

Date: 13 September 2019

Subject: IED evaluation - issues concerning access to justice, access to information, and public participation

1 Introduction

1. ClientEarth is an environmental legal organisation with offices across the EU (London, Brussels, Warsaw, Berlin and Madrid). We have many years of experience in enforcement of EU environmental legal obligations, and with respect to advocating for adoption of improved environmental legal standards. We have a particular expertise in the fields of access to justice, access to information and public participation.
2. One of our major projects concerns the implementation of the IED in countries across Europe, including in particular with respect to coal power plants. Our objectives in this project include ensuring that requirements concerning access to justice, access to information and public participation are complied with in the process for issuing and amending the permits for coal power plants. We conduct this work jointly with partners at the national level in countries including Bulgaria, Germany, Greece, Italy, Poland, Romania, Spain and the United Kingdom.
3. We respond below to questions raised in the IED consultation concerning access to justice, access to information and public participation. We have contributed to the EEB response to the targeted stakeholder survey, and so do not seek to replicate in this response the more general points made in that submission. Rather, we seek provide specific examples based on our experience.

2 The IED and ‘Aarhus rights’ - general considerations

4. 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 primary tool for ensuring compliance with Aarhus Convention obligations.

2.1 The IED framework for implementing Aarhus obligations

5. The requirements concerning access to information and public participation are set out primarily in Article 24 of the IED (together with Article 26, concerning transboundary effects). This requires, in particular, that:
 - a. The public are given “**early and effective opportunities to participate**” in procedures including the granting of a permit for new installations and substantial changes, as well as the updating of a permit where Articles 15(4) or 21(5)(a) apply/.
 - b. Once the decision is made, a range of information is made publicly available; in particular, some information must be published on the internet (specifically, the

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content of the decision, copy of the permit, reasons for the decision, and reasons for granting an Article 15(4) derogation must be published on the internet).

- c. Additional information should be made publicly available with respect to measures taken upon definitive cessation of activities and the results of emissions monitoring.
6. Annex IV specifies in more detail how public participation should take place. This includes requiring that the public are informed “*by public notices or other appropriate means such as electronic media where available*” of specific information relating to the permit that has been applied for / the update procedure to which the participation relates. It also requires that “*The results of the consultations...must be taken into due account in the taking of a decision*”, ensuring that the process is not just a formality but rather that the public’s views are actually capable of influencing the final decision.
7. Access to justice obligations are found in Article 25 of the IED. This requires Member States to ensure that

“members of the public have access to a review procedure before a court of law or another independent and impartial body...to challenge the substantive or procedural legality of decisions, acts or omissions subject to Article 24 when one of the following conditions is met:

- (a) *they have a sufficient interest;*
- (b) *they maintain the impairment of a right, where administrative procedural law of a Member State requires this as a precondition”*
8. It goes on to emphasise that environmental NGOs will be deemed to have a sufficient interest and rights capable of impairment, and to set out further requirements with respect to preliminary administrative review procedures and provision of information regarding administrative and judicial review procedures.
9. The importance of these obligations is established in Recital (27), which states:

*“In accordance with the Århus Convention on access to information, public participation in decision-making and access to justice in environmental matters, effective public participation in decision-making is necessary to enable the public to express, and the decision-maker to take account of, opinions and concerns which may be relevant to those decisions, thereby **increasing the accountability and transparency of the decision-making process and contributing to public awareness of environmental issues and support for the decisions taken.** Members of the public 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.”*

2.2 Systemic problems in implementing the IED’s Aarhus provisions

10. There are some problems that arise with respect to implementing Articles 24-26 and Annex IV of the IED on a systemic level - they occur in numerous Member States. Some of these

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problems reflect flaws in the wording and design of the obligations as set out in the IED; others reflect failures of implementation at the national level.

11. Concrete examples of these problems are set out in case studies concerning Bulgaria, Spain and the United Kingdom in Section 3 below, based on our experience in these jurisdictions. In the remainder of this Section 2, we describe some of these problems in a more generic sense / at a higher level.

