# Le juge administratif

# et

# le droit communautaire

# de l'environnement

# National administrative courts

# And

# Community

# Environmental law

## Contribution

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## La réglementation des déchets et des installations polluantes

## Regulations governing waste and polluting facilities

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**Two difficulties in applying the European directives on waste and polluting facilities**

**1. With respect to the European Waste Framework Directive: application of guidelines**

Judges find the definition of waste difficult to apply. There are divergences in the application of the European Waste Framework Directive between courts in different EC-Member States. Some of these have been resolved by decisions of the European Court of Justice, but others remain. The question arises if there is an alternative for the very broad and vague definition of waste.

The European Commission considers that **guidelines are better suited to delivering legal clarity than definitions in the Waste Framework Directive.** Guidelines would represent a flexible tool adaptable to new evidence and technologies. The Commission's interpretative Communication of 21 February 2007 on waste and by-products is based on the jurisprudence of the European Court of Justice. The Commission fears that the direct translation in the text of the Directive of some of the language used by the European Court of Justice would result in creating new uncertainties.

Guidelines have of course a 'directive' function and individual administrative decisions can be tested against this (technical) 'soft law', but the scope of the judicial review by the Council of State is limited. Is the Council of State able to censure every violation of these (technical) guidelines?

In this respect, an important source of inspiration is offered by the Netherlands: the Dutch Council of State can ask an external organisation to provide the court with an expert report regarding (the technical points and the facts of) appeals against decisions based on the Environmental Management Act. The Council of State can base its judgment on this (technical) report.

**2. With respect to the IPPC-directive: the concept of *'Best Available Techniques'* versus the concept of *'Environmental Quality Standards'***

The IPPC Directive is the EU framework regime for the control of polluting emissions from major industrial sources. Operators of industrial installations covered by Annex I of the IPPC Directive are required to obtain an authorisation (*'environmental permit'*) from the authorities in the EU countries. New installations, and existing installations which are subject to 'substantial changes', have been required to meet the requirements of the IPPC Directive since 30 October 1999. Other existing installations had to be brought into compliance by 30 October 2007. This was the key deadline for the full implementation of the Directive. However, several Member States have not fully transposed the IPPC Directive. The Commission will pursue actions, including infringement proceedings, to ensure full and correct transposition of the legislation.

The concept of 'Best Available Techniques' (*i.e.* the most effective techniques to achieve a high level of environmental protection, taking into account the costs and benefits) is the core element of the IPPC Directive. Permits issued for industrial installations need to take account thereof. The permit conditions including the emission limit values must be based on BAT, without prescribing the use of any technique or specific technology. The IPPC Directive contains elements of flexibility by allowing the licensing authorities, in determining permit conditions, to take into account the technical characteristics of the installation, its geographical location and the local environmental conditions. However, where an environmental quality standard requires stricter conditions than those achievable by the use of the best available techniques, additional measures shall in particular be required in the permit (Article 10 of the IPPC Directive).

To assist the licensing authorities and companies to determine BAT, the Commission organises an exchange of information between experts from the EU Member States, industry and environmental organisations. This work is co-ordinated by the European IPPC Bureau in Seville. This results in the adoption and publication by the Commission of the BAT Reference Documents (BREFs).

However, the implementation of BAT remains insufficient. Licensing authorities can determine divergent emission limit values on basis of the BREFs. Moreover, the BREFs give no (real) information on the most important and most difficult issue, namely the answer to **the question what has to be done to implement 'more than BAT' in order to achieve the environmental quality standard.** This is exactly the challenge of the future: what techniques do the authorities and the companies have to implement to achieve the environmental quality standards?

It remains to be seen if an answer to this question will be given in a near future. It has to be noted that the Commission adopted on 21 December 2007 a Proposal for a Directive on industrial emissions. This Proposal recasts seven existing directives related to industrial emissions (including the IPPC Directive) into a single clear and coherent legislative instrument. The Commission came to the conclusion that BAT remains a sound basis for the future development of EU legislation on industrial emissions. The revision of the current legislation must lead to **improving and clarifying the concept of BAT**, in order to create a more coherent application of the IPPC Directive. It must also lead to improving data collection for review of the so-called BAT Reference Documents (BREFs). To provide **fuller information on, and support for, emerging techniques** the Commission will ensure closer links between the BREF elaboration process, the European Research Framework Programme and the Competitiveness and Innovation Programme.