

Revision of the Industrial Emissions Directive – Targeted Stakeholder Survey

ClientEarth's response

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Executive Summary

The EU's Industrial Emissions Directive (IED, 2010/75/EU) regulates pollution from (agro-)industrial installations and is currently being revised by the European Commission.

The IED has huge potential to become one of the legislative flagships translating the new EU objectives under the European Green Deal into tangible legal obligations:

The revision of the IED is a unique opportunity to bring together the new climate neutrality, zero pollution, non-toxic environment, biodiversity and circular economy goals and provide Member States' authorities and industries with clear rules at hand, while improving public health.

New objectives under the European Green Deal...

The Commission's European Green Deal (EGD) aims to transform the EU's economy for a sustainable future. It acknowledges today's climate and environment-related needs and seeks to turn "an urgent challenge into a unique opportunity". The Commission emphasizes that the response to these challenges must be bold and comprehensive, seeking to "maximise benefits for health, quality of life, resilience and competitiveness. It will require intense coordination to exploit the available synergies across all policy areas." (COM(2019) 640 final, 11/12/2019, Section 1 and 2).

Following the Communication of the EGD, new policies and strategies have been or are being established, such as the (upcoming) EU Climate Law, Zero Pollution Action Plan, Circular Economy Action Plan, Methane Strategy and Methane Regulation, Biodiversity Strategy, Farm to Fork Strategy, Soil Strategy, Chemicals Strategy on Sustainability, as well as the Industrial Strategy. All of them are interlinked with environmental and climate pollution from (agro-)industrial installations. Likewise, the draft 8th Environment Action Programme stresses the need for interactions between the different policy instruments.

...can and must be translated into legal measures under the new IED

The revision of the IED provides a unique opportunity to integrate and combine key strands of the EGD into one piece of legislation, transposing them into legal measures for Member States and setting clear rules for (agro-)industrial operators.

The significance of the IED's role and potential is a result of its broad scope and instruments: the IED currently regulates over 50.000 large industrial activities, including installations of the most resource and energy-intensive industries, such as energy, waste, chemicals, metals, minerals, textiles and agriculture. In order to operate, each of them needs a permit issued by Member States' authorities based on the IED provisions. This permitting regime has the power to have material impact on the conditions of operation. Moreover, the IED follows an integrated approach, seeking to achieve a high level of protection of the environment taken as a whole. In setting rules in particular for emissions into air, water and soil and the generation of waste, the IED's focus is on the prevention of pollution, especially at the source, in line with EU environmental principles (Art. 191(2) TFEU). One of its key elements is the determination of "best available techniques" and the associated emission limit values and environmental performance standards.

The revised version of the IED will thus define the future for industry's (non-)polluting technology.

It will have to do so fully in line with the EGD's objectives of a climate-neutral, clean and circular economy, as the EU is obliged to ensure consistency between, and effectiveness of, its policies and activities, taking all of its objectives into account (Art. 13 TEU, Art. 7 and 11 TFEU). Likewise, Member States are obliged to act consistently with, and in support of, commitments taken by the EU (Art. 4(3) TEU).

Now is the time to strengthen the IED by addressing its flaws and realizing its full potential. The role of industrial operators in reaching EU's objectives cannot be overstated. The Commission itself acknowledges that: “[a]chieving a climate neutral and circular economy requires the full mobilisation of industry. It takes 25 years – a generation – to transform an industrial sector and all the value chains. To be ready in 2050, decisions and actions need to be taken in the next five years.” (EGD, Section 2.1.3.)

Response to the Targeted Stakeholder Survey

In light of the above, ClientEarth responded to the Targeted Stakeholder Survey conducted by Ricardo, a consultancy supporting the Commission with an impact assessment for the IED revision. The following document contains our detailed responses. It only includes the questions addressed to the stakeholder group including “environmental NGOs, third parties and countries with links to the IED, technical experts, academia and researchers”.

Based on the practice and experience of ClientEarth and its partners, we focused on the following problem areas and suggested specific amendments to the legal wording of the IED accordingly:

- **Problem area 1 – Zero pollution ambition and non-toxic environment**
 - New approach of promoting the industrial activity with the least negative environmental impact for the provision of a given product/service (Questions 1, 2 and 23)
 - Expanding the scope, in particular to mining, upstreaming oil and gas, agriculture, aquaculture, and to obligations after cessation (Questions 1, 2 and 18)
 - Restricting the possibility to obtain derogations (Question 22)
 - Tightening flexibilities, including strict emission limit values/environmental performances levels, better inclusion of environmental quality standards and increased EIA coherence (Question 23)
 - Enforcement via effective penalties, suspensions, and a new compensation right (Question 34)
 - Addressing chemicals of concern (Question 48)
- **Problem area 2 – Climate crisis and decarbonisation of industry**
 - Redesigning the relationship between the IED and the EU ETS and including GHG emission limit values and binding energy efficiency requirements (Question 58)
- **Problem area 3 – Circular economy**
 - Making BAT-AEPLs explicitly binding (Question 65)
- **Problem area 5 – Aarhus rights**
 - Including periodical reviews of IED permits, strengthening Aarhus rights (access to information, public participation, access to justice) and NGO participation in Sevilla process (Question 95)
- **Survey Close 7**
 - Strengthening Human Rights (Question 108)

Please note that the original responses were completed in an online survey where no formatting was possible. Therefore, the text below does not contain any formatting other than capital letters. The introductory text of Ricardo under each section is highlighted in blue.

1 Problem 1: The environment is polluted

1.1 Zero pollution ambition

1.1.1 Not all agro-industrial activities that are polluting the environment are covered by the IED

Introducing additional (agro-)industrial activities in the scope of the IED

(Agro-)industrial plants continue to pollute the environment. Whilst the IED has led to reductions of pollution from some 50 000 large-scale (agro-)industrial plants, not all polluting (agro-)industrial activities are covered.

One approach to addressing this problem is to extend the scope of the IED to include additional (agro-)industrial activities. These would then be subject to IED permitting under the IED. In such cases, it will be necessary to establish the scale of economic activity and their associated environmental pressures.

As set out in the accompanying inception impact assessment, the following (agro-)industrial activities are currently outside the scope of the IED and options are under consideration to include them:

- **Intensive farming** (cattle farms and mixed livestock farms, aquaculture). Mixed livestock farms are already within the scope of the IED for cases where intensive rearing of poultry and pigs exceeds the activity thresholds in IED Annex I individually. The option being considered is to introduce a sub-activity to 6.6 which is mixed livestock farms for which the activity threshold could be expressed in Livestock Units (LU) or emissions totals. This would allow combining the livestock places for poultry and/or pigs and/or sows into a single threshold.
- **Mining/ quarrying industries**. This could be brought into line with the E-PRTR activities 3a (underground mining-no threshold) and 3b (opencast mining-with area threshold). Such scope extension would require consideration of the interplay with Directive 2006/21/EC and/or the corresponding BREF.
- **Upstream oil and gas industries (extraction)** (currently subject of BAT Guidance Document on upstream hydrocarbon exploration and production, voluntary).

In addition, there are other (agro-)industrial activities (not identified by the IED evaluation or set out in the inception impact assessment) that are under review:

- Include **battery production**, including **manufacturing of industrial, automotive, electric vehicle and portable batteries (regardless of their shape, volume, weight, design, material composition, use or purpose)**, while also recognising battery compound production (i.e. chemicals) is already covered within the IED's present scope; and **battery disposal and recovery** (to the extent not already covered by activity 5.1). The rapidly changing scale of battery production, disposal and recovery is a key driver in determining whether this sector should be regulated under the IED or not.
- **Ship building** (other than coating) and **ship dismantling** – shipyards are partly covered under IED Activity 6.7 (for the coating activity) but ship building processes (other than coating) and dismantling activities are not covered.

- Certain downstream ferrous metal processing activities: to consider inclusion under IED (e.g. under activity 2.3) of forging presses, cold rolling and wire drawing (above certain thresholds).

Note the additional sectors listed above comprise a non-exhaustive list and others may be considered.

1. In addition to intensive farming, mining industries, upstream oil and gas industries, battery production, disposal and recovery, ship building and dismantling are you aware of major environmental pressures from other (agro-)industrial activity in the EU and currently outside the scope of the IED? [Yes; No] If yes, specify the activity, the relevant environmental pressures and an estimate of the potential for the IED to reduce them [open text response].

Yes

Open text response:

ClientEarth welcomes a broader approach of the IED. However, extending the current list of activities will not be sufficient to achieve the transition we need to reach the EU's new climate and environmental objectives. Instead, the reform of the IED offers the unique opportunity for the Commission to enhance "the full mobilization of industry" as required under the European Green Deal (COM(2019) 640 final, Section 2.1.3). First and foremost, the new IED must strengthen the principle of 'prevention first' and become the flagship when transposing the Zero Pollution Action Plan and its draft "Hierarchy of action on pollution" (ZPAP Stakeholder workshop, 10/02/2021, https://ec.europa.eu/environment/system/files/2021-02/20210210_Overview_ZPAP-workshops.pdf, slide 6).

Against this backdrop, it will not be sufficient to list only single (agro-)industrial activities under Annex I and trying to reduce some of their emissions.

(1.) The SCOPE OF THE IED should be revisited, in order to redefine 'industrial activities' as all activities that can be conducted to produce a certain public good or service provided to society, and give preference to those activities that have the lowest impact on the environment for products they provide.

(2.) When it comes to the specific (agro-)industrial activities, we would like to refer to EEB's response to this Targeted Stakeholder Survey. In particular, as it comes to the expansion of quarrying and extractive activities, we would like to stress the need for regulating not only the operation as such, but also looking at its impacts AFTER THE CESSATION of such activities.

In detail:

(1.) SCOPE OF IED: PROMOTING ACTIVITY WITH LEAST NEGATIVE ENVIRONMENTAL IMPACT

In order to contribute to the zero pollution, climate neutrality and circular economy objectives that are a part of the 2019 European Green Deal (EGD), the IED must integrate a new approach of promoting industrial activity with the least adverse environmental impact for the product or service that is provided. This can be done by redefining the scope of the IED and the role of BAT in the IED.

The IED is the successor of the IPPC Directive (96/61/EC) which was recast and integrated in to the IED in 2010. This structure is shaped to accommodate the existing industrial infrastructure, related technologies and applied BAT at the time the IPPC Directive was developed in the 1990s. Since 2010 the policy objectives of the EU have changed significantly. This has especially become apparent since the EGD's publication. In the EGD, the Commission states that "there is a need to rethink policies for clean

energy supply across the economy, industry, production and consumption, large-scale infrastructure, transport, food and agriculture, (...).” (EGD, 2.2.1.). It stresses that “Achieving a climate neutral and circular economy requires the full mobilisation of industry.” And notes that “It remains too ‘linear’, and dependent on a throughput of new materials extracted, traded and processed into goods, and finally disposed of as waste or emissions.” (EGD, 2.1.3.).

In addition, following the Communication of the EGD, the Commission is currently developing the Zero Pollution Action Plan (ZPAP). The objectives of this action plan are, inter alia, to better prevent and remedy pollution, and “mainstream the zero pollution ambition into all policy developments” (https://ec.europa.eu/environment/strategy/zero-pollution-action-plan_en). The upcoming EU Climate Law will, for the first time, make the climate neutrality ambition by 2050 legally binding. It will also set a stricter EU GHG emissions reduction target by 2030. Lastly, the 8th Environment Action Programme (EAP) to 2030, which is currently under development, pursues a zero-pollution ambition for a toxic-free environment, as well as reducing key environmental and climate pressures related to production and consumption, in particular in the areas of energy and industrial development (COM(2020) 652 final, draft Art. 2(2)).

The two major European Directives that cover the planning and permitting stage of an industrial installation are the Environmental Impact Assessment Directive (EIAD) and the IED. However, the EIAD only regulates the assessment process of a project and has little material impact on the type of installation or technology chosen once that assessment has been made. Here lies the unique power of the IED, which has a material impact on the conditions under which an installation can operate. Therefore, the revision of the IED provides a unique opportunity for the Commission to implement the objectives set in the EGD, the upcoming EU Climate Law, Zero Pollution Action Plan, and other crucial files such as the 8th EAP, into binding law, and therefore must be consistent with the new commitments and strategies they propose.

The extraordinary role of the IED is also based on the fact that this legislation enables the EU’s prevention principle and the EU’s principle to give priority to rectify damage at source first (Art. 191(2) TFEU) and translate it into tangible legal obligations. It should be the flagship when it comes to the Commission’s upcoming “Hierarchy of action on pollution” (ZPAP Stakeholder workshop, 10/02/2021, https://ec.europa.eu/environment/system/files/2021-02/20210210_Overview_ZPAP-workshops.pdf, slide 6; see also a more detailed explanation under Question 58). The draft hierarchy model clearly states that prevention shall be the first action to apply (“by design and during production”). Only as a second action, “minimize & control” shall apply, while “eliminate & remediate” is the last option to consider.

Against this backdrop, the SCOPE OF THE IED should be revisited, in order to redefine ‘industrial activities’ as all activities that can be conducted to produce a certain public good or service provided to society, and give preference to those activities that have the lowest impact on the environment for products they provide – taking into account all up- and downstream impacts. This way, the IED could be shaped to emphasize that prevention of pollution is the priority as well as it would fully integrate the objectives of the circular economy, zero pollution and decarbonization.

MAIN AMENDMENTS:

- Defining the scope and focus on public good or services will have an IMPACT ON ALL CHAPTERS OF THE IED and in particular on ANNEX I, shifting away from the single categories of activities listed there.

- Currently, Annex I lists activities divided over categories that cover several (agro-)industrial sectors. In a revised version, categories could include energy generation, clean water services, waste treatment, protein production, packaging and construction materials.

- Likewise, the ROLE OF BEST AVAILABLE TECHNIQUES (BAT) and their determination have to be revised, which is explained in more detail under Question 23.

(2.) IN PARTICULAR: QUARRYING AND EXTRACTIVE ACTIVITIES, INCL. CESSATION OF ACTIVITIES

When it comes to the specific (agro-)industrial activities, we would like to refer to EEB's response to this Targeted Stakeholder Survey.

In terms of quarrying and extractive sectors, ClientEarth welcomes the inclusion of these activities which are having a huge impact on people's health, the environment and climate. These sectors exemplify the need to start rethinking industrial processes and impacts to make them more circular and to internalize the cost of their environmental and social externalities. Already the European Green Deal stresses that "From 1970 to 2017, the annual global extraction of materials tripled and it continues to grow, posing a major global risk. About half of total greenhouse gas emissions and more than 90% of biodiversity loss and water stress come from resource extraction and processing of materials, fuels and food. The EU's industry has started the shift but still accounts for 20% of the EU's greenhouse gas emissions. It remains too 'linear', and dependent on a throughput of new materials extracted, traded and processed into goods, and finally disposed of as waste or emissions. Only 12% of the materials it uses come from recycling." (EGD, 2.1.3).

Please note that expanding the IED scope to those activities does not mean that the use of "best available techniques" should promote the activities as such. In fact, the inclusion should support the cessation of individual activities where possible (considering also their downstream impacts) and focus all the more on the treatment of unused coal mines and oil and gas wells.

Thus said, part of a more circular approach to extractive industries should include addressing comprehensively remediation of abandoned and closed sites. The present lack of appropriate regulation of unused and abandoned coal mines and oil and gas wells has been well-documented. On the issue of methane leakage from abandoned and closed coalmines, for example, see ClientEarth, together with Global Energy Environmental Investigation Agency (EIA), Environmental Defense Fund, Deutsche Umwelthilfe (DUH), Clean Air Task Force and Ember, "Feedback on the Proposal for a Legislative Act to Reduce Methane Emissions in the Oil, Gas and Coal Sectors" submitted in January 2021, <https://www.clientearth.org/media/zxqnspg0/feedback-on-the-proposal-for-a-legislative-act-to-reduce-methane-emissions.pdf>.

MAIN AMENDMENTS:

- When determining the new SCOPE OF THE IED described above, we would like to stress that the need to regulate activities does not end immediately when the original operation has stopped. Follow up obligations should be strengthened as well.

2. For some of the (agro-)industrial activities under review, more information is needed to establish the current state of play and significance of environmental pressures in the EU and potential pollution reductions if IED provisions were introduced.

A How significant are the environmental pressures from the following (agro-)industrial activities?

For each of the following activities in your area of experience, use the dropdown menu to rate the significance of the environmental pressures. [Rate as follows: Significant; Moderate; Slight; No impact; Do not know; Not applicable].

- Intensive cattle farms

- Emissions to air **Significant**
- Emissions to water **Significant**
- Emissions to soil **Significant**
- GHG emissions **Significant**
- Energy use **Moderate**
- Water use **Significant**
- Other resources/ materials use **Significant**
- Waste generation **Significant**
- Other **Significant**

@Other: **Damages to wild areas/ecosystems and Antibiotic resistance/Environmental contamination (please see also response to Question 2B).**

- Intensive mixed livestock farms

- Emissions to air **Significant**
- Emissions to water **Significant**
- Emissions to soil **Significant**
- GHG emissions **Significant**
- Energy use **Significant**
- Water use **Significant**
- Other resources/ materials use **Significant**
- Waste generation **Significant**
- Other **Significant**

@Other: **Damages to wild areas/ecosystems and Antibiotic resistance/Environmental contamination (please see also response to Question 2B).**

- Intensive aquaculture

- Emissions to air **Significant**
- Emissions to water **Significant**
- Emissions to soil **Significant**
- GHG emissions **Significant**
- Energy use **Significant**
- Water use **Significant**
- Other resources/ materials use **Significant**
- Waste generation **Significant**
- Other **Significant**

@Other: **Escapes of non-native species (please see also response to Question 2B).**

- Mining/ quarrying industries

- Emissions to air **Significant**
- Emissions to water **Significant**
- Emissions to soil **Significant**
- GHG emissions **Significant**
- Energy use **Significant**
- Water use **Significant**
- Other resources/ materials use **Significant**
- Waste generation **Significant**
- Other

@Other: **Please see also response to Question 2B.**

- Upstream oil and gas industries

- Emissions to air **Significant**
- Emissions to water **Significant**
- Emissions to soil **Significant**
- GHG emissions **Significant**
- Energy use **Significant**
- Water use **Significant**
- Other resources/ materials use **Significant**
- Waste generation **Significant**
- Other

@Other: **Please see also response to Question 2B.**

- Battery production

- Emissions to air **Do not know**
- Emissions to water **Significant**
- Emissions to soil **Do not know**
- GHG emissions **Do not know**
- Energy use **Do not know**
- Water use **Do not know**
- Other resources/ materials use **Significant**
- Waste generation **Significant**
- Other **Significant**

@Others: **Batteries have lead, cadmium and other harmful chemicals.**

- Battery disposal and recovery

- Emissions to air **Do not know**
- Emissions to water **Do not know**
- Emissions to soil **Do not know**
- GHG emissions **Do not know**
- Energy use **Do not know**
- Water use **Do not know**
- Other resources/ materials use **Do not know**
- Waste generation **Do not know**

- Other *Do not know*
- Downstream ferrous metal processing activities: forging presses, cold rolling and wire drawing
 - Emissions to air *Do not know*
 - Emissions to water *Do not know*
 - Emissions to soil *Do not know*
 - GHG emissions *Do not know*
 - Energy use *Do not know*
 - Water use *Do not know*
 - Other resources/ materials use *Do not know*
 - Waste generation *Do not know*
 - Other *Do not know*
- Ship building (other than coating) and dismantling
 - Emissions to air *Do not know*
 - Emissions to water *Do not know*
 - Emissions to soil *Do not know*
 - GHG emissions *Do not know*
 - Energy use *Do not know*
 - Water use *Do not know*
 - Other resources/ materials use *Do not know*
 - Waste generation *Do not know*
 - Other *Significant*

@Other: Huge chemical pollution linked to it, esp. antifouling and biocides agents on the boat.
- Other (as specified in question 1) -
 - Emissions to air -
 - Emissions to water -
 - Emissions to soil -
 - GHG emissions -
 - Energy use -
 - Water use -
 - Other resources/ materials use -
 - Waste generation -
 - Other -

If you have referred to an “Other” environmental pressure, please specify. [open text response]

Open text response:

In addition to the environmental pressure listed above, human health and biodiversity/ecosystems pressure should be taken into consideration, see in particular our comments under each activity above.

Furthermore, ClientEarth would like to stress that the significance of impacts shall be assessed according to the full life cycle phases of the (agro-)industrial activity in question, instead of focusing only on the “sub-phases”. This can be exemplified:

- When it comes to aquaculture, the upstream supply chain (specifically the production of feed ingredients) can have a considerable emissions footprint; many sectors of the aquaculture industry rely heavily on soy, palm and other intensively-grown crops with well-documented environmental impacts.

- When it comes to mining activities as well as oil and gas extraction, the downstream impacts of these activities are responsible for a large number of environmental and health damages (e.g. air, water and climate pollution of combustion of fossil fuels or adverse human health impacts of petrochemical products).

B If you have answered “significant” above, by how much could the environmental pressure/pollution be reduced for the following (agro-)industrial activities, and by environmental pressure/pollutant group, if IED provisions, were introduced? For each of the following activities in your area of experience, use the dropdown menu to rate the potential reduction in environmental pressure/ pollution. [Rate as follows: Significant, >15% reduction; Moderate, 5% -15% reduction; Slight, <5% reduction; No impact; Do not know; Not applicable].

- *Intensive cattle farms*

- Emissions to air **Significant**
- Emissions to water **Significant**
- Emissions to soil **Significant**
- GHG emissions **Significant**
- Energy use **Do not know**
- Water use **Do not know**
- Other resources/ materials use **Significant**
- Waste generation **Do not know**
- Other **Do not know**

- *Intensive mixed livestock farms*

- Emissions to air **Significant**
- Emissions to water **Significant**
- Emissions to soil **Significant**
- GHG emissions **Significant**
- Energy use **Significant**
- Water use **Significant**
- Other resources/ materials use **Significant**
- Waste generation **Significant**
- Other **Do not know**

- *Intensive aquaculture*

- Emissions to air **Do not know**
- Emissions to water **Do not know**
- Emissions to soil **Do not know**
- GHG emissions **Do not know**
- Energy use **Do not know**
- Water use **Do not know**
- Other resources/ materials use **Do not know**
- Waste generation **Do not know**
- Other **Significant**

@Other: *See open text box below.*

- Mining/ quarrying industries

- Emissions to air **Significant**
- Emissions to water **Significant**
- Emissions to soil **Significant**
- GHG emissions **Significant**
- Energy use **Significant**
- Water use **Significant**
- Other resources/ materials use **Significant**
- Waste generation **Significant**
- Other **Significant**

@Other: *The inclusion of this sectors should support the cessation of individual activities where possible (considering their impacts in the downstream process, too).*

- Upstream oil and gas industries

- Emissions to air **Significant**
- Emissions to water **Significant**
- Emissions to soil **Significant**
- GHG emissions **Significant**
- Energy use **Significant**
- Water use **Significant**
- Other resources/ materials use **Significant**
- Waste generation **Significant**
- Other **Significant**

@Other: *The inclusion of this sectors should support the cessation of individual activities where possible (considering their impacts in the downstream process, too).*

- Battery production

- Emissions to air **Do not know**
- Emissions to water **Do not know**
- Emissions to soil **Do not know**
- GHG emissions **Do not know**
- Energy use **Do not know**
- Water use **Do not know**
- Other resources/ materials use **Do not know**
- Waste generation **Do not know**
- Other **Do not know**

- Battery disposal and recovery

- Emissions to air **Do not know**
- Emissions to water **Do not know**
- Emissions to soil **Do not know**
- GHG emissions **Do not know**

- Energy use *Do not know*
 - Water use *Do not know*
 - Other resources/ materials use *Do not know*
 - Waste generation *Do not know*
 - Other *Do not know*
- Downstream ferrous metal processing activities: forging presses, cold rolling and wire drawing
- Emissions to air *Do not know*
 - Emissions to water *Do not know*
 - Emissions to soil *Do not know*
 - GHG emissions *Do not know*
 - Energy use *Do not know*
 - Water use *Do not know*
 - Other resources/ materials use *Do not know*
 - Waste generation *Do not know*
 - Other *Do not know*
- Ship building (other than coating) and dismantling
- Emissions to air *Do not know*
 - Emissions to water *Do not know*
 - Emissions to soil *Do not know*
 - GHG emissions *Do not know*
 - Energy use *Do not know*
 - Water use *Do not know*
 - Other resources/ materials use *Do not know*
 - Waste generation *Do not know*
 - Other *Do not know*
- Other (as specified in question 1) -
- Emissions to air -
 - Emissions to water -
 - Emissions to soil -
 - GHG emissions -
 - Energy use -
 - Water use -
 - Other resources/ materials use -
 - Waste generation -
 - Other -

Please provide further information including e.g. identification of specific substances and the scale of their likely reduction [open text response]

Open text response:

In addition to our information provided in our response to Questions 1 and 2A, ClientEarth would like to stress some additional information on the following:

(1) Insufficient regulation: Methane

(2) Insufficient regulation: Aquaculture

In detail:

(1) METHANE

To ensure achieving the new climate targets under the Paris Agreement and the upcoming EU Climate Law, the IED framework must set scientifically-based greenhouse gas (GHG) emission limit values. The IED can become the flagship of translating the EU's objectives into specific measures by focusing on GHG and non-GHG emissions prevention (see our response to Question 58 and our legal analysis "Combating climate change: New IED and ETS interactions required", 03/2021, <https://www.clientearth.org/latest/documents/combating-climate-change-new-ied-and-ets-interactions-required/>).

In regulating such emissions under the IED, GHG emissions limits from industrial processes should be based on the entire lifecycle of the relevant emission. For example, GHGs from coal emissions should encompass the methane emitted as part of the mining process, as well as the carbon dioxide emitted during combustion. Furthermore, we would like to highlight the need to regulate methane emissions generated by oil and gas extraction and agriculture.

(a) METHANE FROM COAL MINING

ClientEarth urges the Commission to take measures to address coal mine methane (CMM) from operational and abandoned mines as part of the new IED framework. In the EU Methane Strategy released in 2020, CMM was not given sufficient attention, when taking into account its significant contribution to EU emissions.

For example, think tank Ember's research has shown that the climate impact of Poland's CMM alone is equivalent to almost twice the CO₂ emitted by Belchatów power plant, Europe's biggest CO₂ emitter (Małgorzata Kasprzak and Dave Jones, 'Poland's Second Belchatow', https://ember-climate.org/wp-content/uploads/2020/11/2020-Coal-mine-methane_EN.pdf). Poland's CMM accounts for 70% of total EU CMM leaks. The problem of CMM is an ongoing one that the EU must address – an estimated 50% of Poland's CMM leaks coal mines occur at mines producing coking coal, which is used for steel-making, and therefore is unlikely to be phased out in the short-term.

Most of these leaks are from operational underground coalmines, but Ember notes that due to poor monitoring, the amount of methane leaking from abandoned sites could be greater than estimates suggest.

MAIN AMENDMENTS:

Next to the new SCOPE OF THE IED as well as the DELETION OF THE EXCLUSION CLAUSES regarding GHG in Art. 9 IED, we ask the Commission to take the following measures:

- Set an emission standard for coal that covers the entire supply chain including all greenhouse gases, with appropriate global warming potential conversions for each gas. As the EU is a major importer of coking coal, all measures targeting CMM leaks should have effect in the upstream part of the supply chain including where that is outside of the EU. Coal power plants have to phase out by 2030 the latest.
- Require coal mining companies to present a clear methane abatement strategy with deadlines and targets for methane emissions reduction (which requires specifically amendments of Art. 12 and 14 IED).

- Make permitting under the IED conditional on provision of adequate security to cover the potential future cost of methane remediation, along with general site remediation. In this context, we would like to stress that a financial security should be provided for all future site closures and remediation in all (agro-)industrial sectors.

Further, the Commission should require coalmine operators and owners of closed wells to comply with strict methane measurement, reporting and verification (MRV) requirements within the next two years, and rigorous leakage detection and repair (LDAR), as outlined in the joint NGO response to the Commission's consultation on its Inception Impact Assessment for a legislative act to reduce methane in the energy sector (Global Energy Environmental Investigation Agency/Environmental Defense Fund/Deutsche Umwelthilfe/Clean Air Task Force/Ember/ClientEarth, "Feedback on the Proposal for a Legislative Act to Reduce Methane Emissions in the Oil, Gas and Coal Sectors", 26/01/2021 (<https://www.clientearth.org/media/zxqnsq0/feedback-on-the-proposal-for-a-legislative-act-to-reduce-methane-emissions.pdf>), pages 3-4 (MRV) and pages 4-7 (LDAR).

(b) METHANE FROM THE OIL AND GAS SECTORS

Methane emissions occur across the entire fossil gas supply chain – at pre-production, extraction, processing, liquefaction, transmission, distribution, storage and use – both inside and outside of the EU. Where the methane leakage rate along the gas supply chain is over 3%, the climate impact of fossil gas is worse than that of coal in power generation (In-Depth Analysis in Support of the Commission Communication COM (2018) 773, page 51, footnote 128, https://ec.europa.eu/clima/sites/clima/files/docs/pages/com_2018_733_analysis_in_support_en_0.pdf). There are signs of extensive methane leaks across the gas supply chain indicating that this threshold could be exceeded for much of Europe's gas.

Furthermore, there are undeniable indications that the oil sector is massively exploiting the gap in current EU law dealing with methane from oil extraction. A study published by GEOMAR scientists in July 2020 discovered methane bubbles emerging from the seabed near abandoned oil and gas wells. (Christoph Böttner et al, Greenhouse gas emissions from marine decommissioned hydrocarbon wells: leakage detection, monitoring and mitigation strategies, 09/ 2020, <https://www.sciencedirect.com/science/article/pii/S1750583619306504>). The main author of the study said that '[t]he results clearly show that thousands of tons of methane are leaking from old drill holes on the North Sea floor every year.' (Helmholtz Centre for Ocean Research Kiel (GEOMAR), Extensive gas leaks in the North Sea: Abandoned wells, 30/07/2020, <https://www.sciencedaily.com/releases/2020/07/200730113055.htm>).

Against this backdrop, it is urgent to address these leakage sources and use all the tools and instruments of a revised IED.

(c) METHANE FROM AGRICULTURE

The agriculture sector is only partly included under the scope of the IED which seems to be artificial and arbitrary (e.g. it includes intensive pig and poultry farms, but no cattle farms). There is untapped potential of preventing and reducing pollution of all three environmental media (air, water and soil), and including climate pollution. Next to ammonia, agriculture is massively contributing to methane emissions across Europe, being accountable for more than half of the methane emissions of the EU (54% in 2017, see EEA Report, Air quality in Europe, No 10/2019b, Figure 2.4). And this is an ongoing trend as we can tell from the very little decrease of emissions since 2000 (ibid, Figure 2.2). The livestock sector represents the main

source of methane emissions in agriculture, due to enteric fermentation and manure management. Hence, its regulation under the IED (including a revised scope, stricter tools and improved BAT determination) could have huge impact.

(2) AQUACULTURE

We would like to stress that we replied to the question above “do not know” as the impact is heavily dependent on the ambition of BATs in this sector. However, a significant improvement could be expected if the tools and instruments of the IED are revised and applied appropriately.

Regulation 1380/2013 of the Common Fisheries Policy aims to boost the development of aquaculture by having all Member States draw up multiannual national strategic plans aimed at facilitating the sustainable development of aquaculture. According to the Regulation, these plans should be based on the following two main principles: promoting aquaculture as a highly sustainable activity; and simplifying administrative procedures. However there is no single EU aquaculture license and aquaculture permit systems are developed at the Member State level. As a result, there are different regulatory regimes from one Member State to another and different levels of implementation for the same sector.

This is a problem because aquaculture can be a highly polluting industrial activity, which is also growing worldwide and an increasing part of the world’s seafood mix. As a result, it is all the more important to include it within the scope of the IED.

Indeed, some emissions from aquaculture operations present significant environmental concerns and would benefit from inclusion in the IED. At-sea aquaculture farms can emit uneaten fish-feed, faeces, antibiotics, chemical and pesticides into the surrounding water. This can affect surrounding ecosystems, water quality and create algal blooms and eutrophication. Escapes of farmed species into the marine environment (made more likely by mismanagement, faulty net-pens or extreme weather events) can seriously destabilize local ecosystems.

At the same time aquaculture relies on a steady stream of huge quantities of feed. The production of feed ingredients can have a considerable emissions footprint; many sectors of the aquaculture industry are heavily reliant on soy, palm and other intensively-grown crops with well-documented environmental impacts. In addition, feed ingredients can also be heavily reliant on wild-caught fish, which can in turn be responsible for emissions of their own, including fuel, discards, so-called “ghost gear” from fishing vessels, and chemicals, waste water and organic waste from vessels.

Conversely, the growth of land-based aquaculture is driven in part by a desire to reduce direct emissions into the marine environment, but should still be monitored within the directive. The simulation of a marine environment on land is energy and water-intensive. Land-based operators may still require feed and antibiotics and include additional chemical water treatments. Waste water from recirculating systems is discharged back into the marine environment, which can create a steady stream of environmentally damaging outputs, polluting soils, rivers and the ocean.

The advantages of fish farms being regulated by the IED are that it would:

- Result in a better harmonization of regulations across Member States for granting aquaculture licenses
- Define common standards for limits on emissions associated with marine and land based aquaculture (e.g. use of antibiotics, use of chemicals and pesticides, escapees, water quality)
- Establish monitoring rules among all operators

- Harmonise sanctions in case of serious breaches of emissions limits
- Lead to an INTEGRATED EU aquaculture license, easier to control and monitor with a centralised database
- Simplify administrative procedures for operators
- Assist in integrated spatial planning beyond strict Member State borders
- Promote a level playing field for EU operators
- Support the delivery of the Farm to Fork Strategy's goals in relation to aquaculture (which include a significant increase in organic aquaculture)

3. Where available, provide references to and/or upload relevant studies with supporting evidence for the environmental pressures and potential reductions rated as significant or moderate, [open text response]

Open text response:

- ClientEarth's feedback to the European Commission's Methane Strategy Roadmap, August 2020, <https://www.documents.clientearth.org/wp-content/uploads/library/2020-08-06-clientearth-s-feedback-to-the-european-commission-s-methane-strategy-roadmap-ce-en.pdf>
- Eionet Report – ETC/ATNI 2020/4, Costs of air pollution from European industrial facilities 2008–2017, January 2021, <https://www.eionet.europa.eu/etcs/etc-atni/products/etc-atni-reports/etc-atni-report-04-2020-costs-of-air-pollution-from-european-industrial-facilities-200820132017>

Extending the production capacity thresholds for (agro-)industrial activities

Some activities fall below current production capacity thresholds set in the IED. Options are under consideration to reduce the current IED activity thresholds for:

- **Waste management - biological treatment:** Recovery of non-hazardous waste from biological treatment (IED Annex I activity 5.3(b)(i)) (to include certain activities with a capacity of less than 75 tonnes per day with increased risk for emissions to soils, such as biogas production or manure processing plants)
- **Textiles:** Pre-treatment or dyeing of textile fibres or textiles (IED activity 6.2), to include textile finishing as well as activities below the current limit of treatment capacity (10 tonnes per day) to encompass a larger proportion of the sector's emissions and impacts, particularly from waste water impacts.
- **Smitheries:** Reduction of IED capacity threshold for smitheries (IED activity 2.3b) from the current limit of 50 kilojoule per hammer and where the calorific power used exceeds 20 MW. This will encompass a larger proportion of the sector's emissions and impacts, particularly for releases to air.
- **Medium Combustion Plant:** Examine the scope of Chapter III - Large Combustion Plants (LCP), detailed under IED Article 28. Move the 20-50 MWth capacity threshold from the Medium

Combustion Plant Directive (MCPD) (Directive (EU) 2015/2193) to LCP. The main driver for this revision is to align with the EU ETS scope threshold.

Updating BAT for landfills under IED

Currently the landfill directive provisions are deemed to constitute BAT (Art 1(2) of Directive 1999/31). Amendments are under consideration to:

- Allow adoption of BAT conclusions for landfills covered by the IED (IED Annex I activity 5.4). BAT conclusions would cover the key environmental issues for which BAT has evolved since the 1990s, including with regard to methane capture.
- Reduce the threshold for inclusion of landfills within the IED scope.

9. For the (agro-)industrial activities that fall below the current IED production capacity thresholds, more information is needed to establish the current state of play and significance of environmental pressures in the EU. **How significant are the environmental pressures from the following (agro-) industrial activities below the current IED production capacity thresholds?** For each of the following activities in your area of experience, use the dropdown menu to rate how significant the environmental pressures are. [Rate as follows: Significant; Moderate; Slight; No impact; Do not know; Not applicable].

