

Air Quality Legislation

Ugo Taddei
Head of Clean Air
ClientEarth

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Breathing clean air is fundamental, also under European law, but unfortunately some MS do not comply. That is why it is essential that civil society, citizens, and judges play a role in ensuring that we can breath clean air.

Introduction to ClientEarth

ClientEarth is a non-profit environmental law organisation

We use law, science and policy to tackle key environmental challenges

We work on climate change, energy, environmental justice, biodiversity, forests and human health

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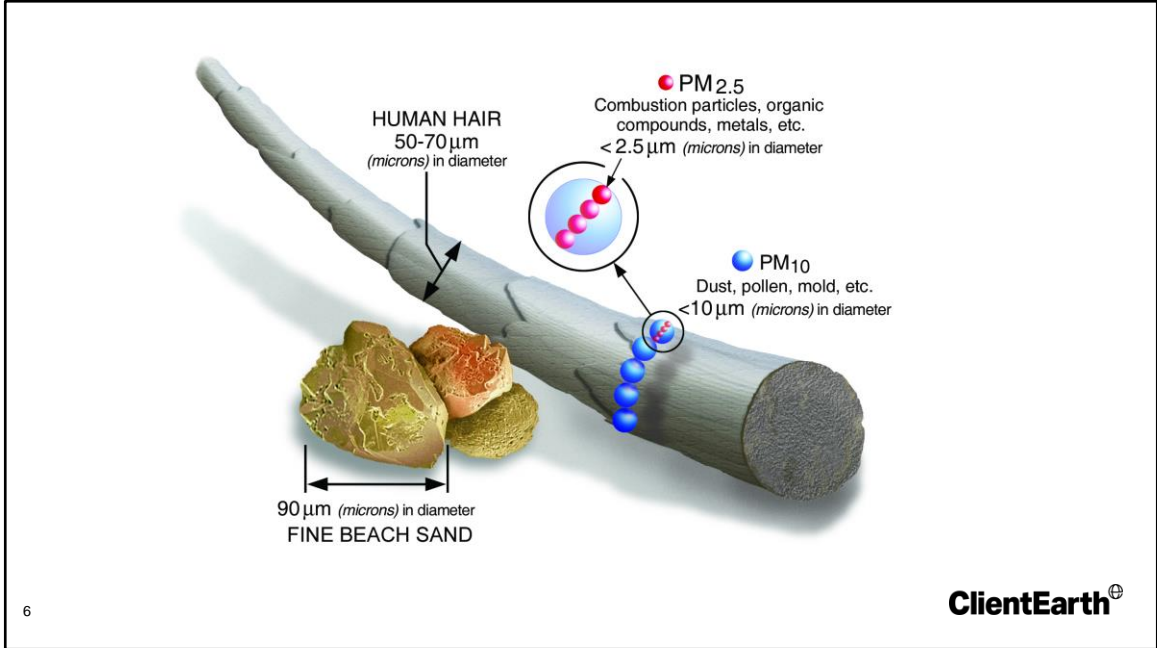
The EU has been regulating air quality since the 1980's.

“Air pollution is the world’s largest single environmental health risk” (WHO, 2014)



Lancet Commission: an estimated 6.5 million global deaths associated with exposure to air pollution in 2012 alone

More than 90% of the world’s children breathe toxic air every day



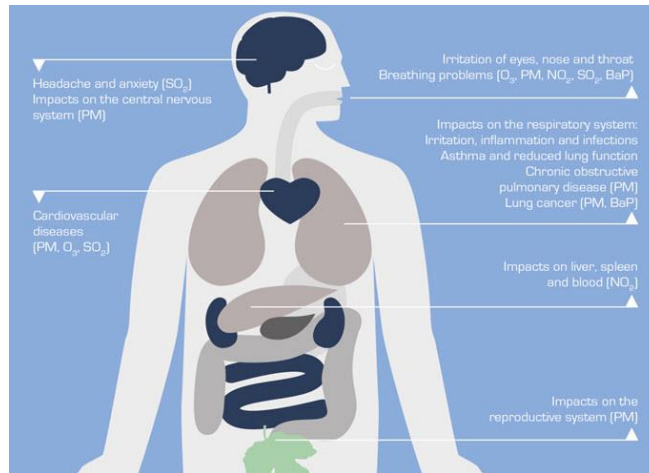
PM = particulate matter

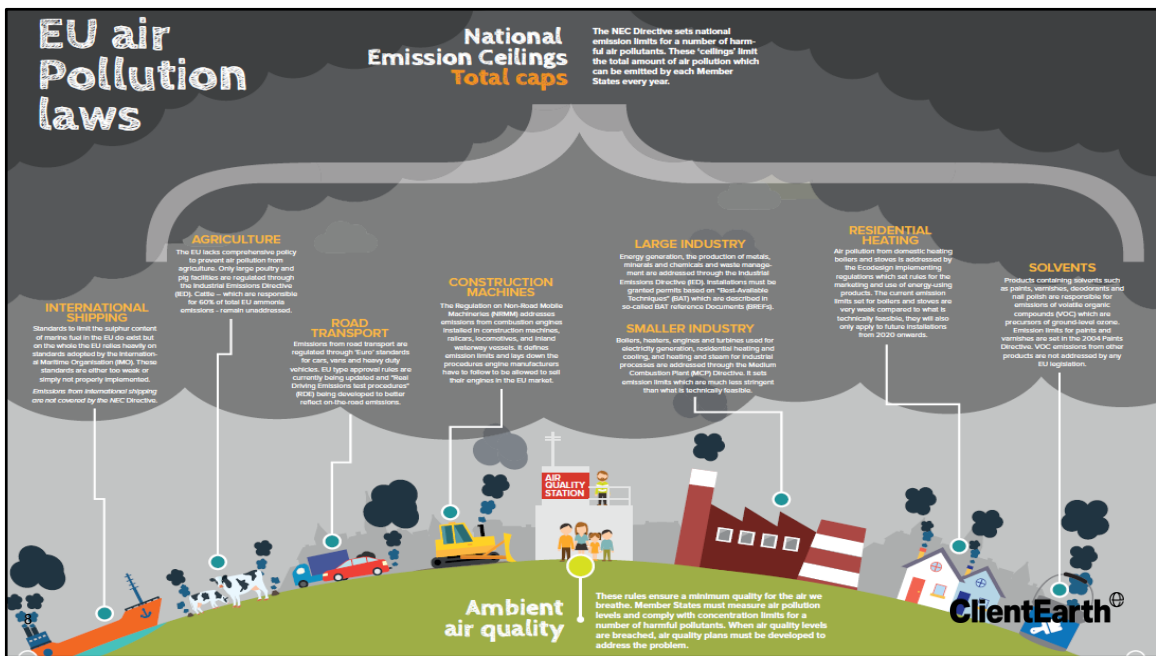
These small particles enter in our body and can affect virtually every organ, as shown in the next figure

The most dangerous one is PM2.5, because when you breathe them, they get into your lungs, and from the lungs to different organs. They go, for example, to the cardiovascular system, to the brain,...

