The role of environmental NGOs in Air Quality Litigation in Europe

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EJTN Administrative Law Project
Judicial training on EU environmental law
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Introduction to ClientEarth

• ClientEarth is a non-profit environmental law organisation

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

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

1) Air pollution in Europe
2) Case law of the CJEU on the right to clean air
3) National jurisdictions: challenges & good practices
“Air pollution is the world’s largest single environmental health risk” (WHO, 2014)
Impacts of air pollution on health

- **Headache and anxiety** ($SO_2$)
  - Impacts on the central nervous system (PM)

- **Cardiovascular diseases** (PM, $O_3$, $SO_2$)

- **Imitation of eyes, nose and throat**
  - Breathing problems ($O_3$, PM, $NO_2$, $SO_2$, BaP)

- **Impacts on the respiratory system**:
  - Irritation, inflammation and infections
  - Asthma and reduced lung function
  - Chronic obstructive pulmonary disease (PM)
  - Lung cancer (PM, BaP)

- **Impacts on liver, spleen and blood** ($NO_2$)

- **Impacts on the reproductive system** (PM)
The Air Quality Directive 2008/50/EC

- Substance
  - Limit values

- Procedure
  - Monitoring
  - Reporting
  - Air quality plans
Concentrations of PM$_{10}$ in 2017
Concentrations of PM$_{2.5}$ in 2017
Concentrations of NO$_2$ in 2017
Health impacts in Europe

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

Estimated 68,000 premature deaths each year in the EU from exposure to NO$_2$

European Environment Agency (2019) - [here](#)
Case C-237/07 – Janecek

• Standing before courts to request adoption of short-term action plans under Directive 96/62

• Limits on the discretion of authorities → judicial scrutiny on measures and policies
Case C-237-07 – Janecek

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

  “[…] the natural or legal persons directly concerned by a risk that the limit values or alert thresholds may be exceeded must be in a position to require the competent authorities to draw up an action plan where such a risk exists, if necessary by bringing an action before the competent courts.” [para 39]
Case C-237-07 – Janecek

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

“while the Member States thus have a discretion, Article 7(3) of Directive 96/62 includes limits on the exercise of that discretion which may be relied upon before the national courts [...], relating to the adequacy of the measures which must be included in the action plan with the aim of reducing the risk of the limit values and/or alert thresholds being exceeded and the duration of such an occurrence, taking into account the balance which must be maintained between that objective and the various opposing public and private interests”
[para 46]
Case C-404/13 – ClientEarth

- Standing of individuals and NGOs under Directive 2008/50/EC
- Discretion of authorities very narrow → plans must achieve compliance ASAP
- Central role of national courts
Case C-404/13 – ClientEarth

• Standing of individuals and NGOs:

“the natural or legal persons directly concerned by the limit values being exceeded ... must be in a position to require the competent authorities, if necessary by bringing an action before the courts having jurisdiction, to establish an air quality plan which complies with the second subparagraph of Article 23(1) of Directive 2008/50” [para 56]
Case C-404/13 – ClientEarth

  - “Member States must take all the measures necessary to secure compliance” and are not allowed “to defer, as they wish, implementation of those measures” [para 31]
  - “As regards the content of the plan, it follows from the second subparagraph of Article 23(1) of Directive 2008/50 that, while Member States have a degree of discretion in deciding which measures to adopt, those measures must, in any event, ensure that the period during which the limit values are exceeded is as short as possible” [para 57]
• Role of national courts and remedies:

“where a Member State has failed to comply with the requirements of the second subparagraph of Article 13(1) of Directive 2008/50 [...], it is for the national court having jurisdiction, should a case be brought before it, to take, with regard to the national authority, any necessary measure, such as an order in the appropriate terms, so that the authority establishes the plan required by the directive in accordance with the conditions laid down by the latter” [para 58]
Case C-723/17 – Craeynest

- Standing to challenge location of monitoring stations
- Complex technical decisions and intense review by national courts
Case C-723/17 – Craeynest

- Rules on location of air quality monitoring stations and standing:

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

43. This is the case, in particular, with regard to the obligation to establish sampling points in such a way that they provide information on the pollution of the most polluted locations [...].”
Case C-723/17 – Craeynest

• Intensity of review of scientifically complex assessments:

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

  – Air Quality Directive protects fundamental rights, including:

    • high level of environmental protection, precautionary principle and principle of prevention required under Article 3(3) TEU and Article 191 (1) and (2) TFEU) [see para 33]

