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TO THE PRESIDENT AND THE MEMBERS OF THE COURT OF JUSTICE

Case C-404/13

OBSERVATIONS

submitted pursuant to Article 20 of the Statute of the Court of Justice of the European Union by the EUROPEAN COMMISSION, represented by Silvia PETROVA and Ken MIFSUD-BONNICI, Members of its Legal Service, acting as its Agents, with an address for service in Luxembourg at the office of Ms Merete CLAUSEN, a Member of its Legal Service, Bâtiment BECH, 5 rue A. Weicker, L-2721 Luxembourg in

Case C-404/13

ClientEarth

- Claimants

v

Secretary of State for the Environment, Food and Rural Affairs

- Defendant

in which the Supreme Court of the United Kingdom has requested a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union.

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1. INTRODUCTION

1. The present request for a preliminary ruling arises out of a case that, at its essence, concerns the interpretation of Articles 22 and 23 of Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe[1] (the "Air Quality Directive" or the "Directive"), and in particular the legal consequences for the relevant authorities and for the national courts of a Member State of a breach of Article 13 of that Directive by that Member State.

2. The Supreme Court of the United Kingdom declared in its judgment of 1 May 2013 that the United Kingdom was in breach of its obligations under Article 13 of the Directive with regard to the nitrogen dioxide limit value in 16 zones, including London. For each of these zones, the UK had drawn up air quality improvement plans under Article 23 of the Directive and submitted them to the Commission.

3. On 16 July 2013, the Supreme Court of the United Kingdom referred 4 questions to the CJEU regarding the interpretation and application of Directive 2008/50/EC. The questions referred are the following:

   (1) Where, under the Air Quality Directive (2008/50/EC) ("the Directive"), in a given zone or agglomeration conformity with the limit values for nitrogen dioxide was not achieved by the deadline of 1 January 2010 specified in annex XI of the Directive, is a Member State obliged pursuant to the Directive and/or article 4 TEU to seek postponement of the deadline in accordance with article 22 of the Directive?

   (2) If so, in what circumstances (if any) may a Member State be relieved of that obligation?

   (3) To what extent (if at all) are the obligations of a Member State which has failed to comply with article 13 affected by article 23 (in particular its second paragraph)?

   (4) In the event of non-compliance with articles 13 or 22, what (if any) remedies must a national court provide as a matter of European law in order to comply with article 30 of the Directive and/or article 4 or 19 TEU?

4. Before answering these individual questions it would appear important to look at the structure and functioning of the different Articles of the Directive referred to in the context of the judgment. In seeking to provide useful assistance to the Court of Justice,

the European Commission will therefore first set out the legal and factual background relevant to a consideration of this case (Section 2) and make some general observations on the legal issues raised (Section 3). It will then provide an analysis of the legal considerations and case-law relevant to the interpretation of Articles 13, 22 and 23 of Directive 2008/50 (Sections 4, 5 and 6), and on that basis address the questions of the referring Supreme Court (Section 7).

2. LEGAL AND FACTUAL BACKGROUND

2.1. Applicable law

5. Recital 2 to Air Quality Directive reads as follows:

> *(2) In order to protect human health and the environment as a whole, it is particularly important to combat emissions of pollutants at source and to identify and implement the most effective emission reduction measures at local, national and Community level. Therefore, emissions of harmful air pollutants should be avoided, prevented or reduced and appropriate objectives set for ambient air quality taking into account relevant World Health Organisation standards, guidelines and programmes.*

6. Recital 16 to Air Quality Directive reads as follows:

> *(16) For zones and agglomerations where conditions are particularly difficult, it should be possible to postpone the deadline for compliance with the air quality limit values in cases where, notwithstanding the implementation of appropriate pollution abatement measures, acute compliance problems exist in specific zones and agglomerations. Any postponement for a given zone or agglomeration should be accompanied by a comprehensive plan to be assessed by the Commission to ensure compliance by the revised deadline. The availability of necessary Community measures reflecting the chosen ambition level in the Thematic Strategy on air pollution to reduce emissions at source will be important for an effective emission reduction by the timeframe established in this Directive for compliance with the limit values and should be taken into account when assessing requests to postpone deadlines for compliance.*

7. Recital 18 to Air Quality Directive reads as follows:

> *(18) Air quality plans should be developed for zones and agglomerations within which concentrations of pollutants in ambient air exceed the relevant air quality target values or limit values, plus any temporary margins of tolerance, where*

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[1] OJ L 152, 11.6.2008, p. 1–44.

applicable. Air pollutants are emitted from many different sources and activities. To ensure coherence between different policies, such air quality plans should where feasible be consistent, and integrated with plans and programmes prepared pursuant to Directive 2001/80/EC of the European Parliament and of the Council of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants [13], Directive 2001/81/EC, and Directive 2002/49/EC of the European Parliament and of the Council of 25 June 2002 relating to the assessment and management of environmental noise [14]. Full account will also be taken of the ambient air quality objectives provided for in this Directive, where permits are granted for industrial activities pursuant to Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control [15].

8. Article 2 of Air Quality Directive defines the following terms relevant to this case as follows:

5. "limit value" shall mean a level fixed on the basis of scientific knowledge, with the aim of avoiding, preventing or reducing harmful effects on human health and/or the environment as a whole, to be attained within a given period and not to be exceeded once attained;

...

7. "margin of tolerance"

8. "air quality plans" shall mean plans that set out measures in order to attain the limit values or target values;

9. Article 13 of the Air Quality Directive provides:

Limit values and alert thresholds for the protection of human health

1. Member States shall ensure that, throughout their zones and agglomerations, levels of sulphur dioxide, PM10, lead, and carbon monoxide in ambient air do not exceed the limit values laid down in Annex XI.

In respect of nitrogen dioxide and benzene, the limit values specified in Annex XI may not be exceeded from the dates specified therein.

Compliance with these requirements shall be assessed in accordance with Annex III.

The margins of tolerance laid down in Annex XI shall apply in accordance with Article 22(3) and Article 23(1).

2. The alert thresholds for concentrations of sulphur dioxide and nitrogen dioxide in ambient air shall be those laid down in Section A of Annex XII.

For nitrogen dioxide, the date specified in Annex IX by which the limit values are to be met is 1 January 2010.

10. Article 1 of the Air Quality Directive provides:

> ***Subject matter***
>
> *This Directive lays down measures aimed at the following:*
>
> *1. defining and establishing objectives for ambient air quality designed to avoid, prevent or reduce harmful effects on human health and the environment as a whole;*
>
> *2. assessing the ambient air quality in Member States on the basis of common methods and criteria;*
>
> *3. obtaining information on ambient air quality in order to help combat air pollution and nuisance and to monitor long-term trends and improvements resulting from national and Community measures;*
>
> *4. ensuring that such information on ambient air quality is made available to the public;*
>
> *5. maintaining air quality where it is good and improving it in other cases;*
>
> *6. promoting increased cooperation between the Member States in reducing air pollution.*

11. Article 22 of the Air Quality Directive provides:

> ***Postponement of attainment deadlines and exemption from the obligation to apply certain limit values***
>
> *1. Where, in a given zone or agglomeration, conformity with the limit values for nitrogen dioxide or benzene cannot be achieved by the deadlines specified in Annex XI, a Member State may postpone those deadlines by a maximum of five years for that particular zone or agglomeration, on condition that an air quality plan is established in accordance with Article 23 for the zone or agglomeration to which the postponement would apply; such air quality plan shall be supplemented by the information listed in Section B of Annex XV related to the pollutants concerned and shall demonstrate how conformity will be achieved with the limit values before the new deadline.*
>
> ...
>
> *3. Where a Member State applies paragraphs 1 or 2, it shall ensure that the limit value for each pollutant is not exceeded by more than the maximum margin of tolerance specified in Annex XI for each of the pollutants concerned.*
>
> *4. Member States shall notify the Commission where, in their view, paragraphs 1 or 2 are applicable, and shall communicate the air quality plan referred to in paragraph 1 including all relevant information necessary for the Commission to assess whether or not the relevant conditions are satisfied. In its assessment, the Commission shall take into account estimated effects on ambient air quality in*

the Member States, at present and in the future, of measures that have been taken by the Member States as well as estimated effects on ambient air quality of current Community measures and planned Community measures to be proposed by the Commission.

