Reports of Cases

JUDGMENT OF THE GENERAL COURT (Third Chamber, Extended Composition)

27 January 2021 *

(Environment – Directive 2010/75/EU – Industrial emissions – Implementing Decision (EU) 2017/1442 – Large combustion plants – Best available techniques (BAT) conclusions – Article 16(4) and (5) TEU – Article 3(2) and (3) of Protocol (No 36) on transitional provisions – Application of the law *ratione temporis* – Comitology)

In Case T-699/17,

Republic of Poland, represented by B. Majczyna and D. Krawczyk, acting as Agents,

applicant,

supported by

Republic of Bulgaria, represented by E. Petranova and T. Mitova, acting as Agents,

and by

Hungary, represented by M. Fehér, acting as Agent,

interveners,

v

European Commission, represented by Ł. Habiak, K. Herrmann and R. Tricot, acting as Agents,

defendant,

supported by

Kingdom of Belgium, represented by M. Jacobs, acting as Agent,

by

French Republic, represented by J. Traband and A.-L. Desjonquères, acting as Agents,

and by

* Language of the case: Polish.

Kingdom of Sweden, represented by C. Meyer-Seitz, H. Shev, L. Zettergren and A. Alriksson, acting as Agents,

interveners,

ACTION pursuant to Article 263 TFEU seeking annulment of Commission Implementing Decision (EU) 2017/1442 of 31 July 2017 establishing best available techniques (BAT) conclusions, under Directive 2010/75/EU of the European Parliament and of the Council, for large combustion plants (OJ 2017 L 212, p. 1),

THE GENERAL COURT (Third Chamber, Extended Composition),

composed of A.M. Collins, President, V. Kreuschitz (Rapporteur), Z. Csehi, G. De Baere and G. Steinfatt, Judges,

Registrar: R. Ūkelytė, Administrator,

having regard to the written part of the procedure and further to the hearing on 17 September 2020,

gives the following

Judgment

Legal framework

The procedure for adopting best available techniques (BAT) conclusions

1 Best available techniques (BAT) conclusions serve as the reference, in accordance with Article 14(3) of Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (OJ 2010 L 334, p. 17), for setting the permit conditions for operating combustion plants.

2 BAT conclusions are adopted in two stages, in accordance with Article 13 of Directive 2010/75 and the Annex to Commission Implementing Decision 2012/119/EU of 10 February 2012 laying down rules concerning guidance on the collection of data and on the drawing up of BAT reference documents and on their quality assurance referred to in Directive 2010/75 (OJ 2012 L 63, p. 1).

3 The first stage consists in drawing up a technical BAT reference document ('BREF') following an exchange of information with the participation of the European Commission, the Member States, the sectors concerned and non-governmental organisations promoting environmental protection. In that context, a technical working group draws up documents relating to the BREF, taking into account the outcome of the exchange of information for a given sector. The final draft of the BREF is sent to the forum established by Article 13(3) of Directive 2010/75, which provides its opinion on the proposed content of the BREF resulting from the technical work carried out.

4 In the second stage, in accordance with Article 13(5) and Article 75(2) of Directive 2010/75, the Commission submits a draft implementing decision on BAT conclusions to the committee established by Article 75 of Directive 2010/75 ('the committee') composed of representatives of the Member States. The committee delivers, under the examination procedure referred to in Article 5 of Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ 2011 L 55, p. 13), its opinion on the Commission's draft implementing decision by the qualified majority defined in Article 16(4) and (5) TEU. Where that opinion is positive, the Commission adopts the implementing decision setting out the BAT conclusions.

The applicable provisions concerning the qualified majority

5 Article 16(4) and (5) TEU states:

'4. As from 1 November 2014, a qualified majority shall be defined as at least 55% of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65% of the population of the Union.

A blocking minority must include at least four Council members, failing which the qualified majority shall be deemed attained.

The other arrangements governing the qualified majority are laid down in Article 238(2) [TFEU].

5. The transitional provisions relating to the definition of the qualified majority which shall be applicable until 31 October 2014 and those which shall be applicable from 1 November 2014 to 31 March 2017 are laid down in the Protocol on transitional provisions.'

