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What do ClientEarth's legal cases mean for local authority plans to deliver nitrogen dioxide compliance in England and Wales?

ClientEarth briefing

Introduction

Illegal levels of nitrogen dioxide ("**NO_2**") persist in areas across the UK. Since 2011, ClientEarth has brought three successful legal challenges against the UK Government's failure to deliver compliance with legal limits of this harmful pollutant and to comply with its obligations under the Ambient Air Quality Directive 2008/50/EC (the "**Directive**"). In each case, the courts have ordered ministers to produce updated or additional plans to tackle illegal levels of pollution.[1]

As part of the UK Government's latest plans, ministers have formally directed 38 English and Welsh local authorities to carry out feasibility studies and produce their own individual proposals to deliver compliance in their areas in the shortest possible time. Ministerial directions[2] have been imposed on:

- Birmingham, Derby, Leeds, Nottingham and Southampton City Councils (the "**First Wave Local Authorities**"), requiring each to submit a "full business case" to the Secretary of State by 15 September 2018 at the latest;

[1] *R (on the application of ClientEarth) v Secretary of State for the Environment Food and Rural Affairs* [2015] UKSC 28; *R (on the application of ClientEarth (No.2)) v Secretary of State for the Environment Food and Rural Affairs and others* [2016] EWHC 2740 ("**ClientEarth (No.2)**"); and *R (on the application of ClientEarth (No.3)) v Secretary of State for the Environment Food and Rural Affairs and others* [2018] EWHC 315 ("**ClientEarth (No.3)**")

[2] Available here: https://www.gov.uk/government/publications/air-quality-plan-for-nitrogen-dioxide-no2-in-uk-2017-air-quality-directions

- a group of 23 local authorities (the "**Second Wave Local Authorities**"), requiring each to produce a final plan by 31 December 2018 at the latest;
- Cardiff City Council and Caerphilly County Borough Council, requiring each to submit a final plan by 30 June 2019 at the latest; and
- a group of eight local authorities (the "**Third Wave Local Authorities**"), requiring each to produce a final plan by 31 October 2019 at the latest.

A list of the First, Second and Third Wave Local Authorities is included at Annex A.

This briefing explains the proper interpretation of the Directive, what it requires of local authorities' plans and business cases and the Secretary of State's and local authorities' obligations in this context. It sets out the legal tests arising from the judgments in ClientEarth (No.2) and ClientEarth (No.3) and explains how those tests must be satisfied by each individual local authority plan. It also highlights the legal imperative for the urgent publication and introduction of plans and clarifies the implications of Brexit on the legal duties underpinning their production.

This is an updated issue of a briefing previously published in April 2018. This briefing is not intended as legal advice. Local authorities should obtain independent legal advice and seek guidance from relevant central government departments where appropriate.

Background

In 2010 the formal deadline passed for EU Member States to comply with legal limits for NO_2 concentration levels set under the Directive to protect human health. Where a breach of the limits takes place after the relevant deadline, the Directive requires that air quality plans must be prepared to achieve compliance "*in the shortest time possible*".

For the purposes of the Directive the UK is split into 43 zones and agglomerations. Eight years on from the deadline, the UK continues to breach legal limits in 37 out of 43 zones.

Since 2011, ClientEarth has been on a lengthy journey through every level of the UK courts, seeking to secure clean air across the UK. In April 2015 the Supreme Court found the Secretary of State to be in breach of the Directive and ordered an updated air quality plan be prepared to achieve NO_2 limits as soon as possible.[3]

In December 2015, the UK Government published the ordered air quality plan. This plan asserted that the five First Wave Local Authorities would be required to implement Clean Air Zones ("**CAZs**") by 2020. However, unfortunately that plan had a range of problems and, following a judicial review brought by ClientEarth (ClientEarth (No.2)), in November 2016 the High Court ordered the Secretary of State to publish a modified air quality plan. This judgment

[3] A briefing prepared by ClientEarth in September 2015 on the consequences of this judgment is available here: https://www.documents.clientearth.org/library/download-info/4296/

gave a detailed and definitive ruling on the proper interpretation of the obligations flowing from the Directive. This is described in further detail in the "Legal Test" section below.

