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REVIEW

Conference report: revision of the Industrial Emissions Directive - in search of consistency with climate, energy and circular economy policies?

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Abstract

This paper is a report on the online webinar “Revision of the Industrial Emissions Directive: in search of consistency with climate, energy and circular economy policies?” that took place on 15th of June 2021 as part of an elni webinar series. The main speakers were Aneta Willems (European Commission), Christian Schaible (EEB) and Prof Jerzy Jendroška (Professor at the Opole University, Poland). The reported discussions focused, inter alia, on whether the revision of the IED would concern a radical change or merely fine-tuning. Main findings include that the IED does not create enough incentives for innovations and the penalties provided are still very low. A new revision proposal is expected in the beginning of 2022.

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Conference report: Revision of the Industrial Emissions Directive - in search of consistency with climate, energy and circular economy policies?

Alina Anapyanova and Jerzy Jendroška

Report on the online webinar “Revision of the Industrial Emissions Directive: in search of consistency with climate, energy and circular economy policies?” on 15th of June 2021 as part of the webinar series regarding the challenges of European environmental law towards 2030 – 2021.

1 Introduction

The Industrial Emissions Directive (IED)¹ has been in force since 2010, merging the previous legal instruments in the field of emission cutting and pollution prevention (including the IPPC Directive).² In this context, *elni* organized together with VVOR a webinar on the question in how far the current version of the IED is consistent with climate, energy and circular economy policies.

The IED is based upon several pillars, governing its legal approach towards the Member States and the different industries:

1. The integrated approach regarding issuing the permits. Permits should take into consideration the overall environmental performance.
2. The permit conditions must be based on the Best Available Techniques (BAT).
3. The IED allows a certain flexibility in setting less strict emissions limit values.
4. Environmental inspections are mandatory, accompanied by inspection plans.
5. The IED has to ensure public participation.³

These main principles have been the guiding the Member States and industries in the Directive’s implementation so far but now the European Commission is undertaking an impact assessment to analyze, which fields of the IED need to be revised and complemented. A new revision proposal is expected in the beginning of 2022.⁴

This year webinar series started with the conference on the Strategic Environmental Assessment Directive and its 20th birthday.⁵ The previous conference on the SEA Directive presented the results of an empirical

study on the SEA implementation in Germany and the legal consequences resulting from the UNECE SEA Protocol⁶, European Green deal⁷ and other EU policies. This webinar’s focus was more on the revision of the IED Directive and its impact assessment.

It was marked by the experts’ participation from the European Commission, the European Environmental Bureau and the academia. The main speakers were

- Aneta Willems (Head of Unit for Industrial Emissions & Safety, Directorate-General For Environment, European Commission),
- Christian Schaible (Industrial Production Policy Manager, EEB), and
- Prof Jerzy Jendroška (Former Member of the Espoo Convention Implementation Committee, Professor at the Opole University, Poland).

Prof Delphine Missone from CEDRE at the Saint-Louis University, Brussels initiated the conference by introducing a number of questions to reflect upon:

- Does the revision of the IED concern a radical change or is it merely a fine-tuning?
- Is there a deficit in the implementation of that Directive?
- If so, is it being taken into account in the process of the revision?
- How are the issues of biodiversity and carbon neutrality dealt with in the revision?

2 The revision of the IED

Aneta Willems, an expert from the European Commission has been working with the IED for 6 years by now. She emphasized that the goal of the Commission is to create a carbon-neutral economy. Aneta Willems announced the Commissions intention to establish an Observatory under the Industrial Emissions Directive to monitor progress and to give an opportunity to interested actors to evaluate and potentially invest in environmentally innovative techniques. The role of the Observatory will also be to observe the happening on the market and to produce the relevant guidance documents regarding the decarbonization techniques.

¹ Directive 2010/75/EU on industrial emissions, OJ L 334, 17.12.2010, p. 17 – 119.

² Directive 2008/1/EC concerning integrated pollution prevention and control, OJL 24, 29.01.2008, pp. 8 – 29.