2.2.1 Flaws in drafting of the IED provisions

Limits on public participation

12. The range of circumstances when Article 24 requires public participation is limited, and does not comply with the requirements of the Aarhus Convention.
13. Article 6(1) of the Aarhus Convention requires early, adequate, timely and effective public participation with respect to 'proposed activities'. Including those listed in Annex I to the Convention. There is a substantial overlap between Annex I of the Convention, and Annex I of the IED - meaning that Article 6 of the Aarhus Convention relates, *inter alia*, to the activities covered by the IED.
14. Article 6(10) of the Aarhus Convention requires public participation also "*when a public authority reconsiders or updates the operating conditions for an activity referred to in paragraph 1*". This means that as well as requiring public participation before an IED permit is issued, this is also required when an existing IED permit is updated.
15. Article 24 of the IED requires participation only in a narrower range of circumstances. This includes prior to granting a permit, complying with Article 6(1) of the Aarhus Convention - however, it does not include all circumstances when a permit is updated. It is limited to updates involving an Article 15(4) derogation or triggered by Article 21(5)(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*"), or where there is a 'substantial change'.
16. This means that public participation is not expressly required when, for example, updating a permit to comply with new BAT conclusions under Article 21(3)(a). This is problematic, because the BAT conclusions typically provide some discretion to permitting authorities as to what abatement techniques and emissions limits should be applied. For example, the BAT-AELs are often expressed as ranges, and the public concerned should be able to exercise their Aarhus Convention rights to express their opinion as to where in that range the limit should be set. This is, however, not expressly required under Article 24 IED.
17. Other circumstances where the permit would be updated and the Aarhus Convention requires public participation, but where this is not expressly required under the IED, include:
 - a. Updates due to operational safety requirements (Article 21(5)(b));

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- b. Updates due to compliance with a new or revised environmental quality standard (Article 21(5)(c));
 - c. Updates when a permit is granted for a non-substantial change (Article 24(1)(b));
 - d. Other cases, including in particular time extensions of operation, extension of capacities (if not considered a substantial change), and other modifications to the permit conditions that do not fall in the above examples.
18. These failures are subject to an ongoing and delayed procedure before the Aarhus Convention Compliance Committee.¹

Limits on access to justice

19. There are also a couple of significant flaws in Article 25 of the IED concerning access to justice.
20. Firstly, whilst it is generally possible for the public / environmental NGOs to establish standing to challenge positive decisions of permit (or other environmental) authorities, it can be extremely hard to hold them to account for failures to act. This could include, for example, failures by environmental authorities to take enforcement action to prevent violation of permit conditions, where such violations have been reported to them - a failure that we have seen occur in multiple Member States.
21. This difficulty arises, firstly, from the structure of most legal systems - where absent either a positive act susceptible to legal challenge, or a specific right set out in legislation, there is often no clear basis for challenging a failure by the authorities to take specific actions. However, this failure would be remedied if the IED required Member States to recognise the standing of the public and NGOs to bring actions against the failure of permit / environmental authorities to implement their obligations under the IED.
22. Secondly, and compounding the first problem, the circumstances in which Article 25(1) requires access to justice to be granted are not clear. Article 25(1) states that the public concerned should be able to challenge "*the substantive or procedural legality of decisions, acts or omissions subject to Article 24*". This phrase is ambiguous.
23. On the one hand, it could mean that Member States must allow the decisions specifically set out in Article 24 (1) to be challenged. This would mean allowing challenges to be brought against permits issued in the circumstances specified in Article 24(1):

¹ The complaint was filed by IIDMA, ClientEarth's partner organisation in Spain. Documents relating to the complaint can be found here: <https://www.unece.org/environmental-policy/conventions/public-participation/aarhus-convention/tfwg/envppcc/envppcccom/acccc2014121-european-union.html>.

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- a. Grant of a permit for new installations;
 - b. Grant of a permit for any substantial change;
 - c. The granting / updating of a permit where Article 15(4) derogation is proposed;
 - d. The updating of a permit or permit conditions under Article 21(5)(a).
24. Alternatively, it could mean refer to any “*decision on granting, reconsideration or updating of a permit*”, under Article 24(2). This would cover all decisions made in the context of granting, reconsidering or updating a permit - much broader than Article 24(1).
25. However, both of these interpretations cover only ‘decisions’ or ‘acts’ - neither of them deal with the issue of ‘omissions’, yet this is also referred to in Article 25(1). Interpreting Article 25(1) in its broadest (and seemingly most true-to-its-wording) meaning would mean that the public concerned (including environmental NGOs) can challenge omissions of authorities with respect to the granting, reconsideration or updating of a permit. However, as explained above, in most Member States it is extremely difficult to establish standing to challenge an omission.
26. The solution to these problems is to ensure much clearer drafting of Article 25 of the IED. This could include a revision of Article 25(1) to state that:
- “Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned have access t a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions **by competent authorities with respect to any of the obligations imposed on them by this Directive**, when on of the following conditions is met...”*
27. This would remove much of the ambiguity regarding the scope of Article 25, and ensure that the public concerned (including environmental NGOs) are able to hold decision-makers to account for ensuring full implementation of the obligations set out in the IED.

2.2.2 Problems arising from implementation at national level

Access to information and public participation

28. Article 24 is clear that certain information must be made available on the internet. Annex IV is much less clear on this point. This should be clarified - all relevant information should be made available online, to ensure the public has the best possible knowledge regarding industrial installations that could be affecting their health and the environment.