6 Article 3 of Protocol (No 36) on transitional provisions (OJ 2016 C 202, p. 321; 'Protocol No 36') provides:

'1. In accordance with Article 16(4) [TEU], the provisions of that paragraph and of Article 238(2) [TFEU] relating to the definition of the qualified majority in the European Council and the Council shall take effect on 1 November 2014.

2. Between 1 November 2014 and 31 March 2017, when an act is to be adopted by qualified majority, a member of the Council may request that it be adopted in accordance with the qualified majority as defined in paragraph 3. In that case, paragraphs 3 and 4 shall apply.

3. Until 31 October 2014, the following provisions shall remain in force, without prejudice to the second subparagraph of Article 235(1) [TFEU].

For acts of the European Council and of the Council requiring a qualified majority, members' votes shall be weighted as follows:

Belgium	12
Bulgaria	10
Czech Republic	12
Denmark	7
Germany	29
Estonia	4
Ireland	7
Greece	12
Spain	27
France	29
Croatia	7
Italy	29
Cyprus	4
Latvia	4
Lithuania	7
Luxembourg	4
Hungary	12
Malta	3
Netherlands	13
Austria	10
Poland	27
Portugal	12
Romania	14
Slovenia	4
Slovakia	7
Finland	7
Sweden	10
United Kingdom	29

Acts shall be adopted if there are at least 260 votes in favour representing a majority of the members where, under the Treaties, they must be adopted on a proposal from the Commission. In other cases decisions shall be adopted if there are at least 260 votes in favour representing at least two thirds of the members.

A member of the European Council or the Council may request that, where an act is adopted by the European Council or the Council by a qualified majority, a check is made to ensure that the Member States comprising the qualified majority represent at least 62% of the total population of the Union. If that proves not to be the case, the act shall not be adopted.

4. Until 31 October 2014, the qualified majority shall, in cases where, under the Treaties, not all the members of the Council participate in voting, namely in the cases where reference is made to the qualified majority as defined in Article 238(3) [TFEU], be defined as the same proportion of the weighted votes and the same proportion of the number of the Council members and, if appropriate, the same percentage of the population of the Member States concerned as laid down in paragraph 3 of this Article.'

7 Article 5 of Regulation No 182/2011 provides, in particular, as follows:

'1. Where the examination procedure applies, the committee shall deliver its opinion by the majority laid down in Article 16(4) and (5) TEU and, where applicable, Article 238(3) TFEU, for acts to be adopted on a proposal from the Commission. The votes of the representatives of the Member States within the committee shall be weighted in the manner set out in those Articles.

2. Where the committee delivers a positive opinion, the Commission shall adopt the draft implementing act.

…'

Background to the dispute

8 On 9 March 2017, the Commission, in its capacity as chair of the committee, submitted to the committee a draft implementing decision establishing BAT conclusions, under Directive 2010/75, for large combustion plants ('LCPs').

9 By letter of 23 March 2017, the Commission invited the members of the committee to a meeting scheduled for 28 April 2017. The purpose of that meeting was to vote on the opinion relating to that draft implementing decision. A draft agenda was attached to that letter.

10 On 30 March 2017, the Republic of Poland requested that the committee take a vote on the opinion on that draft implementing decision in accordance with the voting rules laid down in Article 3(3) of Protocol No 36.

11 On 4 April 2017, the Legal Service of the Council of the European Union sent to the Committee of Permanent Representatives of the Member States an opinion according to which, in essence, in order for a vote on a draft act to be conducted in accordance with the rules applicable before the entry into force of the Treaty of Lisbon, the Member State would have had to submit a request to that effect by 31 March 2017 at the latest and the vote, which is the subject matter of the request, would also have had to take place before that date.

12 On 10 April 2017, the Commission's Directorate-General for the Environment refused the Republic of Poland's request of 30 March 2017 on the ground that the vote on the opinion was scheduled for 28 April 2017, that is to say, after 31 March 2017, the deadline laid down in Article 3(2) of Protocol No 36.

