A

Court of Justice of the European Union

Supreme Court

Regina (ClientEarth) *v* Secretary of State for the Environment, Food and Rural Affairs

B

(Case C-404/13)

EU:C:2014:2382

[2015] UKSC 28

C

2014 July 10; Nov 19 — President of Chamber R Silva de Lapuerta, Judges K Lenaerts, J-C Bonichot, A Arabadjiev, JL da Cruz Vilaça
Advocate General N Jääskinen

2015 April 16; 29 — Lord Neuberger of Abbotsbury PSC, Lord Mance, Lord Clarke of Stone-cum-Ebony, Lord Sumption, Lord Carnwath JJSC

D

Environment — Pollution — Air quality — United Kingdom failing to meet deadline for compliance with nitrogen dioxide limits under European Union law — UK making air quality plans projecting compliance after five years but failing to apply for postponement of deadline — Whether obligation to apply for postponement where deadline exceeded — Whether submission of air quality plans satisfying UK's obligations under EU law — Whether national court required to provide remedies in event of non-compliance — Whether mandatory order requiring compliance to be made — Parliament and Council Directive 2008/50/EC, arts 13(1), 22, 23(1), Annex XI

E

Parliament and Council Directive 2008/50/EC[1] on ambient air quality and cleaner air for Europe provided, by article 13(1) and the second sub-paragraph thereof, that the limit values for nitrogen dioxide specified in Annex XI might not be exceeded from 1 January 2010, the date specified in the Annex, within a member state's designated zones or agglomerations. Article 22 provided a procedure for
F postponement of the compliance date by a maximum of five years where acute pollution problems existed, on condition that an air quality plan was established in accordance with article 23 for the zone or agglomeration to which the postponement would apply, which demonstrated how conformity with the limit values would be achieved before the new deadline. Such plans were to be published to the European Commission. Article 23 imposed a general duty on member states to prepare air quality plans for areas where the limit values were not met and, by the second
G sub-paragraph of article 23(1), in cases where the attainment deadline had already expired, the plans were required to set out appropriate measures, so that the exceedance period could be kept "as short as possible".

In the course of 2010, one or more of the limit values established for nitrogen dioxide was exceeded in 40 of the 43 zones or agglomerations within the United Kingdom. The United Kingdom submitted applications under article 22 of the Directive to the European Commission for time extensions for some of the zones in
H question, but made no such applications in relation to 16 zones, in respect of which the air quality plans projected that the limit values would be complied with after

[1] Parliament and Council Directive 2008/50/EC, art 13: see first judgment, post, para 6.
Art 22: see first judgment, post, para 7.
Art 23(1): see first judgment, post, para 8.
Annex XI: see first judgment, post, para 10.

2015. The claimant, an environmental non-governmental organisation, brought a claim for judicial review seeking, inter alia, an order requiring the Secretary of State to revise the plans to show how the nitrogen dioxide limit values would be achieved as soon as possible, and by 1 January 2015 at the latest, as required by article 22 of the Directive. The judge dismissed the claim and the Court of Appeal upheld that decision. On the claimant's subsequent appeal, the Supreme Court held that, on the basis of concessions made by the Secretary of State, the claimant was entitled to a declaration that the United Kingdom was in breach of its obligations under article 13 for the 16 zones in issue but stayed the question of what relief, if any, should be granted, pending a reference to the Court of Justice for a preliminary ruling on questions concerning, inter alia, the interpretation of articles 13, 22 and 23 of the Directive. By the time of the resumed hearing in the Supreme Court more than five years had expired since the compliance deadline of 1 January 2010.

On the reference—

Held, (1) that article 22(1) of Directive 2008/50/EC meant that, in order to postpone by a maximum of five years the deadline specified by the Directive for achieving conformity with the limit values for nitrogen dioxide specified in Annex XI thereto, a member state had to make an application for postponement where it was objectively apparent, having regard to existing data, and notwithstanding the implementation by that member state of appropriate pollution abatement measures, that conformity with those values could not be achieved in a given zone or agglomeration by the specified deadline; that the Directive contained no exception to the obligation flowing from article 22(1); but that member states had to take all the necessary measures to comply with the requirement in relation to the limit values under article 13(1) and could not consider that the power to postpone the deadline allowed them to defer implementation of those measures (first judgment, post, paras 27, 30–34, 35, operative part, para 1).

(2) That where it was apparent that conformity with the limit values for nitrogen dioxide established in Annex XI could not be achieved in a given zone or agglomeration of a member state by 1 January 2010, the date specified in that annex, and that member state had not applied for postponement of that deadline under article 22(1) of the Directive, the fact that an air quality plan which complied with the second sub-paragraph of article 23(1) had been drawn up did not, in itself, mean that the member state had nevertheless met its obligations under article 13 (first judgment, post, paras 42, 43–48, 49, operative part, para 2).

(3) That the natural or legal persons directly concerned by the limit values being exceeded after the deadline had to be in a position to require the competent authorities, if necessary by bringing a court action, to establish an air quality plan which complied with the second sub-paragraph of article 23(1) of Directive 2008/50, where a member state had failed to secure compliance with the requirements of the second sub-paragraph of article 13(1) and had not applied for a postponement of the deadline as provided for by article 22; that, in relation to the content of the plan, it followed from the second sub-paragraph of article 23(1) of Directive 2008/50 that, while member states had a degree of discretion in deciding which measures to adopt, those measures had to ensure that the period during which the limit values were exceeded was as short as possible; and that, accordingly, where a member state had failed to comply with the requirements of the second sub-paragraph of article 13(1) of Directive 2008/50 and had not applied for a postponement of the deadline as provided for by article 22, it was for the national court, 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 could establish the plan required by the Directive in accordance with the conditions laid down by the latter (first judgment, post, paras 56–58, operative part, para 3).

On the resumed hearing of the appeal—

Held, allowing the appeal, that the Court of Justice's reformulation of the questions referred had introduced a degree of ambiguity which had had the unfortunate effect of enabling each party to claim success on the issue of whether the

A postponement procedure under article 22 of Directive 2008/50/EC was mandatory; but that it was unnecessary to determine the meaning of the court's ruling on that issue since the time taken by the proceedings meant that the article 22 issue now had little or no practical significance; that the critical breach was of article 13, not of article 22 or 23, which were supplementary in nature; that the Court of Justice's ruling left no doubt as to the seriousness of that breach, which had been continuing for more than five years, nor as to the responsibility on the national court for securing
B compliance; and that, accordingly, since the Secretary of State rightly accepted that new air quality plans had to be prepared but was unable to give an undertaking to that effect given the restrictions imposed on Government business during the general election period, a mandatory order would be granted requiring new plans complying with article 23(1) to be prepared not later than 31 December 2015 (second judgment, post, paras 6, 24, 26–31, 35).

