

Defra consultation on draft plans to improve air quality: tackling nitrogen dioxide in our towns and cities, September 2015

ClientEarth response to the consultation

Introduction

1. This document sets out a number of points of law and principle made by ClientEarth in response to the Department for Environment Food & Rural Affairs (“Defra”) consultation on draft plans to improve air quality, *Tackling nitrogen dioxide in our towns and cities*, dated September 2015.
2. The air quality plans set out in the consultation documents are in draft and are, in some respects, incomplete. For this reason and in order to respond to the consultation in a proportionate manner, ClientEarth does not propose to set out in this document every point of legal disagreement, nor every legal point which it might wish subsequently to put forward upon a judicial review challenge of the plans.¹
3. ClientEarth is a member of the Healthy Air Campaign and endorses all points submitted by the campaign in its response to the consultation.

Summary

4. The draft plans consulted upon do not comply with the requirements of Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe (“the Directive”) or with the mandatory order of the Supreme Court dated 29 April 2015 for the following reasons—
 - 4.1. The plans propose only one new national measure (a national framework for clean air zones) and thereby unjustifiably exclude a number of other possible measures,

¹ Whether in a free-standing challenge, or pursuant to the liberty to apply granted by the Supreme Court in its most recent judgment of 29 April 2015 (§35), or both.

despite the fact that (even on Defra's own best case scenario²) the draft plans will not achieve compliance until 2020 in 36 of 37 areas,³ and not until 2025 in London. There has, as previously, been a failure to take the correct 'gap-bridging' approach to compliance.⁴

- 4.2. The only new national measure proposed – the national framework for clean air zones – is proposed to be implemented by local authorities but is not mandatory, even for local authorities where exceedances of mandatory limit values will otherwise continue up to or beyond 2020, ten years after the original date for compliance set out in the Directive and 16 years after the limit values for NO₂ were first set.⁵
- 4.3. Further, the (non-mandatory) clean air zones proposed envisage a timetable which is too leisurely and a range of restrictions which is unduly liberal in the light of the urgent Directive requirement, underlined by the Supreme Court in its most recent judgment, for compliance as swiftly as possible.
- 4.4. The UK overview document wrongly seeks to rely upon local authorities (rather than national governments) implementing the Directive, despite the fact that there is no equivalent legally binding requirement on local authorities to do so (and despite the almost total absence of funding for the necessary measures).
- 4.5. The plans consulted upon wrongly take 2020 as an acceptable target date for compliance and fail to apply the correct legal test of compliance in the shortest possible time.
- 4.6. The plans consulted upon wrongly exclude from consideration developments since 2013 which have significantly worsened air quality and, thus, take the wrong 'baseline' for assessing whether any planned reductions in NO₂ emissions will lead to compliance with the mandatory Directive limit values (and if so, when).

² An alternative scenario modelled by Defra, assuming that 'real world' emissions from diesel vehicles are higher than those predicted by European test cycles, would result in up to 22 additional zones being non-compliant in 2020. See the Draft Evidence Annex accompanying the consultation, at §65.

³ UK Overview Document, consultation draft, Table 2, pp.9–10. The remaining area is projected to be compliant in 2015 in any event.

⁴ See ClientEarth's Note on Impossibility dated 7 March 2013 prepared in the course of the first Supreme Court hearing and annexed hereto (Annex I).

⁵ By Directive 99/30/EC of the Council dated 22 April 1999, Annex II.

- 4.7. The plans consulted upon do not give sufficient detail of the measures proposed or of the timetable for implementation or compliance, and therefore do not comply with §8 of Annex XV to the Directive.
- 4.8. The plans consulted upon fail to have regard to the latest evidence on the 'real world' performance of diesel vehicles (including the Volkswagen scandal) and, therefore, wrongly predict compliance at an earlier date than is in fact feasible on the basis of the measures selected.

The Legal Framework

The requirements of the Supreme Court Order and of the Directive

5. The following are key points as to the requirements of the Directive and of the Supreme Court:
- 5.1. The Secretary of State is required by the Supreme Court Order to prepare new plans under Article 23(1) of the Directive and these plans must set out new measures to address the problems.⁶
- 5.2. Such plans are of an 'emergency character':⁷ Article 23(1) acts as an emergency mechanism applying where there is already (as there has been found to be in this case) a serious breach of EU law resulting in grave dangers to human health.⁸ There is a need for 'immediate action' to address the issue.⁹
- 5.3. Article 23(1) is a specific implementation of Article 4(3) TEU, under which Member States are required to 'take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out the Treaties or resulting from the acts of the institutions of the Union'.¹⁰ Article 4(3) requires the UK to adopt all measures necessary to put an end to its infringement of its obligation under Article 13 of the Directive to achieve compliance with the NO₂ limit values.¹¹

⁶ Supreme Court judgment of 29 April 2015, §23.

⁷ Ibid, §16.

⁸ Ibid §12.

⁹ Ibid §31.

¹⁰ European Commission's Observations in Case C-404/13 R (*ClientEarth*) v *Secretary of State for the Environment, Food and Rural Affairs* (CJEU) ('Observations') §§34, 52.

¹¹ Ibid.