³ The Industrial Emissions Directive - Environment - European Commission (europa.eu).

⁴ [Industrial Emissions – EU rules updates.](#)

⁵ The link to the conference recording can be found here: VVOR-Webinar series I | VVOR (omgevingsrecht.be)

⁶ UNECE Protocol on SEA, 2017.

⁷ COM (2019) 640 final.

2.1 Urgency to act in different fields

According to the speaker, there is an urgency to act now as environmental and health-related issues are connected. Equally, a toxic free environment is crucial for our nature and the biodiversity in Europe. In this regard, the Commission has recently adopted a Zero-Pollution Action Plan for Air, Water and Soil on 12th of May.⁸ She also acknowledged the IED as an inherent part of the Green Deal, being important for circular economy, biodiversity and all the other areas driven by us as a human race.

2.2 Directive's integrative approach

Currently, the Directive is in the middle of the revision work, covering changes in the permit regulation of many industrial installations, including the agricultural dimension. Among the agricultural sector, the Commission looked particularly at the dissemination of the best available techniques for cutting the emissions related to air, water and soil. In this process, an integrative approach is applied, looking at the impact of the industries in other areas such as waste and energy, noise. Hence, the IED aims to be a very encompassing Directive. After the evaluation in 2020 the Commission could clearly see "that more has to be done", as per Aneta Willems.

Certain aspects of the Directive are still working well – such as the 'Sevilla process'⁹, allowing setting the norms for the most concerned industries and making the best practices available. The European Commission observed it as a very inclusive democratic act for the prevention of the pollution and its control. On the other hand, the areas of water and air pollution appeared to be more concerning – since in these areas IED accomplished less pollution control than expected. Thus, more should be done here.

2.3 Responding to changing requirements and existing weaknesses

Another important topic raised, was how the Commission should approach circular economy and innovation within the IED, in line with the current breakthrough technologies on the market. There is an urgent need for better circularity and reuse of resources. In this field, the IED is not yet contributing sufficiently, despite its potential. Additionally, use of chemicals in the production has to be looked at as well as the issues related to innovation. In the recent years, the whole universe of environmental laws has been modernized, so the IED also needs to be modernized. The Commission is therefore looking where new areas in the Directive have to be added, responding to the changing requirements and addressing the existing

weaknesses. The Commission also wants to encourage more industrial symbiosis activities where possible, especially concerning the water use. In this respect, a clear need to address the water scarcity and the water quantity used during the industrial processes was pointed out. Another problematic area mentioned by Aneta Willems was the carbon reduction as per Article 9 of the Directive. Once the carbon free technologies are economically viable, they will be used more. She equally mentioned the fact that there are implementation differences among the different member states. Additionally, she expects synergies between the IED and the ETS Directive.¹⁰ Here, better guidance is required.¹¹

2.4 Need for innovation

The overall conclusion was that the IED is not really pushing the innovation. The role of the Commission in the future will be to supervise what is happening on the market and provide guidance documents to the Member States. Thus, there will be a fine tuning and complementing for well-working provisions - and a radical change for those, which do not. The overall wish is to develop a forward-looking legal document, allowing accelerating the necessary development.

3 Making the Industrial Emissions Directive fit for the EU Green Deal

Christian Schaible from the European network of environmental NGO's (EEB) subsequently reported on his finding regarding the shortcomings in the IED and its enforcement.

According to his observation, the first issue is that there is still too much flexibility in the enforcement of the Directive. This leads directly to the failure of the delivery of the objectives. One concrete example is a systematic alignment of emission limits to lenient Best Available Techniques levels in the upper range. Secondly, in the view of EEB, some operators have currently even the space to derogate and "abuse" the Article 15(4) of the Directive, stipulating that competent authorities can under specific circumstances set less strict emission limit values in the permit than those allowed in accordance with the best available techniques. There is no agreed harmonized method here and numbers are interpreted in a more lenient way, according to Christian Schaible. Derogations are often applied concerning the permits for large combustion plants.