Per curiam. (i) The requirements of article 23(1) of Directive 2008/50/EC are no
C less onerous but may be more specific than those under article 22. They are also subject to judicial review by the national court, which is able where necessary to impose such detailed requirements as are appropriate to secure effective compliance at the earliest opportunity (second judgment, post, para 25).

(ii) In normal circumstances, where a responsible public authority is in admitted breach of a legal obligation, but is willing to take appropriate steps to comply, the court may think it right to accept a suitable undertaking, rather than impose a mandatory order (second judgment, post, para 31).

D Decision of the Court of Appeal [2012] EWCA Civ 897; [2013] Env LR 93 reversed.

The following cases are referred to in the judgment of the Court of Justice:

Janecek v Freistaat Bayern (Case C-237/07) EU:C:2008:447; [2008] ECR I-6221; [2009] Env LR 185, ECJ

Unibet (London) Ltd v Justitiekanslern (Case C-432/05) EU:C:2007:163; [2008] All ER (EC) 453; [2007] ECR I-2271, ECJ
E

The following cases are referred to in the judgment of Lord Carnwath JSC:

Commission of the European Communities v Italian Republic (Case C-68/11) EU:C:2012:815 (unreported) 19 December 2012, ECJ

Commission of the European Communities v United Kingdom (Case C-56/90) EU:C:1993:307 [1993] ECR I-4109, ECJ

F No additional cases were cited in argument.

REFERENCE from the Supreme Court of the United Kingdom

By a judicial review claim form dated 28 July 2011 issued in the High Court of Justice of England and Wales, the claimant, ClientEarth, a non-governmental organisation interested in protection of the environment,
G sought: (i) a declaration that the United Kingdom's draft nitrogen dioxide air quality plans did not comply with the requirements of European Union law; and (ii) a mandatory order requiring the defendant Secretary of State for the Environment, Food and Rural Affairs (a) to revise the draft air quality plans to ensure that they all demonstrated how conformity with the nitrogen dioxide limit values would be achieved as soon as possible and by 1 January 2015 at the latest, and (b) to publish the revised draft air quality plans as
H public consultation documents, giving a reasonable time frame for response. By amendment, the claimant also sought a declaration that the United Kingdom was in breach of its European Union obligations to comply with the nitrogen dioxide limits provided for in article 13 of Parliament and Council Directive 2008/50/EC of 21 May 2008 on ambient air quality and

cleaner air for Europe (OJ 2008 L152, p 1). On 13 December 2011 Mitting J, sitting in the Administrative Court of the Queen's Bench Division, dismissed the claim [2011] EWHC 3623 (Admin); [2012] Env LR 392 and on 30 May 2012 the Court of Appeal dismissed the claimant's appeal [2012] EWCA Civ 897; [2013] Env LR 93. By permission of the Supreme Court of the United Kingdom (Lord Neuberger of Abbotsbury PSC, Lord Mance and Lord Carnwath JJSC) granted on 19 December 2012 the claimant appealed to the Supreme Court.

By a judgment dated 1 May 2013 [2013] UKSC 25; [2013] 2 All ER 928 and order dated 16 July 2013, the Supreme Court (Lord Hope of Craighead DPSC, Lord Mance, Lord Clarke of Stone-cum-Ebony, Lord Sumption and Lord Carnwath JJSC) held that the claimant was entitled to a declaration that the United Kingdom was in breach of its obligations to comply with the nitrogen dioxide limits provided for in article 13 of the Directive but referred to the Court of Justice of the European Union for a preliminary ruling a number of questions, first judgment, post, para 23, on the interpretation of articles 4EU and 19EU of the EU Treaty and articles 13, 22, 23 and 30 of Directive 2008/50.

The judge rapporteur was Judge Bonichot.

The facts are stated in the first judgment, post, paras 12–21.

Dinah Rose QC, *Emma Dixon* and *Ben Jaffey* (instructed by *Solicitor, ClientEarth*) for the claimant.

Kassie Smith QC (instructed by *Treasury Solicitor*) for the Government of the United Kingdom of Great Britain and Northern Ireland.

K Mifsud-Bonnici and *S Petrova*, agents, for the European Commission.

The court decided, after hearing Advocate General Jääskinen, to proceed to judgment without an opinion.

19 November 2014. **THE COURT** (**Second Chamber**) delivered the following judgment.

1 This request for a preliminary ruling concerns the interpretation of articles 4EU and 19EU of the EU Treaty and articles 13, 22, 23 and 30 of Parliament and Council Directive 2008/50/EC of 21 May 2008 on ambient air quality and cleaner air for Europe (OJ 2008 L152, p 1).

2 The request has been made in proceedings between ClientEarth, a non-governmental organisation interested in protection of the environment, and the Secretary of State for the Environment, Food and Rural Affairs, concerning that organisation's request for revision of the air quality plans drawn up by the United Kingdom of Great Britain and Northern Ireland under Directive 2008/50 for certain of its zones and agglomerations.

Legal context

Directive 2008/50

3 Recital (16) in the Preamble to Directive 2008/50 is worded:

"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."

4 Article 1 of Directive 2008/50, entitled "Subject matter", provides:

"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 . . ."

5 Article 2 of Directive 2008/50, entitled "Definitions", provides:

"For the purposes of this Directive . . ."

"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' shall mean the percentage of the limit value by which that value may be exceeded subject to the conditions laid down in this Directive;

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

6 Article 13 of Directive 2008/50, entitled "Limit values and alert thresholds for the protection of human health", provides:

"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)."

7 Article 22 of Directive 2008/50, entitled "Postponement of attainment deadlines and exemption from the obligation to apply certain limit values", provides:

"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."

8 Article 23 of Directive 2008/50, entitled "Air quality plans", provides:

"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."

A 9 Article 30 of Directive 2008/50, entitled: "Penalties", provides:

> "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."

B 10 Annex XI to Directive 2008/50, entitled: "Limit values for the protection of human health", fixes, in Section B, the date by which the limit values for nitrogen dioxide may not be exceeded as 1 January 2010.

11 Annex XV to Directive 2008/50, entitled: "Information to be included in the local, regional or national air quality plans for improvement in ambient air quality", gives details, in Section A, of the information to be C provided under article 23 of the Directive and, in Section B, of the information to be provided under article 22(1).

The dispute in the main proceedings and the questions referred for a preliminary ruling

12 Nitrogen dioxide is a gas formed by combustion at high D temperatures. The order for reference states that road traffic and domestic heating are the main sources of emission in most urban areas of the United Kingdom.

