

Implementation of the European Industrial Emissions Directive

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The Industrial Emissions Directive (Directive 2010/75/EU), abbreviated IED, is based on a 2007 proposal by the European Commission. In 2010 it was passed by the European Council and the European Parliament, published in the Official Journal 17 December 2010 and it became effective 7 January 2011. There is a two-year time interval for its transposition into national law ending 7 January 2013. The intentions were to review and to simplify existing regulations for industrial facilities and to combine them into one legal provision that is this new directive. Moreover, a better application of the reference documents on best available techniques (BAT) shall be achieved in regard to permit approvals for industrial facilities. The following gives an overview on how the directive's aims are to be achieved and outlines its impact on the incineration and co-incineration of waste.

1. Introduction

With effect from 7 January 2014 the IED replaces the IPPC-Directive concerning integrated pollution prevention and control (Directive 2008/1/EC), Directive 1999/13/EC on reducing emissions of volatile organic compounds (VOCs), Directive 2000/76/EC on waste incineration; and three Directives on titanium dioxide: Directive 78/176/EEC on titanium dioxide industrial waste; Directive 82/883/EEC on the surveillance and monitoring of titanium dioxide waste; Directive 92/112/EEC on the reduction of titanium dioxide industrial waste. In addition, with effect from 1 January 2016 the IED replaces Directive 2001/80/EC on the limitation of emissions of certain pollutants from large combustion plants. Via extensive research over the course of two years the Commission analysed and revised the existing Directives. During the legislative procedure European Parliament and the European Council have made some minor revisions (Recast-procedure). According to the EU Commission, the recast of existing directives aims to achieve a significant benefit on the environment and human health and at the same time securing efficiency of costs and technical innovations. In addition this new directive's major thrust is *to amend and simplify*

existing legislation. Clearing the current legal framework of redundancies and unneeded administrative burdens¹ *shortcomings in the current legislation that lead to unsatisfactory implementation and difficulties in Community enforcement actions*² are to be compensated.

2. BAT reference documents: innovation of the Sevilla Process

The standards on best available techniques used to be less significant in member states of the EU under the IPPC-Directive. Article 17 IPPC-Directive envisaged an exchange of information between member states and industries concerned in regard to BAT altogether with required monitoring and developments in this field, relying on regular notifications of member states. This exchange of information on member state level was to decrease imbalances in the application of best available techniques. This so called *Sevilla Process* resulted in *BAT reference documents (BREF)* used by member states as basis to model or to revise national rules and standards or guidance documents. BAT reference documents as such are not mentioned in the IPPC Directive. Due to an unclear legal character and being without binding force application of best available techniques deviated extensively from one member state to the other. As a result, permits issued by member state authorities based on the IPPC Directive usually contained sanctions not included in BAT reference documents. This resulted in varying standards of environment protection and thus added up to significant distortion of competition for the European market.

Exchange of information and the process of drawing up BAT reference documents was only rudimentarily regularised by the IPPC-Directive. Both is now substantiated and codified in the IED. According to Article 13 I IED, major goal of this exchange of information organized by the Commission between Member States, the industries concerned and non-governmental organisations is *to draw up, review and, where necessary, update BAT reference documents*. Article 13 II highlights that the exchange of information shall address: *(a) the performance of installations and techniques in terms of emissions, expressed as short- and long-term averages, where appropriate, and the associated reference conditions, consumption and nature of raw materials, water consumption, use of energy and generation of waste; (b) the techniques used, associated monitoring, cross-media effects, economic and technical viability and developments therein; (c) best available techniques and emerging techniques identified after considering the issues mentioned in points (a) and (b)*.

For this exchange of information to happen the Commission *shall establish and regularly convene a forum composed of representatives of Member States, the industries concerned and non-governmental organisations promoting environmental protection* (Article 13 III 1). Implied is the Brussels Information Exchange Forum (IEF).

Now there even is a legal definition of the term *BAT reference document* in Article 3 No. 11. It *means a document, resulting from the exchange of information organised pursuant to Article 13, drawn up for defined activities and describing, in particular, applied techniques, present emissions and consumption levels, techniques considered for the determination of best available techniques as well as BAT conclusions and any emerging techniques*.

