



Memorandum

From

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To

DEBRIV – German Lignite Association

Copy

EURACOAL – European Association for Coal and Lignite

Date

24 May 2017

Berlin

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Doc ID

DAC24261738/3

Our Ref

167869-0002

LCP BREF: Vote of Art. 75 Committee null and void

On 28 April 2017, the IED Article 75 Committee (the *Committee*) voted on the Draft Implementing Decision of the European Commission (the *Commission*) establishing Best Available Techniques (*BAT*) Conclusions for Large Combustion Plants (*LCP*). The Committee delivered an affirmative opinion by a very close margin. This vote and its formation, however, violate essential procedural provisions and infringe rights of the Member States granted under Art. 291(2), (3) TFEU.

Hence, unless a vote of the Committee is duly repeated, the Committee’s opinion does not allow the Commission to adopt any implementing decision on LCP BAT Conclusions. Currently, no implementing decision establishing LCP BAT Conclusions can be adopted by the Commission.

Reportedly, at the Committee Meeting on 28 April 2017, shortly before taking the vote, the Commission (as chair of the Committee) distributed a last-minute amendment to the draft BAT Conclusions. The BAT Conclusions themselves had been submitted to the members of the Committee weeks ahead of the meeting. Also prior to the meeting, several Member States had raised serious and well-founded objections vis-à-vis the Commission against the draft implementing decision. The last-minute amendment distributed on 28 April 2017 provides for changes to the scope of the BAT Conclusions to the effect that heavy fuel oil (HFO) and/or gas oil fired engines operated on islands that are part of isolated transmission systems shall be exempted from the BAT-AELs until 2025 (new engines) and 2030 (existing engines), respectively. This carefully tailored exemption satisfies the special interests of a limited number of facilities and countries in which those facilities are operated. No reasoning was provided as to why these facilities should be privileged. Rather, in light of the serious and well-founded objections raised against the draft implementing decision (see our legal opinion dated 15 March 2017), the surprising amendment gives the impression of being an attempt to gain marginal, but decisive additional support for the draft implementing decision from a limited number of countries whose interests were addressed by the amendment. The last-minute amendment seems to aim at creating momentum for an affirmative vote at the Committee meeting and, indeed, the Committee delivered an affirmative vote by the thinnest

margin of 0.14% of the total represented EU population. The Committee's chair reportedly suppressed any debate or discussion on the last-minute amendment and turned down demands to pause the meeting to allow for a more thorough assessment of it. Rather, the chair pushed for an immediate vote.

If true, this remarkable and – to our knowledge – unprecedented incident violates essential procedural requirements as set out by Regulation (EU) No. 182/2011 (the **Regulation**) and the Committee's Rules of Procedure (**RoP**) and infringes rights reserved to the Member States by Art. 291(2), (3) TFEU in the adoption of implementing acts. Moreover, it contradicts the requirements for the development of BAT Conclusions under the Directive 2010/75/EU (**Industrial Emissions Directive**) and the Implementing Decision 2012/119/EU.

- (1) The introduction of the amendment at the meeting **violates mandatory time limits**. For the provision of documents by the chair, Art. 3(3) of the Regulation (EU) No. 182/2011 provides for time limits that are proportionate and shall afford Committee members an early and effective opportunity to examine the draft implementing act and express their views. Art. 3(1) RoP requires the chair to submit the agenda, the draft implementing act and *other documents related to the meeting, in particular documents accompanying the draft*, no later than 14 calendar days before the meeting. It is only in duly justified cases that the chair may shorten the time limit. Except in cases of extreme urgency, the time limit shall not be shorter than 5 days. Given the nature and content of the last-minute amendment, a justification on the basis of extreme urgency beyond the control of the chair appears unlikely. In light of the upcoming vote and the serious and well-founded objections raised against the draft implementing decision, it rather seems that the chair withheld the amendment purposefully to create momentum for an affirmative vote. The Commission thereby would have condoned the obstruction of the Committee members' right to an early and effective examination of the amendment and expression of their views.
- (2) The **chair did not seek the widest possible support within the Committee**. According to Art. 3(4) of the Regulation, the chair shall endeavour to find solutions which command the widest possible support within the Committee. The procedures therefore must be led by a sense of consensus and with special regard to the protection of minorities. This means that a draft version of an implementing act supported by a broad majority should be favoured over a version that achieves support only by thin margin. This mandatory principle apparently did not govern the chair's approach. Satisfying the special interests of a limited number of countries by a carefully tailored exemption instead of addressing the concerns of a broader number of states secured just the minimum threshold for an affirmative vote. Instead of seeking the *widest possible* support, the chair apparently settled for the *minimum necessary* support within the Committee and thus favoured confrontation over consensus. In line with Art. 3(4) of the Regulation the Commission would have been obliged to suggest – in due time ahead of the Committee meeting – amendments to the draft that not just tilt the balance, but reflect the concerns of numerous countries and result in wider support for the draft implementing act.