Additionally, there are weak sanctions. In Romania for example, the penalties are very low and not proportionate to the damage, which will arise.

⁸ COM (2021) 400 final, 12.5.2021.

⁹ The Sevilla Process is designed to agree upon what constitutes the Best Available Techniques (BAT) for pollution prevention and control.

¹⁰ Directive 2003/87/EC on the European ETS Trading scheme, OJ L 275 25.10.2003, p. 32.

¹¹ The IED already explicitly refers to the ETS and aims to avoid duplication of regulations, see f. ex.: Art 9 (4), Art 9 Recast.

Therefore, according to Christian Schaible, legal and human rights are neglected.

3.1 Access to information and entering the Digital Age

Another important issue raised was the access to public information about the legal seat of the industrial entity where it is conducting its activities. In this regard evidence is often missing on the real emission numbers. This makes an assessment difficult where the industrial entity is located towards the other industries in terms of its emissions.

Additionally the same time, Christian Schaible noticed some progress. EEB made its own system for it. With entering the digital age, so he suggested a new approach for compliance promotion and benchmarking. The subset of the IED is very much focused on the installations, however, there is no clarity on what we really want from industries in the first place. The EEB suggests to focus on the real input and output points. Overall, the activity emphasis needs to be changed – moving from pollution to energy. All the options need to be looked at. The question here should be about the output in terms of pollution.

He suggested a new approach on reporting for compliance promotion and benchmarking. Consumption data and input about water, materials, chemicals and energy should be made publicly available on the IED platform, so that the real industrial consumption can be seen. Now, this data is difficult to get. Additionally substance groups and the thresholds for their use should be adopted. Additionally, a digital link could be provided for comparability to tracking of performance and the environment quality standards:

- a. Integration of EU reporting streams
- b. Compliance check Best Available Techniques
- c. Real time data
- d. Permitting conditions

At the end of his presentation, Christian Schaible made a comparison between the ‘NGO mantra’ vs ‘industry mantra’. The typical examples and arguments he mentioned were industries often claim that the BAT techniques are not available, there is too little representative data available to report and that this data does not reflect the sector’s specificity. Whereas the NGO’s would claim that BAT’s should go beyond the legal expectations and address the technical feasibility. They aim at the pollution prevention at the source and for a more integrated approach.¹²

Therefore, he sees that overall a more cost efficient approach is necessary. There is not a need for “*more data collection*” – rather for more useful data.

3.2 Performance Evaluation through KPI's

In his view, flexibility needs to be restricted as some Member States are simply exploiting the possible derogations. Here, regulation in the IED is appropriate. Christian Schaible made a suggestion to add a separate chapter on the toxic free environment and to have a cut of point regarding the technical feasibility. In this regards, there is little of representative data.

He noticed that some national rules are stricter than BAT. This should however not lead to a relaxation of the rules. Additionally, there is an imbalance of interests in the Sevilla Process which aims at developing those BAT’s for pollution control.

Key Performance Indicators (KPI’s) are needed here. KPI’s could clearly indicate the concrete added value of the new techniques, including an improved compliance promotion for environmental standards. In his view, there is a need to rate the industries and how the Member State implement the new Directive. Here, a more combined approach is needed, in line with the developments on the market.

He also sees the need for additional chapters and goals in the Directive such as an additional water protection chapter. The goal is here to develop new forward-looking BAT’s. A more integrated approach should be aligned in accordance with the overall Zero-Pollution Ambitions. As an example, in the area of energy-intensive industries, more electrification combined with the use of renewable energies are aimed at to reduce the emissions. In this area, investments in new processes should happen. More prevention at the source of the emissions has to happen – the IED should be adopted more to the purpose. The right change should be therefore stimulated. The legal instrument should provide appropriate tools and incentives for a continuous progress, making the decision-makers accountable.

