

Right to Clean Air and Access to Justice: How can the judgments be enforced?

Sebastian Bechtel

Lawyer, Environmental Democracy, ClientEarth

Ugo Taddei,

Lead lawyer, Clean Air, ClientEarth

Katherine Nield,

Lawyer, UK Clean Air, ClientEarth

Series of webinars

“Right to Clean Air and Access to Justice”

Session 3

26 February 2020



Focus today: Remedies

What the court can order as final relief if a court challenge is (partially) successful + how these orders can be enforced



Contents

PART 1 – The EU legal framework

PART 2 – Case law of the CJEU on right to clean air and effective remedies

PART 3 – Case study: legal battle for clean air in the UK

Questions & answers



The legal framework

Main EU & international law sources:

1. EU law principles: effective judicial protection (Art 19(1) TEU) and sincere cooperation (Art 4(3) TEU)
2. Human rights: right to an effective remedy (Art 47 Charter of Fundamental Rights, based on Art 6+13 ECHR)
3. Art 9(4) Aarhus Convention: procedures shall provide *“adequate and effective remedies”*



(1) Procedural autonomy within limits

- If no specific harmonisation, implementation left to procedural autonomy of MS limited by principles of:
 1. Equivalence = not *“less favourable than those governing similar domestic actions”*;
 2. Effectiveness = *“it must not be made impossible in practice or excessively difficult to exercise rights conferred by EU law”*.

C-201/02 *Wells*, para. 67, C-420/11 *Leth*, para. 38, C-407/18 *Kuhar*, para. 46



(2) Right to effective remedy

Ensure compliance with right to effective remedy (Art. 47 Charter, Art. 9.4 Aarhus) + principle of effective judicial protection (Art. 19 TFEU)

- In area of EU environmental law: Court must *“interpret its national law in a way which, to the fullest extent possible, is consistent both with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention and with the objective of effective judicial protection of the rights conferred by EU law”* C-752/18 *Deutsche Umwelthilfe*, para. 39; C-240/09, *Slovak Bears*, paras 50-51
- All the more important if failure to adopt measures would endanger human health C-752/18 *Deutsche Umwelthilfe*, para. 38



Basic principles

- CJEU:
 - Member States must refrain from taking any measures that can seriously compromise the attainment of a result prescribed by EU environmental law *Case C-129/96, Inter-Environnement Wallonie v Région wallonne, para. 45*
 - National courts should nullify the unlawful consequences of a breach of EU law *C-201/02 Wells, paras 64-65; Art 4(3) TEU + Art 47 Charter*



Application to specific remedies

Main remedies prescribed by EU law:

1. Suspension, revocation and annulment of unlawful decisions and acts
2. Instruction / order requiring adoption of omitted measures
3. Preventing and remedying harm



(1) Quashing a decision/permit

- Example: Lack of EIA in permitting of project that will pollute the air
 - Court must take all “*general or particular measures necessary*” to ensure that an EIA is still carried out
 - This includes: “*subject to the limits laid down by the principle of procedural autonomy of the Member States, the revocation or suspension of a consent already granted*” C-201/02 *Wells*, para. 65
 - Exceptionally, activity may continue until replacement EIA is carried out C-411/17 *Inter-Environnement Wallonie*, paras 175-82



(1) Quashing a decision/permit

Example 2: No appropriate assessment of air impacts on habitat prior to permit: must still carry out appropriate assessment (art 6.3) + if it shows (risk of) deterioration, assess (art 6.4):

1. Should project still be carried out for imperative reasons of public interest?
2. If yes, are there viable alternative solutions
3. If not: take all compensatory measures to ensure the overall coherence of the Natura 2000 site

Case C-399/14 Grüne Liga Sachsen and Others, paras 68-77.



