

Informative note

## Cancellation of BAT Conclusions on large combustion plants

8th February 2021

The judgment of the General Court admits an appeal on points of law before the Court of Justice

The recent judgment of 27th January 2020 of the General Court has annulled Commission Implementing Decision (EU) 2017/1442 of 31st July 2017 setting out Best Available Techniques (BAT) conclusions for large combustion plants ("**BAT Conclusions for LCPs**").

The Republic of Poland brought an appeal against the BAT conclusions for LCP before the General Court. The appeal was based on the following arguments:

- (i) According to the application, the Implementing Decision was not adopted in compliance with the qualified majorities required by Article 3(2) and (3) of Protocol No 36 under the Nice Treaty.
- (ii) The Republic of Poland argued that the emission levels associated with best available techniques (NES-BAT) for NO<sub>x</sub>, Hg and HCl, as well as certain NES-BATs applicable to installations with an annual operation of less than 1,500 hours, had been imposed based on incorrect and unrepresentative information and were in breach of the principle of proportionality.
- (iii) Finally, the Republic of Poland questioned the legality of exemptions granted to certain island regions and the application of NES-BATs to heavy fuel oil and/or diesel engines.

The General Court upholds the first plea in law. In accordance with Directive 2010/75/EU of the European Parliament and of the Council of 24th November 2010 on industrial emissions (integrated pollution prevention and control) ("**Directive 2010/75**"), the Commission is assisted in drawing up BAT Conclusions by the Committee defined in Article 10 of that directive. On 28th April 2017, a committee meeting was held, at which a vote was taken on the adoption of an opinion on an amendment to the Implementing Decision. The vote was held under the voting rules of Article 16(4) of the Treaty on the Functioning of the European Union ("**TFEU**") and not under those of Article 3(3) of Protocol No 36. Twenty Member States voted in favour representing 65.14% of the population and 71.43% of the members of the committee. Eight Member States, including the Republic of Poland, voted against.

The Republic of Poland was able to request until 31st March 2017 under Article 3(2) of Protocol No. 36 that the vote be conducted in accordance with the qualified majority system and the



weighting of votes contained in paragraph 3 of that Article. The request was made on 30th March 2017. The Commission argued in the procedure that both the request and the vote had to take place before 31st March 2017 for Member States to benefit from the voting rules contained in Article 3(3) of Protocol No 36.

The General Court accepts the Republic of Poland's argument and adds that, in accordance with the rules laid down, the threshold number of votes required would not have been reached and the vote would therefore have ended with a different result.

Pursuant to Article 264 TFEU, the General Court temporarily limits the effects of the invalidity in order not to undermine the incorporation into the permits of homogeneous conditions and the high level of environmental protection required by Directive 2010/75.

The judgment orders that the BAT Conclusions for LCP continue to have effect until the entry into force of a new Implementing Decision replacing the previous one adopted in accordance with the qualified majority and weighting of votes laid down in Article 3(3) of Protocol No 36. The General Court provides that the act must be adopted within a period which may not exceed twelve months from the date of notification of the judgment.

Member States have a period of four years from the publication of the BAT Conclusions to adapt permits to their content and ensure that installations comply with those conditions. On 17th August 2017, the BAT Conclusions for LCPs were published. The deadline for compliance expires on 17th August 2021. Installations will therefore have to adapt to the above conclusions.

In our view, this pronouncement by the General Court may be contentious. The approval of new BAT Conclusions for LCP under the voting system indicated in Article 3(3) of Protocol No. 36 could entail amendments to the Implementing Decision to count on the favourable vote of some or all of the Member States that voted against. It would not be excluded that installations that had made investments to comply with stricter environmental limits would react to a potential Enforcement Decision imposing NES-BATs and other less restrictive conditions.

In any event, the General Court's judgment may be appealed on points of law before the Court of Justice pursuant to Article 256(1) TFEU and Articles 167 et seq. of the Rules of Procedure of the Court of Justice of the European Union.



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