4 Q&A Discussion round

The first question in the discussion round related to the choice of an instrument in relation to an integrative approach: “*The choice of instrument is a fundamental. When reducing the emissions, do we stick to the permit instrument or also to other instruments? What extends to an integrated approach? The idea here is the protection of an environment as a whole. However, how to achieve this when moving from one target to another? Where the balancing act does takes place? She commented that the available data shows that the available instrument does not work properly at the moment.*”

¹² Christian Schaible: Making the European Emissions Directive Fit for the EU Green Deal, 2021, slide 6.

Aneta Willems from the European Commission replied that there are some issues in the data collection and data availability. There is a strength of an integrative approach related to the functional information. Here, the Commission looks at the environmental, economic and social impact as a whole. Concerning the IED as an instrument, she replied that the permit requirement is one of the strongest instruments as it commands and controls; looking also at the industrial actors who cannot challenge certain issues.

When it comes to an integrative approach, it is equally assessed from the collected data whether the techniques used to decrease air pollution, did not increase the waste generation at the same time. This is aimed to ensure a more responsible approach to the environment. Here, individual practices have to be looked at. Specifics environmental performance levels for each industry have to be established, integrating other areas objectives as well. If we want to work on the decarbonisation and water pollution at the same time, policies have to be coordinated where full coherence and added value are realized, according to Aneta Willems.

Christian Schaible added that in his view, an integrative approach means to look at the full impact, so the title of the Directive is misleading. The BAT criteria can be defined to also cover Circular Economy goals.¹³ Looking at the consumption and nature of raw materials, it also covers the use of fossil energies. Often, when it comes to the use of hazardous substances, the reference is made to the REACH Regulation. According to Christian Schaible, the BAT principle in the IED can also deal in a complementary way with these issues, covering the whole impact of the permit requirement.

Aneta Willems also pointed out that the European Chemicals Agency ECHA is involved in the revision process to bring this knowledge to the new proposal. However, at the same time, there is a need to prioritize where to put the emphasis and to decide on the data collection. She confirmed that the Commission is seeing certain failures. During the revision process, the opinions of different stakeholders will be therefore considered. Another contribution made by one of the participants, referred to flexibility: Flexibility is often put forward as a positive aspect of this directive, more attuned with the principle of subsidiarity. Already mentioned in the IPPC Directive, it was initially meant to motivate the entrepreneurs to comply. It was “*epic*” in the 1990s. She therefore asked: “*Did we move away from flexibility because of changing circumstances?*”

Aneta Willems replied that the flexibility requirement was there to address those issues, given that there is an

assessment. Looking at Art. 15(4) of the IED Directive, the Commission was not involved when this derogation rule was defined. It could be seen from the previous reports that there were no clear cases of abuse, with some derogations among certain industries though. The Commission is thus keeping an eye on the proper implementation and derogations. If there is a breach, it has the power to act.

Christian Schaible said that he is seeing the flexibility very critical. Why should we be flexible and for whom, to whose benefit? Human health is at stake when being too lenient with pollutions, not implementing the current standards. There should be a win-win situation for the pollutant and the public. He sees the urgency to shift towards the electrification in the production and energy-intensive industries and to move away from the air pollution. Different Member States will adopt different approaches and certain industries will not be dismissed. When looking at the flexibility, we should therefore ask ourselves, what are the technical arguments why flexibility should be granted? Why would the industry not be able to use it (for whom)? Industries motivation to properly report their activities and public transparency are important here.

5 Rights of the public in the context of the IED

At the beginning of his presentation, Prof Jendroška, expert on procedural law and member the Aarhus Convention Compliance Committee, drew attention to the fact that the European Union is a Party to the Aarhus Convention. Thus, in line with the rule of law principle, legal obligations resulting from the Convention have to be followed. He mentioned the following issues of concern: 1) Access to information, 2) Public participation and 3) Access to justice. Prof Jendroška pointed to the flaws in the Directive, most of them inherited from the previous IPPC Directive. Similar concerns were already raised by Prof Jendroška during the elni presentation on the IED in 2010.¹⁴ Legal situation has changed as meanwhile some of the issues were subject to cases at the Aarhus Convention Compliance Committee.

