R (ON THE APPLICATION OF CLIENTEARTH) v SECRETARY OF STATE FOR THE ENVIRONMENT, FOOD AND RURAL AFFAIRS

SPEECH FOR ECJ

Madam President, Members of the Court,

1. This case concerns the right of European citizens to breathe clean air that will not seriously damage their health. The central question is this: what is the role of national courts in enforcing this right when their governments have breached it?

2. Poor air quality is a major public health problem for the EU causing an estimated 420,000 premature deaths in 2010. The direct and indirect costs of air pollution are estimated by the Commission to be over 330 billion Euros every year across the EU.

3. The UK Government admits in this case that it has failed to comply with limits to the levels of nitrogen dioxide which were first laid down by the EU in 1999, and are now contained in Article 13 of Directive 2008/50/EC, the Air Quality Directive.

4. The UK had more than 10 years' notice of the implementation of these limits. It has been in breach of them since January 2010.

5. The problem is particularly serious in London. Average levels of nitrogen dioxide this year on Oxford Street are currently three and a half times the maximum level permitted by the Directive.

6. But the problem is not confined to London. Yesterday, the UK government released revised projections for compliance with NO2 limits on the basis of its current, 2011, plan. These show that of the 43 zones and agglomerations in the UK, only 15 will comply by 2020. Five are expected to be still non-compliant in 2025. London, Birmingham and Leeds are expected to still be in breach in 2030. In effect, the UK does not foresee any time by which London Birmingham and Leeds will comply on its current plans.

7. The main source of nitrogen dioxide is road traffic pollution, particularly from diesel vehicles. Exposure to traffic pollution causes early deaths and hospital admissions from heart attacks, strokes and respiratory illness such as asthma. The UK's systemic breaches of air quality standards will expose a large proportion of its urban population to harmful levels of nitrogen dioxide for a period of decades. The result will be thousands of avoidable illnesses and deaths.

8. This is not the first time this Court has had to consider non-compliance by the UK with EU environmental legislation. See, for example, Case C-337/89 *Commission v United Kingdom* (drinking water) and Case C-56/90 *Commission v United Kingdom* (bathing water). The pattern is a familiar one: the UK is given ample advance notice of environmental standards. It does very little (or nothing) until shortly before the final deadline. It then claims that timely compliance is impossible and would have adverse economic consequences.

9. This Court's response has been clear and principled: EU

environmental law standards are agreed and brought into force

after careful consideration and balancing of their feasibility, costs, and the overriding importance of safeguarding human health. It is not for a Member State to disregard them. The UK should not be permitted benefit from its choice to delay in implementing standards until the last moment. This would give it an unfair advantage over states which have made the effort, and incurred the costs, of loyal cooperation and the proper implementation of EU law

10. Neither can the fact that some other Member States have also failed to comply justify non-compliance by the UK. That too is a familiar picture, as the Commission has pointed out in its written observations, by reference to bathing water.

11. In any event, other Member States have taken early action to address diesel emissions which the UK has chosen not to take. As a result, they have significantly reduced their levels of nitrogen dioxide and are projected to achieve compliance with the Directive many years earlier than the UK.

12. Neither is non-compliance justified by the fact that the Commission has recognised compliance difficulties and offered assistance to Member States. Unless and until the Directive is amended by the EU legislature, Member States are obliged to comply with it. The Commission has, in fact, recently adopted a proposal for a new package of EU legislation on air pollution emissions: that package makes no change to the existing nitrogen dioxide limit values.

13. The reality is that, having been unsuccessful in seeking amendments to the Directive in relation to nitrogen dioxide, the UK now seeks to be permitted to disregard its obligations, and to violate the limits set down by EU law with impunity. It contends that the national courts ought not to take action to prevent it from acting in this way, because of the costs of compliance. This approach undermines the rule of law.

14. The UK highlights in its written observations the claim that technical problems with European emissions standards for diesel vehicles have contributed to its compliance problems. Our response is as follows:

    a. This issue is not before this Court. The national courts have not ruled upon it. It does not feature amongst the particular questions on the interpretation of EU law referred to this Court by the UK Supreme Court;

    b. In any event, this Court has ruled in the case of *Commission v Italy* (Case C-68/11) that a breach of binding Directive limit values cannot be justified by a failure of EU policies to deliver anticipated reductions in pollution;

    c. Finally, the UK has known about these issues since at least 2007, but has taken no meaningful action in response. On the contrary, current UK tax policy exacerbates the problem by incentivising the purchase of diesel vehicles, despite clear evidence that they are more

polluting than petrol. In 2000, only 14% of new cars sold in the UK were diesel. By 2010 this had risen to 46%

The questions referred

The first two questions referred relate to the Article 22 extension procedure. Given that the final date for any such extension, 1 January 2015, is imminent, those questions are now of limited relevance. We therefore focus our oral submissions on the third and fourth questions.