(1) Quashing a decision/permit

CJEU: Exceptionally, activity may continue until replacement assessment is carried out *C-411/17 Inter-Environnement Wallonie*, para. 176

but:

- Art 6(2) applies independently => if deterioration of habitat prior to replacement assessment, authority must take “*appropriate steps*”

C-141/14, Commission v Bulgaria, para 52 and *C 404/09, Commission v Spain*, para 124



(2) Instruction / order requiring adoption

Examples - adoption of

- National Air Pollution Control Programmes (NAPCPs)
 - Joined cases C-165 to C-167/09 *Stichting Natuur en Milieu*
- Air Quality Plans (AQPs)
 - C-237/07 *Janecek*, C-404/13 *ClientEarth*
- Order (or equivalent) on location of sampling points
 - C-723/17 *Craeynest*, para. 56



(3) Damages

Main EU avenues:

1. Environmental Liability Directive: for damage to water, land or protected species or natural habitats
 - May also cover air pollution if causes damage to these elements - *C-129/16 Túrkevei Tejtermelő Kft*, para. 42.
2. Outside of ELD: Court must always “*make good any harm caused by the failure to carry out an [EIA]*” *C-201/02 Wells*, para. 66
3. Can also give rise to a personal damage claim under state liability
C-420/11 Leth



In practice: hurdles in clean air context related to causality

PART 2

CASE LAW OF THE CJEU



Case C-404/13 – *ClientEarth*

Background

- High Court ruling on 13 December 2011:
 - **Refusal to grant a mandatory order** for compliance with Article 13 submitting an air quality plan: *“such a mandatory order ... would raise serious political and economic questions which are not for this court”*
 - **Refusal to grant a declaration**: enforcement lies with Commission’s infringement - *“Those remedies are sufficient”*
- UK Supreme Court ruling on 1 May 2013:
 - **Declaration of breach of article 13** Air Quality Directive
 - **Preliminary reference**: *“In the event of non-compliance with Articles 13 ..., what (if any) remedies must a national court provide as a matter of European law”*



Case C-404/13 – ClientEarth

CJEU Ruling

*“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].*



Case C-723/17 – *Craeynest*

- Direct link between access to justice, judicial review by national court and jurisdiction of that court to take all necessary measures, such as an order, to ensure compliance with Air Quality Directive
- Procedural autonomy of domestic legal systems BUT principles of equivalence and effectiveness
- No need for detailed decision in *Craeynest*, as Belgian courts have power to impose orders to administrative authorities



Case C-752/18 – *Deutsche Umwelthilfe*

Date	Event
2005	Dieter Janecek starts first clean air case in Munich
25 July 2008	CJEU ruling in Case C-237/07 <i>Janecek</i>
1 October 2008	Munich introduces Euro 4 LEZ to tackle PM10 levels
9 October 2012	Administrative Court of Munich orders AQP update to tackle NO2 levels
21 June 2016	DUH wins <u>enforcement action</u> – order to introduce restrictions on diesel vehicles under threat of financial sanctions up to EUR 10,000
27 February 2017	Higher Administrative Court confirms enforcement order
26 October 2017	Administrative Court imposes <u>first financial sanction</u> of EUR 4,000. President of Bavaria publicly state intention not to comply with court order
29 January 2018	Administrative Court imposes <u>second financial sanction</u> of EUR 4,000, but rejects request for committal order
September 2018	Higher Administrative Court requests preliminary ruling to CJEU



Case C-752/18 – *Deutsche Umwelthilfe*

CJEU ruling addressed two key points:

- 1) National court's obligation to ensure effectiveness of EU law and provide effective remedies
- 2) Potential limits on those obligations in the light of the fundamental right to liberty



Obligation to provide effective remedies

Principles:

- Procedural autonomy + principles of equivalence and effectiveness
- 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)



Obligation to provide effective remedies

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]
- 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]



Limits on coercive measures in the light of the fundamental right to liberty

- Articles 6 and 52 Charter Fundamental Rights:
 - legal basis for deprivation of liberty must be sufficiently accessible, precise and foreseeable
 - proportionality = deprivation of liberty *“only where there is no less restrictive measure that enables the objective pursued to be attained”*



Alternative options to be explored

- 1) *“high financial penalties that are repeated after a short time and the payment of which does not ultimately benefit the budget from which they are funded”* [para 40]
- 2) Principle of State liability for loss or damage caused to individuals as a result of breaches of EU law for which the State can be held responsible (*Francovich*)



PART 3

LEGAL BATTLE FOR CLEAN AIR IN THE UK



Image: Sandra Mode (Unsplash)

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



ClientEarth (No.1): remedies

“...[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



Mr Justice Mitting



ClientEarth (No.1): remedies

“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



ClientEarth (No.1): remedies

“THE COURT ORDERED that

2) The Respondent prepare and publically consult upon new replacement draft Air Quality Plans...

