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Legal Analysis

Application of Chapter II of the Industrial Emissions Directive in the Energy Community

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Executive summary

The purpose of this brief analysis is to provide a basic overview of how Chapter II and related annexes (esp Annex I) of the EU Directive 2010/75/EU¹ (Industrial Emissions Directive, hereinafter also IED) could be included as part of the legally binding framework of the Energy Community.

Chapter II of the IED includes rules on a range of industrial installations and provides measures that are supposed to ensure that their impacts to the environment are reduced in a holistic manner and to a large extent. In the centre of these measures is the obligation of operators of installations to hold an integrated environmental permit. The conditions of permits are harmonized by means of documents that describe the “best available techniques” to be used in a given industry and include emissions limit values for installations.

Legal framework of the Energy Community already contains a reference to the predecessor of Chapter II of the IED, the so-called IPPC-Directive (96/61/EC). However, this instrument is not directly applied but members of the Energy Community are merely obliged to “endeavour to implement” the Directive.

Turning Chapter IED into part of the legally binding rules applied in the Energy Community would therefore not be a revolutionary step. On the other hand, it would promote the founding principles and objectives of the TEEC: ensure fair competition, improve environmental situation and provide opportunities for an enhanced public participation, to name the most relevant.

Application of the IED as part of the legally binding „*acquis communautaire* on environment” would require changes to the Article 16 and Annex II of the Treaty Establishing the Energy Community (hereinafter also TEEC) as well as deletion of Article 14 of the TEEC. Such Treaty changes require a decision of the Ministerial Council of the Energy Community.

Chapter II, Art 72(1) and (2) as well as Annexes I-IV of the IED on the other hand could in principle be implemented without amendments, as other pieces of EU environmental law applied in Energy Community so far. In order to avoid some application difficulties posed by references to other EU legal acts, some minor adaptations could alternatively be made to provisions of IED.

¹ Directive 2010 of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control, recast), OJ L 334, 17.12.2010, p.17

1. Brief overview of legal frameworks

1.1. Chapter II and Annex I of the Industrial Emissions Directive

Chapter II of the IED contains specific provisions addressed at operators of activities listed in Annex I of the Directive. These activities were first regulated under Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (the so-called IPPC Directive). Directive 96/61/EC was later replaced by Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control. Although Chapter II of the IED builds on the previous Directives on the same subject matter and contains many of the previously applicable provisions, several important changes were made in the IED.

The most important requirements for operators arising from Chapter II of the IED are obligations to:

- follow general principles, e.g. to avoid causing significant pollution, use energy efficiently, take necessary measures to prevent accidents etc. (Article 11);
- apply for integrated environmental permits that are based on best available techniques and operate in accordance with these permits (Article 12, 14-18);
- notify the authorities of any planned changes to the installations and not carry them out before change of permit, where this is deemed necessary (Article 20);
- assist authorities when they reconsider the terms of the permit (Article 21);
- take measures upon site closure aimed at avoiding significant risks to human health or the environment due to the contamination of soil and groundwater in the future (Article 22);
- assist authorities during environmental inspections of installations (Article 23).

The main obligations of the state authorities on the other hand are to:

- issue permits to the installations in accordance with the relevant articles of the Directive (Article 14-18, 22);
- change, reconsider and update permits periodically and also where this is necessary due to planned changes to the installations, best available techniques or other circumstances listed in the Directive (Article 20-21);
- plan and carry out regular inspections of the installations (Article 23);
- provide the public with participation opportunities and information (Article 24).

In addition to the above-mentioned rules the Chapter also includes provisions on access to justice, rules for permitting procedures in case an installation has transboundary effects etc.

In short, Chapter II of the IED provides a strong legal framework for operation of different (industrial) installations, at the centre of which is the obligation to hold a so-called "integrated environmental permit" and operate in accordance with it. The rules found in the Chapter do not only regulate procedural aspects of the permit, but also some aspects of its contents.

According to Chapter II of the IED, the conditions of the permit must be based on the best available techniques (BAT) described in the industry-specific BAT reference documents (BREFs). Conclusions on the BREFs are adopted and published according to Article 75(2) of

the IED. As a key requirement, emissions levels from a facility must not exceed the ones described in the BAT conclusions². Pending adoption of BAT conclusions, previously adopted BREF documents must be taken as a basis for setting emissions limits in permits.

In addition to basing the permits on relevant BAT, environmental quality standards must also be followed. In case following the BAT alone would not be enough to ensure that the environmental quality standards are adhered to, stricter measures must be required under the permit.³

1.2. Legal framework of Energy Community

The legal framework of the Energy Community is divided into three parts. The first part is the Treaty Establishing the Energy Community. The second part is the *acquis communautaire* that is divided into several parts: electricity, gas, oil, environment, renewable energy, energy efficiency and statistics. The *Acquis communautaire* applicable in the Energy Community is composed of different EU directives and regulations, some of which are amended to suit the structures and circumstances related to the Energy Community. The third part of the framework is composed of procedural acts adopted by the Community.

The Treaty Establishing the Energy Community (TEEC) contains the founding principles of the Community, rules on the extension of the *acquis communautaire* (including references to specific legal acts applicable in the Community) and institutional provisions.