Key parts of BAT reference documents are the BAT conclusions. Article 3 No. 12 IED defines BAT conclusion as *a document containing the parts of a BAT reference document laying down the conclusions on best available techniques, their description, information to*

¹ COM/2007/844 FINAL, p. 6.

² COM/2007/844 FINAL, p. 5.

assess their applicability, the emission levels associated with the best available techniques, associated monitoring, associated consumption levels and, where appropriate, relevant site remediation measures.

According to Article 14 III IED, these BAT conclusions shall be reference documents for setting permit conditions and according to Article 15 III IED function as references for emission limit values ensuring that, under normal operating conditions, emissions do not exceed the emission levels associated with the best available techniques laid down in the decisions on BAT conclusions.

Formerly known as *Executive Summaries* BAT conclusions shall be adopted in accordance with the regulatory and committee procedure of decisions of Article 291 II-IV of the Treaty on the Functioning of the EU. BAT conclusions therefore have the legal character of decisions and thus some legally binding effects.³

To conclude, BAT reference documents, formally just *mere sources of inspiration (but with a great guiding determination)*, have become “*qualified legally binding minimum standards*.”⁴

Based on a cost-benefit ratio taking ecological and economical aspects into consideration competent member state authority may set less strict emission limit values (Article 15 IV IED) in specific cases. This assessment in regard to less strict permit conditions focuses on technical characteristics of the installation concerned and local e.g. geographical and environmental aspects. This opportunity for national deviation dilutes the stricter Commission proposal in key aspects. Adhering to BAT limit values in one member state while others don't distorts competition and frustrates intentions to simplify existing legislation and to ensure consistent standards or at least the harmonization of these standards. As a result further distortion of competition can be expected.

In regard to large combustion plants the Commission proposed stricter emission limit values. These plants should adhere to emission levels of best available techniques by 2016. The Council, however, argued present BAT must be standard for new plants even earlier and opted for a time window of just two years after the directive becomes effective. Existing large combustion plants should use BAT by 2016. Until the End of 2020 there is a transitional period for member states to draw up their own plans for a reduction of NO_x and/or SO₂ emissions and/or dust. Annual critical values need to be reduced between 2016 and 2020 so to ensure they reach BAT values by the year 2019.

3. Permit conditions and environmental inspections

The IED offers a detailed overview on what is expected of member states when it comes to industrial installations. As operators have to comply with general principles laid down in Article 11 IED and the environmental quality standards of Article 18 I, according to Article 14 IED permits must provide for the necessary measures to ensure compliance. These measures shall comprise at least:

- emission limit values for polluting substances;
- rules guaranteeing protection of soil, water and air;
- waste monitoring and management measures;

³ N. b.: *Diel*, Stärkung des europäischen Konzepts der *besten verfügbaren Techniken*, ZUR 2011, S. 60 (61).

⁴ *Diel*, Stärkung des europäischen Konzepts der *besten verfügbaren Techniken*, ZUR 2011, S. 60 (63)

- requirements concerning emission measurement methodology, frequency and evaluation procedure;
- an obligation to inform the competent authority of the results of monitoring, at least annually;
- requirements concerning the maintenance and surveillance of soil and groundwater;
- measures relating to exceptional circumstances (leaks, malfunctions, momentary or definitive stoppages, etc.);
- provisions on the minimisation of long-distance or transboundary pollution;
- conditions for assessing compliance with the emission limit values.

The IPPC-Directive lacked detailed specifications in regard to surveillance and inspection of installations. There were no time-limits and no compulsory site visits. Articles 13 and 14 IPPC-Directive only ordered member states to *take the necessary measures* allowing a wide scope of systems of environmental inspections in member states. This resulted in differing criteria for inspections, thus different standards of environment protection in different member states.

The IED tries to correct these imbalances. Article 3 No. 21 IED defines environment inspections as *all actions, including site visits, monitoring of emissions and checks of internal reports and follow-up documents, verification of self-monitoring, checking of the techniques used and adequacy of the environment management of the installation, undertaken by or on behalf of the competent authority to check and promote compliance of installations with their permit conditions and, where necessary, to monitor their environmental impact.*

Now member states have to set up a system of environmental inspections for all installations (Article 23 IED) *addressing the examination of the full range of relevant environmental effects from the installations concerned.* Based on a regularly reviewed and updated environmental inspection plan competent authority shall regularly draw up programmes for routine environmental inspections, including the frequency of inspections for different types of installations. These shall provide for periodical site visits based on a systematic appraisal of the environmental risks of the installations concerned. The period of time between two site visits shall not exceed one year for installations posing the highest risks and three years for installations posing the lowest risks.