Where the Commission has raised no objections within nine months of receipt of that notification, the relevant conditions for the application of paragraphs 1 or 2 shall be deemed to be satisfied.

If objections are raised, the Commission may require Member States to adjust or provide new air quality plans.

12. Article 23 of the Air Quality Directive provides:

Air quality plans

1. Where, in given zones or agglomerations, the levels of pollutants in ambient air exceed any limit value or target value, plus any relevant margin of tolerance in each case, Member States shall ensure that air quality plans are established for those zones and agglomerations in order to achieve the related limit value or target value specified in Annexes XI and XIV.

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. The air quality plans may additionally include specific measures aiming at the protection of sensitive population groups, including children.

Those air quality plans shall incorporate at least the information listed in Section A of Annex XV and may include measures pursuant to Article 24. Those plans shall be communicated to the Commission without delay, but no later than two years after the end of the year the first exceedance was observed.

Where air quality plans must be prepared or implemented in respect of several pollutants, Member States shall, where appropriate, prepare and implement integrated air quality plans covering all pollutants concerned.

2. Member States shall, to the extent feasible, ensure consistency with other plans required under Directive 2001/80/EC, Directive 2001/81/EC or Directive 2002/49/EC in order to achieve the relevant environmental objectives.

13. Article 30 of the Air Quality Directive provides:

Penalties

Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.

2.2. Proceedings before the UK Courts

14. A summary of the facts and procedure relevant to the case before the Supreme Court of the United Kingdom is provided in points 25 to 38 of the order for reference and will not be repeated.

3. PRELIMINARY OBSERVATIONS

15. The Commission considers that the questions submitted by the Supreme Court call for preliminary observations on the relationship between Articles 13, 22 and 23 of the Air Quality Directive, and on the compliance situation in the UK.

3.1. Relationship between Articles 13, 22 and 23 of the Air Quality Directive

16. The Air Quality Directive imposes on each Member State certain limit values for the levels of nitrogen dioxide in ambient air for the zones and agglomerations on its territory. These values are established on an annual and hourly basis.

17. The Directive came into force in June 2008 and consolidated a framework directive and three daughter Directives, merging existing legislation into a single directive with no change to the limit values for the protection of human health. It was transposed in England, Scotland, Wales and Northern Ireland in June 2010.

18. Directive 2008/50/EC was preceded by Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management[2] – the old framework Directive on ambient air quality. This set out the basic principles as to how air quality should be assessed and managed in the Member States. It listed the pollutants for which air quality standards were established, including nitrogen dioxide.

19. The limit values for nitrogen dioxide were previously defined in Directive 99/30/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air[3] and were applicable as from 1 January 2010. It should be noted, therefore, that Directive 2008/50/EC did not set new limit values for nitrogen dioxide: these were in force since 1999, and have remained

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[2] OJ L 296, 21.11.1996 p. 55 - 63.

[3] OJ L 163, 29.6.1999, p. 41–60.

unchanged since the adoption of Directive 99/30/EC. They were already then applicable as of January 2010.

20. Moreover, Directive 99/30/EC already introduced margins of tolerance decreasing every year until they would reach zero, and the limit vale would therefore then apply a without margin of tolerance on the attainment deadline (i.e. on 1 January 2010 for nitrogen dioxide). In this regard, margins of tolerance were introduced to impose early planning and measures, because air quality cannot be changed overnight. Exceeding the margins of tolerance triggered the obligation to adopt air quality plans under Article 8(4) of the framework Directive 96/62/EC, the precursor to the first subparagraph of Article 23(1). This obligation was therefore conceived as a tool to assist in achieving compliance with the limit values before the initial deadline (and not beyond it).

21. However, during the review of air quality legislation carried out in 2005, annual reports submitted by Member States under Directive 96/62/EC showed that compliance with some limit values would be problematic in a significant number of Member States. This was the case, in particular, for PM10 (as regards the daily limit value) and nitrogen dioxide (as regards the annual limit value).

22. Thus, as regards nitrogen dioxide and PM10, Directive 2008/50/EC included a new key element: a possibility for Member States to obtain time extensions until 2011 with regard to PM10 and a possibility for Member States to postpone the attainment deadline for a maximum of five years with regard to nitrogen dioxide, subject to certain conditions and a zone by zone assessment by the European Commission (Article 22 of the Air Quality Directive, at issue in this case). Article 22 of the Directive includes a number of substantive requirements and procedural safeguards, and requires Member States to include certain additional information in air quality plans when applying for such postponement.

23. On procedure, under Article 22(4), Member States have to notify the Commission of their intention to postpone the deadline. This gives rise to a procedure that can last up to 9 months. After the notification of the air quality plan, the Member States and the Commission must cooperate and exchange all relevant information to allow the Commission to assess whether or not the relevant conditions are satisfied. In its assessment, the Commission must take into account estimated effects on ambient air

quality in the Member States, at present and in the future, of measures that have been taken by the Member States as well as estimated effects on ambient air quality of current Community measures and planned Community measures to be proposed by the Commission. The plans submitted are subject to a Commission power of injunction as set out in Article 22 (4): The Commission has the power to raise objections and even to require a Member State to adjust or provide new air quality plans. (This procedure and power does not apply to plans made under Article 23.) The Commission may therefore require additional measures to be foreseen in a national or regional plan, particularly where it is clear from the relevant studies or annual air quality reports – as in the case at hand – that the adopted plans and measures are clearly not achieving and not likely to achieve timely compliance with limit values by the deadline set in the Directive. Indeed, the Commission has, on several occasions, in decisions adopted pursuant to Article 22, requested additional measures and made the granting of a derogation conditional upon the adoption of such measures.[4]

24. On substance, Member States need to adopt (or revise) air quality plans to demonstrate that they have "considered" the air pollution abatement measures indicated in Annex XV section B, paragraph 3. The choice of measures foreseen is in principle still left to the Member States (though the Commission's power of injunction limits the discretion of national authorities to ensure the effectiveness and adequacy of the plans), but all listed measures must be considered; this was a new requirement compared to earlier legislation. Annex XV section B applies only to plans drawn up under Article 22 and is a new provision (see correlation table: annex XVII of Directive 2008/50). Annex XV section B, paragraph 3 requires, in particular, that the plans submitted under Article 22(1) are to include:

> *3. Information on all air pollution abatement measures that have been considered at appropriate local, regional or national level for implementation in connection with the attainment of air quality objectives, including : a) reduction of emissions from stationary sources by ensuring that polluting small and medium sized stationary combustion sources (including for biomass) are fitted with emission control equipment or replaced; (b) reduction of emissions from vehicles through retrofitting with emission control equipment. The use of economic incentives to accelerate take-up should be considered; (c) procurement by public authorities, in line with the handbook on environmental public procurement, of road vehicles, fuels and combustion equipment to reduce*

[4] For example, see Article 1(2) of Commission Decision C(2012) 9416 final of 14 December 2012 addressed to the Kingdom of Spain.

emissions, including the purchase of: - new vehicles, including low emission vehicles,- cleaner vehicle transport services, - low emission stationary combustion sources,- low emission fuels for stationary and mobile sources, (d) measures to limit transport emissions through traffic planning and management (including congestion pricing, differentiated parking fees or other economic incentives; establishing low emission zones); (e) measures to encourage a shift of transport towards less polluting modes;(f) ensuring that low emission fuels are used in small, medium and large scale stationary sources and in mobile sources; (g) measures to reduce air pollution through the permit system under Directive 2008/1/EC, the national plans under Directive 2001/80/EC, and through the use of economic instruments such as taxes, charges or emission trading. (h) where appropriate, measures to protect the health of children or other sensitive groups.