5.4. In drawing up plans under Article 23(1), ‘a degree of effort’ is required by the Member State, with a very detailed examination and consideration of all available measures being required.¹² The Supreme Court made clear that the replacement plans must consider those measures those included in the ‘checklist’ of measures in Annex XV to the Directive at Section B, §3:

(a) reduction of emissions from stationary sources by ensuring that polluting small and medium sized stationary combustion sources (including for biomass) are fitted with emission control equipment or replaced;

(b) reduction of emissions from vehicles through retrofitting with emission control equipment;

(c) procurement by public authorities, in line with the handbook on environmental public procurement, of road vehicles, fuels and combustion equipment to reduce emissions.

(d) measures to limit transport emissions through traffic planning and management (including congestion pricing, differentiated parking fees or other economic incentives; establishing low emission zones);

(e) measures to encourage a shift of transport towards less polluting modes;

(f) ensuring that low emission fuels are used in small, medium and large scale stationary sources and in mobile sources;

(g) measures to reduce air pollution through the permit system under Directive 2008/1/EC, the national plans under Directive 2001/80/EC, and through the use of economic instruments such as taxes, charges or emission trading.

(h) where appropriate, measures to protect the health of children or other sensitive groups.

5.5. The Article 23 plan must foresee ‘effective, proportionate and scientifically feasible’ measures¹³ to address the specific emissions problems in each zone as swiftly as possible. The measures must be those which would ‘most swiftly and concretely tackle’ the specific problems in that area.¹⁴

¹²Supreme Court judgment of 29 April 2015, §§11, 25.

¹³ Ibid §18.

¹⁴ Ibid §16.

6. Turning in particular to the choice of measures in an Article 23 plan, and their manner of implementation:

6.1. It is not sufficient for a member state to make a choice of measures which are less expensive and less intrusive than those that would be required to put an end to the string of continuous breaches of the limit values¹⁵ as swiftly as possible. Such plans will need to be ambitious and may involve significant public expenditure.¹⁶

6.2. Whereas in preparing a plan under Article 22 a member state may 'take into account and balance various economic, social or political considerations in its choice of the measures to be foreseen' to demonstrate compliance by 2015, its margin of discretion when preparing a plan under Article 23 is 'heavily circumscribed', as doing so would 'further prolong the period of non-compliance with Article 13 beyond that which is inevitable'.¹⁷ Member states are 'must take all the measures necessary' to secure compliance with Article 13.¹⁸

6.3. Any measure set out in a plan under Article 23 must satisfy the following four requirements—¹⁹

(a) The measure must be described (in sufficient detail).

(b) A (specific) timetable for implementing the measure must be set out in the plan.

(c) The plan must set out an estimate of the improvement of air quality foreseen upon implementation of the measure (sometimes referred to as an 'impact assessment').

(d) The plan must set out the expected time required to achieve that improvement after implementation of the measure.

6.4. A measure set out in a plan under Article 23 must include a formal commitment by the competent authorities to take action on that measure. An optional measure to

¹⁵ Ibid §14.

¹⁶ Cf Ibid §17.

¹⁷ Observations, §§61–63.

¹⁸ Supreme Court judgment of 29 April 2015, §29.

¹⁹ Directive, Annex XV, Part A, §8 (a) to (c) (subparagraph (c) sets out two requirements, as to (i) impact assessment and (ii) timetable).

be implemented at a public body's discretion will not fulfil the requirements of Article 23, not least because an optional measure cannot fulfil the requirements set out at §6.3 above.²⁰

6.5. A measure set out in a plan under Article 23 must be proportionate, so that (in particular) the national authorities must show that they have carefully examined all other measures achieving the same result by less restrictive means. Thus, for example, a total ban on traffic in a particular area might be considered disproportionate if the competent authority had failed to consider implementing a less restrictive measure, or combination of measures, which would be equally effective in reducing air pollution in that area in the same timeframe.²¹

6.6. Moreover, in order to comply with Article 23, a member state is required—

(a) to include measures in the plan specifically addressing each and every important source of pollution (so that measures may not be limited to one pollution source, even if that source is predominant);²² and

(b) where appropriate, to ensure a more intensive²³ implementation of a measure which has already been included in the plan (and/or is already in place on the ground) in order to ensure that the period of exceedance is kept as short as possible as required by Article 23.²⁴

The role of local authorities

7. Significant reliance is apparently placed by Defra on the role of local authorities in helping to meet the Directive's mandatory air quality limits are met. ClientEarth of course accepts that local measures – such as clean air zones – are of the utmost importance in dealing with air pollution. But, in order to comply with the requirements of the Directive, the implementation of such measures must be mandatory, as explained further below.

²⁰ See Commission Decision of 25.6.2012 on the notification by the UK of a postponement of the deadline for attaining the limit values for NO₂ in 24 air quality zones, C(2012) 4155 final, §7.

²¹ See e.g. Case C-320/03 Commission v Austria and Case C-28/09 Commission v Austria (No 2) (both relating to a lorry ban); and Commission Decision of 3 May 2006 concerning draft national provisions notified by the Kingdom of the Netherlands laying down limits on the emissions of particulate matter by diesel powered vehicles (2006/372/EC).

²² See the Commission Decision referred to above, note 20, at §11.

²³ E.g. faster or more widespread.