5.1 Cases at the Aarhus Convention Compliance Committee

Article 27 of the IED Recital ensures the right to public participation. If there is no possibility for public participation for updates and reconsideration, it consists in a breach of the Aarhus Convention.

Case law of the Aarhus Convention Compliance Committee (ACCC/C/2014/122 EU and

¹³ See e.g. Art 11 (d) of the IED on waste prevention.

¹⁴ Elni-VMR-VVOR-Congress, 2010, Talking about the environmental effects of industrial installations and the European Directive on the Industrial Emissions (IED/current IPPC directive, <https://www.elni.org/elni/events/by-elni/elni-vmr-vmr-congress-2010>).

ACCC/C/2014/122 Spain) shows that IED and its implementation in Spain fail to comply with the Convention in this respect. The Committee in the Spanish case did not exclude the possibility that there may have been permits updated under the first transitional provision for which public participation was not required. However, a legal framework should envisage at least a possibility for public participation relating to reconsiderations and updates under the first transitional provision of the Spanish Law 16/2002.¹⁵ Thus, the requirement of Article 6 (10) of the Aarhus Convention was not met.

Overall it can be concluded that public participation should be allowed if it is appropriate to participate in the permitting system for installations. In the above mentioned case the Committee found that there are insufficient possibilities for public participation regarding the revision of the permits. It found that that “*by putting in place a legal framework that does not envisage any possibility for public participation in relation to reconsiderations and updates under article 21 (3), (4) and (5) (b) and (c) of the Industrial Emissions Directive, the Party concerned fails to comply with article 6 (10) of the Convention.*”¹⁶

The Committee underlined that there might be permits where public participation might not be required but it should be subject to testing by the authorities. However, making a system where no public participation at all is possible is not in line with the Convention. In the revision of the Directive, the Commission should therefore consider establishing a new approach to these issues about permit.

5.2 Access to information

Another issue of concern raised by Prof Jendroška was the access to information in Article 24 of the IED. If the public is concerned, information should be actively disseminated through an electronic database or upon electronic request. If however, certain information is only available upon an electronic request – it might take a disproportionate amount of time. This could be easily resolved in the Directive itself.

5.3 Legal regime for public participation

Prof Jendroška mentioned also some other issues related to the legal regime for public participation which were not yet fully addressed by the Compliance Committee.

He stressed doubts regarding compliance of IED with Article 7 of the Aarhus Convention which requires public participation in case of plans and programs ‘relating to the environment’. While IED requires preparation of some plans (environmental inspection

plans in Article 23.2 and Transitional National Plan in Article 32) it does not include respective obligations regarding public participation. According to Professor Jendroška, it would be difficult to consider both types of plans as not ‘relating to the environment’ and therefore being not subject to Article 7 of the Convention.

Furthermore, he mentioned that in IED there is still no clear indication that the public notice should be done in „adequate, timely and effective manner” as required in Art.6.2. The issue was briefly addressed already in case ACC/C/17 EC and the argument at that time was that issues not regulated by the respective directives remain the responsibility of Member States. Since then however it has been commonly accepted that if the EU regulates certain area in a directive, like for example public participation, in IED, it should regulate it fully, in line with international obligations, including the Aarhus Convention.

5.4 Access to Justice

Aarhus Convention prescribes equally access to justice in Article 9 and the possibility for injunctive relief where appropriate under Article 9.4. However, injunctive relief is not available under Article 25 of the IED in the list of remedies as envisaged per Article 9(4) of the Aarhus Convention. Prof Jendroška questioned why the Commission does not consider this remedy as necessary so far and concluded his presentation by acknowledging that the Commission already announced stronger measures regarding the access to justice.¹⁷ This could improve the rule of law.