13 On 28 April 2017, a meeting of the committee was held at which the members voted in order to adopt an opinion on an amended draft implementing decision. The vote took place pursuant to the voting rules established by Article 16(4) TEU and not those established by Article 3(3) of Protocol No 36. The vote resulted in a favourable opinion of the committee with regard to the

draft text following the positive vote of 20 Member States representing 65.14% of the population and 71.43% of the members of that committee. Eight Member States, including the Republic of Poland, cast a negative vote.

14 On 31 July 2017, following that vote, the Commission adopted Implementing Decision (EU) 2017/1442 establishing best available techniques (BAT) conclusions, under Directive 2010/75, for large combustion plants (OJ 2017 L 212, p. 1) ('the contested decision').

15 The contested decision imposes, inter alia, emission levels associated with the best available techniques ('the BAT-AELs') in respect of emissions of nitrogen oxides (NO_x), mercury (Hg) and hydrogen chloride (HCl) for LCPs, that is to say, installations with a rated thermal input of at least 50 megawatts (MW), irrespective of the type of fuel used.

Procedure and forms of order sought

16 By application lodged at the Court Registry on 11 October 2017, the Republic of Poland brought the present action.

17 By documents lodged at the Court Registry on 4 January 2018 and 15 January 2018 respectively, Hungary and the Republic of Bulgaria applied for leave to intervene in the present proceedings in support of the form of order sought by the Republic of Poland. By decision of 19 February 2018, the President of the Third Chamber of the Court (former composition) granted those applications.

18 By documents lodged at the Court Registry on 16 January 2018 and 25 January 2018, respectively, the Kingdom of Belgium, the French Republic and the Kingdom of Sweden applied for leave to intervene in the present proceedings in support of the form of order sought by the Commission. By decisions of 19 February 2018 and 21 February 2018, respectively, the President of the Third Chamber of the Court (former composition) granted those applications.

19 The interveners lodged their statements in intervention and the other parties submitted their observations on those statements within the prescribed time limits.

20 By decision adopted on 11 March 2019, pursuant to Article 27(3) of the Rules of Procedure of the General Court, the President of the Court reallocated the case to another Judge-Rapporteur, who was assigned to the Third Chamber (former composition).

21 Following a change in the composition of the Chambers of the Court, pursuant to Article 27(5) of the Rules of Procedure, the Judge-Rapporteur was assigned to the Third Chamber (new composition), to which the present case was accordingly allocated.

22 Acting upon a proposal of the Third Chamber (new composition), the Court decided, pursuant to Article 28 of the Rules of Procedure, to refer the case to a Chamber sitting in extended composition.

23 Acting upon a proposal of the Judge-Rapporteur, the Court (Third Chamber, Extended Composition) decided to open the oral part of the procedure and, by way of the measures of organisation of procedure under Article 89(3)(a) and (b) of the Rules of Procedure, put written

questions to the parties in the main proceedings and requested those parties to make written submissions on certain aspects of the dispute. The parties in the main proceedings replied to those questions within the time limit prescribed.

24 The parties presented oral argument and replied to the oral questions put by the Court at the hearing on 17 September 2020.

25 The Republic of Poland, supported by the Republic of Bulgaria and Hungary, claims that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

26 The Commission, supported by the Kingdom of Belgium, the French Republic and the Kingdom of Sweden, contends that the Court should:

– dismiss the action;

– order the Republic of Poland to pay the costs.

Law

27 In support of its action, the Republic of Poland relies on five pleas in law.

28 The first plea alleges infringement of the provisions applicable in relation to a qualified majority. The Republic of Poland submits that, following its request to that effect and pursuant to Article 3(2) and (3) of Protocol No 36, the contested decision ought to have been adopted in accordance with the qualified-majority rules laid down by the Treaty of Nice and not in accordance with the rules laid down by the Treaty of Lisbon.