We estimate that more than ¼ of cardiovascular diseases and heart diseases are related to air pollution.

Impact of pollution on health





There are rules at the EU that try to limit national emission of pollutants from all the sectors. And then you have regulation for emissions from point sources, such as road traffic, industrial emissions, and residential heating.

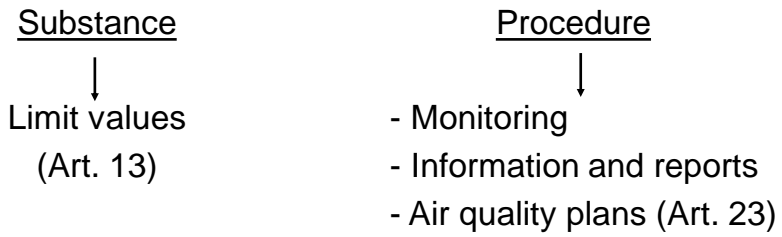
This presentation will focus on top and bottom levels, so, on the ambient air quality directive and the national emissions directive.

Right to clean air The theory



Image: Chris Barbois (Unsplash)

Directive 2008/50/EC on Ambient Air Quality



Objectives for air quality

Limit values

Concentration level fixed on the basis of scientific knowledge to be attained within deadline and **not to be exceeded once attained.**

If exceedance, compliance must be achieved in the shortest time possible.

Target values

Concentration level to be attained where possible.

If exceedance, authorities shall take all necessary measures not entailing disproportionate costs.

So, target values are less compelling to authorities, giving them more discretion on whether and how to achieve the targets.

Limit values (art. 13)

Pollutant	Obligation	Time period	Compliance deadline	Permitted annual exceedances
Nitrogen dioxide (NO₂)	Hourly limit value of 200 µg/m ³	1 hour	1/1/2010 (possible extension to latest 1/1/2015)	No more than 18
	Annual mean limit value of 40 µg/m ³	Calendar year	1/1/2010 (possible extension to latest 1/1/2015)	n/a
Coarse particulate matter (PM₁₀)	Daily limit value of 50 µg/m ³	24 hours	1/1/2005 (possible extension to 11/6/2011)	No more than 35
	Annual mean limit value of 40 µg/m ³	Calendar year	1/1/2005 (possible extension to 11/6/2011)	n/a
Fine particle (PM_{2.5})	Annual mean limit value of 25 µg/m ³	Calendar year	1/1/2015	n/a

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NO₂ comes mostly from traffic, so really important, for example, in cities. You may see there are short term (hours or a day) and long term (a year) targets.

You see that for all these pollutants indicates in the table, the deadline was already many years ago. 2010 or even 2005.

Scientific knowledge and legal standards

Pollutant	WHO	EU
PM _{2.5}	10 µg/m ³ annual mean	25 µg/m ³ annual mean
PM ₁₀	20 µg/m ³ annual mean	40 µg/m ³ annual mean
NO ₂	40 µg/m ³ annual mean	40 µg/m ³ annual mean

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This table compares EU targets with scientific advice. Unfortunately, in Europe, the numbers are significantly higher.

Next slide is about the procedural part of the Directive: what steps should governments take to improve air quality?

Air quality plans (art. 23)

OBLIGATION OF RESULT:

*“In the event of exceedances of those limit values for which the attainment deadline is already expired, the air quality plans shall set out **appropriate measures, so that the exceedance period can be kept as short as possible.**”*

Art. 23 was a new provision brought to the directive in 2008.

This is a very strong obligation, which is not very common in the European regulation.

What is “as soon as possible”?

Minimum requirements for air quality plans (Annex XV, Part A, Directive 2008/50/EC):

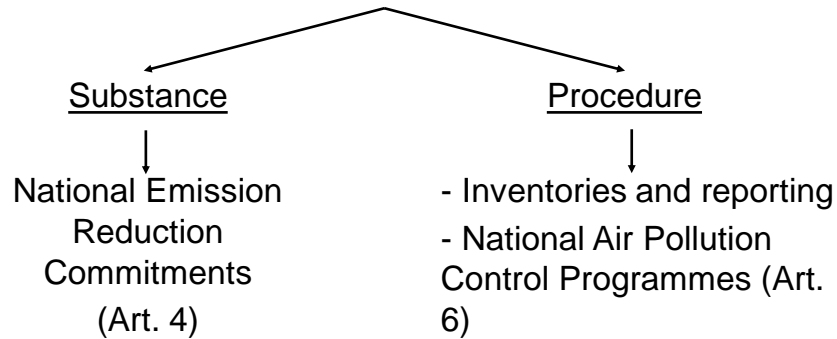
1. identification of **possible measures** to improve air quality (point 6(b))
2. detailed **description of measures adopted** in the plan (point 8(a))
3. **timetable for implementation** of each measure (point 8(b))
4. assessment of the **estimated impact** of each measure and of the whole plan, including the identification of the **expected compliance date** (point 8(c))

Obviously, it is a flexible concept, although it is a rather strong provision. But the directive provides some guidance on annex XV. Those are guidelines for the behaviour of authorities, but also for judges, when it is the case.