The environmental *acquis communautaire* is regulated under Title II, Chapter III of the TEEC (Articles 12-17). These provisions include the list of applicable EU directives and regulations (Article 16) which must be implemented by contracting parties in accordance with the timetable provided in Annex II of the Directive. Article 17 provides that "provisions of and measures taken under" this Chapter shall only apply to network energy as defined in Article 2, Section 2 of the TEEC. Chapter III also contains a reference to the predecessor of the requirements currently found in Chapter II of the Industrial Emissions Directive, the so-called IPPC-Directive (96/61/EC). According to Article 14 of the TEEC, the parties "recognize the importance" of its rules and "endeavour to implement" the IPPC-Directive.

Directives related to environment that form the *acquis communautaire* applicable in the Energy Community are presented in the Annex of the TEEC without any adaptations, as their application is limited to network energy already by the general provisions (Article 17).

² Exceptions are allowed in cases where the costs would be disproportionate due to geographical location, local environmental conditions or technical characteristics of the installation and emission levels may in any case not exceed limit values set for large combustion plants or other installations in the Annexes of the IED (see Article 15(4) of the IED).

³ Article 18 of the IED.

2. Application of Chapter II of IED in the Energy Community

2.1. Justification for application of Chapter II of IED

Application of Chapter II of the IED and its related Annexes in Energy Community in a legally binding manner is justified for many reasons, a selection of which is presented below. These justifications can be divided into two groups. Firstly, such a step is reasonable taking into account the more specific provisions of the TEEC. Secondly, application of the IED would be in line and help further some of the founding principles and objectives of the Energy Community.

The TEEC already refers to the integrated pollution prevention and control mechanism

First of all, it should be borne in mind that the Article 14 of the TEEC already has made a reference to the predecessor of the IED, namely the Council Directive 96/61/EC concerning integrated pollution prevention and control. Although this directive is not part of the legally binding „*acquis communautaire* on environment“, the TEEC nevertheless urges the states to „endeavour to implement“ the IPPC-Directive.

Practical implication of this reference is that adding Chapter II of the IED to the *acquis communautaire* would not be as revolutionary as introducing some other EU legal instrument, e.g. EU Emissions Trading System Directive (EU Directive No 2003/87/EC). Provided that the Parties to the TEEC have implemented the Treaty in good faith thus far, the practical changes for both authorities as well as operators should not be too significant.

As argued below, changes that would still be potentially needed would in any case be proportional to the gains in development of the Energy Community and its founding principles.

Promotion of founding principles and objectives of the TEEC

Although making Chapter II of the IED a part of the *acquis communautaire* of the TEEC would not be revolutionary in itself, uniform application of these provisions would provide a chance to promote and further some of the main founding principles and objectives of the TEEC.

One of the main objectives of the Energy Community is the creation of an integrated market in natural gas and electricity. To ensure proper functioning of this market, a single regulatory space is needed that would ensure **fair market competition** between different economic operators⁴. Environmental regulations that ensure the sustainability of the sector as well as citizens' health and well-being on one hand, at the same time create direct and indirect costs to the companies that are obliged to follow them. Acknowledging the importance of this, EU rules on large combustion plants (Directive 2001/80/EC and Chapter III of the IED) and on sulphur content of certain liquid fuels (Directive 1999/32/EC) are already parts of the *acquis communautaire* under the TEEC.

As explained in Chapter 1.1. of this analysis, Chapter II of the IED also creates obligations for the operators of installations that fall under this regulation. Some of these, especially

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See to that effect the preamble of the TEEC as well as Article 2(1), point „e“.

obligations to apply best available techniques and to clean up the site of installation before closure, might need costly investments. Therefore, the current situation, where the obligations of operators arising from Chapter II of the IED are legally binding to EU Member States, but efforts to “endeavour to implement” it in other Parties to TEEC may considerably vary, hampers fair competition between operators, whose installations are located in different countries.

The obligations provided in Chapter II of the IED would also help to ensure a more uniform approach to **improving the environmental situation** across the Energy Community, which is also one of the key objectives of the TEEC⁵. Although the legally binding *acquis communautaire* of the TEEC already includes some of the key pieces of EU environmental legislation, including on large combustion plants, environmental assessment and protection of birds, Chapter II of the IED would provide additional value. It would provide, especially through the obligation to use BAT, specific limitations to emissions and environmental impacts other than air emissions (e.g. waste creation, water emissions). Unlike the existing provisions on large combustion plants, reduction of environmental impacts should be sought in a holistic manner, e.g. reduction of air emissions should not come at the cost of disproportionately higher waste creation or water emissions.

Thirdly, full and uniform application of the Chapter II of IED would provide for **enhanced public participation** in decision-making related to energy production. Although the EU Directive on environmental impact assessment⁶ is already part of the *acquis communautaire* and therefore provides some public participation opportunities, Chapter II provides for additional participation requirements, e.g. for updates to permits that do not necessitate environmental impact assessments. This may have on one hand an instrumental value, as public participation can provide insights and information valuable to authorities and operators aiming to reduce environmental impacts of the installations. On the other hand, it also provides for a more democratic process, rewarding the decisions made with more legitimacy. Ensuring public participation in decision-making is not expressly one of the key objectives of the TEEC. It is, however, well in line with both with the objective of improving environmental situation as well as the obligations of the Parties of the TEEC under the Aarhus Convention⁷.