    • right to life, under Article 2(1) Charter of Fundamental Rights [see Opinion AG Kokott in Case C-723/17, para 53]
Case C-723/17 – Craeynamest

• Reversal of burden of proof:
  
  – “authorities are required to base their decisions on sound scientific data and, as set out in Section D of Annex III to Directive 2008/50, to prepare comprehensive documentation that includes evidence supporting the choice of the location of all monitoring sites” [para 51]
  
  – Opinion of AG Kokott [para 64]:
    
    • it is for the competent authorities to convince the courts by presenting substantiated arguments
    • the other party can counter such claims with its own scientifically substantiated arguments
    • the court can appoint independent experts
Case C-752/18 – Deutsche Umwelthilfe

- Enforcement of rulings in air quality matters
- Fundamental right to an effective remedy, procedural obstacles and role of national courts
- Possibility (and limits) of coercive measures
Case C-752/18 – Deutsche Umwelthilfe

Obligation to provide effective remedies - principles:

• Procedural autonomy + principles of equivalence and effectiveness
• Fundamental right to effective remedy:
  – Article 47 Charter Fundamental Rights
  – Article 9(4) Aarhus Convention
  – Article 6(1) European Convention of Human Rights
• Relevance of interests protected by Air Quality Directive (human health)
Duty of national courts to use primacy of EU law to overcome procedural obstacles:

- “ascertain, *taking the whole body of domestic law into consideration [...]*, whether it can arrive at an interpretation of domestic law that would *enable it to apply effective coercive measures in order to ensure that the public authorities comply with a judgment*” [para 40]
  - eg high financial penalties that are repeated at short intervals until full compliance

- the principle of primacy of EU law can lead “*to the national court applying procedural rules and adopting measures in situations not provided for by national law*” [AG Opinion, para 60]
LEGAL BATTLE FOR CLEAN AIR IN THE UK
<table>
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<tr>
<th>Year</th>
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<td>2017 Air Quality Plan published – requires individual plans from 23 local authorities</td>
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“...[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
“The new Government [...] should be left in no doubt as to the need for immediate action to address this issue. The only realistic way to achieve this is a mandatory order requiring new plans complying with article 23(1) to be prepared within a defined timetable.”

*ClientEarth (No.1) [2015] UKSC 28, §31*
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The High Court, 2016

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

*ClientEarth (No.2) [2016] EWHC 2740 (Admin), §95*
“...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
“...I reject any suggestion that the state can have any regard to cost in fixing the target date for compliance or in determining the route by which the compliance can be achieved [...] the determining consideration has to be the efficacy of the measure in question and not their cost”

*ClientEarth (No.2) [2016] EWHC 2740 (Admin), §50*
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“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*
“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*
Where has all this got us to?
Clean Air Zones (CAZ) across the UK

- **Newcastle**: Class C CAZ
- **Leeds**: Class B CAZ
- **Manchester**: ?Class B/C CAZ?
- **Sheffield**: Class C CAZ
- **Bradford**: ?Class C CAZ?
- **Birmingham**: Class D CAZ
- **Bristol**: ?Diesel ban?
- **Bath**: Class C CAZ
- **London**: Ultra Low Emission Zone
BARRIERS TO ACCESS TO JUSTICE IN POLAND AND BULGARIA
Procedural obstacles in national laws...

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

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

• Communications to the Aarhus Convention Compliance Committee concerning barriers to access to justice in Poland (Communication ACCC/C/2016/151) and Bulgaria (Communication ACCC/C/2018/161)

• Complaints to the EU Commission requesting start of infringement proceedings against Bulgaria and Poland lodged in February 2019
Infringement procedures in May 2020

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

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

• Clear and binding EU rules on air quality, but widespread breaches many years after entry into force

• Litigation by individuals and NGOs is a key driver to ensure adequate action to fight pollution

• National courts have a key role to play to provide effective legal protection of human health and the environment
Thank you!

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@ClientEarth
Questions?
Useful resources

Have a look at our legal publications:

* Clean Air Handbook
  [https://www.documents.clientearth.org/download/6758](https://www.documents.clientearth.org/download/6758)

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

* Country-specific legal toolkits on access to justice at national level:
  [https://www.clientearth.org/country-toolkits-on-access-to-justice/](https://www.clientearth.org/country-toolkits-on-access-to-justice/)