- Waste management - biological treatment

- Emissions to air **Significant**
- Emissions to water **Significant**
- Emissions to soil **Do not know**
- GHG emissions **Significant**
- Energy use **Do not know**
- Water use **Do not know**
- Other resources/ materials use **Do not know**
- Waste generation **Do not know**
- Other **Significant**

@Other: **Odour, soil (contaminants of manure).**

- Textiles (pretreatment, dyeing and finishing)

- Emissions to air **Significant**
- Emissions to water **Significant**
- Emissions to soil **Significant**
- GHG emissions **Do not know**
- Energy use **Significant**
- Water use **Significant**
- Other resources/ materials use **Do not know**
- Waste generation **Do not know**
- Other **Significant**

@Other: **In particular there are chemical and microplastic emissions from those processes which can end up in air, water and soil.**

- Smitheries

- Emissions to air **Do not know**
- Emissions to water **Do not know**
- Emissions to soil **Do not know**
- GHG emissions **Do not know**
- Energy use **Significant**
- Water use **Do not know**
- Other resources/ materials use
- Waste generation **Significant**
- Other **Significant**

@Other: **Vibration, noise.**

- Medium Combustion Plant

- Emissions to air **Significant**
- Emissions to water **Significant**
- Emissions to soil **Significant**
- GHG emissions **Significant**
- Energy use **Significant**
- Water use **Significant**
- Other resources/ materials use **Significant**
- Waste generation **Significant**
- Other -

If you have referred to an “Other” environmental pressure, please specify. [open text response]

Open text response:

Please refer to our response of Question 1 and Question 23. Instead of focusing on specific activities or specific thresholds, the scope of the IED should be revisited, in order to redefine ‘industrial activities’ as all activities that can be conducted to produce a certain public good or service that provided to society, and give preference to those activities that have the lowest impact on the environmental for products they provide. This will have effect on the activities covered, as well as on thresholds.

10. Where available, provide and/ or upload references to relevant studies to provide evidence for the environmental pressures rated as significant or moderate. [open text response]

Open text response:

- Ballinger/Shanks/Hogg/Sherrington/Duffield, Report “Greenhouse Gas and Air Quality Impacts of Incineration and Landfill”, 04/12/2020, <https://www.clientearth.org/latest/documents/greenhouse-gas-and-air-quality-impacts-of-incineration-and-landfill/>, commissioned by ClientEarth.

A tailored permitting framework addressing the specificities of IED intensive livestock production installations

The setting up of a tailored regulatory permitting framework for emissions from intensive livestock production may allow the IED to be more effective and efficient in addressing the specificity of the intensive livestock production sector.

17. To what extent do you think a tailored regulatory permitting framework for intensive livestock production installations is needed? [Significant need; Moderate; Slight; No need; Do not know; Not applicable]

Significant

18. Where you think there is a significant or moderate need for a tailored regulatory permitting framework for intensive livestock production installations, please describe which specific aspects could be included in such a framework. [open text response]

Open text response:

It is important that the expansion of the agriculture sector under the IED does not mean to expand the intensive livestock production, but instead will be used as an opportunity to adapt and restructure the activities to today's urgent environmental, climate and human health challenges. In the agricultural sector in particular, we observe the following worrying development:

As a general trend, the number of farms in the EU has been in steep decline. However, the amount of land used in the EU for agricultural production has remained steady (+0.2 %) between 2005 and 2016. At the EU-level, this consolidation of agricultural land reflected the growth in the number of the largest holdings and the land that they used for agricultural purposes (Eurostat, Agriculture, forestry and fishery statistics - 2018 edition, <https://ec.europa.eu/eurostat/documents/3217494/9455154/KS-FK-18-001-EN-N.pdf/a9ddd7db-c40c-48c9-8ed5-a8a90f4faa3f>).

Almost three quarters (72.2 %) of the livestock units in the EU-28 in 2013 were reared on very large farms. In recent years, there has been a considerable shift towards a higher number of livestock units being reared on very large farms: their number rose by almost 10 million units between 2005 and 2013 to reach 94 million Livestock Units (LSU).

By contrast, the number of livestock units fell for all of the remaining size classes during this period, with the total number of livestock units reared on very small farms more than halving (to just over one million LSUs).

A more detailed analysis suggests that some of the largest farms in the EU increased their livestock density, suggesting they were making use of more intensive farming practices. The rising number of livestock units on very large farms and falling numbers for all other size classes resulted in a large increase in the share of livestock units reared on very large farms (Eurostat, Archive: Small and large farms in the EU - statistics from the farm structure survey, 26/10/2017, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Small_and_large_farms_in_the_EU_-_statistics_from_the_farm_structure_survey&oldid=357625).

Livestock products constituted 40.9% of the total agricultural output of the EU in 2017 and in terms of output, the volume of animal production keeps increasing, despite the falling number of farms (Eurostat, 2018, page 70).

According to a Greenpeace report, the share of production in the pig, poultry and dairy market held by the largest farms (with a standard output of € 500,000 or more) is in eight European countries: Belgium,

Denmark, France, Germany, Italy, the Netherlands, Poland and Spain (Greenpeace, Feeding the Problem, February 2019, <https://storage.googleapis.com/planet4-eu-unit-stateless/2019/02/83254ee1-190212-feeding-the-problem-dangerous-intensification-of-animal-farming-in-europe.pdf>).

Against this backdrop, when revising the IED and setting standards in BATC later on, it is of utmost importance to use the Organic Production Regulation and the Nitrates Directives as a basis for further consideration.

The urgently needed inclusion of the full agriculture sector under the IED must not lead to an “intensive livestock production minus 1”-practice. This could happen if the Commission focus on a threshold only and this threshold will be too high that IED’s obligation can be easily bypassed by having one animal less.

1.1.2 Ensuring that BAT-AELs: (a) are achieved in permits, and (b) ELVs in permits reflect the full improvement potential of BAT for the concerned installation

(Agro-)industrial plants continue to pollute the environment. Whilst the IED has led to reductions of pollution from (agro-)industrial plants, BAT and their associated emission performance (BAT-AELs) may not always be achieved because:

- ELVs are often set in permits by default at the upper level of the BAT-AEL range, without consideration of whether BAT could lead to lower emissions closer to the lower end of the range
- Some industrial plants are granted Article 15(4) derogations from specific BAT-AELs, which leads to higher levels of emissions than required by BAT Conclusions. The use and approach to granting these derogations varies between Member States.
- Varying interpretations of how to set permit conditions in accordance with:
 - o IED Article 15(1) flexibilities (when setting permit conditions for indirect releases of polluting substances to water).
 - o IED Article 15(3) flexibilities (when setting different ELVs in permit conditions in terms of values, periods of time and reference conditions).
 - o IED Article 18 provisions (when setting stricter ELVs than those achievable by the use of BAT to meet environmental quality standards).

Building on the current approach (setting ELVs in permit conditions to achieve BAT performance), potential options are primarily focussed on amendments to the legal text (i.e. providing clarification and/ or introducing additional provisions).

Options currently under consideration include:

- The default option for setting ELVs in permits would be the lower limit of the BAT-AEL range, unless the operator demonstrates to the satisfaction of the competent authority that applying BAT techniques as described in BAT Conclusions only allows meeting a higher ELV within the BAT-AEL range.
- Tighten the conditions for applying derogations from BAT-AELs under Article 15(4) of the IED, with the potential for derogations to be time-limited (currently no end date needs to be specified for derogations granted).

- Develop a standardised mandatory methodology to assess the disproportionality between costs of implementation and environmental benefits with reference to Article 15(4) of the IED. This would then ensure that derogations are assessed equally across the EU.
- Implement a stricter regime to ensure that the indirect releases to water from an IED installation do not exceed the load that would be directly released should the installation apply BAT, e.g. by amending IED Article 15(1) (whereby currently the effect of a water treatment plant may be taken into account when determining ELVs).
- Delete the flexibility that allows setting different ELVs in permit conditions in terms of values, periods of time and reference conditions (IED Article 15(3[b]) or add to the provisions to clarify (two alternative measures to be developed in more detail).
- Tighten the provisions of Article 18 so that stricter ELVs (going beyond BAT) shall be set in permit conditions in the case that environmental quality standards are not met.

21. To what extent would the following options on setting permit conditions have an impact on the environment? [Significant improvement; Moderate; Slight; No impact; Do not know; Not applicable]

- *The default option for setting ELVs in permits would be the lower limit of the BAT-AEL range, unless the operator demonstrates to the satisfaction of the competent authority that applying BAT techniques as described in BAT Conclusions only allows meeting a higher ELV within the BAT-AEL range*

- Emissions to air **Significant improvement**
- Emissions to water **Significant improvement**
- Emissions to soil **Significant improvement**
- GHG emissions **Significant improvement**
- Energy use **Significant improvement**
- Water use **Significant improvement**
- Other resources/ materials use **Significant improvement**
- Waste generation **Significant improvement**
- Other **Significant improvement**

@Other: The impact depends heavily on the concrete ambition for each BAT-AEPL, including BAT-AELs that must cover all emissions, including GHG emissions. Moreover, the option for operators to demonstrate to the satisfaction of the competent authority that only higher ELVs will be met is too vague – a strict derogation regime is needed instead. Please see our response to Question 23.

- *Tighten the conditions for applying derogations from BAT-AELs under Article 15(4) of the IED, with the potential for derogations to be time-limited.*

- Emissions to air **Significant improvement**
- Emissions to water **Significant improvement**
- Emissions to soil **Significant improvement**
- GHG emissions **Significant improvement**
- Energy use **Significant improvement**
- Water use **Significant improvement**
- Other resources/ materials use **Significant improvement**
- Waste generation **Significant improvement**

→ Other **Significant improvement**

@Other: *The impact depends heavily on how Art. 15(4) will be tightened, please see our response to Question 22.*

- Develop a standardised mandatory methodology to assess the disproportionality between costs of implementation and environmental benefits with reference to Article 15(4) of the IED.

- Emissions to air **Significant improvement**
- Emissions to water **Significant improvement**
- Emissions to soil **Significant improvement**
- GHG emissions **Significant improvement**
- Energy use **Significant improvement**
- Water use **Significant improvement**
- Other resources/ materials use **Significant improvement**
- Waste generation **Significant improvement**
- Other **Significant improvement**

@Other: *The impact depends heavily on the ambition of the standardized mandatory methodology itself, please see our response to Question 22.*

- Subject indirect releases of polluting substances to water to an assessment demonstrating that such releases do not lead to an increased load of pollutants ending up in receiving waters than if the IED installation were to apply BAT and meet AELs for direct releases.

- Emissions to air **Do not know**
- Emissions to water **Slight**
- Emissions to soil **Slight**
- GHG emissions **Do not know**
- Energy use **Do not know**
- Water use **Do not know**
- Other resources/ materials use **Do not know**
- Waste generation **Do not know**
- Other **Slight**

@Other: *It is unclear what exactly will be covered by this policy option and which procedural guarantees will apply for “demonstrating” that no “increased” load of pollutants will end up in receiving waters. Moreover, in light of EU’s precautionary principle, prevention principle, and especially its principle that environmental damage should as a priority be rectified at source, authorities have to focus at the very first source and reason of emitting pollutants to prevent emissions as soon as possible.*

- Prohibit the indirect release of polluting substances to water

- Emissions to air **Significant improvement**
- Emissions to water **Significant improvement**
- Emissions to soil **Significant improvement**
- GHG emissions **Do not know**
- Energy use **Significant improvement**
- Water use **Do not know**
- Other resources/ materials use **Significant improvement**

- Waste generation **Significant improvement**
- Other **Significant improvement**

@Other: Prohibiting indirect release of polluting substances to water supports the implementation of EU's precautionary principle, prevention principle, and especially its principle that environmental damage should as a priority be rectified at source. Furthermore, it has to be ensured that there is no shift from contamination from one medium (such as water) to another (such as soil).

- Delete the flexibility that allows setting different ELVs in permit conditions in terms of values, periods of time and reference conditions (IED Article 15(3[b])).

- Emissions to air **Significant improvement**
- Emissions to water **Significant improvement**
- Emissions to soil **Significant improvement**
- GHG emissions **Significant improvement**
- Energy use **Significant improvement**
- Water use **Significant improvement**
- Other resources/ materials use **Significant improvement**
- Waste generation **Significant improvement**
- Other **Significant improvement**

@Other: A significant improvement can only be expected if deleting flexibility will lead to the effect that more timely and comparable information will be provided. If deleting this flexibility will have the effect that, for example, instead of a daily emission limit value, only a monthly or annual value will be indicated, this would have not only no impact, but a worse impact. For more please see our response to Question 23.

- Tighten provisions of Article 18 so that stricter ELVs (going beyond BAT) shall be set in permit conditions in the case that environmental quality standards are not met

- Emissions to air **Significant improvement**
- Emissions to water **Significant improvement**
- Emissions to soil **Significant improvement**
- GHG emissions **Significant improvement**
- Energy use **Significant improvement**
- Water use **Significant improvement**
- Other resources/ materials use **Significant improvement**
- Waste generation **Significant improvement**
- Other **Significant improvement**

@Other: A significant improvement will only be achieved if the provision of Art. 18 IED will be revised sufficiently, all relevant environmental quality standards will be covered and additional procedural guarantees will be included. For more please see our response to Question 23.

If you have referred to an “Other” environmental pressure, please specify. [open text response]

Open text response:

In general, the real impact of the policy options discussed above are depending very much on the ambition of its translation into concrete legal wording. However, when assessing impacts, ClientEarth would like to stress that all kind of impacts should be considered accordingly, including

- (1.) impacts on public health, social equity and fundamental rights, and
- (2.) impacts on biodiversity.

In detail:

(1.) IMPACTS ON PUBLIC HEALTH, SOCIAL EQUITY AND FUNDAMENTAL RIGHTS

A stronger IED, including stricter BAT-AELs, binding BAT-AEPLs, clearer rules on setting stricter permit conditions as well as improved access to information, public participation and access to justice, have direct links with fundamental human rights, including health and social equality.

Inadequate regulation of the industrial emissions and industrial pollution have been already source of human rights violations confirmed in the European Court of Human Rights judgments (e.g. ECHR, *Fadeyeva v. Russia*, 55723/00, 09/06/2005, or ECHR, *Cordella and others v. Italy*, 54414/13, 24/01/2019)). Both European Courts, the European Court of Human Rights and the Court of Justice of the European Union, confirmed in particular in the context of air pollution, that exceedance of legal limit values of environmental pollution is translating itself into potential danger to health (*Fadeyeva v. Russia*, para 87; *The Opinion of Advocate General Kokott in Craeynest and others*, in case C-723/17, 28/02/2019, para 53).

The WHO, for example, considers air pollution as the major environmental risk to human health, responsible for an estimate of 4.2 million premature deaths worldwide every year (WHO, Factsheet on ambient air quality and health, note 12). Likewise the EEA every year publishes reports that highlight premature death due to air pollution (EEA, *Air quality in Europe – 2020 report*, No 9/2020, <https://www.eea.europa.eu/publications/air-quality-in-europe-2020-report>). Thus, environmental law provisions are essential for a thriving society and economy. In the end, as underlined by Advocate General Kokott in C-723/17, the rules on ambient air quality – but also any other EU rules on environment – put in concrete terms the Union's obligations to provide protection following from the fundamental rights as protected in the Charter of Fundamental Rights of the European Union.

Also the European Commission states: "Pollution causes multiple physical and mental diseases. In the EU, despite important improvements over the last decades, every year over 400 000 premature deaths (including from cancers) are attributed to ambient air pollution, and 48 000 cases of ischaemic heart disease as well as 6.5 million cases of chronic sleep disturbance to noise, next to other diseases attributable to both. Pollution's most harmful health impacts are typically born by vulnerable citizens, notably children, people with certain medical conditions, the elderly and people living in socio-economic deprivation. Pollution of air, water and soil is also one of the five main drivers of biodiversity loss and contributes largely to the current 6th species extinction. It comes at a high price for society and ecosystems, including health-related costs (healthcare, lost workdays, lost productivity), reduced yields (e.g. in agriculture, fisheries and tourism), remediation costs (e.g. water treatment, soil decontamination, marine depollution) and loss of ecosystem services (e.g. pollination). Pollution is also strongly interrelated with other environmental, social and economic risks for businesses and citizens." (ZPAP Roadmap, Ref. Ares(2020)5152184, 01/10/2020).

While the mutually beneficial interrelation of environmental and human rights protection is recognised on international and European level, it needs stronger links in the specific legislation to provide practical legal tools to address this nexus between environment and fundamental rights. Pure declarations without

concrete solution are not enough. For more information how to strengthen the focus on protection of fundamental human rights and how to integrate these issues in the IED, please see below, response to Question 108.

(2.) IMPACTS ON BIODIVERSITY

The main five direct drivers of biodiversity loss are changes in land and sea use, overexploitation, climate change, pollution, and invasive alien species (EU Biodiversity Strategy for 2030, COM/2020/380 final). An improved IED will have impact on almost all of these drivers – first and foremost, the integrated approach of the IED includes provisions on pollution of air, water and soil, the use and production of chemicals of concerns as well as the resource use. At the same time, rules of the IED will also impact land and sea use and climate change, especially if the revised version would include new activities and additional pollutants such as GHG emissions. As confirmed by the Commission in its Biodiversity Strategy, the biodiversity crisis and the climate crisis are intrinsically linked. It demonstrates once more the urgent need of a decarbonised industry (please see also our response to Question 58).

22. If you are supportive of introducing time limits for Article 15(4) derogations, what time limit would in your view be the most appropriate and effective? (express in years and months) [open text response]

Open text response:

ClientEarth welcomes tightening the derogations within the IED. In particular Art. 15(4) is flawed as it provides too vague requirements as well as too little procedural guarantees.

(1.) To achieve full effectiveness of the IED, Art. 15(4) should be deleted.

(2.) At the very least, ClientEarth recommends a fundamental overhaul of the derogation clause. This includes the introduction of time limits (max. 4 years/48 months), a precise focus on environmental considerations in the light of IED's goals, a link to standardized methodology for assessing costs/benefits/disproportionality, as well as procedural improvements.

In detail:

(1.) DELETING ART. 15(4)

Deleting the option for broad derogations under Art. 15(4) would lead to a clear obligation to comply with BAT-AELs for all installations across all Member States while ensuring a level playing field for operators as well as a high level of protection of the environment.

(2.) FUNDAMENTAL OVERHAUL OF ART. 15(4)

At the very least, ClientEarth recommends the following conditions for derogations:

(a) TIME LIMITS

Introducing the shortest possible time limits shall be one additional requirement for derogations under Art. 15(4). A stringent timeframe is needed to support IED's effectiveness.

When defining a maximum time period for derogation, the purpose of the derogation option has to be considered. Art. 15(4) provides the operator more time to adapt to the new requirements under BATC. If the operator cannot adapt to the new requirements within a certain time, the installation shall shut down.

As we can see in the current Art. 21(3), operators should usually be able to adjust their installations within 4 years at the latest after the publication of the Implementing Decision on new BATC. Actually, it shows that operators are usually able to do so in less than 4 years as this maximum transition period includes the time for authorities to update their permits. Therefore, a derogation should not exceed a **MAXIMUM OF A FURTHER 4 YEARS (48 MONTHS)** without the option of prolongation. This period is also leaned in the IED itself: the Commission should aim to update BREFs not later than 8 years (Recital 13), which may be shortened considering the policy options under Problem area 4. It shows that after 8 years, technology should have progressed already significantly and new assessments have to be made. Finally, once new BATC are adopted, existing permits and derogations have to be reviewed and updated (see already today Art. 15(4) last subparagraph).

In practice, derogations are granted with varying time limits. Ricardo's report "Assessment and summary of Member States' reports under Commission Implementing Decision 2018/1135/EU" confirms that 22 out of 133 derogations were reported without any specific end date in 2018 (070201/2019/816748/SFRA/ENV.C.4, page 43 et seq).

According to this report, most derogations granted from the GLS BATC (Manufacture of glass, 2012/134/EU) applied an interquartile duration range from 50 to 90 months (page 46). As a revised Art. 15(4) shall support greater effectiveness of the IED than at present, a new legal time limit should not go beyond the lower limit of today's range. Likewise, for all other BATC (where the 4 year implementation period has ended), the median duration of derogations is **BELOW 50 months** (page 46). Sweden (accounting for the vast majority (40%) of all derogations reported at EU level in 2018, except Slovakia), granted derogations for a duration between 3 and 58 months, while the median duration is far **BELOW 50 months**. This variety illustrates at the same time that a new legally binding time limit in a revised Art. 15(4) should **ONLY BE SET AS A MAXIMUM**, and Member States should be able to grant less duration.

In addition, it has to be ensured that any **REPETITION OR PROLONGATION OF DEROGATIONS ARE EXCLUDED** once the time limit has passed. Otherwise, a first derogation could risk a "lock-in" of outdated and environmentally and climate damaging techniques (as operators may try to argue with even more disproportionately economic viability the older the installations get when applying for a second derogation).

(b) PURPOSE AND SCOPE OF ART. 15(4)

Derogations can only be granted in very exceptional cases **AS A LAST RESORT**. Derogations are not about supporting operations that become only less profitable or where the economic value cannot be translated 1:1 into environmental benefits.

This is all the more valid as the focus on economic aspects only would lead to a **DOUBLE PRIVILEGE** of considering costs. Costs are first of all considered when determining BAT-AELs and second of all when granting derogations. The determination of "best available techniques" does already reflect costs for the operators affected. The definition of "available" techniques includes the consideration of economically viable conditions, "taking into consideration the costs and advantages" (see Art. 3(10)(b) IED and BREF on Economics and Cross-media Effects (ECM REF, 07/2006)). Hence, there is no room for doing the very same assessment when it comes to the derogations under Art. 15(4) again.

Furthermore, any derogation has to be read in the overall context of the IED, which seeks to **PROTECT THE ENVIRONMENT "TAKEN AS A WHOLE"** (Art. 1, see also Art. 15(4) sub-paragraph 4). When setting

a derogation for a specific pollutant, other CROSS-MEDIA IMPACTS shall balance the negative impacts to ensure achieving a high level of protection of the environment in total. Hence, a revised derogation clause has to make clear that any cost benefit assessment is first and foremost about the different impacts such as on air, climate, water and soil, use of raw materials, generation of waste etc. and the effectiveness of pollution abatement technologies for the environment as a whole (see (c) below).

This can be also learned from the existing Guidance Document No. 20 on “Exemptions to environmental objectives” produced for the Water Framework Directive (https://circabc.europa.eu/sd/a/2a3ec00a-d0e6-405f-bf66-60e212555db1/Guidance_documentN%C2%B020_Mars09.pdf). It clarifies:

“From the logic of the WFD it becomes clear that an assessment of disproportionate costs only makes sense AFTER A COMBINATION OF THE MOST COST-EFFECTIVE SOLUTIONS HAS BEEN IDENTIFIED. Most importantly, for all cases where an exemption is applied, all measures that can be taken without involving disproportionate costs should still be taken to reach the BEST STATUS POSSIBLE.” (emphasis added)

Finally, Art. 15(4) shall apply not only for derogations from BAT-AELs, but for ALL BAT-AEPLs and monitoring requirements due to their explicit binding nature in the revised version (please see Question 23 and our responses to Problem area 3).

(c) STANDARDIZED MANDATORY METHODOLOGY FOR ASSESSING COSTS, ENVIRONMENTAL BENEFITS, AND DISPROPORTIONALITY

In order to ensure that Article 15(4) is applied equally across the EU, a standardized methodology for assessing the costs of implementation, the environmental benefits, as well as the disproportionality between costs and benefits (cost benefit assessment, CBA) shall be developed. Therefore, Art. 15(4) has to be concretized with a new IED ANNEX on a general standardized methodology (including the steps for the assessments of costs, benefit, and disproportionality) and with more SPECIFIC GUIDANCE for different sectors in BATC. Furthermore, the conditions of Art. 15(4)(a) and (b) as the basis for any cost benefit assessment shall be specified, either in Art. 15(4) or in the new IED Annex.

Existing reports illustrate the current ‘patchwork quilt’ approach to Art. 15(4) interpretation: there is no harmonized guidance neither on a European, nor in most cases on a national, regional or local level (see Ricardo, “Assessment and summary of Member States’ reports under Commission Implementing Decision 2018/1135/EU”, 070201/2019/816748/SFRA/ENV.C.4, January 2021; Amec/Foster/Wheeler, “Application of IED Article 15(4) derogations”, March 2018). In some countries, such as Germany, authorities are solely assessing on a case-by-case basis although one authority itself cannot rely on huge practical expertise as there are various competent authorities across and within the different States (Bundesländer) in Germany. Improved legal wording of Art. 15(4) and a standardized methodology can ensure a harmonized, fair approach – when applied by authorities, as well as courts.

When establishing the methodology and when setting the basic framework within the IED and its new Annex, the following conditions should be included in particular:

- First of all, one has to assess all kinds of environmental impacts to be able to make a comparison with the economic costs. This includes transboundary and secondary pollution. This should be clear as the IED follows an integrated approach and aims to minimize long-distance and transboundary pollution (see esp. Art. 1, Art. 14), however, it should be stressed under Art. 15(4) and in the new Annex.
- When assessing environmental benefits, one should assess the environmental benefits from complying with the lowest range of the BAT-AELs (instead of the upper range), to evaluate the advantages that authorities across the EU could already ask the operator to do.

- To assess air pollution impacts and environmental benefits and to translate them into monetary terms, the IED should use appropriate methods such as the Value of Statistical Life (VSL) method of the EEA adapted to the US EPA price levels.
- When there are uncertainties with respect to environmental costs, this uncertainty has to be considered in the assessment according to EU's precautionary principle in Art. 191(2) TFEU.
- When assessing benefits and costs, a “shut down scenario” should be taken into consideration and properly assessed.
- Disproportionality should not begin at the point where costs simply exceed quantifiable benefits. The assessment of costs and benefits has to include qualitative as well as quantitative costs and benefits. This has been already clarified in an existing guidance under other policies on how to define economic efficiency and disproportionate costs, e.g. the Guidance Document No. 20 on “Exemptions to environmental objectives” produced for the Water Framework Directive (https://circabc.europa.eu/sd/a/2a3ec00a-d0e6-405f-bf66-60e212555db1/Guidance_documentN%C2%B020_Mars09.pdf).

Furthermore, the conditions of Art. 15(4)(a) and (b) that are the basis for any cost benefit assessments shall be specified in more detail, at least in the new Annex.

Next to this new Annex, a more specific guidance for different (agro-)industrial installations shall be provided by the Commission for each BATC.

Providing “only” the option in a revised IED for the Commission to provide non-legally-binding guidance may not be sufficient to achieve a harmonized application of Art. 15(4). This option was already foreseen by the current Art. 15(4), penultimate subparagraph, but is not being used (despite the fulfilled prerequisite of reports under Art. 72(1)). However, ClientEarth would like to emphasize that it should be used now until a new IED will enter into force as the need for guidance already exists today.

(d) ENVIRONMENTAL QUALITY STANDARDS OF ART. 18

“Red lines” derive from Environmental Quality Standards (Art. 18). Art. 15(4) states that a derogation is only possible “without prejudice to Article 18”. However, in practice, it is still unclear how to link granting a derogation under Art. 15(4) and assessing other Environmental Quality Standards. An improved design of Art. 18 and clearer guidance on its implementation shall impact also (non-)granting of derogations under Art. 15(4), see our response to **Question 23**. In particular, derogations for emissions of substances that are subject to phase out obligations (e.g. priority hazardous substances under the Water Framework Directive) should be explicitly prohibited.

(e) PRE-CONSULTATION OF INDEPENDENT EXPERTS

Information provided by the operator, especially on the economic and technical side, has to be validated by experts. Art. 15(4) is a derogation from binding requirements for all operators across the EU that are the basis for a level playing field. Therefore, it cannot be sufficient that the operator solely claims that there are disproportionate costs due to the geographical location or the local environmental conditions of the installation concerned, or due to the technical characteristics of the installation concerned. There has to be evidence that there are no options to refer to other measures than derogations, including evidence that the financial investments needed are indeed disproportionate. These independent experts have to be consulted on the cost scenarios in advance of any derogation decision (pre-consultation and verification).

(f) FULL GUARANTEE OF ACCESS TO INFORMATION, PUBLIC PARTICIPATION AND ACCESS TO JUSTICE

Derogation procedures shall include mandatory public participation as early as possible. Please see our response and suggestions of amendments under Question 23 and 94. In particular when it comes to access to information, it has to be clarified that all (!) relevant documents, assessments of costs, benefits and disproportionality and justifications shall be provided to the public as early as possible in the decision making process and included in the annex of permit conditions (clarification of current Art. 15(4) subparagraph 2, clarification of Annex IV, amendment of Art. 21, 24). Confidential Business Information shall not be used as an undue excuse for withholding relevant information for evaluating CBAs.

(h) NOTIFICATION TO COMMISSION

To ensure the most effective implementation of the IED and the BATC, and in particular to ensure a level playing field, Member States shall inform the Commission of any plans to grant a derogation, in sufficient time to enable the Commission to submit comments and to intervene, in case needed.

Similar information obligations exist already in the IED when it comes to derogations under Art. 30(5), (6) and to plan changes of Art. 32(6). Member States shall “immediately inform” the Commission of any derogation granted. However, this requirement is too limited as it does not cover derogations under Art. 15(4) and the Commission must be informed only once the derogation is granted.

ClientEarth recommends to oblige Member States to notify the derogations ahead of their granting to the Commission.

(g) CONSEQUENCES IN CASE OF DEROGATIONS

In cases where a derogation must be granted, there are still certain legal consequences to comply with.

Firstly, a derogation shall only be granted as stringently as possible. When an installation cannot comply with a certain BAT-AEL, the differing AEL must be still set at the lowest possible level. Once the “disproportionality line has been crossed, the individual emission limit value and other environmental performance standards have to be **AS STRINGENT AS POSSIBLE**. There must be **NO** automatic fall back on the very minimum standards as set out in the IED’s Annexes.

This requirement could be added declaratory under Art. 15(4). Although the current provision allows only to set, in specific cases, “less strict emission limit values” (not the least) and the derogation shall “not exceed” the safety net requirements of IED’s Annexes, a clarification of the wording is needed to avoid any excessive derogation values.

Secondly, as stressed above, Art. 15(4) still aims for a high level of protection of the environment despite that derogation. Hence, when setting a derogation for a specific pollution, other cross-media impacts shall ‘compensate’ the negative impacts.

Thirdly, the current **SAFETY NET REQUIREMENTS** in the Annexes of the IED are not up to date anymore. The standards are based on scientific and technical knowledge that is older than the last recast of the IED in 2010. The revised Annexes have to be adjusted according to the newest progress made in science and technology. All the more, ClientEarth recommends to make more use of “negative environmental performance levels” in the Annex (e.g. such as BAT 1 of CAK BATC, 2013/732/EU (“The mercury cell technique cannot be considered BAT under any circumstances.”) The Annex should also exclude explicitly derogations for emissions of substances that are subject to phase out obligations (e.g. priority hazardous

substances under the Water Framework Directive). Please refer also to our response under Question 23 (Section 2).

EXAMPLE FROM PRACTICE: NEW BULGARIAN DEROGATIONS FOR COAL POWER PLANTS

ClientEarth works closely with Za Zemiata Access to Justice and Greenpeace Bulgaria on IED issues in Bulgaria. The following comments derive from our numerous cases with our partners and their considerable experience of implementing European law in Bulgaria.

Ricardo's report "Assessment and summary of Member States' reports under Commission Implementing Decision 2018/1135/EU" (070201/2019/816748/SFRA/ENV.C.4) illustrates already various applications of derogations without harmonized duration and publication applications. However, it does not yet include an overview of the derogations from BAT-AEL in the LCP BATC (2017/1442/EU) and other BATC where the 4-year implementation period was still ongoing according to Art. 21(3).

Bulgaria, for example, reported only 1 derogation (without an end date) in 2018 – but, in the meantime, 7 out of all 9 large coal power plants have applied for derogations under LCP BATC. 3 derogations have already been granted (as of March 2021) – TPP Maritsa East 2 EAD (1602 MWe), TPP ContourGlobal Maritsa East 3 AD (908 MWe) and AES Maritsa East 1 EOOD (670 MWe).

Based on the granted derogation for the coal power plant TPP Maritsa East 2 EAD, we would like to exemplify that the amendments suggested above are urgently needed.

RESTRICTION ON DEROGATION LIMITS AND DURATION NEEDED: In the beginning of 2019, the Bulgarian government granted a derogation from the BAT-AELs for sulphur dioxide (SO₂) and mercury (Hg), both toxic substances which pose major health concerns. The derogation allowed the plant to operate for an indefinite period of time under the following excessive conditions:

- a desulphurization rate of 97%-97,5%, which equals an emission limit value of 570 mg/Nm³. For comparison: The general BAT-AEL range (without derogation) under the LCP BATC is 10-130 mg/Nm³, so the granted value is between 4,4 to 57 times higher.
- emission limit value of 30 µg/Nm³ for the pollutant mercury (Hg). For comparison: The BAT-AEL range under the LCP BATC is 1-7 µg/Nm³, so the granted value is 4,3 to 30 times higher.
- no time limit of the derogations.

STANDARDIZED METHODOLOGY NEEDED: Bulgaria adopted Guidance on the preparation of information and application for derogations under Art. 123a, para. 3 of the Environmental Protection Act, respectively Article 15(4) IED. The guidance is NOT publicly available. According to point 5 of this Guidance, the amount of the benefits divided by the costs shall be less than 0.7 to be declared as being 'disproportionate'. Although Bulgaria adopted and applied such a guidance, the derogations from LCP BATC pose serious concern about the proper application of Art. 15(4) for the coal power plants, in particular with respect to the environmental benefit assessment of the derogation decision for TPP Maritsa East 2 EAAD.

- The decision was based on an assessment of environmental benefits based on a method that calculated over 100 times lower benefits than the benefits calculated using the EEA (2014) damage cost function: There have been two approaches to assess the environmental benefits of attaining the BAT-AELs for SO₂. The impact pathway analysis calculated € 6.2 mln benefits, and the damage cost function by the EEA (2014) resulted in € 724.7 mln benefits. The authority, however, credited only the results of the impact pathway analysis. Compared to the costs for SO₂ abatement (€ 159.6 mln.), benefits under the impact

pathway approach were considered considerably lower. If the assessing authority had taken into account the results of the EEA (2014) damage costs function, the question of disproportionality would be a complete opposite and no derogation should have been granted.

- Not all environmental impacts have been taken into consideration. The impact pathway assessment calculated only environmental benefits within a radius of 45 km away from the plant. There is solid evidence that pollution from the plant reaches away from this territory (Even a study provided by the operator in the application process proved that Hg emissions reach further than 45 km away from the plant, confirmed also by other reports such as from EBC, Last Gasp – The coal companies making Europe sick, 20/11/2018, <https://beyond-coal.eu/wp-content/uploads/2020/02/Last-Gasp-2018.pdf>). The impact pathway analysis further limited the amount of environmental benefits by excluding atmospheric chemistry leading to the formation of sulphate aerosols from the emissions of SO₂ (secondary pollution).

A clarification of this case could also not be brought about by the court. After a challenge brought by our partners, the court appointed national experts to consult it on the benefit assessments – but these experts had no experience assessing environmental benefits. Still, they confirmed that the assessment complied with good practices in modelling of the air pollution and the court upheld the derogation decision at first instance (Administrative case 225/2019 at the Administrative Court in Stara Zagora). This decision is now under review by the Supreme Administrative court. Due to the lack of EU guidance, national institutions are in position to choose between the different approaches that experts propose. This could lead to very different interpretations of Art. 15(4), where for an identical situation one institution would grant a derogation and another would not.

ACCESS TO INFORMATION AND PUBLIC PARTICIPATION NEEDED: The concerns of flawed derogations granted by the Bulgarian authorities do exist also for the other 2 granted derogations to TPP ContourGlobal Maritsa East 3 AD and AES Maritsa East 1 EOOD. However, a detailed analysis could not be conducted so far as their assessments have not been disclosed to the public (for access to Information and public participation issues please see also our responses in Problem area 5).

MAIN AMENDMENTS:

Article 15(4) IED

“4. By way of derogation from paragraph 3, and without prejudice to Article 18, the competent authority may, in specific cases, set less strict emission limit values **OR LESS STRICT ENVIRONMENTAL PERFORMANCE LEVELS**. Such a derogation may apply only where an assessment shows that the achievement of **LOWEST** emission levels **OR STRICTEST ENVIRONMENTAL PERFORMANCE LEVELS** associated with the best available techniques as described in BAT conclusions would lead to disproportionately higher costs compared to the environmental benefits due to:

(a) the geographical location or the local environmental conditions of the installation concerned **AS SPECIFIED UNDER ANNEX (xx)**; or

(b) the technical characteristics of the installation concerned **AS SPECIFIED UNDER ANNEX (xx)**.

THE COSTS AND ENVIRONMENTAL BENEFITS AS WELL AS OF THE DISPROPORTIONATELY SHALL BE ASSESSED ACCORDING TO THE STANDARDIZED METHOD AS DESCRIBED UNDER ANNEX (xx) AND VERIFIED BY INDEPENDENT EXPERTS.

The competent authority shall document in an annex to the permit conditions the reasons for the application of the first subparagraph INCLUDING THE ASSESSMENTS and the justification for the conditions imposed.

The emission limit values AND OTHER ENVIRONMENTAL PERFORMANCE LEVELS set in accordance with the first subparagraph shall, however, not exceed the emission limit values AND NOT DIFFER FROM ENVIRONMENTAL PERFORMANCE LEVELS set out in the Annexes to this Directive, where applicable. THE DEROGATION SHALL ONLY BE GRANTED AS FAR AS NEEDED TO AVOID DISPROPORTIONALITY ASSESSED UNDER SUBPARAGRAPH 1. THE DEROGATION MAY BE GRANTED FOR MAXIMUM 48 MONTHS AND ONLY ONE TIME FOR THE SAME REASON.

The competent authority shall in any case ensure that no significant pollution is caused. NO DEROGATION MAY BE SET FOR SUBSTANCES UNDER PHASING OUT OBLIGATION AS SPECIFIED UNDER ANNEX (XX). WHEN A DEROGATION HAS BEEN GRANTED FOR A SPECIFIC EMISSION LIMIT VALUE OR ENVIRONMENTAL PERFORMANCE LEVEL, ALL OTHER EMISSION LIMIT VALUES AND ENVIRONMENTAL PERFORMANCE LEVELS HAVE TO BE SET BEYOND THE UPPER BAT-AEL OR STRICTER BAT-AEPL RANGE TO ENSURE THAT a high level of protection of the environment as a whole is achieved.

