Position Paper

on the EC proposal COM (2022) 156 final/2 for a Revision of the

Industrial Emissions Directive (IED)

Austrian Federal Economic Chamber, Industry Division

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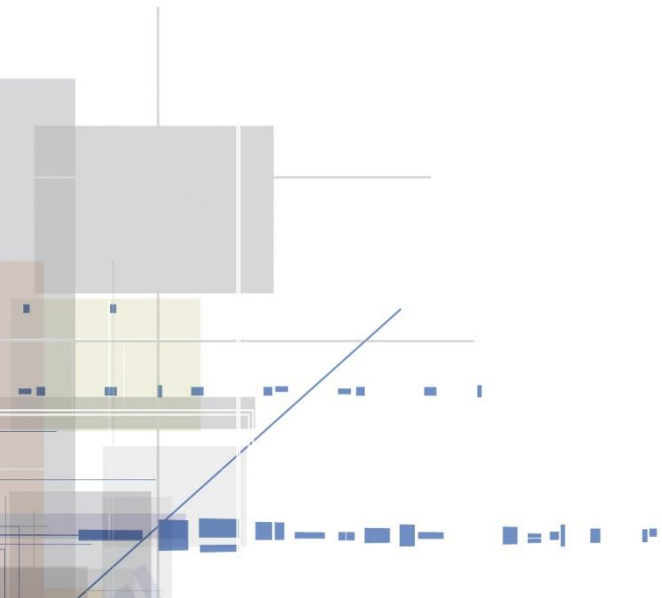

The IED regulations in force and the BREF process have been effective tools for reducing emissions from industrial activities from 2010 until today. We see a need for adaptation in certain areas of the regulatory framework, but we are convinced that the basic structure of the IED, in particular the integrated approach and the use of the best available techniques, has proven its worth for large industrial installations, and that maintaining this structure is crucial for further improving the environmental performance of industrial installations in Europe. The expert-based Sevilla process should therefore remain in place. A balance between increasing environmental ambitions and maintaining competitiveness should be targeted. Global competitiveness must be more strongly anchored in the future process of the IED.

Executive Summary

1. No new burdens for companies in times of crisis: No complication of permit conditions in a phase of highly uncertain times with raw material shortages and energy supply emergencies.

2. Climate protection and energy security through more efficient permit procedures: The political goals can only be achieved if permit procedures for lower-emission, climate-friendly and more energy-efficient installations are processed faster and more efficiently.

3. BAT: Limit values are not the same as emission levels - each technology has a certain operating range and individual limits: Keep the technology-open and integrated approach. Decisive rejection of the Commission's proposal that the competent authorities must in principle set the strictest possible emission limit values in each case – this would be contradicting the basic idea of the IED.

4. Energy and resource efficiency depend on numerous individual factors - generally applicable, binding environmental performance limits are not expedient: Environmental performance limit values must remain indicative to avoid contradictions and conflicting goals. Product-related regulations do not fit into the systematics of the IED and cannot be enforced by authorities properly.

5. Public participation for those affected - not for those preventing: Any extension of public participation leads to more complex, longer approval procedures. The protection of public interests is already largely ensured by the fact that authorities are obliged to consider all relevant factors in the procedure. Often, NIMBY (Not In My Backyard) is a stronger motivation for the public to be involved than optimising the environmental impacts of industrial processes.

6. The IED should be optimally coordinated with other regulatory frameworks - but in no way interfere with other legal matters: It is positive that GHG emissions are not double-regulated or contradictory. Rejection of the obligations regarding transformation plans, the contents of which are only going to be defined by the Commission in a few years.

7. Sensitive information must be adequately protected: The protection of business- and trade secrets is the livelihood of European companies. The Commission's plans do not sufficiently guarantee their protection.

8. Penalties must remain proportionate and appropriate: The proposed fines are draconian and incompatible with Austrian penal law. Civil law provisions on damages have no place in installation permit procedures. Both the reversal of the burden of proof and the right of NGOs to take legal action are strictly rejected.

9. More clarity instead of expanding the scope of application: The expansion of activities in Annex I must only be possible throughout the ordinary legislative procedure - and not, as planned, through delegated acts. Standardising mining as an IED activity weakens the EU's independence from raw material imports.

