

# AIR QUALITY - 2017

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Legal Briefings

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The quality of the air we breathe remains a hot topic for 2017. A series of legal and political developments have catalysed growing concern among the public towards the health risks of air pollution, especially in urban areas. In this article, we consider the key topics and how businesses may be impacted.

## The problem

Concerns over air quality are not new – the Great Smog across London in 1952 led to the Clean Air Act 1956 and there are earlier legal precursors. Measures put in place were assumed to have solved the issue without perhaps an adequate amount of regulatory attention to ongoing monitoring of their effectiveness. Instead they have been caught short by technological change and particularly the mushrooming of urban traffic congestion and perverse (albeit well-intentioned) incentives for consumers to own diesel cars.

The bubble was essentially burst by court action brought by ClientEarth plus the VW 'Dieselgate' emissions scandal, which have together precipitated regulatory risk, whereby we await new policy proposals in a revised national air quality plan to be issued. The UK is simultaneously under threat of legal proceedings before the European Court of Justice for failure to meet relevant EU limits in 16 areas of the country.

We round-up in this article the principal developments to watch and suggest how they might play out.

## 1. ClientEarth (No.2) decision

On 2 November 2016, the High Court ruled that DEFRA's national air quality plan was insufficient to achieve the EU air quality limits for nitrogen dioxide in the shortest possible time.

The EU Air Quality Directive 2008 sets out the limit values for particular pollutants for the protection of human health. Where the limit values are exceeded, the Government is required to prepare an air quality plan which includes measures to achieve compliance within the shortest possible time. DEFRA must publish a new air quality plan for submission to the European Commission ("EC") by 31 July 2017. It has committed to issue it for public consultation first by 24th April.

The EC also recently issued a final warning (a reasoned opinion) to the UK (along with Germany, France, Spain and Italy) to adopt and implement a plan to bring 16 UK air quality zones into compliance as soon as possible. DEFRA has 2 months to respond with appropriate measures it is taking to rectify the issue in order to avoid possible legal proceedings before the EU courts.

### Key takeaways

- Government will have to go substantially beyond the proposals in previous drafts with measures which are objectively assessed as likely to be effective to achieve compliance in a relatively short timeframe. The High Court was clear that such measures need to be taken even if expensive. However, the exact nature of proposals poses considerable uncertainty.
- We expect more widespread use of low emissions zones and more incentives for charging infrastructure for electric vehicles. Businesses which involve transport logistics through larger UK cities may need to upgrade vehicle fleets.
- Additional measures to reduce emissions from inner city construction sites could be imposed.

## **2. Volkswagen emissions tests scandal and diesel cars**

Road transport, particularly in high density urban areas, has been identified as a key source of air pollution. Four recent transport-related developments are of note:

- The legal fallout from the Volkswagen ("VW") diesel emissions scandal continues to unfold. In the US and Canada, VW has agreed to a buyback scheme, compensation payments and fines. In the UK however, VW so far has refused to admit to its liability to pay compensation. In December 2016, the EC issued a formal notice to the UK Government for failure to prosecute VW for its role in cheating emissions tests. A group of affected car owners has also sought a group litigation order at the High Court seeking

compensation of up to £3.6bn for being misled about the fuel emissions and efficiency of the diesel cars they purchased.

- The Private Member's Clean Air Bill is to have its second reading in the House of Commons on 12th May 2017. The Bill seeks to lower vehicle diesel emissions by fixing new air quality targets in urban areas and establishing low diesel emissions zones and pedestrian-only areas, alongside aspirational aims of promoting urban public transport powered by electricity or hydrogen.
- The Department of Transport announced a new £20m fund for 20 firms who designed schemes and new technologies to deploy more low and zero emission vehicles. This new funding is on top of the £290m announced in the 2016 Autumn Statement to promote more widespread use of low emission public and private transport and a £690m competition for initiatives by local government to reduce traffic congestion announced in the Spring 2017 budget.
- From 23 October 2017, all vehicles not meeting the Euro 4 standard will be subject to the T-charge when driving in central London. This is a daily £10 surcharge, on top of the existing congestion charge.

### Key takeaways

- The spotlight is very much on low and ultra low emissions vehicle technology to replace diesel. Alongside these goes the challenge of providing the necessary refuelling/recharging infrastructure and developments in better technology. There are likely to be opportunities for innovation.
- New urban and workplace development projects will increasingly be expected to cater for electric and other low emissions vehicles.
- A diesel car scrappage scheme has been suggested but so far not adopted as Government policy.