MEMBER STATES SHALL INFORM THE COMMISSION, IN SUFFICIENT TIME TO ENABLE IT TO SUBMIT ITS COMMENTS, OF ANY PLANS TO GRANT A DEROGATION.

THE Commission SHALL FURTHER clarify, through guidance, the criteria to be taken into account for the application of this paragraph FOR EACH BATC WITHIN ONE YEAR THE LATEST IN ADDITION TO ANNEX (xx).

The competent authority shall re-assess the application of the first subparagraph as part of each reconsideration of the permit conditions pursuant to Article 21.”

- Please note that the capital letters represent a change from the current text (addition or deletion). -

23. Are there alternative approaches to the amendments under consideration that should be considered? [Yes; No] If yes, please specify. [Open text response]

Open text response:

ClientEarth welcomes tightening flexibilities within the IED. However, now is the time that the Commission has the great opportunity to revise the IED most efficiently and make it one of the flagships of its new zero pollution and climate ambition under the European Green Deal. To translate the promising announcements into tangible legal obligations, ClientEarth recommends alternative approaches and additional amendments to consider and to be more specific when it comes to the policy options described above.

Therefore, we would like to describe the following amendments in more detail:

(1.) The IED needs a new approach to promote the industrial activity with the least negative environmental impact for the provision of a given product / service, to pursue the Green Deal's decarbonisation and zero pollution objectives (please see also response to Question 1).

(2.) A new determination and scope of “best available techniques” are required, focusing on best “achievable” techniques instead, including the assessment of green and safe technologies (Art. 3(2), 13, 14). The criteria listed in Annex III shall be revised and strengthened in accordance with the new European strategies and targets.

- (3.) The obligation of operators and authorities have to be specified, focusing all the more on stimulating a technology choice in favour of the least polluting technique (in particular Art. 11, 12).
- (4.) It is of utmost importance to ensure comprehensive environmental impact assessments ahead of relevant decisions (Art. 5).
- (5.) The lowest range of BAT-AELs has to be applied, while everything else would be a derogation, and all BAT-AEPLs binding declared explicitly binding (esp. Art. 15(3)).
- (6.) General Binding Rules may not be an excuse for not focusing on the full potential of each individual installation (Art. 6, 17).
- (7.) Environmental quality standards in the permit procedure and decision needs to be strengthened and enforced (Art. 18).
- (8.) Derogation clauses (in particular Art. 15(4), 30, 31, 32, 33) shall either be deleted or be restricted as much as possible.
- (9.) A new Regulation, imposing clearer, more precise and unconditional obligations, is more appropriate than a revised Directive to achieve a more efficient and harmonized implementation of its provisions.

In detail:**(1.) NEW APPROACH: PROMOTING ACTIVITY WITH LEAST NEGATIVE ENVIRONMENTAL IMPACT**

In order to contribute to the zero pollution, climate neutrality and circular economy objectives that are a part of the 2019 European Green Deal (EGD), the IED must integrate a new approach of promoting the industrial activity with the least adverse environmental impact for the product or service that is provided. This can be done by redefining the scope of the IED and the role of BAT in the IED as already explained in our response to Question 1 and again presented here:

The IED is the successor of the IPPC Directive (96/61/EC) which was recast and integrated in to the IED in 2010. This structure is shaped to accommodate the existing industrial infrastructure, related technologies and applied BAT at the time the IPPC Directive was developed in the 1990s. Since 2010 the policy objectives of the EU have changed significantly. This has especially become apparent since the EGD's publication. In the EGD, the Commission states that "there is a need to rethink policies for clean energy supply across the economy, industry, production and consumption, large-scale infrastructure, transport, food and agriculture, (...)" (EGD, 2.2.1.). It stresses that "Achieving a climate neutral and circular economy requires the full mobilisation of industry." And notes that "It remains too 'linear', and dependent on a throughput of new materials extracted, traded and processed into goods, and finally disposed of as waste or emissions." (EGD, 2.1.3.).

In addition, following the Communication of the EGD, the Commission is currently developing the Zero Pollution Action Plan (ZPAP). The objectives of this action plan are, inter alia, to better prevent and remedy pollution, and "mainstream the zero pollution ambition into all policy developments" (https://ec.europa.eu/environment/strategy/zero-pollution-action-plan_en). The upcoming EU Climate Law will, for the first time, make the climate neutrality ambition by 2050 legally binding. It will also set a stricter EU GHG emissions reduction target by 2030. Lastly, the 8th Environment Action Programme (EAP) to 2030, which is currently under development, pursues a zero-pollution ambition for a toxic-free environment, as well as reducing key environmental and climate pressures related to production and

consumption, in particular in the areas of energy and industrial development (COM(2020) 652 final, draft Art. 2(2)).

The two major European Directives that cover the planning and permitting stage of an industrial installation are the Environmental Impact Assessment Directive (EIAD) and the IED. However, the EIAD only regulates the assessment process of a project and has little material impact on the type of installation or technology chosen once that assessment has been made. Here lies the unique power of the IED, which has a material impact on the conditions under which an installation can operate. Therefore, the revision of the IED provides a unique opportunity for the Commission to implement the objectives set in the EGD, the upcoming EU Climate Law, Zero Pollution Action Plan, and other crucial files such as the 8th EAP, into binding law, and therefore must be consistent with the new commitments and strategies they propose.

The extraordinary role of the IED is also based on the fact that this legislation enables EU's prevention principle and EU's principle to give priority to take prevention action at source first (Art. 191(2) TFEU) and translate it into it tangible legal obligations. It should be the flagship when it comes to the Commission's upcoming "Hierarchy of action on pollution" (ZPAP Stakeholder workshop, 10/02/2021, https://ec.europa.eu/environment/system/files/2021-02/20210210_Overview_ZPAP-workshops.pdf, slide 6; see also a more detailed explanation under Question 58). The draft hierarchy model clearly states that prevention shall be the first action to apply ("by design and during production"). Only as a second action, "minimize & control" shall apply, while "eliminate & remediate" is the last option to consider.

Against this backdrop, the SCOPE OF THE IED should be revisited, in order to redefine 'industrial activities' as all activities that can be conducted to produce a certain public good or service provided to society, and give preference to those activities that have the lowest impact on the environment for products they provide – taking into account all up- and downstream impacts. This way, the IED could be shaped to emphasize that prevention of pollution is the priority as well as fully integrate the objectives of the circular economy, zero pollution and decarbonization.

MAIN AMENDMENTS:

- Defining the scope and focus on public good or services will have an IMPACT ON ALL CHAPTERS OF THE IED and in particular on ANNEX I, shifting away from the single categories of activities listed there.
- Currently, Annex I lists activities divided over categories that cover several (agro-)industrial sectors. In a revised version, categories could include energy generation, clean water services, waste treatment, protein production, packaging and construction materials.

(2.) AMENDING THE SCOPE AND DETERMINATION OF BAT

Currently, the BREFs describe what are considered the economically and technically most viable technologies that industry needs to apply to a pre-determined activity (such as: a large combustion plant) in order to achieve a high level of environmental protection. Instead of focusing on pre-determined activities, BREF procedures should instead promote the industrial activity with the least adverse environmental impact for the product or service that is provided.

(a) Thus said, when determining "best available techniques", all techniques, including their green and safe alternatives, have to be considered that produce a certain public good or service, and preference shall be given to those activities that have the lowest environmental harmful and climate damaging impact. Full due diligence of upstream, actual and downstream impact, as well as refined research in the safest and

least environmentally and climate damaging alternatives are needed. This can be achieved by a new scope of BAT, including amending Annex I (see above, Section 1). This approach brings the advantage that it stimulates industry and authorities to look for alternatives and to enhance a far less polluting choice of technology – already in the BREF process as well as when applying for permits for individual installations. In the context of IED’s potential of decarbonisation, the Commission highlights the example of “replacement of fossil fuel combustion with electric or hydrogen-based processes” (Evaluation of the IED, SWD(2020) 182 final, 23/09/2020, page 75).

(b) Choices shall be made based on the “criteria for determining best available techniques” as outlined in ANNEX III. In light of the above, these criteria shall not only be applicable within a pre-determined, already chosen technique, but WHEN CHOOSING the activity including its technology and consumption of materials et al. Art. 3(11) and Art. 13 IED shall be amended accordingly. Art. 3(11) shall in particular draw up BAT not only for “defined activities”, but also for their ALTERNATIVES and describe accordingly applied techniques and their alternatives. Art. 13(2) shall include an exchange addressing alternatives for chosen technologies. Both provisions need an explicit reference to Annex III (criteria for determining best available techniques) – It shall not only be “giving special consideration” to the criteria listed (current wording), but COMPLYING WITH THEM STRICTLY. The same is valid when it comes to cases where the competent authority sets permit conditions on the basis of a best available techniques not described in any of the relevant BATC. In these cases, the current Art. 14(5)(a) IED foresees only a “special consideration” of Annex III criteria, which does not consider the urgent need of using the full potential of progress for every activity. Hence, an amendment shall ensure that the technique is mandatory determined according to the criteria listed in Annex III, even outside of existing BATC.

(c) With respect to the SPECIFIC CRITERIA for determining best available techniques in Annex III, these criteria should be revised and strengthened in line with EU’s new strategies and targets following the EGD. For example, No. 5 re technological advances and changes in scientific knowledge and understanding shall ensure the consideration of alternative technologies and changes following the prevention first principle, promoting industrial activity with the least adverse environmental impact for the given product or service. To achieve a non-toxic environment, also No. 2 on the use of less hazardous substances should be updated and replaced by “substitution of chemicals of concern” by safe alternative chemicals or technologies.

An additional criteria should ensure the implementation of EGD’s “do no harm principle” (EGD, 2.2.5) when determining negative BAT. A derivative of this principle already applies to the Recovery and Resilience Facility Regulation (RRF, see Art. 4a, 15 and 16 of the agreed version of the RRF Regulation (2020/0104 (COD)), since no measure should lead to “significant harm” to environmental objectives within the meaning of Article 17 of the Taxonomy Regulation (2020/852).

Negative BAT can exclude most environmental and climate damaging techniques. This is already an instrument existing today, foreseen in Implementing Decision (2012/119/EU):

“The BAT conclusions can also contain, when considered useful for competent authorities and operators, statements which indicate when certain techniques are not BAT and thus have been deliberately excluded from the BAT conclusions due to factors such as poor or non-credible environmental performance, lack of availability, economics, technical and/or economic considerations for retrofitting, cross-media effects, or operational reliability.” (Annex, 3.1).

An example is current BAT 1 of CAK BATC, for the production of chlor-alkali, 2013/732/EU: “The mercury cell technique cannot be considered BAT under any circumstances.”

However, it has not been used widely and should therefore be supported by stronger Annex’s criteria. These negative BATC can be used to support phasing out specific substances (e.g. priority hazardous

substances under the Water Framework Directive) or transition away from fossil fuels such as hard coal or lignite for power production after 2030.

(d) Moreover, the DEFINITION of “best available techniques” in Art. 3(10) IED should be clarified and highlight at least the following:

- “techniques”: The assessment of techniques has to include the assessment of prevention and reduction technology, including “both the technology used (i) TO CONDUCT THE ACTIVITIES and (ii) the way in which the installation is designed, built, maintained, operated and decommissioned (Art. 3(10)(a)).

- “achievable”: Currently, the BREF process (taking several years and being valid for several years) is very much looking at the present “available” techniques. To stimulate an appropriate transition, the BREF should focus on best “achievable” techniques instead, taking clean and safe alternatives into account (Art. 3(10)(b)). Bearing in mind that any BATC based on BREFs will provide an implementation period for another 4 years (Art. 21(3) IED), it is more than required to focus on the progress of development instead of describing the “status quo”.

- “best”: Already today, “best” means most effective in achieving a high general level of protection of the environment as a whole. However, as the choice of technology as such is crucial for any further determination of process, it should be added that alternatives have to be taken into consideration as well. This can be done, e.g., by adding “..., TAKING THE CHOICE OF TECHNOLOGY AND APPROPRIATE ALTERNATIVES INTO ACCOUNT”. In case the Commission will not amend Annex I as suggested above, the definition of “best” techniques should still ensure to stimulate a green choice of activity, next to the choice of technologies within a pre-defined activity. Hence, Art. 3(10)(c) could be extended accordingly, e.g.: “‘best’ means most effective in achieving a high general level of protection of the environment as a whole, TAKING THE CHOICE OF ACTIVITY AND THE CHOICE OF TECHNOLOGY COMPARED TO APPROPRIATE ALTERNATIVES INTO ACCOUNT.”

MAIN AMENDMENTS:

In particular Annex I, Annex III, Art. 3(10), 3(11), 13(2) and 14(5)(a) need to be revised as described above.

(3.) SPECIFIED REQUIREMENTS FOR OPERATORS STIMULATING LEAST POLLUTING TECHNIQUE CHOICE

The obligation of operators and authorities have to be specified, also focusing on stimulating a progressive choice in favour of the least polluting technique and guaranteeing the implementation of EGD’s “do no harm” principle, in particular:

- Art. 11(1) should stress that Member States shall take the necessary measures to provide that installations are “DESIGNED AND operated, AND THE ACTIVITIES UNDERTAKEN THEREIN ARE SELECTED, in accordance with the following principles (...)”. Further strengthening of enforced BAT determination will be achieved by amending obligations in the first Chapter of the IED itself.

- Art. 12(1) should include two additional obligations (preferably after requirement (a) and (b)), asking for a description

(i) “HOW THE GENERAL PRINCIPLES IN ART. 11 WILL BE COMPLIED WITH”, and

(ii) “DEMONSTRATING THAT IT IS THE LEAST POLLUTING MEANS AVAILABLE TO PRODUCE THE INTENDED PRODUCT OR SERVICES”.

- Further policy options how to stimulate a less negative impactful choice of technology should be assessed. In particular, a focus should be laid on Art. 12(1)(k). This provision asks already the operator to provide a description of the main alternatives to the proposed technology, techniques and measures studied by the applicant in outline. However, it does not prescribe what exactly and how many alternatives have to be assessed. At the very least, a justification, why specific alternatives “cannot be chosen” could be included and assessed by the authority.

(4.) STRONGER ENVIRONMENTAL ASSESSMENT REQUIREMENTS

The IED regulates the content and conditions of an operational permit. The assessment of environmental impacts as such is regulated under the Environmental Impact Assessment Directive (EIAD, 2011/92/EU as amended by Directive 2014/52/EU). This directive determines which ‘projects’ must be subject to either an Environmental Impact Assessment (EIA) (Annex I) or a ‘screening procedure’ (Annex II) and foresees procedural guarantees.

The ‘projects’ covered by the EIAD overlap with the ‘installations’ covered by the IED; all installations under Annex I IED are also projects listed in either Annex I or II of the EIAD. However, the definitions of ‘project’ and ‘installation’ are not interchangeable.

As the IED follows an integrated approach and aims for a high level of protection of the environment taken as a whole, it is of utmost importance to ensure comprehensive environmental impact assessments for all relevant installations and amendment of installations and their technology/techniques. Therefore, we suggest a stronger alignment with the EIAD as well as environmental assessments for IED permit updates as described below.

(a) COORDINATED AND/OR JOINT EIA AND IED PROCEDURES TO BECOME MANDATORY

‘Streamlining’ of the permitting processes under the two directives is encouraged, both in the IED itself (for example in Art. 5(1) and Art. 5(3), 12(2) and (to an extent) Art. 24 IED as well as Art. 2(3) EIAD and in the Commission Guidance Document on streamlining environmental assessments conducted under Article 2(3) of the EIAD (CGD, 2016/C273/01). Still Member States have discretion in deciding to what extent this streamlining process should occur.

In practice, both obtaining and amending a permit under the IED can take a significant amount of time after the EIA process (meaning either the full EIA or the screening procedure prescribed by Art. 4(2) EIAD) that formed the basis of the initial ‘development consent’ that is given to the project has been concluded.

This is in particular concerning when development consent (Art. 1(2)c EIAD) is given at the earliest possible stage of development of a new project and the IED permit for the installations subject to that project are issued – at the latest – prior to entering into operation.

This is troublesome, as it is the content of the IED permit that largely determines the actual environmental impact that a project will have. Vice versa, the applicable BAT-AE(P)LS, but also the eligibility of the projects for potential derogations were partly predetermined in the design that was decided upon in the EIA phase of a project – while at this stage, scrutiny of these detailed aspects of the installations that are part of the project could be considered too technical or have not been decided yet.

To mitigate the potential risk of environmental impacts of certain technical decisions made in the IED permit remaining unassessed, and to ensure that the entire permitting procedure remains clear, transparent and encourages effective public participation, we propose to amend Art. 5(3) IED. Note that

stronger joint or coordinated assessment requirements already exist under the assessment procedures prescribed by the Habitats Directive (92/43/EEC) and the EIAD.

MAIN AMENDMENTS:

Article 5 IED

“3. In the case of a new installation or a substantial change where Article 4 of Directive 2011/92/EU AS AMENDED BY DIRECTIVE 2014/52/EU applies, MEMBER STATES SHALL ENSURE THAT THE PERMIT PROCEDURES PRESCRIBED BY THIS DIRECTIVE AND DIRECTIVE 2011/92/EU AS AMENDED BY DIRECTIVE 2014/52/EU SHALL BE SUBJECT TO COORDINATED AND/OR JOINT PROCEDURES. Any relevant information obtained or conclusion arrived at pursuant to Articles 5, 6, 7 and 9 of Directive 2011/92/EU as amended by Directive 2014/52/EU shall be examined and used for the purposes of granting the permit.”

(b) ENVIRONMENTAL IMPACT ASSESSMENTS REQUIRED FOR IED PERMIT UPDATES

In addition to the lack of streamlining in particular for new installations, we observe a need for environmental impact assessments when it comes to relevant updates of IED permits. For example; when an installation and its technology is undergoing changes that do not require physical changes or works to the installation, when permits are updated following regulatory change, such as the adoption of new BAT Conclusions or when the installation is subject to derogation, when the permit of an installation is renewed after a long period of operational time or when the permit renewal results in an extension of the operational lifetime.

The EIAD covers only two type of events where a screening or assessment obligation is triggered: when a new project is developed or when a change or extension to an existing project occurs. These cases are interpreted primarily as “physical changes”. As a consequence, despite the potential adverse impacts, permit updates listed above might not be covered by the EIAD as they might not fall under the definition of ‘change’ or ‘project’, or do not pass the national screening procedures.

However, such changes and updates can have significant and previously unassessed impacts on the environment: Precisely because of its requirements related to BAT, technological development, BAT-ELVs and the incorporation of an increasing number of pollutants, it is exactly the IED that governs those permit updates that have a potentially significant environmental impact without mandating any physical change. In addition, unlike the EIAD, the IED continues to govern installations throughout their lifetime. Therefore, the IED should integrate clear rules on when to assess environmental impacts for its permitting updates.

Already today, the IED outlines certain steps that must be taken that are similar to those reflected in the EIA process – the most obvious examples is Art. 24 IED and its requirement of ‘effective public participation’. Article 24 integrates the rights of the public concerned under the Aarhus convention in the IED permitting process.

Moreover, the IED could increase the alliance with the Aarhus Convention that does not require the ‘physical change’ to constitute an ‘Activity’ that would trigger Art. 6, on public participation, including Art. 6(6), which described the main outlines for an environmental impact assessment. The broader scope of ‘Activity’ confirmed by the Aarhus Convention Compliance Committee in the Borssele Case (ACCC/C/2014/104 (Netherlands)). The focus on physical change has created a regulatory gap between the application of the Aarhus Convention and the EIAD.

The revision of the IED is now the opportunity to close this gap. In light of the new EU's strategies and targets, the Commission already stated that the full mobilisation of industry is required and it takes “25 years – a generation – to transform an industrial sector and all the value chains. To be ready in 2050, decisions and actions need to be taken in the next five years” (EGD, 2.1.3). Hence, it is of utmost importance to not miss the huge potential that IED permit updates can have.

The lack of sufficient assessment requirements and the need for additional clarification has become more and more apparent in the last decade. In its Opinion to Case C-416/10 (Krizan and others) Advocate General Kokott discusses the question whether – when there is change to the permit of a project not as a result of ‘physical changes’ but as a result of a change of conditions within the permit – such a change would require a new EIA. The AG suggests that the concept of “change must be understood in a broad sense”, and that, at the very least, an “updating assessment” should be required when “the environmental conditions or the project have changed so that other significant effects on the environment are possible” (para. 128).

This ‘updating assessment’ should also apply when (1) the legislative framework that covers the project is amended to such an extent that it changes the environmental impact of the project (para. 130) or (2) when the physical environment of a project has changed (para. 131) or (3) when the closure of another project that was projected in the original EIA did not go through (paras. 132). In its Judgement on Case C-416/10, the Court did not touch upon this aspect of the case, however, her insights are still relevant to our argument that the IED should include assessment requirements for permit updates that do not propose or result in physical change.

Similarly, in the AG opinion on Case 411/17, Kokott asserts that the interpretation of “project” established in Case C-275/09 – (Brussels Hoofdstedelijk Gewest) is incompatible with the Aarhus and the Espoo Conventions, as it does not encompass changes to an existing project that does not include physical change (para. 67).

While the Court in this Case 411/17 did rule that the nuclear power plants subject to the Case were to conduct an EIA, this was due to “major renovation works necessary due to the ageing of those power stations and the obligation to bring them into line with safety standards” (para. 79). Therefore, the Court did not have to remove the “physical changes” requirement.

Finally, introducing a clear update assessment requirement would also solve the problem of the differentiation between “new” and “existing” installations in specific cases. We must remember that many of the installations covered by the IED were licensed before the EIAD entered into force, in particular in (but not limited to) the Eastern European states that joined the EU only in the 2000s. Therefore, there is a sizable proportion of installations that have never been subject to EIA and which are continuously relicensed without their environmental effects ever being considered. This would lead to the absurd result that the oldest and most polluting installations, some of which refuse to update to meet new BATC requirement, could escape a full assessment.

We therefore propose that the requirement for an ‘updating assessment’ as proposed by AG Kokott, is to be integrated in the IED itself. This requirement is valid for IED updates that fall under Art. 24(b-e). This amendment is very much linked with further suggestions we propose under Question 95.

EXAMPLES FROM PRACTICE: DECADES AND DECADES WITHOUT EIAs

ITALY – FEDERICO II

The coal power plant Federico II is one of Europe's largest plants, with a capacity of 2.6 GW. It emits millions of tonnes of CO₂, next to its significant NO_x, SO₂ and dust emissions. Epidemiological studies indicate that Federico II has a serious effect on human health in the local area.

This power plant has been originally authorized in 1982 (before the predecessor EIAD entered into force) and started operating in the 1990s (after the predecessor EIAD entered into force). Despite the significant negative environmental impacts, the plant and its updates have never been subject to a full EIA. After its IED permit update in July 2017 – without a full EIA – ClientEarth, together with WWF Italy, challenged this permit update. And while the case is still pending before the first instance, the authority granted another permit update in 2020 – again, in absence of an EIA.

ROMANIA – ROVINARI

In December 2017, the IED permit of the 3765 MWth coal power plant Rovinari expired. In October 2018, the operator was granted a new integrated permit, authorising the production of electricity for an indefinite period of time. No EIA nor screening decision was undertaken before the grant of the new permit. In the case of Rovinari, no EIA has ever been carried out on the impacts of the project as a whole in the 43 years the plant has been operational.

ClientEarth has partnered with Greenpeace Romania to challenge the integrated permit for Rovinari in 2019. One of the grounds relates to the absence of an EIA. Its argumentation is built on AG Kokott's Opinion regarding Case C411/17.

MAIN AMENDMENTS:

Article 5 IED

“4. WITHOUT PREJUDICE TO THE OBLIGATIONS THAT FOLLOW FROM DIRECTIVE 2011/92/EU AS AMENDED BY DIRECTIVE 2014/52/EU, MEMBER STATES SHALL ENSURE THAT ALL PROCEDURES LISTED IN ARTICLE 24(1)(b)-(e) OF THIS DIRECTIVE SHALL BE ACCOMPANIED BY AN UPDATING ENVIRONMENTAL ASSESSMENT.

THE UPDATING ASSESSMENT REQUIREMENT SHALL FOLLOW THE PROCEEDINGS AS SET OUT IN DIRECTIVE 2011/92/EU AS AMENDED BY DIRECTIVE 2014/52/EU.”

(5.) MAKING LOWEST RANGE OF BAT-AELS AND BAT-AEPLS BINDING EXPLICITLY AND SETTING CLEAR PERMIT CONDITIONS

(a) The current practice of setting ELVs in permits based on BATC is typically by default at the upper limit of the BAT-AEL range, without assessing of the potential to achieve lower emissions by using the lowest end of the range or even setting stricter emissions according to Art. 14(4) IED. This has been described under this Chapter by Ricardo, as well as in other reports, such as by the Commission, Study: The costs of not implementing EU environmental law – Final Report, March 2019, https://ec.europa.eu/environment/eir/pdf/study_costs_not_implementing_env_law.pdf, Section 7.3.; or in particular for permits for cement facilities, and iron and steel facilities using Electric Arc Furnaces in Chowdhury/Beechener/Hutchens/Kulesza/Duffield, Eunomia, An Assessment of IED Permitting Stringency, 19/12/2019, <https://circabc.europa.eu/ui/group/06f33a94-9829-4eee-b187-21bb783a0fbf/library/58e70688-7c92-4e84-99fd-c36f9d930b21/details>.

This practice ignores not only the fact that every technical means have to be used to prevent and reduce emissions in light of today's urgency to address environmental needs. It also ignores the fact that the lower range of the BAT-AEL are already a result of a BREF process between relevant stakeholders and the agreement that these are achievable limits under normal operating conditions.

ClientEarth highly recommends to define a clear obligation to set ELVs in permits at the lowest limit of the BAT-AEL ranges. The policy option presented under Question 21, establishing a 'default option' for the 'lower' limits is going into the right direction. Though, it should replace 'lower' by 'lowest' to avoid any misleading interpretation of exact limits (in fact, it would require another definition/range of 'lower' limits). Moreover, we do have concerns when talking about a 'default' option only and weakening it with the insertion "unless the operator demonstrates to the satisfaction of the competent authority that applying BAT techniques as described in BAT Conclusions only allows meeting a higher ELV within the BAT-AEL range". It is completely unclear how to 'demonstrate' (what evidence?), to authority's 'satisfaction' (what criteria?), that it is 'only' allowed (under which efforts?) to meet 'higher' (which?) ELVs. To bring the IED and BAT-AELs to full effectiveness, it needs clear rules. There will be a huge risk to bypass a 'default' option if it is up to the operator's demonstration and the 'satisfaction' of an individual authority. Hence, any default option must be understood as an obligation to meet the lowest BAT-AEL range BY FORCE and any deviation of this limit must be granted only based on a DEROGATION assessment in specific cases, taking into account unambiguous, well-defined criteria according to a revised Art. 15(4) (see our response to Question 22).

ClientEarth would like to stress that setting ELVs at lower levels should already be the default option today in accordance with IED's objectives and Member States and operators' obligations. Ranges (and discretion for authorities) are only set to reflect the differences within a given type of installation (e.g. differences in the grade/purity and quality of the final product, differences in design, construction, size and cap as described in Chapter 3.3 of Commission Implementing Decision 2012/119/EU) – but not to weaken the overall IED's goals. Only the general use of the lowest limit values can ensure to achieve a high level of protection of the environment taken as a whole (Art. 1, Art. 3(10), Art. 11, Art. 14). If, for a specific pollutant, an authority has to refer to the upper range of a BAT-AEL, then it should a fortiori refer to the lower range of BAT-AEL for other pollutants, to achieve some kind of "compensation" and balance to ensure a high level of protection of the environment taken as a whole.

This is all the more true as the lower range of the BAT-AEL is already a product of a debate in the BREF process. These limits were set based on an exchange with industry's representatives, considering their economically and technically viable conditions and confirming their proportionality. There is no room to refer to the upper range only without assessing the full potential of technical means re the individual installations. A regular reference to the upper range for authorities/Member States is excluded, as this would affect the level playing field between operators applying for a permit with another authority or in another Member State. And if all authorities in all Member States were to refer to the upper range, the goals of the IED would be completely missed and the BREF/BATC process would be taken ad absurdum.

Any other interpretation of the BAT-AEL ranges would all the more contradict EU's principle of sincere cooperation as enshrined in Art. 4(3) TEU. Member States shall, in particular, take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. Hence, in accordance with today's EU commitments, Member States have to aim for the high level of protection of environment in general which can be only achieved by a general reference to the lower limit of BAT-AEL ranges. This is particularly evident in light of the zero pollution goal.

However, as we find that current practice does not fully take these obligations into account, we welcome a CLEARLY DEFINED RULE-EXCEPTION RELATIONSHIP. Thereafter, there is a strict obligation to set ELVS in permits to the lowest range by force, unless, in specific cases, a derogation must be granted

according to the conditions specified in Question 22. Art. 15(3) shall be amended accordingly, in particular instead of saying “do not exceed the emission levels associated with the best available techniques”, it must say “do not exceed the emission levels associated with the best available techniques AT LOWEST LIMIT OF ITS RANGE”.

(b) ClientEarth would like to emphasize that the rule-exception ratio should be defined more clearly not only when it comes to BAT-AEL ranges, but also when it comes to the compliance with other environmental performance levels (BAT-AEPLs). It should be made EXPLICIT THAT ALL BAT-AEPLS ARE BINDING (and when there is a range, it always refers automatically to the strictest end of range). To achieve this, Art. 15(3) shall include not only emission limit values based on BAT-AEPLs, but also BAT-AEELs and BAT-AEPLs explicitly. Also Art. 15(2) shall make clear that not only emission limit values, but also all other environmental performance standards shall be based on the best available techniques.

(c) As it comes to the policy option of deleting the flexibility that allows setting different ELVs in permit conditions in terms of values, period of time and reference conditions (Art. 15(3)(b)), we would like to stress that its evaluation depends heavily on the final values/periods/references. We emphasize that making different data comprehensible and comparable with each other is an important question of transparency. It can be also achieved by converting and translating different data in the permit as such. However, we insist that any harmonization cannot mean that the data and conditions as such will be weakened. In particular when it comes to period of time, it shall be clear that ELVs shall be set as strict as possible, e.g. daily instead of monthly or yearly, because this allows a better understanding of fluctuations in emissions and more timely control, including peaks.

In this context, also Art. 14(2) needs clarification as it allows the replacement of ELVs by equivalent parameters or technical measures ensuring an equivalent level of environmental protection. For example, when setting only a desulphurisation rate instead of SO₂ ELVs, the exact level of pollution generated by the specific installation is unclear to the public.

(d) Finally, transparency would be improved by including the reference to each BAT of BATC within the permit (see for example issues when comparing permits in cement industry in Chowdhury/Beechener/Shanks/Hutchens/Chu, Eunomia, IED Additional Permit Assessment, 08/2020, <https://circabc.europa.eu/ui/group/06f33a94-9829-4eee-b187-21bb783a0fbf/library/e732f358-97ef-4561-b559-2aa17b9f9fa1/details>).

MAIN AMENDMENTS:

Article 15 IED

“3. The competent authority shall set emission limit values AND ENVIRONMENTAL PERFORMANCE LEVELS that ensure that, under normal operating conditions, emissions do not exceed the emission levels AND ENVIRONMENTAL PERFORMANCES DO NOT DIFFER FROM ENVIRONMENTAL PERFORMANCE LEVELS associated with the best available techniques AT LOWEST EMISSION LIMIT OF ITS RANGE AND AT STRICTEST PERFORMANCE LEVEL OF ITS RANGE as laid down in the decisions on BAT conclusions (...)”

(6.) GBR AND LOWEST RANGE OF BAT-AELS

The current IED foresees the option for Member States to include requirements for certain categories of installations, combustion plants, waste incineration plants or waste co-incineration plants in general binding rules (GBR, Art. 6). Art. 17 stresses when adopting GBR, Member States shall ensure an

integrated approach and a high level of environmental protection equivalent to that achievable with individual permit conditions.

Doubtless, GBR may not be an excuse for not using the full potential of each individual installation. The CLEARLY DEFINED RULE-EXCEPTION relationship described in Section 5 above, i.e. the obligation to refer to the lowest limit of BAT-AE(P)L ranges and anything else to handle as a derogation under a revised Art. 15(4), does EQUALLY APPLY FOR GBR. As derogations for very specific cases require, inter alia, very specified assessments of costs, benefits and disproportionality, they cannot be granted in abstract GBR. Therefore, it may be questioned if the GBR option is still needed in a revised IED, given their obligation to refer to the lowest BAT-AEL (and BAT-AEPLs) anyway. In case the Commission still sees a useful scope of application, e.g. for setting obligations for sectors where BATC do not (yet) exist or for setting stricter obligations than in the BATC, it should be mentioned explicitly in Art. 6 and 17.

All the more, some clarification should be made based on the current lax and partly illegal practice when using GBR (see German example below). ABSTRACT GBR do complement, but not replace INDIVIDUAL permit conditions. In particular, GBR cannot bypass the requirement for every authority to assess peculiarities of individual installations and the environment and, if possible, to set stricter permit conditions than those achievable by the use of the best available techniques as described in the BATC (ART. 14(4), to be applied ex officio). Even more, if the GBR in question has not even made abstract assessments yet, but referred to the upper range of BAT-AELs by default, the permit may not simply include a reference to the GBR without any individual assessment of ELVs. To avoid any misleading interpretation, ART. 6(2) shall be deleted. At least, Art. 6(2) shall state declaratorily that conditions that require individual assessments (such as Art. 14(4) and Art. 18), cannot be replaced by a reference to adopted GBR.

EXAMPLE FROM PRACTICE: GERMAN GBR (NOT) IMPLEMENTING LCP BATC

Germany makes use of Art. 6 and 17 IED by adopting GBR. The “Executive Regulations” by the Federal Government (“Rechtsverordnungen”) define the ELVs for all plants falling under its scope. In light of the LCP BATC of 2017 (2017/1442/EU), which have to be implemented by 18th August 2021 the latest (see Art. 21(3) IED), Germany drafted new provisions transposing these BATC (in particular for emissions into air see draft of 13. Bundesimmissionsschutzverordnung (BImSchV) as of 05/01/2021, <https://www.bmu.de/gesetz/kabineentwurf-einer-verordnung-zur-neufassung-der-verordnung-ueber-grossfeuerungs-gasturbinen-und/> and for emissions into water see draft 11. Abwasserverordnung (AbwV) as of 17/03/2020, https://www.bmu.de/fileadmin/Daten_BMU/Download_PDF/Glaeserne_Gesetze/19_Lp/abwv_elfte_novelle/Entwurf/abwv_elfte_novelle_refe_bf.pdf). The content of the draft regulations shows that it results in most cases in setting the upper limit of the range for all relevant plants by default. There was no assessment between lower and upper limits of BAT-AELs, i.e. reflecting the differences within a given type of installation in Germany (e.g. differences in the grade/purity and quality of the final product, differences in design, construction, size and cap, see Chapter 3.3 2012/119/EU) or any other German specific justifications. In the explanatory memorandum of the draft regulations, you can either find almost no justification why the ELVs in question have been chosen, or you find the note that operators do already comply with these limits so the Government did not want to set stricter requirements. In the end, the GBR manifest “business as usual” rather than assessing what would be environmentally needed and technical feasible. All of these regulations, despite a national deadline for transposition of one year after entry into force of the BATc, have not yet been passed.

While Art. 17(1) IED prescribes that, when adopting GBR, Member States shall ensure an integrated approach and a high level of environmental protection equivalent to that achievable with individual permit conditions, this has not been applied when setting up the new German rules. All the more, in combination

with Art. 6(2) and the simple reference to the (drafted) GBR, authorities claim that there is no need anymore to assess the potential of the industrial facility. This leads to the effect that there is no assessment of the options of an installation in question at all – neither on an abstract, nor on an individual level.

This can be exemplified as it comes to the coal power plant of Mannheim (Großkraftwerk Mannheim – GKM). New technology was to be used in certain units in the plant and the previous permit for water discharges expired at the end of 2020. The operator requested a new permit to discharge waters that contain pollutants. According to the German system, the water permit is needed next to the IED permit (see §§ 8(1), 9(1) no. 4 Water Management Act (WHG)), but the thresholds for these pollutants derive from the LCP BATC (hence, the AbwV). The regional authority granted a new permit in mid-December 2020 for the period of 1 January 2021 until 31 December 2038. The permit sets emission limit values for pollutants into water, especially for mercury. It allows a concentration of 0,003 mg/l (equalling 3 µg/l) and thus the highest possible threshold for mercury load according to the LCP BATC (BAT 15, providing a range of 0,2-3 µg/l).

A technical expert identified that in this case, when using a better technology, the operator could reduce the mercury load further (compared to other coal plants approximately by a factor of 10). However, the operator is only enforced to do the absolute minimum to meet the upper limit of the BAT-AEL range.

In its justification, the authority referred to the draft GBR transposing LCP BAT-AELs (see draft AbwV) and stated that this value complies with the upper range of the BAT-AELs. Therefore, according to the authority, the legal requirements were met. The authority negates the argument that technically the mercury output could be reduced further based on the fact that (1) the facility uses the technology described in the BATC and (2) the BAT-AELs are met. No other possibilities to reduce mercury emissions by technical means are evaluated.

