

Climate Act fails stress test

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Introduction

Environmental Court of Appeal decision

Comment

Introduction

A Swedish refinery operator has applied for a permit to expand the capacity of its refinery in Western Sweden. The refinery is the largest in the Nordics and its expansion will give rise to increased greenhouse gas emissions, at least locally. The permit assessment has given rise to a question with potentially far-reaching consequences – particularly with regard to the Climate Act – which goes to the core of Sweden's centre-left government.

Permits for such operations are assessed by the environmental courts, which are regular Swedish courts of law. However, in this case, the government exercised a seldom-used right to make an exclusive assessment of the admissibility of the refinery's expansion – namely, whether a permit can be granted. The Environmental Court of Appeal, where the matter is now pending, must nevertheless clarify its own view on the admissibility of the expansion before the government's decision. On 15 June 2020 the Environmental Court of Appeal submitted its assessment regarding the admissibility to the government.

Environmental Court of Appeal decision

As a point of departure, the Environmental Court of Appeal defined the scope of the government's assessment of the expanded refinery. According to the court, there is no difference between the scope of the government's permit test and the permit test that is normally performed in the land and environmental courts. Thus, the government can consider only the Environmental Code and other acts concerning permits when deciding the admissibility of the expansion. According to the court, there is no room for any considerations other than strict judicial ones. Consequently, the court assessed the expansion in relation only to the requirements established in the Environmental Code and other relevant legislation. In doing so, the court came to two interesting conclusions.

First, since the refinery is part of the EU emissions trading system, no limit can be placed on its emissions of carbon dioxide under national legislation (ie, the Environmental Code).

Second, the Climate Act, enacted by Parliament in 2017, is of no legal relevance for the permit assessment. The court stressed that both the Climate Act and the long-term emissions goals regulate only the government's own undertakings and have no legal bearing when individual permits for environmentally hazardous activities are tried. Consequently, the court concluded that there are no legal grounds to declare an expanded refinery inadmissible in light of higher carbon dioxide emissions.

After examining other aspects of the operation, the court held that the government should declare the expanded refinery admissible.

Comment

The court's views – in particular, that the Climate Act cannot legally be taken into consideration in individual permit matters regarding environmentally hazardous activities – have raised a debate among the government. The Climate Act is a matter of vital interest for the Green Party, the minor member of Sweden's coalition government. The Green Party has also invested significant political prestige in trying to halt the refinery expansion project due to the alleged increase in greenhouse gases. It remains to be seen whether the government's upcoming decision on the admissibility question will put an end to the refinery expansion plans or to the government itself.

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