25. The information listed here thus requires a very detailed scientific examination and consideration of all available measures. Therefore, plans under Article 22 require a degree of effort by a Member State to demonstrate that it will introduce and implement the most appropriate measures to tackle the anticipated delay in compliance, and to demonstrate that the measures it has foreseen are consistent with achieving full compliance in the problematic zones by January 2015 at the latest.

26. Finally, it should also be noted that, even if a Member State has been granted a derogation to postpone the attainment deadline, Article 22(3) still provides that the Member State shall ensure that the limit value for *inter alia* nitrogen dioxide is not exceeded by more than the maximum margin of tolerance specified in Annex XI[5]. So even where a Member State has obtained a derogation, exceedences will result in breach of Article 22(3) if this additional margin is not respected.

27. It follows from all the above that Article 22 of the Air Quality Directive was conceived as derogation, albeit one subject to significant procedural and substantive requirements and safeguards. As the deadline for compliance for nitrogen dioxide is 1 January 2010, where a Member State has not applied for a derogation for certain zones but exeedences of the limit values set out in Article 13 are registered for those zones, then Article 13 is breached and Article 23 applies.

28. Indeed, Article 23 requires that a Member State submit an air quality improvement plan in any other situation where exeedances have been registered; such plan must include the

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[5] The margin of tolerance for nitrogen dioxide is 50% (Annex XI, Section B), meaning an annual mean of 60 $\mu g/m^3$ instead of 40 $\mu g/m^3$.

information set out in Annex XV, section A. Annex XV section A, which applies to air quality plans under Article 23, corresponds to what was already due under Annex IV of the old framework Directive 96/62 (and so should already have been in place for zones where there was an excedeence of limit values before the attainment deadline).

29. Article 23 will apply in 3 situations:

— First, where an exceedance of limit values occurred before and in the run up to the attainment deadline of 1 January 2010. In such case there is no breach of Article 13 of the Directive as the attainment deadline does not yet apply. (This situation is of historical relevance and can no longer occur as the attainment deadline has now passed.)

— Second, where an exceedance of limit values occurs after the attainment deadline of 1 January 2010 and the Member State has not obtained a derogation pursuant to Article 22. In such case, the Member State is already in breach of Article 13 of the Directive. This is the situation at issue in this case.

— Third, where a Member State has obtained a derogation pursuant to Article 22, and an exceedance of limit values occurs after the extended attainment deadline of 1 January 2015 at the latest, or the Member State is unable to meet the conditions on which the time extension was granted in this period. In such case, the Member State is also in breach of Article 13 of the Directive.

30. In the first of those situations (where there is no breach of Article 13), the first subparagraph of Article 23(1) applies (but the second subparagraph does not), meaning that the Member States must ensure that air quality plans are established for the relevant zones and agglomerations in order to achieve the related limit value or target value specified. As mentioned previously, this obligation finds its precursor in Article 8(4) of the old framework Directive 96/62/EC. In the Commission's view, this subparagraph exists, therefore, to ensure that Member States take appropriate measures to remain on their emissions reduction trajectory of decreasing limit values in the run up to the attainment deadline.

31. However, in the second and third of those situations – i.e. where exceedances of the limit values occur after the (regular or extended) attainment deadline has expired – not only

the first but also the second subparagraph of Article 23(1) applies, and Member States are obliged not only to adopt air quality plans, but also in so doing to "set out appropriate measures" to achieve compliance "as soon as possible". This is of course an obligation of result. The second subparagraph of Article 23(1) does not find a counterpart under the previous legislation and was introduced by Directive 2008/50/EC.

32. It must therefore be kept in mind that, where the second subparagraph of Article 23(1) applies, Member States were already bound, pursuant to Article 13, to achieve emissions below the limit values by the attainment deadline, and also that they were already bound, pursuant to Article 4(3) TEU, to have taken all measures, whether general or particular, to ensure that this obligation was attained.

33. Moreover, where the second subparagraph of Article 23(1) applies, Member States would have already had eleven years (from 1999) to implement measures leading to emissions below the limit values by the attainment deadline, as well as a possibility to extend that deadline by up to five years pursuant to Article 22.

34. In the Commission's view, therefore, the second subparagraph of Article 23(1) must be seen as an emergency mechanism that applies where there is already a serious breach of Union law that results in grave dangers to human health. In that regard, it must also be seen as a specific implementation of Article 4(3) TEU, where a Member State is already in breach of Union law and is already bound to remedy that breach.

35. The grave dangers to human health arising where there is a breach of Article 13 in respect of nitrogen dioxide are well known and particularly well documented in highly authoritative scientific literature:

> *"The scientific evidence of ambient air pollution adverse effects on human health has strengthened since the EU ambient air quality standards were set. In 2013, the World Health Organisation (WHO), has reviewed all scientific evidence on air pollution health aspects and issued guidance in relation to policy application (the REVIHAAP project[6]). Amongst other conclusions there is now strengthened evidence of significant adverse health effects at levels around and below the current WHO guidelines and EU air quality standards, inter alia for particulate matter, PM2.5, and nitrogen dioxide. In addition, the International Agency for Cancer Research (specialised Agency under WHO) on*

[6] The REVIHAAP project final report, available on WHO webpage at: http://www.euro.who.int/en/health-topics/environment-and-health/air-quality/publications/2013/review-of-evidence-on-health-aspects-of-air-pollution-revihaap-project-final-technical-report/.

> *17 October 2013 concluded that ambient air pollution is carcinogenic to humans and that the relation is causal (Class 1). According to the same source, the most recent data indicate that in 2010, 223 000 deaths from lung cancer worldwide resulted from air pollution*[7].

It is well known that nitrogen dioxide concentrations in the UK are mainly related to transport emissions and those of diesel vehicles in particular. In this regard, it is noteworthy that in June 2012 the International Agency for Cancer Research classified diesel engine exhaust as carcinogenic to humans (Class 1), "based on sufficient evidence that exposure is associated with an increased risk for lung cancer".[8] Moreover:

> *"Health effects can result from short-term exposure to NO2 (e.g. changes in lung function in sensitive population groups) and long-term exposure (e.g. increased susceptibility to respiratory infection). Epidemiological studies have shown that symptoms of bronchitis in asthmatic children increase in association with long-term exposure to NO2. Reduced lung function is also linked to NO2 at concentrations currently found in cities of Europe and North America".*[9]

36. It is therefore unsurprising that the second subparagraph of Article 23(1) does not only require a Member State to adopt measures appropriate to achieve compliance within a "reasonable time" – rather, it requires a Member State to adopt measures appropriate to achieve compliance "as soon as possible". A Member State excluding or failing to foresee effective, proportionate and scientifically feasible measures to address the specific emissions problems in the relevant zone as swiftly as possible would clearly not result in compliance as soon as possible. Due to the seriousness of the situation, Member States are invited moreover, to additionally include specific measures aiming at the protection of sensitive population groups, including children.

37. In the Commission's view, therefore, Article 22 is the only lawful solution offered by the legislator to Member States facing a problem of compliance. This solution is accompanied by strict conditions both on substance and procedure, because a postponement of the deadline is an exception to the general rule and has a severe effect on human health as well as individual rights. On the other hand, the first sub-paragraph

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[7] IARC press release of 17 October 2013, available at: http://www.iarc.fr/en/media-centre/iarcnews/pdf/pr221_E.pdf.

[8] International Agency for Cancer Research, available at http://www.iarc.fr/en/media-centre/pr/2012/pdfs/pr213_E.pdf.