13 For the purposes of assessing and managing air quality in accordance with Directive 2008/50, the territory of the United Kingdom was divided into 43 zones and agglomerations, within the meaning of the Directive.

E 14 In 40 of those zones and agglomerations, one or more of the limit values established by the Directive for nitrogen dioxide was exceeded in the course of 2010.

15 According to the draft air quality plans published on 9 June 2011 for public consultation, in 17 zones and agglomerations, including Greater London, compliance with those limit values was expected to be achieved after 2015.

F 16 On 22 September 2011 final plans were submitted to the European Commission, including applications under article 22 of Directive 2008/50 for time extensions for 24 of the 40 zones or agglomerations in question. Those plans showed how the limit values would be met by 1 January 2015 at the latest.

17 By decision of 25 June 2012 the Commission unconditionally G approved nine applications for time extensions, approved three others subject to certain conditions being fulfilled, and raised objections in respect of 12 zones.

18 For 16 zones or agglomerations in respect of which the air quality plans projected compliance with the limit values between 2015 and 2025, the United Kingdom did not make any application for a time extension under article 22 of Directive 2008/50 and the Commission did not make any H comment on those zones or agglomerations.

19 ClientEarth brought a claim in the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), seeking an order requiring the Secretary of State for the Environment, Food and Rural Affairs to revise the plans to ensure that they demonstrate how conformity with the

nitrogen dioxide limit values will be achieved as soon as possible, and by 1 January 2015 at the latest, as required by article 22 of Directive 2008/50.

20 That court [2012] Env LR 392 dismissed the claim, holding that, even if a member state has not complied with its obligations under article 13 of Directive 2008/50, it is not required to apply under article 22 of the Directive for an extension of the deadline laid down by that Directive for compliance with the limit values. The court added that, in any event, such an order would raise serious political and economic questions and involve political choices that are not within the court's jurisdiction.

21 The appeal brought against that decision was dismissed by the Court of Appeal (England and Wales) (Civil Division) on 30 May 2012 [2013] Env LR 93, which, however, granted ClientEarth permission to appeal to the Supreme Court of the United Kingdom.

22 The latter court [2013] 2 All ER 928 held that the United Kingdom was in breach of its obligation to comply with the limit values for nitrogen dioxide under article 13 of Directive 2008/50 for the 16 zones and agglomerations at issue in the main proceedings. The court also held that the case raised questions of interpretation of Directive 2008/50, which had not been addressed by the case law of the court.

23 In those circumstances, the Supreme Court of the United Kingdom decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

> "1. Where, under [Directive 2008/50], 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 4EU 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 [of Directive 2008/50] 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 . . . [Directive 2008/50] and/or article 4EU or 19EU?"

Consideration of the questions referred

The first and second questions

24 By its first and second questions, which it is appropriate to consider together, the referring court asks, in essence, (i) whether article 22 of Directive 2008/50 must be interpreted as meaning that, where conformity with the limit values for nitrogen dioxide laid down in Annex XI to that Directive cannot be achieved in a given zone or agglomeration of a member state by 1 January 2010, the date specified in Annex XI, that state is, in order to be able to postpone that deadline for a maximum of five years, obliged to make an application for postponement in accordance with article 22(1) of Directive 2008/50 and (ii) whether, if that is the case, the state may nevertheless be relieved of that obligation in certain circumstances.

A **25** The obligation to comply with the limit values for nitrogen dioxide laid down in Annex XI to Directive 2008/50 by 1 January 2010, the date specified in that annex, results from the second sub-paragraph of article 13(1) of the Directive.

26 Article 22(1) of Directive 2008/50 provides, however, for the possibility of postponing the deadline initially set where conformity with
B the limit values cannot be achieved by that deadline, on condition that the member state concerned establishes an air quality plan for the zone or agglomeration to which the postponement would apply, which meets certain requirements. In particular, the plan must be established in accordance with article 23 of Directive 2008/50. It must also contain the information listed in Section B of Annex XV relating to the pollutants concerned and demonstrate how conformity with the limit values will be achieved before
C the new deadline. Under article 22(4) of Directive 2008/50, those zones, agglomerations and plans must be submitted to the Commission for approval.

27 As regards the question whether, in order to be able to postpone by a maximum of five years the deadline specified in Annex XI to Directive 2008/50, the member state concerned is obliged to make an application and
D to establish for that purpose such a plan, when the conditions referred to in article 22(1) of the Directive are met, it must be held that, while the wording of that provision does not give clear indications in that respect, it follows both from the context of that provision and the aim pursued by the European Union ("EU") legislature that article 22(1) must be interpreted to that effect.

E **28** Article 22(4) of Directive 2008/50 obliges the member state concerned to notify the Commission of the zones and the agglomerations to which it considers article 22(1) applies and to submit the air quality plan referred to in the latter provision.

29 Next, that is the interpretation most suited to achieving the aim pursued by the EU legislature of ensuring better ambient air quality because it obliges the member state concerned to anticipate that conformity with the
F limit values will not be achieved by the deadline specified and to formulate an air quality plan giving details of measures that are capable of remedying that pollution by a later deadline.

30 However, it should be noted that while, as regards sulphur dioxide, PM10, lead and carbon monoxide, the first sub-paragraph of article 13(1) of Directive 2008/50 provides that member states are to "ensure" that the limit
G values are not exceeded, the second sub-paragraph of article 13(1) states that, as regards nitrogen dioxide and benzene, the limit values "may not be exceeded" after the specified deadline, which amounts to an obligation to achieve a certain result.

31 Consequently, member states must take all the measures necessary to secure compliance with that requirement and cannot consider that the power to postpone the deadline, which they are afforded by article 22(1) of
H Directive 2008/50, allows them to defer, as they wish, implementation of those measures.

32 As recital (16) in the Preamble to Directive 2008/50 makes clear, that provision allows the deadline initially specified by the Directive to be postponed only where, notwithstanding the implementation of appropriate

pollution abatement measures, "acute compliance problems" exist in specific zones and agglomerations.

33 In those circumstances, article 22(1) of Directive 2008/50 must be interpreted as meaning that, in order to be able to postpone by a maximum of five years the deadline specified by the Directive for achieving conformity with the limit values for nitrogen dioxide specified in Annex XI thereto, a member state is required to make an application for postponement when it is objectively apparent, having regard to existing data, and notwithstanding the implementation by that member state of appropriate pollution abatement measures, that conformity with those values cannot be achieved in a given zone or agglomeration by the specified deadline.

34 As regards the question of whether certain circumstances may nevertheless justify a failure to comply with that obligation, it suffices to observe that Directive 2008/50 does not contain any exception to the obligation flowing from article 22(1).