The draft GBR (AbwV), in turn, defines the thresholds for mercury as 3 µg/l by referring to the upper limit of the BAT-AEL range only. It contains no further content-related justification. It only describes a 1:1-approach of implementing the BAT-AEL. It does not specify the reasons why for the fleet of coal plants such as the GKM this is also a reasonable BAT-AEL. It does also not justify why installations in Germany should be obliged to the upper BAT-AEL range only.

This case shows that neither on abstract level when adopting GBR, nor on individual level when setting permit conditions for the installation, a proper assessment and evaluation of the technical options to prevent and reduce mercury emissions have been undertaken. This contradicts IED requirements, its integrated approach and objective to achieve a high level of protection of the environment, and its underlying prevention principle, as well as other environmental obligations and objectives such as of the Water Framework Directive. The LCP BATC implementation based on the draft GBRs has been assessed by Prof. Dr. Hentschel, commissioned by ClientEarth. Her legal opinion also comes to the conclusion that the planned GBR contradict European law, see ClientEarth, Press release: Geplante Schadstoffgrenzwerte für Kohlekraftwerke widersprechen europäischem Recht, 12/01/2021, <https://www.de.clientearth.org/geplante-schadstoffgrenzwerte-fur-kohlekraftwerke-widersprechen-europaischem-recht/>.

While ClientEarth, together with Friends of the Earth Baden-Wurtemberg, filed a legal action against this permit of the GKM, the plant can still emit mercury massively every day. A zero pollution cannot be achieved in this way. In the end, it also contradicts the principle of sincere cooperation as enshrined in Art. 4(3) TEU according to which in particular the Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

But the German LCP BATC implementation process is not yet over: Despite the obligation for Member States to ensure that all permit conditions are updated in compliance with LCP BAT and to ensure that the

installation complies with those permit conditions within 4 years after the publication of the BATC (hence, by 18th August 2021), Germany has not yet formally adopted the GBR. In any case, Germany has to ensure that the permits will comply with the BATC and going beyond the upper limit of the BAT-AEL range to ensure a high (not minimum) level of protection of the environment.

MAIN AMENDMENTS:

Art. 6(2) shall be deleted. At least, Art. 6(2) shall state declaratorily that conditions that require individual assessments (such as Art. 14(4) and Art. 18), cannot be replaced by a reference to adopted GBR.

(7.) ENFORCING ENVIRONMENTAL QUALITY STANDARDS IN THE PERMIT PROCEDURE AND DECISION (ART. 18)

In line with the IED's integrated approach and in order to achieve a high level of protection of the environment taken as a whole, Art. 18 asks for additional measures where an environmental quality standard (EQS) requires stricter conditions than those achievable by the use of the best available techniques. Art. 18 IED has to be taken into account when setting permit conditions (Art. 14(1)), 14(4), 15(2)), and when granting derogations under Art. 15(4). New or revised EQS can also lead to a permit update (Art. 21(5)).

Art. 18 is relevant for all over 50.000 (agro-)installations covered by the IED. We observe that Art. 18 is hardly applied in practice and objectives of EQS are failed. According to Ricardo's report "Assessment and summary of Member States' reports under Commission Implementing Decision 2018/1135/EU" (070201/2019/816748/SFRA/ENV.C.4), only 5 (!) cases have been reported for 2018 where Art. 18 was used to set stricter emission limit values in permits – solely from Sweden. For 2017 and 2018, Germany and Italy reported an additional 3 cases where stricter emission limit values were based on both, Art. 18 and Art. 14(4). Based on previously reported information, 10 Member States have reported to set stricter permit conditions according to Art. 18 or Art. 14(4). RICARDO suggests that for the new report, "relevant information may not have been reported to the EU Registry by seven Member States". However, also another reason could have led to less reporting for 2018: Ricardo's report itself states that discussions with Member States' competent authorities revealed a misunderstanding between the setting of stricter permit conditions and setting ELVS from the lower range of BAT-AELs instead of the upper range (page 41).

ClientEarth asks for a stronger link of Art. 18 in permitting procedures and permitting conditions. An improved wording of Art. 18 IED will lead to an improved implementation at national level.

(a) First of all, if a new installation or its update lead to a breach of EQS, the permit may either be rejected (if there is no option to comply with the EQS at all), or the permit conditions have to be adjusted accordingly to address the breach. In other words: The solution has to be sought IN THE PERMIT itself. The current Art. 18 asks for additional measures to be included in the permit "without prejudice to other measures which may be taken to comply with environmental quality standards". This half sentence needs to be deleted. It is not clear what kind of "other measures" are to be considered and by whom to be undertaken. Moreover, if it is not included in the IED permit itself, there is no possibility to monitor and control its implementation and, if needed, to enforce the measure (again, by whom?). As the new/updated permit procedure is THE momentum and THE instrument to prevent and reduce emissions AT SOURCE, authorities shall not refer to measures unrelated to the installation. Stricter permit conditions for the (agro-)industrial facility transposes the EU's precautionary principle, prevention principle, and especially its principle that environmental damage should as a priority be rectified at source (Art. 191(2) TFEU). All the

more, it implements the EU's polluter pays principle as the operator itself is responsible for taking additional measures to prevent and reduce its emissions and comply with other EQS – while this is fully monitorable and enforceable following IED's obligation.

Setting conditions for the installation in the permit is particularly important if an updated or new permit would allow breaches of EQS in ACCUMULATION with parallel existing loads /emissions. If the installation alone does not violate EQS, but the accumulation of existing (or previously permitted) installations is contrary to EQS, a solution must be sought in the respective permit procedure. This is precisely the main added value of Art. 18: The provision aims to include EQS to look at, for example, the status of water bodies or air quality in a given area, not focusing on singular emitters only, but naturally taking into account pollution originating from more than just that individual facility (Art. 3(6)).

Only in case the Commission will not delete the reference to “other measures” (despite the aforementioned implementation of EU's principles) and authorities make use of it, at the very least, the other measures have to be described precisely and included explicitly in the permit as a permit condition. This should already be clear from the current wording of Art. 14(1), obliging Member States to ensure that “the permit includes ALL measures necessary for compliance with the requirements of Articles 11 and 18” (emphasis added). Also Art. 18 makes the link itself. Whereas the predecessor Art. 10 of the IPPC Directive stated that “additional measures shall IN PARTICULAR be REQUIRED in the permit”, this was deleted in the new version, see Proposal of 2007: “additional measures SHALL BE INCLUDED in the permit” (see former Art. 19 of Proposal for a Directive of the European Parliament and of the Council on industrial emissions (Recast), COM/2007/0844 final - COD 2007/0286). As explained above, any measure outside of a permit could not be monitored, surveilled and enforced appropriately. Even more, the explicit inclusion of Art. 18 measures in permits enables the public to understand what kind of measures are in consideration during a PUBLIC PARTICIPATION process. Finally, it should be clear that the validity of a permit depends on the entry into force of the measures under Art. 18, as otherwise the EQS would be breached – hence, these measures are PERMIT CONDITIONS in the sense of Art. 14(1).

(b) Second, strengthened PROCEDURAL GUARANTEES for the application of Art. 18 are needed. There seems to be misleading interpretations between Member States' competent authorities as stated in Ricardo's report (page 41). The Commission has to ensure that all relevant EQS are assessed in all permitting procedures. Although it is already stated in Art. 14(1), (4), and Art. 15(4), additional clarification of procedural guarantees are recommended to mainstream and align the procedures across the Member States. This could be done, for example, by adding ANOTHER LETTER after Art. 14(1)(b), including: “additional measures such as stricter emission limit values for polluting substances, and other environmental performance standards than those achievable by the use of the best available techniques required according to Art. 18 and the conditions for assessing compliance with those”.

(c) Third, ClientEarth suggests establishing a PROCEDURAL GUIDANCE immediately next to the IED reform initiative. There is no time to wait for a reform of the IED although the present Art. 18 obliges Member States to comply with EQS. Its proper application has to be ensured as soon as possible. This guidance should include detailed information on the procedural guarantees as well as on the content of EQS (see below) and the measures that can be required. In case the Commission has not provided any such guidance until the adoption of the revised IED, Art. 18 has to be complemented by a new paragraph saying: “The Commission shall establish guidance on the procedure and content of measures to comply with environmental quality standards as set out in paragraph 1.”

(d) When it comes to the content of “Environmental Quality Standards”, being defined as a “set of requirements which must be fulfilled at a given time by a given environment or particular part thereof, as set out in Union law” (Art. 3(6)), further clarification is needed. A more detailed, harmonised DEFINITION of environmental quality standard across European legislation is still missing which leads to ambiguity in practice if specific objectives and provisions are to consider or not. Bearing in mind that the IED is following

explicitly an integrated approach, the definition has to be as comprehensive as possible. To enable the achievement of targets such as the zero pollution ambition, the definition must not exclude additional EMISSION limit values from other legislation. The existence of additional legal provisions regarding the quantity of certain pollutants rather proves that these pollutants need to be handled explicitly very carefully and every opportunity to prevent their emissions should be taken. Setting stricter permit conditions would a fortiori implement the EU principles of prevention, prevention at source, and the polluter pays principle.

According to the CJEU, national emission ceilings established by the NEC Directive did not constitute EQS in 2011, see Judgment of 26/05/2011, Joined Cases C-165/09 to C-167/09, where the CJEU referred to the Opinion of Advocate General Kokott based on the current wording of Art. 3(6) (“by”). However, Kokott also stressed that it does not mean that an evaluation of the NECD requirements when authorising installations is precluded, but rather has to be considered when interpreting other requirements of the IPPC Directive (incl. e.g. the operator’s general obligations): “The essentially programmatic character of the obligations under the NEC Directive cannot influence the question of WHETHER, but simply the question of HOW, they are to be taken into account in the framework of a decision on a permit under the IPPC Directive. (...) it is hardly conceivable that the measures adopted by Member States to ensure compliance with emission ceilings do not AFFECT THE GRANT OF PERMITS FOR INSTALLATIONS under the IPPC Directive as those installations contribute significantly to the emissions produced.”, Opinion, 16/12/2010, Joined Cases C-165/09 to C-167/09, para 73, 74 (emphasis added). As we do, however, see in practice a lot of implementation issues also when it comes to obligations beyond Art. 18, the Commission has now the opportunity to clarify these requirements and make the definition of EQS more effective.

Against this backdrop, the definition of Art. 3(6) should be complemented at least as follows: EQS means “the set of requirements which must be fulfilled at a given time by OR IN a given environment or particular part thereof, as set out in Union law”.

Furthermore, the Commission is recommended to add to the guidance mentioned above a chapter on the content of the EQS, providing a comprehensive, but non-exhaustive list of relevant EQS.

(e) Finally, Art. 18 plays a role when it comes to the following amendments:

- Art. 18 must be valid for all kinds of derogation regimes. For example, if Art. 31-35 as specific derogation clauses for large combustion plants won’t be deleted (as requested), it shall at least ensure that any such derogations will only be applicable “without prejudice to Article 18”.
- Any update of permit conditions to comply with a new or revised environmental quality standard in accordance with Art. 18 (see Art. 21(5)(c)) shall lead to public participation in the permit procedure according to a revised Art. 24 (see Question 95).
- Environmental quality standards must already be assessed as far as possible when determining BATs. In particular when it comes to pollutants being regulated in different legislation, a harmonized approach is suggested in order to ensure a coherent system of emission reductions. BREF/BATCs shall enhance the cessation or phasing-out of use of pollutants subject to other environmental law such as mercury or other priority hazardous substances, also by establishing more “negative BAT” for those.

EXAMPLE FROM PRACTICE: BULGARIAN IGNORANCE OF ART. 18 DESPITE INFRINGEMENT PROCEDURES

ClientEarth works closely with Za Zemiata Access to Justice and Greenpeace Bulgaria on IED issues in Bulgaria. The following comments derive from our numerous cases with our partners and their considerable experience of implementing European law in Bulgaria.

Two Bulgarian cases exemplify the need for an improved Art. 18 as described above. Either as a result of deliberate ignorance of Art. 18 or as a result of a number of flaws in the analysis, authorities deny violations of EQS – putting people and environment continuously at risk.

CONTINUOUS BREACH OF EU AIR QUALITY STANDARDS

Sulphur dioxide presents health threats in its pure state, but health impacts also arise when SO₂ reacts with other air pollutants to produce fine particulate matter (PM_{2.5}). Exposure to SO₂ and PM_{2.5} has been linked to a host of health problems including respiratory problems, heart and lung disease and even dementia. Bulgaria is the only country in the EU still breaching the bloc's SO₂ limits and is number 21 in the world's ranking of most SO₂ polluting countries (Greenpeace India and the Centre for Research on Energy and Clean Air, Global SO₂ emission hotspot database, 10/2020 <https://www.greenpeace.org/static/planet4-mena-stateless/a372e5fe-so2-report-english.pdf>).

In 2019, the European Commission referred Bulgaria to the Court of Justice of the European Union for their continuous breach of SO₂ limits (July infringements package: key decisions, 25/07/2019, https://ec.europa.eu/commission/presscorner/detail/en/inf_19_4251). The Commission's decision is based on persisting non-compliance with the limit values for SO₂ concentration in ambient air in the South-East zone, where the four largest thermal power plants in Bulgaria are located. And it has not been the first case: Based on another infringement procedure brought by the Commission, the CJEU confirmed Bulgaria's failure to comply with the limit values for PM₁₀ in its judgement of 5 April 2017 (Commission v Bulgaria, C-488/15).

As the infringement case enters its final stages, instead of addressing the issue, Bulgaria has specifically allowed three plants to emit huge amounts of SO₂, indefinitely (see also ClientEarth, Press release: Green groups petition EU over Bulgaria's untackled SO₂ pollution, 19/01/2021, <https://www.clientearth.org/latest/press-office/press/green-groups-petition-eu-over-bulgaria-s-untackled-so2-pollution/>).

One of the biggest coal-fired power stations on the Balkan Peninsula – state-owned TPP Maritsa East 2 EAD (1602 MWe) – was given permission that could jeopardise the attainment of the air quality standards for SO₂ set by the Ambient Air Quality Directive (see case example under Question 22). Formally, it granted indefinite (!) derogations under Art. 15(4) IED. Although Art. 15(4) can only grant derogations “without prejudice to Article 18”, the permit allowed the installation to apply a desulphurisation rate of 97-97,5 % in breach of the air quality plan prepared under Art. 23 of the Ambient Air Quality Directive: The 2019–2023 Air Quality Plan for the Galabovo Municipality, sets an obligation to power plants in the region to apply an efficiency of at least 98% (Measure GI_Lt_Pr_t_4, p. 282 of the Air Quality Plan, http://galabovo.org/sites/default/files/Programa_Galabovo%20-%20%D0%9E%D0%BA%D0%BE%D0%BD%D1%87%D0%B0%D1%82%D0%B5%D0%BB%D0%B5%D0%BD%20%D0%B2%D0%B0%D1%80%D0%B8%D0%B0%D0%BD%D1%82.pdf). This difference has already huge effect on SO₂ pollution.

The permitting authority based its conclusion on the compliance with Art. 18 on two models:

- One modelling, prepared by the operator, compared the air pollution of the plant applying the BAT-AELs and the conditions of the derogation from these BAT-AELs. This modelling compared only the emissions from the individual power plant with the air quality standards for SO₂, but it did neither assess the pollution from the nearby power plants nor from other sources such as prominent SO₂ pollution from domestic heating.

- The second modelling, prepared by the authority, is not publicly available and has not even been shared with the complainant in the court case against the permit decision. Only a summary of its results has been provided in the technical assessment to the permit. This modelling did include SO₂ pollution from the four

power plants in the region of Galabovo, but it did not take into consideration the pollution from domestic heating, which could be responsible for a substantial part of the SO₂ pollution in certain parts of the Municipality of Galabovo according to its Air Quality Plan. Furthermore, this study took into consideration ONLY the pollution levels in the TOWN of Galabovo – ignoring the fact that the MAXIMUM LEVELS of pollution from TPP Maritsa East 2 EAD are reached in the villages in the REGION.

Our partners challenged the derogation permit for violation of Art. 18 before court, where not only the shortcomings listed above, but also huge misunderstandings revealed. The first instance court held that the Executive Environmental Agency is not obligated to consider the Air Quality Plan of Galabovo because such an obligation would not be set out in the national sub-legislation re IED permits. The ignorance of Art. 18 becomes clear when the judgment states explicitly that the plan was irrelevant to the present proceedings and should not be discussed on in this decision (Judgement No. 358 of 28 August 2020 on case No. 225/2019 at the Administrative court of Stara Zagora). The court further held that since the pollution is caused by all four power plants in the region, it is not substantiated why stricter measures shall be applied to TPP Maritsa East 2 EAD specifically. Not surprisingly, this judgement is currently being reviewed by the Supreme Administrative Court (case 239/2021).

NEW DETERIORATION OF WATER QUALITY

In 2019, TPP Bobov Dol EAD obtained a new IED permit that allowed the co-incineration of biomass and refuse-derived fuel (RDF) together with coal. TPP Bobov Dol discharges waste water in Razmetanitsa River, whose ecological status deteriorated from medium to bad in the period 2017-2019. The permit set out limit values for seven additional pollutants to be discharged in Razmetanitsa River. Upon the issue of the permit, the permitting authority did not assess the impact of the new pollutants on the quality of the water.

The permit granted to TPP Bobov Dol EAD failed to apply Art. 18 with regards to the quality standards for water. In particular, it contradicted Article 4, paragraph 1, a), i)—iii) of the Water Framework Directive (2000/60/EC), which obligates Member States to ensure good status of the water bodies.

Our partners also challenged this permit before court. The court of first instance upheld the permit WITHOUT any reasoning on the application of Art. 18 (Judgement No. 222 of 2020 on case 242/2019 of the Administrative Court of Kyustendil). The court simply noted that the limit values for discharged water according to the LCP BAT Conclusions of 2017 are complied with, ignoring any relevance of environmental quality standards.

MAIN AMENDMENTS:

Article 3(6) IED

“6. ‘environmental quality standard’ means the set of requirements which must be fulfilled at a given time by OR IN a given environment or particular part thereof, as set out in Union law;”

Article 14 IED

New letter under Art. 14(1):

“(x) ADDITIONAL MEASURES SUCH AS STRICTER EMISSION LIMIT VALUES FOR POLLUTING SUBSTANCES OR STRICTER ENVIRONMENTAL PERFORMANCE STANDARDS THAN THOSE ACHIEVABLE BY THE USE OF THE BEST AVAILABLE TECHNIQUES REQUIRED ACCORDING TO ARTICLE 18(1) AND THE CONDITIONS FOR ASSESSING COMPLIANCE WITH THOSE;”

Article 18 IED

“1. Where an environmental quality standard requires stricter conditions than those achievable by the use of the best available techniques, additional measures shall be included in the PERMIT.

2. THE COMMISSION SHALL ESTABLISH GUIDANCE ON THE PROCEDURE AND CONTENT OF MEASURES TO COMPLY WITH ENVIRONMENTAL QUALITY STANDARDS AS SET OUT IN PARAGRAPH 1.”

(8.) RESTRICTING DEROGATION CLAUSES

Please refer to our detailed response under Question 22 regarding the need to restrict the derogation clause of Art. 15(4) as it flaws of a too vague requirements as well as too little procedural guarantees. To achieve full effectiveness of the IED and a level playing field, Art. 15(4) should be deleted. At the very least, a fundamental overhaul of the derogation clause is required as explained above.

With respect to large combustion plants (Chapter III IED), we also experience ambiguities of the interaction of different derogation clauses in practice (Art. 15(4), Art. 31, 32, 33, 34, 35), being partly excessive used and prolonged/repeated. Moreover, none of these derogation clauses do limit any derogations “without prejudice to Art. 18” which is no longer in line with today’s environmental needs.

As the main purpose of these provisions has been to provide derogation options during specific transition periods, they won’t be necessary anymore to be included in the new IED. Stopping the delays of environmental protection can have huge potential, as also seen by the Commission in IED’s Evaluation: “Large combustion plants are a major contributor to emissions to air from IED sectors. Whilst their emissions have been reduced significantly, given a number of time-limited flexibilities granted to Member States under the IED, this has been slower than what would have been achieved if BAT had been applied earlier. However, the decreasing trend is very encouraging and the main time-limited flexibilities are coming to an end at the time when the 2017 BAT conclusions for large combustion plants will become applicable.” (Evaluation of the IED, SWD(2020) 182 final, 23/09/2020, page 40).

Hence, these additional derogation clauses shall be DELETED. In a revised version, Art. 15(4) should be used as the only provision for granting derogations. For example, if the Commission is of the opinion to include limited life time derogations anyway, this should still be linked to Art. 15(4) that already foresees the option to grant a one-time derogation for another 4 years – hence, Art. 15(4) would be the basis for the last 4 years (maximum) an installation can operate before shutting down. All the more, ANY derogation procedure under the IED has to include due public participation and ANY derogation regime must be applied only “without prejudice of Article 18”.

For more details with respect to derogations applicable for large combustion plants, please see report of Frank Bold, “Industrial Emissions Directive: Various LCP derogation regimes” as of 31/03/2021, <https://drive.google.com/file/d/13PpFHGPiOWfZGys24mWXGWUQuJRr2epD/view>.

(9.) REGULATION INSTEAD OF DIRECTIVE

A Regulation can impose clearer, more precise and unconditional obligations. It will help to strengthen a harmonised implementation of the key provision set out in this legislative file and is therefore a more appropriate and more effective type of legislation for regulation industrial emissions.

- Please note that the capital letters in our proposed amendments represent a change from the current text of the provision (addition or deletion). -

1.1.3 Lack of clarity and guidance for permitting processes

Permitting practices differ across the Member States. While the binding nature of BAT Conclusions has led to an improved harmonisation in permitting across the EU compared to the IPPC Directive, there remains scope for different interpretation and implementation of the requirements. Inconsistencies lead to a varying level of environmental protection achieved through implementation of BAT Conclusions across the EU Member States.

Building on the current legislative text, options are primarily focused on clarification and/ or the provision of additional guidance that would aid Member States in a more harmonised implementation of the IED and thus more consistent outcomes for the environment.

Issues currently under consideration include further harmonisation, clarification or provision of guidance on:

- Implementation of Article 16 of the IED concerning monitoring requirements, particularly with regard to monitoring indirect releases to water which are currently not explicitly covered by Article 16 and requirements for periodic monitoring of emissions to soil.
 - Implementation of BAT conclusions in permits.
 - Baseline reports submitted for environmental protection and stringency of requirements upon definitive cessation of activities (IED Article 22).
 - Environmental inspections (IED Article 23).
 - EU-wide definition of (co)incineration, including pyrolysis, currently left to each Member State.
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28. To what extent would guidance improve harmonisation between sectors and Member States in the following areas? [Significant improvement; Moderate; Slight; No impact; Do not know; Not applicable]

- *Monitoring indirect releases* **Slight**
- *Monitoring emissions to soil* **Slight**
- *Implementation of BAT Conclusions in permits* **Slight**
- *Development of baseline reports* **Slight**
- *Stringency of requirements upon definitive cessation of activities* **Slight**
- *Identification of waste (co-) incineration activities that require permitting* **Slight**

1.1.4 Varied interpretation of enforcement and insufficient guidance

Practices related to inspection and enforcement of environmental permits vary across the EU Member States often owing to differing interpretation of the compliance assurance rules and insufficient guidance at EU level on how inspection and enforcement should be implemented.

The current approach requires Member States to take the necessary measures to ensure that permit conditions are complied with. Building on this, so that Member States maintain this responsibility, options under consideration include, e.g.:

- Allow competent authorities to suspend operation of non-compliant plants: Amend IED Article 23 to allow competent authorities to suspend operation of non-compliant plants (e.g. drawing on experience with MCPD Article 8(3) whereby in cases that “non-compliance causes a significant degradation of local air quality, the operation of the medium combustion plant shall be suspended until compliance is restored”).
- Introduce common compliance assessment rules with emission limit values under Chapter II of the IED.
- Implement support services for IED implementation to oversee compliance control and enforcement by the competent authorities and provide EU peer review and/or inspection.
- Elaborate Article 79 on penalties applicable to infringements of the provisions on the IED.

33. To what extent would the following enforcement options improve IED implementation? [Significant improvement; Moderate; Slight; No impact; Do not know; Not applicable]

- Allow competent authorities to suspend operation of non-compliant plants **Significant improvement**
- Introduce common compliance assessment rules with emission limit values under Chapter II of the IED **Significant improvement**
- Implement support services for IED implementation to oversee compliance control and enforcement by the competent authorities and provide EU peer review and/or inspection **Significant improvement**
- Elaborate Article 79 on penalties applicable to infringements of the provisions on the IED **Significant improvement**

34. Are there more ways in which enforcement can be strengthened? [open text response]

Open text response:

In our experience, there are considerable differences in the level of enforcement in different EU Member States. Additional harmonization on the EU level would be of great benefit, both to fulfil the IED’s objective of a high level of environmental protection as well as to ensure a level playing field for businesses operating throughout Europe. Specifically, we advocate for:

- (1.) Amendments to Art. 79 on penalties;
- (2.) Amendments to Art. 8(2) on non-compliance;
- (3.) Broadening access to justice to pursue failures to enforce IED obligations;
- (4.) The introduction of a new article dedicated to the victim’s right to request compensation.

In detail:**(1.) INTRODUCE SPECIFIC, MANDATORY THRESHOLDS FOR PENALTIES IN RELATION TO IED BREACHES (ART. 79)**

Currently, the penalties for non-compliance with the IED's provisions are regulated in a broad and generic manner under Art. 79. While Member States are thereby under the obligation to ensure the EFFECTIVE, PROPORTIONATE AND DISSUASIVE implementation of penalties under national law, the lack of detail results in a lack of compliance with this obligation in certain Member States. This leads to arbitrary and contradictory results. For example, in some jurisdictions, operating without any IED permit is sanctioned with a maximum fine of only a few thousand EUR. An operator can even pay less fines for operating without any permit than for breaching specific permit conditions (see Romanian example below).

In order for penalties to be effective, proportionate and dissuasive: (a) the amount of the fine should be sufficiently high; (b) additional fines should be administered for as long as the breach continues; and (c) the list of operators who are in breach of the IED provisions should be publicly available.

(a) It is of utmost importance to harmonize the minimum penalties for certain offences at EU level to ensure their effective, proportionate and dissuasive impacts. The IED must provide for an express minimum for the penalties applied for specific breaches of the IED, such as operation without a permit (as per Art. 4(1)), breach of permit conditions (as set out in the permit according to Art. 8(1) and 14 IED), or breach of the obligations under Art. 8(2). A proper way to ensure that the penalties are effective, proportionate and dissuasive is to define a minimum amount in the IED as well as a specific percentage of a company global turnover, and apply whichever is higher.

This principle has already been implemented in other pieces of EU legislation – both Regulations and Directives.

The General Data Protection Regulation ((EU) 2016/679) stipulates that administrative fines shall be effective, proportionate and dissuasive, and to this end it sets forth individual fines for a catalogue of violations, which could be used as a criteria to determine what constitutes “effective, proportionate and dissuasive”. Additionally, this Regulation stipulates under Art. 83(5) and (6) that infringements of specific provisions can lead to the application of fines up to “20,000,000 EUR or in the case of an undertaking, up to 4 % of the total worldwide annual turnover of the preceding financial year, whichever is higher”.

In a similar manner, Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Art. 81 and 82 of the Treaty (now Art. 101 and 102 TFEU) lists a series of infringements under its Art. 23, for which every participating undertaking can receive administrative fines of “up to 10 % of its total turnover in the preceding business year”.

Furthermore, Art. 13(3) of the Unfair Commercial Practice Directive (2005/29/EC) provides that „Member States shall ensure that when penalties are to be imposed [...] the maximum amount of such fines being at least 4 % of the trader's annual turnover in the Member State or Member States concerned“. In addition, under Art. 13(4) the same Directive provides that: „[f]or cases where a fine is to be imposed in accordance with paragraph 3, but information on the trader's annual turnover is not available, Member States shall introduce the possibility to impose fines, the maximum amount of which shall be at least EUR 2 million.“

Another example is Art. 16 of the EU ETS Directive (2003/87/EC) which provides that: „Member States shall ensure that any operator who does not surrender sufficient allowances by 30 April of each year to

cover its emissions during the preceding year shall be held liable for the payment of an excess emissions penalty. The excess emissions penalty shall be EUR 100 for each tonne of carbon dioxide equivalent emitted by that installation for which the operator has not surrendered allowances.”

(b) Besides dissuasive amounts, it is important that the public authorities can impose repeated fines until the violation is brought to an end in case a breach is continuous, i.e. if the operation of the installation without a permit or in violation of permit conditions continues even after the initial fine is paid. In Case C-752/18, brought by German NGO Deutsche Umwelthilfe with the support of ClientEarth, the CJEU required, in relation to enforcing a national court judgement that found a violation of the Air Quality Directive, “effective coercive measures in order to ensure that the public authorities comply with a judgment that has become final, such as, in particular, HIGH FINANCIAL PENALTIES THAT ARE REPEATED AFTER A SHORT TIME and the payment of which does not ultimately benefit the budget from which they are funded.” para. 40, emphasis added).

This approach is already implemented in the above mentioned Council Regulation 1/2003. Art. 24 provides that the Commission may also impose periodic penalty payments, not exceeding 5% of the average daily turnover in the preceding business year per day, in order to ensure compliance with certain obligations.

(c) Finally, following the ETS Directive example which explicitly provides for the obligation to publish the operators who are in breach of the requirements to surrender sufficient allowances, the IED should also have an express provision compelling Members States to publish information regarding the operators who are breaching the IED provisions and their own IED permit. This ensures better compliance in practice and contributes to the widest possible systematic availability of environmental information, as envisaged by Art. 1 Directive 2003/4 and Art. 5 Aarhus Convention.

In order to address these points, Art. 79 needs to be amended (see below).

EXAMPLE FROM PRACTICE: ROMANIAN (NON-)PENALTIES

One clear example of a failure to fulfil this mandatory obligation is Romania’s way of implementing the IED’s penalty provisions, provided under Law 278/2013. Those penalties do not fulfil any of the IED conditions: they are neither effective, nor proportionate, nor dissuasive.

To start with, in Romania, an economic operator performing an IED activity without an IED permit receives a lower fine than if it has an IED permit but does not comply with it. Specifically, operation without an IED permit is sanctioned with a fine of between 30,000 – 60,000 RON (equivalent of 6,147 – 12,295 EUR (at an average exchange rate of 1 EUR = 4.88 RON), whereas operation with an IED permit but without complying with its conditions is sanctioned with a fine of between 50,000 – 100,000 RON (10,245 – 20,491 EUR). Furthermore, the penalty shall be reduced by 50% if the titleholder pays the fine within 15 days of the communication of the sanctioning decision, according to the Romanian Government Ordinance regarding administrative offences which supplements the law transposing the IED, Law 278/2013.

The exceptionally low fines provided by Romanian legislation are not effective as they do not ensure compliance with EU law. Fines this low are not dissuasive, as they do not deter operators from committing the offence. This is demonstrated by the number of coal plants in Romania that have operated without an IED permit in the past and continue to do so. Below, we list a couple of examples of coal power plants that functioned without a valid IED permit in Romania, and which were imposed penalties (before the application of the possible 50% reduction). We also indicate the percentage of this fine in relation to the turnover of the titleholders, to demonstrate that this level of penalty is incapable of being effective or

dissuasive, even assuming the 50% reduction is not applied. On the basis of these examples, ClientEarth filed a complaint to the European Commission against Romania under Article 258 TFEU (see <https://www.clientearth.org/latest/press-office/press/romania-s-failure-to-penalise-polluting-coal-plants-triggers-complaint-to-the-european-commission/>). The Commission has now opened an infringement procedure against this Member State (more details: https://ec.europa.eu/commission/presscorner/detail/en/inf_21_441).

Summary of fines for plants operating without an IED permit:

PLANT – DATE – OFFENCE – FINE – TURNOVER - % OF TURNOVER

PAROȘENI - Dec '15 - Operating without a valid IED Permit since 2013 - 40,000 Ron (8.585 EUR) - 525,784,746 Ron (112,829,345 EUR) - 0.0076%

MINTIA - June '15 - Operating without a valid IED Permit since 2013 - 60,000 Ron (12.880 EUR) - 525.784.746 Ron (112,829,344.64 EUR)

GOVORA - June '15 - Operating without a valid IED Permit since 2013 - 60,000 Ron (12.880 EUR) - 402,301.937 Ron (86,330,888 EUR) - 0.0149%

TURCENI - Feb '16 - Operating unit 7 without a valid IED Permit since 2015 - 60,000 Ron (12.880 EUR) - 2,284,933,249 Ron (490,329,023 EUR) - 0.002625%

These examples demonstrate the systematic failure to ensure the effective, proportionate and dissuasive implementation of the penalties under national law.

By contrast, in Greece, if an operator performs an IED activity without holding a valid IED permit, an administrative penalty of 500 EUR to 2,000,000 EUR can be imposed, according to Art. 30 of Law 1650/1986. The gravity of the infringement, frequency, reoffending and level of emissions exceedance, for example, will determine the amount of the imposed fine.

Another good practice example is Spain. According to Art. 31 and 32 of Spanish Royal Legislative Decree 1/2016 of 16 December approving the revised text of the Integrated Pollution Prevention and Control Law, if a plant operates without an IED permit, it will receive a fine of between 20,000 and 2,000,000 EUR, depending on whether it caused serious damage or deterioration to the environment or health of people. Assuming that the operation of a coal plant would be highly likely to cause such damage, the fine would be of at least 200,001 EUR.

MAIN AMENDMENTS:

Article 79 IED

“1. Member States shall determine penalties applicable to infringements of the national provisions adopted pursuant to this Directive. The penalties thus provided for shall be effective, proportionate and dissuasive. Member States shall notify those provisions to the Commission by [...] and shall notify it without delay of any subsequent amendment affecting them.

MEMBER STATES SHALL ENSURE THAT THE COMPETENT AUTHORITIES HAVE DUE REGARD TO THE FOLLOWING FACTORS, WHEN DECIDING ON A SPECIFIC PENALTY:

- (a) THE NATURE, GRAVITY AND DURATION OF THE INFRINGEMENT, TAKING INTO ACCOUNT THE DIMENSION OF THE ENVIRONMENTAL IMPACT AND THE DAMAGE THAT OCCURRED, AS WELL AS WHETHER THE ENVIRONMENTAL DAMAGE IS IRREVERSIBLE;
- (b) THE INTENTIONAL OR NEGLIGENT CHARACTER OF THE OPERATOR IN RELATION TO THE INFRINGEMENT;
- (c) ANY RELEVANT PREVIOUS INFRINGEMENTS BY THE OPERATOR OR OF THIS INSTALLATION;
- (d) THE DEGREE OF COOPERATION WITH THE COMPETENT AUTHORITY, IN ORDER TO REMEDY THE INFRINGEMENT AND MITIGATE THE POSSIBLE ADVERSE EFFECTS OF THE INFRINGEMENT;
- (e) THE MANNER IN WHICH THE INFRINGEMENT BECAME KNOWN TO THE COMPETENT AUTHORITY, IN PARTICULAR WHETHER, AND IF SO TO WHAT EXTENT, THE OPERATOR INFORMED THE COMPETENT AUTHORITIES OF THE INFRINGEMENT;
- (f) WHERE PENALTIES UNDER THIS PROVISION HAVE PREVIOUSLY BEEN ORDERED AGAINST THE OPERATOR WITH REGARD TO THE SAME SUBJECT-MATTER, WHETHER THESE PENALTIES HAVE BEEN EFFECTIVE OR SHOULD BE INCREASED;
- (g) ANY OTHER AGGRAVATING OR MITIGATING FACTORS APPLICABLE TO THE CIRCUMSTANCES OF THE CASE, SUCH AS SUCH AS FINANCIAL BENEFITS GAINED, OR LOSSES AVOIDED, DIRECTLY OR INDIRECTLY, FROM THE INFRINGEMENT.

2. MEMBER STATES SHALL ESTABLISH THAT THE PENALTIES APPLIED FOR THE INFRINGEMENTS OF THE NATIONAL PROVISIONS PURSUANT TO THIS DIRECTIVE SHALL BE AT A MINIMUM OF 20,000 EUR OR IN THE CASE OF A PRIVATE UNDERTAKING, UP TO 10 % OF THE TOTAL WORLDWIDE ANNUAL TURNOVER OF THE PRECEDING FINANCIAL YEAR, WHICHEVER IS HIGHER. THESE PENALTIES SHALL BE CALCULATED AND APPLIED INDEPENDENTLY FROM ANY REMEDIAL PAYMENTS FOR ENVIRONMENTAL OR OTHER DAMAGE.

3. MEMBER STATES SHALL ENSURE PUBLICATION ON A PUBLICLY AVAILABLE NATIONAL WEBSITE OF THE NAMES OF OPERATORS WHO ARE IN BREACH OF THE NATIONAL PROVISIONS IMPLEMENTING THIS DIRECTIVE, AS WELL AS WHAT ACTIVITY IS PERFORMED.”

(2.) EFFECTIVE PERMIT SUSPENSIONS IN CASE OF DANGER TO HEALTH AND ENVIRONMENT (ART. 8(2))

Art. 8(2) provides that the suspension of an IED activity is applied when “the breach of the permit conditions poses an immediate danger to human health or threatens to cause an immediate significant adverse effect upon the environment”.

We observe two significant problems in applying this provision:

First, practical difficulties in substantiating and proving that the adverse effect threatening (i) human health or (ii) the environment will be immediate and significant leads to major obstacles in reaching the IED’s objective of ensuring a high level of protection of the environment.

