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EU: Industrial Emissions Directive adopted

Key Issues

The Industrial Emissions Directive (IED) was formally adopted by the EU on 24 November 2010 (2010/75/EU). The Directive brings together much of the EU legislation on industrial pollution into one instrument combining in particular:

- The Integrated Pollution Prevention and Control (IPPC) Directive (1996/61/EC) dealing with permitting for potentially polluting industrial activities;
- The Large Combustion Plants Directive (2001/80/EC) dealing with air pollution from large combustion plants;
- The Waste Incineration Directive (2000/76/EC);
- The Solvent Emissions Directive (1999/13/EC) limiting the emissions of Volatile Organic Compounds.

This consolidation is intended to improve clarity of regulation and reduce administrative burdens by creating a broadly common permitting regime covering all of these activities and thereby avoiding the existing duplicated permitting under the separate regimes. In addition to consolidation, the IED makes a number of substantive changes. These include:

- Requiring any permit conditions that do not apply "**Best Available Techniques**" to be justified by the competent authority with specific reasoning. The current requirement to apply BAT to activities under the IPPC Directive has been inconsistently applied in the EU;
- Setting **minimum frequency for inspections** by authorities of industrial installations (1 year for the highest risk installations, 3 years for the lowest risk installations) and a more structured approach to reconsidering permit conditions;
- **Extending the scope** of permitting to cover certain activities (e.g. gasification or liquefaction of non-coal fuels over 20MW); and
- Providing that all combustion plants over 300 MW consented since June 2009 assess the possibilities for **carbon capture and storage** and, where appropriate, set aside suitable land to implement it.

The IED also makes some changes to the regime for large combustion plants in particular in tightening minimum emission limit values. New power stations will have to meet stringent limits immediately in January 2013. However, due to Member States' concerns over the speed at which emission improvements can be made, or new cleaner plant introduced, older plants have had their derogations extended. Member States can decide to implement a Transitional National Plan (TNP) for plants which were permitted before 27 November 2002 and operational before 27 November 2003. This will allow such plants an extension to meet stricter limits until 30 June 2020. Finally, a time limited derogation will allow an exemption from stricter limits from 2016 until 31 December 2023 provided they only operate for limited hours, effectively allowing their decommissioning.

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Member States must transpose the main provisions of the IED into national law by 7 January 2013.

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EU: Ministers approve need for new EHS regulations on offshore oil & gas activities

On 3 December 2010, the European Council noted its support for the European Commission's recent Communication[1] proposing new regulation on the subject of offshore oil & gas activities. The Communication, issued in the light of the Deepwater Horizon spill, noted the fragmented way in which environmental and health & safety (EHS) issues are regulated in the offshore industry across Europe. In order to avoid and/or minimise the impact of such major events in the future, the Commission suggested a number of actions to ensure that "state of the art" EHS practices are consistently in place across all Member States.

The Commission made proposals in a number of areas including the following:

- Licensing: Key requirements for licensing approval should be set at EU level including the presentation of a safety case and associated health & safety documentation; demonstration of the technical capacity of operators and financial capability (possibly insurance or other risk cover) to deal with unforeseen events.
- Operational regulatory requirements: The Commission will assess the extent to which environmental legislation needs to be strengthened, e.g. on pollution control and major accident hazards and either produce new legislation or amend existing legislation. The framework for health & safety legislation will also be reviewed and Member States and operators will be required to review and update safety cases where necessary. The Commission will consider also improving design and standards of offshore installation assets by including them within the remit of EU product safety legislation.
- Liability: Amendments will be made to extend the Environmental Liability Directive to damage caused to all marine waters. In addition, the Commission will reconsider whether to impose mandatory financial security on offshore activities.
- Public Oversight: "State of the art" practices in licensing, inspections and compliance monitoring by competent authorities will be introduced.
- EU Emergency Response: The Commission wants to create a stronger EU disaster response system for delivering relief and assistance in case of an incident. The availability of emergency response capacity across the EU would be enhanced to cover all regions.
- Safety outside European Waters: Noting the potential for incidents outside the EU to affect European Waters, the Commission will seek to enhance dialogue with its neighbours outside the EU to share information and promote high levels of safety and incident prevention. It will also seek to ensure that EU-based operators apply similar safety levels wherever they operate globally. Action on an international level, e.g. to produce best practice benchmarks and global standards will also be pursued.

The Council has asked the Commission to present detailed proposals, including those for new legislation, as soon as possible in 2011.

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[1] "Facing the challenge of the safety of offshore oil and gas activities" dated 12 October 2010.