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29. In most jurisdictions - as demonstrated in the case studies in Section 3 - only a very limited range of material is made available to the public online, at an appropriate (i.e. early) time. This typically complies with the requirement in Article 24(2)(a) - publishing the permit itself - however, it very often does not fully comply with Article 24(2)(b) and (f) - the full reasons behind a decision are often not published, and in addition, documents relating to the Article 15(4) derogation process are not always made available to the public (online or otherwise).
30. Likewise, the information that Annex IV requires to be made publicly available, including on the internet where appropriate, is not always made publicly available, and certainly not always made available on the internet.
31. In some Member States, there is not a single authority responsible for permitting; rather, there may be many different permitting authorities. For example, as described below, in Spain there are 17 Autonomous Communities, each responsible for permitting within its own borders. And each authority may take a differing approach to how it makes information available to the public.
32. Also in most Member States, it is not possible for the public to set up automatic notifications (e.g. by email) regarding the publication of information concerning industrial installations (nor concerning the commencement of public participation procedures). This means that only the most alert and concerned members of the public will be aware of such matters - e.g. if they are very regularly checking the relevant website. The problem is worsened where there are multiple permitting authorities that might have information of interest to the relevant member of the public concerned - there are then multiple information sources that have to be regularly checked.
33. Moreover, access to information is not always free. In Germany, we regularly face fees of several hundred Euros to secure access to environmental information regarding coal power plants - information that in other Member States would typically be provided free of charge. And there is not a single approach to charging fees applicable across all German states, but rather different fees are applicable in different contexts.
34. As our examples in Section 3 below demonstrate, it is common for environmental authorities to initially refuse to provide access to information - or sometimes, to refuse to provide access on an appropriate timescale - unless and until the member of the public concerned (or NGO) goes to court to secure an order forcing them to do so. It should not be necessary to have to go to court to establish a right of access to information - and once this has been done, all environmental authorities in the country should acknowledge this legal requirement. However, we have observed a clear pattern of environmental authorities in multiple countries refusing to provide access to information as required by law until this obligation is enforced in court. This clearly frustrates the purposes of the relevant provisions of the IED.
35. All these factors taken together can make it very hard for the public concerned to know where to look for information and to secure access to the full extent of relevant information.
36. A much-improved system is required to enable the public to secure timely and effective access to information, and to facilitate their participation in permit issuance and update procedures. This could take advantage of up to date information technology to facilitate

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public access to information and public participation - complying with the Annex IV requirement of making information available by electronic media where available.

37. At the very least, it should be mandatory to establish a comprehensive online register of information concerning installations regulated by the IED - including at least all information specifically referred to in Article 24 and Annex IV, and ideally also including all non-commercially sensitive correspondence between operators and permitting authorities with respect to their IED permits. This would ideally be centralised - if not at the EU level, then at least within the Member State - but at the very least, should be implemented by every permit authority within each Member State. Whilst this might have appeared ambitious at the time of drafting the IED, this now appears very reasonable, given advances in information technology.
38. One of the best examples we have seen is in Ireland which, whilst not perfect, goes a lot further towards meeting this objective than in many other Member States. All Member States should be required to achieve this standard at a minimum.

Public participation

39. Many of the obstacles to public participation derive from the wording of the IED and problems with implementing access to information at the national level. There are also some other practical obstacles encountered.
40. A major obstacle concerns the technicality of information provided. It can be very hard for the public concerned to fully understand the meaning of technical documents produced by the operator as part of the permitting procedure. Indeed, even with access to technical expertise, NGOs with greater resources than the general public often still find this to be an obstacle. This makes it difficult for the public to consider the implications for their health / the environment of the permit being granted or updated with the proposed conditions.
41. Another major obstacle arises with respect to the requirement in paragraph 4 of Annex IV, that the results of consultations be taken into account in the decision taken by permitting authorities. Operators have a considerable advantage in terms of persuading permit authorities. The public concerned will typically not be able to provide substantial technical evidence to support their submissions - and will also be very unlikely to enjoy the regular access to and closer relationship with permit authorities that is enjoyed by operators.
42. More fundamentally, permit authorities very often appear to take an approach to permitting that assumes that their role is to grant permits to, or allow continued operation of, industrial installations without imposing excessively burdensome conditions on them, where those conditions are not strictly required by law. In other words - they are reluctant to go beyond the minimum legal requirements. This issue is addressed in some detail in the response made by the EEB to the targeted stakeholder survey. However, in the present context this further demonstrates how the submissions made by the public and NGOs into permit procedures are rarely taken into account by decision-makers, where those submissions are arguing for imposition of stricter permit conditions than those that represent the minimum required by law.

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2.3 Conclusion overarching issues

43. Many of the IED implementation deficits - some, but not all, of which appear to violate the provisions of the IED - frustrate achievement of the objectives spelt out in Recital (27). Given the limited resources of national environmental authorities and DG ENV to ensure full compliance with IED obligations, and given the huge resources that industry is able to commit to participation in permit procedures (etc), obstacles placed on access to information and public participation can be hugely detrimental to protection of human health and the environment.
44. Rather than reinforcing the existing inequality of resources between industry and the public, Member States should establish frameworks that insofar as possible reduce this inequality and fully support and facilitate access to information and participation by the public. Very rarely is this the case.