Besides non-routine environmental inspections an additional site visit shall be carried out within 6 months as a result of complaints, serious environmental accidents, incidents and occurrences in important cases of non-compliance with the permit conditions.

4. Turning away from the requirement of *Betreiberidentität* (operator's identity)

The IED turns away from the requirement of *Betreiberidentität* as known in German law on air pollution control. *Operator* as defined by Article 3 XV IED now means *any natural or legal person who operates or controls in whole or in part the installation or combustion plant, waste incineration plant or waste co-incineration plant or, where this is provided for in national law, to whom decisive economic power over the technical functioning of the installation or plant has been delegated.*

Due to the addition of *in whole or in part* facilities of different or even competing operators on one location might have to be evaluated together. In German law reasons for a facility's

permit necessity resulted out of the facility itself. This had nothing to do with its location or with neighboring facilities of third parties (note section 1.1 sentence 4 of the 4. BImSchV)⁵

As this new operator definition has become directive law, Germany needs to revise its existing regulations on air pollution control. The basic principle of *Betreiberidentität* in German law will not remain under IED regime.

5. Influences on the incineration and co-incineration of waste

Directive 2006/76/EC on waste incineration together with its emission limit values have become Annex VI of the IED. As limit values are slightly becoming stricter, there are consequences for the incineration and co-incineration of waste. Far greater impact on existing facilities have probably the Commission's decisions on BAT conclusions. According to Article 21 III IED competent member state authority has to monitor and to ensure compliance of permit conditions of a facility with the IED. If necessary, permit conditions have to be updated. As stated in Article 15 III IED, this has to happen within four years of publication of decisions on BAT conclusions. From a facility operator's point of view this is short notice.

Nevertheless, modifying existing permits in accordance with present provisions on air pollution control in regard to new limit values requires a legal basis for authorisation for state authority to have immediate impact on the operation of an existing waste incineration or co-incineration facility. To date, best available technology is reflected in German air pollution control law such as the 17th ordinance for the implementation of Bundes-Immissionsschutzgesetz (17. BImSchV) in accordance with Germany's Federal Administrative Court's continuous adjudication.

In order to make permit requirements stricter, one needs an authorised regulation of check values. Check values are, however, only valid if facility technology under normal operation can ensure compliance. Some sort of *construing*, in other words reading these new BAT conclusions into determination criteria of best available technology like those in the annex of section 3.6 Bundes-Immissionsschutzgesetz is out of the question.

According to No. 12 of said annex determination of best available technology shall implement information published by the Commission in accordance with Article 16 II IPPC Directive. BAT conclusions, however, exceeding mere *information* due to their now legally binding character ask for a revision of existing law. In regard to legal certainty, directive-conform interpretation will not do the trick.

In spite of only a slight intensification of limit values in the IED, BAT conclusions might result in changing emission limit values depending on the availability of such best techniques thus rendering them dynamic. As such they might get stricter with every new BAT conclusion.

6. Conclusion

The IED as a combination and recast of existing sectoral directives to restrict polluting emissions from industrial facilities and operations in a single legal provision is to applaud. The high level of environment protection of the IPPC Directive is ensured. Still there is doubt whether EU administered air pollution control can be simplified with the abundance and

⁵ Compare: BT-Drs. 15/5218 vom 07.04.2005, S. 6; BVerwG, Urteil vom 30.06.2004 - 4 C 9/03 -, BVerwGE 121, 182 ff.

density of regulation that is the IED. The basic idea to grant BAT standards a certain legal relevance is in line with protecting the environment and fair competition. Unfortunately there are loop holes that might confound steps taken against distortion. There is hope, however, that these new and extensive regulations on environmental inspections together with the member states' duty to come up with practical inspection plans and programmes end existing imbalances concerning the quality of surveillance in member states.