A final revised air quality plan was published in July 2017 (the "**2017 UK Air Quality Plan**"). The technical evidence accompanying that plan indicated that implementing CAZs, where vehicles that do not meet minimum emissions standards are charged to enter,[4] is likely to be the quickest route to compliance. However, the 2017 UK Air Quality Plan delegated responsibility for preparing air quality plans to the 23 Second Wave Local Authorities and in doing so required those authorities to first consider whether there are other equally effective options which don't involve introducing CAZs. The Secretary of State directed the Second Wave Local Authorities to each undertake a feasibility study to identify the option that will deliver compliance with legal limits for NO_2 in the shortest possible time and to produce a final plan setting out the preferred option by 31 December 2018.

The 2017 UK Air Quality Plan did not require equivalent action to be taken in 45 additional local authority areas, which remained in breach of the NO_2 limit values but were projected to achieve compliance by 2021. The 2017 UK Air Quality Plan also failed to require action to address continuing breaches of NO_2 limit values in Wales.

Following another judicial review brought by ClientEarth (ClientEarth (No.3)), on 21 February 2018 the High Court declared the 2017 UK Air Quality Plan unlawful. The Court found that in its application to the 45 local authority areas, the plan did not contain measures sufficient to ensure compliance with the Directive. It also failed to include a compliant plan for Wales. The Court granted a mandatory order requiring the urgent production of a supplement to the 2017 UK Air Quality Plan (the "**English Supplemental Plan**") to ensure that feasibility studies and plans to address NO_2 exceedances are developed in an additional 33 English local authority areas. The Welsh Ministers also committed to the Court to produce a supplemental plan for Wales (the "**Welsh Supplemental Plan**").

In order to inform the content of the English Supplemental Plan, the Secretary of State directed each of these additional 33 local authorities to undertake a feasibility study to identify measures to bring forward compliance with legal limits in their respective areas. The resulting English Supplemental Plan was published on 5 October 2018. It revealed additional evidence showing that in the Third Wave Local Authorities compliance would not be achieved until much later than originally indicated within the 2017 UK Air Quality Plan – in some cases as late as 2028. The Secretary of State, therefore, issued further ministerial directions to require each of the Third Wave Local Authorities to undertake a more detailed feasibility study and submit initial plans by 31 January 2019 with final plans to follow by 31 October 2019.[5]

The Welsh Supplemental Plan was subsequently published on 29 November 2018, and was accompanied by ministerial directions to Cardiff City Council and Caerphilly County Borough Council, requiring each to carry out a feasibility study and submit a final plan by 30 June 2019 at the latest.

[4] Clean Air Zones (CAZs) are also known as Low Emission Zones (LEZs). These are areas where vehicles are restricted from entering if they do not meet minimum standards for emissions of air pollutants. Non-compliant vehicles can either be charged to enter the CAZ or banned from entering with fines applied if they do enter the CAZ.
[5] Environment Act 1995 (Feasibility Study for Nitrogen Dioxide Compliance) (No. 2) Air Quality Direction 2018

The Legal Test

The judgment of the High Court in ClientEarth (No.2) established important legal tests that apply to the preparation of air quality plans. It gave a detailed and definitive ruling on the proper interpretation of the obligations flowing from the Directive and, in particular, the requirement in Article 23 that air quality plans must be prepared to achieve compliance "in the shortest time possible". In his ruling, Mr Justice Garnham set out a three-part test for assessing air quality plans.[6] The test requires that plans must:

1. Aim to achieve compliance as soon as possible;

2. Choose a route to compliance which reduces human exposure as quickly as possible; and

3. Ensure that compliance with the limit values is not just possible but likely.

The proper interpretation of each of the above limbs is explained in further detail below.

Unfortunately the Clean Air Zone Framework for England, published by Government alongside the draft 2017 UK Air Quality Plan does not explicitly describe these legal requirements when setting out the principles for setting up a CAZ in England and no final equivalent CAZ framework for Wales appears to have yet been adopted.

