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*Ms Markéta PEKAROVÁ ADAMOVÁ
President of the Poslanecká sněmovna
Sněmovní 4
CZ – 118 26 PRAGUE 1*

Dear President

The Commission would like to thank the Poslanecká sněmovna for its Opinion on the proposal for a Directive of the European Parliament and of the Council amending Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions and Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste {COM(2022) 156 final} and the proposal for a Regulation of the European Parliament and of the Council on reporting of environmental data from industrial installations and establishing an Industrial Emissions Portal {COM(2022) 157 final}.

The 2020 evaluation¹ of the Industrial Emissions Directive 2010/75/EU had concluded that it was generally effective in preventing and controlling pollution into air, water and soil from industrial activities, and in promoting the use of best available techniques. However, the evaluation had also identified several areas for improvement, in light of new challenges. To incentivise the deep industrial transformation required between 2025 and 2050, the Commission therefore committed, in the European Green Deal, to revise European Union measures to address pollution from large agro-industrial installations.

The general objectives of the Industrial Emissions Directive revision are to help, in the most effective and efficient way, protecting human health and the environment from the adverse effects of pollution from industrial installations and livestock farms, and improving European Union industry's resilience to the impacts of climate change. It aims at stimulating and accompanying a deep transformation towards zero pollution through the use of breakthrough technologies, thereby contributing to the European Green Deal objectives of reaching climate neutrality, increased energy efficiency, a non-toxic environment and a circular economy. It also aims at continuing to support the

¹ Commission Staff Working Document Evaluation of the Industrial Emissions Directive (IED); SWD(2020) 181 final.

creation of a competitive level-playing field providing a high level of protection of human health and the environment. In addition, the Industrial Emissions Directive revision seeks to modernise and simplify the current legislation, for example through digitalisation and improving knowledge about sources of pollution. It finally aims at improving public participation in decision-making and increasing access to information and justice, including effective redress mechanisms, and compensation for damages, consistent with the Aarhus Convention as well as with the case-law of the Court of Justice of the European Union.

In addition, the European Pollutant Release and Transfer Register will be transformed into a European Union Industrial Emissions Portal where citizens will be able to access data on permits issued anywhere in Europe and gaining insight into polluting activities in their immediate surroundings in a simple way.

The Commission welcomes the Poslanecká sněmovna's broad support for the aims of the proposals, but notes its doubts relating to the compliance of the Commission's proposal for revising the Industrial Emissions Directive with the principle of subsidiarity, in particular with regard to the setting of emission limit values and environmental performance levels in permits, the evaluation compliance with emission limit values set in permits and requiring the operator to address the overall environmental performance of the supply chain over the life cycle.

The Commission is pleased to have this opportunity to provide a number of clarifications regarding its proposal to revise the Industrial Emissions Directive and hopes that these will allay the Poslanecká sněmovna's concerns.

The Industrial Emissions Directive has a unique integrated approach to environmental pressures. It reduces pollution and encourages the use of less toxic chemicals supports decarbonisation and promotes energy and resources efficiency and also the circular economy. It thus represents a major opportunity to accompany the needed green and digital transition of our largest industrial-scale economic activities.

With Russia's illegal invasion of Ukraine, we are facing increased challenges in getting the necessary supply of energy and materials. This reminds us that we need to keep our focus on building a sustainable and more resilient European Union economy. Improving resource efficiency and increasing our autonomy in sourcing critical raw materials are therefore important priorities of the proposals.

The Industrial Emissions Directive includes in its design safeguards to ensure that requirements remain proportionate and respect subsidiarity. Best available techniques are defined in the Industrial Emissions Directive as the most environmentally effective and economically viable technique. Furthermore, derogations are allowed at national level in cases where implementation in an individual installation of requirements based on European Union best available techniques would lead to disproportionate costs. Furthermore, the inherent decentralised approach at the heart of the Industrial Emissions Directive relies heavily on the competent authorities of the Member States for implementing the Directive.

The proposed Industrial Emissions Directive revision maintains this very important role of the Member State's competent authorities; they remain responsible for determining detailed obligations of the operators of installations, such as emission limit values and derogations, in light of the specific circumstances of the installations concerned.

In response to the more technical comments in the reasoned Opinion, the Commission would like to refer to the attached annex.

The Commission hopes that the clarifications provided in this reply address the issues raised by the Poslanecká sněmovna and looks forward to continuing the political dialogue in the future.

Yours faithfully,

*Maroš Šefčovič
Vice-President*

*Virginijus Sinkevičius
Member of the Commission*

Annex

The Commission welcomes the inquiry that the Poslanecká sněmovna has carried out into this important subject and would like to offer the following comments and clarifications regarding the Commission proposal for revising the Industrial Emissions Directive in response to the observations made in point 5 of the reasoned Opinion.