10. The IED needs a future-proof, lean, unbureaucratic and legally certain design - it must become more enforceable for companies and authorities: The proposed involvement of all authorities would go beyond the scope of the permit procedure. Mandatory Environmental Management Systems would contradict the existing system and complicate the procedure with the authorities.

11. Proposals for urgently needed additions to the Commission's proposal: Facilitation of monitoring in case of irrelevance, redimensioning of the obligation to submit an initial status report.

Ad 1: No new burdens for companies in times of crisis

Due to the war in Ukraine, the exorbitant increase in energy and raw material prices, the shortage of raw materials and impending problems with gas supplies, many industrial companies are currently facing existential difficulties. From their point of view, now is the worst possible time to introduce new burdens. Also given the enormous approval marathon that Europe is facing to achieve the set climate targets, new requirements that prolong and complicate procedures are completely incomprehensible. In the interest of Europe as a business location, we, therefore, call for a postponement of all measures contained in the Commission's proposal that burden companies and make approval procedures more complex and deferring.

Ad 2: Climate protection and energy security through more efficient permit procedures

The ambitious European climate targets require a restructuring of the energy system, the infrastructure and the production of goods. Modern installations are lower in emissions, more

climate-friendly and more energy-efficient. The goals set in these areas can only be achieved if permit procedures are handled faster and more efficiently - which is counteracted by the introduction of new content-related and bureaucratic burdens for companies and authorities. We expected from the review of the IED that – based on many years of experience - both the Sevilla process and the individual permit procedures could be handled in a more legally secure, timely and efficient manner in the future. Unfortunately, these hopes are hardly fulfilled by the Commission‘s proposal. On the contrary: instead of acceleration and more efficiency, implementation of this revision proposal would primarily bring new burdens and delays - due to an expansion of the scope of application, stricter, more complex requirements and more rigid penal provisions.

Ad 3: BAT: Limit values are not the same as emission levels - each technology has a certain operating range and individual limits

The emission limit values at the lower end of the intervals do not represent BAT but are values that can only be achieved under special conditions. The reason for expressing BAT with a range of emission limit values is the mutual dependency of environmental performances, which is not always the same. Not every measure that leads to an emission reduction of a certain pollutant also reduces the emission of another. Article 15 (3) of the Commission proposal makes the integrative approach of the IED (originally even anchored in the name of the Directive) obsolete.

The BAT process would be restricted or become superfluous. The established BREF processes would be undermined and the data analysis and derivation of emission limit value ranges carried out there would be null and void. The very purpose of bandwidths is to enable limit values in the entire range of bandwidths - and not only at their lower end.

The previously proven approach, which is technology-open and takes into account the aspects of proportionality, is abandoned with the new Article 15 (3), without the characteristic of practicability for installations with certain technical features or for old installations still playing a role. This is an open contradiction to the BAT standard, which is norm-systematically not tenable and is not legally justified. In practice, this may lead to countless installations not being able to be get a permission.

The planned application of the lower "strictest possible" limit of the BAT-AEL range has exactly the opposite effect to the regulation in Article 15 (2): It pushes the technology that achieves exactly the lowest value - other technologies with a slightly lower performance will not be eligible for approval.

In our view, basing permits on the strictest possible emission limit values also violates the principles of the BAT-AEL range concept. The approach proposed by the Commission completely neglects the complexity and variability characteristic of different installations within the same sector. It is not technically possible for all installations to meet the minimum

emission level in each and every area due to the individual different circumstances - raw materials used, products manufactured, variations in the processes, etc..

The BAT ranges are intended for different technologies; not every technology can achieve the lowest value in every area. Example: Company A uses technology A, which guarantees excellent fine atmospheric particulate matter values, but is in the middle range for NO_x. Company B uses technology B, with exactly the opposite performance. Since companies cannot use both technologies, countless exceptions would have to be formulated in the BREF process or separate AEL tables would have to be formulated for each technology.

In any case, the principle of technology neutrality should be upheld in the IED and not watered down. The listing of techniques described in the BAT conclusions should continue to be descriptive and not exhaustive. Techniques other than those listed should continue to be allowed, provided that an equivalent level of environmental protection is ensured.