2.2. General questions on application

Before turning to the more specific questions on which provisions of the TEEC need to be added/amended to apply Chapter II of the IED in the Energy Community fully and in a legally binding manner as part of its environmental *acquis communautaire*, it needs to be determined which body and how would need to make such a decision.

Among other amendments to the TEEC, reference to the IED-Directive must be made in Article 16 while at the same time removing the reference to the IPPC-Directive from Article 14. This would constitute a change to the provisions of the Title II that would implement new pieces of the EU *acquis communautaire* in the Energy Community in a legally binding

⁵ See Article 2(1), point „d“.

⁶ Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC of 3 March 1997 and Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003.

⁷ All of the Parties to the TEEC are also parties to the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), with the exception of Kosovo, due to its controversial status under international law.

manner. Such a revision of the TEEC would according to Article 100 of the TEEC require a decision of the Ministerial Council of the Energy Community. The decision would need to be taken by a unanimous vote.

3. Amendments to legal texts needed for application

3.1. Amendments to Energy Community Treaty

As mentioned above, the first and most important change to the TEEC would be adding a reference to the Chapter II of the IED to Article 16 of the TEEC. By Decision of the Ministerial Council D/2013/06/MC-EnC a reference to Chapter III of IED (on large combustion plants) and related Annexes was already added to Article 16 as point (v). Therefore it would seem most logical to amend this point to also include Chapter II of the IED and related Annexes (I-IV). In addition to Chapter II, relevant reporting provisions of Article 72 (para 1 and 2) should also be applied, as has been already done on introduction of Chapter III of the IED in the *acquis communautaire*⁸.

As also mentioned above, Article 14 of the TEEC currently already contains a reference to the predecessor of Chapter II of the IED in a non-binding way, urging the Parties to “endeavour” to apply this legal instrument. Adoption of Chapter II of the IED as part of the legally binding *acquis communautaire* in the Energy Community would therefore also necessitate the deletion of Article 14 in order to avoid unnecessary confusion.

In addition to the changes of the main text of the TEEC, application deadlines must also be added to Annex II of the Treaty. Similarly to the application of Chapter III of the IED in the Energy Community, an application delay of 5 years for new installations should be sufficient; therefore Chapter II would apply together with Chapter III to the new installations from 1 January 2018.

If Chapter II of IED would be implemented in the Energy Community in an analogous way to that of the European Union, it should be applied to existing installations from January 2019 (for installations covered by the earlier IPPC-directive) or July 2020 (for installations not covered by the earlier IPPC-directive). However, according to the Energy Community Ministerial Council Decision D/2013/05/MC-EnC on LCP Directive implementing rules, existing installations would have to comply with emissions limit values provided in that Chapter only by 1 January 2028. Therefore, the Chapter II obligations, including the obligation to apply best available techniques and related emissions values should also apply to all existing installations from 1 January 2028 the latest. There are however two cases, where Chapter II should be applied earlier. Firstly, countries that intend to join the EU before that date would have to apply Chapter II of the IED to existing installations in accordance to their respective Accession Treaties. Secondly, in the case of existing installations undergoing significant changes, such as those included in the National Emissions Reduction Plans, their permits issued upon upgrades should be in line with IED both Chapters II and III.

The text of Title II, Chapter III of the TEEC with proposed highlighted amendments can be found in Annex I of this analysis.

3.2. Amendments to Chapter II of the IED

Article 17 of the TEEC provides that *acquis communautaire* shall only apply to network energy. Because this general provision provides the framework for applying EU legal acts in

⁸ Article 72 (3) and (4) apply in accordance with the Decision of the Ministerial Council of the Energy Community D/2013/06/MC-EnC.

the field of environment in the Energy Community, these have so far been applied without any more specific amendments to them. As an example, the EU Directive on environmental impact assessment is applied in the Energy Community only as regards projects in electricity, gas and oil sectors although no specific adaptations have been made to the EIA-Directive under the TEEC.

In principle, the same approach can be taken for Chapter II of the IED and its related Annexes. However, certain references to other EU legal acts in Chapter II of the IED that are not part of *acquis communautaire* legally binding in the Energy Community might give rise to interpretation difficulties. Therefore, an alternative approach could be to apply the provisions of Chapter II of the IED with adaptations, as has been done with many legal acts of the *acquis communautaire* under other Titles of the TEEC, e.g. Directive 2009/72/EC (on the internal electricity market).

It is worth noting that not all references to EU legislation that are not part of the *acquis communautaire* in Energy Community in Chapter II of the IED would lead to interpretation difficulties. Problems would arise in case the content of obligations of operators or authorities was determined by referenced but inapplicable law. References related only to definitions, on the other hand, do not pose such a problem and do not need to be adapted.

Text of Chapter II of the IED and related Annexes with highlighted potential amendments is found in Annex II of this analysis.