[9] EEA latest report, page 53, available at: http://www.eea.europa.eu/publications/air-quality-in-europe-2012.

of Article 23(1) should be seen as a "left-over" from the earlier legislation (Article 8(4) of Directive 96/62), though this was extended by a second sub-paragraph to deal with other exceptional circumstances, notably it was foreseen to apply where:

— A Member State was complying with the limit value within the deadline and therefore did not apply for a derogation under Article 22, but later on experiences local situations of exceedance (this may occur for various reasons, including entirely unexpected events such as industrial accidents);

— A Member State expected to achieve the limit value by the attainment deadline, and therefore did not apply for a derogation under Article 22, but fails to do so;

— After the 5 years of postponement allowed by Article 22, limit values are still exceeded notwithstanding the measures taken under the plan drawn up. In this respect, it should be noted that the limit values are hourly, daily and annual. The obligation of keeping the period of exceedance "as short as possible" should therefore be assessed in relation to the individual limit values: an hourly limit value should not be exceeded for too many hours, and a daily limit value should not be exceeded for too many days beyond the exceedance which is unavoidable because, in any event, the shorter the exceedance the smaller its impact on human health.

38. On the other hand, the second sub-paragraph of Article 23(1) was not foreseen to offer relief to a Member State that did not request or qualify for a derogation under Article 22 because of circumstances existing within its own legal order or because it considered that it would be economically unattractive to pursue the measures that would result in compliance before the attainment deadline of January 2015 at the latest.

39. As outlined above, a key point is that the air quality plans produced under Article 22 have to meet stricter conditions compared to those communicated under Article 23 (Annex XV section B). Plans under Article 22 are subject to a Commission power of injunction and rejection. If a Member State could circumvent such conditions by using Article 23 instead of Article 22 in situations where exceedances were predictable, this would result in a kind of self-service derogation (*derogation à la carte*) and in an erosion in oversight, enforcement and in the standard of legal protection of public health that would be contrary to both the structure and the spirit of the Directive.

40. To avoid such a situation, it is of particular gravity that the requirement for a Member State to foresee appropriate measures to achieve compliance "as soon as possible" is very strictly construed and applied. Moreover, this requirement must be necessarily be subject to adequate and effective judicial review and judicial redress.

3.2. Compliance situation in the UK

41. The UK has been divided into 43 zones (not counting Gibraltar) for air quality assessment. There are 28 agglomeration zones (large urban areas) and 15 non-agglomeration zones.

42. A Compliance Assessment Summary dated September 2013 provided by the UK Department for Environment, Food and Rural Affairs is attached to these observations as **Annex 1**. This showed that for 2012 only 5 zones met the annual mean limit value for nitrogen dioxide. None of these were the 16 zones at issue and that were declared as in breach of Article 13 of the Air Quality Directive by the UK Supreme Court. The report confirmed that a total of 38 zones exceeded the annual limit value in 2012, including the 16 covered by this case. Only 15 of these (not including the zones at issue in this case) were granted time extensions under Article 22 of the Directive (for some of them, after recent re-notifications showing that the conditions were met). However, five of these fifteen zones were in breach of the margins of tolerance in 2012, with a total of 34 zones and agglomerations breaching either the annual limit value (29 zones, including the 16 covered by the Supreme Court ruling) or the annual limit value plus margin of tolerance (5 of the 15 zones covered by a time extension decision under Article 22 of the Directive).

43. From the domestic proceedings, from the compliance situation detailed above, as well as from its own research and numerous interactions with UK authorities, it appears to the Commission that UK may have chosen less expensive and intrusive measures (e.g. by avoiding the establishment of effective LEZs – low emission zones – in particular for the traffic categories identified as problematic for this pollutant in the individual zones e.g. HGVs, buses but also for passenger cars) than those that would be required to put an end to a string of continuous breaches of the limit values set out in Article 13. From the air quality plans submitted by the UK pursuant to Article 23(1) for the 16 zones at issue in the case, as well as from correspondence with the UK in the context of EU Pilot files 1038/10/ENVI (concerning alleged failures of the UK Government to submit plans and

programmes showing how compliance with the NO2 limit value will be achieved for the London zone) and 3628/12/ENVI (concerning, inter alia, an alleged breach of limit values for nitrogen dioxide, and hence of Article 13 of the Directive, for the zones at issue in this case), it emerges that the UK only expects compliance to be achieved for each zone between 2015 and 2020 or even between 2020 and 2025 (London).

4. QUESTIONS 1 AND 2 – MEMBER STATE OBLIGATIONS PURSUANT TO ARTICLE 22

44. By its first and second questions, the referring Court asks:

> *(1) Where, under the Air Quality Directive (2008/50/EC) ("the Directive"), in a given zone or agglomeration conformity with the limit values for nitrogen dioxide was not achieved by the deadline of 1 January 2010 specified in annex XI of the Directive, is a Member State obliged pursuant to the Directive and/or article 4 TEU to seek postponement of the deadline in accordance with article 22 of the Directive?*
>
> *(2) If so, in what circumstances (if any) may a Member State be relieved of that obligation?*

45. The Commission considers it useful to consider these two questions together.

46. As described above, pursuant to Article 13, Member States must comply with the limit values for nitrogen dioxide by 1 January 2010. In accordance with Article 22 of the Directive, a Member State may ask to postpone this deadline by a maximum of five years until 1 January 2015, for any particular zone or agglomeration, on condition that an air quality plan is established in accordance with Article 23 for the zone or agglomeration; such air quality plans shall be supplemented by the information listed in Section B of Annex XV – related to the pollutants concerned – and shall demonstrate how conformity will be achieved with the limit values before the new deadline.

47. From the provision of Article 22, it appears clear that a Member State "may" decide to seek a postponement of the deadlines for compliance with LV for nitrogen dioxide for a maximum period of 5 years. A literal reading would therefore support the view that Member States are given the option to do so but that they are not so obliged. Such a view would also be supported by the text of Recital 16, which states that "For zones and agglomerations where conditions are particularly difficult, it should be possible to postpone the deadline for compliance".

48. Such a view would also be supported by the legislative history of Article 22, as set out above, by which Article 22 was foreseen as an optional derogation for Member States applicable to obligations that already existed under the previous legislation.

49. Nor does it appear that a different reading of Article 22 is required in the light of the objectives of the Directive. Recital 2 to the Directive states:

> *(2) In order to protect human health and the environment as a whole, it is particularly important to combat emissions of pollutants at source and to identify and implement the most effective emission reduction measures at local, national and Community level. Therefore, emissions of harmful air pollutants should be avoided, prevented or reduced and appropriate objectives set for ambient air quality taking into account relevant World Health Organisation standards, guidelines and programmes.*

50. Moreover, Article 1, quoted in full above, specifies that the Directive lays down measures aimed at, notably and *inter alia*, "*defining and establishing objectives for ambient air quality designed to avoid, prevent or reduce harmful effects on human health and the environment as a whole*" and "*maintaining air quality where it is good and improving it in other cases*".

51. Mindful of the procedural and substantive safeguards set out in Article 22, it would still not appear to the Commission that the UK obtaining a derogation to delay the deadline by when the limit values must be reached would be conducive to this aim. Rather, the UK obtaining such a derogation would only allow it, at best, to achieve a situation of formal compliance with the Directive with no direct environmental benefit or benefit to human health or other benefit consistent with the aims of the Directive. A derogation would, to the contrary, result in a delay in the date by which the environmental benefits and benefits to human health are to be achieved.

52. Under these circumstances, the Commission cannot consider that the UK would, pursuant to Article 4(3) TEU, be obliged to apply for a derogation. Rather, it considers that the UK is obliged, pursuant to Article 4(3) TEU, to adopt all measures, whether general or particular, necessary to put an end to the infringement of Article 13, including as foreseen in Article 23 of the Directive.