35 Consequently, the answer to the first and second questions is that article 22(1) of Directive 2008/50 must be interpreted as meaning that, in order to be able to postpone by a maximum of five years the deadline specified by the Directive for achieving conformity with the limit values for nitrogen dioxide specified in Annex XI thereto, a member state is required to make an application for postponement and to establish an air quality plan when it is objectively apparent, having regard to existing data, and notwithstanding the implementation by that member state of appropriate pollution abatement measures, that conformity with those values cannot be achieved in a given zone or agglomeration by the specified deadline. Directive 2008/50 does not contain any exception to the obligation flowing from article 22(1).

The third question

36 By its third question, the referring court asks, in essence, whether, where it is apparent that conformity with the limit values for nitrogen dioxide established in Annex XI to Directive 2008/50 cannot be achieved in a given zone or agglomeration of a member state by 1 January 2010, the date specified in that annex, and that member state has not applied for postponement of that deadline under article 22(1) of Directive 2008/50, the fact that an air quality plan which complies with the second sub-paragraph of article 23(1) of the Directive has been drawn up permits the view to be taken that that member state has nevertheless met its obligations under article 13 of the Directive.

37 At the outset, it should be recalled that the second sub-paragraph of article 23(1) of Directive 2008/50 specifies that it applies when the limit values for pollutants are exceeded after the deadline laid down for attainment of those limit values.

38 In addition, as regards nitrogen dioxide, application of that provision is not made conditional on the member state having previously attempted to obtain postponement of the deadline under article 22(1) of Directive 2008/50.

39 Consequently, the second sub-paragraph of article 23(1) of Directive 2008/50 also applies in circumstances such as those arising in the main proceedings, in which conformity with the limit values for nitrogen dioxide established in Annex XI to the Directive is not achieved by 1 January 2010,

A the date specified in that annex, in zones or agglomerations of a member state and that member state has not applied for postponement of that date under article 22(1) of the Directive.

40 It follows, next, from the second sub-paragraph of article 23(1) of Directive 2008/50 that where the limit values for nitrogen dioxide are exceeded after the deadline laid down for their attainment, the member state concerned is required to establish an air quality plan that meets certain
B requirements.

41 Thus, that plan must set out appropriate measures so that the period during which the limit values are exceeded can be kept as short as possible and may also include specific measures aimed at protecting sensitive population groups, including children. Furthermore, under the third sub-paragraph of article 23(1) of Directive 2008/50, that plan is to
C incorporate at least the information listed in Section A of Annex XV to the Directive, may also include measures pursuant to article 24 of the Directive and must be communicated to the Commission without delay, and no later than two years after the end of the year in which the first breach of the limit values was observed.

42 However, an analysis which proposes that a member state would, in circumstances such as those in the main proceedings, have entirely satisfied
D its obligations under the second sub-paragraph of article 13(1) of Directive 2008/50 merely because such a plan has been established, cannot be accepted.

43 First, it must be observed that only article 22(1) of Directive 2008/50 expressly provides for the possibility of a member state postponing the deadline laid down in Annex XI to the Directive for achieving conformity
E with the limit values for nitrogen dioxide established in that annex.

44 Second, such an analysis would be liable to impair the effectiveness of articles 13 and 22 of Directive 2008/50 because it would allow a member state to disregard the deadline imposed by article 13 under less stringent conditions than those imposed by article 22.

45 Article 22(1) of Directive 2008/50 requires that the air quality plan contains not only the information that must be provided under article 23 of
F the Directive, which is listed in Section A of Annex XV thereto, but also the information listed in Section B of Annex XV, concerning the status of implementation of a number of Directives and on all air pollution abatement measures that have been considered at the appropriate local, regional or national level for implementation in connection with the attainment of air quality objectives. That plan must, furthermore, demonstrate how
G conformity with the limit values will be achieved before the new deadline.

46 Finally, this interpretation is also supported by the fact that articles 22 and 23 of Directive 2008/50 are, in principle, to apply in different situations and are different in scope.

47 Article 22(1) of the Directive applies where conformity with the limit values of certain pollutants "cannot" be achieved by the deadline initially laid down by Directive 2008/50, account being taken, as is clear from recital
H (16) in the Preamble to the Directive, of a particularly high level of pollution. Moreover, that provision allows the deadline to be postponed only where the member state is able to demonstrate that it will be able to comply with the limit values within a further period of a maximum of five years. Article 22(1) has, therefore, only limited temporal scope.

48 By contrast, article 23(1) of Directive 2008/50 has a more general scope because it applies, without being limited in time, to breaches of any pollutant limit value established by that Directive, after the deadline fixed for its application, whether that deadline is fixed by Directive 2008/50 or by the Commission under article 22(1) of the Directive.

49 In the light of the foregoing, the answer to the third question is that, where it is apparent that conformity with the limit values for nitrogen dioxide established in Annex XI to Directive 2008/50 cannot be achieved in a given zone or agglomeration of a member state by 1 January 2010, the date specified in that annex, and that member state has not applied for postponement of that deadline under article 22(1) of Directive 2008/50, the fact that an air quality plan which complies with the second sub-paragraph of article 23(1) of the Directive has been drawn up does not, in itself, permit the view to be taken that that member state has nevertheless met its obligations under article 13 of the Directive.

The fourth question

50 By its fourth question, the referring court asks, in essence, whether articles 4EU and 19EU and article 30 of Directive 2008/50 must be interpreted as meaning that, where a member state has failed to comply with the requirements of the second sub-paragraph of article 13(1) of Directive 2008/50 and has not applied for a postponement of the deadline as provided for by article 22 of the Directive, 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.

51 As a preliminary point, it should be noted that the reason why the interpretation of article 30 of Directive 2008/50, which relates to the system of penalties that must be implemented by the member states, is relevant to the dispute in the main proceedings, is not sufficiently clear from the file submitted to the court.

52 As regards article 4EU, it should be recalled that according to settled case law, under the principle of sincere co-operation laid down in paragraph 3 of that article, it is for the member states to ensure judicial protection of an individual's rights under EU law: see, inter alia, *Unibet (London) Ltd v Justitiekanslern* (Case C-432/05) [2007] ECR I-2271; [2008] All ER (EC) 453, para 38. In addition, article 19(1)EU requires member states to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law.

53 If the limit values for nitrogen dioxide are exceeded after 1 January 2010 in a member state that has not applied for a postponement of that deadline under article 22(1) of Directive 2008/50, the second sub-paragraph of article 23(1) of that Directive imposes a clear obligation on that member state to establish an air quality plan that complies with certain requirements: see, by analogy, *Janecek v Freistaat Bayern* (Case C-237/07) [2008] ECR I-6221, para 35.

