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To:

Commissioner Potočník
European Commissioner for the Environment
Environment Directorate-General
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Belgium

From:

James Thornton
Alan Andrews

By:

Post and email:

17 March 2010

Dear Commissioner Potočník

**Complaint to the Commission concerning the UK's failure to comply with Community law
Nitrogen dioxide pollution in London – failure to prepare and implement compliant plans and
programmes**

Further to our letter of 2 March 2010, we are writing to submit a formal complaint concerning the UK's failure to comply with Community law. In particular, the UK has failed to submit plans and programmes which demonstrate how compliance with nitrogen dioxide (NO₂) limit values will be achieved by 1 January 2010, as required by Directive 1996/62 EC (the '1996 Directive').

This constitutes a serious breach of Community law, particularly when viewed in the context of London, where ambient concentrations of NO₂ are among the highest in Europe. As we explained in our previous letter, the hourly limit value was breached in a number of central London locations within weeks of coming into force on 1 January 2010. According to the London Air Quality Network, there have now been 120 exceedances of the hourly limit value at Marylebone Road (the central London monitoring station used particularly by the UK government for the purposes of monitoring compliance with limit values).¹

The failure to put adequate plans and programmes in place reveals a disturbing level of inertia in government policy on tackling NO₂ and air quality more generally. Intervention by the Commission

¹London Air Quality Network:

http://www.londonair.org.uk/london/asp/publicstats.asp?region=0&site=MY1&bulletin=hourly&la_id=&statyear=2010&postcode=

will focus attention on the issue and ensure that an effective and ambitious programme of measures is developed and implemented as a matter of urgency.

1. Measures: plans and programmes

The 1996 Directive requires member states to make a list of zones and agglomerations where levels of one or more pollutants exceed the limit value plus a margin of tolerance. Member states must then draw up plans and programmes for attaining the limit values by the 'specific time limit' and send these to the Commission no later than two years after the end of the year during which the levels were observed.² The limit values and the 'specific time limit' were subsequently laid down in Directive 1999/30 EC (the '1999 Directive'). The time limit for meeting the NO₂ limit values is 1 January 2010. The UK government's plans and programmes must therefore show that compliance with the limit values will be achieved by this date.

The requirements of the 1996 Directive are supplemented by Commission Decision 2004/224 EC (the 'Decision'), which prescribes the format in which member states must submit plans and programmes to the Commission. The annex to the Decision contains seven standard forms, a full set of which is required for each plan or programme.

2. The UK submission

On 17 December 2009, the UK submitted its plans and programmes relating to the breaches of the NO₂ limit values plus margin of tolerance which occurred in the 2007 calendar year.³ The submission shows that the hourly and annual limit values plus relevant margins of tolerance were exceeded in Greater London.

The submission does not contain the information required by the 1996 Directive and the Decision. Form 5 requires member states to provide details of measures that have been taken beyond those already required by existing legislation. The UK submission lists thirteen measures in Form 5, which are then described in Form 7.

Two of the listed measures had already been scheduled for significant modification at the time the submission was made. First, the description of the London Congestion Charge contained in Form 7 refers to the fact that it was extended westwards in February 2007. However, it fails to mention that the western extension zone has been scheduled for cancellation by the Mayor of London. One of the Mayor's key election pledges was to hold a public consultation on the future of the western extension zone. Following this consultation, the draft Mayor's Air Quality Strategy, which was published for statutory consultation in October 2009, then proposed that the extension should be cancelled. Removal of the western extension zone in 2010 will result in an estimated 4-8% increase in emissions of NO_x within the former zone.⁴

² The 1996 Directive, Article 8(3), Article 11(1)(a)(iii).

³ The submission is available at:
<http://cdr.eionet.europa.eu/gb/eu/aqpp/envsyokmq>

⁴ Draft Revised Mayor's Transport Strategy Integrated Impact Assessment: Appendix E: Report on The Removal of the Western Extension Zone, October 2009, page 20.