....

4) The new Air Quality Plans be delivered to the European Commission not later than 31 December 2015

...”
...



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



ClientEarth (No.2): standard of review

“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



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 (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



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	<u>CJEU judgment</u> – 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 govt 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



ClientEarth (No.3): liberty to apply

“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 (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



ClientEarth (No.3): liberty to apply

*“IT IS ORDERED that
[...]*

*4. In relation to the, English AQP, there be liberty to apply on notice
(a) for further or additional relief;
(b) in relation to any issues as may arise in the course of the
preparation of the Supplement and
(c) as to the lawfulness of the final Supplement.
[...]*”



Where has all this got us to?



(1) Some positive steps

Newcastle: Class C CAZ

Leeds: Class B CAZ

Manchester: ?Class B/C CAZ?

Sheffield: Class C CAZ

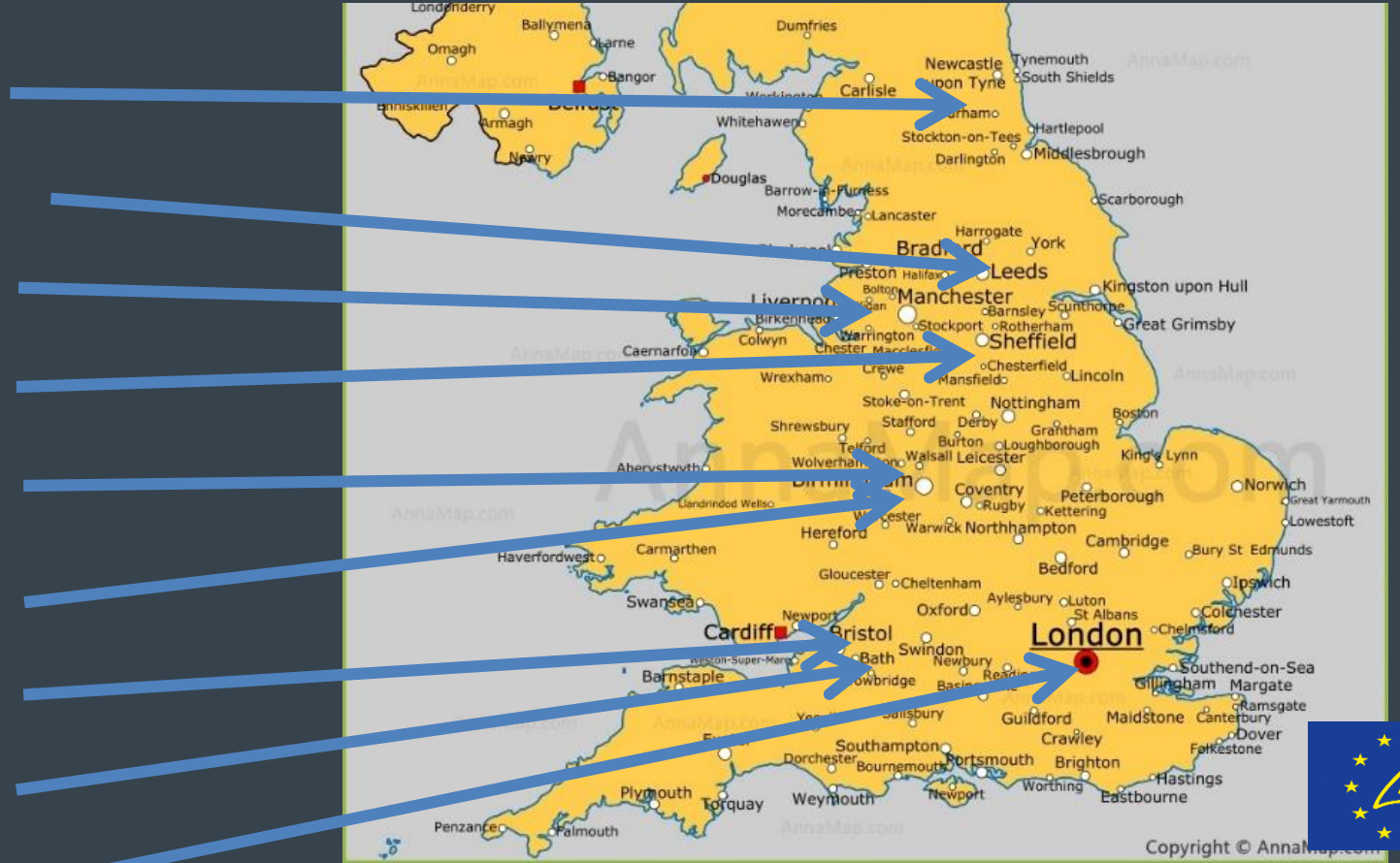
Bradford: ?Class C CAZ?