1. Compliance as soon as possible

The deadline for compliance with the legal limits set out in the Directive was 2010. Where those limits were not met, Member States were required to prepare air quality plans in accordance with Article 23 of the Directive, which requires that they set out appropriate measures to keep the exceedance period as short as possible.

The Court did not set a particular date by which compliance must be achieved, but in ClientEarth (No. 2) it ruled that Government had acted unlawfully by fixing on 2020 as a target date for compliance, which it viewed as "*too distant*".

It determined that the correct approach is instead to include in the air quality plan all technically feasible and effective measures to bring forward compliance. The Court clarified that such obligation is not qualified by the cost of the different measures to tackle air pollution:

"there can be no objection to a Member State having regard to cost when choosing between two equally effective measures. […] But I reject any suggestion that the state can have any regard to cost in fixing the target date for compliance or in determining the route by which the compliance can be achieved where one route produces results quicker than another. In those respects the

[6] ClientEarth (No. 2), Paragraph 95. https://www.judiciary.gov.uk/wp-content/uploads/2016/11/clientearth-v-ssenviron-food-rural-affairs-judgment-021116.pdf

determining consideration has to be the efficacy of the measure in question and not their cost. That, it seems to me, flows inevitably from the requirements in the Article to keep the exceedance period as short as possible".[7]

In other words, when selecting measures to tackle air quality, the determining factor must be their efficacy not their cost. Local authorities must identify which measures will meet the legal limits in the shortest time.

The primary obligation is to protect human health through the achievement of the limit values by the earliest possible date. Considerations such as cost or unpopularity of measures are not lawful reasons for excluding effective measures from a plan.

The only situation in which cost can be taken into consideration is where there are two equally effective measures i.e. only where two measures can be shown to be equally effective at bringing forward the likely date of compliance can the authority lawfully choose the lowest cost option.

Consequently, cost benefit analysis is not an appropriate primary method for selecting measures for inclusion in an air quality plan. Measures which would be most effective in bringing forward the likely compliance date should be included in an air quality plan.

Local authorities will need to be aware of this important legal test when commissioning or carrying out feasibility studies and in subsequent decision-making as to the content of their final plans and full business cases. Whilst local authorities have been directed by the Secretary of State to undertake their feasibility study in accordance with the Treasury Green Book approach, this should not override this important legal test set out by the High Court.

2. Reducing human exposure

This element of the test recognises the Directive's primary purpose of protecting human health by reducing exposure to air pollution. It recognises that whilst compliance might not be achievable immediately, the responsible authorities must reduce exposure as much as possible whilst they are trying to achieve the final objective of meeting the limit values.

Mr Justice Garnham gave further clarification on how this second limb of the legal test should be distinguished from the first, saying that:

"At the heart of my judgment in this case of 2 November 2016 were the conclusions that the proper construction of Article 23 of the ambient air quality directive had three consequences. [...]

It is important to emphasise that the first and second of those requirements demand different things. The first is directed at the time by which the objective is to be achieved. The second is

[7] ClientEarth (No. 2), Paragraph 50, https://www.judiciary.gov.uk/wp-content/uploads/2016/11/clientearth-v-ssenviron-food-rural-affairs-judgment-021116.pdf

directed at the exposure to nitrogen dioxide that persists whilst that final objective is being achieved."[8]

A plan which aimed to achieve compliance by a certain date throughout the zone, would not meet the legal test, if there were additional or alternative measures which could also reduce human exposure during the period of non-compliance. In other words, while aiming at achieving compliance in the pollution hotspots by the target date, local authorities should take any measures available to reduce exposure at the same time.

ClientEarth considers that this means that local authorities should also refrain from taking actions that, whilst they may not affect the final compliance date for the overall zone, would increase exposure, or delay reduction of exposure in any part of the zone.

3. Compliance must be "likely" not just possible

In ClientEarth (No. 2) the Court heavily criticised the 2015 Air Quality Plan for making overly optimistic projections of future compliance with limit values. This third part of the legal test requires that measures chosen to tackle air pollution must make compliance not just possible, but likely.