Second, the London Low Emission Zone is also included in Form 5. However, the description of this measure in Form 7 fails to mention that the Mayor's Air Quality Strategy proposed that phase 3 of this programme be postponed from 2010 to 2012. This would delay by two years a crucial measure that is expected to reduce emissions of NO_x by an estimated 200 tonnes in the first year it is introduced.⁵

A number of the other measures listed in Form 5 are merely vague policy aspirations, lacking detail or any firm commitment on the part of the government to adopt them as policy or implement them. For example, 'incentivizing early uptake of Euro-standards' is listed as a measure that has been taken, but the description reveals that this is merely based on an announcement that the government would consider this as a policy option.

Form 5 requires member states to provide information on the estimated costs of the measures and the funding that has been allocated to them. However, no information has been provided by the UK in this respect. This would suggest that many of these measures are not supported by adequate financial resources.

Form 5 also requires member states to provide an estimate of the levels of NO₂ in the year which the limit value has to be met, taking the additional measures into account. However, no such quantitative assessment has been made. Instead, the form merely states that:

'More needs to be done to ensure limit values are met as soon as possible. In areas where it is not projected that limit values will be met, Plans have been or will be drawn up at local level to ensure that local authorities work towards the national air quality objectives, which are either equal to or lower than the limit values set in the First Daughter Directive. In a small number of cases, it is expected that measures under the UK Air Quality Strategy and other measures already agreed at European level, will deliver the [Limit Values].'

This is a clear admission that the plans or programmes are not sufficient to ensure compliance with the limit values by 1 January 2010.

Form 6 requires member states to provide details of possible measures that have not yet been taken and reasons for not taking them. The form lists two possible measures (increased uptake of low emission vehicles and reducing emissions of NO_x and SO₂ from shipping) that have not yet been taken. However, the only reason given for not taking these measures is that *'Further consideration of implications [is] needed.'* In view of the scale and urgency of the UK's NO₂ problem, it is wholly inadequate to still merely be considering the implications of two key measures. Given that the limit values for NO₂ were adopted over ten years ago, all appropriate research should have been completed in time to inform the preparation of the plans and programmes included in this submission.

⁵ Draft Mayor's Air Quality Strategy, October 2009, Page 48.

3. Time extension notifications

The note accompanying the submission states that the UK is currently preparing a time extension notification in relation to NO₂, and that the measures outlined in the submission do not reflect that work which is currently in progress. However the time extension notification process is irrelevant for the purposes of the requirement to submit plans and programmes under the 1996 Directive. The 'specific time limit' for the purposes of the 1996 Directive is that introduced by the 1999 Directive i.e. 1 January 2010. The possibility of obtaining time extensions was introduced by Directive 2008/50 EC (the '2008 Directive'), which did not enter force until June 2008, i.e. after 2007 (the calendar year to which the UK's submission relates).

Even if the time extension process was relevant to the submission of plans and programmes under the 1996 Directive, the 'specific time limit' would remain 1 January 2010 unless and until any time extension notification submitted by the UK is approved by the Commission. The prospect of a time extension does not excuse the UK from the legal obligation to comply with the relevant limit values from 1 January 2010 or to have proper plans and programmes in place to demonstrate how compliance will be achieved.

The UK government appears to be relying on the fact that it is working on a time extension notification as a justification for its failure to comply with the reporting requirements under the 1996 Directive and the Decision. This is an example of how the time extension process is being misused by member states to justify inaction on air quality. The UK's air quality policies, at both the national and London level, are based on a false assumption that time extensions will be approved for both NO₂ and PM₁₀, even where the preconditions for obtaining an extension under the 2008 Directive have not been satisfied. Infringement action by the Commission on NO₂ is needed to prevent the time extension procedure being abused in this way.

4. The need for intervention by the Commission

While our complaint relates directly to a specific infringement of Community law by one member state, it should be viewed as a priority infringement by the Commission due to its broader strategic implications.