3 Case studies

45. In our experience, all Member States go some way towards compliance with the access to information, public participation and access to justice requirements set out in the IED. However, in almost all cases, there are deficits / failures to comply with these obligations. In the following sections, we provide some examples by country, focussing on the Bulgaria, the UK and Spain as being representative of issues encountered across the EU.

3.1 Bulgaria

Granting a permit

46. Public consultation on the permit application is carried out in the procedure to grant a permit. The public consultation lasts one month. The period is not prolonged if it coincides with vacations periods or public holidays.
47. The consultation period applies to interested persons and countries affected by the activity in the context of a transboundary impact.²
48. Notice of the public consultation is published on the website of the Executive Environmental Agency (EEA) and the websites of the respective municipalities at the location of the site.

² Article 122a (5) of the Environmental Protection Act "(...) the competent authority under art. 120, para. 1 shall initiate the procedure for issuing an integrated permit, which shall be notified in writing to the operator, and jointly with the municipalities shall notify and ensure for one month, on equal terms, access of the interested persons to the application, including in the countries affected by the activity of the installation in the context of transboundary impact."

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The notice is published on the first day of the public consultation and includes the following information:³

- a. Information that public consultation on the application/draft permit is carried out.
 - b. The start and end date of the consultation.
 - c. Information on how the documentation subject to public consultation can be accessed.
49. The website of the EEA does not have RSS function and automatic monitoring of the page is not possible. As a result of this, one has to manually check the website all the time. In other words, there is no way for the public to know that a public consultation is going to be launched unless they are constantly and actively checking the website. This is not realistic for the vast majority of people.
50. Access to the information is only provided on site (i.e. physically / in person) in the building of the EEA and the municipality within the working hours of the respective institutions. The EEA does not allow the information to be copied. Access onsite consists of reviewing the file. The applications for granting a permit are voluminous and contain technical information. In practice, environmental organizations and members of the public cannot properly review and become familiar with the application.
51. As of 2018, the EEA and municipalities are legally obliged to provide access to electronic copies of documents.⁴ Despite this, the EEA practically bars access by delaying the review

³ A standard notice would read as follows:

“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:

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

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

⁴ Terms and Procedure for Issuing Integrated Permits (IP Ordinance) Article 7 (3) *“The Executive Environmental Agency and the municipality (s) shall provide access in accordance with Art. 122a, para. 5*

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of the request. The EEA reviews requests for access to the electronic files pursuant to the Access to Public Information Act and takes up to 14 days to respond to the request.⁵ While the EEA reviews the request, the 30-day period to respond to public consultation continues to run. Due to this misapplication of the law, environmental organizations are provided with the electronic file at the end of the 30-day public consultation procedure.

52. A proposal for amendment of the IP Ordinance announced for public consultation on 22 June 2019 envisages removing the possibility for electronic access to the application. If this proposal is adopted and enters into legal effect, the EEA would quite possibly deny access to the electronic file completely.⁶
53. The failure to provide electronic access to information early in the public participation procedure is unjustifiable. It also seems to violate the IED - Article 24(1) requires Member States to ensure “*early and effective*” participation, whilst Annex IV requires the public to be provided with information by “*electronic media where available*”.
54. In the case of transboundary impact, the transboundary public consultation shall be carried out within the 30 days for national public consultation. Bulgarian legislation does not stipulate specific rules for carrying out transboundary public consultations. We are not aware of the EEA ever carrying out a transboundary public consultation for the grant of an IED permit. This suggests that the IED is not being correctly implemented, given that air (and sometimes water) pollution from industrial facilities such as LCPs is clearly capable of having significant negative effects on the environment of another Member State. There is ongoing litigation regarding the lack of transboundary public consultation with respect to the Maritsa East 2 lignite power plant.

Updating a permit / Article 15(4) derogations

55. Public consultation is held in the following case of permit update:

- a. where the application of Article 15(4) is proposed;
- b. where 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 values need to be included in the permit.

56. In these cases, public consultation is carried out for the same period of time and under the same conditions as in the case of issuing a new permit. Access is granted to the draft permit

of the EPA to the hard copy, including providing a copy electronically upon request.” State Gazette No. 3 of 2018

⁵ This practice violates the rights of the public, as the Access to Public Information Act applies to any public information. Within the public consultation, it is provided by law that access to the application shall be provided, this the EEA does not have discretion to decide whether access shall be provided or not.

⁶ <http://strategy.bg/PublicConsultations/View.aspx?lang=bg-BG&Id=4454>

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only. In the case of proposal for the application of Article 15 (4) IED, no access to the cost benefit analyses and the application for permit update is granted.