54 In addition, the court has consistently held that individuals are entitled, as against public bodies, to rely on the provisions of a Directive which are unconditional and sufficiently precise. It is for the competent national authorities and courts to interpret national law, as far as possible, in

A a way that is compatible with the purpose of that Directive. Where such an interpretation is not possible, they must disapply the rules of national law which are incompatible with the Directive concerned: see *Janecek's* case, para 36 and the case law cited.

55 Lastly, as the Court of Justice has noted on numerous occasions, it is incompatible with the binding effect that article 288FEU of the FEU Treaty ascribes to Directive 2008/50 to exclude, in principle, the possibility of the B obligation imposed by that Directive being relied on by the persons concerned. That consideration applies particularly in respect of a Directive whose objective is to control and reduce atmospheric pollution and which is designed, therefore, to protect public health: see *Janecek's* case, para 37.

56 It follows that the natural or legal persons directly concerned by the limit values being exceeded after 1 January 2010 must be in a position to C 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 sub-paragraph of article 23(1) of Directive 2008/50, where a member state has failed to secure compliance with the requirements of the second sub-paragraph of article 13(1) of Directive 2008/50 and has not applied for a postponement of the deadline as provided D for by article 22 of the Directive: see, by analogy, *Janecek's* case, para 39.

57 As regards the content of the plan, it follows from the second sub-paragraph 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.

58 The answer to the fourth question is therefore that, where a member E state has failed to comply with the requirements of the second sub-paragraph of article 13(1) of Directive 2008/50 and has not applied for a postponement of the deadline as provided for by article 22 of the Directive, 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 F establishes the plan required by the Directive in accordance with the conditions laid down by the latter.

Costs

59 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is G a matter for that court. Costs incurred in submitting observations to the court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. Article 22(1) of Parliament and Council Directive 2008/50/EC of 21 May 2008 on ambient air quality and cleaner air for Europe must be interpreted as meaning that, in order to be able to postpone by a maximum H of five years the deadline specified by the Directive for achieving conformity with the limit values for nitrogen dioxide specified in Annex XI thereto, a member state is required to make an application for postponement and to establish an air quality plan when it is objectively apparent, having regard to existing data, and notwithstanding the implementation by that member state

of appropriate pollution abatement measures, that conformity with those values cannot be achieved in a given zone or agglomeration by the specified deadline. Directive 2008/50 does not contain any exception to the obligation flowing from article 22(1).

2. Where it is apparent that conformity with the limit values for nitrogen dioxide established in Annex XI to Directive 2008/50 cannot be achieved in a given zone or agglomeration of a member state by 1 January 2010, the date specified in that annex, and that member state has not applied for postponement of that deadline under article 22(1) of Directive 2008/50, the fact that an air quality plan which complies with the second sub-paragraph of article 23(1) of the Directive has been drawn up, does not, in itself, permit the view to be taken that that member state has nevertheless met its obligations under article 13 of the Directive.

3. Where a member state has failed to comply with the requirements of the second sub-paragraph of article 13(1) of Directive 2008/50 and has not applied for a postponement of the deadline as provided for by article 22 of the Directive, 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.

SUSANNE ROOK, Barrister

APPEAL from the Court of Appeal

Following the judgment of the Court of Justice of the European Union (Second Chamber) on 19 November 2014 (Case C-404/13) EU:C:2014:2382 (first judgment, above), the Supreme Court resumed the hearing of the claimant's appeal from the decision of the Court of Appeal [2013] Env LR 93 in the judicial review proceedings, to consider what further orders, if any, should be made.

The facts are stated in the judgment of Lord Carnwath JSC.

Ben Jaffey (instructed by *Solicitor, Client Earth*) for the claimant.

Kassie Smith QC (instructed by *Treasury Solicitor*) for the Secretary of State.

The court took time for consideration.

29 April 2015. The following judgment was handed down.

LORD CARNWATH JSC (with whom **LORD NEUBERGER OF ABBOTSBURY PSC, LORD MANCE, LORD CLARKE OF STONE-CUM-EBONY** and **LORD SUMPTION JJSC** agreed)

Introduction

1 These proceedings arise out of the admitted and continuing failure by the United Kingdom since 2010 to secure compliance in certain zones with the limits for nitrogen dioxide levels set by European law, under Parliament and Council Directive 2008/50/EC of 21 May 2008 on ambient air quality and cleaner air for Europe (OJ 2008 L152, p 1). The legal and factual background

A is set out in the judgment of this court dated 1 May 2013 [2013] 2 All ER 928, and need not be repeated. For the reasons given in that judgment, the court referred certain questions to the Court of Justice of the European Union ("CJEU"). That court has now answered those questions in a judgment dated 14 November 2014 (Case C-404/13) (above). It remains to consider what further orders if any should be made in the light of those answers.

B **2** Central to the referred questions were the interpretation of, and relationship between, three provisions of the Directive: articles 13, 22 and 23. Article 13 laid down limit values "for the protection of human health", and provided that in respect of nitrogen dioxide, the limit values specified in Annex XI "may not be exceeded from the dates specified therein", the relevant date being 1 January 2010. Article 22 provided a procedure for the postponement of the compliance date for not more than five years in certain C circumstances and subject to specified conditions. Article 23 imposed a general duty on member states to prepare "air quality plans" for areas where the limit values were not met. By the second paragraph of article 23(1), in cases where "the attainment deadline [was] already expired", the air quality plans were required to set out appropriate measures, so that the exceedance period can be kept "as short as possible".

D **3** The required contents of air quality plans prepared under article 23 were laid down by Annex XV, Section A. In addition, where an application for an extension of the deadline was made under article 22, the plan was to be supplemented by the information listed in Annex XV, Section B. The additional requirements were, first, information concerning the status of implementation of 14 listed Directives, not all directly relevant to nitrogen dioxide emissions (para 2), and, secondly, information on "all air pollution E 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 five specified categories of measures, such as for example: "(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) . . ." (para 3).

F **4** When making the reference, this court determined to make a declaration of the breach of article 13, notwithstanding its admission by the Government. Differing in this respect from the Court of Appeal, this court thought it appropriate to do so, both as a formal statement of the legal position, and also to make clear that, regardless of arguments about articles 22 and 23 of the Directive, "the way is open to immediate enforcement action at national or European level": [2013] 2 All ER 928, para 37.

G

The referred questions and the CJEU's response

5 The questions referred by this court were as follows:

"(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 H 2010 specified in Annex XI of the Directive, is a member state obliged pursuant to the Directive and/or article 4EU 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 4EU or 19EU?"