5.5 Concluding remarks

Aneta Willems confirmed that the Commission is looking into the issues of public participation and the access to information. She also added that the impact assessment report on the IED will be made available in the first quarter of 2022, the complete staff working document, legal proposal and the Commissions communication on the IED revision.¹⁸

Following that, Christian Schaible replied to another participant’s question about the Sevilla Process improvement. Some targets in the process have to be set regarding the technical feasibility. It has to be looked at the main question: what do we want from industries to achieve in future? Here, setting the Key Performance Indicators could help. There is some “*toughness*” required here. Moreover, if we want to offer data, comparing the overall technical performance, we should choose the best reference plants. There is already an increasing difficulty to compare data from permits in different languages which are regularly updated and at times not available

¹⁵ Spanish Law 16/2002, of July 1, Integrated Pollution Control and Prevention.

¹⁶ ACCC/C/2014/121 EU case.

¹⁷ Commission (2020) 643 final.

¹⁸ SWD/2020/0181 final: the current version was lastly updated in 2020 (23.9.2020).

online. Consequently, decision makers' accountability can be made more transparent through a correct data collection. Here, IT systems have to work for us, helping to compare the data among different industries. This way, best practices can be chosen.

In this context, Prof Jendroška raised the point about a possibility to publish and collect data via specific databases. Christian Schaible replied that the annual compliance report, as per Article 14 of the IED also offers a solution if the industries properly report their data. As of now, it is not always produced in a meaningful way and essential data is missing.

Christian Schaible noticed equally that good reporting practices in certain Member States should be highlighted and be available for everyone. Annual reporting systems should be harmonized. The information can be then verified by a "double check" through authorities. Raw data from the different industries via a digital portal can first be made available, followed by an authority check. The reported data at the moment does not provide an overall insight into the other areas of pollutions such as water pollution, despite its availability.

6 Overall conclusion and recommendations

The IED will be revised and adopt a more integrative approach, encompassing the areas of biodiversity, water and air pollution and circular economy. Water needs particular attention.

There will be a fine tuning in some areas and complementing in other areas. The Directive is not pushing enough the innovation. More technology advancement in different areas is needed. Synergies with the ETS Directive will be expected in future. The ECHA Agency is contributing to the revision work of the Directive.

The penalties provided by the Directive are still very low and disproportionate compared to the potential damage caused. The industry approach should shift more towards the input/output oriented approach, looking at other alternatives reducing emissions.

There is a need for less data but for a more meaningful data. Establishing Key Performance Indicators can allow tracking and choosing the best performing industries. The industries need to make their information available in a meaningful way. The IED adopts already with the BAT principle an integrative approach, issues as the use of hazardous substances can also be dealt with in the Directive

The IED does not fully comply with the Aarhus Convention requirement. Access to public information and access to justice have to be looked at and adopted in certain cases. The public participation in cases of permit granting is not always available.

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In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.

Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. elni is a registered non-profit association under German Law.

elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.

Coordinating Bureau

Three organisations currently share the organisational work of the network: Öko-Institut, Technische Hochschule Bingen (TH Bingen) and sofia, the Society for Institutional Analysis, located at the Darmstadt University of Applied Sciences. The person of contact is Prof. Dr. Roller at TH Bingen.

elni Review

The elni Review is an English language law review. It publishes articles on environmental law, focussing on European and international environmental law as well as recent developments in the EU Member States. elni encourages its members to submit articles to the elni Review (info@elni.org) in order to support and further the exchange and sharing of experiences with other members.

The first issue of the elni Review was published in 2001. It replaced the elni Newsletter, which was released in 1995 for the first time.

The elni Review is published by Öko-Institut, TH Bingen and sofia.

elni Conferences and Fora

elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researches, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in the Brussels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

Publications series

elni publishes a series of books entitled "Publications of the Environmental Law Network International". Each volume contains papers by various authors on a particular theme in environmental law and in some cases is based on the proceedings of the annual conference.

elni Website: elni.org

The elni website www.elni.org contains news about the network. The members have the opportunity to submit information on interesting events and recent studies on environmental law issues. An index of articles provides an overview of the elni Review publications. Past issues are downloadable online free of charge.

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