²⁴ See the Commission Decision of 25.6.2012 referred to above, §20.

8. In the absence of binding requirements on local authorities to take action, the inclusion in an air quality plan of an optional measure to be taken by a local authority does not comply with Article 23 and cannot ensure compliance with the Directive's mandatory limits for NO₂:

8.1. The Directive is transposed into national law by (in England) the Air Quality Standards Regulations 2010.²⁵ Those regulations place a duty on the Secretary of State to ensure that Directive limit values (including for NO₂) are not exceeded (reg.17). They do not set out any like duty for local authorities. Elsewhere in the UK, regulations for the devolved administrations also place a duty on those administrations, rather than the local authorities in their territories, to achieve compliance with the Directive limit values.²⁶

8.2. Thus, a legislative choice has been made to transpose the Directive by means of a duty on the Secretary of State (or, outside England, on the devolved administrations) rather than a duty on local authorities. This is readily understandable given, in particular, the limited range of powers available to local authorities by comparison with national government (which, in addition to being able to take national measures may require local authorities to take local ones).

8.3. In England, the Directive limit values are set as 'air quality objectives' for local authorities by virtue of the Air Quality (England) Regulations 2000 (as amended) (reg.4 and Schedule) (separate Regulations do the same for local authorities in Wales, Northern Ireland, and Scotland).²⁷ That gives rise to a duty on local authorities to designate as an air quality management area any part of its area where the Directive limits are not being achieved: Environment Act 1995, s.83.²⁸ That, in turn, gives rise to a number of duties on the local authority in relation to designated areas, including a requirement to prepare an action plan: Environment Act 1995, s.84.

²⁵ See the transposition note contained in the Explanatory Memorandum to the 2010 Regulations (SI 2010 No. 1001).

²⁶ Air Quality Standards (Wales) Regulations 2010 (reg.13); Air Quality Standards Regulations (Northern Ireland) 2010 (reg.18); Air Quality Standards (Scotland) Regulations 2010 (reg.17).

²⁷ Air Quality (Wales) Regulations 2000 (as amended) (reg.4 and Schedule); Air Quality Regulations (Northern Ireland) 2003 (as amended) (reg.4 and Schedule); Air Quality (Scotland) Regulations 2000 (as amended) (reg.4 and Schedule).

²⁸ In relation to Northern Ireland, to which the 1995 Act does not extend, the corresponding provisions to those discussed here and below are in Part III of the Environment (Northern Ireland) Order 2002.

- 8.4. It is important to note that the statutory scheme under the Environment Act 1995 does not – and does not purport to – implement the requirements of the Directive. By way of example only—
- (a) There is no requirement that a local authority should act to keep any exceedance of Directive limit values ‘as short as possible’ (cf Article 23(1)) or at all. The timescales envisaged in practice are lengthy: for example, guidance suggests a period of 12-18 months for the drawing up of an action plan following designation of any air quality management areas.²⁹
 - (b) There is no requirement that an action plan should include the information in Annex XV to the Directive.
- 8.5. The Secretary of State has reserve powers under s.85 of the Environment Act 1995 to give directions to a local authority where (*inter alia*) air quality standards or objectives are not being achieved or where the local authorities’ actions, or proposed actions, in purported compliance with ss.83-83 are ‘inappropriate in all the circumstances of the case’. ClientEarth is not aware of any instance in which the Secretary of State has exercised these powers in relation to NO₂, even in cases of serious and long-standing breaches of limit values in particular local authority areas.
- 8.6. The inclusion of a clean air zone, or any other particular measure, by a local authority in an action plan is optional. Practice guidance is provided by Defra as to the ‘more ambitious’ measures which local authorities can take, but it is not mandatory for them to do so.³⁰ Indeed, Defra states that there is no obligation on local authorities to have regard to the practice guidance at all.³¹
- 8.7. Moreover, it is important to note that the funding which would be necessary in order for local authorities to ensure compliance in the shortest time possible with Directive limit values has not been made available. Contrast, for example, (i) Defra’s estimate that local authorities would incur £24m in infrastructure costs for six clean air zones³² with (ii) the (total) funding of just £500,000 being made

²⁹ Local Air Quality Management Policy Guidance (PG09), February 2009, Defra, at §4.3 p20.

³⁰ Local Air Quality Management Policy Guidance, p.45 para 2. See also <http://laqm.defra.gov.uk/action-planning/aqap-supporting-guidance.html> (accessed 20.10.2015) under heading ‘LAQM Practice Guidance’.

³¹ See the website referred to in the previous footnote, loc cit.

³² Draft Evidence Annex, §§49–50 and Table 6.3.

available by Defra to local authorities in England in 2015-2016.³³ This is half what was available in the previous two grant years. The Scottish Parliament alone makes £500,000 available annually to local authorities to assist with air quality monitoring and a further £1m for supporting action plan measures.³⁴ Defra has made no commitments to help local authorities fund the substantial projected costs of establishing clean air zones, saying only that ‘appropriate incentives’ will be determined ‘taking into account the outcome of the consultation and the current Spending Review’.³⁵ It would be neither reasonable nor realistic to expect a particular local authority to divert funding from other areas of its budget solely to ensure compliance with Directive NO₂ limits.³⁶

9. Turning to the position in EU law, it is of course the case that it is the UK Government which remains responsible for the breaches of EU law in this case.³⁷ And any suggested failure by local authorities to take action which would help to achieve Directive limit values cannot justify a failure by the UK to comply with its EU law obligations³⁸ as a matter of EU law.³⁹

The Draft Plans

Overall approach to compliance

10. The correct approach to complying with the Directive would involve (in summary) the following steps:⁴⁰

- 10.1. First, identify the locations in each zone and agglomeration where the NO₂ limit value is not currently being met;

³³ UK Overview Document, consultation draft, §121 p29.