6 The CJEU, for reasons it did not clearly explain, decided to reformulate the first two questions:

"24. By its first and second questions, which it is appropriate to consider together, the referring court asks, in essence, (i) whether article 22 of Directive 2008/50 must be interpreted as meaning that, where conformity with the limit values for nitrogen dioxide laid down in Annex XI to that Directive cannot be achieved in a given zone or agglomeration of a member state by 1 January 2010, the date specified in Annex XI . . . that state is, *in order to be able to postpone that deadline for a maximum of five years*, obliged to make an application for postponement in accordance with article 22(1) of Directive 2008/50 and (ii) whether, if that is the case, the state may nevertheless be relieved of that obligation in certain circumstances." (Emphasis added.)

As will be seen, the reformulation of the first two questions, in particular by the inclusion of the emphasised words, has introduced a degree of ambiguity which it had been hoped to avoid in the original formulation. This has had the unfortunate effect of enabling each party to claim success on the issue. Fortunately, for reasons I will explain, it is unnecessary to making a final ruling on this difference, or to make a further reference for that purpose.

7 The court's answers to the three questions as so reformulated were:

"1. Article 22(1) of Parliament and Council Directive 2008/50/EC of of 21 May 2008 on ambient air quality and cleaner air for Europe must be interpreted as meaning that, in order to be able to postpone by a maximum of five years the deadline specified by the Directive for achieving conformity with the limit values for nitrogen dioxide specified in Annex XI thereto, a member state is required to make an application for postponement and to establish an air quality plan when it is objectively apparent, having regard to existing data, and notwithstanding the implementation by that member state of appropriate pollution abatement measures, that conformity with those values cannot be achieved in a given zone or agglomeration by the specified deadline. Directive 2008/50 does not contain any exception to the obligation flowing from article 22(1).

"2. Where it is apparent that conformity with the limit values for nitrogen dioxide established in Annex XI to Directive 2008/50 cannot be achieved in a given zone or agglomeration of a member state by 1 January 2010, the date specified in that Annex, and that member state has not applied for postponement of that deadline under article 22(1) of Directive 2008/50, the fact that an air quality plan which complies with the second sub-paragraph of article 23(1) of the Directive has been drawn up, does not, in itself, permit the view to be taken that that member state has nevertheless met its obligations under article 13 of the Directive.

A "3. Where a member state has failed to comply with the requirements of the second sub-paragraph of article 13(1) of Directive 2008/50 and has not applied for a postponement of the deadline as provided for by article 22 of the Directive, 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 B in accordance with the conditions laid down by the latter."

8 The parties have made written and oral submissions on the appropriate response to the CJEU decision. In summary, Mr Ben Jaffey for ClientEarth invites the court: (i) to confirm, in accordance with their interpretation of the CJEU judgment, that the article 22 time extension C procedure was mandatory, and to quash the existing air quality plan which was prepared under an error of law in that respect; (ii) to direct the production within three months of a new air quality plan under article 23(1) demonstrating how the exceedance period will be kept "as short as possible", and complying with the additional and stricter requirements of Annex XV, Section B.

9 In response Miss Kassie Smith QC for the Secretary of State submits D that the correct interpretation of the CJEU decision is that the article 22 procedure was not mandatory, and that, given the stated intention of the Secretary of State to prepare updated plans by the end of the year, no further relief is necessary or appropriate.

The Commission's submissions to the CJEU

E 10 There was no Advocate General's opinion in this case to provide background to the court's characteristically sparse reasoning. However, the European Commission had presented detailed observations, which help to fill the gap. Their submission contains a valuable discussion of the legal and factual background to the relevant provisions of the Directive and their objectives, before giving the Commission's proposed responses to the referred questions. They give a much clearer answer to the first two F questions than the court—ostensibly in favour of the Government, but in terms which may be regarded as making it a somewhat Pyrrhic victory in its practical consequences. Their answers to the third and fourth questions are in substance the same as those given by the court, in essence for the same reasons albeit more fully stated.

11 The Commission explained that the limit values for nitrogen dioxide G were previously defined in Council 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 (OJ 1999 L163, p 41), which also fixed the date for compliance at 1 January 2010. In that respect the 2008 Directive made no change. However, a review in 2005 had shown that compliance would be problematic for a significant number of states. In recognition of this, the 2008 Directive introduced, in article 22, the H possibility of an application for an extension of up to five years, subject to "a number of substantive requirements and procedural safeguards" (para 22), and subject to approval and supervision by the Commission. Although the choice of measures was left to member states, Annex XV, Section B lays down a new requirement for "a very detailed scientific

examination and consideration of all available measures", and entailing "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" (para 25).

12 Article 22 was thus conceived as "derogation, albeit one subject to significant procedural and substantive requirements and safeguards" (para 27). Where a member had not applied for derogation for particular zones, but the limits were exceeded, then article 13 was breached and article 23 applied. The Commission pointed out that in such cases, the state would have been already bound to take all necessary measures to secure compliance by January 2010, and would have had 11 years (from 1999) to do so:

> "In the Commission's view, therefore, the second sub-paragraph 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)EU, where a member state is already in breach of Union law and is already bound to remedy that breach." (Para 34.)

13 In the Commission's view, article 22 was "the only lawful solution offered by the legislator to member states facing a problem of compliance" (para 37). They stressed the "key point" that air quality plans produced under article 22 have to meet the stricter conditions laid down by Annex XV, Section B:

> "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." (Para 39.)

14 Commenting on the compliance situation in the United Kingdom, the Commission observed that there appeared to have been a choice of "less expensive and intrusive measures" than those that would be required to put an end "to a string of continuous breaches of the limit values". The plans submitted showed that for the relevant zones "the UK only expects compliance to be achieved for each zone between 2015 and 2020 or even between 2020 and 2025 (London)" (para 43).

15 In answer to the first two questions, the Commission expressed the view that the article 22 procedure was not mandatory, but was foreseen as "an optional derogation" for member states to obligations that already existed (para 48). The consequence was that the United Kingdom was not obliged, in terms of article 4(3)EU, to apply for a derogation; but rather it was obliged to adopt all necessary measures to put an end to the infringement of article 13 as soon as possible. The infringement for article 13 resulted, not from its decision not to apply for a derogation, but from its failure to adopt adequate measures to achieve compliance by January 2010 (para 53).

16 With regard to the third question (the relationship between articles 13 and 23), the Commission emphasised that, if the state chose not to apply

for derogation under article 22, it remained under a mandatory obligation under article 23 to prepare air quality plans showing measures appropriate to keep the exceedance period "as short as possible". Noting "the emergency character" of plans drawn up under the second sub-paragraph, it commented on the relevance of Annex XV, Section B, at para 62:

> "The obligation in the second sub-paragraph of article 23(1), in the case of exceedances 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 Annex XV, Section B, will have to tackle any problems in concreto, for each zone."