To satisfy this requirement, ClientEarth considers that local authorities should:

- Include in air quality plans only concrete, impact-assessed measures, with a defined timetable for implementation and impact. Local authorities should not rely upon the benefits hoped to flow from uncertain, aspirational or non-modelled measures.
- Adopt the most rigorous and up-to-date emissions factors and dispersion models to estimate future compliance scenarios.
- Adopt conservative estimates to projecting future compliance. When faced by margin of uncertainties on the expected impact of measures, local authorities should pick the most-likely scenario, rather than the optimistic, best-case scenario.

Timeline for the production of plans

Local authorities are under a statutory duty to comply with the terms of the ministerial directions issued to them by the Secretary of State or Welsh Ministers.[9] If a local authority fails to meet its respective deadline for the submission of its initial plan, final plan, outline business case or full business case, it will be in breach of this duty.

A large number of local authorities have already failed to meet the deadlines for submission of final proposals. Neither Derby nor Southampton City Councils met the original 15 September deadline for submission of their full business cases. Based on publically available information,

[8] ClientEarth (No.2), [2017] EWHC (Admin) 1966, Paragraphs 9 and 10, https://www.documents.clientearth.org/library/download-info/high-court-ruling-on-clientearth-no2-vs-ssefra-aqp-consultation/
[9] Section 85(7) Environment Act 1995

we also understand that at least 13 of the 23 Second Wave Local Authorities[10] directed to submit final plans by 31 December have missed this deadline, with some now aiming to finalise their proposals months later than legally required.[11] We understand that the Secretary of State has already written to a number of these authorities, to highlight the threat of legal action against continued delays.

It is now over eight years since legal limits came into force. As recognised by the High Court in ClientEarth (No.3), as we await compliant plans to address illegal levels of pollution *"[a]ll the while, the health of those living in the towns and cities of this country is at real risk*".[12]

The law requires that plans must be prepared to achieve compliance "*in the shortest possible time*". In rejecting previous applications from Government to push back the timetable for the publication of air quality plans, Mr Justice Garnham clarified that the obligation is:

"…to introduce the plan as soon as can be, and to do so by the route which achieves the greatest reductions in emissions in the shortest possible time. If the Government are true to that obligation they cannot make up for lost time by working a little harder."[13]

Cost or political difficulties cannot be used to justify a delay to publication.

Furthermore, when refusing Government's application to push back the date for publication of the draft 2017 UK Air Quality Plan on account of general election Purdah restrictions, the court was clear that the Secretary of State was not entitled to more time because an election had been called. Purdah is not a rule of law capable of overriding the duties under the Directive and the Regulations. Mr Justice Garnham stated in his judgment:

"…Purdah does not mean it is not "possible" to publish a plan. The obligation on Government is to produce an Air Quality Plan which reduces exposure to nitrogen dioxide as quickly as possible and further delay constitutes further or continued breach"

"…perhaps most importantly…continued delays leads to a continued threat to public health. That alone constitutes a powerful reason for refusing to permit further delay in the process to remedy the problem."[14]

Any Purdah period associated with national or local elections therefore cannot constitute a lawful reason to push back the submission of local authorities' final air quality plan proposals. Any such delay could be vulnerable to challenge by judicial review.

[10] These include Bristol City Council, Coventry City Council, Bolton Metropolitan Borough Council; Bury Metropolitan Borough Council; Manchester City Council; Salford City Council; Stockport Metropolitan Borough Council; Tameside Metropolitan Borough Council; Trafford Metropolitan Borough Council; Bath & North East Somerset Council; Gateshead Metropolitan Borough Council; Newcastle City Council; and North Tyneside Council.
[11] See the response of Therese Coffey MP to a Parliamentary Question raised on 9 January 2019 regarding the status of Second Wave Local Authority Plans at: https://www.parliament.uk/business/publications/written-questions-answers-statements/written-questionsanswers/?page=1&max=20&questiontype=AllQuestions&house=commons%2clords&uin=206818
[12] ClientEarth (No.3), remedies judgment [2018] EWHC 398, per Garnham J at paragraph 12
[13] ClientEarth (No.2), transcript of judgment on Defendant's Purdah application, dated 27 April 2017, https://www.documents.clientearth.org/library/download-info/high-court-ruling-on-clientearth-no2-vs-ssefra-pre-election-purdah/
[14] ClientEarth (No.2), transcript of judgment on Defendant's Purdah application, dated 27 April 2017, https://www.documents.clientearth.org/library/download-info/high-court-ruling-on-clientearth-no2-vs-ssefra-pre-election-purdah/