³⁴ Ibid, §122.

³⁵ *Consultation on draft plans to improve air quality: Tackling nitrogen dioxide in our towns and cities*, September 2015, §29.

³⁶ Cf the Policy Statement for Part 2 of the Localism Act, §69 p20.

³⁷ Ibid, §§10-11 p7.

³⁸ Case C-388/01, *Commission v Italy*, judgment at §§26-27.

³⁹ Cf the position, as regards the Government seeking a financial contribution in certain strictly defined circumstances, in domestic law by virtue of Part 2 of the Localism Act 2011 and the associated Policy Statement (referred to above, note 36).

⁴⁰ The approach is considered in more detail in ClientEarth’s Note on Impossibility (Annex I); see further the *UK Approach to its Application for Time Extension Notification to Nitrogen Dioxide Limit Value deadline*, version 1.2, August 2009, especially at §2.2, §29 and §§78-85.

- 10.2. Secondly, quantify the extent to which the NO₂ limit value is not currently being met;
 - 10.3. Thirdly, analyse the sources of the exceedance so as to find—
 - (a) The emission reductions that are required to meet the limit value (both currently and in the future⁴¹); and
 - (b) Which are the major sources contributing to the exceedance.
 - 10.4. Fourthly, in relation to each exceedance, identify all measures⁴² available to tackle each and every important source of pollution.
 - 10.5. Fifthly, select from those measures a combination of binding and specific measures which will most swiftly and concretely tackle the specific problems in the geographical area in question.
11. Considering these five requirements in turn in relation to the draft plans and the consultation documents:
- 11.1. The first requirement (identifying the locations at which the NO₂ limit value is not being met) is satisfied, subject to the questions of (a) the baseline year (and subsequent exceedances); (b) the real-world performance of diesel vehicles. These two points are dealt with separately below.
 - 11.2. The second requirement (quantifying the extent of the exceedance at each location) is, similarly, met subject to points (a) and (b) above.
 - 11.3. As to the third requirement, this has been satisfied, subject to points (a) and (b) above, in relation to the contribution of road transport, but not with regard to non-transport sources, with significant proportions of the overall levels of NO_x being attributed to general categories such as “domestic”, “industry” and “regional background”.

⁴¹ This modelling needs to take into account any increases in NO₂ concentrations since the baseline year, taken in the consultation documents as 2013: see further below.

⁴² References to ‘measures’ here and in what follows are to measures which are effective, proportionate and scientifically feasible.

12. As to the fourth requirement, the consultation documents and draft plans simply fail to carry out the central, and vitally important, exercise of identifying all available measures to tackle each and every significant source of pollution:

12.1. What is required is a full and complete list of available national, regional and local measures for tackling NO₂. By way of illustration only, such a list would need to include the following—

- (a) All the measures set out in the 2007 Air Quality Strategy, including⁴³ those measures which (as at 2007) had been listed as suitable for being kept under review as well as those rejected at that time as not being cost beneficial or being less feasible. Such measures include, for example, a national road pricing scheme, tighter emission standards for boilers, and reducing emissions from large combustion plants through the application of SCR equipment.
- (b) All the measures set out in Table 5⁴⁴ of the Regulatory Impact Assessment dated January 2011 accompanying the 2011 UK Overview Document.
- (c) All the measures identified in the Mayor of London's December 2010 Air Quality Strategy⁴⁵ and September 2014 Transport Emissions Roadmap, including for example: extending scrappage schemes for vehicles contributing significantly to pollution in urban areas (including heavier vans, minibuses and taxis); grants for vehicle retrofitting; consumer labelling schemes for vehicles at the point of sale; use of the tax regime; increases in the fixed penalty for vehicle idling; and encouraging and promoting the cleanest vehicles through financial incentives.⁴⁶ A recent progress report on the 2010 Strategy (*Cleaner Air for London: Progress report on the delivery of the Mayor's Air Quality Strategy*) sets out (Policy 13) that '*The Mayor continues to lobby Government for more resources and action at the national level,*' highlighting that he alone cannot solve London's air quality.

⁴³ As was recognised in the *UK Approach* document (note 40 above) at §§81-83. See further ClientEarth's Note on Impossibility (Annex I hereto) at §§6-13.

⁴⁴ Page 23. This table is not in itself complete since (i) it does not include all measures in the 2007 Air Quality Strategy; (ii) it arbitrarily excludes measures which, although available and scientifically feasible, had (at that time) an estimated abatement cost in excess of £80,000 per tonne of NO_x.

⁴⁵ At §§5.3.8 to 5.3.9.