There are frequent situations where the threat caused by the operator’s breach of the permits condition is considered not immediately significant upon the environment or immediately dangerous to human health, but it is in fact still significantly negative. Most breaches in the permits’ conditions have negative effects upon the environment and/or human health, including (multiple) secondary pollution and transboundary impacts, but the negative impact is not immediate. In such situations, the competent authority does not

have the competence to apply the suspension of the IED activity because there lacks an immediate link between the breach and the threat to human health/adverse effect on the environment.

The suspension of the IED activity would ensure that the operator stops performing the harmful activity and focuses instead on remediating the breach in order to perform the IED activity in compliance with the permit's conditions.

Moreover, when the operator did not previously comply with the competent authority's measures, the suspension is necessary to force the operator to comply as a last resort. In that sense, this point relates to the issue of adequate penalties discussed above. It is of utmost importance that the competent authorities has the competence to take all the measures necessary to ensure compliance with the IED permit conditions, without any negative impact upon the environment and human health. The example of Art. 8(3) of the Medium Combustion Plant Directive (MCPD), which foresees suspension of the operation of a plant where "non-compliance [with the Directive] causes a significant degradation of local air quality", does not provide an appropriate example to follow, as it does not ensure this high threshold of environmental protection. In that case as well, the suspension of activity applies only if significant degradation of the environment already occurs. Effective protection of both human health and/or the environment would require that the competent authority has the competence to generally apply the suspension of an IED activity irrespective of whether the harmful impact on the environment occurs immediately, as long as the IED activity performed by the operator is in breach of IED.

The second problem with the application of Art. 8 is that in some Member States, even if the competent authority suspends the economic operator's activity due to a lack of IED permit or serious breaches thereof, this suspension sanction can itself be suspended. In this sense, please see the practical example from Romania from immediately below.

The most appropriate place to revise the current IED provisions regarding the suspension of an IED permit is in Art. 8, which already provides for situations in which the suspension can be applied by the competent authority. By contrast, Art. 23, which regulates environmental inspections, does not contain any express provisions regarding the suspension. As Art. 23(6) last paragraph mentions, in practice these two articles may be corroborated, thus amending only Art. 8 would be sufficient, as this may be corroborated with Art. 23.

EXAMPLE FROM PRACTICE: ROMANIA

In Romania, under Government Ordinance 2/2001 regarding administrative offences which supplement the national law transposing IED, an economic operator who was sanctioned with suspending an IED activity has the possibility to challenge the sanction decision in court. Such challenge effectively and immediately suspends the sanction previously applied, namely the suspension of the activity, for the entire duration of the litigation, including appeals. In most cases, this lasts for several years. Therefore, after filing the legal challenge against the sanctioning decision, an offender can continue operation, even if it is undisputed that it has no IED permit or has a permit but is not complying with its provisions. This happened with several coal power plants in Romania, such as coal power plants CET Govora, Turceni, Paroşeni and Mintia. The practice of suspending the sanction applied is widespread in Romania, and occurs across all industries regulated under the IED.

Such practices are an obstacle to reaching the IED's objectives. Art. 8 should therefore be amended to clarify that when the sanction to suspend the activity of the economic operator is applied, it shall remain in force without any possibility to suspend the suspending sanction.

MAIN AMENDMENTS:

Article 8

"2. (...)

Where the breach of the permit conditions **POSES DANGER TO HUMAN HEALTH or THREATENS TO CAUSE ADVERSE EFFECT UPON THE ENVIRONMENT, OR WHERE OTHER MEASURES AND/OR PENALTIES APPLIED AS PER ARTICLE 79 HAVE PROVEN INEFFECTIVE**, and until compliance is restored in accordance with points (b) and (c) of the first subparagraph, the operation of the installation, combustion plant, waste incineration plant, waste co-incineration plant or relevant part thereof shall be suspended.

3. THE SUSPENSION MUST OPERATE IN AN EFFECTIVE, IMMEDIATE MANNER AND CANNOT BE POSTPONED OR CEASED, EVEN IF THE OPERATOR CHALLENGES THE SUSPENSION DECISION OR THROUGH OTHER JUDICIAL MEANS."

(3.) BROADEN ACCESS TO JUSTICE TO PURSUE FAILURES TO ENFORCE IED OBLIGATIONS

Another crucial improvement to ensure better enforcement of the IED is to give the public concerned, as defined in Art. 3(17) IED, the possibility to lodge administrative and judicial review challenges where national authorities fail to take adequate enforcement action, in line with Arts 4(1), 8(1), 14(1) and 23 IED. Adequate access to justice for the public concerned is a key aspect of adequate enforcement of environmental law. It is also a requirement for the EU under Art. 9(3) Aarhus Convention.

See our proposed amendment to Art. 25 IED under Question 95 below.

(4.) INTRODUCE THE RIGHT TO COMPENSATION FOR DAMAGES SUFFERED BY ANY PERSON FROM THE OPERATOR FOR SIGNIFICANT BREACHES

Currently, under the IED there are no express provisions concerning the right to receive compensation for persons which suffer damages following the operators' breaches of IED obligations. In theory, individuals may be able to obtain compensation via national tort / non-contractual liability legislation. However, in the case of diffuse environmental damage, in practice individuals will often be unable to prove the causal link between the pollution arising from the IED breach and the damage they suffered.

For instance, there is overwhelming epidemiologic evidence on the negative health impacts of air pollution on the population. However, given that air pollution is usually just one of several concurrent causal factors, it is difficult to prove the link at individual level. A recent ground-breaking decision issued by the inner south London coroner found that air pollution was a cause of the death of a nine-year-old girl, Ella Kissi-Debrah, in February 2013. However, it is still too difficult for victims of infringements of the IED to prove that they have actually suffered harm as a result of air pollution and to obtain compensation. For instance, several French citizens have started legal actions (including in Montreuil, Lyon, Grenoble) seeking damages for

health impacts related to air pollution. While in all the cases the courts of first instance found that the French government has failed to comply with the obligations set under Directive 2008/50/EC, no compensation has been awarded, because the claimants have not been able to prove that they have actually suffered harm as a result of the infringement. The same applies for cases based on breaches of the IED that led to harmful air pollution. Equally, breaches of IED and permit obligations may result in water or soil pollution, which may impact people's health. In all these cases, the causal link will be very difficult to prove in court.

Damage claims moreover serve as an additional enforcement mechanism because operators will have to plan to pay for possible compensation claims if they breach a permit or otherwise violate the provisions of the IED. This additional cost incentivises operators to minimize cases of non-compliance to the minimum and to make the necessary investments to that end.

The revision of the IED should therefore include provisions regarding the person's right to request and receive compensation for damages in order to harmonize this matter at EU level. In this context, the IED must expressly include the following aspects:

- Clarify that any person who has suffered material or non-material damage as a result of a breach of the IED permit shall have the right to request and receive compensation.
- Facilitate claims of victims due to IED permit(s)' breaches in line with the precautionary principle and the principle of prevention. The burden and/or the standard of proof required for the establishment of the causal link should not render the exercise of the right to damages practically impossible or excessively difficult. When an individual can provide prima facie proof that they suffered from health impacts from the IED permit or could have suffered from such impacts, there should be a rebuttable presumption that they suffered harm as a result of the infringement of the IED provisions. For example, a person should be able to request the compensation for damages on the basis of water quality test results, elaborated by an accredited specialized laboratory, which show serious exceedance of the limits imposed by the IED, provided this can be reasonably linked to any damage suffered by the person.
- This rebuttable presumption should apply unless the operator can credibly demonstrate to the satisfaction of the court that the IED provisions' breach had no material contribution to causing the actual harm.
- Establish clear limitation period so that victims have sufficient time to bring an action. Victims should have at least 5 years to bring damage claims, starting from the moment when they had the possibility to discover that they suffered harm from a breach of an IED permit.

Compensations for damages are already extensively regulated manner within the EU legal framework. For example, the Directive on Antitrust damages actions (2014/104/EU) lays down under Art. 11 that "each of those undertakings [liable for the harm caused by the infringement of competition law] is bound to compensate for the harm in full, and the injured party has the right to require full compensation from any of them until he has been fully compensated."

In a similar manner, the General Data Protection Regulation (2016/679/EU) provides under Art. 82 that "[a]ny person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered".

It is of utmost importance to have similar provisions under environmental law, such as under the IED, especially as the breaches made in this field generally have complex and long-term consequences on both and the environment and human health. At present, such a right to compensation for damages caused by

such breaches is not provided for under existing EU environmental law. In particular, the Environmental Liability Directive (ELD, 2004/35/CE), expressly excludes such right in Art. 3(3) ELD. As to the Environmental Crime Directive (Directive 2008/99/CE) it only applies to criminal conducts and does not cover civil law compensation.

In light of the above, we make the proposal for a new article in the IED.

MAIN AMENDMENTS:

New Article (x) – RIGHT TO COMPENSATION AND LIABILITY

“1. WHERE A PERSON PRESENTS PRIMA FACIE EVIDENCE REASONABLY DEMONSTRATING THAT HE OR SHE HAS SUFFERED MATERIAL OR NON-MATERIAL DAMAGE AS A RESULT OF AN OPERATOR’S BREACH OF THE PERMIT’S CONDITIONS OR OTHER IED OBLIGATIONS, INCLUDING THE LACK OF HOLDING A VALID PERMIT, THAT PERSON SHALL HAVE THE RIGHT TO RECEIVE COMPENSATION FROM THE OPERATOR FOR THE DAMAGE SUFFERED, UNLESS THE OPERATOR PROVES THAT THE DAMAGE DID NOT RESULT FROM THE BREACH OF THE PERMIT’S CONDITIONS OR OTHER IED OBLIGATIONS, INCLUDING THE LACK OF HOLDING A VALID PERMIT.

2. THE OPERATOR SHALL BE LIABLE FOR THE DAMAGE CAUSED BY ITS SUBCONTRACTORS, WHICH CAUSED THE BREACH OF THE IED PERMIT THAT LED TO THE HARMFUL EVENT THAT CAUSED DAMAGES. A SUBCONTRACTOR SHALL BE LIABLE FOR THE DAMAGE CAUSED ONLY WHERE IT HAS NOT COMPLIED WITH THE OBLIGATIONS OF THIS DIRECTIVE DIRECTLY APPLICABLE TO ITS ACTIVITY OR WHERE IT HAS ACTED OUTSIDE OR CONTRARY TO LAWFUL INSTRUCTIONS OF THE OPERATOR.

3. WHERE MORE THAN ONE OPERATOR IS INVOLVED IN THE SAME HARMFUL EVENT THAT LEAD TO DAMAGES AND WHEN THEY ARE, UNDER PARAGRAPH 2, RESPONSIBLE FOR ANY DAMAGE CAUSED BY THE BREACH OF THE IED PERMIT(S), EACH OPERATOR SHALL BE HELD LIABLE FOR THE ENTIRE DAMAGE IN ORDER TO ENSURE EFFECTIVE COMPENSATION OF THE PERSON THAT SUFFERED THE DAMAGE.

4. WHERE AN OPERATOR HAS, IN ACCORDANCE WITH PARAGRAPH 4, PAID FULL COMPENSATION FOR THE DAMAGE SUFFERED, THAT OPERATOR SHALL BE ENTITLED TO CLAIM BACK FROM THE OTHER OPERATOR(S) INVOLVED IN THE SAME PROCEEDINGS THAT PART OF THE COMPENSATION CORRESPONDING TO THEIR PART OF RESPONSIBILITY FOR THE DAMAGE, IN ACCORDANCE WITH THE CONDITIONS SET OUT IN PARAGRAPH 2.

5. COURT PROCEEDINGS FOR EXERCISING THE RIGHT TO RECEIVE COMPENSATION SHALL BE BROUGHT WITHIN 5 YEARS FROM WHEN THE PERSON HAS BECOME AWARE OF THE DAMAGE UNDER PARAGRAPH 1 BEFORE THE COURTS COMPETENT UNDER THE LAW OF THE MEMBER STATE WHERE THE PLANT IS LOCATED OR WHERE THE PERSON THAT SUFFERED THE DAMAGE HAS HIS OR HER HABITUAL RESIDENCE.”

- Please note that the capital letters in our proposed amendments represent a change from the current text of the provision (addition or deletion). -

1.1.5 Varied interpretation and not using latest techniques for monitoring and reporting

The IED and the BREFs have contributed to a further harmonisation of monitoring provisions. However, practices related to monitoring of environmental permits continue to vary across the EU Member States. Added to this, while the use of latest available techniques to monitor emissions supports online reporting of real time continuous monitoring data, the extent to which this is integrated in Member State reporting is limited.

Options are under consideration to integrate new technologies that would simplify and facilitate Member States meeting their legal requirements as well as to extend the current scope of monitoring and reporting obligations, including (overlap with measure under consideration for Problem 5):

- Include provisions so that 'real-time' emission data are automatically linked to Member State databases, in order to be linked with ambient air quality
 - Extend the scope of monitoring/ reporting concerning Article 15(4) derogations.
-

39. Do you use real time monitoring for measuring emissions from (agro-)industrial plants? [Yes; No] If yes, please explain how you use this data. [open text response]

Yes

Open text response:

Real time monitoring is of utmost importance to effectively and efficiently inform the public, in particular to facilitate monitoring of compliance with IED obligations. Only real time monitoring permits the public to control compliance at a continuous rate. Once all relevant IED permit information is published, the monitoring system shall enable the public to compare IED permit conditions with real time emissions. This ensures better compliance in practice and contributes to the widest possible systematic availability of environmental information, as envisaged by Art. 1 Directive 2003/4 and Art. 5 Aarhus Convention.

Real time monitoring information also gives the public the possibility to effectively participate in IED permit procedures as it facilitates the public's understanding of existing pollution and potential changes through new or updated permits. As Art. 6(6) Aarhus Convention recognizes, the public concerned by an activity must be given all information relevant to the permitting procedure to effectively participate in the decision-making.

Although there are already real time monitoring systems such as in China, offering real time data at facility level, or in the US, allowing to compare key information also within neighbouring countries, there is no such tool provided on EU level which needs to be changed urgently. Acknowledging the high prices of implementing such systems, the EU should nevertheless make steps towards the transition to mandatory real time monitoring for IED activities.

For more information and suggestions, please refer to

- EEB, "New tracking tool maps the reality of industrial pollution in Europe, 09/09/2020, <https://eeb.org/new-tracking-tool-maps-the-reality-of-industrial-pollution-in-europe/> and its "Industrial Plants Data Viewer (IPDV) Background briefing", 08/09/2020 FIN, <https://mk0eeborgicuyptuf7e.kinstacdn.com/wp-content/uploads/2020/09/EEB-briefing-on-highlights-on-Industrial-Plants-Data-Viewer.pdf>;

- Frank Bold, “Industrial Emissions Directive: Lack of access to continuous emission monitoring data”, 01/04/2021, https://drive.google.com/file/d/15T2Z_7wGRQSP5vkk_VrT3XQaV9UWX0ov/view.

40. To what extent do you expect the considered options to impact on environmental pollution from (agro-)industrial plants? [Significant reduction; Reduction; No impact; Do not know; Not applicable]

- Real time monitoring systems **Significant reduction**
- Extend the scope of monitoring/ reporting concerning Article 15(4) derogations **Significant reduction**

1.1.6 (Agro-)industrial activities continue to contribute to transboundary pollution

Whilst the IED has led to reductions of transboundary pollution from (agro-)industrial plants, this continues to be relevant.

Options are under consideration to strengthen provisions to further minimise transboundary environmental pollution, including:

- Ensure greater cooperation/ harmonisation between Member State competent authorities and nature conservation agencies/ groundwater control, including public consultation (IED Article 26)
 - Improvement of actions to limit transboundary pollution under Article 26 of the IED. This could include for example, mandatory response times from receipt of a Member State request, horizon scanning for potential issues.
-

44. To what extent do you expect improved cooperation between neighbouring Member States to impact on transboundary environmental pollution from (agro-)industrial plants? [Significant reduction; Moderate; Slight; No impact; Do not know; Not applicable]

Significant improvement

1.2 Non-toxic environment

(Agro-)industrial plants often use, treat and store hazardous substances and with this there is a risk of emissions, accidents and leakages of such hazardous substances. The main drivers of this problem are:

- Insufficient coverage of chemicals of concern (including substances of very high concern (SVHC) and persistent organic pollutants (POPS)) in BREFs and BAT conclusions
- Lack of alignment between IED provisions allowing releases to water and the Water Framework Directive objectives for priority hazardous substances. There are opportunities to reduce such risks and contribute to achieving a non-toxic environment.

Options under consideration include:

- Operators to establish a chemical management system (CMS) to continuously move to safer chemicals, track, quantify and manage hazardous chemicals. This includes the mandatory use of available tools for chemical risk assessment made available by the European Chemicals Agency (ECHA) and regular reporting on progress and outcome, e.g. under IED Art. 14 (1)(d).
- Systematic inclusion in BREFs and in BAT conclusions of information on chemicals of concern used in the sector and the availability of safer chemicals.

46. To what extent do you expect the options under consideration to have an impact on environmental pollution from toxic substances? [Significant reduction; Moderate; Slight; No impact; Do not know; Not applicable]

- Operators to establish a chemical management system **Do not know**

- Systematic inclusion in BREFs and in BAT-conclusions of information on chemicals of concern used in the sector and the availability of safer chemicals **Moderate**

47. To what extent do you think that addressing chemicals of concern in BAT conclusions, and during the BREF process as a mandatory key environmental issue, could have an impact on the environment? [Significant improvement; Moderate; Slight; No impact; Do not know; Not applicable]

Significant improvement

48. Are additional measures needed to support further alignment between IED and REACH, particularly for SVHCs? [Yes; No] If yes, please specify. [open text response]

Yes

Open text response:

It is necessary to ensure consistency between the IED and its pollutants and obligations and all other relevant environmental legislation, including the Water Framework and the REACH Regulation (see Art. 13 TEU and 7 TFEU).

However, only “duplicating” obligations in each of the different instruments will not be sufficient to achieve a non-toxic environment in line with EU’s environmental objectives. These objectives can only be achieved provided the IED and all its instruments, in particular the BREF process, are being used to their full potential. The IED should promote the minimization of the production and use of harmful substances and the integration/creation of truly safer alternatives.

Against this backdrop, we responded to Question 46 on the policy option of establishing a chemical management system “Moderate”, as the option is too vague at the moment. Such a system could have a significant reduction impact if it becomes an enforcement tool of the REACH monitoring, as well as create obligations for risk minimisation via the IED permit and additional obligations that would, for example, truly promote the minimisation of emissions, the monitoring of all emissions and the phasing out of harmful substances in favour of safer technologies or chemicals.

We also responded “moderate” to Question 46 on the policy option to include, in BREFs and BATC, information on chemicals of concern used in the sector and the availability of safer chemicals, because it

is too vague as well. Informing only about chemicals of concern and available safer chemicals is not sufficient if the use of chemicals of concern instead of the safer chemical is still allowed.

MAIN AMENDMENTS:

- As suggested under Question 47, addressing chemicals of concern is urgently needed especially in the in BATC (and BREF) process. This can have a significant impact if all the chemicals with intrinsic properties of concern are included, irrespective of their use, such as nitrates, CMRs, PBT, vPvB, PMT, vPvM as well as EDCs and substances toxic for aquatic organisms (as identified under CLP or REACH candidate list).
- When determining BAT, best practices in assessing the chemical footprint of the activity and in phasing out harmful substances in favour of selecting the safest chemical or technological alternative should be considered. Moreover, the option of setting “negative BAT” should be used more often in this context, see also our response to Question 23.
- No. 2 of Annex III, listing the criteria for determining best available techniques, should be rephrased. The current wording lists “the use of less hazardous substances” as a criteria. This should be replaced by “substitution of chemicals of concern” by safe alternative chemicals or technologies.
- Although Annex II is a non-exhaustive list of polluting substances, this list needs an overhaul to ensure all stakeholders are aware of the most important pollutants into air, water and soil.
- Likewise, IED permits should include enforcement and control mechanisms for the obligations set by REACH. For example, there should be particular attention given to verifying that substances used as “on-site isolated intermediate” and “transported isolated intermediates” within the meaning of Article 3(15) of REACH (and thus subject to lighter registration obligations under REACH), are not released.
- Finally, in conjunction to Questions 39 and 40, a precise monitoring of any emission of the substances listed above is required – at least the smallest amount of emission possible.

2 Problem 2: Climate crisis is happening

(Agro-)industrial plants under the scope of the IED include energy intensive plants that are a major source of GHG emissions. The main current EU legislation to reduce such GHG emissions is the Emissions Trading System (ETS), which covers most but not all GHGs. Because many IED plants are also covered by the ETS, the reduction of GHG emissions has not been a primary objective of IED design and implementation. In particular, GHG covered by the EU ETS and emitted by installations within the EU ETS are not regulated under the IED (owing to the exemption allowed under IED Article 9(1) and to some extent under IED Article 9(2)). Nevertheless, IED implementation has to some extent addressed GHG emissions, for example through the setting of BAT and associated performance levels (BAT-AEPLs) on energy efficiency or through BAT on the substitution of fluorinated GHGs. In a few cases, BAT-AELs have been set for GHGs not covered by Annex II of the ETS Directive.

With the current approach:

- BAT conclusions on energy efficiency (and hence in most cases, related GHG reductions) can be disregarded by competent authorities for installations falling under the ETS
- GHG emissions and mitigation are typically omitted from BREF reviews irrespective of whether the installations and emissions are covered by the ETS

In the medium/ long-term, avoiding interaction between the ETS and the IED will become challenging, and may be increasingly unrealistic: future breakthrough technologies will often contribute to both carbon neutrality and pollutant emission reduction. Once viable, such technologies would qualify as BAT, and the IED would foster their roll-out and promote a level playing field. In other cases, decarbonisation techniques may have negative impacts on pollutant emission. Thus, there are potential synergies between the IED and the ETS and options will consider how best to optimise them.

Accordingly, options are being considered as to whether or not IED permit conditions should include GHG ELVs and/or energy efficiency standards (through binding BAT-AEPLs), including:

- Deleting the provision that exempts (agro-) industrial plants from setting GHG ELVs and energy efficiency requirements in permit conditions if they are regulated by the EU ETS (IED Article 9)
- Identifying direct and indirect GHG as mandatory key environmental issues (KEIs), so that GHG emissions are considered when identifying BAT alongside with pollutant emission
- Establishing a long-term permit review obligation (e.g. by 2035) focusing on the capacity of the concerned installations to operate in accordance with EU's carbon neutrality objectives.

Added to this, some (agro-)industrial activities generating GHG emissions fall outside the current scope of the IED or fall below the IED's current production capacity thresholds. Examples include intensive farming (e.g. cattle farms), mining / quarrying industries and landfills.

Questions related to extension of the scope of the IED are presented in Problem 1.1 – The environment is polluted. Questions related to setting binding energy efficiency BAT-AEPLs are presented in Problem 3 – Natural resources are being depleted. Questions on deep transformation of industrial sectors (most likely reducing GHG emissions as well as abating other pollutants, and adopting emerging/ novel techniques) are covered in Problem 4 – state of the art.

55. What impact do you think including GHG in the BREF process as a mandatory key environmental issue (KEI) would have on reducing GHG emissions? [Significant improvement; Moderate; Slight; No impact; Do not know; Not applicable]

Significant improvement

56. What added value for reducing GHG emissions from (agro-)industrial plants that are NOT covered by the ETS would the following measures have? [Significant decrease; Moderate; Slight; No impact; Do not know; Not applicable]

- Set GHG ELVs and energy efficiency requirements in permit conditions (in accordance with BAT-AEL and/or BAT-AEPLs adopted by BAT Conclusions).

Significant decrease

- Establish a long-term permit review obligation (e.g. by 2035) focusing on the capacity of the concerned installations to operate in accordance with EU's carbon neutrality objectives

Significant decrease

57. What added value for reducing GHG emissions from (agro-)industrial plants that are covered by the ETS would the following measures have? [Significant decrease; Moderate; Slight; No impact; Do not know; Not applicable]

- Set GHG ELVs and energy efficiency requirements in permit conditions (in accordance with BAT-AEL and/or BATAEPLs adopted by BAT Conclusions). This includes deletion of IED Art. 9

Significant decrease

- Establish a long-term permit review obligation (e.g. by 2035) focusing on the capacity of the concerned installations to operate in accordance with EU's carbon neutrality objectives

Moderate

58. What additional measures can be considered within the IED to accelerate direct and indirect GHG emission reductions from (agro-)industrial plants? [open text response]

Open text response:

A revised IED has the potential to be ONE OF THE KEY LEGISLATIVE INSTRUMENTS translating the climate targets under the Paris Agreement and the new EU Climate Law into tangible legal obligations. ClientEarth strongly supports the inclusion of scientifically-based GHG emission limit values under the scope of the IED and the introduction of mandatory energy efficiency requirements. The current exclusion provisions in Art. 9 IED and Art. 26 ETSD must be deleted accordingly and well-designed interactions between the IED and ETSD have to be redesigned.

We would like to submit our legal note “Combating climate change: New IED and ETS interactions required” of March 2021, available at https://www.clientearth.org/media/mleppyf1/clientearth_combating-climate-change_new-ied-and-ets-interactions-required_march-2021.pdf that we have prepared for this Targeted Stakeholder Survey and the Public Consultation by the Commission.

This analysis aims to illustrate why there is an urgent need to reshape the relation between the IED and the ETSD:

- (1.) The policy and legal situation since IED's recast in 2010 has changed drastically, especially with the Communication of the European Green Deal (EGD). At the same time, the urgency to combat climate continues to increase. As the EU is obliged to ensure consistency between its new policies and activities, it must redesign the interactions between the IED and ETSD accordingly.
- (2.) The ETSD alone is insufficient to respond to today's challenges, especially because it does not focus on the technical possibilities to prevent emissions.
- (3.) The IED provides necessary tools to support the decarbonisation of the relevant industries, in particular thanks to its broad scope, its integrated prevention and control system to achieve a high level of protection of the environment taken as a whole, and its focus on technology.
- (4.) Complementary interactions between the IED and ETSD must follow EU's environmental principles, first and foremost the PREVENTION PRINCIPLE, in accordance with the new 'Hierarchy of action on pollution' developed by the Commission.
- (5.) Exploiting the synergies between the ETSD and IED can lead to technological innovations that are beneficial for operators, the environment and the climate.

In detail:

As the format (including footnotes) could not be uploaded as a response to the online survey, we referred to the publication only (see link above). For the sake of completeness, we add the text in this document:

1. New commitments require new interactions

The EU is legally obliged to **ensure consistency between its policies and activities**, taking all of its objectives into account (Art. 7 TFEU), in particular environmental protection (Art. 11 TFEU). Environmental protection includes combating climate change (Art. 191(1) TFEU). Additionally, Member States are obliged to act consistently with, and in support of, commitments taken by the EU (Art. 4(3) TEU), which includes acting on the behalf of EU's international commitments.

A lot has happened since the IED's last recast in 2010. While the timeframe for action is getting shorter, the scientific understanding of climate change continues to increase.¹ All the more significant developments have taken place at policy and legal levels:

¹ The Commission itself confirms: "Greenhouse gas emissions-neutrality by 2050, effectively tackling GHG emissions has become more important compared to when the IED was adopted back in 2010. In addition, the time frame for action is shorter than at the time of the IED development, with a clear recognition that energy-intensive industries also need to start planning and taking action to reduce and, where possible, eliminate their GHG emissions along with their other impacts.", see Evaluation of the Industrial Emissions Directive, SWD(2020) 181, 23/09/2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020SC0181&rid=2>, page 77.

The EU and its Member States signed the **Paris Agreement**, the “first-ever universal, legally binding global climate change agreement”², which entered into force in 2016 only. It sets out a global framework to avoid dangerous climate change by limiting global warming to well below 2°C and pursuing efforts to limit it to 1.5°C. To achieve this, GHG emissions (including CO₂ and non-CO₂ emissions) have to fall drastically as of now, and reach net zero by 2050.³ The EU in particular bears a duty to reach zero GHG emissions ahead of other parties according to the Paris Agreement’s principle of common but differentiated responsibilities and respective capabilities, given the EU’s relatively high share of the historical emissions budget, and its high degree of economic and technical capability.

At EU level, policies and legislation have also evolved, above all with the Communication of the **European Green Deal** (EGD) in 2019. Now is the time to see whether the Commission is serious about the promises it made in the EGD, such as “to exploit the available synergies across all policy areas”,⁴ “to rethink policies for clean energy supply”⁵ and that “transformational change is most needed and potentially most beneficial for the EU economy, society and natural environment”.⁶ Those promises find a specific meaning when it comes to addressing pollution from large industrial installations. The Commission acknowledges the interaction between environmental and climate pollution as it “will look at the sectoral scope of the legislation and at how to make it fully consistent with climate, energy and circular economy policies.”⁷

The revision of the IED, including the revision of its interaction with the ETSD, must be done consistently with the new commitments and strategies following the EGD. The upcoming **EU Climate Law** will, for the first time, make the climate neutrality ambition by 2050 legally binding. It will also set a stricter EU GHG emissions reduction target by 2030. Other already established strategies, legislation and plans as well as Roadmaps and Inception Impact Assessments for files that are still under development, clearly demonstrate the need for strong and comprehensive actions, including:

- the **Zero Pollution Action Plan**⁸, aiming to better prevent, remedy, monitor and report on pollution and incorporate a zero pollution ambition into all of its policies.
- the **Circular Economy Action Plan**⁹, presenting a set of interrelated initiatives to establish a strong and coherent product policy framework, as scaling up the circular economy will make a decisive

² Commission, Climate Action – Paris Agreement, https://ec.europa.eu/clima/policies/international/negotiations/paris_en.

³ According to the Intergovernmental Panel on Climate Change (IPCC), in order to limit global warming to 1.5°C as foreseen under the Paris Agreement, we must achieve 45% reductions in carbon dioxide emissions from 2010 before 2030, along with deep reductions for non-CO₂ greenhouse gases, including reductions of methane emissions of 20% by 2030 and at least 35% by 2050, see for more ClientEarth, ClientEarth’s feedback to the European Commission’s Methane Strategy Roadmap, August 2020, <https://www.documents.clientearth.org/wp-content/uploads/library/2020-08-06-clientearth-s-feedback-to-the-european-commission-s-methane-strategy-roadmap-ce-en.pdf>, page 2.

⁴ Communication from the Commission, The European Green Deal, COM(2019) 640 final, 11/12/2019, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1588580774040&uri=CELEX:52019DC0640>, page 3.

⁵ The European Green Deal, page 4.

⁶ The European Green Deal, page 4.

⁷ The European Green Deal, page 14, 15.

⁸ Commission, Roadmap, EU Action Plan “Towards a Zero Pollution Ambition for air, water and soil – building a Healthier Planet for Healthier People”, Ares(2020)5152184, 01/10/2020, <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12588-EU-Action-Plan-Towards-a-Zero-Pollution-Ambition-for-air-water-and-soil>.

⁹ Communication from the Commission, A new Circular Economy Action Plan For a cleaner and more competitive Europe, COM/2020/98 final, 11/03/2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1583933814386&uri=COM:2020:98:FIN>.

contribution to achieving climate neutrality by 2050 and decoupling economic growth from resource use.

- the **Methane Strategy**¹⁰ and a new EU's Methane Regulation¹¹, addressing the second biggest contributor to climate change.
- the Biodiversity Strategy¹², Farm to Fork Strategy¹³, Soil Strategy¹⁴, and Chemicals Strategy on Sustainability¹⁵, as well as the new Industry Strategy¹⁶ and others that are interlinked with environmental and climate pollution.

As environmental policy grows, so does the need for interactions between different policy instruments, as also highlighted in the **8th Environment Action Programme (EAP)** to 2030 currently being developed.¹⁷ The EAP, as proposed by the Commission, seeks to accelerate the EU's transition to a climate-neutral, resource-efficient, clean and circular economy in a just and inclusive way. It lists six thematic priority objectives, including irreversible and gradual reduction of GHG emissions, advancing towards a regenerative growth model that gives back to the planet more than it takes, pursuing a zero-pollution ambition for a toxic-free environment, as well as reducing key environmental and climate pressures related to production and consumption, in particular in the areas of energy and industrial development (draft Art. 2(2) EAP).

Since listing objectives is not enough, the draft EAP puts particular efforts into streamlining policy interactions: "The current proposal serves to increase coherence and synergies between actions across all level of governance by measuring progress towards environmental and climate objectives in an integrated way." (draft explanation of Art. 1 EAP). It asks for strengthening the integrated approach through mainstreaming the priority objectives in all relevant strategies and (non-)legislative initiatives (draft Art. 3(1)(b) EAP). Coherence between internal and external approaches and coordinated action is also required, in particular as regards strengthening the implementation of the Paris Agreement (draft Art. 3(1)(k) EAP).

The need for a closer link between environmental and climate pollution in permitting and planning processes had already been highlighted before the adoption of the EGD, notably during the revision process of the **Environmental Impact Assessment Directive (EIAD, 2011/92/EU)**. The revised version of the EIAD in 2014 finally stated explicitly that climate impacts should be part of EIAs. Its recitals stress

¹⁰ Communication from the Commission, EU strategy to reduce methane emissions, COM(2020) 663 final, 14/10/2020, https://ec.europa.eu/energy/sites/ener/files/eu_methane_strategy.pdf.

¹¹ Commission, Inception impact assessment, Proposal for a legislative act to reduce methane emissions in the oil, gas and coal sectors, Ares(2020)7864968, 22/12/2020, <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12581-Proposal-for-a-legislative-act-on-methane-leakage-in-the-energy-sector>.

¹² Communication from the Commission, EU Biodiversity Strategy for 2030 Bringing nature back into our lives, COM/2020/380 final, 20/05/2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1590574123338&uri=CELEX:52020DC0380>.

¹³ Communication from the Commission, A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system, COM/2020/381 final, 20/05/2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0381&from=EN>.

¹⁴ Commission, Roadmap, New Soil Strategy - healthy soil for a healthy life, Ares(2020)6391319, 05/11/2020, <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12634-Healthy-soils-new-EU-soil-strategy>.

¹⁵ Communication from the Commission, Chemicals Strategy for Sustainability Towards a Toxic-Free Environment, COM(2020) 667 final, 14/10/2020, <https://ec.europa.eu/environment/pdf/chemicals/2020/10/Strategy.pdf>.

¹⁶ Communication from the Commission, A New Industrial Strategy for Europe, COM/2020/102 final, 10/03/2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1593086905382&uri=CELEX%3A52020DC0102>.

¹⁷ Proposal for a Decision of the European Parliament and of the Council on a General Union Environment Action Programme to 2030, COM(2020) 652 final, <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12709-New-8th-Environment-Action-Programme-supporting-the-European-Green-Deal>.

that the amendments to the directive were necessary, *inter alia*, in order to “enhance coherence and synergies with other Union legislation and policies” (Recital 3 EIAD). It further makes clear that “[o]ver the last decade, environmental issues, such as resource efficiency and (...) climate change (...) have become more important in policy making. They should therefore also constitute important elements in assessment and decision-making processes.” (Recital 7 EIAD).

In order to ensure that the 2014 amendments to the EIAD fully achieve their purpose, substantive law has to be interpreted or amended accordingly. The impacts of projects on climate (for example the nature and magnitude of GHG emissions, see also Art. 3(1c), Annex III, IV EIAD) will have to play a stronger role not only as it comes to the assessments procedures, but all the more when it comes to the consequences in material law, such as to requirements under the IED. Assessing the impact on climate without any influence on the final content of a permit decision would not help the climate. In this context, the draft EAP also asks explicitly to maximise the benefits from implementing the EIAD and Strategic Environmental Assessment Directive (SEAD) to achieve its priority objectives (draft Art. 3(1)(b) EAP).

In line with the drastic policy and legislative changes that have taken place since 2010, it has now become a necessity that the EU revises the interaction between IED and ETSD.

2. ETS alone does not provide sufficient response

The EU ETS does not provide the complete answer to today’s challenges, not in its current form, nor the revised form being discussed by the Commission according to the Inception Impact Assessment¹⁸. Its shortcomings require complementary measures.

Between 1990 and 2018, the EU reduced its GHG emissions by 23%. At that pace, the EU will not be able to reach its original EU reduction target of -40% by 2030,¹⁹ and even less so the more ambitious targets that are expected under the upcoming EU Climate Law. The exact figure is not yet known, but the European Commission proposed a net reduction of at least 55% of EU’s GHG emissions compared to 1990 levels, and the European Parliament calls for a 60% reduction.²⁰ ENGOs ask to cut at least 65% GHG emissions in order to comply with the Paris Agreement and fulfil the EU’s share according to the principle of common but differentiated responsibilities and respective capabilities.²¹

Whichever of the above target is eventually adopted, a drastic change in the current trajectory will be necessary, with urgent, profound and much more systematic efforts. In 2019, the EGD stated clearly that achieving a climate neutral and circular economy would require the full mobilisation of industry

¹⁸ Commission, Inception impact assessment, Amendment of the EU Emissions Trading System (Directive 2003/87/EC), Ref. Ares(2020)6081850, 29/10/2020, <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12660-Updating-the-EU-Emissions-Trading-System>.

¹⁹ EEA, Trends and projections in Europe 2020, Report No 13/2020, available at <https://www.eea.europa.eu/publications/trends-and-projections-in-europe-2020>, page 7.

²⁰ European Parliament, EPRS, European climate law, Briefing December 2020, [https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI\(2020\)649385](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2020)649385).