The Commission has identified better compliance with air quality as a specific challenge and has highlighted the need for immediate and intensive action in relation to breaches of Community law which have particularly far-reaching negative impacts for citizens.⁶ This includes '*Systemic breaches of environmental quality or other environmental protection requirements presenting serious adverse consequences or risks for human health and well-being...*'

It is anticipated that many EU countries will need to submit time extension notifications due to their inability to meet the NO₂ limit values by the original 1 January 2010 deadline. This suggests that there must have been widespread failures by member states to put plans and programmes in place which ensured compliance by 1 January 2010 in accordance with the 1996 Directive.

⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on implementing European Community Environmental Law, 18 November 2008, page 8.

This is just one aspect of a wider, systemic failure on the part of member states to implement and enforce air quality laws. This failure has a serious impact on the health of EU citizens, as well as implications for climate change and biodiversity. For example, according to the Thematic Strategy on air pollution, exposure to particulate matter and ozone resulted in 370,000 premature deaths in the EU in 2000.⁷

The reporting requirements under the 1996 Directive are a vital step in preventing breaches of the limit values. Infringement action on this basis may also represent the Commission's best opportunity, in the short term, of ensuring that member states are on a path to compliance with NO₂ limit values.

The 1999 Directive requires member states to notify the Commission of any exceedences of the limit values within nine months of the end of each year. The Commission will therefore not be able to take infringement action for breaches of NO₂ limit values until, at the earliest, September 2011 (9 months from the end of the 2010 calendar year).

While in theory the time extension process allows the Commission to ensure that member states have adequate plans in place to ensure compliance by the extended deadline, many member states will not submit time extension notifications until September 2011, as this is the earliest date they would face infringement action from the Commission. Even then these time extensions will only set out measures aimed at achieving compliance by the extended deadline of 1 January 2015. In the meantime, many member states will, like the UK, continue to use the possibility of obtaining a time extension as a reason for delaying action on tackling NO₂ pollution.

Infringement action for failure to submit compliant plans and programmes is therefore an opportunity for the Commission to bring forward action on NO₂ by approximately 18 months. This would also help to ensure that London's NO₂ problems are dealt with now rather than in the months leading up to the 2012 Olympic games, which would draw unwelcome attention to Europe's air quality problems.

Finally, as the guardian of Community law, the Commission is under a constitutional duty to scrutinise documents submitted by member states to check they demonstrate that, if properly and fully implemented, compliance will be achieved. Please provide us with copies of all documents held in relation to the Commission's examination of the UK's NO₂ plans and programmes. We note that the Commission also has an ongoing obligation to regularly check implementation of the plans and programmes submitted by member states.⁸

Conclusion

The plans and programmes contained in the UK's submission clearly fail to ensure that compliance with the NO₂ limit values will be attained in London by 1 January 2010. This is acknowledged in the

⁷ Communication from the Commission to the Council and the European Parliament, Thematic Strategy on air pollution, 21 September 2005, Annex 3.

⁸ The 1996 Directive, Article 8(5).

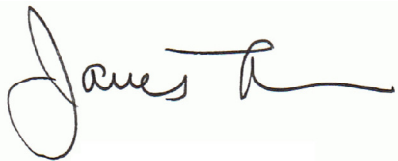
submission itself and evidenced by the fact that the hourly limit value has already been breached in Greater London (based on data from the UK government's principal monitoring station). The purpose of the requirement to submit plans and programmes is to prevent breaches of the limit values, so these breaches can be directly attributed to the UK government's failure to prepare and implement adequate plans and programmes. The possibility of a time extension does not excuse the UK's failure to prepare and implement compliant plans and programmes or to comply with the limit values by 1 January 2010.

I would therefore urge you to initiate infringement action against the UK based on its failure to comply with the requirements laid down by the 1996 Directive and the Decision to prepare and implement plans and programmes and to do so by 1 January 2010. Action by the Commission would encourage the government to take action on NO₂ now rather than rely on the time extension provisions to put off taking action for several years. This would also send a clear message to all member states that the Commission will not tolerate inaction in tackling air quality problems.

We authorise the Commission to disclose our identities in its contacts with the UK authorities.

I look forward to your prompt response. We would welcome the opportunity to meet with Commission staff to discuss the issues raised in this letter in person. In the meantime please do not hesitate to contact us if you have any queries.

Yours sincerely,



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