The European Commission did not present an impact assessment on individual Member States, thus failed to allow national Parliaments to fully assess all the implications of the proposal, as well as in terms of compliance with the principle of subsidiarity.

The proposal is accompanied by a subsidiarity grid providing an in-depth analysis of all subsidiarity aspects of the proposal². Moreover, the explanatory memorandum and the impact assessment report contain sections assessing the compliance with the principle of subsidiarity. This clarifies the long-standing necessity and added value to act at European Union level, which goes back to 1996, when the industrial emissions legislation was first established.

As regards the analysis of impacts, the Commission's impact assessment does not assess all impacts at national level. Because of the decentralised approach of the Industrial Emissions Directive and the large room for manoeuvre that Member States have in implementing the Directive, it is not possible to make such assessment in detail at European Union level. However, we have used all information available to inform our proposal, in particular Member State specific information available in the European Pollutant Release and Transfer Register and information provided by stakeholders in response to Commission consultations.

The impact assessment³ was subject to a thorough consultation process. This included a variety of consultation activities aimed at gathering the views of and the relevant information from all concerned stakeholders. This complemented information gathered at the evaluation stage. This ensured that the proposal is supported by best available data and a proportionate analysis. A broad analysis of the consultation process is provided in Annex 2 to the impact assessment.

The proposal sets a framework for the Member States to achieve the objectives of the Industrial Emissions Directive and implement the measures into their national law. This gives Member States freedom to choose the most appropriate means of implementing the measures in the Directive. It also allows Member States to ensure that the amended rules are embedded in the most appropriate manner in their substantive and procedural legal framework regulating permits for installations.

2 Subsidiarity grid for the Industrial Emissions Directive revision proposal: SWD(2022) 110; subsidiarity grid for the IEPR proposal SWD(2022) 113.

3 SWD(2020) 181.

The Directive proposes to unify at EU level the process for evaluating measured continuous emissions measurements, but has not demonstrated the true added-value of the chosen way of acting at EU level.

The evaluation of the Industrial Emissions Directive⁴ has revealed that inhomogeneous implementation of certain provisions leads to significant divergence of emissions of installations across the European Union, thereby undermining both the pollution prevention objective of the Directive and its contribution to levelling the playing field.

When assessing permit compliance, Member States use diverging methods to account for measurement uncertainty, thus creating discrepancies in compliance in the European Union. Even where emission limit values in permits are the same, diverging Member State approaches to measurement uncertainty lead to major differences in the actual emission levels. These discrepancies may reach 25% or more of the emissions of a given plant. The support study⁵ of the evaluation provides the summary of available information on the diversity of national approaches and assesses the potential impact of the observed strong divergence.

The proposed new Article 15a will allow determining, in consultation with the experts of the Member States, common methods based on sound scientific information and methodologies, for the Member States competent authorities to take measurement uncertainty into account when assessing compliance of the operation of installations with emission limit values set in their permits. This will enhance legal certainty and contribute to levelling the playing field within the European Union.

This will also simplify the implementation of the Directive, by avoiding the need to check compliance twice for the same plants, with different methods, where they are covered both by Chapter II of the Industrial Emissions Directive and its Chapters III (large combustion plants) or IV (waste incinerators).

The Directive requires the use of the strictest values within the emission levels interval associated with the best available techniques (BAT-AEL) defined in the BAT Conclusions when setting the emission limits of individual installations. This does not allow the situation of a particular establishment to be assessed by a responsible authority, which contravenes the principles of proportionality and subsidiarity.

While the current Directive has helped to decrease pollution, it has not achieved its full potential. This is largely because Member States fail to set sufficiently ambitious emission limit values in permits of industrial installations. This divergence undermines both the pollution prevention objective of the Directive and its contribution to levelling the playing field.

Despite difficult access to permits and their complex and inhomogeneous drafting, the analysis of permits for several sectors shows that between 75-85% of all emission limit values are either based on the upper end of the range or are above it. Whilst setting the

⁴ SWD(2020)181.

⁵ <https://circabc.europa.eu/sd/a/589a486c-1732-4e9d-abbc-a515ddf0aca0/IED-evaluation-support-study-published.pdf>, see pages 118-119.

emission limits at or close to the upper limit of the range may be justified for some individual installations, such widespread fixing of emission limits at the upper limit of the range is not consistent with the obligation of operators under Article 11 (a) of the Industrial Emissions Directive that requires that best available techniques are applied.

The amended Article 15(3) requires those emission limits to be consistent with the real performance of the use of best available techniques in the individual installation. It does not require setting the most stringent emission standard but requires (i) an assessment by the operator of the feasibility to meet such standard demonstrating the best performance the installation can achieve by applying best available techniques, and (ii) that the Member State's competent authorities set in the permit emission limit values reflecting the best performance possible of best available techniques for the individual plant.