The draft also leaves open whether the regulation according to Article 15 (3) already applies to the BAT-AEL emission ranges prepared under the current IED or only to the BAT conclusions prepared after the new IED enters into force. It needs to be clarified that it can only apply to BAT conclusions derived under the "new" IED and does not lead to changes to existing BREFs or BAT conclusions or permits already issued. This also applies to all new regulations and their enforcement: BREF/BAT conclusions that are or were drawn up based on the currently applicable IED must of course be enforced according to its regulations and not according to any revised new regime. We suggest a corresponding transitional provision.

Finally, on the implementation and enforcement of the revised Article 15 (3): An unclear regulation like this will be handled and interpreted differently in different Member States. This contradicts the aim of the IED to create a level playing field in Europe.

Ad 4: Energy and resource efficiency depend on numerous individual factors - generally applicable, binding environmental performance levels are not expedient

The provision of Article 15 (3a) aims to make BAT performance levels other than BAT-AELs, namely BAT-AEPLs (Associated Emission Performance Levels) - such as resource or energy efficiency - legally binding.

Energy efficiency should become a mandatory part of permits with regard to greenhouse gas mitigation. We believe that energy efficiency targets should retain their indicative nature in the context of the BAT conclusions. Many greenhouse gas mitigation technologies require a higher amount of energy compared to today's state-of-the-art technologies. Therefore, setting mandatory energy efficiency targets would lead to situations where an installation operator could not contribute to the EU climate neutrality target and comply with its permit

at the same time. Here we are dealing with a classic environmental policy trade-off that cannot be resolved by the additional inclusion of mandatory criteria - quite the contrary.

The IED is the most important instrument for regulating emissions and should remain so - energy efficiency should continue to be only part of an integrated consideration in this regulatory framework due to the conflict situation outlined above and should not be made mandatory as AEPLs.

Life cycle analyses are always product-related and not installation-related; product-related regulations would be a completely foreign body in the IED, which, moreover, cannot be enforced by the authorities at all. How should an enforcement authority be able to assess the environmental performance of the entire supply chain? The enforcement would already be overburdened with the examination of the obligation to use material resources efficiently.

We point to the principle that legal provisions must be formulated in such a way that their content can be adequately monitored. This is not the case here.

For cost reasons alone, it is in the industry's interest to achieve optimum efficiency wherever possible. In most IED sectors, resource and energy efficiency is something that depends heavily on the techniques and processes used. Binding AEPLs cannot adequately reflect the diversity of existing plant configurations.

Furthermore, in our view, the question arises as to how resource or energy efficiency targets are to be defined, quantified and evaluated at all: What should the targets look like in concrete terms and in which units should they be measured?

The BAT process and data collection would be unnecessarily inflated and thus further delayed by the requirement to define environmental performance thresholds and the planned introduction of corresponding comparative values (which would also require the collection of a plethora of new parameters). Moreover, because these values depend on numerous external factors (source material, location, etc.), they are often highly variable and therefore usually not comparable with each other.

The extension of the test period for emerging and innovative techniques is welcomed. However, it must be ensured that the investigations of the performance of techniques remain open-ended until their conclusion. It is also requested that the new *Innovation Centre for Industrial Transformation and Emissions* (INCITE) only provides information for the Sevilla process and is not itself an actor in defining the state of the art. Significant participation of the industry in the activities of INCITE appears essential and should be established accordingly.

Ad 5: Public participation for those affected - not for those preventing

It must be realised that an extension of public participation leads to more complex and longer permit procedures. Especially in connection with the "strictest possible emission limit value" of Article 15, extended public participation must be rejected: It is not expedient to vote democratically on such complex technical issues. From our experience, in the future official experts in proceedings involving NGOs or neighbours would find it very difficult to justify a limit value in the higher range of the BAT.

BAT ranges exist because different technologies are used: In one range, a lower emission value is possible, but this requires more energy, for example, or in another range, a higher limit value. Discussing this integrated approach in a procedure with public participation, when the requirement is to choose the "strictest possible value", will in many cases have the consequence that receiving a permit will become a game of chance for installation operators in the future.

