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Practitioner Insights: Environmental Law: What Will Happen With Emissions Limits

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The EU's Approach to Emissions Limits

The need to lay down air emissions limits for large industry has been on the European Union's radar for a long time. It was a question of balance: Industry drives economic growth, but harms the environment in many ways, including degrading air quality. As major emitters, power and heat production facilities in particular were scrutinized under European law. Nevertheless, local limitations on industrial air emissions could have been a hurdle to the common market.

Thus, the only reasonable way forward was to confront the issue head on at the EU level. After adopting stricter emissions standards that were binding for all 28 member states a few years ago, the EU is now transitioning to even more stringent pan-European emissions limits that will apply to more industry sectors. As businesses try to figure out how to tighten their belts, it is worth considering what options lie ahead.

I. Historical Legacy

The EU tackled the issue of air emissions from industry in 1996 with Directive 96/61/EC, which called for an integrated pollution prevention and control approach to prevent emissions into air, water and soil, and to better control waste.

The next major development came 12 years later. Directive 2008/1/EC on integrated pollution prevention and control (IPPC) sought to base emissions limit values, parameters and equivalent technical measures on the best available techniques (BAT). The European Commission, the EU's executive arm, determines the BAT on the EU scale based on information that member states provide. The BAT for industries was established in reference documents called BREFs.

Chinks in the environmental armor appeared fairly quickly. The BREFs were not binding legislation. National agencies could—but didn't have to—take into account the content of particular BREFs when issuing integrated pollution prevention and control permits and setting emissions limits. Consequently, discrepancies arose among member states; some countries used BREFs to determine emissions limits, others did not.

In the meantime, binding emissions limits were laid down at the EU level for specific industries, including waste incineration, activities using organic solvents and titanium dioxide production, through a handful of specially targeted directives. Directive 88/609/EEC in particular had the biggest impact on the limitation of emissions of certain pollutants into the air from large combustion plants (LCP). It was later superseded by Directive 2001/80/EC on limiting emissions of certain pollutants into the air from large combustion plants. It laid down emissions limits for sulphur dioxide, nitrogen oxides and dust from large combustion plants (i.e. combustion plants, the rated thermal input of which is equal to or greater than 50 megawatts, irrespective of the type

of fuel used). These directives changed the playing field as all businesses throughout the EU had to comply with the same emissions levels.

II. A Common System for Industrial Emissions

In an effort to combine the numerous acts on emissions levels and the integrated environmental protection system, the EU adopted Directive 2010/75/EU on industrial emissions in 2010. This Industrial Emissions Directive (IED) entered into force Jan. 6, 2011, and had to be transposed into national law by the member states by Jan. 7, 2013. It repealed and replaced the IPPC and LCP directives, as well as Directive 2000/76/EC on waste incineration, Directive 1999/13/EC on use of organic solvents, and Directives 78/176/EEC, 82/883/EEC and 92/112/EEC concerning titanium dioxide production.

The IED lays down rules on integrated prevention and control of pollution arising from industrial activities that are set out in Annex I to the Industrial Emissions Directive. The IED also includes rules designed to prevent or, where that is not practicable, to reduce emissions into air, water and land, and to prevent the generation of waste in order to protect the environment.

What is most important, however, is that IED combines into one act the emissions limits laid down in the previous specially targeted directives, and member states must make sure that these emissions limits are kept by the businesses. This is the so-called safety net.

III. Large Combustion Plants and Get-Out Clauses

Directive 2010/75/EU significantly tightens the standards for emissions of sulphur dioxide, nitrogen oxides and dust from large combustion plants.

For example, installations with a total rated thermal input between 50 and 100 megawatts combusting coal, brown coal or other solid fuels under the old LCP directive were allowed to emit 850 milligrams per cubic meter (mg/Nm3) of sulphur dioxide. The IED slashed this to 400 mg/Nm3. Changes of the same magnitude affected nitrogen oxides and dust.

Generally, these stringent new standards have applied to existing large combustion plants since Jan. 1, 2016. There is an exception for plants that can benefit from the so-called treaty derogation, but this runs out Dec. 31, 2017. A treaty derogation allows member states to delay complying with certain provisions of IED. Many of the new member states negotiated the treaty derogation when they joined the European Union. Essentially, it gives these member states free reign to ignore emissions limits in the short term until they can get their act together. This includes values for sulphur dioxide, nitrogen oxides and dust indicated in the LCP directive for installations explicitly listed in the attachments to the amendments to the Treaty of the European Union.

For new large combustion plants that became operational after Jan. 7, 2014, the emissions limits set in the Industrial Emissions Directive apply from their launch date.

A considerable number of combustion plants, mainly in newer member states such as Poland, could not operate under the emissions limits set in the IED without costly and time-consuming upgrades. Therefore, Directive 2010/75/EU introduced a few derogation mechanisms allowing operators to adapt these installations to the new standards later than originally prescribed.

These derogations are: the Transitional National Plan valid until June 30, 2020; district heating plants derogation valid until Dec. 31, 2022; limited lifetime derogation valid until Dec. 31, 2023; and small isolated systems derogation valid until Dec. 31, 2019. Laxer emissions limits were introduced for older large combustion plants working a maximum of 1,500 hours a year.

Many businesses applied for inclusion in these derogation mechanisms. Poland, in particular, was finding it difficult to comply with the directive's new emissions standards.