- (3) The **chair disregarded fundamental principles of the Comitology procedures**. To allow for effective control of the Commission's exercise of its implementing powers by the Member States, the Regulation (see Recital 5) requires procedures that are *clear, effective and proportionate* to the nature of the implementing act. To withhold an amendment of the draft implementing act from Committee members prior to the vote runs contrary to the principles of clarity and transparency. It inherently raises the question whether selected Committee members were made aware of the amendment earlier or had a chance to comment on it beforehand. If need be, these questions have to be clarified on the basis of information requested and provided in accordance with Regulation (EC) No 1049/2001 regarding the public access to EU documents. To introduce a potentially decisive amendment at the last minute deprives the Committee members of sufficient time to assess the changes introduced. To suppress any debate on the amendment then strips the Committee members of the opportunity to sufficiently express their views. Both precludes the Member States from effective control of the Commission's exercise of its implementing powers. To introduce an amendment in the last minute which appears to be intended to tilt the outcome of the vote is also in no way proportionate to the nature and significance of BAT Conclusions, irrespective of the extent of changes the amendment actually brings with it. As BAT Conclusions define the emission levels for all industrial plants within their scope for many years, corresponding Commission implementing acts have an immense impact on both plant operators and the Member States and their industrial and environmental policy. The significance of BAT Conclusions is reflected by the requirement of an examination procedure under the Regulation that, in contrast to the usual advisory procedure, provides the Member States with a significantly more dominant role.
- (4) Consequently, given the violation of essential procedural requirements under the Regulation, the action of the Committee's chair **infringes rights of the Member States** granted under Art. 291(2), (3) TFEU. The Commission may only exercise conferred implementing powers within the limits of Art. 291(2), (3) TFEU, i.e. if in the interest of the Member States effective control mechanisms are installed and de facto respected in good faith. The surprising last-minute amendment and the suppression of any debate denied the Member States an effective control.
- (5) Finally, the last-minute amendment which exempts certain heavy fuel oil (HFO) and/or gas oil fired engines from the BAT-AELs contradicts the requirements for BAT Conclusions under the **Industrial Emissions Directive** and the Implementing Decision 2012/119/EU. According to these, the drawing up of BAT Conclusions has to be transparent and objective and needs to be based on sound technical and economic information. This applies as well to amendments to BAT Conclusions which are affirmed only at the late stage of the Committee. In regard to the last-minute amendment, however, no technical, environmental or socio-economic rationale was given or seems to have even been considered. Rather, given the timing of the amendment, it seems that its purpose was to satisfy the special interests of a limited number of countries in view of the Committee's vote. The amendment therefore falls

short of the requirements of the Industrial Emissions Directive and the Implementing Decision 2012/119/EU on the development of BAT Conclusions. Besides, it remains unclear whether the last-minute amendment is compatible with the provision of Art. 34(1) of the Industrial Emissions Directive.

If confirmed, the tactical behaviour of the chair of the Committee cannot be viewed in isolation. Rather, it appears to be the most recent example of an apparent pattern of conduct of the Commission bodies active in the LCP BREF process. During the process of the LCP BREF revision, concerns regarding certain disproportionately strict emission levels raised by Member States and industry associations were frequently pushed aside or not given adequate consideration although these concerns were based on valid technical information and supported by expert opinions. In particular, the Commission and Member States which depend less on coal and lignite overruled the well-founded concerns brought forward by Member States in which coal and lignite account for a larger share of the energy mix. As highlighted in our legal opinion dated 15 March 2017, the drawing up of BAT Conclusions, however, must not be based on the pursuit of an agenda of industrial and environmental policy. To politically bargain over BAT Conclusions, disconnected from facts and proportionality, contradicts the Industrial Emissions Directive that requires the process of determining BAT techniques to be transparent, objective and based on sound technical and economic information, i.e. to comply with the primacy of technical accuracy.