57. Case example: 2019 grant of derogation to Maritsa East 2 EAD:

- a. **Access to the Cost Benefit Assessment:** The EEA did not provide access to the Cost Benefit Assessment used to justify the derogation. The cost benefit assessment was only provided as a part of the court file, after Za Zemiata Access to Justice had challenged the decision.
- b. **Access to the "Reasons" for granting the Article 15(4) derogation:** From the information provided, the public was not informed of the "reasons for the application" of the derogation.
- c. **Access to an electronic copy of the documents:** During the public consultation procedure, it took 14 days for the authority to provide Za Zemiata Access to Justice with an electronic copy of the draft decision document. Such delay significantly limits the time that members of the public can acquaint themselves with the documents and provide an opinion.
- d. **Access to the documents on site:** When trying to access the documentation on site, EEA employees prohibited Za Zemiata Access to Justice from taking photos or copying the documentation. Access to paper copy during working hours, without the possibility of obtaining a copy or electronic copy is contrary to the purpose of the law and the requirements of public access.

Details of permits granted and conditions contained (Article 24 IED)

58. The full permit is published in the Register of Integrated Permits at the website of the Ministry of Environment and Waters (MEW).⁷ The permits, however are very often published in the register days after the official notice that the permit is issued is published - there is no legal provision requiring it to be published on the same day.
59. This is problematic, because in Bulgaria, environmental NGOs and the public concerned may challenge the permit and the permit update in court within 14 calendar days starting to count from the day the EEA publishes official notice of the permit issue/update. The period is not prolonged if it coincides with vacations periods or public holidays. Similarly to the opening of public consultation, the website of the EEA does not provide RSS and one has to manually check if a new permit is issued.
60. This creates a major obstacle in terms of the public being able to hold decision-makers to account and ensuring access to justice - if the permit is not published at the start of the 14 day period, and the public have access to it only later in that period (or indeed, as is

⁷ <http://registers.moew.government.bg/kr/>

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sometimes the case, at the end of that period), it deprives them of meaningful opportunity to review the permit and consider whether it should be subject to legal challenge.

61. The notice of the permit issue/update mentions only the following information:

- a. Information that a permit is issued/updated;
- b. The name of the operator;
- c. The legal provisions based on which the permit is issued/updated.

Information on environmental performance of installations

62. In 2016, Za Zemiata requested information from the Regional Inspectorate for Environment and Water ('RIEW') in Pernik on emissions to air from two installations and information on instances where their permit conditions were breached. The RIEW refused to grant Za Zemiata access to the information. Za Zemiata appealed the refusal before the local Administrative court in Pernik. The first instance court reversed the RIEW refusal. The RIEW appealed this decision to the Supreme Administrative Court, and lost. Za Zemiata's right to access information about emissions to the air was upheld.

63. As a consequence, subsequent requests for information about the measurements of the continuous measuring systems of the power plants have been granted for 2015 – 2018 from the Regional Inspectorates in Pernik, Stara Zagora and Haskovo, but not in Sofia.

Response to complaints / alerts of violations

64. When it comes to instances where we have witnessed possible violations of the permit of coal power plants, e.g. discharge in nearby rivers, unorganized emissions of pollutants in the atmosphere in the area around the plant or emissions from the stacks of the plant, which are not equipped with sulphur scrubbers, we have notified the respective regional inspectorates.

65. However, responses on the performances of these installations regarding these kinds of instances are generally inadequate. Often the regional inspectorate calls the operator of the installation to check if there is a violation of the permit or does a physical check of the installation at least a day later, when the violation has stopped. Subsequently, they inform us that the installation's environmental performance is in order. The relevant authorities are not well equipped to supervise the performance of coal power plants and whether they comply with environmental rules.

Access to justice

66. In Bulgaria, we have brought numerous cases with our partners (Za Zemiata Access to Justice) before the courts, challenging IED permits on the basis that they do not comply with the clear substantive requirements of the IED. We have found it very difficult to persuade judges to rule that permits have been issued illegally - seemingly because the judges either

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do not understand what the law requires, or because they are not making sufficient effort to do so. This could be due to sympathies for / links with plant operators, or simply due to a failure to comprehend the technical requirements of the IED (a point also address in the UK case study below). We set out some examples.

67. In a court procedure challenging the IED permit of the Sliven lignite power plant - which authorised the co-incineration of waste with lignite - Za Zemiata Access to Justice alleged violation of Article 15(3) in several respects:
- a. Firstly, the permit authority admitted that its experts do not as a rule verify the feasibility of the environmental performance claimed by the operators in their applications. They defer entirely to the operators' assessment of whether the ELVs can be met by the installation in question. The court rejected our claim that this failure to verify the operator's claims violated the obligation in Article 15(3) to ensure that "*under normal operating conditions*", the BAT-AELs are complied with. It did so on the basis that this matter would be dealt with at the enforcement stage by the permit authority. This seems to be an inappropriate way of interpreting the IED - the authorities have obligations not just at the stage of enforcing permits, but also at the stage of issuing them.
 - b. Secondly, the application itself contained information demonstrating that IED requirements could not be met (details in the footnote).⁸ The judge refused to consider the details of this technical aspect, on the basis that it was not his job as a judge to adjudicate upon technical issues. This raises the question of whom, if not the judge, has this responsibility?
 - c. Thirdly, there was a contradiction between the technical specification of part of the installation and the facts as described by the applicant, leading to the conclusion that under normal operation conditions the part of the installation in question would not be able to function properly.⁹ The court again refused to consider this technical aspect of the case - even though it again related to ensuring compliance with Article 15(3).
68. We have also seen judges clearly failing to engage with other substantive provisions of the IED. This includes:

⁸ In the Sliven IED permit update application, the operator stated that dioxins and furans, emitted from a furnace where waste and biomass would be burnt would pass through a pipe where the temperature would amount to at least 1100 degrees C. However, based on another part of the application one can see that the temperature in the pipe will be maximum 850 degrees C. It was obvious that if the normal operating conditions as described in the application happen, dioxins and furans would not be eliminated and would be emitted in the ambient air.

⁹ A facility to measure the amount of emitted gases was required to work under condition that the temperature of the emitted gases should not be lesser than 62 degrees C. However at the moment when the facility was tested the temperature of gases was between 59 and 60 degrees. It was obvious therefore that the operator had not tested the capacity of the measuring device in "normal operating conditions".

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- a. Article 18, requiring compliance with EQS. In the region of Galabovo, near Stara Zagora, there is a concentration of large combustion plants. In at least one court case, where Za Zemiata Access to Justice challenged the IED permit of the Brikel power plant, it was alleged that due to the continuing breaches of ambient air quality standards in the city of Galabovo (PM 10 and SOx), the authority should have set stricter conditions for Brikel's emissions, than those existing in the BAT in force. However, the judge found that as Brikel was not the only source of pollution, the granting authority was not required to implement Article 18 - this appears to be a clear misunderstanding of what is required by that provision.
- a. Article 29, concerning aggregation rules. In at least two cases for granting or update of an IED permit (at Sliven and Brikel power plants) the authority calculated the capacity of the plants by adding up the capacities of the boilers which were allowed to operate at the same time - even though this was less than the capacity of all boilers connected to the relevant stack, a clear violation of Article 29(1) of the IED. Before court we claimed that the total capacity should be calculated by adding up the capacity of all boilers, irrespective of whether they will be operated in the same time or in a different period of time. In both cases the court rejected our submissions and found that the authority had correctly applied the aggregation rule - this appears to be a clear misunderstanding or misapplication of Article 29.

3.2 Spain

69. ClientEarth works closely with the environmental legal organisation Instituto Internacional de Derecho y Medio Ambiente (IIDMA) in Spain. The following comments derive from their considerable experience of working to ensure proper implementation in Spain of access to information and public participation obligations arising under the IED and the Spanish legislating implementing its requirements. IIDMA have focussed on this topic primarily with respect to coal-fired power plants.
70. Given the distribution of competences in environmental matters in Spain, Autonomous Communities (AA.CC) are the ones responsible for handling IED permits, including granting, substantial change, review or update procedures. As explained below, the fact that in Spain there are a total of 17 AA.CC with competences on this matter makes it considerably more complicated to achieve full compliance with access to information and public participation provisions regarding implementation of the IED.

Access to information

71. One of the major implementation problems found in Spain is the failure of regional authorities to provide access to information requested within the legal periods established under Spanish Aarhus Law 27/2006.
72. Pursuant to the Aarhus Convention, Spanish law requires a response to be given within a period of one month or, where justified, within two months based on the amount or

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complexity of the information. Between 2015 and 2019, IIDMA submitted a total of around 35 access to information requests to competent authorities of regions where coal-fired power plants are operating.

73. These requests referred to relevant information for ensuring compliance by coal plants of the IED provisions, i.e., access to baseline reports, environmental inspection reports, data on industrial emissions, etc. However, only 10 of those 35 requests were answered within the appropriate period established by law. Furthermore, in many cases authorities do not provide a response or just provide partial access to the information, making necessary to file further requests until complete information is provided.
74. The failure to comply with access to information obligations has led IIDMA to launch two judicial cases challenging the failure to grant access to the baseline reports of coal power plants operating in the AA.CC of Asturias and Aragón. In these cases, access to this information was provided by the competent authorities voluntarily once the legal challenge was initiated. This proves that the regional administrations deliberately withheld this information from IIDMA with the clear intention of delaying its right to access environmental information.
75. Furthermore, in Spain there is a lack of national-level websites compiling all relevant information on IED permits. This makes locating information unnecessarily difficult, forcing the public or concerned citizens to search on the website of each regional competent authority which differ significantly from each other. While all permits are generally published in the publicity-available journals of each AA.CC as required by law, there are cases in which regional official websites do not provide updated information on permits, hindering the chances to know if they have been subject to any review, update or substantial change procedure.
76. To avoid misinformation, IIDMA carries out a search on the corresponding regional official journals every two weeks. However, whilst this is possible (if challenging) for a specialist legal organisation such as IIDMA, it would be extremely challenging for the general public to undertake a similar exercise.

