the Supreme Court requested that the request for a preliminary ruling be deal with under the expedited procedure provided for in Article 105 of the Court's Rules of Procedure, but this request was rejected by the CJEU (Case C-404/13, *R (Client Earth) v Secretary of State for the Environment, Food and Rural Affairs*, EU:C:2013:805).

II. Judgment

The Supreme Court enquired whether Article 22 must be interpreted as meaning that, where compliance with the limit values cannot be achieved in a given zone or agglomeration by the 1 January 2010 deadline, a Member State, in order to be entitled to postpone that deadline, must make an application for postponement in accordance with Article 22. The national court also asked whether there were any circumstances in which a Member State may be relieved of that obligation. The CJEU emphasised that, as regards nitrogen dioxide, Article 13(1) provides that the limit values "may not be exceeded" after the deadline and that this amounts to "an obligation to achieve a certain result." It followed that Member States are required to take all the measures necessary to comply with that obligation and cannot consider that the power to postpone the deadline, which exists under Article 22, allows them to "to defer, as they wish, implementation of those measures." Drawing on recital 16 in the preamble to the Air Quality Directive, the CJEU stressed that deferral of the original deadline is only permissible where, notwithstanding implementation of appropriate pollution abatement measures, "acute compliance problems" exist in specific zones and agglomerations.

The CJEU determined therefore that a Member State is indeed required to make an application for postponement (for a maximum of five years) when it is objectively apparent, having regard to existing data, and notwithstanding implementation of appropriate pollution abatement measures, that compliance with the limit values cannot be achieved in a specific zone or agglomeration within the original deadline. The CJEU explained that this interpretation followed from both the context of Article 22(1) and the aim pursued by the EU legislature of ensuring better ambient air quality. Furthermore, the directive does not provide for any exception to the obligation created in Article 22(1).

The national court also asked whether, in circumstances where it is apparent that compliance with the limit values for nitrogen dioxide cannot be achieved in a specific zone or agglomeration before 1 January 2010, and the Member State has not applied for postponement of that deadline under Article 22, the fact that an air quality plan has been drawn up in accordance with Article 23(1) means that the Member State can be considered to have met its obligations under Article 13. The CJEU recalled that where the limit values for nitrogen dioxide are exceeded after the deadline, the Member State must draw up an air quality plan that meets certain requirements. That plan must set out appropriate measures so that the period during which the limit values are exceeded is as short as possible. The CJEU refused to accept that the mere fact that such a plan had been prepared meant that the Member State concerned had entirely satisfied its obligations under Article 13(1). According to the Court, such an analysis would be liable to impair the effectiveness of Articles 13 and 22 because it would permit a Member State to disregard the deadline set under Article 13 under less stringent conditions than those imposed by Article 22.

In its final question, the Supreme Court enquired of the CJEU whether Articles 4 and 19 TEU and Article 30 of Directive 2008/50/EC must be interpreted

as meaning that, where a Member State has failed to meet the limit values within the original deadline, and has not applied for a postponement of that deadline as per Article 22, it falls to the national court to take any necessary measure, such as an order in the appropriate terms, so that the national authority establishes the plan as required by the directive. The CJEU took the view that the reason why the interpretation of Article 30 of the directive was relevant to the dispute in the main proceedings was not clear from the file submitted to the Court, and so it focussed its attention on Articles 4 and 19 TEU.

Article 4 TEU concerns the principle of sincere cooperation. The established jurisprudence confirms that it is for the Member States to ensure judicial protection of an individual's rights under EU law (Case C-432/05, *Unibet*, EU:C:2007:163, para. 38). Article 19 TEU requires Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law.

The CJEU explained that if the limit values for nitrogen dioxide are exceeded after 1 January 2010 in a Member State that has not applied for a postponement of that deadline in accordance with Article 22, then Article 23(1) imposes a clear obligation on the Member State to establish an air quality plan that complies with certain conditions (Case C-237/07, *Janecek,* EU:C:2008:447, para. 36).

The Court then recalled the well-established principles from its jurisprudence governing the enforcement of EU law at national level: individuals are entitled to invoke the provisions of a directive which are unconditional and sufficiently precise against public authorities. Furthermore, the competent national authorities and the courts must interpret national law, as far as possible, in a manner that is compatible with the purpose of the directive. Where such an interpretation is not possible, they must disapply the rules of national law which are incompatible with the directive in question. The CJEU has ruled consistently that it is incompatible with the binding effect that Article 288 TFEU ascribes to the Air Quality Directive to exclude, in principle, the possibility of the obligation imposed by that directive being relied on by persons concerned. That consideration applies in particular to a directive whose objective is to control and reduce air pollution and which is designed to protect public health.