Birmingham: Class D CAZ

Bristol: ?Diesel ban?

Bath: Class C CAZ

London: Ultra Low Emission Zone



(2) Some obstacles to enforcement

- Passing the burden of responsibility to local authorities
 - a fragmented target
 - politics, delays, and resourcing issues
 - a constantly shifting timeline
- Modelling AQ compliance
 - reliance on local authorities' own technical assessments



(3) Exerting pressure outside of the courts

- Engaging with local authorities
 - correspondence and consultation
 - utilising the legal threat
- Increasing public awareness and political pressure
 - engaging the media
 - mobilising individuals and progressive businesses



Conclusions

- National courts have a duty to provide effective remedies under EU law. This is all the more important in air quality matters, considering the breaches of the Directive endanger human health
- Unfortunately, national procedural laws are often ill-equipped to address failures to act of public authorities
- Individuals and NGOs have a toolset to overcome national procedural barriers and obtain effective coercive measures



Sebastian Bechtel

Lawyer, Environmental
Democracy

ClientEarth

sbechtel@clientearth.org

www.clientearth.org

@ClientEarth

Ugo Taddei

Lead Lawyer, Clean Air

ClientEarth

utaddei@clientearth.org

www.clientearth.org

@ClientEarth

Katherine Nield

Lawyer, UK Clean Air

ClientEarth

kniel@clientearth.org

www.clientearth.org

@ClientEarth



Training of the ATOJ EARL project,
funded by the European commission LIFE programme.



Next webinars and events

- EU-wide conference on 13 May in Brussels: “Access to justice in environmental matters: obstacles, impacts and ways forward”
 - Register: cpineau@clientearth.org
- Next webinars:
 - Climate Change
 - Habitats Directive



Questions?



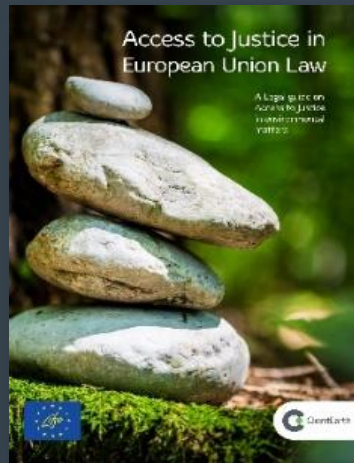
Thank you!

To know more about our LIFE project on Access to Justice EARL A2J and our next trainings, visit our website:

<https://www.clientearth.org/access-justice-greener-europe/>

And sign up for updates on Access to Justice :

https://www.action.clientearth.org/access-justice-newsletter?_ga=2.201027438.1583032739.1578912944-2129994527.1571747365&_gac=1.195725022.1576580999.CjwKCAiAluLvBRASElwAAAbX3GVAcq2bcPVj6Z129pwjoaBzxsN66dargggcOHZlQFcSulE2Ph-Rq8RoC2usQAvD_BwE



Recordings of past-webinars online ([here](#))

Have a look at our legal publications :

- * Guide on access to justice in environmental matters at EU level:

<https://www.documents.clientearth.org/library/download-info/16209/>

- * Country-specific legal toolkits on access to justice at national level:

<https://www.clientearth.org/country-toolkits-on-access-to-justice/>