²¹ See e.g. CAN-E, FACTSHEET: science shows 65% emission reduction by 2030 is feasible and pays off, 08/09/2020, <https://caneurope.org/factsheet-science-shows-65-emission-reduction-by-2030-is-feasible-and-pays-off/#:~:text=According%20to%20the%20latest%20UNEP,at%20least%2065%25%20by%202030>.

and that it takes “25 years – a generation – to transform an industrial sector and all the value chains. To be ready in 2050, decisions and actions need to be taken in the next five years”.²²

It becomes clear that only searching for solutions in the ETS is not enough. Besides the possibilities to improve the current ETSD design and potential reform options,²³ there are fundamental shortcomings in this system. The ETS establishes a framework to reduce (certain) economy-wide GHG through a cap and trade scheme, but it does not focus on the huge potential of enhancing prevention technologies. It does not cap the level of emissions related to a particular project, site or industry and it does not on its own ensure that the most cost-effective approach is followed for each activity. This gap was implicitly recognised by the Commission itself when proposing the ETSD in 2001 and adding: “**Limitation of emissions will require an effort to be made by installations**, but emissions trading will enable reductions to be made **more** cost-effectively.”²⁴ (emphasis added).

Relying on the ETS alone means, *in principle*, that those who can afford to pay, pay.²⁵ It presents significant lock-in risks as certain sectors can continue ‘business as usual’ while failing to make real progress towards decarbonisation. All the more, given its *trading* approach, it can also lead to a displacement of pollution from one activity to another.

The EU’s new targets require that all levers be pulled: there is **no room (nor time) for allowing industries and operators the option not to invest in cleaner technologies**. The use of all available instruments, including a strengthened regulatory approach complementing and supporting the EU ETS, is key to driving appropriate investments.

The need for supplementary approaches has already been recognised by countries within and outside the EU. The United Kingdom (UK), for example, introduced GHG emission limits in addition to the ETS. As the UK Climate Change Committee (CCC) have advised: “Carbon pricing is important, but market mechanisms by themselves will not achieve full decarbonisation – supplementary policies will be needed to address barriers and overcome preferences driven by factors other than price, as well as to deal with myopia and price uncertainty. (...) The Government should not rely on carbon pricing alone. **Whilst carbon pricing is essential it needs to be used as part of a suite of policy instruments, as confirmed by real-world experience internationally.**”²⁶ (emphasis added).

Indeed, in a briefing document accompanying its recent Sixth Carbon Budget advice, the CCC specifically cites adjustment of the existing EU Best Available Techniques reference documents as a potential means of accelerating emissions reduction in the industrial sector.²⁷

²² Communication from the Commission, The European Green Deal, COM(2019) 640 final, 11/12/2019, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1588580774040&uri=CELEX:52019DC0640>, page 7.

²³ See e.g. CMW, Carbon Market Watch’s response to the public consultation on the EU Emissions Trading System (EU ETS) review, February 2021, <https://carbonmarketwatch.org/wp-content/uploads/2021/02/Response-to-EC-public-consultation-on-updating-the-EU-ETS.pdf>.

²⁴ Proposal for a Directive of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, COM/2001/0581 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52001PC0581>, Explanatory Memorandum.

²⁵ Leaving aside issues like free allowances granted for certain installations that again have to be seen critical, see *ibid.*

²⁶ CCC, Letter: The future of carbon pricing, 08/08/2019, <https://www.theccc.org.uk/publication/letter-the-future-of-carbon-pricing/>.

²⁷ CCC, The Potential of Product Standards to Address Industrial Emissions, 09/12/2020, <https://www.theccc.org.uk/publication/the-potential-of-product-standards-to-address-industrial-emissions/> (,

3. Revised IED provides systematic response

A revised IED, including emission limit values (ELVs) for all GHG and energy efficiency standards, could provide means for tackling climate change more urgently and more systematically.

(a) Comprehensive scope

Already today, the **IED covers extremely resource and energy-intensive industrial activities** (e.g. large combustion plants, iron, steel, glass and cement production, chemicals industry, waste management, certain agriculture activities, see Annex I) and the largest emitters of GHG in the EU. The scope of the revised IED may be even expanded to additional GHG intensive sectors, including e.g. methane emissions from mining activities or cattle farms. The broad scope of the IED enables to ensure all GHG intensive activities are covered. The EU ETS regulates only around 45% of EU's total GHG emissions, as it does not have a comprehensive approach.²⁸ For example, the production and use of energy across economic sectors account for more than 75% of all GHG emissions in the EU²⁹ – not all of it is covered by the ETS.

(b) Integrated approach

The IED is already an ideal instrument for combining rules on climate and environmental pollution. It follows an integrated approach to **prevention and control** of emissions into air, water and soil, to waste management, to energy efficiency and to accident prevention, while also aiming to contribute to the achievement of a level playing field in the Union (Recital 3 IED). Its integrated prevention and control system lays down rules in order to achieve a high level of protection of the **environment “taken as a whole”** (Art. 1 IED). In addition, it does not only focus on local pollution, but seeks to minimise long-distance and transboundary pollution (Art. 14(1)(g) IED).

Excluding some of the most significant emissions from the scope of legislation that follows an integrated approach to prevention and control of emissions is unsystematic and arbitrary. Protecting the environment as a whole does include combating climate change. This is reaffirmed in Art. 191(1) TFEU, which states clearly that Union policy on the environment shall contribute especially to combating climate change. It is also within the ambit of the IED itself, as it seeks to protect the environment from pollutants in a broad sense (Art. 3(2) IED). Already today, GHG emissions are one of several pollutants covered by the IED:

- For non-ETS installations, it is already possible to set ELVs on GHG emissions and energy efficiency requirements.³⁰ However, in practice, the exclusion of ETS installations (Art. 9 IED, Art. 26 ETSD) led to such requirements generally being omitted from BREF reviews, irrespective of whether the installations fall under the ETS or not.
- For ETS-installations, GHG ELVs may be set where it is necessary to ensure that no significant local pollution is caused (Art. 9(1) IED).

²⁸ CMW/EEB, A New Industry Framework for achieving the EU Green Deal ‘Zero Pollution’ Goal, June 2020, <https://carbonmarketwatch.org/wp-content/uploads/2020/06/A-New-Industry-Framework-For-Achieving-the-EU-Green-Deal-Zero-Pollution-Goal-1.pdf>, page 5.

²⁹ Communication from the Commission, The European Green Deal, COM(2019) 640 final, 11/12/2019, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1588580774040&uri=CELEX:52019DC0640>, page 10.

³⁰ See for example ELVs for methane emissions from the combustion of natural gas in a spark-ignited lean-burn gas engine in BAT No. 45 II, III of Commission Implementing Decision (EU) 2017/1442, 31/07/2017, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017D1442>.

- Energy efficiency is one of the criteria for determining best available techniques (Annex III IED) and one of the operator's general principles (Art. 11(f) IED). For combustion plants falling under ETS, Member States may choose “not” to impose energy efficiency requirements, which seems to imply that Member States would still impose them on a regular basis.
- The IED also does not prevent Member States from maintaining or introducing more stringent protective measures, “for example greenhouse gas emission requirements” (Recital 10 IED).³¹ The UK, when it was a member of the EU, made use of this legal basis and introduced e.g. a duty not to exceed annual carbon dioxide emissions limits for operators of any fossil fuel plant (Section 57 of UK's Energy Act 2013). This example demonstrates in principle that both legal instruments can co-exist for the same installations within the EU.

These inclusions and exclusions under the current IED show that **a systematic and harmonised approach throughout the EU is needed**. This can be achieved by deleting the exemptions of Art. 9 IED (and Art. 26 ETS). Energy savings, and prevention and reduction of GHG emissions have to be more than just “by-products” of the IED. The fossil fuel sector, such as coal or gas power plants, presents huge potential for energy savings and the reduction of GHG emissions. Yet, up to this day, we have observed that neither the ETS, nor the fragmented rules of today's IED prevented the development of new highly polluting installations in this sector.

Regulating both GHG and non-GHG emissions under the same legislation enables all the more to assess effectively in one procedure **all kind of (multiple) effects of emissions**,³² **including secondary and long-range pollutants**. A separation of certain pollutants seems to be artificial and arbitrary. Methane, for example, is not only a GHG, but also a precursor of ground-ozone, a harmful air pollutant.³³ Hence, there is no justification to disregard GHG emissions under the IED.

(c) Technology focus

Under the IED, permit conditions including emission limit values must be based on the **best available techniques** (BAT). These BAT and BAT-associated emission limit values (BAT-AELVs) are developed in the BREF process, including industries and other relevant stakeholders. Focusing on GHG ELVs and energy efficiency requirements in this process will enforce a stronger focus on more and more advanced technologies.

Likewise, when it comes to the permitting process for individual installations, the IED approach offers huge advantages. Clear requirements from the very beginning create an early opportunity for the operator but also the authorities **to stimulate a decision in favour of a more advanced, innovative technology**.

In addition, as the IED permit is following an integrated approach, the choice of technology and the permit conditions will impact not only GHG pollution, but also other pollutants. As stated in the introductory text

³¹ Based on Art. 17 of Kyoto Protocol to the United Nations Framework Convention on Climate Change Kyoto of 11 December 1997.

³² Also the Commission speaks of “a need to address the combined effects of different pollutants” in the context of its zero pollution ambition, see Communication from the Commission, The European Green Deal, COM(2019) 640 final, 11/12/2019, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1588580774040&uri=CELEX:52019DC0640>, page 14.

³³ See also Commission, Evaluation of the Industrial Emissions Directive, SWD(2020) 181, 23/09/2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020SC0181&rid=2>, page 77.

of this Chapter, “future breakthrough **technologies will contribute to both carbon neutrality and pollutant emission reduction**” (emphasis added).

At present, we can observe great synergies of technologies on the one hand, and untapped potential on the other:³⁴

- Iron and steel: SO₂, NO_x and dust pollutants have dropped significantly after technological adjustments following new BAT reference documents in 2009 and 2012. In parallel, CO₂ emissions followed the same trend. It may lead to the conclusion that pollution abatement technologies for SO₂, NO_x and dust pollutants in this sector also had an impact on CO₂ emissions.
- Large combustion plants: SO₂, NO_x and dust pollutants have dropped significantly after technological adjustments following stricter emission limit values and environmental performance standards in 2008, 2013 and 2016. However, CO₂ emissions have not significantly dropped over the same period which suggests that there is still more to achieve through decarbonisation techniques.

4. IED/ETS relation according to prevention principle and new hierarchy of actions

The reason for the exclusion of GHG ELVS from ETS installations under the IED was to avoid “duplication of regulation” (Recital 9 IED). However, the situation since the IED’s last recast has changed drastically, as described in Section 1. Today, there is a real need to create synergies between the two legislations by using their different approaches and principles.³⁵ The argument of double regulation is no longer valid if their interactions are well designed. Even more, based on EU’s environmental principles, a combined approach is required according to the ‘Hierarchy of action on pollution’ and the Energy Efficiency First principle.

According to Art. 191(2) TFEU, Union policy on the environment shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

The IED implements several of these principles. It lays down rules on “integrated prevention and control of pollution” in order to “**prevent or, where that is not practicable, to reduce**” and as far as possible eliminate pollution arising from industrial activities in compliance with the principle of pollution prevention and the ‘polluter pays’ principle, giving **priority to intervention at source** (Recital 2, Art. 1 IED). It also aims to **prevent** the generation of waste, while ensuring prudent management of natural resources and taking into account, when necessary, the economic situation and specific local characteristics (ibid).

The ETS establishes a system for GHG emissions allowance trading within the EU in order to “**promote reductions** of greenhouse gas emissions in a cost-effective and economically efficient manner” (Art. 1 ETSD), but it does not focus on prevention. The prevention principle is not even mentioned by the ETSD,

³⁴ Both examples taken from CMW/EEB, A New Industry Framework for achieving the EU Green Deal ‘Zero Pollution’ Goal, June 2020, <https://carbonmarketwatch.org/wp-content/uploads/2020/06/A-New-Industry-Framework-For-Achieving-the-EU-Green-Deal-Zero-Pollution-Goal-1.pdf>, page 7.

³⁵ See already ClientEarth, Legal Briefing: Amendments to introduce a CO₂ emission limit value in the IED/IPPC Directive, 2008, <https://www.documents.clientearth.org/wp-content/uploads/library/2008-12-12-amendments-to-introduce-a-co2-emissions-limit-value-in-the-ied-ipcc-directive-ce-en.pdf>.

nor by the Inception Impact Assessment for its revision. All the more, the ETS does not follow the principle to give priority to intervention at source as it does not even prescribe to reduce avoidable GHG emissions of industrial activities as long as the operator pays for allowances under the cap. Given its trading approach, emissions allowances may also just be displaced from one source to another as described in Section 2.

The enforcement of the prevention principle is urgently needed to achieve climate neutrality. The new EU policies and legal obligations lead to a new 'Hierarchy of action on pollution', with a '**prevention first**' principle as the first and foremost basis. Before being able to pay for or trade GHG emissions, one should be required to avoid producing the emissions. This has to be considered in both situations, when determining BATs, but also when setting concrete permit conditions.

A draft '**Hierarchy of action on pollution**' was presented during the Stakeholder Workshop of the Zero Pollution Action Plan in February 2021.³⁶ In accordance with Art. 191(2) TFEU, it confirms that Union policy on the environment shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay. The draft 'Hierarchy of action on pollution' aims to protect health and the environment and encourage innovation and business opportunities. The new hierarchy is illustrated as an upside down pyramid (see below). At the very top is the largest field of application (green-coloured), representing the action "Prevent (by design and during production)". The second, smaller field of application in yellow is described as "Minimise & control", whereas the smallest field of application, highlighted in red, contains the action "Eliminate & remediate". This pyramid demonstrates the priority order of actions to be considered to tackle pollution. The whole pyramid is surrounded by a ring including the terms "Transparency", "Accountability", "Reliability" and "Participation".

³⁶ Commission, Presentation at Stakeholder workshop – Zero Pollution Action Plan for air, water and soil, 10/02/2021, https://ec.europa.eu/environment/system/files/2021-02/20210210_Overview_ZPAP-workshops.pdf, slide 6. A similar 'Zero Pollution Hierarchy of actions' was already presented by EEB, EEB feedback to the Zero Pollution Action Plan roadmap, 29/19/2020, <https://eeb.org/library/eeb-feedback-to-the-zero-pollution-action-plan-roadmap/>.

Hierarchy of action on pollution

DRAFT

Union policy on the environment shall be based on the **precautionary principle** and on the principles that **preventive action** should be taken, that environmental damage should as a priority be **rectified at source** and that the **polluter should pay**.



Protect health and the environment

Encourage innovation and business opportunities



Draft “Hierarchy of action on pollution”, European Commission, Presentation at Stakeholder Workshop – Zero Pollution Action Plan for air, water and soil, 10/02/2021, https://ec.europa.eu/environment/system/files/2021-02/20210210_Overview_ZPAP-workshops.pdf (slide 6).

The ‘Hierarchy of action on pollution’ is embedded in the Zero Pollution Action Plan as a cross-sectoral plan not focusing on individual legislative pieces only, but on the overall approach of tackling pollution by mainstreaming the zero pollution ambition into **all** policy developments. Hence, it **applies to both, the IED and the ETSD**. According to its general approach, it must cover non-GHG as well as GHG emissions, as both emissions are pollutants. This is very clear when looking at the IED that defines pollution in a very broad sense (Art. 3(2) IED)³⁷. It is – and always was – clear, that **GHG emissions are pollutants** under the IED, as they are still partly covered by the IED (see Section 3) and as there is only a specific exemption for certain installations due to another Directive, not due to the type or features of these emissions. The Commission itself stated in its proposal of the ETSD in 2001: “The IPPC Directive covers emissions of greenhouse gases. (...) The IPPC Directive defines “pollution” in a very broad sense. (...)”³⁸ (IPPC Directive is one of the main predecessor directives of the IED).

ClientEarth strongly welcomes this new hierarchy of action on pollution.³⁹ Before considering actions to minimise/control pollution (e.g. by a cap and trading scheme) or eliminate/remediate pollution, industry

³⁷ “‘pollution’ means the direct or indirect introduction, as a result of human activity, of substances, vibrations, heat or noise into air, water or land which may be harmful to human health or the quality of the environment, result in damage to material property, or impair or interfere with amenities and other legitimate uses of the environment”, Art. 3(2) IED.

³⁸ Proposal for a Directive of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, COM/2001/0581 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52001PC0581>, Explanatory Memorandum.

³⁹ See also the similar ‘Zero Pollution Hierarchy of actions’ by EEB, EEB feedback to the Zero Pollution Action Plan roadmap, 29/19/2020, <https://eeb.org/library/eeb-feedback-to-the-zero-pollution-action-plan-roadmap/>.

and authorities shall aim to prevent polluting emissions – “by design and during production”, which includes clearly the choice of technology. This fits perfectly to a strengthened IED, including any kind of GHG and non-GHG pollutants.

When setting energy efficiency standards for energy intensive industries, this ‘Hierarchy of action on pollution’ transposes at the same time the **Energy Efficiency First Principle** (EE1st), which already applies to the relevant sectors.⁴⁰ It is one key pillar of the Energy Union, aiming to ensure secure, sustainable, competitive and affordable energy supply in the EU and to cut GHG emissions.⁴¹ The EE1st principle prioritise investments in efficiency (e.g. by means of cost-optimal energy end-use savings, demand-side response initiatives) in all decisions regarding energy system development (including in industry), over investments in new energy infrastructure. The Commission recognised it as a horizontal guiding principle of European climate and energy governance and beyond, to ensure that only energy is produced that is really needed.⁴² It must be driving the EU institutions’ decisions and legislation as well as Member States’ energy planning, policy and investment decisions (Recital 64 and Art. 2(18) of the Governance of the Energy Union Regulation). In the same vein, the European Climate Law, in the version adopted by the European Parliament on 8 October 2020, places the EE1st principle as a mandatory criterion to be taken into account by the Commission when revising the trajectory to achieve climate neutrality by 2050 (draft Art. 3 EU Climate Law).⁴³ The Energy System Integration Strategy released in July 2020 also insists on applying the EE1st principle consistently across the whole energy system.⁴⁴

Moreover, lessons can be learned from other environmental sectors. The ‘Hierarchy of action on pollution’ is similar to the development of the rules on waste prevention and management. The EU Waste Framework Directive (WFD) seeks to prevent and reduce the negative impacts of waste and improve resource efficiency. It sets out a ‘**Waste hierarchy**’ for prioritising action for waste management: preventing waste is the very first preferred option followed by re-use, recycling and recovery. Waste disposal is only the very last resort (Art. 4(1) WFD).⁴⁵ Furthermore, Art. 4(3) WFD states that Member States shall make use of economic instruments and other measures to provide incentives for the application of the waste hierarchy. This shows that the prevention and hierarchy approach can also be combined with economic incentives.

⁴⁰ Even more, the EU is likely to meet its 2020 energy efficiency target only because of the covid-19 pandemic and risks not reaching the 2030 target in the context of the proposed new climate ambition of the EU. The proper and systematic implementation of energy efficiency standards under the IED will be needed to reduce that gap. See also Communication from the Commission, Stepping up Europe’s 2030 climate ambition Investing in a climate-neutral future for the benefit of our people, COM/2020/562 final, 17/09/2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0562>.

⁴¹ See European Parliament, Fact Sheet on Energy Efficiency, 2020, <https://www.europarl.europa.eu/factsheets/en/sheet/69/energy-efficiency>.

⁴² As outlined in the European Green Deal, the EU strategy on Energy System Integration, and the EU Renovation Wave, see Communication from the Commission, A Renovation Wave for Europe - greening our buildings, creating jobs, improving lives, COM/2020/662 final, 14/10/2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0662>.

⁴³ Amendments adopted by the European Parliament on 8 October 2020 on the proposal for a regulation of the European Parliament and of the Council establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law), https://www.europarl.europa.eu/doceo/document/TA-9-2020-0253_EN.html.

⁴⁴ Communication from the Commission, Powering a climate-neutral economy: An EU Strategy for Energy System Integration, COM(2020) 299 final, 08/07/2020, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2020:299:FIN>, page 5.

⁴⁵ See also Commission, Waste Framework Directive, https://ec.europa.eu/environment/topics/waste-and-recycling/waste-framework-directive_en.

5. Conclusions: Benefiting from synergies

Today's climate, environmental and human health challenges require a transition from an exclusive relationship between the IED and ETSD towards an inclusive, harmonised and synergetic approach. The EU must act in consistency with the international Paris Agreement, the new growth strategy 'European Green Deal', as well as the new policy and legislative files based on it. Shortcomings in the ETS can be corrected by an improved IED, by making full use of its comprehensive scope, its integrated approach and its focus on innovative technology. The redesign of interactions between the IED and the ETS must follow, first and foremost, the EU's prevention principle according to a 'Hierarchy of action on pollution', including climate pollution.

Finally, the synergies between the prevention approach of the IED and the market-based approach of the ETS can lead to a **'win-win-win' situation** for the operator, climate and environment. When less GHG emissions are produced/less energy is used, (1) the operator has to buy less ETS allowances or can sell those that not longer needed; (2) the climate will be less damaged; and (3) other environmental damage may be prevented through cleaner technology.

In particular, the combination of concrete environmental performance standards that ensure a level playing field, and financial incentives that ensure lower costs/trading with leftover ETS allowances, may **stimulate innovation** more than ever. This combination may lead to a positive "race to the bottom" as it creates incentives to constantly operate with the least polluting and least energy intensive technologies. This innovation process will then increase the likelihood of being able to tighten the cap of the ETS Directive to achieve climate neutrality by 2050.

In conclusion, the current exclusion provisions in Art. 9 IED and Art. 26 ETSD must be deleted accordingly.

MAIN AMENDMENTS:

In light of the above, ClientEarth strongly supports the inclusion of scientifically-based GHG emission limit values under the scope of the IED and the introduction of mandatory energy efficiency requirements. The current exclusion provisions in Art. 9 IED and Art. 26 ETSD must be deleted.

3 Problem 3: Natural resources are being depleted

3.1 Clarify the binding nature of resource efficiency BATAEPLs

In some BAT Conclusions, resource efficiency BATs (aiming for efficient use of energy, water, and materials, including the minimisation of waste generation) are expressed as quantitative BATs (i.e. BAT-AEPLs), or are merely contained in narrative BATs. There are indications of heterogeneous approaches between and within Member States when implementing BAT-AEPLs in permits. Some Member States consider that the resource efficiency BAT-AEPLs do not have a binding value.

A general challenge for the setting of environmental performance benchmarks, but in particular for deriving quantitative resource efficiency BATs, is that certain information (e.g. production levels, process or product specifications, or the resource use per unit produced) is considered by industry to be confidential business information ('CBI').

Options are under consideration to:

- Make the binding nature of resource efficiency BAT-AEPLs explicit in the same way as BATAELs for new permits and permit reviews
 - Allow CBI issues to be surmounted when setting BAT-AEPLs via legislative means and/ or procedural means
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63. Could you state good examples that you have come across regarding the drafting of permit conditions promoting resource efficiency/ Circular Economy, especially where implementing BAT-AEPLs? [open text response]

Open text response:

No positive example to provide.

64. To what extent do you think making the binding nature of BAT-AEPLs in BAT Conclusions explicit for new permits and permit reviews would impact on resource management at (agro-)industrial plants? [Significant improvement; Moderate; Slight; No impact; Do not know; Not applicable]

- On energy efficiency (specific energy consumption) **Significant improvement**
- On water efficiency (specific water consumption, specific waste water generation) **Significant improvement**
- On material efficiency (specific materials consumption, specific waste generation) **Significant improvement**

65. Where quantitative BAT-AEPLs are not reflected in quantified permit conditions, what are the reasons? [open text response]

Open text response:

ClientEarth identifies two main reasons for the missing reflection of BAT-AEPLs in permit conditions:

The first, main problem is that BAT-AEPLs, including energy efficiency standards, is interpreted as being non-binding. The IED lacks clear rules in that respect in Art. 14 and 15. As explained already under Question 23, it should be made explicit that all BAT-AEPLs are binding. And when the authority has to set permit conditions of BAT-AEPLs with a range, it shall always refer automatically to the strictest end of the range. To achieve this, Art. 14(1) shall include as an additional “minimum” permit condition those environmental performance levels. Furthermore, Art. 15(2) should explicitly add that environmental performance levels shall be based on the best available techniques. Art. 15(3) should not only include emission limit values based on BAT-AEPLs, but also explicitly mention BAT-AEELs and BAT-AEPLs so that competent authorities can set clear standards. This would also lead to legally clear requirements for derogations under a revised Art. 15(4).

Secondly, when it comes in particular to energy efficiency standards, Art. 9(2) IED (and its mirror Art. 26 in the ETSD) discourages binding standards. Please see our response to Question 58 for further explanation on why Art. 9(2) should be deleted and the IED and ETS relation urgently redesigned.

Generally, we also would like to stress that the inclusion of circular economy in the IED requires an overhaul of the scope and determination of BATs. This is explained more in detail under Question 23, Section 1 and 2. As the Commission states, “Circularity is an essential part of a wider transformation of industry towards climate neutrality and long-term competitiveness. It can deliver substantial material savings throughout value chains and production processes, generate extra value and unlock economic opportunities.” (Circular Economy Action Plan, COM(2020) 98 final, 2.3). The revised IED should use this great potential by strengthening its key BAT tool. All the more, stimulating a greener choice of technology, including the choice of use of raw materials, will be achieved by improved alternative assessment requirements (see response to Question 23).

MAIN AMENDMENTS:

Article 14 IED

New letter under Art. 14(1)

(x) ENVIRONMENTAL PERFORMANCE LEVELS, INCLUDING ENERGY EFFICIENCY STANDARDS;

Article 15 IED

“3. The competent authority shall set emission limit values AND ENVIRONMENTAL PERFORMANCE LEVELS that ensure that, under normal operating conditions, emissions do not exceed the emission levels AND ENVIRONMENTAL PERFORMANCES DO NOT DIFFER FROM ENVIRONMENTAL PERFORMANCE LEVELS associated with the best available techniques AT LOWEST EMISSION LIMIT OF ITS RANGE AND AT STRICTEST PERFORMANCE LEVEL OF ITS RANGE as laid down in the decisions on BAT conclusions (...)”

Article 9 IED

(2) – TO BE DELETED –

66. A. Does the current IED and other related legislation (e.g. Article 11 of E-PRTR Regulation 166/2006 and Article 4 of Directive 2003/4/EC on public access to environmental information) sufficiently allow collection of information on parameters of resource efficiency while protecting operators' concerns on Confidential Business Information (CBI)? [Yes; No]

No

B. If you answered “NO”, what changes do you think are needed in the legislation to allow the effective setting of ambitious and binding AEPLs regarding resource efficiency? [open text response]

Open text response:

We would like to stress that there are still significant gaps on reporting obligations both in the IED and E-PRTR which is a huge burden to get access to information with respect to resource efficiency. As for emissions, resource efficiency data is to be monitored continuously and transparently (see also response to Question 39 and Question 95).

When it comes to setting ‘ambitious’ BAT-AEPLs regarding resource efficiency, we would like to emphasize that a transparent exchange of information between Member States and the Commission, industries and NGO representatives is of utmost importance to develop any BAT at the first place. As described under Question 95, there is a huge imbalance between NGO representatives and other participants in the Sevilla process. Ensuring a right balance can be, inter alia, addressed in Art. 13 (in addition to a dedicated funding stream). In any case, any withholding of information and any excessive use of ‘Confidential Business Information’ hinders even more a transparent and efficient decision-making at the expense of ensuring a high level of protection (see also EEB, “Confidential business information and industry infiltration within Member State delegations in Technical Working Group (EU BREF process)”, http://eipie.eu/storage/files/2021_01_20%20EEB%20letter%20to%20DG%20ENV%20CBI%20closed%20workshop%20way%20forward.pdf).

Finally, we would like to add in this context that we do experience issues of not receiving relevant information during permitting procedures, too. For example, cost benefit assessments under Art. 15(4) are not disclosed based on CBI arguments. Please see for more our response under Question 95.

67. A. Once the CBI is collected, are there barriers to its use in order to allow the effective setting of ambitious and binding AEPLs on resource efficiency/ Circular Economy requirements? [Yes; No]

Yes

B. If you answered “YES” to the above, what are these barriers? [open text response]

Please see above.

C. What would need to change in the legislation AND/ OR the BREF process to overcome any identified CBI-related barriers? [open text response]

Please see above.

3.2 Further elaborate obligations relating to resource efficiency and circular economy

According to the IED evaluation, the IED has not been very effective in addressing resource efficiency and circular economy aspects. Furthermore, BREFs & BAT Conclusions do not systematically take into account value chain issues that could be addressed by the IED operator. Two options are under consideration to address this issue:

It is proposed to extend the scope of monitoring/ reporting to cover resource efficiency improvements achieved under the EMS by introducing an operator Resource Efficiency and Circular Economy Plan, organising at plant level the continuous improvement of resource efficiency (materials, water and energy). Such a plan would include:

- (i) Operator's measures that improve in-house resource efficiency (water, materials and energy consumption and use);
- (ii) Choices made by the operator of an IED installation that demonstrably affect:
 - a. the environmental footprint of the plant's feedstocks and resources, and/or
 - b. the environmental impacts associated with the treatment of the plant's waste and the use of by-products of the production process, in the same or in other sectors.

This plan would support BAT 1 on EMS of BAT Conclusions. It could include reporting obligations on progress and outcome, e.g. under IED Art. 14 (1)(d).

Another option is for the BREFs to include critical, sector-specific information on feedstock and waste specifications more systematically, in order to support authorities in the setting of End-of-Waste criteria, either for:

- (i) waste streams which could be converted into feedstocks for the plants/processes covered by the BREF
 - (ii) waste streams of the plants/processes covered by the BREF, which could be processed into feedstock for the own plants/processes or sector, or others'.
-

70. Do you think that monitoring/ reporting of operator's identified measures and choices that improve resource efficiency and thus realise environmental benefits either in-house or upstream or downstream in the supply chain, should be a mandatory requirement of each plant's EMS? [Yes; No]

- A. For in-house resource efficiency measures with environmental benefits **Yes**
- B. For measures with upstream environmental effects associated to the plants' intake of (secondary) raw materials, (renewable) energy or other resources **Yes**
- C. For measures with downstream environmental effects related to the valorisation of the plant's waste and by-products **Yes**

If yes, should this mandatory reporting include a time-limited improvement plan (with concrete timeline, actions, milestones, and monitorable objectives and (qualitative and/or quantitative targets)? [open text response]

Open text response:

We would like to emphasize that time-improvement plans should not be deployed as a type of derogation measure that could undermine regulatory requirements, but rather as an approach to ensure continuous progress towards the desired objectives.

Furthermore, we would like to stress that the entire value chain should taken into account to ensure a most efficient approach. In the end, it shall facilitate the transformation to a far less impactful industry.

71. How would IED operators’ contribution to resource efficiency and to the circular economy be impacted by the inclusion in BREFs of information that is meant to contribute to the setting of end-of-waste criteria by local or national authorities or at Community level? [Significant improvement; Moderate; Slight; No impact; Do not know; Not applicable]

Slight

72. A How would IED operators’ contribution to resource efficiency and to the circular economy be impacted by the inclusion in BREFs of information of how to improve upstream and downstream environmental impacts of the operation of the installation? [Significant improvement; Moderate; Slight; No impact; Do not know; Not applicable]

Significant improvement

B If significant, is clarification needed on how BREFS and BAT Conclusions cover upstream and downstream environmental impacts of the operation of the installation? [Open text response]

Open text response:

Taking circular economy in the BREF and BATC seriously and include up- and downstream environmental impacts of the operation can have huge effect. As quoted already in our response to Question 65, the Commission’s acknowledges that “Circularity is an essential part of a wider transformation of industry towards climate neutrality and long-term competitiveness. It can deliver substantial material savings throughout value chains and production processes, generate extra value and unlock economic opportunities.” (Circular Economy Action Plan, COM(2020) 98 final, 2.3).

Against this backdrop, it is of utmost importance not only to provide information regarding the value chain in BREF, but to include appropriate standards and requirements in the binding BATC.

3.3 Promotion of industrial symbiosis

Industrial symbiosis (IS) refers to inter-firm resource sharing by related or traditionally separate industry sectors in a collective approach, to achieve a mutually beneficial competitive advantage involving physical exchange of materials, energy, water and by-products. The exchange of production residues is however

considered as recycling (waste treatment), and not as Industrial Symbiosis, if a production residue that is categorised as waste¹, is reprocessed into products, materials or substances. (NB such reprocessed uses may be for the original or other purposes, and may be in a facility that exclusively or mainly uses wastes as an input for its production.)

Industrial Symbiosis has clear advantages for resource efficiency and in promoting a more Circular Economy, but there are few measures at present that support a wider overall uptake.

BREFs currently contain limited information needed for unlocking the potential for generating mutual/reciprocal benefits from cross-sectoral and cross-value chain collaboration (thus fostering Industrial Symbiosis), which would create more resource efficient value chains.

Options are under consideration to promote industrial symbiosis through national plans, supported by EU guidance on good practices and information included in BREFs.

75. Do you have national measures promoting industrial symbiosis? [Yes; No] If yes, please describe. [open text response]

No

76. A. Would national plans contribute to the uptake of industrial symbiosis? [Significant improvement; Moderate; Slight; No impact; Do not know; Not applicable]

Do not know

B. If an “improvement”, would the inclusion of information in BREFs on the potential for a sector to engage in industrial symbiosis, complemented by EU guidance on good practices, usefully support such national plans? [Significant improvement; Moderate; Slight; No impact; Do not know; Not applicable]

Do not know

3.4 Depletion of natural resources – general

79. What do you consider could be the untapped potential via the IED actions listed below [High, medium, low]:

- *Mandatory BAT-AEPLs and proper management of CBI issues*
 - *Water use efficiency & water reuse* **High**
 - *Choice of primary/ secondary feedstock and fuels* **High**
 - *Waste reduction and recycling* **High**
 - *Energy use* **High**
 - *Improved environmental performance over the supply chain* **High**
 - *Other – please specify -*
- *Reinforced mandatory resource efficiency reporting requirements in EMS*

- *Water use efficiency & water reuse* **Medium**
 - *Choice of primary/ secondary feedstock and fuels* **Medium**
 - *Waste reduction and recycling* **Medium**
 - *Energy use* **High**
 - *Improved environmental performance over the supply chain* **Medium**
 - *Other – please specify -*
- *Inclusion in BREFs of critical, sector-specific information to support setting of End-of-Waste criteria*
- *Water use efficiency & water reuse* **Low**
 - *Choice of primary/ secondary feedstock and fuels* **High**
 - *Waste reduction and recycling* **High**
 - *Energy use* **Moderate**
 - *Improved environmental performance over the supply chain* **High**
 - *Other – please specify -*
- *Promotion of industrial symbiosis by Member States/ regions/ intra-sector and inter-sector local systems*
- *Water use efficiency & water reuse* **High**
 - *Choice of primary/ secondary feedstock and fuels* **High**
 - *Waste reduction and recycling* **High**
 - *Energy use* **Medium**
 - *Improved environmental performance over the supply chain* **High**
 - *Other – please specify -*

If you have referred to an “Other” area of resource efficiency, please specify. [open text response]

-

4 Problem 4: State of the art techniques cannot respond satisfactorily to problem areas #1 to #3 (deployment of emerging and breakthrough technologies)

Deployment of emerging and breakthrough technologies is needed to address the emission of pollutants and GHGs. It is expected that the same innovative techniques will contribute to reducing emissions of both pollutants and GHGs.

The evaluation of the IED concludes that the IED has not made a significant contribution to the uptake of innovative techniques. This is driven by a number of factors, including:

- The BREF review cycle is slow, i.e. 10 to 12 years
- BAT-AELs are based on ‘backward looking’ information and are static
- Scarce information on innovative techniques is included in BREFs and BAT conclusions
- There are few technology suppliers/developers in the BREF Technical Working Groups.
- There is no evidence of effective action taken by Member States under Art. 27 of the IED to promote development and application of emerging techniques and no Commission guidance has been published
- Art 15(5) derogation seem to be used in very limited occasions

Options are under consideration to better reflect recent innovations in BREFs, including:

- Shorter BREF cycle focussing on recent innovations and their expected future environmental performance, i.e. Emerging Techniques Associated Emission Levels (ET-AELs)
- Upscale the Industrial Emissions Innovation Observatory to monitor the Technology Readiness Level (TRL) of emerging and breakthrough technologies. Recognition by the Observatory of an advanced TRL would trigger BREF reviews. This builds on a pilot to test an Innovation Observatory for two BREFs (Textiles and Slaughterhouses and animal by-products), being included in BREFs.

Options are also under consideration to facilitate the deep transformation of industry to apply emerging/breakthrough techniques and avoid inadvertently “locking-in” existing good rather than best practice including:

- Revision of IED (Art 15(5)) to facilitate development and testing of emerging techniques (currently allows testing of emerging techniques over a period of up to 9 months, revision would involve extending time period (period to be determined)).
- Revision of IED Article 21(3) to provide more than four years for deep transformation of industrial sectors, where BAT conclusions have recognised innovative techniques being BAT and require dramatic changes across a sector (e.g., requiring co-adoption of novel techniques that substantially reduce GHG emissions as well as emissions of other pollutants/ use of materials and resources).
- Revision of IED Article 21(3) to allow more time for operators to implement higher performing emerging techniques with a high Technology Readiness Level (TRL), instead of implementing BAT within four years. This would be supported by inclusion in BREFs of stricter long-term Emerging

Techniques Associated Emission Levels (ET-AELs) reflecting the expected environmental performance of emerging techniques.