29 In the second and third pleas, the Republic of Poland submits that the BAT-AELs imposed by the contested decision for emissions of nitrogen oxides (NO_x), mercury (Hg), hydrogen chloride (HCl) from LCPs, as well as certain BAT-AELs, applicable to LCPs the annual operating life of which is less than 1 500 hours, were set on the basis of incorrect and unrepresentative data and infringe the principle of proportionality.

30 By the fourth and fifth pleas, the Republic of Poland disputes the legality of the derogation granted by the contested decision to certain island regions for the application of BAT-AELs to HFO- and/or gas-oil-fired engines.

The first plea in law, alleging infringement of the provisions of Article 16(4) and (5) TEU in conjunction with those of Article 3(2) and (3) of Protocol No 36

31 The Republic of Poland, supported by Hungary, submits that the contested decision was adopted in breach of the rules governing qualified-majority voting established by Article 16(4) and (5) TEU and by Article 3(2) and (3) of Protocol No 36. In essence, it submits that, in order to benefit from the rules on qualified-majority voting provided for in Article 3(3) of that protocol, it suffices for a Member State to make a request to that effect within the time limit prescribed by Article 3(2) of

that protocol, that is to say, between 1 November 2014 and 31 March 2017. As the Republic of Poland submitted such a request on 30 March 2017, those rules on qualified-majority voting ought, in its view, to have been applied during the vote on the draft contested decision within the committee on 28 April 2017. Hungary adds that, under those rules, the threshold of necessary votes for the adoption of that draft could not have been attained and the vote would therefore have led to a different result.

32 The Commission, supported by the Kingdom of Belgium, the French Republic and the Kingdom of Sweden, replies, in essence, that the period defined in Article 3(2) of Protocol No 36 covers both the date on which the member of the Council submits its request and that on which the vote takes place. According to the Commission, that provision provides for an exception to the general rule enshrined in Article 16(4) TEU and must, therefore, be interpreted strictly. Article 16(5) TEU conclusively determines the substantive scope of the transitional provisions contained in Protocol No 36 and it is clear from its wording, as well as from that of Article 3(2) of Protocol No 36, that the qualified majority defined in Article 3(3) of Protocol No 36 is applicable only to votes which took place between 1 November 2014 and 31 March 2017. The Commission takes the view that the Republic of Poland's approach is tantamount to conceding that the transitional provisions on the definition of a qualified majority depend entirely on a unilateral decision of a single Member State and that those provisions could apply indefinitely, which would render Article 16(4) TEU and the committee procedure ineffective and would result in a breach of the principle of legal certainty. The Commission states that the duration of the transitional period must be known *a priori* and that it was clearly determined by the authors of the Treaty.

33 In the context of the present plea, the Court is called upon to determine the scope of Article 3(2) of Protocol No 36 and, more specifically, whether, in order to be able to benefit from the application of the qualified-majority rules laid down in Article 3(3) thereof, which correspond to the qualified majority of the Treaty of Nice, it is sufficient for a Member State to request the application of those rules between 1 November 2014 and 31 March 2017 or whether it is necessary that the decision should also be taken during that period.

34 In that regard, it must be recalled that the interpretation of a provision of EU law requires account to be taken not only of its wording, but also of its context, and the objectives and purpose pursued by the act of which it forms part. The legislative history of a provision of EU law may also reveal elements that are relevant to its interpretation (judgment of 25 June 2020, *A and Others (Wind turbines at Aalter and Nevele)*, C-24/19, EU:C:2020:503, paragraph 37). It is therefore necessary to carry out a literal, contextual, teleological and historical interpretation of Article 3(2) of Protocol No 36. In that context, it must be borne in mind that EU-law texts are drafted in several languages and that the different language versions are all equally authentic, which may make it necessary to compare the different language versions (see judgment of 14 July 2016, *Latvia* v *Commission*, T-661/14, EU:T:2016:412, paragraph 39 and the case-law cited).

35 In the first place, as regards the literal interpretation, the parties agree that the wording of Article 3(2) of Protocol No 36 does not make it possible to remove the uncertainty as to the precise scope of that provision. It is not apparent from the wording, according to which, 'between 1 November 2014 and 31 March 2017, when an act is to be adopted by qualified majority, a member of the Council may request that it be adopted in accordance with the qualified majority as defined in paragraph 3', that that act must also be adopted within that period.