Air quality monitoring

- Assessment regime: fixed monitoring stations, modelling, indicative measurements and objective estimation
- Minimum number of stations: based on pollution levels and size of population exposed (Annex V)
- Location of monitoring stations: areas where the highest concentrations occur (Annex III)

Directive 2016/2284/EU on the reduction of national emissions of certain atmospheric pollutants



National Emission Reduction Commitments (NERC)

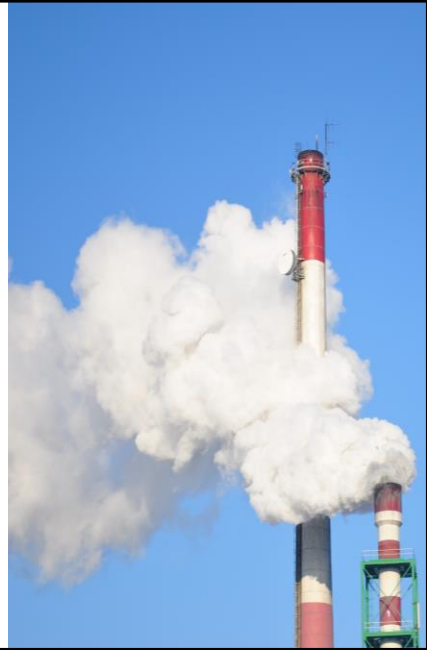
National emission reduction commitments (Article 4)

“1. Member States shall, as a minimum, limit their annual anthropogenic emissions of sulphur dioxide, nitrogen oxides, non-methane volatile organic compounds, ammonia and fine particulate matter in accordance with the national emission reduction commitments applicable from 2020 to 2029 and from 2030 onwards, as laid down in Annex II.”

Air pollutants covered

1. Sulphur dioxide (SO_2)
2. Nitrogen oxides (NO_x)
3. Non-methane volatile organic compounds (NMVOC)
4. Ammonia (NH_3)
5. Fine particulate matter ($\text{PM}_{2.5}$)

20 Image: pexels.com



SO_2 and NO_x come mostly from industry. NO_x also from traffic.
Ammonia mostly from agriculture and farming activities.

ANNEX II

NATIONAL EMISSION REDUCTION COMMITMENTS

Table A

Emission reduction commitments for sulphur dioxide (SO₂), nitrogen oxides (NO_x) and non-methane volatile organic compounds (NMVOC). The reduction commitments have the year 2005 as base year, and for road transport, apply to emissions calculated on the basis of fuels sold (*).

Member State	SO ₂ reduction compared with 2005		NO _x reduction compared with 2005		NMVOC reduction compared with 2005	
	For any year from 2020 to 2029	For any year from 2030	For any year from 2020 to 2029	For any year from 2030	For any year from 2020 to 2029	For any year from 2030
Belgium	43 %	66 %	41 %	59 %	21 %	35 %
Bulgaria	78 %	88 %	41 %	58 %	21 %	42 %
Czech Republic	45 %	66 %	35 %	64 %	18 %	50 %
Denmark	35 %	59 %	56 %	68 %	35 %	37 %
Germany	21 %	58 %	39 %	65 %	13 %	28 %

The tables in the annexes bring targets in percentiles compared with the emissions from 2005, which is not very clear. So, ClientEarth has prepared some tables with the actual numbers.

Table B

Emission reduction commitments for ammonia (NH₃) and fine particulate matter (PM_{2.5}). The reduction commitments have the year 2005 as base year, and for road transport, apply to emissions calculated on the basis of fuels sold (*).

Member State	NH ₃ reduction compared with 2005		PM _{2.5} reduction compared with 2005	
	For any year from 2020 to 2029	For any year from 2030	For any year from 2020 to 2029	For any year from 2030
Belgium	2 %	13 %	20 %	39 %
Bulgaria	3 %	12 %	20 %	41 %
Czech Republic	7 %	22 %	17 %	60 %
Denmark	24 %	24 %	33 %	55 %
Germany	5 %	29 %	26 %	43 %

Indicative 2025 target

Indicative 2025 target determined by **linear reduction trajectory** between emission reduction commitments for 2020 and emission reduction commitments for 2030

Member states may follow **a non-linear reduction trajectory**, if economically or technically more efficient. BUT **duty to give reasons** in the national air pollution control programmes

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The targets are for 2020 and 2030, but there is also an indicative target for 2025, to try to guarantee that MS follow a linear reduction.

National Air Pollution Control Programmes (NAPCP)

NAPCPs (Article 6)

- Member States shall draw up, adopt and implement national air pollution control programmes in order to **limit their emissions in accordance with their emission reduction commitments**
- Key tool to ensure attainment of 2020 and 2030 targets
- Obligation to consult public on draft NAPCPs

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MS must adopt plans every 4 years, in order to ensure they will be able to achieve the targets.

Minimum requirements (Annex III)

- a. Air quality policy framework in the MS
- b. Policy options considered to achieve NERCs and impact assessment
- c. Measures and policies adopted, including:
 - i. timetable for adoption, implementation and review
 - ii. competent authorities for implementation
- d. Reasons for any flexibilities and/or non-linear trajectory
- e. Assessment of coherence with other policies (eg AQP, NECP)



The right to clean air the reality

Image: Jacek Halicki

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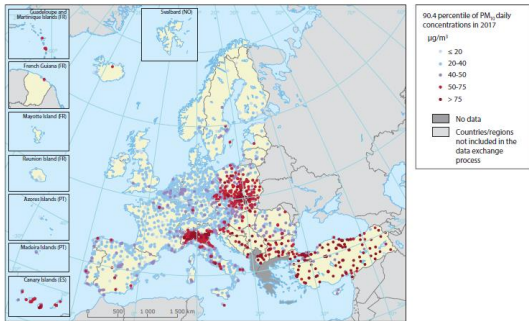
We have strong legal measures in place. Now we take a closer look at what is the reality of air pollution in Europe.



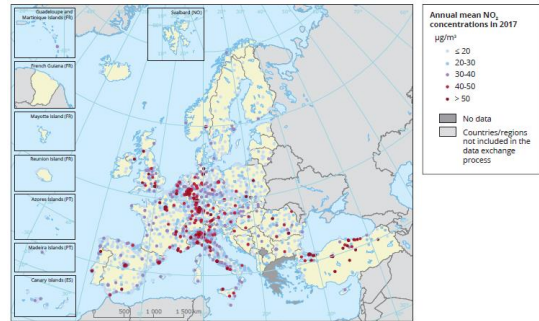
This report is a key instrument.