Moreover, an as a matter of principle NIMBY ("Not In My Backyard") attitude, which is often not in the general interest, is in many cases a stronger motivation for the public to be involved than optimising the environmental impacts of industrial processes.

Ad 6: The IED should be optimally coordinated with other regulatory frameworks - but in no way interfere with other legal matters

We very much welcome that greenhouse gases emitted by installations within the EU-ETS remain excluded from the scope of the IED. Article 9 ensures the interaction of the IED with the EU-ETS. Deleting these provisions would lead to GHG emissions being regulated in parallel by two different legal instruments, contrary to the 'better regulation principles', and thus jeopardise both the efficiency of the EU-ETS framework and the integrated approach of the IED.

The requirements regarding transformation plans for climate neutrality under Article 27d are rejected, as the preparation of such plans means additional effort, costs, time delays and legal uncertainty. Especially for small and medium-sized enterprises, this would entail immense bureaucratic effort. An additional benefit of the new obligation for the transformation to climate neutrality and an added value for the environment are not discernible. The transformation process is comprehensively regulated by other regulations from the EU Commission's Fit for 55 package so it is not necessary to draw up plans based on the IED for this as well.

The introduction of binding environmental performance limits also increases the risk of overlaps with other European standards on topics such as REACH, waste and water management. To ensure legal certainty for all parties, competent authorities, citizens and the industry, coherence between different pieces of legislation is essential.

The protection of human health as an additional protection goal of the IED would lead to a complex orientation towards toxicological limits, which are currently not even known for most pollutants and would first have to be worked out at the medical level. Furthermore, differentiation would be needed between the protection of the health of neighbours on the one hand and the protection of employees working in the plant on the other. The protection of employees or occupational safety cannot be the protection goal of the IED.

Obligations for chemicals concerning documentation, risk assessment, alternative testing, etc. are a alien to installation law. Rather, such obligations arise based on chemicals or worker protection law. In particular, REACH regulates the authorisation and restriction of the use of substances (chemicals). These processes are based on clearly structured processes and have been well established over the years. Installation law should not duplicate these process regulations.

To avoid additional bureaucracy and unnecessary administrative burden, companies should at least be given the alternative option of covering these topics, e.g. within the framework of a published sustainability report. In any case, the company must ultimately be able to decide what is published in detail so that any trade secrets can be protected.

Ad 7: Sensitive information must be adequately protected

The planned obligation to make permits public must not have the consequence that the content of all (previous) permits must be published and that there are differences between the Member States in the scale of the information published. It must be clear that business and trade secrets, in particular the detailed information on installation technology contained in the permits, as well as certain plant-specific conditions, are protected from publication. Unrestricted publication jeopardises the know-how protection of European companies and leads to distortion of competition.

NGOs should still not be handed over trade and business secrets. The protection of trade and business secrets must be strictly upheld. The confidential handling of sensitive data is a central aspect of the exchange of information with the Commission and requires regulations that allow the necessary information to be derived from the data while at the same time safeguarding the data protection interests of the industry. The regulation of Article 13 does not meet these requirements. Under such conditions, there will be no acceptance of the BAT process by the industry. Moreover, effective control of the protection of secrets is necessary.

Ad 8: Penalties must remain proportionate and appropriate

The drastic tightening of the requirements for national penal provisions must be strictly rejected; we are in favour of retaining the existing provisions. Furthermore, the fines to be

imposed for infringements according to the newly amended Article 79 are not compatible with Austrian penal law: fines amounting to 8% of the annual turnover cannot be imposed by the competent authorities for constitutional reasons.

We are strictly against the introduction of national damage compensation schemes. Civil law damage compensation regulations have no place in installation permit procedures. Apparently, civil environmental liability, which has been discussed for decades, is now - after several failed attempts (see the EU Environmental Liability Directive and cf. the Proposal for a Directive on environmental liability with regard to the prevention and remedying of environmental damage [COM (2002)17 final]) - to be introduced via the back door for IED installations. The reversal of the burden of proof, which is highly problematic in terms of content, and the right of NGOs to bring collective actions are strictly rejected.

Ad 9: More clarity instead of expanding the scope of application

We are firmly opposed to the competence granted to the Commission in the new wording of Article 74 to extend the list of activities listed in Annex I through delegated acts. An extension must be part of an ordinary legislative procedure. The consultation of "experts" according to Article 76 (4) is insufficient.