36 The other language versions of Article 3(2) of Protocol No 36 do not make it possible to remove the uncertainty as to the precise scope of that provision either.

37 In the second place, a historical interpretation of the provision in question also does not clarify its wording. In this respect, it should be noted that the Treaty of Lisbon, which amended the rules on the calculation of the qualified majority, was adopted following a mandate given to the Intergovernmental Conference which convened with the aim of preparing a draft text of a treaty amending the EU Treaty and the EC Treaty. According to the terms of that mandate, 'during a transitional period until 31 March 2017, when a decision is to be adopted by qualified majority, a member of the Council may request that the decision be taken in accordance with the qualified majority as defined in Article 205(2) of the present TEC' (paragraph 13 of the mandate included in the Presidency Conclusions of the Brussels European Council of 21 and 22 June 2007, 11177/1/07 REV 1, Annex I, p. 18). Since the wording in that mandate is very similar to that of Article 3(2) of Protocol No 36, it does not, as the Commission rightly maintains, make it possible to overcome the ambiguity referred to in paragraph 35 above. That said, it does not follow from that document, as the Republic of Poland submits, that voting in accordance with the rules of the Treaty of Nice had to take place before 1 April 2017.

38 In the third place, as regards the teleological interpretation, it must be observed that the objective of Protocol No 36 is, according to its sole recital, 'to organise the transition from the institutional provisions of the Treaties applicable prior to the entry into force of the Treaty of Lisbon to the provisions contained in that Treaty'.

39 For that purpose, Article 3(2) of Protocol No 36 confers on a Member State the right to request, during the period from 1 November 2014 to 31 March 2017, the application of the qualified majority defined in Article 3(3) of Protocol No 36, which corresponds to that of the Treaty of Nice, a point which, moreover, appears to be undisputed between the parties.

40 On the other hand, the views of the parties differ as to whether the vote must also take place during that same period. The right conferred on the Member States by Article 3(2) of Protocol No 36 to request a qualified-majority vote according to the rules of the Treaty of Nice during the period specified in that article necessarily implies that, following the submission of such a request by a Member State, the vote is to be taken in accordance with those same rules, even when that vote takes place after 31 March 2017. Such an interpretation alone is capable of ensuring that a Member State is able effectively to exercise that right during the entirety of that period, up to the last day of the prescribed period.

41 Any interpretation to the contrary would render ineffective the express setting of a period from 1 November 2014 to 31 March 2017 to exercise the right in question, and would significantly reduce the period in which a vote according to the rules of the Treaty of Nice could actually be requested by a Member State. It would mean that a request made at the end of that period would, in practice, be too late to trigger the application of the rules of the Treaty of Nice. Such a contrary interpretation would force the Member States, as the case may be, to make their request much earlier, depending on the – unpredictable – date of the vote. Such a result would be contrary to the right of the Member States to request a vote in accordance with the rules of the Treaty of Nice up to the last day of the period laid down by Article 3(2) of Protocol No 36.

42 Therefore, it follows from a teleological interpretation of the provision in question that the definition of the qualified majority referred to in Article 3(3) of Protocol No 36 can be applied to a vote held even after 31 March 2017, on condition that its application is requested by a Member State before that date.

43 In the fourth place, it should be noted that such a conclusion is also supported by a contextual interpretation of the provision in question. In that regard, it must be observed that Article 3(2) of Protocol No 36 forms part of the three transitional stages relating to the entry into force of the qualified-majority rules laid down by the Treaty of Lisbon.

44 Although the Treaty of Lisbon entered into force on 1 December 2009, the definition of the qualified majority in Article 16(4) TEU came into effect only as from 1 November 2014. Under Article 16(5) TEU, transitional provisions were applicable, first, until 31 October 2014 and, second, between 1 November 2014 and 31 March 2017, as laid down in the Protocol on Transitional Provisions, that is to say, Protocol No 36.