Belgium: New exemptions to urban planning permit requirements for the industrial sector

The Flemish urban planning code requires an urban planning permit (*stedenbouwkundige vergunning*) for a wide range of works or changes of use involving property. Various works are exempted from these requirements by a Decree from the Flemish Government. On 1 December 2010, two new Decrees regarding exemptions to these permit requirements entered into force.

The first decree introduces a new type of works that do not need an actual permit but that need only to be notified in advance to the local authorities (*College van Burgemeester en Schepenen*). This Decree contains a provision that is particularly relevant for the industrial sector: extending or changing an existing and duly authorised industrial plant by adding new buildings or extending the additional buildings at the plant no longer requires an urban planning permit but only a simple notification, provided that, among other things, the following conditions are met:

- the zoning plan locates the plant in an industrial area;
- the plant will continue to be used for industrial activities;
- the height of the buildings that will be erected does not exceed 10 metres nor the distance between the buildings and the neighbouring land;
- the buildings will be located more than three metres from the neighbouring land; and
- the plant is subject to a class I or class II environmental permit that already covers the planned extension of the plant.

The notification must be made by means of the standard form that is annexed to the Decree. Works that were duly notified may be started within 20 days following the notification. Note that the works must be started within 2 years following the notification. Past that date, a new notification will be required in order to conduct the works.

By virtue of the above provisions, extending or modifying an existing industrial plant will in many cases no longer require an urban planning permit if the proposed extension is already covered by the environmental permit for the plant. This will significantly reduce the administrative burden and time delay that is associated with extension works.

Another new Decree entirely replaces and significantly enlarges the previously existing list of works that are exempted from urban planning permit requirements. The Decree also reconfirms the pre-existing exemption from urban planning permit requirements of the construction of structures that are not actual buildings (such as large technical machinery and equipment) at an industrial plant, provided that certain conditions are met.

Pieter de Bock
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The Netherlands: Dutch Government introduces new renewable energy policy

Since October 2010, the Netherlands have had a new government. One of the first initiatives of the new cabinet is a complete review of its renewable energy policy. In a letter of 30 November 2010 to the Dutch parliament, minister Verhagen set out his priorities for this sector.

The existing subsidy system for renewable energy "SDE" will be replaced by a new system: "SDE+". Subsidies for renewable energy projects granted under the SDE will remain unaltered, but applications for new projects will be considered under the new SDE+, which will be open for first applications by July 2011 at the latest.

The focus of the SDE+ will be on taking a more cost-efficient approach to meet the Netherlands' European target of producing 14% of its energy through renewables by 2020. Under SDE+, an application will specify the rate of subsidy needed for the project. Each year, subsidies will be granted in four phases. Each phase will have its own subsidy cap per kWh for electricity and green gas, such that the first phase will have the lowest caps and the last phase the highest. However, a total cap for all phases will apply and subsidies are granted on a first-come-first-served basis. This implies that if e.g. the total cap is reached during phase 2, then phases 3 and 4 will not be applied during that calendar year and further applications will not be allowed. In this manner the minister wants to prioritise "cheap technologies". Once a project is granted a subsidy, it will continue to receive it at the same level on an annual basis for up to 15 years. The total budget for subsidies granted in 2011 is EUR 1.5 billion.

Although the final technologies for which SDE+ will open still need to be assessed, at least the following categories are specifically mentioned in a letter of 30 November 2010:

- Onshore wind
- Green gas, e.g. landfill gas
- Heat
- Biomass

Maximum basic compensation for phase 4 in the first year is set at EUR 0.15 per kWh and EUR 1.32 per Nm3 for green gas. A "Free Category" (with no specific limit) for more expensive technologies has been established and would be decided on a case-by-case basis.

Whilst the subsidies under the SDE were funded out of the general tax income of the Dutch State, the subsidies under the SDE+ will be funded by the introduction of a form of feed-in tariff, and possibly by a coal and gas tax. The bill for the introduction of the feed-in tariff will be submitted to parliament by mid-2011. The possible introduction of the coal and gas tax depends on a consultation with the European Commission.

Further detail on how these mechanisms would operate is awaited from the Minister.

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Poland: Changes to Environmental Assessment requirements

On 15 November 2010 a new environmental impact assessment (EIA) Ordinance of the Minister of Environment came into force (EIA Ordinance)[2]. The EIA Ordinance sets out the classifications of projects which require a preliminary environmental consent before the main administrative permits for the project can be granted to develop them. Where such a consent is needed, EIA may or may not be needed based on the following categorisation set out in the EIA Ordinance:

- "List 1" lists projects which are "likely to ***always*** significantly affect the environment" and therefore always need EIA as part of this process.
- "List 2" lists projects which are "likely to ***potentially*** significantly affect the environment". For these projects, EIA is required at the discretion of the relevant environmental authorities.