53. Where a Member States decides not to make use of the derogation provided in Article 22, even where exeedences of the nitrogen dioxide limit values after January 2010 are

foreseeable well before that date, it is clear that this could be expected to give rise to a situation where there is a future infringement of Article 13 of the Directive. This is precisely the situation in the main proceedings, where the UK was found in breach of Article 13 by the UK Supreme Court with regard to 16 zones. However, it simply does not follow from such a state of events that Article 22 becomes compulsory. Critically, the infringement of Article 13 results not from a Member State's decision to not apply for a derogation under Article 22, but rather from that Member State's failure to comply with Article 13 itself, that is to say its failure to adopt and implement adequate measures to achieve nitrogen dioxide emissions below the limit values by January 2010.

4.1. Proposed response to Questions 1 and 2

54. In the light of the considerations above, the Commission would propose the following answer to the first two questions:

A Member State is not obliged, pursuant to either the Directive or to Article 4 TEU, to seek postponement of the deadline in accordance with Article 22 of the Directive even where, in a given zone or agglomeration, conformity with the limit values for nitrogen dioxide was not achieved by the deadline of 1 January 2010 specified in annex XI of the Directive.

In the light of the answer to the first question, an answer to the second question is not required.

5. QUESTION 3 – THE RELATIONSHIP BETWEEN ARTICLES 13 AND 23

55. By its third question, the referring Court asks:

> *(3) To what extent (if at all) are the obligations of a Member State which has failed to comply with article 13 affected by article 23 (in particular its second paragraph)?*

56. As a preliminary point, there appears to be a typographical error in the question asked by the referring Court, by which the question refers to the second paragraph of Article 23, while the context and content of the order for reference would indicate unequivocally that the Court intended to refer to the second subparagraph of Article 23(1). The Commission will therefore discuss the latter provision.

57. It is clear that, where a Member State finds itself in breach of Article 13, it is bound to bring that breach to an end. In the Commission's view, that Member State remains able to – and would ideally – re-establish formal compliance by making use of the option made available to it under Article 22, and submit an air quality plan that is likely to achieve substantive compliance with limit values by 1 January 2015 at the latest.

58. However, and as set out above, where a Member State chooses not to do so, it remains obliged to bring the infringement to an end, while moreover the second subparagraph of Article 23(1) applies. Unlike under Article 22, Article 23(1) is couched in mandatory wording, indicating that where a zone is in exceedance "Member States shall ensure that air quality plans are established...". Moreover, the second subparagraph of Article 23(1) provides that, where the attainment deadline is already expired, "the air quality plan shall set out appropriate measures, so that the exceedance period can be kept as short as possible." A Member State is therefore bound not only to adopt an air quality plan, but also to foresee in that plan measures appropriate to keep the exceedance period as short as possible. As has been stressed above, this is an obligation of result.

59. It is fundamental in this regard to note that, unlike for plans under Article 22, which have to demonstrate compliance by 2015, the second subparagraph of Article 23(1) requires plans to achieve compliance not by 1 January 2015 at the latest, but in a period that is as short as possible. This may well be before 1 January 2015.

60. A Member State is, under Article 22, in principle allowed liberty as to the choice of measures it envisages (limited only by the Commission's power of injunction to ensure the effectiveness and adequacy of the plans in the light of the 2015 deadline). In so doing, it should demonstrate that it has duly considered all measures listed in Annex XV, section B paragraph 3. It may therefore within these limits take into account and balance various economic, social or political considerations in its choice of the measures to be foreseen. However, the Commission may use its power of injunction to *inter alia* force the Member State to foresee additional measures, or to foresee measures to address certain categories of emissions that are unaddressed in the plan it proposes, if this is necessary in the light of the 2015 deadline.

61. However, on the other hand and as discussed above, the emergency character of plans drawn up under the second subparagraph of Article 23(1), requires a Member State to

choose amongst possible measures those that will bring the infringement to an end as soon as possible.

62. In other words, while a Member State retains a margin of discretion in choosing suitable measures, this margin of discretion is heavily circumscribed, because a Member State excluding or failing to adopt measures that address the most important sources of emissions, or failing to implement measures that would be effective, proportionate and scientifically feasible to address the specific emissions problem in the relevant zone would clearly not result in compliance as soon as possible. The obligation in the second subparagraph of Article 23(1), in the case of exeedences for which a derogation has not been granted, requires Member States to achieve a very precise result - compliance with the limit values for nitrogen dioxide in the shortest possible period of time, In other words, the Directive requires the Member State to bring the infringement of Article 13 to as swift an end as possible by adopting measures that would be appropriate for the specific zone or agglomeration and that would most swiftly and concretely tackle the specific problems in that area. These measures, as opposed to the ones referred to in Annexe XV section B, will have to tackle any problems *in concreto,* for each zone. For example, in urban areas it might be required to regulate transport traffic or domestic heating, while for non-urban areas it may be required to limit emissions from large combustion plants, or to tackle agricultural pollution.

63. The second subparagraph of Article 23(1) requires a Member State, therefore, to foresee in its plans effective, proportionate and scientifically feasible measures to address the specific emissions problems in the relevant zone as swiftly as possible. In other words, a Member State does not have the full discretion to take into account and balance economic, social or political considerations in its choice of the measures to be foreseen (see mutatis mutandis para 15 and 46 of Janecek), as in so doing it would further prolong the period of non-compliance with Article 13 beyond that which is inevitable. Rather, it may do so only within the limits of the objective prescribed in the Directive, and its margin of discretion is heavily circumscribed.

64. It would be perverse if Article 23(1) were treated as requiring a lesser effort from Member States than Article 22.

65. The concerns raised by ClientEarth in proceedings before the various national instances, including the Supreme Court, are precisely that the plans submitted by the UK were simply not ambitious enough, and that it was not enough for the UK to blame its failure to comply with Article 13 on the results of delivery of diesel vehicle emissions at Union level. For the plan prepared for London, for example, there are various specific criticisms that little new action was being proposed in practice, out of the wide range of options already identified by the competent authorities.

66. Nitrogen dioxide emissions are closely linked to economic activity through combustion. As recognised recently in the Commission paper outlining Options for revision of the EU Thematic Strategy on Air Pollution and Related Policies,[10] concentrations of nitrogen dioxide at sustained high levels are in particular attributed to transport emissions. While gasoline engines have largely delivered the intended emission reductions in real-world driving conditions, developments in diesel engine technology have largely failed to reduce emissions. Whilst part of the problem lies with poor representativeness of the standardised test cycle used for type approval in the Union and weaknesses in compliance testing, this has been exacerbated by Member States' failure to control traffic volumes in urban areas, and in particular diesel fuelled traffic in congested areas.

67. It appears that for almost all the zones concerned the main pollution source is local, with the indication that the main sources are from traffic in its various forms, and from traffic related combustion. Any national remedies would therefore be expected to target traffic reduction, and in particular a reduction in diesel powered engines entering the relevant zones.

68. The Commission in this regard takes note of and is concerned by ClientEarth's assessment that the plans drawn up by the UK for the areas at issue appear not to have adequately tackled these sources of pollution.

69. Furthermore, based on the latest available annual reports provided under Article 27 of the Directive, the UK was still in breach of limit values for nitrogen dioxide from 2010 to 2012 inclusive. Moreover, from the studies at the Commission's disposal, and from the UK air quality strategy plans for the 16 zones covered by the Supreme Court ruling,

[10] Commission Staff Working Paper on the implementation of EU Air Quality Policy and preparing for its comprehensive review, SEC(2011) 342 final of 14 March 2011.

including Greater London, and all other information made available to the Courts in the course of the national proceedings, it appears that compliance is not foreseen in any of these zones by 2015, but later. For London the date for compliance foreseen is 2025.

70. In the light of this, it seems that the situation of non-compliance with the limit values may be persistent and that UK may have chosen measures insufficient or inadequate to put an end to a continuous breach of the limit values in Article 13 in as short a time as possible. In the Commission's view, this means that there may also be in breach of Article 23(1) (due to insufficiency of the air quality plans). This seems to be confirmed rather than contradicted by paragraph 15 of the Supreme Court's order for reference, which quotes the reasons given by judge Mitting at first instance in the High Court for refusing the application for judicial review and reads as follows: "a mandatory order".... to submit an application under Article 22 of the Directive would "*impose upon taxpayers and individuals a heavy burden of expenditure which would require difficult political choices to be made*".