It is disappointing that the additions to Annex 1 significantly expand the scope of application of the IED, but one searches in vain for necessary clarifications or relief.

According to the draft revision, mining is to be newly included as an IED activity in the future. We reject this, not just because it thwarts all EU efforts to reduce Europe's problematic dependence on third parties for raw materials. Inclusion would also hamper the supply of raw materials essential to the goals of the New Green Deal.

Mining is also already regulated by an established permitting and review regime and is subject to comprehensive European and national environmental and worker protection regulations specific to mining. The emission spectrum of average mining operations in Austria is very small and does not justify inclusion in the scope of the IED, certainly not in view of the high costs that would be involved. Due to the large differences between the individual deposits and the correspondingly applied processes and resulting emissions, it would be impossible to define appropriate parameters in a BREF document. In any case, the inclusion of very small companies or companies without relevant emissions would be disproportionate due to the lack of thresholds.

The inclusion of new installations or installations below the current thresholds, as the Commission proposal foresees for example for the processing of ferrous metals (forging, rolling mills, wire drawing), would in general be neither appropriate nor efficient in view of the high compliance costs of the IED, which are offset by a relatively low benefit, and is therefore strictly rejected.

Moreover, it must be taken into account that any extension of the subject matter and scope of the IED would have a negative impact on the efficiency of the Sevilla process, which is already in need of major improvements.

Ad 10: The IED needs a future-proof, lean, unbureaucratic and legally certain design - it must become more enforceable for companies and authorities

An obligation to refer to all authorities responsible for compliance with the EU's environmental regulations (which authorities exactly are meant by this?) before issuing permits is absurd, given the length of procedures that already exist. Such an obligation would lead to authorisation procedures being delayed even further.

Environmental management systems are already not implemented at all sites, as such systems are basically voluntary in nature. Many companies complain about the effort associated with an environmental management system, which is disproportionate to the benefits. Independently of this, their mandatory introduction for IED facilities is rejected, as environmental management systems are set up and implemented according to a completely different system than the licensing and monitoring of facilities. The authorities are not familiar with environmental management systems, which in turn would lead to considerable procedural delays. Furthermore, we are firmly opposed to an obligation to publish environmental management systems.

Ad 11: Proposals for urgently needed additions to the Commission's proposal

The European Court of Justice has clarified on the subject of the delimitation of installations that activities are only directly linked if they are indispensable for the performance of the activities listed in the Annex and constitute a specific and distinguishable form of integration in the technical process which characterises the activities within the meaning of the Annex to the Directive (cf. ECJ 9.6.2016, C-158/15, 'EPZ'; ECJ 29.4.2021, C-617/19 'Granarolo'). It is therefore necessary to adapt the definition of "installation" to this case law and to provide for a corresponding transitional provision.

The war in Ukraine has led to bottlenecks in the supply of energy resources and operating materials for emission reduction (ammonia water, urea, etc.). For such exceptional situations, possibilities must be created to reset limit values and thus ensure the continued operation of industrial installations. A changeover to another fuel or other energy supply (due to the necessity of a possibly insufficient supply of natural gas) must be made possible quickly and unbureaucratically and should therefore not be considered a significant change to an operating facility - with the corresponding consequences (extensive permit procedure, public participation, preparation of initial status report etc.).

Advantages should be provided for installations that extract heat for the public district heating supply.

Obligations to monitor emissions should be reduced or waived altogether if official immission monitoring provides evidence of irrelevance or if pollutants cannot be detected at all on the emission side.

The current obligations regarding the initial status report should be reconsidered, as they involve an immense planning and cost burden for companies and authorities - with extremely little additional benefit for the environment and human health.

The experience of the last ten years shows that there is still uncertainty about the interpretation of the text of the IED: A revised Directive needs more standard definitions and delimitations, especially with regard to installations and activities, reporting units or sub-streams.

Countless experts work for years to define BAT in a sector. Nevertheless, it often becomes apparent in retrospect that questions of practical relevance were not taken into account. The revised Directive should therefore guarantee that directly affected companies and local approval authorities have a stronger voice in the Sevilla process in future.

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