In other words, the obligation under article 23(1) was not less onerous than Annex XV, Section B, but more specific. As the Commission observed: "It would be perverse if article 23(1) were treated as requiring a lesser effort from member states than article 22" (paras 64).

17 The Commission also noted ClientEarth's concerns that the plans submitted by the United Kingdom "were simply not ambitious enough" (para 65) to address the problem in as short a time as possible. This view seemed to be confirmed by Mitting J's observation in the High Court that a mandatory order would "impose upon taxpayers and individuals a heavy burden of expenditure which would require difficult political choices to be made": [2012] Env LR 392, para 15. The Commission noted the European court's rejection of similar arguments of "impossibility" in a line of cases under the air quality Directives, beginning with *Commission of the European Communities v Italian Republic* (Case C-68/11) (unreported) 19 December 2012; and, by analogy, in an earlier series of cases relating to Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water (OJ 1976 L31, p 1), beginning with *Commission of the European Communities v United Kingdom* (Case C-56/90) [1993] ECR I-4109. The Commission observed: "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" (para 79).

18 In line with these observations, the Commission's answer to the third question was that, where a member state finds itself in breach of article 13, it may either request and obtain a derogation under article 22, or comply with article 23(1) by preparing plans to bring the breach 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 [of] article 23(1) of the Directive, alongside article 4(3)EU." (Para 84.)

19 With regard to the fourth question (the duty of the national court), the Commission noted that the United Kingdom's claim that it was not possible to achieve earlier compliance had not yet been tested in the national court. It regarded this as "a particularly serious question" where there was an established breach of article 13 "resulting in a clear and grave hazard to human health" (para 87). It reviewed the authorities on the right of individuals to invoke Directives before national courts, and the duty of the latter to provide appropriate remedies for their breach. It was the duty of national courts to ensure that those directly concerned by a violation of article 13 were in a position to require the competent authorities either to seek and obtain a derogation under article 22, or, if they chose not to do so, to adopt and communicate to the Commission air quality plans, compliant with article 23(1), so as to deal with the specific problems in the relevant zones as swiftly as possible (para 113).

Non-compliance—the present position

20 Before discussing the proposed responses to the CJEU decision, it is appropriate to record the present position in respect of compliance with the Directive, as summarised in the frank and helpful evidence of Jane Barton on behalf of the Secretary of State. The latest information, published in July 2014, shows a significant deterioration since the case was last before the court (and as compared to the information considered in the Commission's submission):

> "In July 2014, the UK Government published updated projections for concentrations and expected dates for compliance with the annual mean limit values in the Air Quality Directive . . . These projections showed that compliance would be achieved later than previously projected. The previous projections for NO_2 published in September 2011 . . . show 27 zones compliant by 2015, 42 zones compliant by 2020 and all 43 zones compliant by 2025. The updated projections up to 2030 show five out of 43 zones compliant by 2015, 15 zones by 2020, 38 by 2025 and 40 by 2030. The remaining three zones would not be compliant by 2030 (Greater London Urban Area, West Midlands Urban Area and West Yorkshire Urban Area)."

21 It is fair to add that the failures of compliance are not confined to the United Kingdom. Analysis of 2013 air quality compliance data reported by member states indicated that 17 member states reported exceedances of the hourly mean limit value. One of the reasons for the worsening position is said to be failure of the European vehicle emission standards for diesel vehicles to deliver the expected emission reductions of oxides of nitrogen. Ms Barton explains:

> "The main reason for this is that the real world emission performance of a vehicle has turned out to be quite different to how the vehicle performs on the regulatory test cycle. Vehicles are emitting more NOx than predicted during real world operation. This disparity has meant the expected reductions from the introduction of stricter euro emission standards have not materialised. In fact, as is recognised in the new Clean Air Programme for Europe, average real world NOx emissions from Euro

A 5 diesel cars type-approved since 2009 now exceed those of Euro I cars type-approved in 1992."

She adds that this is a problem which cannot easily be addressed by individual member states, since they cannot unilaterally set stricter vehicle emission standards than those set at EU level. The European Commission, with the support of the UK Government, has made a proposal to introduce a B new test procedure from 2017 to assess NOx emissions of light-duty diesel vehicles under real world driving conditions.

22 Even if some aspects of the problem may be affected by matters beyond the control of individual states, this has not led to any loosening of the limit values set by the Directive, which remain legally binding. In February 2014, the Commission launched a formal infringement C proceeding against the UK for failure to meet the nitrogen dioxide limit values. It is not clear why for the moment only the UK has been selected for such action. It may have been triggered by the declaration made by this court in 2013, which was referred to in the Commission's press release, and the detailed consideration given by the Commission in connection with the CJEU case. Without sight of the correspondence with the Commission (which is said to be confidential), it is not possible to comment on the scope D of that action or its likely timing and outcome. However, as is clear from the answer to the fourth question, any enforcement action taken by the Commission does not detract from the responsibility of the domestic courts for enforcement of the Directive within this country.

23 It is in any event accepted by the Secretary of State that the air quality plans which were before the court in 2011 will need to be revised to take account of the new information, and of new measures to address the E problems. It is intended that these should be submitted to the European Commission, following consultation, by the end of this year. It is estimated that on average around 80% of nitrogen dioxide emissions at sites exceeding the EU limit values come from transport, so that developing effective transport measures is regarded as a key priority for work and investment. According to Ms Barton, the Government has since 2011 committed over F £2bn in measures to reduce transport emissions. Other initiatives are being developed at local level. One example is what she describes as a "game-changing" proposal by the Mayor of London, published on 27 October 2014, for an "Ultra-Low Emission Zone" (ULEZ) in central London from 2020. One of the issues for consideration in the appeal is whether these proposals should be taken on trust, or should be subject to some measure of G court enforcement.

Discussion

24 These proceedings were commenced in July 2011, shortly following the publication in June of air quality plans for consultation under article 23, which included an indication of the zones for which the Secretary of State did not intend to apply under article 22 because compliance within the H extended time limit was considered impossible. At that time the possibility of an effective application under article 22 for a postponement to January 2015 remained a live issue, at least in theory. It is understandable therefore that the focus of the claim was on that article. Unfortunately, the time taken by the proceedings, including the reference to the CJEU, has meant that

article 22, with one possible exception, is of no practical significance. An extension to January 2015, the maximum allowed under that article, is of no use to the Secretary of State. Indeed, it may have been in anticipation of this position that the CJEU felt able to avoid a direct answer.