The Third Question

15. Article 23 applies to the present case because the limit values for nitrogen dioxide have been exceeded by the UK, and no Article 22 extension has been sought.

16. The second subparagraph of Article 23(1) requires the UK to establish an air quality plan setting out a comprehensive range of additional measures to ensure that the exceedance period is kept as short as possible.

17. The purpose of the Directive would be undermined if Article 23 was interpreted so as to provide an easy way out for a Member State which has failed to comply with Articles 13 and 22.

18. There are five key points about the measures which must be included in a plan under Article 23.

19. First, the plan must be *comprehensive*: it must include all scientifically feasible measures to bring the infringement to an

end in the shortest time possible. It must be at least as rigorous as a plan submitted under Article 22.

20. Second, and contrary to the suggested approach of the UK Government, there is *no exception or limitation* in Article 13 for undesirable economic costs, or perceived political disadvantages. These factors were taken into account by the legislature when the limit value was set in 1999, and when it was reaffirmed in 2008, and applied equally to the whole of the EU. The limit value set was the maximum level judged permissible, in order to safeguard human health. It is not for a member state to second guess the legislative judgment that has already been made. The obligation under Article 13 is not qualified or conditional. In this regard it contrasts with the duty in Article 17 to take only those measures to attain *target* values which do not entail disproportionate cost.

21. Third, air quality plans must contain *formal commitments* to implement measures, and not mere aspirations. A promise to investigate a measure is insufficient.

22. Fourth, there must be a *clear timetable*. That timetable must commit to measures being implemented as soon as possible.

23. Fifth, the measures set out in a plan to ensure compliance in the shortest possible time must be *additional* to those measures that are already in place.

24. The plan prepared by the UK does not meet these requirements:

a. It contains only one additional measure: “investigating the feasibility” of a national framework for low emission zones.

b. No formal commitment was made even to the one additional measure identified.

c. No timetable was set for its implementation. Three years later, no national framework has been adopted. London remains the UK’s only low emission zone. By contrast, Germany now has 48 low emission zones in place.

d. A large number of other possible measures were excluded from the plan on the basis of an arbitrary cost limit of £80,000 per tonne.

25. Even the London zone has been inadequately implemented. An essential component of a national low emission zone framework is a certification scheme for vehicle retrofit equipment. Because of the Government’s failure to establish such a scheme, the Mayor of London was forced to cancel the next phase of the London low emission zone, which would have applied nitrogen oxides emissions standards to all heavy duty vehicles from 2015. Now phase 5 of the zone will only apply to London buses, leaving nitrogen dioxide emissions from heavy goods lorries and coaches unregulated. By contrast, Germany’s low emission zones set standards for all vehicles.

26. The national framework was one of 14 national measures identified by the Mayor of London in his 2010 Air Quality Strategy as requiring Government implementation, in order to achieve compliance with the Directive by 2015. Most of these measures have not been implemented.

The fourth question

27. The fourth question is of central importance. Despite the UK's admission of a breach of Article 13, the High Court and the Court of Appeal both declined to give any remedy in this case. While the UK Supreme Court made a declaration confirming the admitted breach of Article 13, it has not yet granted any relief to require the UK Government to meet its legal obligations.

28. The approach of the lower courts was said to be justified because the grant of relief raised complex political and economic questions, and would impose costs. As we have explained, such an approach fundamentally misunderstands the legislative scheme The hard political and economic judgments were taken at European level when the obligations in the Directive were formulated and reaffirmed. It is for national Governments and national courts loyally to enforce them, not to seek to reopen them. The UK has failed to persuade the EU to amend the legislation. It ought not in that situation be permitted to refuse to comply with it.

29. Neither does the fact that infraction proceedings have been commenced by the Commission relieve the national courts of

their independent obligation to ensure the effective enforcement of EU law.

30. In any event, infraction proceedings will take several years, and thus cannot ensure the effective protection of the rights of UK citizens in this case.

31. . The declaration made by the UK Supreme Court in 2013 has done nothing to improve Britain's air quality. No new plan has been produced and compliance is still not anticipated before 2025.

32. Though the precise form of the remedy is for the national court, it must, in this case, include as a minimum mandatory relief, requiring the UK to produce a plan which complies with Article 23; provision for the review of the adequacy of the plan produced in response to the Court's order; and the imposition of financial sanctions of a sufficient size to deter further breaches.

33. Only mandatory sanctions imposed by the national court can bring the admitted breaches of the Directive in this case to an end in the shortest possible time, and give effect to the right of UK citizens to breathe clean air.

[ends]