45 It is therefore necessary to distinguish between three periods, that is to say, first, the period from 1 December 2009 to 31 October 2014, second, that from 1 November 2014 to 31 March 2017, and, third, the period as from 1 April 2017.

46 During the first period, the rules on the qualified majority defined in Article 3(3) of Protocol No 36 applied, by extending those of the Treaty of Nice, to which they corresponded. During the second period, a member of the Council could, under the provision at issue, that is to say, Article 3(2) of Protocol No 36, request that an act be adopted in accordance with those rules of the Treaty of Nice. If no such request were made, the new definition of the qualified majority in Article 16(4) TEU applied, a fact highlighted by Article 3(1) of Protocol No 36. During the third period, the qualified majority is defined as provided for in Article 16(4) TEU, without the possibility of requesting a different method for calculating votes.

47 Therefore, contrary to the Commission's contention, Article 3(2) of Protocol No 36 is not an exception to the rule laid down in Article 16(4) TEU, but is a transitional provision governing one of the three transitional stages which applied successively following the entry into force of the Treaty of Lisbon. Its transitional nature is confirmed by the sole recital of Protocol No 36 (see paragraph 38 above) as well as by the wording of the title of Protocol No 36 'on transitional provisions' and by that of Article 16(5) TEU, which provides that a protocol is to lay down 'the transitional provisions' for the period from 1 November 2014 to 31 March 2017.

48 The interpretation set out in paragraph 42 above is consistent with the requirements of Article 16(5) TEU, pursuant to which Article 3(2) of Protocol No 36 was adopted. According to that interpretation, Article 3(2) of that protocol, first, was applicable between 1 November 2014 and 31 March 2017, as the deadline for requesting the application of the qualified majority defined in Article 3(3) of Protocol No 36 was 31 March 2017, and, second, was transitional because voting according to that qualified majority took place only for draft acts in respect of which such a request had been made during that period. The Commission is therefore wrong in its view that Article 16(5) TEU requires that the qualified majority defined in Article 3(3) of Protocol No 36 should apply only to voting which took place between 1 December 2009 and 31 October 2014. Similarly, the Republic of Poland is not justified in arguing that the scope of Article 16(5) TEU does not concern the definition of the qualified majority.

49 In any event, as is shown by the various interpretations submitted by the parties, the wording of Article 16(5) TEU is ambiguous to the extent that it does not make it possible to invalidate the interpretation set out in paragraph 42 above.

50 Contrary to the Commission's submissions, the interpretation set out in paragraph 42 above also complies with the requirement, resulting from settled case-law, according to which a transitional provision must be interpreted strictly (see judgment of 27 February 2019, *Greece* v *Commission*, C-670/17 P, EU:C:2019:145, paragraph 52 and the case-law cited; see also, to that effect, judgment of 28 October 2010, *Commission* v *Poland*, C-49/09, EU:C:2010:644, paragraph 41 and the case-law cited). First, in the context of that interpretation, the application of Article 3(2) of Protocol No 36 remains subject to a well-defined limitation in time (see paragraph 48 above) and therefore guarantees its transitional nature (see paragraph 38 above). Second, that interpretation is essential in order for a Member State to be able to exercise effectively its right up to the last day of the period provided for by Article 3(2) of Protocol No 36 (see paragraphs 40 and 41 above) and, therefore, does not go beyond what is necessary to ensure the exercise of that right.

51 Moreover, the Commission is not justified in arguing that the interpretation set out in paragraph 42 above renders ineffective Article 16(4) TEU and the committee procedure, which are designed to strengthen the democratic legitimacy and the representativeness of citizens. In that regard, it must be pointed out that Article 3(2) of Protocol No 36 is also covered by primary law and that its effectiveness must thus be guaranteed by the Commission in the same manner as for the Treaties, with the result that it cannot be neglected for the benefit of a premature application of Article 16(4) TEU.

52 Consequently, a contextual analysis confirms the interpretation of Article 3(2) of Protocol No 36, as set out in paragraph 42 above.