80. To what extent do you think that the following actions would accelerate uptake of innovations? [Significant contribution; Moderate; Slight; No impact; Do not know; Not applicable]

- Shorter BREF cycle focussing on recent innovations and their expected future environmental performance, i.e. Emerging Techniques Associated Emission Levels (ET-AELs) **Significant contribution**
- Upscale the Industrial Emissions Innovation Observatory to monitor the Technology Readiness Level (TRL) of emerging and breakthrough technologies. Recognition by the Observatory of an advanced TRL would trigger BREF reviews. **Slight**
- Revision of IED (Art 15(5)) to facilitate development and testing of emerging techniques (currently allows testing of emerging techniques over a period of up to 9 months, revision would involve extending time period (period to be determined)). **Do not know**
- Revision of IED Article 21(3) to provide more than four years for deep transformation of industrial sectors, where BAT conclusions have recognised innovative techniques being BAT and require dramatic changes across a sector (e.g., requiring co-adoption of novel techniques that substantially reduce GHG as well as emissions of other pollutants/ use of materials and resources). **Do not know**
- Revision of IED Article 21(3) to allow more time for operators to implement higher performing emerging techniques with a high Technology Readiness Level (TRL), instead of implementing BAT within four years. This would be supported by inclusion in BREFs of stricter long-term Emerging Techniques Associated Emission Levels (ET-AELs) reflecting the expected environmental performance of emerging techniques. **Do not know**

81. How often should emerging techniques for each sector be reviewed? E.g. reviewing the maturity (TRL) or expected performance levels.

Every 0-1 years Every 2-3 years Every 4-6 years Not applicable Do not know

Do not know

82. To what extent do you think the Innovation Observatory can impact on: [Significant improvement; Moderate; Slight; No impact; Do not know; Not applicable]

- More frequent identification and assessment of emerging and breakthrough techniques maturity More participation of technology developers to get their views (and evidence) on emerging and breakthrough techniques **Do not know**
- Qualifying emerging and breakthrough techniques as candidate BAT faster or more frequently (in between two BREF reviews) **Do not know**
- Generating information on the expected future environmental performance of identified emerging and breakthrough techniques **Do not know**
- Generating information on expected capital costs and running costs of identified emerging and breakthrough techniques **Do not know**

- Facilitating the deep transformation of industry to more promptly apply emerging and breakthrough techniques *Do not know*

83. Which stakeholders should sit in the Innovation Observatory?

- European Commission
- Industrial operators
- *Environmental NGOs*
- Member State representatives / competent authorities
- *Civil NGOs*
- *Think tanks*
- *Applied RTD institutes*
- *Technology developers and providers*
- *European Environment Agency*
- *European Institute of Innovation & Technology (EIT)*
- *Other, please specify Academia*

If you have referred to an “Other” stakeholder, please specify. [open text response]

Open text response:

- It is of utmost importance to include academia as relevant stakeholders.
- With our response above we wanted to emphasize the inclusion of stakeholders that are often not well represented in committees and observatories. Currently, we do experience a huge imbalance between industry (and other) representatives and NGO representatives, in particular in the Sevilla process.

The participation of NGOs in the Sevilla process is a central feature in order to obtain a more balanced view of the issues relevant to effective IED implementation. However, NGOs have very limited resources to participate in this process, meaning that in practice far too few NGOs (mainly EEB) have been able to regularly take part in the processes on behalf of the entire NGO community in Europe. In order to change this situation, the Commission should provide for a dedicated funding stream to facilitate the participation of NGO representatives at the meeting. We would like to emphasize that participation in the Sevilla process is a matter of Art. 8 Aarhus Convention, in relation to the preparation of executive regulations. Moreover, Art. 3(4) Aarhus Convention requires its Parties to give appropriate support for associations, organizations or groups promoting environmental protection.

Against this backdrop, also for the Innovation Observatory to ensure the effective and meaningful participation of NGOs, its design has to ensure a balanced number of seats while providing appropriate support such as a dedicated funding stream has to be ensured. Where there is no equal seat allocation, the balanced representation should be ensured through giving more weight to the NGOs that do participate.

84. **Assuming that energy intensive sectors would decarbonise faster and experience deeper transformation, do you consider it useful to focus the activities of the Innovation Observatory on energy intensive sectors during its first years of operation?** [strongly agree, agree, neutral, disagree, strongly disagree, do not know]

Do not know

85. **To what extent would accelerated uptake of innovative techniques through improvements of the IED, have an impact on the following?** [Significant increase; Increase; No impact; Reduction; Significant reduction; Do not know] Where significant, please provide more detail [open text response]

- EU competitiveness *Do not know*

- EU market share *Do not know*

- Trade with third countries *Do not know*

- Employment *Do not know*

- Consumer prices *Do not know*

- Innovation *Do not know*

- Reduced environmental impacts via advance investment cycle planning of new/ revised installations, processes and equipment *Do not know*

86. **A. To what extent do you think that allowing more time for installations to implement innovative techniques with a high Technology Readiness Level (TRL), instead of implementing BAT within 4 years, would drive industrial investment towards more advanced technologies?** [Significant improvement; Moderate; Slight; No impact; Do not know; Not applicable]

Do not know

B. What would be the impact on permitting of such ‘two-speed’ approach? Assuming that in practice the BREF review cycle typically lasts 12 years, what could be the duration of the additional time granted for implementing innovative techniques identified in the Innovation Observatory, without jeopardising the sectoral level playing field? [1 year; 2-4 years; 4-8 years; depending on the achieved improvement versus BAT]

Depending on the achieved improvement versus BAT

5 Problem 5: Private individuals have limited opportunities to obtain information about, and take action regarding impacts caused by (agro-)industrial plants

5.1 Public access to information

There are heterogeneous approaches between and within Member States when providing public access to information, with cases of restricted access, information being made available only upon request, or for a fee, appearing to go against the phrasing of Article 24(2) of the IED. In addition, information is presented in complex formats, which makes it potentially challenging to the public to identify relevant information, or to track changes in permit content over time.

Options are being considered to ensure simplified and harmonised ways of providing public access to information, through enhanced transparency of information, specifically on the permitting process, permit decisions and operation of the plant (to show how permit conditions are being met). Potential options include:

- Include in IED Article 24(2) a requirement for internet open-access (i.e. free of charge and without restricted access to registered users).
 - Require a publicly available permit summary and a clear overview of the timing of the process and validity, and dates of reviews/renewals.
-

87. **How would you rate ease of access to relevant information?** [Very easy; Easy; Moderate; Difficult; Very difficult; Do not know]

- Permit decision and accompanying documentation to inform the decision **Difficult**
- Article 15(4) derogation **Very difficult**
- Site visit reports **Difficult**
- Emissions monitoring data **Difficult**

5.2 Public access to information on the environmental impact of derogations

There is a growing need to establish and understand the environmental impacts that the use of derogations is having. Currently, there is insufficient information made publicly available to monitor the impact of Art. 15(4) derogations.

To further improve public access to information, options are being considered to make available results of emission monitoring for specific derogation granted under IED Article 15(4).

Additional questions relating to emission monitoring for specific derogation granted under IED Article 15(4) are presented under Problem 1 a – zero pollution ambition.

92. Where derogations have been granted, to what extent is information on the environmental impacts of the derogation (i.e. the difference compared to if the plant was implementing BAT and meeting BAT-AELs) already made available to the public? [Publicly available for all plants; Publicly available for some plants; Not available; Restricted availability to registered users; Available for fee; Unable to respond]

Publicly available for some plants

93. To what extent would publicly available emissions monitoring data for a specific derogation impact on public participation in the decision-making process for granting Article 15(4) derogations? [Significant improvement; Moderate; Slight; No impact; Do not know; Not applicable]

Significant improvement

5.3 Public engagement

The current scope for public participation, as defined by IED Article 24(1), does not cover all permitting procedures (e.g. there is no requirement to invite the public to participate in cases where a permit is updated to reflect BAT conclusions).

To improve public participation, options are being considered to widen the scope of public participation under the IED to all permitting procedures, including permit updates, in particular where they are expected to have a significant environmental impact.

94. Which reconsideration and updates are likely to have an environmental impact? [Significant improvement; Moderate; Slight; No impact; Do not know; Not applicable]

- As part of a regular review *Significant improvement*
- To comply with BAT Conclusions *Significant improvement*
- To reflect developments in BAT (where no BAT Conclusions have been adopted) *Significant improvement*
- To address significant pollution despite existing ELVs *Significant improvement*
- To ensure operational safety *Significant improvement*
- To comply with environmental quality standards *Significant improvement*

95. In addition to public access to information, please state additional factors that determine the extent of public participation. [open text response]

Open text response:

We observe a number of important problems in relation to access to information and public participation under the IED. Below we outline these concerns and suggest a number of possible amendments in order to address these issues.

As further explained below, many of these recommendations are intended to better implement and reflect the requirements of the Aarhus Convention in the IED. The Aarhus Convention provides an international framework for ensuring access to information, public participation and access to justice in environmental matters. The EU is a party to this Convention, and with respect to industrial installations in the EU, the IED is the primary tool for ensuring compliance with Aarhus Convention obligations. This is also reflected in Recital 27 IED.

Against this backdrop, we would like to highlight the following:

(1.) There lacks a requirement to periodically reconsider existing IED permits, which results in a complete absence of public participation. We therefore suggest an amendment to Art. 21 IED.

(2.) In order to cover the gaps in the Aarhus Convention transposition under the IED, we suggest specific revisions of Art. 25 to give the public the possibility to challenge acts and omissions which contravene the IED's provisions.

(3.) We suggest a number of changes to Art. 24 and Annex IV IED to remedy issues related to:

- (a) lack of access to information for the public;
- (b) the failure to carry out public participation procedures in relation to certain permit updates;
- (c) the modalities of public participation;
- (d) transboundary notification and consultation.

(4.) In addition, there is a need to address the issue of a lack of information around experimental plants.

(5.) Finally, we address issues with NGO participation in the Sevilla process.

In addition to those points, we would like to refer to the submission on Aarhus-related issues in the IED we provided during the IED Evaluation process in September 2019, including case studies from Spain, Bulgaria and the United Kingdom (<https://www.documents.clientearth.org/wp-content/uploads/library/2019-09-16-ied-fitness-check-response-aarhus-issues-ce-en.pdf>).

In detail:**(1.) INTRODUCE PERIODIC RENEWAL OF THE IED PERMIT (ART. 21)**

Currently, the IED does not provide for a maximum timeframe for the validity of IED permits. Art. 21 provides for general obligations, such as to perform a periodic reconsideration of the IED permits in case specific situations occur, as provided under Art. 21(3) to 21(5) (e.g. updated BAT, the pollution caused by the installation is of such significance that the existing emission limit values of the permit need to be revised etc.). However, no express obligation is provided regarding the obligation to renew the permit periodically, without the emergence of a major event.

Introducing the obligation to renew the IED permit periodically, along with standard criteria for the renewal, would ensure EU harmonization with respect to the validity of IED permits issued at across the EU, as well as to the titleholder's obligations in order to have a valid IED permit. It would harmonize currently diverging

practices regarding the timeframe of an IED permit's validity, as well as regarding the procedure to follow for its renewal/the periodic reconsideration. There have been situations, as we shall show below, when the national provisions in this regard effectively undermine compliance with the IED's obligations. EU harmonization would therefore greatly contribute to the effective implementation of the IED in a unitary manner. It would also ensure effective public participation regarding older and therefore often more polluting facilities.

A periodic re-evaluation and renewal of the IED permits is also necessary for the administrative authorities to assess whether some obligations have become obsolete or replaced by new ones, as the applicable legislation is in continuous development. A standard validity period and procedure to follow for the renewal of the IED permit would ensure a proper actualization of the IED permits at EU level, without the possibility to breach the IED's provisions. In this context, lifelong IED permits without regular reviews and appropriate renewals should not be permitted as they prevent continuous improvement for the sake of human health and environment protection. We suggest regular renewals every 4 years (as this would be in line with the maximum implementation period after new BATC publication in Art. 21(3), and in accordance with the derogation time limitation as explained in our response to Question 22).

The periodic review should be included in Art. 21 as outlined further below.

EXAMPLES FROM PRACTICE:

GREECE – EXPIRED PERMIT VALID WITHOUT PUBLIC PARTICIPATION

In Greece, an IED permit can be kept in force provided that an application for the renewal was submitted within 2 months before the expiration of the permit, according to Art. 5(4) and 6(5) of Law 4014/2011. Such a situation existed in relation to the IED permit of the coal power plant Megalopoli, which was due to expire in 2006. Nevertheless, because its renewal application was submitted before the expiration of the permit, in due time according to the national law, the IED permit was factually extended for 7 more years, until the revised IED permit was issued in 2013. As a consequence, a plant with an IED permit which had been expired for 7 years was allowed to perform industrial activities. Even though, at the time when this situation emerged, the predecessor of the IED was in force, namely the IPPC Directive, the situation remains the same under the current IED.

In 2019 the Greek Council of State issued three judgements based on a challenge by WWF Greece, Greenpeace Greece and ClientEarth (Judgement No. 1606/2019 for Megalopoli A power plant, Judgement No. 1607/2019 for Megalopoli B power plant and Judgement No. 2865/2019 for Meliti power plant). The judgments interpret these provisions in a stricter way, in the sense that the extension cannot be greater than the initial duration of the permit. Nevertheless, this still allows operators to perform an IED activity without a valid IED permit for the same timeframe as the permit's validity period. According to Law 4014/2011 currently in force in Greece, the IED permits are generally valid for 15 years. As such, an operator who submits the renewal application in due time can continue to perform an IED activity for an additional 15 years after the expiration of its IED permit.

ROMANIA – “VISA” ONLY INSTEAD OF PUBLIC PARTICIPATION

Under Romania's Emergency Ordinance 195/2005, the validity of IED permits is lifelong, provided an annual 'visa' is obtained by the operator from the competent Environmental Protection Agency. The procedure to obtain the annual 'visa' cannot be considered as a renewal of the IED permit as it consists in a simplified procedure of evaluation of the IED permit. Furthermore, this annual procedure does not include a public participation procedure, which should be inherent for the renewal of an IED permit. Thus, currently,

an IED permit that has been issued can be lifetime-extended, without comprehensive re-evaluation of the IED permit and without periodic public participation.

POLAND – PROOF OF SUBSTANTIAL CHANGES

The practice in Poland shows that NGOs have to prove that a permit update for an installation amounts to substantial change or derogation, or that a permit update has significant adverse transboundary impact and therefore requires a public participation procedure. Hence, it is the member of the public concerned who has to provide credible proof of potential significant environmental impact or technical details of an installation which would require public participation in proceedings and therefore grant access to the proceedings. For example, the expert opinion required to prove that one of the biggest CO₂ emitter in the EU – coal power plant Belchatow – has significant adverse transboundary impact requires costs tens of thousands of euros. Given the costs of experts' opinions and the lack of screening decisions, reconsiderations and updates will often not be undertaken. Periodic permit reconsiderations and updates would provide an effective countermeasure to prevent these practices.

Please note that the interpretation of “substantial change” is a problem not only in Polish practice. For more examples, please refer to Frank Bold, Industrial Emissions Directive: (Non)-substantial permit change, 01/04/2021, <https://drive.google.com/file/d/15nBhIYpMgt3X9nUFJE3GIbn8CX-YxMbF/view>).

MAIN AMENDMENTS:

Article 21 IED

“5. The permit conditions shall be reconsidered and, where necessary, updated at least in the following cases:

- (a) the pollution caused by the installation is of such significance that the existing emission limit values of the permit need to be revised or new such values need to be included in the permit;
- (b) the operational safety requires other techniques to be used;
- (c) where it is necessary to comply with a new or revised environmental quality standard in accordance with Article 18;
- (d) IN CASE THE PERMIT HAS NOT BEEN UPDATED FOR 4 YEARS OR WHERE IT HAS ONLY BEEN UPDATED FOR SPECIFIC RECONSIDERATIONS REQUIRED BY THE PRECEDING PARAGRAPHS AND SUB-PARAGRAPHS.”

(2.) EXPAND ACCESS TO JUSTICE FOR THE PUBLIC TO CHALLENGE ACTS AND OMISSIONS CONTRAVENING THE IED (Art. 25)

Currently, the IED contains gaps in transposing the access to justice provisions of the Aarhus Convention. In 2020, the European Commission proposed a reform in order to better implement the Aarhus Convention in EU law (<https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1743-EU-implementation-of-the-Aarhus-Convention-in-the-area-of-access-to-justice-in-environmental-matters>). To this end, the EU has proposed an amendment to the EU Aarhus Regulation, which regulates the possibilities for members of the public to obtain access to justice in relation to internal review of acts and omissions of the EU institutions and bodies (COM(2020) 642 final). On the same date, the Commission

also published a Communication aimed at improving access to justice to Member State courts (COM(2020) 643 final).

In the latter document, the Commission declares the inclusion of access to justice provisions in new or revised EU legislation as a priority action. This approach replaces the earlier proposal by the Commission to table a Directive to implement Art. 9(3) Aarhus Convention, which would give members of the public the possibility to challenge acts and omissions contravening EU and national law related to the environment. This Directive was finally not adopted, meaning that currently Art. 9(3) Aarhus Convention is only implemented by way of certain sectoral EU legislation and preliminary reference judgments from the Court of Justice (see cases C-240/09 Slovak Bears, C-664/15 Protect, C-197/18 Burgenland, C-826/18 Stichting Varkens in Nood etc), creating an inconsistent patchwork of implementation in EU Member States. For instance, a recent study prepared for the Commission concluded that broad legal standing is granted by law and in practice in less than half of the Member States (13 out of then 28) (see https://ec.europa.eu/environment/aarhus/pdf/Final_study_EU_implementation_environmental_matters_2019.pdf, pp. 106-107).

This inconsistency is equally reflected in the IED. Art. 25 IED implements Art. 9(2) of the Aarhus Convention by giving members of the public the possibility to challenge decisions, acts and omissions preceded by public participation in the sense of Art. 24 IED (which implements Art. 6 Aarhus Convention, compare above). While there continues to be significant issues in implementing the provision in its current form, Art. 25 IED moreover does not implement Art. 9(3) Aarhus Convention.

Art. 9(3) Aarhus Convention encompasses all cases in which an alleged violation of EU or national law relating to the environment has taken place, and enables the public to “have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities” in relation to such violations.

This is essential as it gives the public the ability to scrutinize acts and omissions at national level relating to the environment on a regular basis. Having Art. 9(3) properly reflected in the IED would thus help ensure better compliance by the IED operator and the national authority when performing their activities.

Essential in the transposition of this article into IED are the following elements (as pointed out generally in relation to Art. 9(3) Aarhus Convention by the Aarhus Convention Compliance Committee in the Aarhus Convention Implementation Guide, https://unece.org/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf, pp. 197-199):

(1) The ability to submit the challenge must generally be provided to members of the public. Even if Member States may provide for limitations of the standing, such limitations cannot block access to justice under the future IED provision transposing Art. 9(3). Access to such procedures should be the presumption, not the exception.

(2) It must be possible to challenge acts and omissions in relation to any specific IED obligation applicable either to the operator or the competent authority. These cannot be limited to any specific decisions/omissions, such as in the case of Art. 25 IED, but must apply generally.

In particular, the following acts and omissions should at a minimum be subject to such challenge:

(a) the inspection notes issued by the competent authority following an environmental inspection performed in accordance with Art. 8(2) and Art. 23 IED (act) or the lack of an environmental inspection when the situation requested such an inspection (omission);

(b) the failure of an operator holding an IED permit to perform the monitoring tests in accordance with the IED permit which it holds (omission) and other breaches of the permit conditions (act) in contravention of Art. 8(1);

(c) general binding rules adopted by the Member States when they fail to comply with Art. 17 IED.

These are examples of situations which frequently occur in practice and which currently cannot or are difficult to be challenged by the public. In all of these situations, there is an obligation of the public authority to act in order to bring the infringement by the operator to an end. A challenge could therefore address either the omission of the public authority or the act/omission by the operator directly. It could be left to the national legal system to decide which route is made available, as long as there is an effective possibility to halt the infringement in every case.

In order to remedy these issues, we suggest to add a new paragraph to Art. 25.

MAIN AMENDMENTS:

Article 25 IED

“6. IN ADDITION AND WITHOUT PREJUDICE TO THE REVIEW PROCEDURES REFERRED TO IN PARAGRAPH 1, MEMBER STATES SHALL ENSURE THAT MEMBERS OF THE PUBLIC CONCERNED IN THE SENSE OF PARAGRAPHS 1 AND 3 HAVE ACCESS TO ADMINISTRATIVE OR JUDICIAL PROCEDURES TO CHALLENGE ACTS AND OMISSIONS BY THE OPERATOR OR THE COMPETENT AUTHORITY UNDER ARTICLES 4(1), 8, 17(1) TO (3) AND 23(2), (4) AND (5).”

(3.) IMPROVE PUBLIC PARTICIPATION

(a) IMPROVE PROACTIVE DISSEMINATION OF CRUCIAL ENVIRONMENTAL INFORMATION (ART. 24 AND ANNEX IV)

Art. 24(2) and (3) and Annex IV of the IED require the proactive publication of certain information necessary to participate in relevant decision-making procedures under the Directive. However, the list of documents is too limited, meaning in practice that many important documents are not publicly available.

In such cases, members of the public can request access to these documents from the competent national public authorities in accordance with the national legislation implementing Directive 2003/4, which transposes the access to environmental information provisions of the Aarhus Convention into EU law.

However, in many cases practical issues prevent this procedure from being a functioning substitute for proactive publication of the relevant documents. Two of the most important problems are (a) the time it takes to obtain information via an access request and (b) in certain Member States, the costs charged for obtaining this information.

(i) NO TIMELY ACCESS TO INFORMATION VIA ACCESS TO DOCUMENTS REQUESTS

For documentation that is crucial to obtain in order to effectively participate in a decision-making procedure, access to information requests will in many cases not result in disclosure of information while the decision-making procedure is still ongoing. Directive 2003/4 requires public authorities to disclose information as

soon as possible or, at the latest, within one month after receipt of the request (Art. 3(2)(a) Directive 2003/4). This period may be extended to two months after the receipt if the volume and complexity of the requested information justifies it (Art. 3(2)(b)). These periods are too long to effectively obtain information to take part in an ongoing public participation procedure. Even if it is known that a public participation procedure will come up later, and the request is made particularly early, it will in practice often still be impossible to obtain the information in time in cases in which an administrative and even judicial review is necessary in relation to a refusal of the authority to provide the information.

EXAMPLE FROM PRACTICE: YEARS OF MISSING INFORMATION IN BULGARIA

This issue is well demonstrated by a case from Bulgaria. Za Zemiata and Greenpeace Bulgaria, supported by ClientEarth, requested the documents supporting the Art. 15(4) derogation requests in relation to the coal-fired power plants TPP Maritsa East 2 EAD, TPP ContourGlobal Maritsa East 3 AD and AES Maritsa East 1 EOOD. These included the cost-benefit assessments under Art. 15(4) and information that no significant pollution was caused and that a high level of protection of the environment as a whole was achieved (Art. 15 (4)). The requests were made well ahead of time (June 2018) in order to ensure timely access to the information at the time of the procedure to permit the derogation. However, the competent authority denied the request overall 4 times, requiring the NGO to appeal to the administrative court. The court quashed associated refusal decisions of the competent authority three times. Finally, even though the NGO had already been successful in court three times with a fourth case pending, the authority continues to deny access on ‘confidential information’ grounds. Hence, after almost three years, we have not obtained access to this information. This demonstrates how access to information requests cannot substitute for sufficient proactive disclosure of the relevant information.

(ii) OBTAINING INFORMATION IN SOME MEMBER STATES PROHIBITIVELY EXPENSIVE

In granting public access to environmental information, Member States authorities “may make a charge for supplying any environmental information but such charge shall not exceed a reasonable amount”, according to Art. 5(3) Directive 2003/4.

Nevertheless, in reality there are Member States which make unreasonably high cost requests. It is clear that such fees prevent effective exercise of the right to environmental information and inhibit the public from seeking to effectively participate in the IED processes.

EXAMPLE FROM PRACTICE: COSTS IN GERMANY

One example arises in Germany, where each of the 16 states (Bundesländer) implements the Directive in a different way as regards requests to their authorities. For example, in the Lower Saxony State, there is no maximum amount which can be charged by the authority when dealing with a request, such as a fixed cap or the possibility to exempt/reduce the fee for equity reasons or because the requester is an NGO. In our experience, in 2019 we have been ordered to pay costs in Lower Saxony amounting to a total of € 1208.50 for specific information related to industrial plants. In the same year in Saxony, the competent authority informed us in relation to a similar request that the charge for handling the request would exceed € 900, which meant that we had to abandon the request. In another case in 2019, a German NGO has

been charged overall € 20,782.09 in Brandenburg for information requests concerning 19 coal fired power plants, with individual awards ranging between €37 and €354.

The EEB also reports to have been charged €180 per IED related request in Lower Saxony in 2017. In a separate case, the EEB was informed that certain information on permits of 25 large combustion plants would cost up to €2,000 per plant, i.e. up to €50,000 in total (see <https://eeb.org/library/for-your-information/>, p. 21).

(iii) RESULTING RECOMMENDATIONS

These issues demonstrate that the only truly effective way in which access to information, which is necessary for the public to participate in IED procedures, can be ensured is to increase the information that is proactively disseminated by the competent authority. This is not to say that Directive 2003/4 does not fulfil an important function but its existence does not replace sufficient publication of relevant information as part of the IED. To address this, two important amendments to the IED are necessary.

First, it is crucial that the list of documents under Annex IV is expanded so as to cover all information that is necessary for the public to effectively participate in all relevant decision-making procedures under the IED. This includes in particular the assessments and re-assessments prepared for a derogation under Art. 15(4).

This is also required by Art. 6(6) Aarhus Convention, which obliges the competent public authorities to give effective access to the public, free of charge and as soon as it becomes available, to all information relevant to the decision-making procedures subject to Art. 6. While Art. 6(6) gives the possibility to only provide this information on request, this presupposes an effective way to obtain the information by way of TIMELY administrative and judicial review procedures, which, as discussed above, is not the case in many Member States.

Second, it is crucial to establish an EU-wide IED register that contains up-to-date information on industrial emissions. Currently, in most countries, ensuring public information is not done transparently nor effectively due to a missing centralised, easily accessible and online documentation format that contains all relevant information on IED procedures and documents with respect to a specific installation, as well as relevant links to environmental and human health pollution information of the same installation. Member States should provide centralised websites where all information will be collected. The EU-wide IED register should then, for the IED documentation of national States, provide the overview of these websites.

The current lack of transparency and effective information is well documented (see, e.g., for Large Combustion Plants: EEB, Burning The Evidence – How European Countries Share Industrial Pollution Permit Information Online, August 2017, <https://mk0eeborgicuyptuf7e.kinstacdn.com/wp-content/uploads/2019/07/Burning-The-Evidence.pdf>).

Moreover, we refer in this regard to the Staff Working Document on the IED Evaluation, which states: “There are, nevertheless, a number of countries outside the EU, as well as some EU regions and companies, which publish the results of emission measurements online, including in real time in the case of continuous measurements. These examples demonstrate the feasibility of applying digital technologies to improve the overall efficiency of emissions reporting, facilitate compliance checks and enhance public access to information.” (Evaluation of the IED, SWD(2020) 182 final, 23/09/2020, page 53). This is the standard that should be reached in the EU, by way of a centralised register administered by the EU Commission.

Such an EU register would better implement Art. 5(3) Aarhus Convention, which requires that environmental information progressively becomes available in easily accessible electronic databases.

In any case, in order to provide information in a timely and efficient manner, each Member State should provide for the option to register for an “automatic alert”, thanks to which the registered person will be informed automatically of any updates regarding permitting under the IED, including, but not limited to, new applications for permits, new relevant documentation such as cost/benefit assessments or drafts and decisions, etc. People should be able to select specific criteria about what kind of information (about a specific plant, a specific region, a specific type of document, etc) they want to be informed.

- A concrete proposal on how to implement these changes in the IED is suggested further below. -

(b) ENSURE PUBLIC PARTICIPATION FOR A WIDER RANGE OF DECISIONS TAKEN IN RESPECT OF IED PERMITS, WHICH IS MANDATORY UNDER THE AARHUS CONVENTION (ART. 24)

Currently public participation is mandatory under the IED for a limited range of decisions taken with respect to IED permits, as provided under Art. 24. Art. 24(1) requires public participation for: new installations, any substantial change (as defined in Art. 3(9)), in case of updating of a permit due to a derogation according to Art. 15(4) and in case where the existing emission limit values need to be revised or new values included because of the significance of the pollution caused by an installation (as per Art. 21(5)(a)). However, other cases of reconsideration or updates of permits are not covered by Art. 24 and are therefore exempted from mandatory public participation.

In its findings of 30 March 2020, the Aarhus Convention Compliance Committee (ACCC) concluded that this does not comply with the Aarhus Convention (see findings on communication ACCC/C/2014/121 (European Union), <https://unece.org/fileadmin/DAM/env/pp/compliance/CC-68/ece.mp.pp.c.1.2020.8.e.pdf>), based on a complaint by Instituto Internacional de Derecho y Medio Ambiente (IIDMA), ClientEarth’s partner organisation in Spain.

Art. 6(10) Aarhus Convention requires public participation when the operating conditions of an Annex I activity are reconsidered or updated. The activities listed in Annex I are very similar to those in Annex I IED. The public participation requirements of the Convention are to be applied *mutatis mutandis*, i.e. with the necessary changes, and where appropriate as compared to a new activity. As the ACCC explained, this implies that “if the reconsideration or update of an activity’s operating conditions is capable of significantly changing the basic parameters of the activity, or will address significant environmental aspects of the activity not already covered by the permitting decision” it should be subject to public participation (para. 101). The Committee emphasized that what is decisive is whether the change concerned is “capable of” changing the basis parameters or will “address” significant environmental aspects, not whether there will finally be a significant update or a significant environmental effect as an outcome of the reconsideration (para. 104).

On this basis, the ACCC concluded that Art. 6 Aarhus Convention also requires public participation in cases where the IED requires a reconsideration or update because of:

- i. The publication of new BAT conclusions applicable to an installations (Art. 21(3) IED);
- ii. Developments in the best available techniques allow for the significant reduction of emissions for an installation not covered by any BAT conclusions (Art. 21(4) IED);
- iii. Operational safety requirements (Article 21(5)(b) of IED);

iv. Compliance with a new or revised environmental quality standard (Article 21(5)(c) of IED).

As the Committee held, there should be public participation in these cases unless it can be excluded from the outset that the specific reconsideration or update would not be capable of significantly changing the basic parameters of the activity, and will not address significant environmental aspects of the activity.

In our view, the best manner in which this requirement can be implemented in the IED is to ensure that a reconsideration is required in all cases, because it cannot be reliably excluded in any of the mentioned cases that there will not be such changes to the parameters or that significant environmental aspects will be addressed. Such a general rule also prevents abuse in specific cases.

The findings of the ACCC are limited to those situations in which the IED explicitly requires a reconsideration or update of permit consideration. Where a reconsideration or update is conducted even though this is not mandatory under the IED, for the purposes of the Aarhus Convention the obligation to provide for public participation rests with the Member States. This follows from the EU's declaration upon accession to the Aarhus Convention, which clarifies that the Member States remain responsible for the obligations under the Aarhus Convention to the extent that EU law is not applicable. However, this does not mean that the IED currently covers for all cases in which a reconsideration or update with public participation would be required by the Aarhus Convention, let alone all cases in which a reconsideration or update would be necessary.

Particularly important is the situation of a life-time extension of an activity. As discussed above, some Member States allow for IED permits that are granted for the entire life-time of an installation. This is highly problematic because it gives the possibility to operate an installation for many years without any reconsideration or update of the permit and without using the full technological potential of installation updates in line with EU's zero pollution ambition (see section 1 above).

In this context, revising Art. 23 and 24 of IED in order to expressly transpose the provisions of the Aarhus Convention is of utmost importance. Requiring public participation for a wider range of circumstances, as mentioned above, and expressly listing these situations in the IED would lead to a higher involvement of the public in decisions related to IED permits, which is highly necessary.

- A concrete proposal on how to implement these changes in the IED is suggested further below. -

(c) IMPROVE THE MODALITIES OF PUBLIC PARTICIPATION (ART. 24 AND ANNEX IV)

In various jurisdictions, public participation procedures are not organized in an effective manner. In particular, public notices often do not reach the public concerned, participation periods are organized too late, insufficient time is given to the public authorities to take the outcome of the public participation into account and it is not adequately demonstrated how the comments of the public have been taken into account.

These issues can be demonstrated at hand of the practices of different Member States. Below, we refer to the legal framework and practice in Bulgaria, which is one of the countries in which we are particularly active.

EXAMPLE FROM PRACTICE: BULGARIA

First, in Bulgaria the public is informed that an IED permit procedure has been opened by way of notice of opening the public consultation. No information of the procedure is published before that. In the procedure for a permit update, the public consultation takes place at the very end of the process, after the operator and the competent authorities have been consulted. A clarification in Annex IV that the public notice shall be given “when all options are open” would counteract these practices as well as providing a minimum time period of 6 weeks for notification prior to the public participation.

Second, the permitting authority only has ten days to issue the permit after the end of the public consultation (Art. 186, para 4 of the IP Ordinance). Such a sequence and duration of the phases in the procedure leaves no possibility for the public to participate when all options are still open – it ultimately constitutes only a pro forma consultation. The period of ten days is instructive, meaning that a valid permit can be issued after that. It would therefore be important to clarify in Annex V that a reasonable time period must be provided for the competent authorities to take the outcome of the public consultation into account, with again a minimum period of 6 weeks.

Third, the notice for opening the public consultation primarily contains references to legal provisions and no simple explanation of the substance of the application. Information about the purpose of the procedure can be derived only through the permit application or the draft permit. Below is the notice for opening of the consultation on the proposal to grant derogation from BAT LCP 2017 for SO₂ and Hg to TPP Maritsa East 2 EAD (original in Bulgarian).

“Announcement of the Municipality of Nova Zagora

Pursuant to Art. 122 "a", para. 5 in conjunction with Art. 123a, para. 3 of the Environmental Protection Act (EPA), public access to the draft decision updating the integrated permit (IP) No 50/2005 of TPP Maritza East 2 EAD was opened, for operation of the following installations: Combustion installation for the production of electricity with a rated thermal capacity of 4 312 MWth - item 1.1 of Annex 4 to the EPA; Hydrogen production plant - item 4.2. a) from Annex No 4 to the EPA and the Landfill for inert, construction, hazardous and non-hazardous waste - item 5.4 of Annex No 4 to the EPA.

The documentation is available to interested parties every working day from 25.10.2018 to 25.11.2018 in:

1. The building of the Municipality of Nova Zagora, Nova Zagora, 1 May Street 1, floor 4, room 404, from 8:00 to 12:00 and from 13:00 to 17:00;
2. The Public Information Center at the Executive Agency for the Environment (EEA), Sofia, 136 Tsar Boris III Blvd., 13th floor from 09:00 to 12:00 and from 13:00 to 17:30.

Contacts, comments, clarifications and objections:

*** - Head of the Department of PHAPZ, EEA, tel .: 02 / 940-64-71;

*** - Head of ECO Department of Nova Zagora, tel .: 0457/5 70 33.”

The technicality of the content makes it very difficult for non-experts to understand the substance of the proposal and to participate. It is indicative that in all IED permit procedures regarding coal power plants in Bulgaria in the period 2018-2020, our partners Za Zemiata and Greenpeace Bulgaria were the only natural or legal persons to respond to public consultations. The only public consultation in which individuals actively participated was on the application of TPP Brikel to incinerate RDF and biomass together with coal. As a result of the active campaign of ENGOs, approximately 100 individuals submitted responses to the public consultations. This proves that while members of the public in general have interest to participate, they are barred to do so due to the technical nature of the information provided and the

inaccessible notices to the public. It should therefore be clarified in Annex IV that public notices must be formulated in non-technical language.

Fourth, the notice for the start of the public consultation is published on the website of the permitting authority and the website of the municipality. The notice is also placed in the building of the municipality and is published in a newspaper. Notices are however not posted in places usually frequented by the public. At the very least therefore, Annex IV should require notices in the vicinity of the activity.

Fifth, the responses to the public consultations are included in the technical assessment together with an explanation whether the proposal is taken into consideration and why. It has already been pointed out, that in the permit update procedure in Bulgaria, the public consultation takes place after all stakeholders are consulted and the authority has only 10 days to finalize the administrative decision. In practice, the permitting authority is forced to disregard the results of the consultation. Besides clarifying that sufficient time needs to be allocated to take the input into due account, it should therefore be stated in Art. 24 IED that the competent authorities publish a report on how the outcome of the public participation has been taken into account.

- *A concrete proposal on how to implement these changes in the IED is suggested further below.* -

(d) CLARIFY TRANSBOUNDARY CONSULTATION REQUIREMENTS

Currently, the IED provides for the obligation to notify the competent authorities of other Member States which may be affected by the an IED activity that is performed within their territory, according to Article 26 IED. This provision transposes the Espoo Convention on environmental impact assessment in a transboundary context (Espoo Convention).

In addition to this obligation, in relation to the potential transboundary impact on the environment of another Member State, the Aarhus Convention requires that the public concerned be informed of an activity, without discrimination as to residence and nationality (Art. 6 in conjunction with Art. 3(9) Aarhus Convention). The Aarhus Convention Compliance Committee clarified these requirements in cases [ACCC/C/2012/71](https://unece.org/fileadmin/DAM/env/pp/compliance/CC-56/ece.mp.pp.c.1.2017.3.e.pdf) (Czech Republic - <https://unece.org/fileadmin/DAM/env/pp/compliance/CC-56/ece.mp.pp.c.1.2017.3.e.pdf>) and [ACCC/C/2013/91](https://unece.org/fileadmin/DAM/env/pp/compliance/CC-58/ece.mp.pp.c.1.2017.14.e.pdf) (United Kingdom - <https://unece.org/fileadmin/DAM/env/pp/compliance/CC-58/ece.mp.pp.c.1.2017.14.e.pdf>) as regards EIA procedures related to nuclear power plants. As an interpretation of Art. 6 Aarhus Convention, the same requirements apply for activities subject to the IED which have potential transboundary effects.