### **3. The Heathrow runway expansion**

Following Prime Minister Theresa May's decision to approve the Heathrow expansion in October 2016, four local councils and Greenpeace launched a joint legal challenge on grounds that the expansion will lead to the UK's failure to meet climate change and air pollution standards. This has since been struck out as it was held to be "premature" and the Government must first prepare the National Policy Statement ("NPS").

An NPS for new runway capacity and infrastructure at airports in the south east of England is currently under consultation until 25 May 2017. The current draft states that if Heathrow fails to demonstrate that the expansion will not affect the UK's ability to meet legal air quality requirements, then development consent will be refused. However, the Environmental Audit Committee is critical of the Government's approach and said that "the Government looks set to water down the limits on aviation emissions".

#### Key takeaways

- The ability to demonstrate air quality compliance (against datasets now corrected to account for higher vehicle pollution post Dieselgate) remains an Achilles heel for the Heathrow expansion project in an area of London with existing air quality exceedance.
- Changing the goal posts by lowering the applicable air quality limits post Brexit would be an option unpopular with those who oppose the scheme.

#### **4. Medium Combustion Plant Directive**

The rapid growth in emissions from diesel-fuelled low-cost, small scale flexible power generators in recent years, encouraged in the UK by the electricity capacity market mechanism, has also been identified as a cause for concern necessitating EU-wide action. The Government is expected to transpose the Medium Combustion Plant Directive (the "MCPD") agreed in 2015 into domestic law by December 2017 as required. Over 30,000 medium combustion plants (with 1-50MW rated thermal input) are believed to be affected – these include engines powering heating and cooling in buildings and generating steam in industrial facilities that are not currently caught by the regulations on combustion plant over 50MW. The new legislation will over time require permits, set emissions limits and require operators to test emissions from their plants to demonstrate compliance with emissions limits for both new and existing plant.

Yet the Government's analysis also suggests that the proposed MCPD measures will not be sufficient. It consulted early in 2017 on additional measures to control emissions and is expected to publish its response to the comments received by 8th May 2017.

#### Key takeaways

- Businesses should consider whether they use any equipment within the 1-50MW rated thermal input range. This could include large standby generators.

- The new regulations are not limited to use at industrial facilities.

## **5. Brexit and air quality**

Until exit negotiations are concluded, the UK remains a full member of the EU and is required to negotiate, implement and apply that legislation. The Great Repeal Bill will transpose all EU law existing at the time of Brexit into domestic law. However, there are concerns regarding the practicalities of transposing law that is based on a different interpretative approach, and often refers to EU guidance, other EU legislation and EU bodies. The think-tank IPPR published a report on the same day as the recent ClientEarth (No.2) judgment, which confirms our view that the UK's departure from the EU means that legislation on air pollution limits could be repealed and standards reduced.

The Great Repeal Bill is expected to be introduced at the start of the next parliamentary session in May 2017 and is likely to contain "Henry VIII" clauses granting power to Government Ministers to make changes to "saved" EU legislation to allow it to function. The precise scope for change could end up being wider so as to allow early changes to air quality limits. Alternatively, relaxation of limits could be made through later amendments by Parliament. Note that the EC's Brexit negotiator has already warned the UK against watering down environmental regulation as this may give the UK an unfair competitive advantage.

## **6. Considerations for Business**

Air quality is an important consideration in planning decisions and is relevant where development is: a) likely to affect the air quality in a poor air quality area, b) adversely impact air quality strategies and action plans (which will include the revised air quality plan), and/or c) lead to a breach of legal limits. Air quality is increasingly a cause of objections and challenges. Air quality was the main issue in a judicial review of the planning decision for the Greenwich Port cruise liner terminal and was the reason a recent planning application for 300+ houses in Swale was dismissed.

Local authorities are also obliged under the local air quality management regime to review and assess air quality in their area in light of national emissions limits, and devise air quality strategies and action plans. The recent developments addressed above may increase the pressure on local authorities to further address air quality in local and neighbourhood plans, Merton Council, for example, has taken this step and will be introducing a diesel vehicle levy charge of up to £150 for resident, business or trade parking permits.

For environmental permitting, the need to reduce releases of pollutants to air may result in a re-evaluation of best available technology and a ratcheting down of emissions limits for both new facilities and for existing facilities (through permit variations).

The ability to demonstrate that impacts on air quality have been minimised is likely to become a more important aspect of community relations, especially for facilities in close proximity to schools and hospitals.

As the science develops, it may before long be possible for persons whose health is affected by air pollutants to establish the likely source of those pollutants, raising the prospect of negligence claims. It is therefore increasingly important for businesses with air emissions to carefully consider the potential risk of harm and take steps to manage it.



## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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