53 In the fifth place, it should be noted that that interpretation is supported by the principle of legal certainty, which requires, on the one hand, that rules of law be clear and precise and, on the other, that their application be foreseeable for those subject to them. Specifically, in order to meet the requirements of that principle, legislation must enable those concerned to know precisely the extent of the obligations imposed on them, and those persons must be able to ascertain unequivocally their rights and obligations and take steps accordingly (see judgment of 1 July 2014, *Ålands Vindkraft*, C-573/12, EU:C:2014:2037, paragraphs 127 and 128 and the case-law cited).

54 In that regard, the Commission cannot maintain that making the application of the transitional provision depend solely on a Member State's unilateral request would allow that provision to be applied indefinitely since, from a formal point of view, an act continues to be subject to the Council's deliberations for as long as the Commission has not withdrawn it. That argument disregards not only the fact that the application of the transitional provision is subject solely to the condition that the Member State makes a request for that purpose, which is limited in time, since it must be submitted on 31 March 2017 at the latest, but also the fact that the deliberations leading to a vote bring to an end the application of that transitional provision, with the result that it is not indefinite.

55 On the contrary, the interpretation advocated by the Commission, which makes the application of the transitional provision subject to the cumulative requirements of a Member State submitting a request and a vote taking place on 31 March 2017 at the latest, would entail, at the end of the transitional period, uncertainty as regards the application in time of the qualified majority in

accordance with the definition provided for in Article 3(3) of Protocol No 36. Since the duration of work on a draft act may vary, a Member State which avails itself of the right conferred on it by that provision during the transitional period, particularly when the date of its request is close to that of 31 March 2017, would not be certain that the vote could indeed take place in accordance with those rules. If work on a draft act were to continue beyond 31 March 2017, the interpretation advocated by the Commission would have the result that the vote would have to take place by the qualified majority referred to in Article 16(4) TEU, whereas completion of that work before that date, and making it possible for the vote to take place before 31 March 2017, would entail the application of the qualified majority defined in Article 3(3) of Protocol No 36. In addition, such an interpretation would not only give rise to a lack of predictability but could also lead to a circumvention of the transitional provision in question by setting the date of the vote at a date after 31 March 2017.

56 In the light of all the foregoing considerations, Article 3(2) of Protocol No 36 must be interpreted as meaning that, in order for a draft act to be adopted in accordance with the qualified-majority rules laid down in Article 3(3) of Protocol No 36, which correspond to those of the Treaty of Nice, it suffices that the application of those rules is requested by a Member State between 1 November 2014 and 31 March 2017, without it being necessary that the vote on the draft act in question must also take place between those dates.

57 In the present case, since the Republic of Poland submitted a request under Article 3(2) of Protocol No 36 on 30 March 2017, those rules ought to have been applied at the time of the vote on the draft contested decision on 28 April 2017.

58 It is clear from the case-law that a failure to comply with voting arrangements constitutes an infringement of an essential procedural requirement within the meaning of Article 263 TFEU (see, to that effect, judgments of 23 February 1988, *United Kingdom* v *Council*, 68/86, EU:C:1988:85, paragraph 49; of 28 April 2015, *Commission* v *Council*, C-28/12, EU:C:2015:282, paragraph 55; and of 20 September 2017, *Tilly-Sabco* v *Commission*, C-183/16 P, EU:C:2017:704, paragraph 115), which necessarily results in the annulment of the act vitiated by such a defect, irrespective of whether it caused harm to the person pleading it (see, to that effect, judgments of 6 April 2000, *Commission* v *ICI*, C-286/95 P, EU:C:2000:188, paragraph 52; of 21 September 2017, *Feralpi* v *Commission*, C-85/15 P, EU:C:2017:709, paragraphs 45 to 47; and of 8 September 2016, *Goldfish and Others* v *Commission*, T-54/14, EU:T:2016:455, paragraph 47).

59 Therefore, the question of whether the Commission could have organised that vote before 1 April 2017 and whether the Republic of Poland could have requested that that vote take place before that date is irrelevant. In any event, in view of the result of the vote, as indicated in paragraph 13 above, the threshold required for the adoption of the draft contested decision would, under the qualified-majority rules laid down in Article 3(3) of Protocol No 36, not have been reached.