Following its earlier *Janecek* ruling, (Case C-237/07, *Janecek,* EU:C:2008:447, para. 39), the CJEU held that the natural or legal persons directly concerned by the limit values being exceeded after 1 January 2010 must be entitled to require the competent authorities to establish an air quality plan which complies with the requirements of Article 23, if necessary by bringing an action before the national courts, in circumstances where a Member State has failed to meet the limit values on time and has not applied for postponement of the deadline.

Although the Member States have an element of discretion as regards which measures to adopt in the air quality plan, it is clear from Article 23(1) that those measures must ensure that the period during which the limit values are exceeded is a short as possible.

The Court concluded therefore that where a Member State has failed to meet the limit values by the original deadline, and has not applied for a postponement of the deadline, it is for the national court having jurisdiction, when a case is brought before it, to take "any necessary measure, such as an order in the appropriate terms", against the national authority concerned, so that the authority establishes the air quality plan required by the directive.

This reply from the CJEU to the question posed by the Supreme Court confirms that the national court must take the measures necessary, including potentially making an order against the Secretary of State, with a view to securing compliance with the obligations set down in the Air Quality Directive.

III. Comment

The CJEU's judgment is significant for two reasons. First, the Court clarified the obligations imposed on Member States under the Air Quality Directive. This was the first occasion on which the Court was called on to consider these obligations in any detail. The CJEU confirmed that Article 13 creates a binding obligation to deliver a certain result. Furthermore, the Court ruled that where the limit values will not be met within the original deadline, the obligation to apply to the Commission for a postponement of that deadline under Article 22 is mandatory. These aspects of the judgment were fairly predictable. The CJEU has adopted a consistently robust and purposive approach when called on to clarify the scope of Member State obligations under environmental directives. This is particularly the case where, as in the case of

the Air Quality Directive, one of the key aims of the directive is to protect human health.

Second, by confirming that a national court is required to take all measures necessary to ensure that a Member State government complies with its obligations under the Air Quality Directive, the Court has given a further boost to the enforcement of EU law at national level. The CJEU's unequivocal ruling on the national court's responsibility to take the necessary measures, which may include making an order against the UK Government requiring that specific action be taken to address air pollution, should embolden judges in the Member States to enforce EU environmental law against public authorities. National courts are often (understandably) reluctant to enforce EU law against their own governments in the absence of the clearest pronouncement from the CJEU. The *ClientEarth* ruling provides welcome authority on this point. Having confirmed the national court's responsibility to enforce EU law, the CJEU, as is its consistent practice, provided fairly general guidance to the national court; it did not specify precisely what measures the Supreme Court should take to ensure UK compliance. It left it to the national court to determine what measures or orders would be most appropriate in the circumstances. This is a sensible and pragmatic approach which recognises that the local court is best placed to determine the most appropriate remedy and/or sanction for breach of EU law.

The dispute in the main proceedings will return to the Supreme Court in due course and we can expect interesting developments here. It seems clear that the national court will make an order against the Secretary of State requiring that certain measures be taken as a matter of urgency, specifically the development of air quality plans to ensure compliance in the shortest time possible. This raises interesting practical issues because the Supreme Court itself does not have the technical expertise to assess air quality plans for compliance with Article 23.[1] It is also likely that the national court will be required to oversee implementation of its order(s).

It is notable that the European Commission has initiated infringement proceedings against the UK for breach of the Air Quality Directive.[2] So the UK Government is under pressure from two fronts – at national level before the Supreme Court and at EU level by reason of the Commission's enforcement action. Clearly, it is the action at national level that holds the greatest potential to force the government to take urgent action to address air pollution. Infringement proceedings at the EU level are notoriously slow and cumbersome. This state of affairs demonstrates, yet again, the importance of effective enforcement of EU environmental law by the national courts. These courts are best placed to make the necessary orders in light of the prevailing local conditions and to impose appropriate sanctions in the event of breach of EU law. In its landmark *ClientEarth* ruling, the CJEU has acted to strengthen local enforcement as the primary mechanism for delivering the rule of EU (environmental) law in the Member States.

Postscript

On 29 April 2015, the Supreme Court unanimously ordered the UK Government to prepare new air quality plans under Article 23(1), in accordance with a defined timetable, and to submit the revised plans to the European Commission not later than 31 December 2015: R (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs [2015] UKSC 28.

1 Richard Macrory, "European Court rules on air quality obligation", *ENDS Report* 479, January 2015, at p. 22.

2 European Commission, Press Release, "Commission takes action against UK for persistent air pollution problems", IP/14/154, 20 February 2014.