# Council draft report for 20 December

The Presidency prepared an Annex draft compromise proposal for the revised IED (hereinafter, the Compromise Text), which was presented in the Council meeting on 20 December. While the Council Environment Working Party has improved many aspects of the initial Commission’s proposal, there are still few points that should be amended. Please see below Cefic red lines in relation with Cefic Position Paper:

* Art 15.3: the compromise text proposed is not resolving the issue of setting the strictest possible emission limit values, while we think that the competent authority should consider the whole BAT range
* Art 15.3a: the associated emission performance levels (AEPLs) are still binding, while we consider these should remain indicative
* Art 14a: Environmental Management systems are still binding in the compromise text, while we consider these should be developed as non-binding operators obligations at corporate level and not permit requirement.
* Article 13(2). Cefic recommends to restrict access to confidential and commercially sensitive data facilitated by industrial sites to the Commission and civil servants from ECHA and national competent authorities who are bound by law to an obligation of professional secrecy.
* On penalties, Article 79(1): Cefic recommends the addition of a reference to the need for administrative sanctions to respect the provisions of the Charter of Fundamental Rights of the EU.
* On compensation, **Article 79a(1):** Cefic **cautions against** creating an individual right to compensation in the absence of a causation link between the emissions in violation of the IED and the health damage. In addition, on Article 79a(2): Cefic highly recommends to include safeguards against abusive litigation on the model of Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers.

Please see below the summary:

**Permitting:**

**Benchmarks:** definition is now more generic, *“‘benchmarks’ means the indicative environmental performance levels associated with best available techniques*”

**Art 5.4**: permits available on the internet- deleted. However, the requirements are included under Art 24:

**Art 24.2:** when granting a permit, the info should be made available to the public (pag 39) including the emission limit values and environmental performance limit values. In addition, the Commission shall adopt an implementing act to establish the format to be used for the information and documents for this provision.

**Art 15.3**:

* ‘The competent authority shall set the strictest possible emission limit values ***~~that are consistent with the lowest emissions~~*** achievable by applying BAT in the installation…’- negative. In addition included: ‘***General binding rules referred to in Article 6 may be applied provided these rules taking into account the best achievable performance while setting relevant emission limit values****.’*It make Art 6 more strict considering also how to achieve the best performance (eg Annex V).
* **New point 3b**:
* derogations for AEPLs taking into consideration the location and technical characteristics of the installation, which will be justified in the Annex to the permit. It shall be ensured that it shall achieve a high level of protection of the environment as a whole.
* ***Through implementing acts - a standardised methodology for undertaking the assessment for the derogations for AEPLs***

So the AEPLs are still binding based on Art 15. 3a and it limits the flexibility of the derogation process because now not only AELs but also for AEPLs there will be a defined process on how to grant derogation. In addition, derogation for AEPLs will create  additional burden for companies and could delay the permitting process. However, as a worst-case scenario, I think it is better to have a derogation in place than none at all although it might be hard to get them in the future.

**Art 16.3:** requests that the operator provides *an assessment of the impact of the derogation on the concentration of the pollutants concerned in the receiving environment. If this is quantifiable, the operator to monitor the concentration of the pollutants concerned in the receiving environment.* This reads as the operator needs toprovide the assessment before the derogation is granted, and not to monitor the impact after the derogation is granted as in the EC proposal.

**Art 18: EQS :** *Where the stricter conditions included in the permit, have a quantifiable or measurable effect on the environment, the competent authority* ***may*** *require the operator to monitor the concentration of the pollutants concerned in the receiving environment. (Positive)*

**EMS:**

**Art 14a**: EMS: clarified under point 3a (new) the requirements for MS (take measures at least every 3 years to check the audit done by the audit organization and that the operator reviews its EMS. However, these are still binding per installation (negative).

**Art 27d:**

* transformation plan: includes reference to the nature, scale and complexity of the installation (positive)
* added that the non-confidential information of EMS shall be made available (positive)

**Legal aspects**

**CBI**

* **Article 13(2).** Cefic **recommends** to restrict access to confidential and commercially sensitive data facilitated by industrial sites to the Commission and civil servants from ECHA and national competent authorities who are bound by law to an obligation of professional secrecy. Representatives of NGOs promoting the protection of human health or the environment and representatives of NGOs representing the industries concerned by the BREF should only have access to non-confidential information. Data submitted for the purpose of the adoption and review of BREFs includes highly sensitive data on technology and performance, some of which are sensitive under competition law (e.g. revealing volumes, revealing new technologies). An NDA is unlikely to provide sufficient protection to the entities facilitating the data.

**Penalties**

* **Article 79(1).** Cefic **recommends** the addition of a reference to the need for administrative sanctions to respect the provisions of the Charter of Fundamental Rights of the EU, including but not limited to the ne bis in idem principle and the proportionality principle.
* **Article 79(2).** Cefic **welcomes** the proposal in the Compromise Text to remove the minimum maximum threshold for administrative fines linked to IED violations. The amount of administrative fines should be proportionate to the nature of the illegal conduct. Fines should have the main objective to take away the benefits of non-compliance without being excessive. Turnover as a basis to calculate an administrative fine can to lead to unfair results.

**Compensation**

* **Article 79a(1).** Cefic **cautions against** creating an individual right to compensation in the absence of a causation link between the emissions in violation of the IED and the health damage. Language “has occurred as a result of” should be substituted by “was caused by”. It should also be recognized that such right is not absolute, and remains subject to limitations and exceptions existing under national civil law. For instance, the legal person should not be liable in case the violation was triggered by force majeure.
* **Article 79a(2).** Cefic **highly recommends** to include safeguards against abusive litigation on the model of Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers. Article 4(3), 10 and Article 12(1) of Directive (EU) 2020/1828 the explicit mutatis mutandis apply to collective actions for compensation referred to in the IED. In addition, consent of the individuals affected should be required (opt-in mechanism).
* **Article 79a(4).** Cefic **strongly supports** the proposal in the Compromise Text to remove the paragraph 4 of Article 79a of the Commission proposal. If the burden of proof is reversed, operators would have to prove a negative (i.e. that the emissions did not cause the health damage), and thus would have to demonstrate beyond reasonable doubt that other causes for the health damage are present. Given that many diseases are correlated with many putative causal factors, furnishing such proof would be impossible, even more so for SMEs.