71. Before the national courts, the UK Government has claimed that earlier compliance with the limit values in the zones concerned would be impossible (see the Secretary of State's note on impossibility and the main arguments therein (attached as **Annex 2**), as well as the appellant's note of impossibility at pp. 6-7, paras 25-27 (attached as **Annex 3**), and ClientEarth's further submission on the note of impossibility (attached as **Annex 4**).

72. It was sustained in the main proceedings that the Secretary of State did not adopt additional cost-effective measures even though these were available, possible and known – an example was given with London, where the situation is particularly serious. It was also discussed whether or not the establishment of LEZs – low emission zones - was one of the feasible and more cost-effective measures that the Secretary of State could have considered including in the Air quality plans for the zones in exeedence.

73. As stressed already above, pursuant to the second subparagraph of Article 23 (1) a Member State needs to achieve a result – putting an end to the exeecences of limit values, and this is a serious matter of human health. This provision requires that this result be achieved in the shortest possible time. The UK, however, argues before the

national courts that it was not objectively possible to adopt more efficient air quality measures (see **Annex 2**). While itself considering the impossibility or otherwise of these measures appears beyond the Court of Justice's remit in answering the questions referred, the Commission would still stress that in its judgment of 19 December 2012, in Case C-68/11 Commission vs Italy, the Court considered, at paragraph 60, that: "unless the directive has been amended by the European Union legislature for the purpose of extending the time-limits prescribed for implementation, the Member States are required to comply with the time-limits originally laid down." A similar conclusion was also reached in Cases C-34/11 Commission vs Portugal, C-479/10 Commission vs Sweden, and C-365/10 Commission vs Slovenia.

74. Therefore, it follows that, where there is a breach of Article 13 in a given zone or agglomeration, a Member State should either seek postponement of the deadline pursuant to Article 22, or establish an efficient air quality plan pursuant to Article 23 so as to ensure that it will bring an end to this breach as soon as possible.

75. This requirement should be read in light of the case law of the Court of Justice. In particular, at paragraph 46 of Case C-237/07 Janacek, the Court stated:

> *It must be noted in this regard that, 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 (see, to that effect, Case C 72/95 Kraaijeveld and Others [1996] ECR I 5403, paragraph 59), 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.*

The Commission would, however, caution that, though Case C-237/07 Janacek also concerned air quality legislation, the obligations applicable were substantially less stringent than those applicable pursuant to the second subparagraph of Article 23(2) of the Directive, which now entail an obligation of result – in this regard, it would refer the Court to paragraphs 45 and 46 of that judgment.

76. Considering parallel case law in the water sector, Member States were also faced with substantial challenges requiring long term planning and significant investment. In the first case brought to the CJEU on the enforcement of the former bathing waters Council

Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water,[11] Case C-56/90 Commission v. United Kingdom, the United Kingdom contended that a Meber State cannot be required, under a Directive, to do the impossible. Here the UK was accused of having failed to ensure adequate water quality for a number of bathing waters in and around Blackpool in North West England. The UK argued that the remedial works could not be carried out within the period allowed and that a Member State could only be obliged to take all practicable steps (paragraph 40, and 42-3 of the UK's defence).

77. However, the Court ruled, at paragraph 46 that: "*Even assuming that absolute physical impossibility to carry out the obligations imposed by the directive may justify failure to fulfil them, the United Kingdom has not, as the Advocate General pointed out at paragraph 56 of his Opinion, succeeded in establishing the existence of such impossibility in this case.*"

78. In that case, the Member States were given 10 years to comply with the Directive. In his Opinion, the Advocate General noted that an extension of the time was available under the Directive and that such derogations must be construed strictly and given a narrow interpretation. At paragraph 55 of his Opinion, the Advocate General went on to say that he saw no reason why a Member state should not be liable as a guarantor vis-a-vis the Community for the attainment of specific aims. With regard to the claim of impossibility made by the UK, the Advocate General at paragraph 56 observed that this was not a case of objective impossibility. In addition, Advocate General pointed out that "*...the belated start made on the requisite works is undoubtedly the responsibility of the Member State. It may remain open whether on account of the extent of the works it would have been possible to carry them out earlier.*" In that case, the AG also noted that the Member State had been given 10 years to comply with the Directive.

79. It is of interest to note that the subsequent judgment against the UK, which followed the Opinion, was itself followed by numerous judgments against other Member States. These include Cases C-92/96 Commission vs Spain (which became a 2nd referral Case C-278/01), C-198/97 Commission vs Germany C-307/98 Commission vs Belgium, C-147/00 Commission vs France, C-268/00 Commission vs Netherlands, C-368/00 Commission vs Sweden, C-427/00 Commission vs United Kingdom, C-226/01

[11] OJ L 31, 5.2.1976, p. 1–7.

Commission vs Denmark, C-272/01Commission vs Portugal, all for failure to correctly apply old Bathing Water Directive 76/160/EEC. In each of these cases, the Court found no obstacle to rely on annual bathing water reports to declare failures, finding unfounded any arguments as to difficulties faced by Member States.

80. Under proceedings now before the Court, the situation is similar – Directive 2008/50 consolidated obligations already existing in the previous Directive 1999/33/EC, whereby limit values for nitrogen dioxide were already applicable from 1 January 2010. Furthermore, the UK did not ask for a time extension as was open to it under the Directive. As such, the UK's air quality plans submitted pursuant to Article 23(1), which would effectively require many additional years for compliance, might be found to constitute an infringement of Article 23(1) of the Directive, of Article 4(3) TEU (duty of sincere cooperation) and of Article 249 TFEU (duty to comply with directives).

81. To summarise the Commission's position, therefore, the obligation "*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*" should be interpreted in the light of the changes introduced by Directive 2008/50/EC since the judgment in Case C-237/07 Janacek.

82. The judgment in Janacek concerned only short term measures (Article 7 paragraph 3, now Article 24), for which the old directive did not offer any indication of possible measures or precise indication of result (see paragraphs 44 and 45 of that case), while Article 23 (which is about structural measures) refers explicitly to Annex XV, which includes a catalogue of measures, and prescribes a precise result to be achieved. Therefore, pursuant to the second subparagraph of Article 23(1), Member States' discretion is heavily circumscribed by the obligation of result set out in that subparagraph, as they are bound to adopt all measures that are appropriate to bring the infringement of Article 13 to an end, in the shortest time possible. That is to say that the air quality plan must foresee effective, proportionate and scientifically feasible measures to address the specific emissions problems in the relevant zone as swiftly as possible, subject to judicial review by the domestic courts. The Commission also argues that the basis for this would derive from the very wording of Article 23(1) (i.e. "appropriate measures, to achieve compliance as soon as possible" – because only adopting all measures that are appropriate to bring the infringement of Article 13 to an end can result

in "compliance as soon as possible"), from its character as an emergency mechanism that applies where there is already an infringement of the Directive with serious implications for human health, from its nature as a specific implementation of Article 4(3), from its character as an obligation of result, and from the notion that, in the light of the objectives of the Directive, it would be perverse if Article 23(1) were less engaging for Member States than Article 22.

83. Based on the above, therefore, the Commission argues that, where there has been a breach of Article 13, and where a Member State has not foreseen in its air quality plans all necessary measures appropriate to achieve compliance as soon as possible, that Member State would have also failed to fulfil its obligations pursuant to Article 23(1) of Directive 2008/50/EC, and in particular its obligation under the second subparagraph to keep the exceedance period as short as possible.