Continued legal imperative following Brexit

The Directive will cease to have effect following UK exit from the European Union. However, the existing domestic Regulations implementing the Directive, and related case law, will not fall away.[15] This means that immediately following exit day, the existing legal limit values for NO_2 (as well as other regulated ambient air pollutants) will remain in force and the obligation on the Secretary of State to draw up air quality plans where those limits are exceeded will be unchanged.

Brexit does not alleviate local authorities of their plan-making duties pursuant to the ministerial directions. The above comments relating to the associated legal tests will therefore continue to apply.

European Commission infringement proceedings

In May 2018, the European Commission referred the UK to the Court of Justice of the EU ("**CJEU**") in relation to the ongoing exceedances of the NO_2 limit values. These proceedings could result in the CJEU ultimately issuing large daily and lump sum fines to the UK. The Secretary of State has already highlighted that these fines could be passed down to local authorities under the Localism Act 2011.

It is currently uncertain what, if any, role the European Commission and CJEU will have in enforcing EU environmental laws in the UK during any transition period. The UK government has committed to create a national regulator to ensure compliance with environmental law after the UK leaves the EU.

Conclusion

The legal tests set out in ClientEarth (No. 2) and ClientEarth (No.3) apply to local authorities in their preparation and implementation of air quality plans. The adoption of local air quality plans that do not meet the tests above will be vulnerable to legal challenge. The plans themselves must be introduced as soon as can be. Political or technical difficulties, costs or election Purdah are not lawful reasons to justify delay. Nor does Brexit weaken the legal imperative for putting plans in place.

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[15] European Union (Withdrawal) Act 2018, section 2; Air Quality Standards Regulations 2010; Air Quality Standards (Wales) Regulations 2010

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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Annex A – List of relevant English and Welsh local authorities required to produce local air quality plans

Local authority	Latest available forecast compliance year without further action
The five First Wave Local Authorities	
Birmingham City Council	2025
Derby City Council	2024
Leeds City Council	2024
Nottingham City Council	2024
Southampton City Council	2024
The 23 Second Wave Local Authorities	
Basildon District Council	2022
Bath & North East Somerset Council	2022
Bolton Metropolitan Borough Council	2022
Bristol City Council	2022
Bury Metropolitan Borough Council	2022
Coventry City Council	2022
Fareham Borough Council	2022
Gateshead Metropolitan Borough Council	2022
Guildford Borough Council	2022
Manchester City Council	2022
Middlesbrough Borough Council	2024
New Forest District Council	2019
Newcastle City Council	2022

Local authority	**Latest available forecast compliance year without further action**
North Tyneside Council	2022
Rochford District Council	2022
Rotherham Metropolitan Borough Council	2022
Rushmoor Borough Council	2023
Salford Metropolitan Borough Council	2021
Sheffield City Council	2023
Stockport Metropolitan Borough Council	2022
Surrey Heath District Council	2022
Tameside Metropolitan Borough Council	2022
Trafford Metropolitan Borough Council	2021
The eight Third Wave Local Authorities	
Bolsover District Council	2023
City of Bradford Metropolitan District Council	2027
Broxbourne Borough Council	2028
Leicester City Council	2022
Liverpool City Council	2026
Newcastle-under-Lyme Borough Council	2026
Portsmouth City Council	2023
Stoke-on-Trent City Council	2022
The two Welsh local authorities	
Cardiff City Council	2023
Caerphilly County Borough Council	2029