The main motive for the preparation of the EIA Ordinance was the necessity to ensure full transposition into the Polish legal system of the provisions of the Environmental Impact Assessment Directive (85/337/EC) which requires Member States to implement the EIA regime. In 2006, the European Commission accused Poland of improper transposition to the national law of the provisions of the Directive (violation no. 2006/2281), in particular to the Polish classification of "List 2" undertakings. The charges related, among others, to the thresholds of classification established for the undertakings. As a result, changes were made in the EIA Ordinance in particular with respect to thresholds of classifications and exemptions regarding undertakings from the agricultural and forest sectors (e.g. sawmills and joiner's workshops, animal husbandry, forestry planting), and infrastructure projects. For example, the following exemption is now contained in the EIA Ordinance: installations for the production of agricultural biogas with an installed power of no more than 0.5 MW as well as the sewage networks where the total length of the venture is less than 1 km, will be exempt from the obligation to obtain the preliminary environmental consent (and therefore EIA).

The Polish Government took the opportunity in the EIA Ordinance of making further changes, in particular, to the List 2 projects in addition to those affected by the complaints of the European Commission. For example, a number of types of projects undertaken on environmentally protected areas (e.g. national parks, reserves, landscape parks, areas of protected landscape, Nature 2000 areas etc.) have now been included as List 2 projects.

Also, other changes were introduced in the EIA Ordinance: currently not only the initial construction, but also reconstruction, extension or the combining together of existing facilities will be classified as separate projects which will require a preliminary environmental consent (and possibly EIA).

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[2] Issued under the Act of 3 October 2008 on Providing Information on the Environment and Environmental Protection, Public Participation in Environmental Protection and on Environmental Impact Assessment (the "EIA Act") replacing the previous EIA ordinance of 9 November 2004.

The new EIA Ordinance should make it much easier for project developers to understand whether undertakings are in List 2 and therefore whether a preliminary environmental consent decision and EIA will be required. It should also lead to greater consistency of decision-making by the Polish authorities, and consequently fewer legal challenges against projects.

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UK: Proposals for changes to Contaminated Land regime guidance

The contaminated land regime was introduced (in England) in 2000 under Part IIA Environment Protection Act 1990 and requires authorities (principally local authorities) to identify contaminated land in their area and require polluters (or alternatively owners) to remediate the contamination. For some years, the regime has been plagued with problems, in particular, of uncertainty over how to determine whether land is "contaminated" and the extent to which numerical soil values should be used in risk assessments for that purpose. As a result, the regime has not had real success in directly leading to contaminated sites being cleaned up.

The government is proposing to amend the Statutory Guidance which sets out complex rules on how contaminated land is to be identified, remediated and responsibilities and liabilities apportioned. The aim of the revised Statutory Guidance is not a wholesale change of approach to the regime (the statutory provisions are not being changed) but is broadly twofold: to help prioritise higher risk sites and to simplify and shorten the Guidance, leaving local authorities more freedom to decide upon their remediation strategies.

A major element of the legal test for land to be considered "contaminated land" and therefore subject to clean up requirements, is based on the concept of contaminants causing "Significant Possibility of Significant Harm" (or SPOSH) e.g. to human health. The proposed revised Guidance, in particular seeks to direct authorities that:

- SPOSH cannot be determined by numerical tests (e.g. soil values); the test must be qualitatively based on risk; and
- Uncertainty is an inevitable feature of the assessment process, but authorities should concentrate on likely events as opposed to hypothetical possibilities.

It is hoped that these changes will allow authorities to focus on more seriously contaminated sites but allowing them to rule out low risk sites quicker and be less concerned with the possibilities for legal challenge over application of the SPOSH test. In that way, the government hopes that authorities will make more use of the regime to clean up contaminated land.

The regime contains special provisions relating to contaminated water within a site. The current position is that land can be considered "contaminated" where "pollution of controlled waters (e.g. groundwaters) is being caused". Such a low threshold test for pollution of waters has been considered an anomaly. As far back as 2003, a UK Water Act contained provisions to amend this test and restrict it only to "significant pollution" or a "significant possibility" of such pollution, thereby conforming it to the general SPOSH test described above. This change will be brought into force under these proposals and the amended Guidance sets out options as to how these tests will be applied.

It should be noted that the aspects of the guidance dealing with liability for contamination and remediation requirements, are to remain broadly the same.

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