5.1. Proposed response to Question 3

84. In the light of the considerations above, the Commission would propose the following answer to the third question:

Where a Member State finds itself in breach of Article 13, it may either request and obtain a derogation pursuant to Article 22 of the Directive (where this option remains open to it) or, in the alternative, it must comply with Article 23(1), including therefore the obligation to adopt air quality plans that foresee all appropriate measures that would bring the breach of Article 13 to an end as soon as possible. That is to say that the air quality plan must foresee effective, proportionate and scientifically feasible measures to address the specific emissions problems in the relevant zone as swiftly as possible, subject to judicial review by the domestic courts. A failure by a Member State to do so would result in the infringement also Article 23(1) of the Directive, alongside Article 4(3) TEU.

6. QUESTION 4 – REMEDIES BEFORE THE NATIONAL COURT

85. By its fourth question, the referring Court asks:

> *(4) In the event of non-compliance with articles 13 or 22, what (if any) remedies must a national court provide as a matter of European law in order to comply with article 30 of the Directive and/or article 4 or 19 TEU?*

6.1. Introduction

86. In the proceedings before the Supreme Court, the UK claimed that it was not possible to achieve compliance any earlier than foreseen in its plans, but from the evidence presented it would appear that this claim was not tested before the national court.

87. This should be considered a particularly serious question in situations where there is an established breach of Article 13 resulting in a clear and grave hazard to human health. From the main proceedings, it emerges that the UK may have a systemic problem with tackling air quality limit values for nitrogen dioxide, resulting in a general exposure of the population to a highly elevated level of a substance that is, as was detailed above, classified by the International Agency for Cancer Research (a specialised Agency under the WHO) as a Class 1 carcinogenic to humans, and that also has various other serious consequences for human health.

88. In this context, it is indeed both relevant and of significant importance to consider the obligations that a Member State and its Courts have under Union law where a breach of Union law has occurred and a remedy is requested by a private party with a legal interest in that breach.

89. The fourth question falls into two parts, namely (i) remedies and (ii) sanctions under Article 30. These will now be considered in turn.

6.1. Remedies

90. The key question raised by the fourth question of the referring Court appears to be whether private parties are entitled to a remedy under the principle of effectiveness, as derived from Articles 4(3) and 19 TEU and Article 47 of the Charter.

91. In this regard, at paragraph 56 of Case C-72/95 Aannemersbedrijf P.K. Kraaijeveld BV e.a. vs Gedeputeerde Staten van Zuid-Holland, the Court of Justice stated that:

> *As regards the right of an individual to invoke a directive and of the national court to take it into consideration, the Court has already held that it would be incompatible with the binding effect attributed to a directive by Article 189 to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened*

if individuals were prevented from relying on it before their national courts, and if the latter were prevented from taking it into consideration as an element of Community law in order to rule whether the national legislature, in exercising the choice open to it as to the form and methods for implementation, has kept within the limits of its discretion set out in the directive (Verbond van Nederlandse Ondernemingen, paragraphs 22 to 24).

92. Furthermore, the CJEU concluded at paragraph 70 of its judgment in Case C-210/02 R (Delena Wells) v. Secretary of State for Transport, Local Government and the Regions that where there is a breach of EU law Member States are obliged to take "within the sphere of their competence, all general or particular measures for remedying the failure".

93. In Case C-583/11 P Inuit, the Court of Justice moreover confirmed that:

99 As regards the role of the national courts and tribunals, referred to in paragraph 90 of this judgment, it must be recalled that the national courts and tribunals, in collaboration with the Court of Justice, fulfil a duty entrusted to them both of ensuring that in the interpretation and application of the Treaties the law is observed (Opinion of the Court 1/09, paragraph 69).

100 It is therefore for the Member States to establish a system of legal remedies and procedures which ensure respect for the fundamental right to effective judicial protection (Unión de Pequeños Agricultores v Council, paragraph 41, and Commission v Jégo-Quéré, paragraph 31).

101 That obligation on the Member States was reaffirmed by the second subparagraph of Article 19(1) TEU, which states that Member States 'shall provide remedies sufficient to ensure effective judicial protection in the fields covered by European Union law'.

94. From the above, it may be surmised that the national courts have an obligation to give useful effect to Articles 13 and 23(1) of the Directive and thereby to ensure the effective judicial protection of parties relying on a declared breach of an obligation by a public administration.

95. As for this very case, in English administrative law, whether to make a particular declaration or order is a matter for the court's discretion (as set out in paras 15-17 of the judgment of the High Court, and para. 22 of the judgment of the Court of Appeal in this case). However, where the principle of effectiveness applies, there is instead a right to a remedy. The Court of Justice has already grappled with this phenomenon of English administrative law in a different context in Case C-406/08 Uniplex (paras 37-43). (Of course, it is not so with regard to interim relief, since by definition there can be no

absolute right to interim relief in a given case. However, interim relief is not in issue in the present proceedings.)

96. In this regard, there is clearly not an absence of procedural rules in the UK that would be needed to for UK courts to give useful effect to Articles 13 and 23(1) of the Directive, as national remedies exist.

97. The UK courts are, where seized to do so, bound to carry out judicial review not only of the UK's compliance with Article 13 of the Directive, but also of its compliance with Article 23(1). In this regard, they must therefore ensure that the UK either seeks and obtains a derogation pursuant to Article 22, or in the alternative that air quality plans are submitted pursuant to Article 23(1) and also, as discussed above, that such plans include all measures that would bring the breach of Article 13 to an end as soon as possible, that is to say, the air quality plan must foresee effective, proportionate and scientifically feasible measures to address the specific emissions problems in the relevant zone as swiftly as possible, subject to judicial review by the domestic courts.

98. In this case, the UK Courts are required to use all existing national remedies, including mandatory orders, to ensure the adoption of an air quality plan the content of which is capable of ensuring compliance of the UK with its full range of obligations, as set out in Articles 13 and 23(1) (or in the alternative Article 22) of the Directive. In this regard, a failure by the national courts to provide such a remedy would violate the principle of effectiveness and the principle of sincere cooperation set out in Article 4(3) TEU (see paragraph 46 in Case C-56/90 Commission vs UK).

99. This is confirmed by Case C-237/07 Janacek, at paragraph 39:

> *"It follows from the foregoing that 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."*

100. Thus, in Janacek, the Court found that, under Union law, an individual or legal person, such as in this case ClientEarth, must be in a position to require, through the national courts, that an air quality action plan be put in place to put an end to the health risk caused by non-compliance with a Union air quality directive.

101. However, at the same time, the case at issue now is to be distinguished from Janacek in that the nature of the obligations incumbent upon the Member States under current legislation is different. The Court of Justice noted in Janacek that:

> *44 According to Article 7(3) of Directive 96/62, action plans must include the measures 'to be taken in the short term where there is a risk of the limit values and/or alert thresholds being exceeded, in order to reduce that risk and to limit the duration of such an occurrence'. It follows from that very wording that the Member States are not obliged to take measures to ensure that those limit values and/or alert thresholds are never exceeded.*
>
> *45 On the contrary, it is apparent from the broad logic of the directive – which seeks an integrated reduction of pollution – that it is for the Member States to take measures capable of reducing to a minimum the risk of the limit values and/or alert thresholds being exceeded and the duration of such an occurrence, taking into account all the material circumstances and opposing interests.*

102. Under the legislation at that time, a Member State was indeed obliged to take measures "*to reduce the risk or limit the duration of an occurrence*" but not to "*take measures to ensure that those limit values and/or alert thresholds are never exceeded*". However, and by contrast, the second subparagraph of Article 23(1) is premised not on the exceedence of a limit value before the attainment deadline, but on an existing breach of Article 13. Therefore, Member States "*shall set out appropriate measures, so that the exceedance period can be kept as short as possible*". In other words, the measures must be appropriate not only to limit the duration of an exceedence, but to bring the infringement to an end in the shortest time possible. This is an obligation of result.