- (d) All measures necessary to tackle emissions from sources other than road transport, such as industry, non-road mobile machinery, shipping (including electrification of port infrastructure and speed limits) and domestic heating (such as a national boiler scrappage scheme).

12.2. But the consultation documents fail to set out any such list of available measures. There is no indication that Defra has compiled such a list for present purposes, still less that it has analysed the list in order to determine how effective each measure will be in reducing pollution by NO₂ in the areas of exceedance.

12.3. Rather, the approach taken in the consultation documents is to refer to a number of existing measures tackling NO₂, acknowledge that they are not adequate to achieve compliance before 2020, and yet propose just one new national measure (from the very large number which would, on a proper analysis, be available) – namely a national network of (optional) clean air zones.

12.4. The consultation document states at §228 *‘we do not consider there is a combination of measures able to deliver compliance earlier than modelled in each and every zone outside London’*. But that statement is not one which Defra is properly able to make. From the consultation documents, Defra does not seem to have carried out the necessary analysis of (i) identifying each and every available measure; (ii) quantifying the reduction in NO_x emissions if that measure is implemented; (iii) calculating the timescale for implementation of the measure; (iv) selecting from among the available measures that combination which would most swiftly and concretely tackle air pollution in the area in question.

12.5. By way of example only, no new measures are proposed to address emissions from industry in circumstances where (i) on Defra’s analysis, industry is the largest overall source of NO_x in the UK;⁴⁷ and (ii) the UK has applied for an optional derogation under Article 32 of the Industrial Emissions Directive 2010/75/EU which, if granted, will allow certain power stations which emit high levels of NO_x (using high smokestacks, thus dispersing NO_x over a large area) to continue doing so until 2020. The use of this optional derogation is plainly contrary to the UK’s

⁴⁷ UK Overview Document, §204.

obligation to achieve compliance with the NO₂ limit values in the shortest possible time.

12.6. Indeed, the statement that there are no available measures to deliver compliance earlier than modelled is demonstrably false, even on the limited analysis which Defra has carried out. That is because the earlier (and mandatory) implementation of effective clean air zones in the areas which are currently in exceedance⁴⁸ would, as set out below, plainly lead to swifter improvements in NO₂ levels than is currently planned.

13. Thus, for the reasons set out above, the fifth requirement, to select from the available measures a combination of binding and specific measures which will most swiftly and concretely tackle the specific problems in the geographical area in question, is not and cannot be met by the draft plans and consultation documents. Only one new national measure is proposed and, as set out further below, there is simply no attempt to achieve compliance before 2020. Indeed, as will now be demonstrated, even limiting consideration to the one new national measure proposed – that of a network of (optional) clean air zones – it is clear that compliance in a significantly shorter time can and should be achieved by a more intensive, including faster, implementation of the zones (and across a wider range of geographical areas).

Proposed network of clean air zones

14. The draft plans propose a national system of Clean Air Zones ('CAZs'),⁴⁹ but make clear⁵⁰ that this is an optional measure to be implemented at local authorities' discretion, even in the case of serious and long-lasting exceedances of the mandatory Directive limit values. The draft plans do so only in outline, with a 'full framework' for the CAZs to be set out in 'early 2016' (UK Overview Document, §146, p.33). This is contrary to the Supreme Court Order, which requires the Secretary of State to deliver new air quality plans to the Commission in final form no later than 31 December 2015.

15. We will provide more detailed submissions on the national framework for Clean Air Zones in due course, but for the purposes of this response will make some general

⁴⁸ Including those which are likely to be in exceedance under real-world conditions (§65 of the UK Overview document): as to this point, see further below.

⁵⁰ E.g. Evidence Annex, §49: 'It is at the discretion of the Local Authority whether and how they implement any CAZs.'

comments on the approach that has been outlined. ClientEarth agrees that there is an urgent need for a national network of effective Clean Air Zones which restrict access to the most polluted areas to all but the cleanest vehicles. However, such a network must be (i) mandatory, (ii) implemented as swiftly as possible so as to bring exceedances to an end⁵¹ and (iii) ensure vehicles are meeting the strictest emissions standards under real world driving conditions.

Need for binding measures

16. It is clear that the consultation's proposal for optional CAZs does not comply with Article 23 of, and Annex XV to, the Directive and, accordingly, does not comply with the Order of the Supreme Court. See the Commission's Decision on earlier UK proposals for discretionary low emission zones:⁵²

“Several of the air quality plans list the measure “low emission zone” as an optional measure to be implemented. It should be noted that a plan is considered as an air quality plan for the purposes of a notification pursuant to Article 22 of Directive 2008/50/EC,⁵³ if it has been formally endorsed by the competent authorities so that it constitutes a formal commitment to take the necessary abatement action with the view of ensuring compliance with the NO₂ limit values before the new deadline. Considering that the competent authorities have indicated the measure “low emission zone” to be only optional, the Commission finds that it does not allow the Commission to assess with enough certainty whether this measure will be implemented or not and hence whether compliance by the extended deadline can be achieved in those zones.”

17. Accordingly, in order to comply with the Directive and the Supreme Court Order, the final plans submitted to the Commission by the UK Government should provide for mandatory CAZs⁵⁴ to be introduced by a certain date in each zone or agglomeration.