Widespread exceedances of limit values

PM₁₀ exceedances: often linked to fuel combustion (heating, transport...)



NO₂ exceedances: often linked to traffic (diesel), in more than 130 cities in the EU



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130 cities across 16 of the 28 EU member states.

Almost all EU cities have issues with nitrogen dioxide (NO₂) caused mainly by diesel vehicles in cities.

Commission 2020 implementation report on the NEC Directive

Press release | 26 June 2020 | Brussels

Air pollution: Most EU Member States not on track to reduce air pollution and its related health impacts by 2030

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Press contact

The assessment of Member States' first programmes of measures to control air emissions finds that the implementation of the [new European clean air rules](#) needs improvement. Member States need to step up efforts across all sectors to make sure their citizens can breathe clean air, preventing respiratory diseases and premature death caused by breathing polluted air.

30 Source: EU Commission, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1188

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There is an implementation gap, meaning that the MS are not implementing properly the European regulation.

Health impacts in Europe

Table 10.1 Premature deaths attributable to PM_{2.5}, NO₂ and O₃ exposure in 41 European countries and the EU-28, 2016

Country	Population (1,000)	PM _{2.5}		NO ₂		O ₃	
		Annual mean(1)	Premature deaths (1)	Annual mean(2)	Premature deaths(2)	SDM05 (3)	Premature deaths(3)
Austria	8 700	120	5,300	18.9	1,000	4,521	270
Belgium	11 311	127	7,600	21.7	1,000	2,203	380
Bulgaria	7 154	22.9	11,100	19.4	1,700	2,947	280
Croatia	4 191	184	5,300	15.2	200	4,996	490
Cyprus	1 184	137	500	24.0	240	5,613	240
Czechia	10 054	164	9,000	15.2	240		
Denmark	5 707	92	2,700	10.4			
Estonia	1 310	5.0	500				
Finland	5 482	5.1	1,500	7.6			
France	64 977	109					
Germany	82 170	111					2,900
Greece	12 764	111					440
Hungary						3,162	380
Ireland						1,323	
Italy						18,000	4,068
Latvia				12.0	60		
Lithuania				24.0	11.7		
Luxembourg							
Malta				11.1	2.10		
Netherlands	16 379	11.9					
Poland	37 962	300					
Romania	9 800						320
Slovakia						2,485	490
Slovenia						4,124	160
Spain						30	5,007
Sweden				20.0	7,700	3,212	1,900
Switzerland				27.0	63.7	80	1,919
Turkey				11,800	21.8	11,800	1,101
Ukraine							530
United Kingdom	22.9	5,100	13.7	70	3,475	380	
EU-28	71	10.1	40	16.2	+1	4,424	+1
EU-28	3,516	28.7	5,400	13.2	20	4,409	320
EU-28	333	4.8	60	10.1	+1	489	+1
EU-28	1,772	27.1	3,600	14.4	20	4,708	500
EU-28	38	14.3	30	20.8	10	7,186	+1
EU-28	422	20.3	4,200	11.0	+1	2,209	20
EU-28	2,071	34.0	3,400	17.4	110	4,434	30
EU-28	1 211	1.0	1,100	12.4	130	1,502	30
EU-28	38	14.3	30	16.2	+1	1,007	+1
EU-28	1 036	24.0	13,700	13.4	1,500	3,308	280
EU-28	8 327	10.1	3,700	10.7	620	4,842	240
EU-28	966 028	42.8	374 000	14.3	48 000	1,547	14 000
Total	528 914	14.4	412 000	14.3	31 800	3,911	15 100

Estimated 374,000 premature deaths each year in the EU from exposure to PM_{2.5}

Estimated 68,000 premature deaths each year in the EU from exposure to NO₂

Next slide on the key drivers of the pollution problems

Quiz session

Question 1

Air quality limit values describe:

- a) emission quantities which a specific emitter may not exceed
- b) recommended maximum concentrations of a pollutant in the air to be attained where possible, adopting measures not entailing disproportionate costs
- c) maximum concentrations of a pollutant in the air to be attained within a given deadline and not to be exceeded once attained

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Correct answer: c

Question 2

Air quality plans:

- a. must ensure compliance with limit values, setting out appropriate measures, so that the exceedance period is kept as short as possible
- b. are routine air quality management tools to ensure gradual improvements in air quality over the long term
- c. may be adopted by Member States, where requested by the Commission

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Correct answer: a



Case law of the CJEU

Case C-237/07 – *Janecek*

- **Standing** before courts to request adoption of short-term action plans under Directive 96/62
- **Limits on the discretion** of authorities → judicial scrutiny on measures and policies

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Mr. Janecek was a member of the Green Party in Bavaria.

Case C-237/07 – Janecek

Standing of individuals to request adoption of short-term action plans under Directive 96/62:

“[...] the natural or legal persons directly concerned by a risk that the limit values or alert thresholds may be exceeded must be in a position to require the competent authorities to draw up an action plan where such a risk exists, if necessary by bringing an action before the competent courts.” [para 39]

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The case states that natural people should be in the position to require authority to adopt action plans, even bringing an action before court, if necessary. This was essential, because previously in Germany it was not possible, because you would need to show a breach of a right.

Case C-237/07 – Janecek

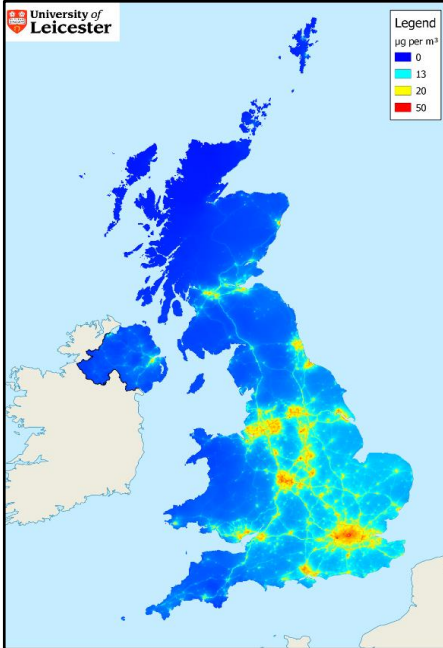
Intensity of review of short-term action plans under Directive 96/62:

“while the Member States thus have a discretion, Article 7(3) of Directive 96/62 includes limits on the exercise of that discretion which may be relied upon before the national courts [...], relating to the adequacy of the measures which must be included in the action plan with the aim of reducing the risk of the limit values and/or alert thresholds being exceeded and the duration of such an occurrence, taking into account the balance which must be maintained between that objective and the various opposing public and private interests” [para 46]

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Limits on the exercise of discretion by the national authorities – (1) **gradual** return to a level below limit values; (2) **balance** which must be maintained between air quality objective and the various opposing public and private interests



Case C-404/13 – *ClientEarth*

- **Standing** of individuals and NGOs under Directive 2008/50/EC
- **Key role of national courts**
- **Discretion of authorities very narrow** → plans must achieve compliance as soon as possible

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Case C-404/13 – ClientEarth

Standing of individuals and NGOs:

“the natural or legal persons directly concerned by the limit values being exceeded ... must be in a position to require the competent authorities, if necessary by bringing an action before the courts having jurisdiction, to establish an air quality plan which complies with the second subparagraph of Article 23(1) of Directive 2008/50” [para 56]

Case C-404/13 – ClientEarth

Review of Air Quality Plans (Art. 23 Directive 2008/50):

*“Member States must take **all the measures necessary to secure compliance**” and are not allowed “to defer, as they wish, implementation of those measures” [para 31]*

*“As regards **the content of the plan**, it follows from the second subparagraph of Article 23(1) of Directive 2008/50 that, while Member States have a degree of discretion in deciding which measures to adopt, **those measures must, in any event, ensure that the period during which the limit values are exceeded is as short as possible**” [para 57]*

Case C-404/13 – ClientEarth

Role of national courts and remedies:

“where a Member State has failed to comply with the requirements of the second subparagraph of Article 13(1) of Directive 2008/50 [...], it is for the national court having jurisdiction, should a case be brought before it, to take, with regard to the national authority, any necessary measure, such as an order in the appropriate terms, so that the authority establishes the plan required by the directive in accordance with the conditions laid down by the latter” [para 58]

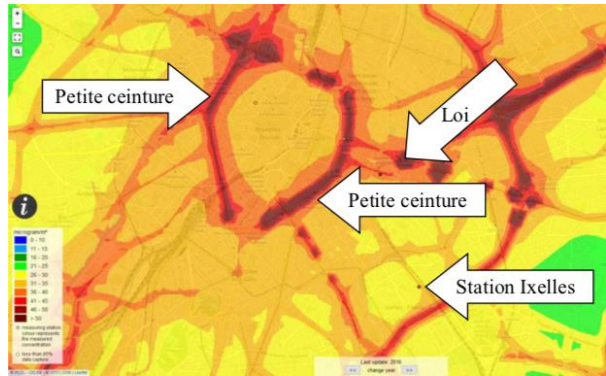
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This is especially important because in many jurisdictions the courts may only maintain or annul, but do not have jurisdiction to issue orders against the authority.

Case C-723/17 – Craeynest

- Standing to challenge location of **monitoring stations**
- National courts must carry out **intense review** of administrative decisions (≠ deference to “expert decisions of authorities”)



Case C-723/17 – Craeynest

Rules on location of air quality monitoring stations and standing:

*“42. Some of the provisions of Directive 2008/50 [on air quality monitoring] contain **clear, precise and unconditional obligations, which means that they can be invoked by individuals against the State.**”*

43. This is the case, in particular, with regard to the obligation to establish sampling points in such a way that they provide information on the pollution of the most polluted locations [...].”

Case C-723/17 – Craeynest

Intensity of review of scientifically complex assessments:

*“in order to determine the **rigour of judicial review** of national decisions adopted pursuant to an act of EU law, it is necessary to **take into account the purpose of the act** and to ensure that its effectiveness is not undermined” [para 46]*

Air Quality Directive protects fundamental rights, including:

- **high level of environmental protection, precautionary principle and principle of prevention** required under Article 3(3) TEU and Article 191 (1) and (2) TFEU [see para 33]
- **right to life**, under Article 2(1) Charter of Fundamental Rights [see Opinion AG Kokott in Case C-723/17, para 53]

There was the question if the national courts should interfere with such technical issues. And the CJEU said yes! Given the importance of the air quality directive.

Case C-723/17 – Craeynest

Reversal of burden of proof:

- “authorities are required to base their decisions on *sound scientific data* and, as set out in Section D of Annex III to Directive 2008/50, to prepare comprehensive documentation that includes *evidence supporting the choice* of the location of all monitoring sites” [para 51]
- Opinion of AG Kokott [para 64]:
 - it is for the competent authorities to convince the courts by presenting substantiated arguments
 - the other party can counter such claims with its own scientifically substantiated arguments
 - the court can appoint independent experts

So, it is **not** up to the citizen to explain the technical aspects.



Case C-752/18 – *Deutsche Umwelthilfe*

- Enforcement of rulings in air quality matters
- Fundamental **right to an effective remedy**, procedural obstacles and role of national courts
- Possibility (and limits) of **coercive measures**

Governor Markus Soeder

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Governor Markus Soeder

The issue was that there has been already several rulings against the Bavarian government asking them to improve the air quality plan, dating back to the Janecek case in 2007. And, in the end, the authority were refusing to review the air quality plan and introduce restriction on vehicles. They openly said before the parliament that they had no intention to comply with the court order. So, the question was sent to the higher court asking if the governor could be sent to jail in order to achieve compliance.

Case C-752/18 – *Deutsche Umwelthilfe*

Obligation to provide effective remedies - principles:

- Procedural autonomy + principles of equivalence and effectiveness
- Fundamental right to effective remedy:
 - Article 47 Charter Fundamental Rights
 - Article 9(4) Aarhus Convention
 - Article 6(1) European Convention of Human Rights
- Relevance of interests protected by Air Quality Directive (human health)

Case C-752/18 – Deutsche Umwelthilfe

Duty of national courts to use primacy of EU law to overcome procedural obstacles:

- “ascertain, *taking the whole body of domestic law into consideration [...] whether it can arrive at an interpretation of domestic law that would enable it to apply effective coercive measures in order to ensure that the public authorities comply with a judgment*” [para 40]
 - eg high financial penalties that are repeated at short intervals until full compliance
- the principle of primacy of EU law can lead “*to the national court applying procedural rules and adopting measures in situations not provided for by national law*” [AG Opinion, para 60]

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So, apply the national law to the maximum extent, to be able to achieve compliance. When there is conflict between the national law and the European duty to provide effective remedies, you should be able to either interpretate your national laws to an maximum extent, or, if it is not possible, to go beyond the national provisions and apply directly the European law.