IV. Coming Soon: BAT Conclusions

This is not the end of tightening the emissions levels at the EU level, however. The Industrial Emissions Directive introduced a mechanism that allows the European Commission to adopt decisions on best available techniques conclusions. Decisions on BAT conclusions are directly binding in the member states and do not have to be transposed into national law. Once published in the Official Journal of the European Union, the decision on BAT conclusions is directly binding both for the member states and for natural and legal persons from the time of its entry into force.

BAT conclusions denote a document setting out the conclusions on what exactly best available techniques mean. They set out BAT descriptions, information to assess their applicability, the emissions levels associated with the best available techniques, monitoring and consumption levels and, where appropriate, relevant site remediation measures. BAT conclusions are based on and form part of BREFs. BAT reference documents themselves are not binding legal documents. Because they are used as the main tool that gives grounding for BAT conclusions, however, they play an essential procedural role in the adoption of decisions on BAT conclusions.

In order to draw up, review and, where necessary, update BREFs, the European Commission organizes an exchange of information between member states, relevant industries, appropriate nongovernmental organizations and the European Commission.

The BAT conclusion is a significant development because it is a reference point for setting permit conditions. The competent authority in each member state is obliged to set emissions limit values in the respective permit to ensure that, under normal operating conditions, emissions do not exceed the levels associated with the best available techniques as laid down in the decisions on BAT conclusions. These are known as BAT associated emissions levels, or BATAELs. In fact, this means that BAT conclusions introduce binding emissions limits throughout the EU. The permit should be updated and installation should comply with the new permit conditions within four years of publication of decisions on BAT conclusions. Consequently, operators have a maximum of four years to adapt their installations to the new emissions limit values as set forth in the respective BAT conclusions. This is very short period, especially if upgrading projects are necessary.

Thirty-one BAT conclusions were planned for various industrial activities, but to date only 10 have been ad-

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opted. The adopted BAT conclusions concern industrial activities such as: common wastewater and waste gas treatment; management systems in the chemical sector; iron and steel production; glass, non-ferrous metals manufacturing industries; cement, lime and magnesium oxide production; chlor-alkali; pulp, paper and board production; mineral oil and gas refining; hides and skins tanning; and wood-based panels production.

After years of intensive work, the BAT conclusions for large combustion plants are expected to be adopted in late 2017. Based on the available draft of the BAT conclusions for these plants, one thing is clear: In many cases, these BATAELs are stricter than the emissions limits in the Industrial Emissions Directive. This means that businesses that have already adapted to the strict emissions limits laid down in the IED now will have to invest again in order to adapt to even stricter BATAELs.

Industry as a whole can expect a serious increase in the air emissions requirements and they will have to undertake serious modernization efforts to meet these stricter requirements. And it may not end here. The BAT conclusions will be updated in the future. Thus, in a few years' time, the emissions level values could be even stricter. It is crucial to see what could be done to avoid fast repetition of upgrade works.

V. Derogation From BAT Conclusions

To ease the pain, the Industrial Emissions Directive introduces a derogation mechanism from emissions limit values set in the BAT conclusions. This derogation mechanism allows the competent authority in each member state to set less strict emissions limits than the BATAELs.

The derogation, however, may apply only if an assessment by the competent authority shows that achieving the BATAELs as laid down in BAT conclusions would lead to disproportionately higher costs compared to the environmental benefits. Moreover, these disproportionately higher costs could be due only to the location, environmental conditions or technical characteristics of the installation.

When these conditions are fulfilled, the competent authority may grant derogation from BATAELs, but the reasons for such a decision must be precisely explained in the permit. The European Commission has the option to adopt guidance on the derogation criteria. So far, however, it has not issued such a document. It is up to member state authorities to interpret these criteria and grant derogations.

It is important to note that where the derogation is to be granted, public participation needs to be assured. This means that the applications for derogation should be carefully drafted as they will be under intense public scrutiny. This also means that member states may be reluctant to grant derogations. In the years to come we will see whether derogations will be commonly granted or just as a rare exception.

VI. Medium Combustion Plants

As mentioned earlier, the Industrial Emissions Directive applies only to large combustion plants. In order to establish emissions limit values for combustion plants with a total rated thermal input lower than 50 megawatts, Directive 2015/2193/EU for Medium Combustion Plants (MCP) was adopted.

The MCP directive regulates pollutant emissions from the combustion of fuels in plants with a rated thermal input equal to or greater than 1 megawatt and less than 50 megawatts. It entered into force Dec. 18, 2015, and needs to be transposed to national law by Dec. 19, 2017.

The directive regulates emissions of sulphur dioxide, nitrogen oxides and dust into the air with the aim of reducing those emissions and the related risks they pose to human health and the environment. The emissions limit values set in this directive will have to be applied from Dec. 20, 2018, for new plants and by 2025 or 2030 for existing plants, depending on their size.

The Medium Combustion Plants Directive also includes a couple of derogations from the imposed emissions limits that member states may adopt. One type of derogation may be applied to existing plants supplying heating networks, combusted with solid biomass or used to drive gas compressor stations, and this will last until Jan. 1, 2030. The other type concerns existing and new plants that do not operate for more than 500 hours a year. This type of derogation has no formal ending date. Other derogations may apply in extraordinary circumstances of operation of certain types of MCPs.

VII. What's Next

Changes to the air emissions management at the EU level are far from complete. Once large combustion plants are adapted to the BATAELs laid down in the BAT conclusions, work will begin on adapting smaller combustion plants. Then the BAT conclusions may be amended again and this will trigger new upgrade obligations. This shows that air quality is still one of the EU's top priorities.

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