

What are the BAT conclusions and who do they concern?

The BAT conclusions are adopted at the European Union level in the form of decisions based on the Industrial Emissions Directive (IED), separately for the individual industrial sectors regulated by it. They introduce stricter emission levels which installations from a given sector must comply with. This concerns in particular air emissions.

On 27 January 2021 the General Court of the European Union declared the so-called BAT conclusions for large combustion plants annulled. It is worth considering what this ruling really means and what it may mean for the European energy sector.

In July 2017, an extremely important decision for the European energy sector was adopted, i.e. Commission Implementing Decision (EU) 2017/1442 of 31 July 2017 establishing the best available techniques (BAT) conclusions for large combustion plants under Directive 2010/75/EU of the European Parliament and of the Council (OJ 2017, L 212, p. 1). This decision is commonly referred to as the BAT conclusions for LCPs. They apply primarily to combustion of fuels in installations with a total rated thermal input of 50 MW or more. Moreover, this BAT conclusions apply to certain cases of gasification of coal and other fuels in installations with a total rather thermal input of 20 MW of more as well as disposal or recover of waste in waste co-incineration plants. The BAT conclusions for LCP set out restrictive emission limit values for these plants with respect to, amongst other things, dust, SO_x, NO_x, HCL, HF and Hg. Large combustion plants should operate according to the BAT conclusions for LCPs within 4 years of their publication, unless they make use of the possibility of obtaining an exemption. This deadline is 17 August 2021. Compliance with the requirements of the BAT conclusions for LCPs involves substantial capital expenditures. In this context, the attempt to challenge the validity of the BAT conclusions for LCP before the EU court was an attractive possibility, which Poland as one of the EU Member States decided to use. On 11 October 2017, a complaint was filed against the decision establishing the BAT conclusions for LCP. The complaint raised 5 pleas and requested an annulment of the decision. The first plea concerned procedural aspects: in brief, Poland alleged that the voting of the contested decision should have followed different rules than was the case. The next four concerned specific provisions of the BAT conclusions. The second and third pleas were particularly important in the context of the practical application of the BAT conclusions. The point was raised that the emission levels associated with the best available techniques (BAT-AELs) established in the contested decision in respect of nitrogen oxides (NO_x), mercury (Hg), hydrogen chloride (HCl) emissions and certain BAT-AELs applicable to large combustion plants – whose annual operating life is less than 1 500 hours – were set on the basis of incorrect and unrepresentative data and infringe the principle of

proportionality.

Bulgaria and Hungary supported the Polish complaint. Belgium, France and Sweden sided with the Commission.

Judgment of the EU General Court

In its judgment the EU General Court referred only to the first plea concerning procedural aspects. Poland argued that the vote on the adoption of the BAT conclusions for LCP should have been held according to the Nice principles, as it had requested, and not according to the Lisbon principles. The essence of the dispute in this regard comes down to whether, in order to benefit from the application of the qualified majority voting rules under the Nice procedure, it was sufficient for a Member State to submit an application in this regard by 31 March 2017, or whether it was also necessary for the vote in question to take place within that period. Poland submitted its application within this deadline, but the vote itself on the BAT conclusions for the LCP took place later. If the Nice system had been applied, according to the approach presented by Poland, a sufficient majority would not have been gathered to adopt the BAT conclusions for LCP four years ago.

In considering this doubt, the General Court conducted an extensive contextual, teleological and historical analysis. Taking all these circumstances into account, the General Court held that for the Nice procedure to be applied it was sufficient that a Member State had submitted its motion within the allotted time limit, and therefore the vote on the BAT conclusions for the LCP should have taken place under the Nice procedure as Poland had requested it.

Accordingly, this plea by Poland was upheld in its entirety and, consequently, the decision establishing the BAT conclusions for LCP was annulled on account of an infringement of the rules governing the voting procedure, without it being necessary to examine the other pleas.