Need for more intensive, including faster, implementation of CAZs

18. The approach taken in the Evidence Annex is as follows:

18.1. First, six zones are selected which are predicted⁵⁵ to exceed the mandatory Directive annual NO₂ limit in 2020, based on existing data and with a baseline year of 2013.^{56,57}

⁵¹ See further below.

⁵² Commission Decision of 25.6.2012 at §7.

⁵³ This applies equally to Article 23 of the Directive.

⁵⁴ As to which zones/agglomerations require such mandatory action, see below.

18.2. Secondly, the 'compliance gap' in 2020 is calculated on the basis of existing measures for that zone.⁵⁸

18.3. Thirdly, an analysis is carried out considering which classes of vehicles need to be included in the CAZ for each zone in order to achieve compliance in 2020.^{59,60}

19. The outcome of this exercise is to suggest CAZs (the implementation of which is optional and at the local authority's discretion) for six zones, including London, as follows:

19.1. Greater London Urban Area: type D (buses, coaches, taxis, HGVs, LGVs and cars);

19.2. West Midlands Urban Area and West Yorkshire Urban Area: type C (buses, coaches, taxis, HGVs and LGVs);

19.3. East Midlands, Nottingham Urban Area, and Southampton Urban Area: type A (buses, coaches and taxis).

20. This analysis is flawed in a number of respects:

20.1. First, as already set out, it fails to adopt the correct approach to ensuring compliance with the Directive in that it only assesses and proposes for (voluntary) implementation one measure and fails to consider or assess other available measures for improving air quality and ensuring speedy compliance.

20.2. Second, the approach wrongly limits CAZs to those zones which will not be compliant in 2020 based on existing measures. In order to ensure compliance as soon as possible, CAZs should be considered for all areas which are currently in breach.⁶¹

⁵⁵ On the basis of European test cycle data as to diesel emissions. If real-world emissions are used, a further 22 zones may be non-compliant in 2020: Evidence Annex, §65. This point is dealt with separately below.

⁵⁶ The question of the correct baseline is also dealt with separately below.

⁵⁷ Evidence Annex, §18.

⁵⁸ Evidence Annex Table 4.1.

⁵⁹ Assuming that this measure alone is used.

⁶⁰ Evidence Annex, §23 and Table 4.3.

⁶¹ Unless either (a) the area is unsuitable for a CAZ – e.g. it is a rural area or (b) the zone will be compliant with Directive limit standards within a short period of months rather than years, i.e. would be compliant by the time a CAZ was introduced allowing the necessary time for consultation and implementation.

20.3. Third, the approach wrongly seeks to ensure compliance by 2020 rather than in the shortest time possible. A further five years' delay cannot and does not amount to compliance in the shortest possible time, particularly given the public health context and the need, recognised by the Supreme Court, for urgent action on an emergency basis. CAZs should be implemented as swiftly as possible, allowing the necessary time for consultation and implementation before they are brought into force. That can and should be done much sooner than 2020.

20.4. Fourth, in the case of the five zones other than Greater London that compliance with the Directive limit values can and should be achieved significantly sooner than 2020 by increasing the number of classes of vehicle affected e.g. by 'upgrading' the West Midlands and West Yorkshire from Type C to Type D and thus requiring cars to comply with the CAZ restrictions. In both zones, cars (and in particular diesel cars) are the largest contributors of NO₂ at the location of maximum exceedance, so excluding them from the scope of the Clean Air Zone would run contrary to the requirement to keep the exceedance period as short as possible.⁶² This is one example of where a more intensive implementation of that measure is required (as well as the adoption and implementation of additional suitable measures).⁶³ Similarly, the Clean Air Zone framework should also apply stringent emission standards to non-road transport sources, including non-road mobile machinery, domestic and commercial boilers and other stationary sources such as combined heat and power plants.

20.5. Fifth, the approach fails to reflect that the limit values can and should be achieved significantly sooner by requiring compliance with more stringent emissions standards than those proposed in the draft plans.⁶⁴ For example, for petrol cars, compliance with the Euro 6 rather than Euro 4 standard should be required. If compliance in the shortest possible time requires that only zero emissions vehicles qualify for the CAZ, the emissions standards should be revised accordingly. Analysis conducted in support of the London ULEZ showed that such

⁶² *Draft Air Quality Plan for the achievement of EU air quality limit value for nitrogen dioxide (NO₂) in West Midlands (UK0035)*, September 2015, Table 3, p.12, and §4.2, p.14; *Draft Air Quality Plan for the achievement of EU air quality limit value for nitrogen dioxide (NO₂) in West Yorkshire Urban Area (UK0004)*, September 2015, Table 3, p.11, and §4.2, p.13.

⁶³ Commission Decision of 25.6.2012 (above), at §20.

⁶⁴ See Table 4.2 in the Draft Evidence Annex, p.10.

an approach would be sufficient to achieve almost full compliance within the zone.⁶⁵

20.6. Sixth, the approach fails to deal with the problem of Euro 6 diesel vehicles failing to deliver emissions reductions in real driving conditions (a topic dealt with separately below). CAZs must therefore be accompanied by a robust system of vehicle inspection and certification, backed by effective penalties for non-compliance to ensure that only vehicles meeting that standard in real driving conditions qualify.