25 The possible exception relates to the requirements of Annex XV, Section B, which would apply to a plan produced under article 22, but not, in terms, under article 23. However, the difference is more apparent than real. The purpose of the listed requirements under article 22 appears closely related to the procedure envisaged by the article, which involves approval and supervision by the Commission. As the Commission explained, the requirements of article 23(1) are no less onerous, but may be more specific than those under article 22. They are also subject to judicial review by the national court, which is able where necessary to impose such detailed requirements as are appropriate to secure effective compliance at the earliest opportunity. A formulaic recitation of steps taken under the long list of Directives in paragraph 2 of Section B may be of little practical value. Mr Jaffey realistically limited his claim to paragraph 3 of Section B, which he described as a "checklist" of measures which had to be considered in order to demonstrate compliance with either article. I agree with that approach, but do not regard it as necessary to spell it out in an order of the court.

26 In those circumstances I need comment only briefly on the court's answer to the first two questions. As already noted, the problem with the court's reformulation was that it introduced ambiguity in both question and answer. The court did not say whether the state was or was not obliged to make the application; but simply that it was obliged to so "in order to be able to postpone . . . the deadline specified by the Directive". This formulation appeared to start from the assumption that the state was seeking to extend the deadline, and to leave open the question whether it was obliged to do so. On the other hand, the concluding statement that "Directive 2008/50 does not contain any exception to the obligation flowing from article 22(1)" might be thought to imply an unqualified obligation in all circumstances.

27 Before this court, both counsel have bravely attempted their own linguistic analysis of the reasoning to persuade us that the answer is clearer than it seems at first sight. I am unpersuaded by either. Understandably neither party wanted us to make a new reference, although that might be difficult to avoid if it were really necessary for us to reach a determination of the issues before us. If I were required to decide the issue for myself, I would see considerable force in the reasoning of the Commission, which treats article 22 as an optional derogation, but makes clear that failure to apply, far from strengthening the position of the state, rather reinforces its essential obligation to act urgently under article 23(1), in order to remedy a real and continuing danger to public health as soon as possible. For the reasons I have given I find it unnecessary to reach a concluded view.

28 The remaining issue, which follows from the answers to the third and fourth questions, is what if any orders the court should now make in order to compel compliance. In the High Court, Mitting J considered that compliance was a matter for the Commission:

> "12. . . . If a state would otherwise be in breach of its obligations under article 13 and wishes to postpone the time for compliance with that obligation, then the machinery provided by article 22(1) is available to it,

A but it is not obliged to use that machinery. It can, as the United Kingdom Government has done, simply admit its breach and leave it to the Commission to take whatever action the Commission thinks right by way of enforcement under article 258 of the Treaty on the Functioning of the European Union."

The Court of Appeal adopted the same view. That position is clearly
B untenable in the light of the CJEU's answer to the fourth question. That makes clear that, regardless of any action taken by the Commission, enforcement is the responsibility of the national courts.

29 Notwithstanding that clear statement, Miss Smith initially submitted that, in the absence of any allegation or finding that the 2011 plans were as such affected by error of law (apart from the interpretation of
C article 22), there is no basis for an order to quash them, nor in consequence for a mandatory order to replace them. I have no hesitation in rejecting this submission. The critical breach is of article 13, not of article 22 or 23, which are supplementary in nature. The CJEU judgment, supported by the Commission's observations, leaves no doubt as to the seriousness of the breach, which has been continuing for more than five years, nor as to the
D responsibility of the national court for securing compliance. As the CJEU commented, at para 31:

> "Member states must take all the measures necessary to secure compliance with that requirement [in article 13(1)] and cannot consider that the power to postpone the deadline, which they are afforded by article 22(1) of Directive 2008/50, allows them to defer, as they wish,
E implementation of those measures."

30 Furthermore, during the five years of breach the prospects of early compliance have become worse, not better. It is rightly accepted by the Secretary of State that new measures have to be considered and a new plan prepared. In those circumstances, we clearly have jurisdiction to make an order. Further, without doubting the good faith of the Secretary of State's
F intentions, we would in my view be failing in our duty if we simply accepted her assurances without any legal underpinning. It may be said that such additional relief was not spelled out in the original application for judicial review. But the delay and the consequent change of circumstances are not the fault of the claimant. That is at most a pleading point which cannot debar the claimant from seeking the appropriate remedy in the
G circumstances as they now are, nor relieve the court of its own responsibility in the public interest to provide it.

31 In normal circumstances, where a responsible public authority is in admitted breach of a legal obligation, but is willing to take appropriate steps to comply, the court may think it right to accept a suitable undertaking, rather than impose a mandatory order. However, Miss Smith candidly accepts that this course is not open to her, given the restrictions imposed on
H Government business during the current election period. The court can also take notice of the fact that formation of a new Government following the election may take a little time. The new Government, whatever its political complexion, 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.

32 Although Mr Jaffey initially pressed for a shorter period than that proposed by the Secretary of State, he made clear that his principal objective was to secure a commitment to production of compliant plans within a definite and realistic timetable, supported by a court order. In the circumstances, I regard the timetable proposed by the Secretary of State as realistic. There should in any event be liberty to either party to apply to the Administrative Court for variation if required by changes in circumstances.

33 Finally, I should mention a further important issue which we have not been called upon to determine as part of these proceedings, but which may well arise in connection with the new plans. This concerns the interpretation of the words "as short as possible" in article 23(1). The judgments of the CJEU noted by the Commission (para 17 above), in particular the *Italian Republic* case 19 December 2012 (relating to the precursor of article 13 itself) indicate that the scope for arguing "impossibility" on practical or economic grounds is very limited. Miss Smith sought to distinguish the *Italian Republic* case, on the grounds that it related to article 13, not article 23. Mr Jaffey objects that this argument takes insufficient account of the direct relationship between the two articles, as underlined by both the Commission and the CJEU. If this remains an issue in relation to the new air quality plans, when they are published for consultation, it may call for resolution by the court at an early stage to avoid further delay in the completion of compliant plans.

34 That is a further factor which makes it desirable that the new plans should be prepared under a timetable approved by the court, with liberty to apply for the determination of such issues as and when they arise in the course of the production of the plan, without the need for the expense and delay of new proceedings.

35 For these reasons, I would allow the appeal. In addition to the declaration already made, I would make a mandatory order requiring the Secretary of State to prepare new air quality plans under article 23(1), in accordance with a defined timetable, to end with delivery of the revised plans to the Commission not later than 31 December 2015. There should be provision for liberty to apply to the Administrative Court for variation of the timetable, or for determination of any other legal issues which may arise between the present parties in the course of preparation of the plans. The parties should seek to agree the terms of the order, or submit proposed drafts with supporting submissions within two weeks of the handing down of this judgment.

Appeal allowed.

JILL SUTHERLAND, Barrister