Public participation

77. The main implementation deficits found in relation to public participation rights under the IED relate to the failure of public authorities to provide early and effective opportunities to participate in procedures concerning review and substantial change of (coal plant) permits.
78. Spanish Administrative Law 39/2015 recognizes the right of “interested parties” to take part and be informed about the course of judicial procedures in which they have been recognized such condition. This includes the opportunity to participate during the consultation period for interested parties before a final permitting decision is adopted.
79. IIDMA was recognized the condition of “interested party” in the review procedures of the environmental permits of all coal plants operating in the A.C of Asturias. However, the regional Administration failed to notify IIDMA of the conduct of review procedures for the permits of two of these coal plants (Aboño and Soto de Ribera), preventing IIDMA from

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participating and being able to meaningfully influence on the decision-making procedure concerning the permits' conditions. IIDMA was only made aware that the review procedures had already finalized once the resolutions approving the reviewed permits were published in the Official Journal of Asturias. This forced IIDMA to initiate administrative procedures requesting the nullity of both permits.

80. In 2014, IIDMA filed a complaint before the Aarhus Convention Compliance Committee for considering that Spanish IPPC Law 5/2013,¹⁰ which partially transposes the IED and regulates the update of existing permits. It is not compliant with the public participation requirement established in Article 6 of the Aarhus Convention. This failure in compliance is based on the fact that neither the Spanish IPPC Law nor the IED foresee public participation in all cases when a public authority reconsiders or updates operating conditions for Article 6 activities. These include combustion installations with a heat input of 50 megawatts (MW) or more, as established in Annex I of the Aarhus Convention - see further the explanation of this point in Section 2 above.

3.3 UK

Access to information and public participation

81. In the UK, different countries (England, Scotland, Wales, Northern Ireland) are subject to slightly different regimes. The following comments focus primarily on the regime in England, though also have some broader applicability.
82. Both final permits and permit consultations are made available online. As with all other jurisdictions, there are difficulties for the public to know when these materials have been made available - regular checking of the website is required. There is no ability to receive automatic updates when information is added to the website. This poses clear obstacles to access to information and public participation by the public.
83. Only the final permit and the reasons behind it are made available online. Other information is not routinely made available online (except where there is a public participation procedure), and has to be requested by way of a formal information request. Whilst publication of the proposal for a permit update and other correspondence with the operator may not legally be required under the IED unless there is a public participation procedure, failure to publish this information poses major challenges with respect to issues of access to justice.
84. To give one example, ClientEarth brought a judicial review against the permit for the Humber Oil Refinery.¹¹

¹⁰ Documents concerning this complaint are available here: <https://www.unece.org/environmental-policy/conventions/public-participation/aarhus-convention/tfwg/envppcc/envppcccom/acccc2014122-spain.html>.

¹¹ <https://www.gov.uk/government/publications/dn40-3dw-phillips-66-limited-eprup3230lr014-environmental-permit-issued>.

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- a. The judicial review focussed primarily on the inclusion by the operator of green coking calciners within the Integrated Emissions Management Technique ('IEMT'), even though the IEMT in BATs 57 and 58 of the REF BATc only applies to FCC, SRU and combustion units.
- b. We became aware of the permit's publication based on information in the media. We informed the Environment Agency of our provisional intention to bring a judicial review in a letter on 12 December 2018, and in that letter requested access to environmental information that would help us better determine whether the IEMT complied with IED / BATc requirements.
- c. This included a request for a copy of the 'IEMT Protocol'. This Protocol sets out the conditions for the FCC, SRU, combustion units and green coking calciner - conditions that would ordinarily be found in the permit. In this case, the IEMT Protocol was not made available online, meaning that some of the permit conditions - incorporated by reference to the IEMT Protocol - were not available online.
- d. We received an initial response, with some but not all of the relevant information supplied, on 18 December 2018. This included a redacted version of the IEMT Protocol. In that response, the Environment Agency state that "*we need more time to consider the remaining information requests you have made. We will revert to you on these as soon as possible.*" The information not provided included information that was clearly necessary to determine how the Environment Agency had arrived at the permit conditions, and which the Agency is obliged to provide under Environmental Information Regulations "*as soon as possible and no later than 20 working days after the date of the receipt of the request*".¹²
- e. No further documents were provided pursuant to the information request until July 2019 - considerably later than the 20 day period running from 12 December 2018. We therefore commenced the litigation procedure, filing for judicial review in January 2019 without possession of all information relevant to assessment of whether the Environment Agency had complied with its legal obligations.
- f. The Agency provided access to some further information during the litigation procedure - this is the 'disclosure' process in the English legal system, which took place in March 2019. However, this still did not include access to all information requested in our letter of 12 December 2018.
- g. Finally, in July 2019 and after the litigation had been dismissed by the court (see further below), the Environment Agency provided the remainder of the documents requested. In doing so, they acknowledged that they "*did not comply with our duty to respond within the statutory timescales*". The information included in this final batch of documents could have had material relevance for the arguments raised in the judicial review, but it was no longer possible to use it in this manner as the litigation had already been dismissed.