Commission's infringements

- Key cases:
 - C-68/11 *Commission v Italy*,
 - C-488/15 *Commission v Bulgaria*
 - C-336/16 *Commission v Poland*
 - C-636/18 *Commission v France*
- Obligation of result
- Not admissible to justify breach for technical, financial or socio-economic difficulties

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Those cases lead to understanding the obligation to comply with the limit values.

Case C-68/11 – *Commission v Italy*

- Obligation of result:
 - *“it is irrelevant whether the failure to fulfil obligations is the result of intention or negligence on the part of the Member State responsible, or of technical difficulties encountered by it” [para 63]*
- The following defences cannot be accepted:
 - technical difficulties
 - financial difficulties
 - unfavourable weather conditions

Case C-488/15 – *Commission v Bulgaria*

- Finding of systemic and continuous breach of the Air Quality Directive
- Argument based on “*socio-economic situation cannot be accepted*” [para 77]
- Case-by-case analysis and strike “*balance between the aim of minimising the risk of pollution and the various opposing public and private interests*” [para 106]

Opinion of AG Kokott in Case C-488/15 – *Commission v Bulgaria*

- Balancing exercise: “*the high importance of ambient air quality for the protection of life and health leaves only very little room for consideration of other interests*” [para 96]
- “*the longer the exceedances persist, the more they show how effective — or ineffective — the measures already taken to improve air quality were*” [para 104]
- Reversal of burden of proof [para 107]
- Information required by Annex XV (on measures, timetable, impact assessment, compliance date) is central to assess adequacy of air quality plans [para 113]

“As short as possible” and balancing of other interests

- **Structural changes** needed to achieve compliance cannot be considered exceptional circumstances and are not such as to exclude the possibility of setting shorter compliance dates than 10 or 15 years after the start of the exceedances
- **Case C-336/16 – Commission v Poland** [para 99-101]: socio-economic costs and financial challenge of replacing individual and collective boilers across Poland with more efficient equipment
- **Case C-636/18 – Commission v France** [para 83-85]: significant financial investment and risk of backlash (“*gilets jaunes*”) in order to modernise vehicle fleet and change mobility infrastructure

Case law on NEC Directive

- Binding obligation of Member States to take “*all the measures necessary*” to achieve the 2020 and 2030 NERCs
 - refrain from adopting any measures liable seriously to compromise the attainment of the NERC (body of policies and measures ≠ individual decision)
 - obligation to adopt adequate national air pollution control programme
 - Joined Cases C-165/09 and C-167/09 *Stichting Natuur en Milieu* [78; 84-87]

There isn't such a big number of cases before the Court of Justice regarding the NEC Directive. There is only a case about the previous version of the directive, in 2001.

Content of NAPCPs and judicial review

- Member States have “*wide flexibility in selecting the specific initiatives to be implemented*”
- However, there are **limits on the exercise of such discretion** → the NAPCP, as a whole, must be appropriate to reduce emissions in line with NERCs
- Limits as to appropriateness of NAPCPs can be relied upon before the national courts
 - Recital 27 of NEC Directive
 - Joined Cases C-165/09 and C-167/09 *Stichting Natuur en Milieu* [101-103]

The right to clean air before national courts



When the Court of Justice issues a ruling, it is binding. And those rulings basically clarified that we have the right to clean air, to challenge exceedances of the limit values, and to obtain strong rulings from the national courts to ensure compliance in the shortest time possible.

**Legal battle for
clean air in the
UK**



Image: Sandra Møde (Unsplash)

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2010	NO ₂ limit value in force: 40 out of 43 zones in breach
2011	ClientEarth launches first legal challenge
May 2013	Supreme Court refers questions to the CJEU
Nov 2014	CJEU judgment – establishes the right to clean air
Apr 2015	First win: <u>Supreme Court orders new Air Quality Plan</u>
Dec 2015	2015 Air Quality Plan published – commits 5 cities and London to introduce clean air zones
Nov 2016	Second win: <u>High Court orders new Air Quality Plan</u>
Apr 2017	Third win: High Court dismisses application for time extension
Jul 2017	2017 Air Quality Plan published – requires individual plans from 23 local authorities
Feb 2018	Fourth win: <u>High court orders supplemental Air Quality Plan</u>
Oct 2018	2018 Supplemental Air Quality Plan published – requires proposed measures from 33 additional local authorities



Mr Justice Mitting

The High Court, 2011

*“...[t]he means of enforcing...lie elsewhere”,
and a mandatory order would “raise serious
political and economic questions which are
not for this court”*

*ClientEarth (No. 1) [2011] EWHC 3623 (Admin) §15
and §16*

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The start was very difficult. There was a judge who interpreted in a very narrow and limited way, as quoted in this slide.



Lord Carnwath

The UK Supreme Court, 2015

“The new Government [...] should be left in no doubt as to the need for immediate action to address this issue. The only realistic way to achieve this is a mandatory order requiring new plans complying with article 23(1) to be prepared within a defined timetable.”

ClientEarth (No. 1) [2015] UKSC 28, §31

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The appeal lead to this manifestation from the Supreme Court, which is completely opposed to the initial ruling from the High Court.

2010	NO ₂ limit value in force: 40 out of 43 zones in breach
2011	ClientEarth launches first legal challenge
May 2013	Supreme Court refers questions to the CJEU
Nov 2014	CJEU judgment – establishes the right to clean air
Apr 2015	First win: <u>Supreme Court orders new Air Quality Plan</u>
Dec 2015	2015 Air Quality Plan published – commits 5 cities and London to introduce clean air zones
Nov 2016	Second win: <u>High Court orders new Air Quality Plan</u>
Apr 2017	Third win: High Court dismisses application for time extension
Jul 2017	2017 Air Quality Plan published – requires individual plans from 23 local authorities
Feb 2018	Fourth win: <u>High court orders supplemental Air Quality Plan</u>
Oct 2018	2018 Supplemental Air Quality Plan published – requires proposed measures from 33 additional local authorities

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The government, then, adopted a new plan, which was better, but not perfect. So, they challenged it again and won in the first instance.