21. The final plans adopted and submitted to the Commission should, in addition to making the implementation of CAZs mandatory, also—

21.1. Extend the CAZ requirement to all⁶⁶ zones where there is currently an exceedance of the Directive limit values for NO₂.

21.2. Require CAZs to be implemented as quickly as possible in all such zones, taking into account the urgent public health imperative for doing so and the need for measures to be taken, accordingly, on an emergency basis.

21.3. Require CAZs to restrict all classes of diesel vehicle rather than only a selection.

21.4. Require CAZs based on the best available evidence of real-world diesel emissions rather than of theoretical emissions based on test-cycle results.

The 2013 'Baseline'

22. As set out in the Evidence Annex,⁶⁷ the projected concentrations of NO₂ in all zones and agglomerations for future years are based on 2013 data. The effect of this appears to be that where a project adversely affecting air quality has been undertaken with a start date after 2013, the deterioration in air quality (the increase in NO₂ levels) has not been taken into account in the draft plans when modelling the duration of exceedances of the Directive limits. This is a significant concern, particularly in relation to particular projects

⁶⁵ Mayor of London and Transport for London. February 2014. 'Ultra Low Emission Zone. Update to the London Assembly. <http://www.cleanair.london/wp-content/uploads/CAL-264-ULEZ-Update-Feb-and-March-2014.pdf> pp4-5

⁶⁶ Subject to the *caveats* at note 61 above.

⁶⁷ §29 p12.

adversely affecting air quality such as the proposed expansion of Heathrow airport. Where one or more project(s) has had or is likely to have a significant adverse effect on air quality in the period 2013-15, this must be reflected in the finalised plans. Similarly, it appears that various government departments are not assessing the impact of air quality in various policy decisions.⁶⁸

Real-World Diesel Emissions

23. The draft plans set out in the consultation are based upon the assumption that emissions from diesel vehicles are in accordance with those measured under test conditions. ClientEarth contends that this is unsatisfactory and that projected emissions (and, accordingly, the measures set out in the plans and implemented in order to reduce such emissions) should be based on the best available evidence as to 'real-world' emissions. This is particularly important given the public health context, which is that NO₂ pollution could be causing an additional 23,500 early deaths each year in the UK.⁶⁹

24. There are three particular areas of concern—

24.1. First, the disparity between real-world emissions and those found in European test cycle results (this is of particular relevance to 'Euro 4, 5 and 6' diesel vehicles).

24.2. Second, the recent revelations that Volkswagen used so-called 'defeat devices' in order to mask NO₂ emissions at testing, thus flouting US air pollution regulations (the 'Dieselgate' revelations).

24.3. Third, the recent decision by the Technical Committee on Motor Vehicles to weaken proposals to introduce real driving emissions testing by allowing a 'conformity factor' of 2.1 (i.e. 110% above the NO_x emission limit) from 2017 for new models and 1.5 (i.e. 50% above the NO_x emission limit) from 2021 for all new vehicles.⁷⁰

25. European test cycle results: Defra has for some time acknowledged that real-world emissions from diesel vehicles complying with certain European standards are

⁶⁸ See Annex II: Responses to ClientEarth under Environmental Information Regulations: Department for Transport letter dated 30 July 2015; Department of Energy and Climate Change letter dated 27 August 2015; HM Treasury letter dated 28 August 2015; HM Treasury letter dated 14 October 2015.

⁶⁹ Evidence Annex, §9.

⁷⁰ Commission press release dated 28 October 2015: http://europa.eu/rapid/press-release_IP-15-5945_en.htm

significantly higher than those predicted by testing. The modelling in the Evidence Annex finds that should Euro 6 emissions standards not perform as modelled, this could result in up to 22 additional zones being in exceedance of Directive limit standards for NO₂ in 2020.⁷¹

26. 'Dieselgate': ClientEarth has written to Defra (and the Department of Transport) separately about this issue,⁷² seeking an urgent investigation into the use of defeat devices in the UK and the release of information held by the UK Government on the results of real driving emissions tests. To date, the UK Government has not announced any plans to carry out such an investigation or taken all necessary steps to ensure that the affected vehicles are recalled.⁷³

27. It is essential that in preparing the final plans to be submitted to the Commission, the UK Government should consider the outcome of a meaningful investigation on the use of defeat devices (both by Volkswagen and, potentially, by other car manufacturers) and, more widely, the existing information on real driving emissions. The plans submitted should be based on the likely real-world emissions from diesel vehicles; and the measures included in the plans should be measures which will reduce real-world diesel emissions and bring NO₂ concentrations below the Directive limit values as swiftly as possible.

Compliance in the Shortest Possible Time

28. Defra's obligation under the Directive and under the Supreme Court Order is to act urgently under Article 23(1) in order to remedy a real and continuing danger to public health as soon as possible.⁷⁴ The circumstances are that there have been serious breaches of the Directive⁷⁵ resulting in clear and grave dangers to human health;⁷⁶ that

⁷¹ Evidence Annex, §65. Given that acknowledgement, it is surprising that, on the basis of "*updated information on vehicle emissions factors*" and "*changes in fleet composition*", Defra now projects that only eight zones will be non-compliant by 2020 if no new measures are taken, whereas as recently as July 2014 that figure was as many as 28 zones: UK Overview Document, §§17–18. At the very least, Defra has not provided the information necessary to assess the accuracy of the new figure. In a related point, Defra has not adequately explained why it has not been able to identify more precise compliance dates for each zone than the position as at 2020 (UK Overview Document, §223). A 'snapshot' of compliance against that arbitrarily chosen date (see below) is inadequate to comply with the Supreme Court Order to prepare plans for achieving compliance as soon as possible.