The IED already incorporates the requirement to notify the public concerned by an activity (Art. 24(1) in conjunction with Art. 3(17) IED). However, in practice notification is often limited to the public living within the Member States, even if the activity has clear transboundary effects thus equally affecting persons living in another Member State.

For example, in the beginning of 2019, the Bulgarian government granted derogation from the LCP BAT Conclusions of 2017 to TPP Maritsa East 2 EAD. TPP Maritsa East 2 EAD is the biggest coal power plant in Bulgaria. An EIA decision of 2004 found that the installation has a transboundary impact in the territory of Greece. Studies prove that the installation has an impact in the territory of neighbouring Member States (especially health risks based on particulate matter from long-range transboundary air pollution) and that coal power plants in general may contribute to the air pollution hundreds of kilometers away from the plant (<https://beyond-coal.eu/last-gasp/>). Nonetheless, in the procedure for issuing the derogation decision, the permitting authority did not inform the authorities in Greece, nor the public concerned in Greece.

This example highlights two separate issues. First, the obligation under the Espoo Convention as implemented under Art. 26 IED only apply in case of new installations and major changes. However, decisions such as the mentioned derogation also have potentially significant effects on the public living abroad. Accordingly, Art. 26 IED should be amended to apply to all permit reconsiderations and updates subject to public participation in line with Art. 21 IED.

Second, the separate obligation under the Aarhus Convention to inform the public concerned, regardless of whether they live in the Member State of the activity or abroad, was not complied with. In particular, the public living in Greece should have been notified in an adequate, timely and effective manner (see findings cited above, C71, para. 72 and C91, para. 81). This obligation should therefore be made clearer in Annex IV IED.

MAIN AMENDMENTS:

We suggest the following amendments to Art. 24, Annex IV and Art. 26 IED. Please note that this includes also references to our suggestions regarding an amended Art. 21(5) as stated in Section 1 above (Question 95) and our suggestions as explained under Question 23.

Article 24 IED

“1. Member States shall ensure that the public concerned are given early and effective opportunities to participate in the following procedures:

- (a) the granting of a permit for new installations;
- (b) the RECONSIDERATION OR granting of a permit for any substantial change;
- (c) the granting or RECONSIDERATION OR updating of a permit for an installation where the application of Article 15(4) is proposed;
- (d) THE RECONSIDERATION AND updating of a permit or permit conditions for an installation in accordance with ARTICLE 21(2), (4) or (5);
- (E) ANY OTHER RECONSIDERATION AND UPDATING OF A PERMIT, UNLESS THE POTENTIAL UPDATE IS NOT CAPABLE OF CHANGING THE BASIS PARAMETERS OF THE PERMIT AND WILL NOT ADDRESS ANY SIGNIFICANT ENVIRONMENTAL ASPECTS OF THE ACTIVITY.

The procedure set out in Annex IV shall apply to such participation.

2. When a decision on granting, reconsideration or updating of a permit has been taken, the competent authority shall make available to the public AS SOON AS POSSIBLE, including via the internet, the following information:

- (a) the content of the decision, including a copy of the permit and any subsequent updates;
- (b) the reasons on which the decision is based;
- (c) the results of the consultations held before the decision was taken and an explanation of how they were taken into account in that decision,

(D) THE COMMENTS AND OPINIONS SUBMITTED BY THE PUBLIC DURING THE PUBLIC PARTICIPATION PROCEDURE TOGETHER WITH A REPORT SUMMARISING HOW THESE COMMENTS AND OPINIONS HAVE BEEN TAKEN INTO ACCOUNT;

(E) the title of the BAT reference documents relevant to the installation or activity concerned;

(F) how the permit conditions referred to in Article 14, including the emission limit values, have been determined in relation to the best available techniques and emission levels associated with the best available techniques;

(G) where a derogation is granted in accordance with Article 15(4), the specific reasons AND ASSESSMENTS for that derogation based on the criteria laid down in that paragraph and the conditions imposed.

3. The competent authority shall also make available to the public AS SOON AS THEY ARE RECEIVED BY THE COMPETENT AUTHORITY, including via the Internet:

(a) relevant information on the measures taken by the operator upon definitive cessation of activities in accordance with Article 22;

(b) the results of emission monitoring as required under the permit conditions and held by the competent authority.

4. THE MEMBER STATES SHALL ESTABLISH CENTRALISED NATIONAL ONLINE PLATFORMS, WHICH SHALL CONTAIN THE INFORMATION REFERRED TO IN PARAGRAPHS 2 AND 3, ANNEX IV AND THE RESULTS OF EMISSION MEASUREMENTS, AS SOON AS THE INFORMATION IS RECEIVED. THESE PLATFORMS SHALL BE FREE OF CHARGE AND ALLOW ANY PERSON TO SET UP AUTOMATIC ALERTS ON SPECIFIC TYPES OF INFORMATION.

5. THE COMPETENT AUTHORITY SHALL SUBMIT THE INFORMATION REFERRED TO IN PARAGRAPH 4 TO THE COMMISSION. THE COMMISSION SHALL DISPLAY THESE MEASUREMENTS IN THE EUROPEAN EMISSIONS REGISTER AS SOON AS THEY ARE RECEIVED. THE COMMISSION SHALL ADOPT A DELEGATED ACT BY [1 YEAR FROM ADOPTION OF THE AMENDMENT] TO DETERMINE THE DETAILED SET-UP OF THE REGISTER.

6. Paragraphs 1, 2 and 3 of this Article shall apply subject to the restrictions laid down in Article 4(1) and (2) of Directive 2003/4/EC.

Annex IV of the IED

“1. The public shall be informed IN NON-TECHNICAL LANGUAGE (by public notices IN THE VICINITY OF THE ACTIVITY AND other appropriate means INCLUDING FREELY ACCESSIBLE ONLINE INFORMATION) of the following matters early in the procedure, WHEN ALL OPTIONS ARE OPEN, for the taking of a decision or, at the latest, as soon as the information can reasonably be provided:

(a) the application for a permit or, as the case may be, the proposal for the updating of a permit or of permit conditions in accordance with Article 21, including the description of the elements listed in Article 12(1);

(b) where applicable, the fact that a decision is subject to a national or transboundary environmental impact assessment or to consultations between Member States in accordance with Article 26;

(c) details of the competent authorities responsible for taking the decision, those from which relevant information can be obtained, those to which comments or questions can be submitted, and details of the time schedule for transmitting comments or questions;

(d) the nature of possible decisions or, where there is one, the draft decision;

(e) where applicable, the details relating to a proposal for the updating of a permit or of permit conditions;

(f) an indication of the times and places where, or means by which, the relevant information will be made available;

(g) details of the arrangements for public participation and consultation made pursuant to point 5.

2. Member States shall ensure that, AS SOON AS POSSIBLE, the following is made available to the public concerned:

(a) the main reports and advice issued to the competent authority or authorities at the time when the public concerned were informed in accordance with point 1;

(B) WHERE APPLICABLE, ALL ASSESSMENTS OR RE-ASSESSMENTS PREPARED FOR THE PURPOSES OF A DEROGATION UNDER ARTICLE 15(4);

(c) in accordance with Directive 2003/4/EC, information other than that referred to in point 1 which is relevant for the decision in accordance with Article 5 of this Directive and which only becomes available after the time the public concerned was informed in accordance with point 1.

3. The public concerned shall be entitled to express comments and opinions to the competent authority before a decision is taken.

4. The results of the consultations held pursuant to this Annex must be taken into due account in the taking of a decision.

5. The detailed arrangements for informing the public (for example by bill posting within a certain radius or publication in local newspapers) and consulting the public concerned (for example by written submissions or by way of a public inquiry) shall be determined by the Member States. Reasonable time-frames for the different phases shall be provided, allowing sufficient time to inform the public and for the public concerned to prepare and participate effectively in environmental decision-making subject to this Annex AND FOR THE COMPETENT AUTHORITIES TO TAKE THE OUTCOME OF THE CONSULTATIONS INTO DUE ACCOUNT. EACH PERIOD (NOTIFICATION PRIOR TO THE CONSULTATION PERIOD, THE CONSULTATION PERIOD ITSELF, TAKING INTO ACCOUNT THE COMMENTS RECEIVED) SHALL IN NO CASE BE SHORTER THAN 6 WEEKS.

6. THE PUBLIC CONCERNED LIVING ACROSS A NATIONAL BORDER FROM THE ACTIVITY SHALL BE INFORMED IN AN EQUALLY EFFECTIVE MANNER TO THE PUBLIC CONCERNED LIVING IN THE SAME MEMBER STATES WHERE THE ACTIVITY IS IMPLEMENTED. THIS SHALL INCLUDE THE TRANSLATION OF RELEVANT INFORMATION UNDER PARAGRAPHS 1 AND 2 ABOVE.”

Article 26 IED

“1. Where a Member State is aware that the operation of an installation is likely to have significant negative effects on the environment of another Member State, or where a Member State which is likely to be

significantly affected so requests, the Member State in whose territory the application for a permit pursuant to Article 4 or Article 20(2) OR UPDATE PURSUANT TO ARTICLE 21 was submitted shall forward to the other Member State any information required to be given or made available pursuant to Annex IV at the same time as it makes it available to the public. (...)"

(4.) NOTIFICATION OF EXPERIMENTAL PLANTS

Art. 42(2)(b) exempts experimental plants which treat less than 50 tonnes per year from the application of Chapter IV and thus the special obligations related to waste incineration plants. While the principle of allowing for certain experimental installations for research purposes is not in itself problematic, in certain Member States this provision is used to allow for waste incineration not meant for research, development and testing and/or exceeding 50 tonnes per waste per year.

For instance, in Bulgaria waste incineration exceeding this threshold was permitted in at least two plants (Bobovdol and Brikel). Since these experimental plants are exempted from Chapter IV, there is a lack of information for the public and to the Commission when these clear breaches of the IED occurs. It is therefore necessary to insert a provision into the IED to ensure that the operation of these experimental plants is notified.

We therefore propose an amendment to Art. 42.

EXAMPLE FROM PRACTICE: BULGARIAN LETTERS

In June and July 2018, TPP Bobov Dol EAD sent two letters to the Minister of Environment and Waters, requesting that they allow the plant to co-incinerate 500,000 tonnes of waste for experimental purposes. In August 2018, the Minister authorised TPP Bobov Dol EAD the experimental co-incineration of unspecified amounts of non-hazardous waste without updating the plant's integrated permit. The period of authorisation was 6 months, from 12 November 2018 to 11 May 2019. The authorisation was granted on the basis of Art. 42(2)(b) IED by means of a simple letter. The procedure for issue of an integrated permit was not applied. The public was not informed at any stage of the procedure and the letter was not published. EIA procedures were not followed.

Bulgarian NGOs Za Zemiata and Greenpeace Bulgaria found out about this authorisation from media publications. In February 2019, the two organisations requested access to the letter. However, the access was denied for a number of reasons, including national security and commercial confidentiality. Following two court decisions that found the refusal unlawful, in autumn 2020, the Minister disclosed the letter. Za Zemiata and Greenpeace Bulgaria, supported by ClientEarth, challenged the letter in court claiming that the official procedure for issue of an integrated permit was not followed. In its defence, the Ministry argues that the authorisation was issued by means of a simple letter, because there is no legislative procedure to authorise experimental activities. The case is currently pending before national courts.

According to TPP Bobov Dol EAD `s annual environmental reports (<http://eea.government.bg/bg/r-r/r-kpkz/godishni-dokladi-14/index>), the plant incinerated 47,000 tonnes of waste in 2018 and 31,000 of waste in 2019 on the grounds of the Minister`s letter. In April 2019, the installation was granted an official permit to co-incinerate coal, RDF and biomass.

MAIN AMENDMENTS:

Article 42 IED

“2. This Chapter shall not apply to the following plants:

(...)

(b) experimental plants used for research, development and testing in order to improve the incineration process and which treat less than 50 tonnes of waste per year.

MEMBER STATES SHALL IMMEDIATELY INFORM THE COMMISSION AND THE PUBLIC CONCERNED, IN LINE WITH ANNEX IV, PRIOR TO GRANTING CONSENT, OF THE REASONS JUSTIFYING THE NON-APPLICATION OF THIS CHAPTER TO THE SPECIFIC PLANT.”

(5.) IMPROVE NGO STAKEHOLDER PARTICIPATION IN THE SEVILLA PROCESS

The participation of NGOs in the Sevilla process is a central feature in order to obtain a more balanced view of the issues relevant to effective IED implementation. However, NGOs have very limited resources to participate in this process, meaning that in practice far too few NGOs (mainly EEB) have been able to regularly take part in the processes on behalf of the entire NGO community in Europe. In order to change this situation, the Commission should provide for a dedicated funding stream to facilitate the participation of NGO representatives. We would like to emphasize that participation in the Sevilla process is a matter of Art. 8 Aarhus Convention, in relation to the preparation of executive regulations. Moreover, Art. 3(4) Aarhus Convention requires its Parties to give appropriate support for associations, organizations or groups promoting environmental protection.

Next to such funding stream, also Art. 13 IED can be strengthened by including an explicit rule that the exchange between the Commission, Member States, industries and NGO representatives shall ensure a balanced number of representatives. Where there is no “equal seat” allocation, the balanced representation should be ensured through giving more weight to the NGOs that participate.

- Please note that the capital letters in our proposed amendments represent a change from the current text of the provision (addition or deletion). -

6 Problem 6: Policy overlap may affect overall policy efficiency

6.1 Internally conflicting provisions within the IED

In addition to IED Annex II pollutants, relevant pollutants to an IED sector are identified in a systematic manner through the BREF information exchange process. Thus, BAT-AELs can be adopted by BAT Conclusions for additional pollutants to those set out in IED Annex II.

Depending on the extent to which it is used when setting permit conditions, the removal of Annex II is under consideration.

99. Generally, when reviewing and setting permit conditions, do you make reference to IED Annex II pollutants, to the pollutants in BAT conclusions or to information on substances that could be emitted by the individual installation? [Mainly IED Annex II pollutants; Mainly pollutants in BAT conclusions; Equally IED Annex II pollutants and pollutants in BAT conclusions]

Equally IED Annex II pollutants and pollutants in BAT conclusions

Conflicting operating regimes internally within the IED leads to excessive burden

The IED includes several requirements on **combustion plants**: chapter II of the IED and Annex I activity 1.1 comprises combustion installations of at least 50 MWth; the LCP BAT Conclusions set out BAT for LCPs under chapter II; and chapter III of the IED sets special provisions for combustion plants of at least 50 MWth whilst referring to Annex V.

Similarly, the IED includes several requirements on **waste incineration plants**: chapter II of the IED and Annex I activity 5.2; the BAT Conclusions on waste incineration under chapter II; and dedicated special provisions for waste incineration plants in chapter IV and the Annex VI to the IED. Chapter IV applies to all waste incineration plants while Chapter II (BAT Conclusions) applies only above a capacity threshold.

Furthermore, both gasification and pyrolysis plants are considered within the scope of Chapter IV (IED Article 42) while pyrolysis is not explicitly listed under Annex I activities. This results in uncertainty regarding which plant categories are within the scope of the IED.

These dual requirements are not necessarily an issue leading to complexity for competent authorities and operators, except for the differences in scope.

The assessment of compliance is further complicated for both LCPs and WIs because averaging periods set out in Annex V and Annex VI to the IED differ from those under the LCP BAT Conclusions. In addition some terminology is currently undefined at EU level related to normal operating conditions. This difference leads to additional administrative cost for operators and competent authorities.

Finally, prior work undertaken by the Commission has flagged that the current wording of Annex V Part 3 has not been implemented consistently between Member States with regard to the subtraction of measurement uncertainty in compliance assessment.

Options are under consideration to:

- Clarify the definitions of 1) Combustion installation and combustion plant; 2) co-incineration, and (3) normal operation conditions for LCPs and (co)-incinerators.
- Streamline the provision of the various chapters of the IED regarding gasification and pyrolysis plants
- Harmonise or allow conversion between the different averaging periods used in IED Annex V and VI and the LCP BAT Conclusions
- Harmonise the approaches taken in accounting for measurement uncertainty in compliance assessment for LCPs and waste (co)-incinerators

100. **To what extent would the following actions of the IED be helpful?** [Very helpful; Slightly helpful; Neutral/no view, Unhelpful; Do not know]

- Clarification of the definitions of 'combustion installation' and 'combustion plant' **Slightly helpful**
- Clarification of the definition of 'co-incineration' **Very helpful**
- Clarification of the definition of 'normal operating conditions' for LCPs and (co)-incinerators **Very helpful**
- Streamlining the provision of the various chapters of the IED regarding gasification and pyrolysis plants **Very helpful**
- Harmonising or allowing conversion between the different averaging periods used for LCPs in IED Annex V and the LCP BAT Conclusions **Do not know**
- Harmonising the approaches taken in accounting for measurement uncertainty in compliance assessment for LCPs and waste (co)- incinerators **Very helpful**

Please justify [open text response]

Open text response:

- With regard to the definition of (other) than normal operating conditions please refer to the report of Frank Bold, "Industrial Emissions Directive: Lack of access to continuous emission monitoring data", 01/04/2021, https://drive.google.com/file/d/15T2Z_7wGRQSP5vkk_VrT3XQaV9UWX0ov/view.
- With regard to harmonising or allowing conversion between different averaging periods used for LCPs in IED Annex V and the LCP BATC, we replied "do not know" as it is unclear how it will be harmonised. It is of utmost importance that harmonization does not mean that the averaging periods won't be less strict. In particular when it comes to period of time, it shall be clear that ELVs/measurements shall be set e.g. daily/weekly instead of monthly or yearly to ensure continuous monitoring of fluctuations in emissions and more timely control, including peaks.
- With regard to measurement uncertainty, please refer to report of Frank Bold, "Industrial Emissions Directive: Measurement uncertainty issues", 29/01/2020, <https://drive.google.com/file/d/1vy9h2i-4W1X1nzGjNL2W4i7a3BlxkFpr/view>.

101. **What impact do you think the following options would have on annual administrative costs and environmental impacts relative to existing annual costs and environmental impacts?** [>15%

increase; 5-15% increase; little or no impact (+/-5%); 5-15% decrease; >15% decrease; Do not know; Not applicable]

- Option: Clarification of the definitions of ‘combustion installation’ and ‘combustion plant’
 - Administrative Costs **Do not know**
 - Environmental Impacts (Elaborate below) **Do not know**
- Option: Clarification of the definition of ‘coincineration’
 - Administrative Costs **Do not know**
 - Environmental Impacts (Elaborate below) **Do not know**
- Option: Clarification of the definition of ‘normal operating conditions’ for LCPs and (co)- incinerators
 - Administrative Costs **Do not know**
 - Environmental Impacts (Elaborate below) **Increase**
- Option: Streamlining the provision of the various chapters of the IED regarding gasification and pyrolysis plants
 - Administrative Costs **Do not know**
 - Environmental Impacts (Elaborate below) **Do not know**
- Option: Harmonising or allowing conversion between the different averaging periods used for LCPs in IED Annex V and the LCP BAT Conclusions
 - Administrative Costs **Do not know**
 - Environmental Impacts (Elaborate below) **Do not know**
- Option: Harmonising the approaches taken in accounting for measurement uncertainty in compliance assessment for LCPs and waste (co)- incinerators
 - Administrative Costs **Do not know**
 - Environmental Impacts (Elaborate below) **Increase**

Where environmental impacts are present, please elaborate on the nature of impacts [Open text feedback]

Open text response:

We would like to stress that we replied to the “Environmental Impacts” mostly by “do not know” as it depends always on the streamlining and harmonization ambition.

In addition, with respect to the assessment of administrative costs, we would like to emphasize that harmonized reporting and monitoring obligations including improved access to information may reduce administrative costs in total.

Finally, we would like to draw the attention to another potential impact that is not currently mentioned by the Survey: When assessing cost-effectiveness of monitoring, reporting and assessment regimes in Member States and at EU level, it is essential to take into account a benefit that often goes overlooked. Availability of greater information about concentrations of pollutants in the air and population exposure has allowed significant developments in science about health impacts of air pollution. It is difficult to put a monetary value on this benefit, but it is clearly essential. Greater scientific knowledge of air pollution and other environmental impacts is essential to support decision making and policies. This aspect would be particularly important with regard to supporting scientific research on different components of particulate matter (Black Carbon/Elemental Carbon) and on Ultrafine Particles which again, can have huge

environmental impact (see also ClientEarth, Feedback to consultation on inception impact assessment for the revision of the Ambient Air Quality Directives, January 2021, <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12677-Revision-of-EU-Ambient-Air-Quality-legislation/F1453327>).

6.2 IED overlap with Directive 94/63/EC

Directive 94/63/EC of 20 December 1994 on the control of volatile organic compound (PVR-I) aims to prevent emissions of volatile organic compounds during petrol storage at terminals and its subsequent distribution to service stations. However, the measures that PVR-I prescribes are both outdated and largely covered by other legislation, including the IED.

This section assignment seeks views and information on the extent to which PVR-I requirements are covered elsewhere. This will help inform policy decisions as to whether all or part of the PVR-I could be merged into the IED, whilst avoiding any lacunae / loopholes.

102. To what extent is there overlap between the IED and Directive 94/63/EC? [Significant overlap; Overlap; No overlap; Synergies; Significant synergies; Do not know]

Do not know

Where significant, please provide more detail [open text response]

-

103. To what extent are the provisions of Directive 94/63/EC outdated or redundant? [Significantly outdated or redundant; Outdated or redundant; Not outdated or redundant]

Do not know

Where significant, please provide more detail [open text response]

-

6.3 Incoherence between Industrial Emissions policy and related environmental policies

Accidents Doctrine for the IED

In the event of any incident or accident significantly affecting the environment, IED Article 7 requires that the operator informs the competent authority, takes measures to limit the environmental impact, and prevents further incident or accident.

Under the Environmental Liability Directive, (agro-)industrial plants permitted under the IED are liable for environmental damage. Accordingly, where environmental damage has not yet occurred but there is an

imminent threat of such damage occurring, the operator shall, without delay, take the necessary preventive measures. In addition, where environmental damage has occurred the operator shall, without delay, inform the competent authority of all relevant aspects of the situation and take remedial action.

The Seveso Directive sets out measures to control and prevent major-accident hazards involving dangerous substances which might result from certain industrial activities and the limitation of their consequences for human health and the environment.

Clarification may be needed to establish the interface of IED Article 7 provisions with both the Environmental Liability Directive and the Seveso Directive, also with regard to land planning aspects, to align requirements and streamline where possible.

104. To what extent do accidents not regulated by the Seveso Directive have an impact on the environment? [Major source of pollution; Minor of source pollution; Source of pollution; No impact; Do not know, Not applicable]

Do not know

Emissions to air Emissions to water Releases to soil Land planning aspects

-

105. To what extent is there overlap between the accident doctrines established by IED Article 7, the Environmental Liability Directive and the Seveso Directive? [Significant overlap; Overlap; No overlap; Synergies; Significant synergies; Do not know]

Do not know

Where significant:

a) Please specify the reason. [open text response] -

b) To what extent does this incoherence impact on annual administrative costs (relative to existing annual costs)? [Significant increase; Moderate; Slight; No impact; Do not know; Not applicable] -

6.4 The definition of some activities is unclear

Clarify thresholds for (agro-)industrial activities

The definition for some activities is unclear and has led to ambiguity in some cases as to whether or not it is in scope of the IED. In such cases, options are under consideration to review and clarify the current definitions. This includes:

- Addition of specific threshold(s) for certain subdivisions of the 'chemicals industry', e.g., pharmaceuticals, to account for lower-scale 'artisanal' production.

106. If specific threshold(s) for certain subdivisions of the ‘chemicals industry’, e.g., pharmaceuticals were added to the definition of activities under the IED to account for lower scale production:

a. Which subdivisions of the chemicals industry would this be most relevant for? [open text response]

Open text response:

In this context, we would like to highlight that chemical regulations traditionally consider the impact of each substance in isolation of one another/real life. The IED could be an opportunity to de-fragment this area and help the chemical strategy ambition to consider the real life “cocktails” of chemicals by considering all the chemicals emissions from one site, and from several sites in one region, irrespective of the sector.

In addition, REACH foresees that some chemicals may be “non-threshold” (i.e. no safe dose can be established) and thus the risk cannot in any way be “adequately controlled” in such case (see Art. 60(3) REACH). This means that a small dose may have great adverse impacts on human health and/or the environment. Therefore, a “low scale” facility may be as damaging to people living around the plant than a “high scale” facility. All facilities should be covered by IED, irrespective of the sector.

b. What reduction in annual administrative costs might there be for these installations in the absence of regulation by the IED? [multiple choice: Significant (more than 15%); Moderate (5-15%); Slight (less than 5%); No impact; Do not know; Not applicable]

Do not know

c. What increases in environmental impacts would occur from the abovementioned chemical industry plants in the absence of regulation by the IED? [table to complete below]

- Emissions to air

- Significant (more than 15%)
- Moderate (between 5-15%)
- Slight (less than 5%)
- No impact
- Do not know
- **Not applicable**

- Emissions to water

- Significant (more than 15%)
- Moderate (between 5-15%)
- Slight (less than 5%)
- No impact
- Do not know
- **Not applicable**

- Emissions to soil

- Significant (more than 15%)
- Moderate (between 5-15%)

- *Slight (less than 5%)*
- *No impact*
- *Do not know*
- **Not applicable**

- *GHG emissions*
 - *Significant (more than 15%)*
 - *Moderate (between 5-15%)*
 - *Slight (less than 5%)*
 - *No impact*
 - *Do not know*
 - **Not applicable**

- *Energy use*
 - *Significant (more than 15%)*
 - *Moderate (between 5-15%)*
 - *Slight (less than 5%)*
 - *No impact*
 - *Do not know*
 - **Not applicable**

- *Water use*
 - *Significant (more than 15%)*
 - *Moderate (between 5-15%)*
 - *Slight (less than 5%)*
 - *No impact*
 - *Do not know*
 - **Not applicable**

- *Other resources / materials use*
 - *Significant (more than 15%)*
 - *Moderate (between 5-15%)*
 - *Slight (less than 5%)*
 - *No impact*
 - *Do not know*
 - **Not applicable**

- *Waste generation*
 - *Significant (more than 15%)*
 - *Moderate (between 5-15%)*
 - *Slight (less than 5%)*
 - *No impact*
 - *Do not know*
 - **Not applicable**

- *Other (specify)*
 - *Significant (more than 15%)*

- *Moderate (between 5-15%)*
- *Slight (less than 5%)*
- *No impact*
- *Do not know*
- ***Not applicable***

If you have referred to an “Other” environmental impact, please specify. [open text response]

-

107. Where available, provide and/ or upload references to relevant studies to provide evidence for the environmental pressures rated as significant or moderate. [open text response]

-

7 Survey close

108. Are there areas other than those considered in this survey for which you would like to suggest options? [open text response]

Open text response:

The policy options described under the Problem areas above are going in the right direction, but require adjustments and additions in the following revision process. Our responses to this Targeted Stakeholder Survey provide some key suggestions for the IED revision. These suggestions are not exhaustive and may still be adjusted according to subsequent developments.

In addition, we would like to highlight the following:

- (1.) Industrial emissions should be regulated by a Regulation instead of a Directive.
- (2.) The new legislation should have strengthened links to Fundamental Rights.
- (3.) ClientEarth would be delighted to provide further information and clarification about our proposed amendments in the following phases of the procedure.

In detail:

(1.) A REGULATION INSTEAD OF A DIRECTIVE

A European law on industrial emissions will be one of the key legislations to translate the targets and strategies under the European Green Deal into concrete legal wording. This is especially valid for the ambition to achieve zero pollution and climate neutrality by 2050 at the latest. Against this backdrop, a Regulation is a more appropriate legal form than a revised Directive. A Regulation can impose clearer, more precise and unconditional obligations and can all the more solve some of the implementation issues highlighted under Problem area 1.

(2.) STRENGTHENED LINK TO FUNDAMENTAL RIGHTS

(a) As stated under Question 21, inadequate regulation of industrial emissions and industrial pollution have been already source of human rights violations as confirmed in the European Court of Human Rights judgments (e.g. ECHR, *Fadeyeva v. Russia*, 55723/00, 09/06/2005, or ECHR, *Cordella and others v. Italy*, 54414/13, 24/01/2019)). Both the European Court of Human Rights and the Court of Justice of the European Union confirmed, in the context of air pollution, that exceedance of legal limit values of environmental pollution is translating itself into potential danger to health (*Fadeyeva v. Russia*, para 87; The Opinion of Advocate General Kokott in *Craeynest and others*, in case C-723/17, 28/02/2019, para 53).

The WHO considers air pollution as the major environmental risk to human health, responsible for an estimate of 4.2 million premature deaths worldwide every year (WHO, Factsheet on ambient air quality and health, note 12). Likewise the EEA publishes reports every year that highlight premature deaths due to air pollution (EEA, *Air quality in Europe – 2020 report*, No 9/2020, <https://www.eea.europa.eu/publications/air-quality-in-europe-2020-report>). In that light, environmental law provisions are essential for a thriving society and economy: In the end, as underlined by Advocate General Kokott in C-723/17, the rules on ambient air quality – but also any other EU rules on environment – translate in concrete terms the Union's obligations to provide protection following from the fundamental rights laid out in the Charter of Fundamental Rights of the European Union.

Furthermore, the European Commission itself recognised the widespread implications of pollution on health, society and economy, all of which affect fundamental rights: “Pollution causes multiple physical and mental diseases. In the EU, despite important improvements over the last decades, every year over 400 000 premature deaths (including from cancers) are attributed to ambient air pollution, and 48 000 cases of ischaemic heart disease as well as 6.5 million cases of chronic sleep disturbance to noise, next to other diseases attributable to both. Pollution’s most harmful health impacts are typically born by vulnerable citizens, notably children, people with certain medical conditions, the elderly and people living in socio-economic deprivation. Pollution of air, water and soil is also one of the five main drivers of biodiversity loss and contributes largely to the current 6th species extinction. It comes at a high price for society and ecosystems, including health-related costs (healthcare, lost workdays, lost productivity), reduced yields (e.g. in agriculture, fisheries and tourism), remediation costs (e.g. water treatment, soil decontamination, marine depollution) and loss of ecosystem services (e.g. pollination). Pollution is also strongly interrelated with other environmental, social and economic risks for businesses and citizens.” (ZPAP Roadmap, Ref. Ares(2020)5152184, 01/10/2020).

(b) The strong correlation and interconnection between environmental protection and fundamental human rights is also recognised under the United Nations human rights legal framework. The UN Human Rights Treaty Monitoring Bodies continue to underline the connection between the violation of a human rights and environmental degradation. The UN Human Rights Committee, in its general Comments 36 on the right to life, stated that environmental degradation constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life. The obligations under environmental law should thus inform the content of the right to life. Conversely, the obligation to respect and ensure the right to life should also inform relevant environmental law (CCPR/C/GC/36, para. 62 http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d/PPRiCAqhKb7yhsrdB0H1I5979_OVGGB%2BWPAXhNI9e0rX3cJImWwe/GBLmVrGmT01On6KBQgqmxPNljrLLdefuuQjjN19BqOr/S93rK PWbCbgoJ4dRgDoh/Xgwn). In other words the better and stronger fusion between two values and obligations should be ensured.

(c) While the mutually beneficial interrelation of environmental and human rights protection is recognised at international and European levels, it needs to be anchored in concrete legislation providing for practical legal tools to address this nexus between environment and fundamental rights. Pure declarations without concrete solution are not enough.

For this reason, in the revised IED (including among others, stricter BAT-AELs, binding BAT-AEELs and BAT-AEPLs; clearer rules on setting stricter permit conditions; and improved access to information, public participation and access to justice) a direct reference to fundamental human rights, including health and social equality should be ensured.

The IED seeks to protect the environment and human health. This is especially clear in its key definition of “pollution” under Art. 3(2): “‘pollution’ means the direct or indirect introduction, as a result of human activity, of substances, vibrations, heat or noise into air, water or land which may be HARMFUL TO HUMAN HEALTH OR THE QUALITY OF THE ENVIRONMENT, result in damage to material property, or impair or interfere with amenities and other legitimate uses of the environment;” (emphasis added).

The goal of the IED becomes all the more clear when looking at other provisions focusing on human health, such as Art. 3(9), 8(2), 22(3, 4), 23(4), 30(1), 36(2), 42(2), 46(1), 52(1), 59(2), 64 and Recital 18, 27, 29, 34, 35, 45.

Recital 27 in particular, highlights that people concerned should have access to justice in order to “contribute to the protection of the right to live in an environment which is adequate for personal health, and well-being”. Further, Recital 45 states that the directive „respects the fundamental rights and observes

the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to promote the application of Article 37 of that Charter.”

These ambitious goals are however NOT reflected in Art. 1 of the IED, which undermines the impact of the Directive. Art. 1 describes the subject matter of the IED, aiming to achieve a high level of protection of the environment taken as a whole, but not mentioning in this context the protection of “human health” or “healthy environment”. Including a reference to human fundamental rights under the revised legislation would not be an isolated approach: it is common, in comparable legislation, to mention fundamental values of protection in the first article, see for example:

- Art. 1 of the Air Quality Directive (Directive 2008/50/EC):

“This Directive lays down measures aimed at the following:

1. defining and establishing objectives for ambient air quality designed to avoid, prevent or reduce harmful effects on human health and the environment as a whole (...)”

- Art. 1 of the REACH Regulation (Regulation (EC) No 1907/2006):

“1. The purpose of this Regulation is to ensure a high level of protection of human health and the environment (...)

3. This Regulation is based on the principle that it is for manufacturers, importers and downstream users to ensure that they manufacture, place on the market or use such substances that do not adversely affect human health or the environment. Its provisions are underpinned by the precautionary principle.”

- Art. 1 of the NEC Directive (Directive (EU) 2016/2284):

“1. In order to move towards achieving levels of air quality that do not give rise to significant negative impacts on and risks to human health and the environment (...)”

In light of the above, and besides the improvements described under Question 34 and 95 which are needed to facilitate law enforcement, more emphasis should be placed on the link with human health impacts and corresponding fundamental rights. The Commission now has the opportunity to ensure that zero pollution and social equity go hand in hand by making the IED as one of its legal instruments for protecting the environment and human rights. This should be reflected by amending Art. 1 and the recitals accordingly, as well as when determining obligations under the IED, such as those foreseen under Art. 11, 12 and 14 (those should e.g. include assessments of impacts on human health).

MAIN AMENDMENTS:

Article 1 IED

“(1) This Directive lays down rules on integrated prevention and control of pollution arising from industrial activities.

(2) It also lays down rules designed to prevent or, where that is not practicable, to reduce emissions into air, water and land and to prevent the generation of waste, in order to achieve a high level of protection of HUMAN HEALTH AND the environment taken as a whole.”

Recital 45

“(45) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the EU. In particular, this Directive RESPECTS THE RIGHT TO LIFE, THE RIGHT FOR PRIVATE AND FAMILY LIFE AND THE RIGHT TO HEALTHY ENVIRONMENT, AND seeks to promote the application of Article 2, 7 and 37 of that Charter.”

(3.) ADDITIONAL INFORMATION

ClientEarth would be delighted to provide further information and clarification about our proposed amendments in the following phases of the procedure.

ClientEarth is a non-profit European environmental law organisation with offices in Brussels, London, Madrid, Berlin, Warsaw and Luxembourg (as well as Beijing and Los Angeles). In total, ClientEarth has over 200 staff working on projects in more than 50 countries. Using the power of the law, we develop legal strategies and tools to address major environmental issues, we provide legal support and information to most of the environmental NGOs in Brussels (and beyond) and use the courts where necessary to enforce environmental law. The organisation is composed of programmes on Climate, Energy, Fossil Fuel Infrastructure, Trade, Oceans, Harmful Chemicals, Plastics, Clean Air, Wildlife, Forest, Agriculture and Environmental Democracy.

ClientEarth has many years of experience in enforcement of EU environmental legal obligations, and with respect to advocating for the adoption of improved environmental legal standards. One of our major projects concerns the implementation of the Industrial Emissions Directive (IED) in countries across Europe, including in particular with respect to coal power plants. We conduct this work jointly with partners at the national level in countries including Belgium, Bulgaria, Germany, Greece, Italy, Poland, Romania, Spain as well as beyond the EU in particular in the United Kingdom and Serbia. We also have specific expertise in the fields of access to justice, access to information and public participation.

In addition to our responses to this Targeted Stakeholder Survey, we would like to refer to the following documents:

- Legal note on the relation between the revised IED and the ETS submitted during the Public Consultation for the IED revision initiative in March 2021, <https://www.clientearth.org/latest/documents/combating-climate-change-new-ied-and-ets-interactions-required/>;
- Key asks submitted under the Initial Impact Assessment in April 2020, <https://www.documents.clientearth.org/wp-content/uploads/library/2020-04-22-ied-update-inception-impact-assessment-clientearth-response-ce-en.pdf>;
- Case study on IED and Aarhus related issues of September 2019, <https://www.documents.clientearth.org/wp-content/uploads/library/2019-09-16-ied-fitness-check-response-aarhus-issues-ce-en.pdf>.

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