¹² Regulation 5(2) of the EIR, available at <http://www.legislation.gov.uk/uksi/2004/3391/part/2/made>.

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85. This lengthy description aims to provide an example of the challenges of securing access to information in the UK. There are few meaningful remedies to these failures. Additionally, until information is provided it can often be hard to know what information was held in the first place - making it even harder to challenge the failure to provide full access to information.
86. This demonstrates the inherent difficulties with a system that requires the public to request specific information from the authorities, rather than being able to access that information on a public database. Demonstrated weaknesses in the system include:
- a. That the public need to know what information exists before they can request it - often they will not know what information exists until the information is made available, especially if they are not technical subject matter experts.
 - b. Delays in making the information available has a considerable impact on the ability of the public to make use of that information to exercise their legal rights.
87. Much preferable would be a system that ensures all relevant information is made publically available online - see for example the Irish system, which provides much clearer access to information, including with respect to correspondence with the operator.

Access to justice

88. There are a number of general issues concerning access to justice in the United Kingdom, some of which are also relevant in other Member States.
89. Firstly, and specifically as regards the kind of technical legal challenge likely to be brought with respect to the IED, it can be extremely difficult for judges to understand the legal and technical arguments made in a judicial review procedure.
90. By way of example, in the above-mentioned case concerning the Humber Oil Refinery, ClientEarth submitted to the judge a step-by-step explanation of the key concepts relevant to the case. This included explanation of BATs, the BAT conclusions, the BREF, and the interaction between Chapters II and III of the IED. Despite these detailed written submissions, the judge had very little understanding of what the IED actually required with respect to compliance with the BAT conclusions and BAT-AELs at the start of the hearing.
91. Initially scheduled for 1 hour, the preliminary hearing (known as a 'permission hearing', at which the applicant asks for 'permission' for the case to proceed to the substantive stage) ended up lasting for 4 hours, as we tried to explain all these concepts. However, at the end of this permission hearing, the judge refused permission for ClientEarth's case to proceed to the substantive stage of the judicial process. He did so on the basis that the arguments raised were highly technical, and it deferred to the Environment Agency as an 'expert

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- regulator'. And based on the wording of his judgment, it was clear that he still had not fully understand the issues at stake in the case and the functioning of the IED.¹³
92. The difficulty is that the IED is indeed extremely technical, and it can be very hard for even lawyers with a lot of experience of the IED to understand always what is required to implement it. The situation is much worse for judges, who will almost certainly never have previously adjudicated on a case concerning an IED permit, and for whom all the concepts and issues raised are entirely novel. This is why we very often see - in many Member States, not just the UK - judges deferring to the expert judgment of the permit authority. This is even and especially the situation in cases where it is precisely the expert judgment of the permit authority that is being challenged.
93. The consequence is that there is often nobody guarding the guards (the environmental authorities) - they are responsible for enforcing the law against the operators, but there is nobody able to effectively hold the authorities themselves to account.
94. Secondly, the high costs of litigation are a major deterrent to individual members of the public seeking to hold the permit authorities to account. Attempting to bring its system more in line with Aarhus Convention requirements that access to justice is "not prohibitively expensive" (also found in Article 25(4) of the IED), the UK government introduced rules meaning that individuals face maximum 'adverse costs'¹⁴ of GBP 5,000 (and for NGOs, it is GBP 10,000). These adverse costs are in addition to the costs they must pay for their own lawyers, which in the UK can be considerable.¹⁵
95. The effect is that the potential cost of litigation remains considerable for individuals and (especially smaller) NGOs, and can pose a major disincentive and obstacle to them bringing litigation. We see major variations in this respect across Member States - in sum, such as Spain, there are effectively no adverse costs faced by NGO bringing such litigation, whilst in other countries like the UK costs can be dissuasive with respect to bringing litigation. This significantly reduces the ability of the public to hold environmental decision-makers to account with respect to complying with IED obligations.

¹³ See ClientEarth's press release on this case: <https://www.clientearth.org/press/lawyers-raise-alarm-as-court-dismisses-oil-refinery-pollution-case/>.

¹⁴ Adverse costs refer to the liability of the losing party to pay the costs of the winning party in a court case.

¹⁵ A fuller explanation is provided in this article: <https://www.clientearth.org/states-fail-to-remedy-access-to-justice-failures/>, and media coverage of the same topic is here: <https://www.thetimes.co.uk/article/un-rebukes-britain-for-lack-of-legal-recourse-over-environmental-disputes-758qprq5r>.