⁷² Letter of 24 September 2015 (Annex III to this document).

⁷³ Ibid.

⁷⁴ Supreme Court judgment of 29 April 2015, §27.

⁷⁵ Ibid, §29.

⁷⁶ Ibid, §12]; §19.

these breaches have continued for more than five years;⁷⁷ and that the UK has already had 16 years (from the 1999 Directive)⁷⁸ to take the necessary measures to comply.⁷⁹ The Supreme Court Order was intended to leave no doubt as to the need for immediate action⁸⁰ to rectify the long-running and dangerous exceedances of NO₂ limit values.

29. Despite this, the approach taken in the draft UK Overview Document and the accompanying Evidence Annex is to seek to identify measures seeking to ensure compliance by 2020.⁸¹ That this is the approach is clear from, for example, the following:

29.1. UK Overview document §222:

“For each zone we have considered the trajectory between the most recently reported compliance data (2013) and the projection for 2020.”

29.2. Ibid §224-225:

“...The individual zone plans describe local authority action which, combined with the measures outlined in this national plan, will help to bring forward compliance, and ensure that it is by 2020, in these zones.

For those eight zones that are projected to still have exceedances in 2020 the action local authorities are already taking is not yet enough to reach compliance with the 40µg/m³ limit level earlier. We have [assessed] the gap in 2020 between the projected concentrations and the EU limit value of 40µg/m³. ...”

29.3. The Evidence Annex, which, as set out in more detail above (§18), is based upon the ‘2020 compliance gap’⁸² for each zone and on an approach of implementing (optional) CAZs in areas otherwise projected to be in exceedance ‘in 2020’.⁸³

30. By 2020, the UK will have had 21 years to take the necessary measures to comply and will have been in serious breach of the mandatory Directive limit values for ten years.

31. The approach of seeking compliance by 2020 is wrong in principle and does not comply with the Directive or the Supreme Court Order:

⁷⁷ Ibid, §29.

⁷⁸ Directive 99/30/EC of the Council dated 22 April 1999.

⁷⁹ Ibid, §12.

⁸⁰ Ibid §31.

⁸¹ For zones outside London, and later than this in Greater London.

⁸² Evidence Annex §23.

⁸³ Ibid §60.

- 31.1. The Directive, and the Order, require compliance as soon as possible with the period of any exceedance being kept as short as possible.
- 31.2. There is no justification for selecting an arbitrary date and then identifying such measures as are needed to ensure compliance by that date. Rather, the aim is to ensure compliance as soon as possible.
- 31.3. That is particularly so where the date selected involves serious non-compliance with the Directive limit values, leading to grave dangers to human health, for a period of ten years – double the length of the only time extension period set out in the Directive. ‘As short as possible’ cannot, in this legislative context, mean ‘five years or more’.
- 31.4. It is plain that there are numerous measures which are available⁸⁴ but have not been included in the plans. Plainly, including some or all of those measures in the plans would lead to swifter compliance with the mandatory Directive limits.
- 31.5. As set out above, even if attention is confined to the single measure of CAZs, a more intensive implementation of that measure (sooner, in relation to more categories of vehicle, and in a larger number of zones) would lead to compliance with the Directive limit values for NO₂ much sooner in a large number of zones or agglomerations.
- 31.6. Detailed modelling tools are available to Defra to quantify the effect of changes in road traffic on emissions of NO_x and annual mean concentrations of NO₂ across the UK.⁸⁵ No justification has been provided for Defra’s failure to carry out modelling on the basis of the introduction of CAZs (alone or in combination with other available measures) by, for example, the end of 2016 (or 2017 or 2018).
- 31.7. The true position is that Defra is choosing to select, and include in its plans, measures which may ensure compliance by 2020 and no earlier. It is choosing to ‘bring forward’ compliance⁸⁶ rather than to ensure compliance as swiftly as possible. But that is not a choice lawfully open to it. Earlier compliance with Directive limit values is possible by more intensive, and earlier, implementation of

⁸⁴ And which are effective, proportionate and scientifically feasible.

⁸⁵ Evidence Annex, Box 5.1 p13.

⁸⁶ UK Overview Document, p3, §4.

existing measures and/or by the inclusion of further available measures. Accordingly, earlier compliance is required by the Directive and the Supreme Court Order, which require plans of an emergency character to be drawn up bringing exceedances to an end in the shortest possible time.

Conclusion

32. For the reasons summarised at §4 above and set out in this document, the draft plans consulted upon do not comply with the Directive or the Supreme Court Order. They should be modified so as to include binding, compulsory measures (including a national network of effective Clean Air Zones as well as other available measures) so that the serious and dangerous exceedances of mandatory NO₂ limits in the UK which have persisted for more than five years may be brought to an end as a matter of urgency.

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ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

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