60 Accordingly, the first plea must be accepted and the contested decision must be annulled, without there being any need to examine the other pleas raised by the applicant.

The effects ratione temporis ***of the annulment of the contested decision***

61 The second paragraph of Article 264 TFEU provides that, if the EU Courts consider this necessary, they are to state the effects of the act which they have declared void which must be regarded as definitive. That provision has been interpreted, inter alia, as allowing, on grounds of legal certainty

(see, to that effect, judgments of 20 September 2017, *Tilly-Sabco* v *Commission*, C-183/16 P, EU:C:2017:704, paragraph 124, and of 4 September 2018, *Commission* v *Council (Agreement with Kazakhstan)*, C-244/17, EU:C:2018:662, paragraph 52), but also on grounds seeking to prevent a lack of continuity or a decline in the implementation of policies conducted or supported by the European Union, such as in the fields of environmental protection or public health (see, to that effect, judgments of 25 February 1999, *Parliament* v *Council*, C-164/97 and C-165/97, EU:C:1999:99, paragraphs 22 to 24, and of 16 April 2015, *Parliament* v *Council*, C-317/13 and C-679/13, EU:C:2015:223, paragraphs 72 to 74), the effects of an act declared void to be maintained for a reasonable period.

62 In the present case, when asked by the Court at the hearing about a possible temporal adjustment of the effects of the annulment which it might order, the Republic of Poland opposed such an adjustment, whereas the Commission requested such an adjustment if the contested decision were to be annulled.

63 Taking account of the fact that the BAT-AELs established by the contested decision serve, as set out in paragraph 1 above, as a basis for setting permit conditions for the operation of LCPs by national authorities, the annulment of the contested decision with immediate effect would be liable to jeopardise uniform permit conditions for that type of plant in the European Union and would risk leading to legal uncertainty for the parties concerned, inter alia, LCP operators, until the entry into force of a new decision concerning BAT conclusions.

64 Furthermore, the annulment of the contested decision with immediate effect would run counter to the objectives of ensuring a high level of environmental protection and the improvement of environmental quality, as provided for in Article 191(2) TFEU, in Article 37 of the Charter of Fundamental Rights of the European Union, and in recitals 2 and 44 as well as in Article 1 of Directive 2010/75, to which the contested decision contributes.

65 Consequently, the effects of the contested decision must be maintained until the entry into force, within a reasonable period which cannot exceed twelve months from the date of delivery of the present judgment, of a new act intended to replace it and adopted in accordance with the qualified-majority rules laid down in Article 3(3) of Protocol No 36.

Costs

66 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Republic of Poland.

67 Article 138(1) of the Rules of Procedure provides that Member States and institutions which have intervened in the proceedings are to bear their own costs. Consequently, the Kingdom of Belgium, the Republic of Bulgaria, the French Republic, Hungary and the Kingdom of Sweden are to bear their own costs.

On those grounds,

THE GENERAL COURT (Third Chamber, Extended Composition)

hereby:

1. **Annuls Commission Implementing Decision (EU) 2017/1442 of 31 July 2017 establishing best available techniques (BAT) conclusions, under Directive 2010/75/EU of the European Parliament and of the Council, for large combustion plants;**

2. **Orders that the effects of the implementing decision annulled pursuant to paragraph 1 of the present operative part be maintained until the entry into force, within a reasonable period which cannot exceed twelve months from the date of delivery of the present judgment, of a new act intended to replace it and adopted in accordance with the qualified-majority rules laid down in Article 3(3) of Protocol (No 36) on transitional provisions;**

3. **Orders the European Commission to bear its own costs and to pay those incurred by the Republic of Poland;**

4. **Orders the Kingdom of Belgium, the Republic of Bulgaria, the French Republic, Hungary and the Kingdom of Sweden to bear their own costs.**

Collins Kreuschitz Csehi

De Baere Steinfatt

Delivered in open court in Luxembourg on 27 January 2021.

[Signatures]