Recital 15 of the proposal recognises that the actual emission level to be set may vary from installation to installation, as it states that 'Emission levels associated with the best available techniques (BAT-AELs) are usually expressed as ranges, rather than as single values, to reflect the differences within a given type of installations that result in variations in the environmental performances achieved when applying BAT. For example, a given BAT will not deliver the same performance for different installations, some BATs may not be suitable for use in certain installations, or a combination of BATs may be more effective on some pollutants or environmental media than others.' It will be the responsibility of the Member States' competent authorities to determine the appropriate level of the emission limit, based inter alia on the technical report that the operator will provide to the operator.

The Directive calls for the assessment of material efficiency and overall environmental performance of the supply chain over the life cycle to be added to the general operator requirements. This requirement does not comply with the principle of proportionality because its benefits are not properly justified or explained and this is a major administrative increase linked to the operation of the facility with marginal theoretical environmental benefits.

The Commission recognises that operators may have a limited impact on the overall life cycle of products, as plants typically belong to the 'process industry' that produces materials (for example metals, glass, plastics, etc.) and they are not designing and manufacturing final products.

However, operators make decisions on a daily basis that may impact the life cycle of materials, for example the sourcing of supply feedstock, whether and how to pre-treat and condition by-products and waste to optimise the circular economy, and whether to use certain hazardous chemicals that may contaminate final products. A full discussion of these aspects is provided in section 1.3.2 of Annex 6 to the impact assessment report.

The addition of a general principle in Article 11 reflects this potential influence of the operation of the installations under the Industrial Emissions Directive on the overall environmental performance of the supply chain.

To address resource efficiency and the circular economy in a proportionate manner taking into account the limitations described above, the Commission proposed a flexible approach enabling operators to implement this general principle. This is the broader use of Environmental Management Systems, to promote better use of energy, material and water resources and encourage the use of less toxic chemicals.

It is already an obligation under the current Industrial Emissions Directive that operators have an Environmental Management System, as this requirement is included in all best available techniques conclusions. The proposal now provides a clearer legal framework enhancing the role of the Environmental Management Systems. Building on this existing obligation both provides the necessary flexibility for operators to define the appropriate action at installation level and limits the increase in administrative burden.

Through these proposals, operators will include in their Environmental Management Systems measures to progressively lower environmental impacts both upstream and downstream. Operators may develop, for example, (i) procurement requirements, aiming at renewable, recycled or low-carbon feedstocks, (ii) specific measures that avoid or limit the content of hazardous substances in the plant's waste or by-products to be treated or used by third parties, or (iii) measures such as waste sorting or by-product pre-treatment. Such measures taken at installation level are expected to gradually generate socio-economic and environmental benefits across the whole value chain.

The Directive, which does not comply with the principle of proportionality, calls for other environmental parameters (so-called 'environmental parameters') to be enforced (BAT-AEPLs) referred to in the BAT Conclusions (outside emission limits for BAT-AELs) without the possibility of derogation. Because the requirements are often contradictory in their consequences and the strictest values are always required, it will no longer be possible to design a device that complies with all requirements.

The Industrial Emissions Directive has not been effective in addressing resource efficiency and the circular economy. This is mainly because it only gives a clear legal status to the parts of best available techniques conclusions that contain ranges for setting emission limit values in permits for pollutant emissions to air and water. Other parts, such as techniques to reduce resource use and prevent waste generation, to reuse water within installations or the use of reclaimed water for inflows, are solely characterised as a 'reference' for setting permit conditions. This results in diverging interpretation by Member States of the legal status of those parts, leading to further discrepancy in implementation.

The proposal provides two mutually exclusive tools for developing quantified resource efficiency requirements:

- *Setting in best available techniques conclusions meaningful binding best available techniques associated environmental performance levels (emission levels associated with the best available techniques). In practice, this will only be possible for activities that are highly homogenous across the European Union. Such emission levels associated with the best available techniques will be incorporated within permits by the Member State's competent authorities. As*

emission levels associated with the best available techniques will only be used for highly homogenous process across the European Union, the Commission considered that a derogation procedure would not be needed.

- *Setting benchmarks in best available techniques conclusions to address activities that vary depending on local conditions or installation specificities. Those benchmarks will be taken into account by operators when developing their Environmental Management Systems. As the benchmarks are non-binding, no derogation procedure is necessary.*

Which of these two tools is the best will be decided case by case for each sector and environmental issue considered. The evidence-based Seville information exchange process for developing best available techniques conclusions, and its inclusive nature that involves active participation of experts from the Member States, the industry concerned and environmental non-governmental organisations, will ensure that such choice is fully justified, proportionate and environmentally effective.

Article 15 is specific to the setting of emission limit values in permits and does not apply to implementing emission levels associated with the best available techniques on resource efficiency in permits. Hence Paragraph 15(3), requiring the assessment of the feasibility of applying the strictest values does not apply. See also point 3 above concerning the proposal to amend Article 15(3).