103. Moreover, as already mentioned, while the Court in Janacek (at paragraph 46) admitted that the Member State retained a margin of discretion in deciding the measures to be adopted pursuant to Article 7(3) of Directive 96/62, as argued above the second subparagraph of Article 23(1) of the Air Quality Directive does not allow Member States such a wide margin of discretion, but rather requires Member States to act in a manner that brings the infringement of Article 13 to as swift an end as possible by foreseeing in its plans effective, proportionate and scientifically feasible measures to address the specific emissions problem in the relevant zone. It is for the authorities of the Member

State concerned to take the general or particular measures necessary to ensure that Community law is compiled with.[12]

104. It is noteworthy that, in the recent Italian Council of State ruling 6989/2012 of 19 December 2012 (Regione Lombardia v Genitori Antismog),[13] the Association "Antismog Parents" brought an action before the Lombardy Administrative Court to declare that the Lombardy Region had failed to adopt an air quality plan in conformity with national law. On 2 July 2012, the Court ordered the Lombardy Region to draft the plan within 60 days from the judgement. The Council of States dismissed the appeal brought by the Lombardy Region against this judgment, since in the meantime (7 November 2012) the Lombardy Region had fulfilled its obligations to draft and adopt a plan. There was therefore no further interest for the Court to rule on the appeal.

105. Furthermore, in a ruling of 5 September 2013 in case BVerwG 7C 21.12 involving the environmental group Deutsche Umwelthilfe e.V vs Land Hessen[14] the Federal Administrative Court of Germany took a position on the question of efficiency and adequacy of the plans to be adopted under the second subparagraph of Article 23(1) of the Air Quality Directive that is broadly consistent with the views advanced here by the Commission.

106. Though, at paragraph 59, the ruling refers to an obligation to adopt measures to 'minimise' emissions under Art. 23(1) and explains that this obligation is also the yardstick for judicial control of administrative measures, the Court also specifies that the latter must aim at rapidly achieving emission standards for air quality in an appropriate and proportionate manner. This objective limits the administrative margin of discretion of the authorities. Thus, amongst all measures available, the administration should choose the one most likely to fulfil compliance with the nitrogen dioxide limit as soon as

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12 See case C-321/06 point 38 submits (point 38) see, also C- Wells, paragraphs 64 and 65, and Case C-495/00 Azienda Agricola Giorgio, Giovanni e Luciano Visentin and Others [2004] ECR I 2993, paragraph 39). While they retain the choice of the measures to be taken, those authorities must in particular ensure that national law is changed so as to comply with Community law as soon as possible and that the rights which individuals derive from Community law are given full effect.

A Member State is, moreover, required to make reparation for loss and damage caused to individuals as a result of breaches of Community law. Where the conditions for State liability are fulfilled, it is for the national court to apply that principle (see, inter alia, Case C 66/95 Sutton [1997] ECR I-2163, paragraph 35, and Case C 224/01 Köbler [2003] ECR I 10239, paragraphs 51 and 52).

13 Available at: http://www.genitoriantismog.it/sites/default/files/ORDConsiglio%20di%20Stato27102012.pdf.

14 Available at: http://www.bverwg.de/entscheidungen/entscheidung.php?ent=050913U7C21.12.0.

possible. Therefore, the Court should order the fastest and most efficient measures to achieve this objective (paragraph 60).

6.1. Sanctions

107. The fourth question of the referring court refers to Article 30 of the Air Quality Directive. It is not clear why the referring court has mentioned this provision in its questions, but for good measure the Commission sets out the following considerations on this issue.

108. Article 30 of the Directive is the standard penalties clause deriving from case-law of the Court of Justice. In this regard, the Commission would first of all note the case law of the Court of Justice that develops the concepts on which Article 30 is based: Cases C-416/07 Commission vs Hellenic Republic (protection of animals during transport and at the time of slaughter or killing), and in particular paragraphs 120-124, C-354/99 Commission vs Ireland (failure to provide for an adequate system of penalties for non-compliance with requirements of Directive 86/609/EEC on protection of animals used for scientific purposes), and in particular paragraph 41 (referring to Article 5 TEC – now Article 4/3 TFEU), and paragraphs 42-48. And in that sense also C-213/99 José Teodoro de Andrade vs Director da Alfândega de Leixões, and in particular paragraph 19, and C-36/94 Siesse vs Director da Alfândega de Alcântara, paragraph 20.

109. Having regard to this case law, the Commission considers that, historically, the standard penalties clause derives from case-law concerned with compliance by private parties subject to requirements under Union law or under national law derived from the implementation of Union law. This can be opposed to Member States' non-compliance with their duty to transpose, and to non-compliance with duties by the administration itself.

110. The non-compliance at issue in this case would, however, concern the fulfilment of duties by the administration itself.

111. However, in the Commission's view, it is arguable that both the case law quoted above, and the wording of Article 30 may be considered to also create a basis for penalties for failures by the public administration. In this regard, it is noteworthy that the underlying principles deployed by the Court in its case law quoted above were those of equivalence and effectiveness. In the Commission's view, it cannot be excluded that the principles of

equivalence and effectiveness may under certain circumstances require the possibility of penalties in relation to the fulfilment of duties a public administration.

112. Nevertheless, it is not clear why the referring court has mentioned this provision in its questions, as the issue of penalties to be imposed on a public administration does not seem to arise in the case at issue. Given that this matter does not seem to arise at all, the Commission will refrain from taking a position on it.

6.2. Proposed response to Question 4

113. In the light of the considerations above, the Commission would propose the following answer to the fourth question:

Pursuant to the principle of effectiveness, as derived from Articles 4(3) and 19 TEU and Article 47 of the Charter, the national courts must ensure, using existing national judicial remedies available, that natural or legal persons directly concerned by a violation of Article 13 of the Directive are be in a position to require the competent authorities to either seek and obtain a derogation pursuant to Article 22 (where this option remains open to the competent authorities) or, if the competent authorities choose not to do so, to adopt and communicate to the Commission air quality plans that are compliant with Article 23(1), that is to say, plans that foresee effective, proportionate and scientifically feasible measures to address the specific emissions problems in the relevant zone as swiftly as possible.

7. CONCLUSION

114. In view of the above, the Commission proposes the following reply to the questions referred by the Supreme Court of the United Kingdom:

Answer to Question 1:

A Member State is not obliged, pursuant to either the Directive or to Article 4 TEU, to seek postponement of the deadline in accordance with Article 22 of the Directive even where, in a given zone or agglomeration, conformity with the limit values for nitrogen dioxide was not achieved by the deadline of 1 January 2010 specified in annex XI of the Directive.

Answer to Question 2:

In the light of the answer to the first question, an answer to the second question is not required.

Answer to Question 3:

Where a Member State finds itself in breach of Article 13, it may either request and obtain a derogation pursuant to Article 22 of the Directive (where this option remains open to it) or, in the alternative, it must comply with Article 23(1), including therefore the obligation to adopt air quality plans that foresee all appropriate measures that would bring the breach of Article 13 to an end as soon as possible. That is to say that the air quality plan must foresee effective, proportionate and scientifically feasible measures to address the specific emissions problems in the relevant zone as swiftly as possible, subject to judicial review by the domestic courts. A failure by a Member State to do so would result in the infringement also Article 23(1) of the Directive, alongside Article 4(3) TEU.

Answer to Question 4:

Pursuant to the principle of effectiveness, as derived from Articles 4(3) and 19 TEU and Article 47 of the Charter, the national courts must ensure, using existing national judicial remedies available, that natural or legal persons directly concerned by a violation of Article 13 of the Directive are be in a position to require the competent authorities to either seek and obtain a derogation pursuant to Article 22 (where this option remains open to the competent authorities) or, if the competent authorities choose not to do so, to adopt and communicate to the Commission air quality plans that are compliant with Article 23(1), that is to say, plans that foresee effective, proportionate and scientifically feasible measures to address the specific emissions problems in the relevant zone as swiftly as possible.

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