Postponement of the annulment

Whilst annulling the BAT conclusions for the LCP, the General Court has maintained their effects until a new act enters into force – within a reasonable period – to replace them. This reasonable period cannot exceed twelve months from the date of delivery of the judgment. The new conclusions are to be adopted in accordance with the qualified majority under the Nice system.

In the Court's view, this postponement of the effects of the annulment was dictated by the potential threat to the uniform conditions of granting the integrated permits on the basis of the annulled BAT conclusions in the Member States, legal uncertainty, and the objectives

pursued by the BAT conclusions of ensuring a high level of environmental protection and improving environmental quality.

What next?

Given all the circumstances of the case, various scenarios are possible at this stage. First of all, the judgment in question is a judgment of the EU General Court, which means that an appeal to the EU Court of Justice is still possible. The appeal must be confined to matters of law, which means that the appeal may be based on a lack of jurisdiction of the EU General Court, on a breach of procedure before the EU General Court which adversely affects the interests of the appellant, or on an infringement of EU law by the EU General Court. An appeal does not suspend the effect of a judgment that has already been delivered. Such an appeal could be brought by the Commission. If the appeal is well-founded, the Court of Justice of the EU may set aside the judgment of the EU General Court and give its ruling on the case or refer the case back to the EU General Court.

However, the Commission may refrain from filing the appeal and focus on adopting new BAT conclusions for the LCP. If the Commission succeeds in doing this within the period for which the effects of the existing BAT conclusions for LCPs have been maintained (i.e. by 27 January 2022 inclusive, at the latest) and, in addition, they have the same content as the annulled ones, except that they are adopted by a different majority, the situation will in fact remain unchanged for operators of installations.

However, as Member States do not agree on the content of the BAT conclusions for LCPs, there is a risk that the new conclusions will not be adopted on time. In that case, the BAT conclusions for LCPs will no longer be valid after 27 January 2022.

Impact on LCP operators

First of all, it is worth pointing out that while the formal plea proved to be the path to victory in this case, the key issue for LCP operators is the content of the BAT conclusions for LCPs, including the stringent BAT-AELs. Unfortunately, the EU General Court has been completely silent on this issue. Therefore, it cannot be ruled out that any new BAT conclusions for LCPs will contain similar solutions in this respect (provided, of course, that the necessary majority of votes is obtained for such solutions), and therefore investments in LCPs will still be necessary in order to meet the stringent BAT-AELs requirements.

Looking now at the situation of operators of particular LCP installations, it should be noted that the deadline for adjusting installations to meet the BAT conclusions for LCPs is 17 August 2021, and this date falls within the period for which the EU Court upheld the BAT

conclusions for LCPs. Therefore, at this point in time, the judgment should not have any impact on the pending proceedings on changes to integrated permits or on the adjustment to meet the BAT conclusions for LCP.

On the other hand, new possibilities to act will arise if new BAT conclusions are adopted for LCP, but with a different content than the annulled ones, and even more so in a situation in which no BAT conclusions for LCP are adopted in the next 12 months. The question will certainly arise as to whether installations that have complied with the BAT conclusions for the LCP should continue to operate with the restrictions arising from those conclusions or whether they should challenge the existing content of their integrated permits, which reflect the content of the rescinded BAT conclusions for the LCP. It will be necessary to consider what compensation possibilities such a situation raises in the context of those operating installations which have incurred substantial capital expenditures in order to comply with the existing BAT conclusions for LCP.

However, operators of those installations which have not yet complied with the BAT conclusions for LCP, may now undertake intensive analysis as regards further strategy. Of course, each situation will have to be considered individually to fully assess the opportunities arising from the judgment of the EU General Court.

As can be seen, the practical consequences of this judgment can be varied and difficult to predict. For the time being, operators of LCP installations are not exempt from the obligation to bring their installations into line with the BAT conclusions covered by the judgment. This concerns all EU countries, but in practice it impacts CEE to a larger extent. Nevertheless, all operators should follow the further developments of the BAT conclusions for LCPs.

Source: cms-lawnow.com