Mr Justice Garnham

The High Court, 2016

“the Secretary of State fell into error ... in fixing on a projected compliance date of 2020 (and 2025 for London)” and “by adopting too optimistic a model for future emissions”

ClientEarth (No.2) [2016] EWHC 2740 (Admin), §95

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Function of surveillance (watch dog) of the NGOs

ClientEarth (No.2): standard of review

“...the Secretary of State must aim to achieve compliance by the soonest date possible

[...] choose a route to that objective which reduces exposure as quickly as possible, and

[...] take steps which mean meeting the value limits is not just possible, but likely”

ClientEarth (No.2) [2016] EWHC 2740 (Admin), §95

ClientEarth[⊕]

ClientEarth (No.2): standard of review



“...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 [...] the determining consideration has to be the efficacy of the measure in question and not their cost”

ClientEarth (No.2) [2016] EWHC 2740 (Admin), §50

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Only when you have a choice between two different measures which are equally effective then you can choose the cheapest one.

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The High Court, 2018

“The Court itself cannot realistically monitor the performance by the government [...], but it can adapt its procedure to provide a quick, efficient and low cost means of enabling the current claimant, which has acted as a valuable monitor of the government's efforts to improve air quality to date, to bring the matter back before the Court...”

ClientEarth (No.3) [2018] EWHC 398 (Admin), Judgment on remedies, §14

ClientEarth[⊕]

So, it was a kind of supervisory jurisdiction, to keep the case open and allow ClientEarth to bring the matter back to the court every time there are doubts about what the government is doing.

ClientEarth (No.3): liberty to apply

“In the particular circumstances of this case, where we have an expert claimant, which to date has advanced only what are properly arguable claims, and which has demonstrated both high level expertise, legal and technical, and a responsible attitude towards making a claim, it is appropriate, in my judgment, to grant this extended liberty to apply. I acknowledge that this is a wholly exception course for the Court to take...”

ClientEarth (No.3) [2018] EWHC 398 (Admin), Judgment on remedies, §16

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Where has all this got us to?

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Clean Air Zones (CAZ) across the UK

- Newcastle:** Class C CAZ
- Leeds:** Class B CAZ
- Manchester:** ?Class B/C CAZ?
- Sheffield:** Class C CAZ
- Bradford:** ?Class C CAZ?
- Birmingham:** Class D CAZ
- Bristol:** ?Diesel ban?
- Bath:** Class C CAZ
- London:** Ultra Low Emission Zone



MAYOR OF LONDON

CENTRAL LONDON ULTRA LOW EMISSION ZONE – SIX MONTH REPORT

October 2019

Ultra-low emission zone (ULEZ) in London reduced NO₂ pollution by 29% in the first three months of implementation



theguardian

High court rules UK government plans to tackle air pollution are illegal

EveningStandard.

Government plans to cut London's deadly pollution levels are not good enough, judge says

The Telegraph

High Court victory for air pollution campaigners in legal battle with Government

New Scientist

Court orders UK to take urgent action to reduce air pollution

Mail Online

Diesel owners face congestion charge to drive in 16 cities after ruling that the Government is not doing enough to meet EU air pollution targets

BBC

Sign in



News

Sport

Weather

iPlayer

NEWS

Green group wins air pollution court battle



Germany



Image: Håkon Sataøen (Unsplash)

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Düsseldorf, September 2016



All these cases lead to restrictions on diesel vehicles.

Munich, February 2017



Image: Robert Mehlau (Picco)

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Stuttgart, September 2017



Specially in Stuttgart the case was quite disruptive and a political problem, since it is the home of Mercedes. So, the cities appealed the order saying that they did not have the power under German law to introduce these restrictions, and that the Federal government needed to change the legal framework to make these restrictions possible.

You would expect the federal government to do so. But all the opposite...:



Political pressure to stop court orders

The Federal government will do *“everything in our powers to make sure there won’t be such bans”*

Angela Merkel, Federal Chancellor, 5 septembre 2017

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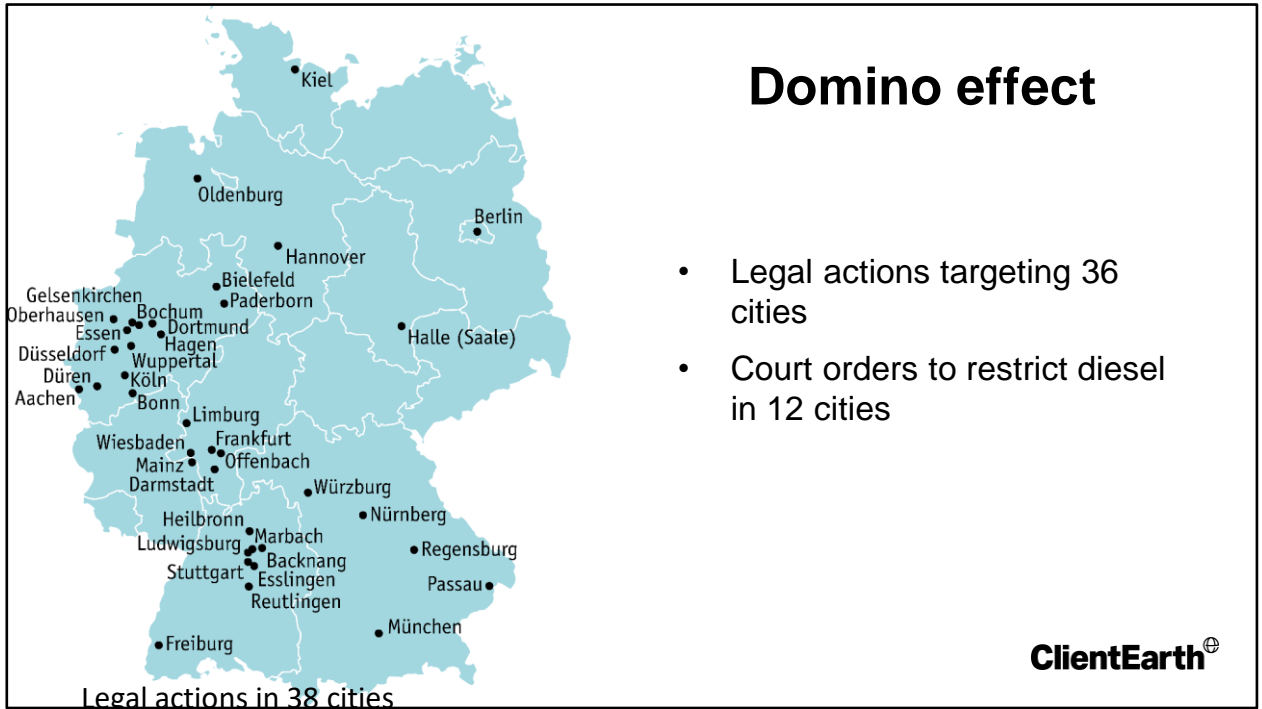
Federal Administrative Court in Leipzig, February 2018



So, the Federal Administrative Court in Leipzig applied European Law. It is true that there are doubt about if the cities can introduce these restrictions, but under European Law there is a clear obligation to adopt the measures that will ensure compliance in the shortest time possible. So, in this situation the Federal Court decided to set aside German Federal Law, and give the cities power, but also de duty and the obligation, to introduce these restrictions.

Domino effect

- Legal actions targeting 36 cities
- Court orders to restrict diesel in 12 cities



12 cities forced to introduce restrictions on diesel vehicles: Aachen, Berlin, Bonn, Cologne, Darmstadt, Dusseldorf, Essen, Frankfurt, Gelsenkirchen, Hamburg, Munich, and Reutlingen

Impacts

- Recall 5.3 million diesel cars for software updates to cut emissions
- 2 billion euros clean air fund (250m euros from manufacturers)
- Levels of pollution improved twice as high in cities where there are court cases

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Between 2018 and 2019 alone, nitrogen dioxide (NO₂) levels reduced by an average of 4.2µg/m³ in cities where air quality litigation has been undertaken. Meanwhile, in cities where no action was taken, that average reduction stands at just 2.1µg/m³.

The recall was also an effect of the “dieselgate” (car manufactures were cheating on the car’s emissions)

The New York Times

Germany's Car Capital Reels As Court Allows Ban on Cars

By KATRIN BENNHOLD

STUTTGART, Germany — The star of Daimler shines bright over Stuttgart. The giant illuminated emblem of its most famous car, the Mercedes, towers above the main train station, greeting visitors. It is visible for miles.

"As soon as you arrive," said Manfred Niess, a retired teacher and local environmental activist, "you know who rules here."

Now, though, Daimler and other automakers in Stuttgart are facing a startling new reality: It may soon be illegal for some to drive a Mercedes in this city, where the local soccer club plays in the Mercedes-Benz stadium.

On Tuesday, a German court ruled that Stuttgart, one of the country's most polluted cities, can ban diesel cars from driving in downtown areas to improve air quality. The ruling could ultimately lead to bans in a host of cities in Germany, a country with millions of diesel cars on the streets. Unlike in the United States, where diesel cars are the exception, in Germany roughly one in three passenger vehicles runs on diesel.

"It is the latest wake-up call for the German auto industry and German politicians," said

Continued on Page A6

THE WALL STREET JOURNAL

Germany Paves Way for Diesel Ban, Dealing Blow to Auto Makers

Court allows major German cities to ban older diesel vehicles

Bloomberg

How a German Court Case Could Accelerate Diesel's End

The Washington Post

Germans love their cars. They also love the environment. A diesel ban is forcing them to choose.



The Diesel Delusion

Court Ruling Could Change Future of Mobility in Germany

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Barriers to access to justice in Poland and Bulgaria



- Some of the worst air pollution in the world
- Some of the most ineffective air quality plans
- Very serious barriers to access to justice for citizens

Procedural obstacles in national laws...

- In Poland, air quality plans are local laws, not administrative decisions, subject to *lex specialis* for standing (article 90(1) of the Act of Provincial Self-Government)
- In Bulgaria, air quality plans are internal administrative acts
- In both countries, there is no easy route to challenge AQPs: claimants must demonstrate a violation of an individual, concrete and actual legal interest

...and barriers before the national courts

- Polish Supreme Administrative Court rejected a case in Silesia (File No. II OSK 3218/17, 23 January 2018)
- Bulgarian Supreme Administrative Court rejected cases in Sofia (ruling No. 13138 on 1 November 2017) and Plovdiv (ruling No. 16049 on 20 December 2018)
- Both courts **refused** to:
 - interpret/disapply national law in line with EU law
 - refer preliminary question to CJEU

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Follow-up

- Communications to the Aarhus Convention Compliance Committee concerning barriers to access to justice in Poland (Communication ACCC/C/2016/151) and Bulgaria (Communication ACCC/C/2018/161)
- Complaints to the EU Commission requesting start of infringement proceedings against Bulgaria and Poland lodged in February 2019

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Infringement

Access to justice in environmental matters: Commission calls on BULGARIA and POLAND to remove barriers to access to justice for citizens and environmental organisations in relation to air quality plans

The Commission is urging **Bulgaria** and **Poland** to remove barriers to access to justice in relation to air quality plans. Neither of the two countries has ensured that natural or legal persons directly concerned by exceedances of the air pollution limits under [Directive 2008/50/EC](#) on ambient air quality and cleaner air for Europe, are allowed to bring an action before the national courts. Environmental organisations and natural or legal persons in these two Member States are currently not allowed to challenge the consistency of an air quality plan and to require public authorities to establish air quality plans as the Directive requires.

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May 2020.

Conclusions

- Clear and binding EU rules on air quality, but widespread breaches many years after entry into force
- Litigation by individuals and NGOs is a key driver to ensure adequate action to fight pollution
- National courts have a key role to play to provide effective legal protection of human health and the environment

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Thank you!

Ugo Taddei

Head of Clean Air

ClientEarth

utaddei@clientearth.org

t. +32 (0)2 808 4323

Twitter: @UgoClientEarth

www.clientearth.org

@ClientEarth

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Questions?



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