ANNEX

Proposed way forward & main legal provisions relating to handling of CBI under BREF reviews

The BREF review steps involve procedures and decision-making steps that involve a differentiated degree of public availability and access to information applied. *Access to the information exchange in the standards making process is restricted in practical terms to TWG members only that have access to the password protected BATIS system. Information supplied to the BATIS system is deemed to be publicly available. Active dissemination of information beyond the BATIS (selective access conditions) is occurring at the stage of Kick Off meeting, Draft 1 (Draft 2 where applicable), discussions on content at the IED Forum, the draft Commission Implementing Decision with the Draft BAT-C, publication of the BAT-C in the Official Journal of the EU and subsequent finalisation and publication of the full BREF on the EIPPCB website.*

The EEB's proposed way forward as to how to handle CBI under the IED BREF reviews depends on the decision making / drafting phase of the BREF and can be adapted accordingly. Step 1 and 2 are general considerations applicable throughout the decision-making phase on CBI issues, whilst Step 3 proposes a practical way forward to enable a transparent exchange on data claimed CI / validated as CBI during the standards making phase, whilst still leaving the fate and format of its publication within the final BREF document open.

STEP 1: What information can(not) be considered as confidential business information (CBI)?

Information "relating to emissions into the environment" is by default considered as public information which overrides any CBI claim, as provided by the Aarhus framework[1]. The IED refers to the term 'pollution' (Art. 3(2) "*direct or indirect introduction […] of substances, vibrations, heat or noise into the air, water or land which may be harmful to human health or the quality of environment, result in damage to material property, or impair or interfere with amenities and other legitimate uses of the environment*", the definition of 'emissions' (Art. 3(4)) includes also diffuse sources as well as the products use phase. The Environmental Performance Levels, associated with the application of the Best Available Techniques (BAT-AE(P)Ls) are the basis for setting emission limit values (Art. 14(3)); and permits need to address amongst other items *raw and auxiliary materials, other substances and the energy used in or generated by the installation, the nature and quantities of foreseeable emissions into each medium* (Art. 12).

Art. 13(2) foresees that the exchange of information shall, in particular, address the following: *consumption and nature of raw materials, water consumption, use of energy and generation of waste*.

The BREF shall give *special considerations to the criteria listed in Annex III* (as per Article 3(11)), which includes the following: *use of low-waste technology; use of less hazardous substances; recovery and recycling of substances generated and used in the process; nature, effects and volume of the emissions concerned; consumption and nature of raw materials (including water) used in the process and energy efficiency; need to prevent or reduce to a minimum the overall impact of emissions on the environment and the risks to it; need to prevent accidents and to minimise the consequences for the environment*.

Article 14.1 point d) sets an obligation on the operator to report, at least annually, the information necessary to enable compliance verification with permit conditions (i) as well as the BAT-Conclusions (ii). Information on how the permit conditions have been determined in relation to BAT / BAT-AELs are considered to be public information (Art. 24(2)).

The Aarhus framework enables CBI in very specific situations, i.e. 'a legitimate economic interest protected by law' is substantiated and information does not relate to emissions into the environment.

[1] Notably Art 4(4) point d) of the Aarhus Convention, transposed in Regulation (EC) 1049/2001, Art 4(4) and Regulation (EC) 1367/2006, Art 6.

European Environmental Bureau
Europe's largest network of environmental citizens' organisations
www.eeb.org
Rue des deux églises 14-16
1000 Brussels, Belgium
+32 2 289 10 90
eeb@eeb.org

International non-profit association
Association internationale sans but lucratif (AISBL)
EC register for interest representatives:
Identification number: 06798511314-27
BCE identification number: 0415.814.848
RPM Tribunal de l'entreprise francophone de Bruxelles

It follows from the above that **the following information types may never be considered CBI** because either it is relating to emissions into the environment or/and because the information exchange / reporting on that information item is required by law **(referred here as 'type A information')**:

- **information relating to releases / emissions** (see notably C-673/13 para 78 and 79 and C-442/14), covering release from industrial production outputs as well). The Court held that the "*concept must be understood to include, inter alia, data that will allow the public to know what is actually released into the environment or what, it may be foreseen, will be released into the environment under normal or realistic conditions of use of the product or substance in question, namely those under which the authorisation to place that product or substance on the market was granted and which prevail in the area where that product or substance is intended to be used. Consequently, that concept must be interpreted as covering, inter alia, information concerning the nature, composition, quantity, date and place of the actual or foreseeable emissions, under such conditions, from that product or substance.*" An analogy can be made in the BREF context: information serving as a basis for deriving a BAT-AE(P)L represents actual emissions and performance. The revised BAT-C constitute the basis for setting permit conditions (authorisation to emit under that condition) that may not be exceeded and hence influence the foreseeable emissions by that activity or the new EU standard (practice) subject to the IED requirements.
- **information concerns items referred to under Article 13(2) IED** e.g. consumption data on inputs (water, energy, process substances)
- **information concerns any of the items referred to under Annex III** (this may concern production volumes as well if there is a link to the nature, effects and volume of (diffuse) emissions, such as from products or recovery of the substances in the process)
- **information used as a basis for determining a BAT-AE(P)L**, which will therefore become the basis for setting permit conditions and hence 'relate to emissions into the environment' (see C-673/13 precited).

We therefore consider this type of information to be public information (either on request or pro-active).

STEP 2: Transparent procedure and tracking system on CBI claims received / validated

2.1 CBI claims need to be validated by the Member State / EIPPCB (**first level controller**) justification for accepted CBI claims have to be made available within one month of submission to the contact point of the representative(s) of Environmental NGOs or on a dedicated BATIS folder 'CBI claims accepted'. Any CBI claim without justification is rejected;

Identifying data/information cases that would "harm a legitimate interest protected by law" -if shared in the information exchange context- is extremely limited. The Aarhus Convention states in Article 4(4) point (d) that disclosure of information may be refused if that disclosure would 'adversely affect the confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed." For assessing the question of "legitimate economic interest" the UNECE Aarhus Implementation Guide, second edition, page 87-89 http://www.unece.org/env/pp/implementation_guide.html provides for a list of tests.

First test: where the information concerns any of the items that can never been considered CBI (see above type A information in STEP 1), a CBI cannot be validated. The first level controller should be able to verify if this concerns Type A information which is subject to active information exchange provisions, withholding it is therefore *contra legem*.

Second test: Where the information relates to other data/information than the precited type A information, the data may be considered a valid CBI if all of the following conditions are met:

European Environmental Bureau
Europe's largest network of environmental citizens' organisations
www.eeb.org
Rue des deux églises 14-16
1000 Brussels, Belgium
+32 2 289 10 90
eeb@eeb.org

International non-profit association
Association internationale sans but lucratif (AISBL)
EC register for interest representatives:
Identification number: 06798511314-27
BCE identification number: 0415.814.848
RPM Tribunal de l'entreprise francophone de Bruxelles

a) it is protected by law
b) in order to protect a "legitimate economic interest"
c) the release of that information harms (a legitimate interest)
d) the public interest served by disclosure does not outweigh withholding access to that information.

The burden of proof is on the company to make the case that all those (4) conditions are met.

Condition (a) and (b): The first level controller should be able to verify those conditions. The EU competition (antitrust) rules prohibit restriction or distorting competition within the internal market and to make agreements to that end (TFEU, Article 101). This includes notably price fixing, production control, sharing markets or supply. To our knowledge it is very unlikely that the information exchange on BREFs would encompass such situations. However, it is clear that those agreements, concerted practices or agreements are only between associations of "undertakings" (competitors). The Industry concerned TWG stakeholder group, is represented by its sector group trade association (CEFIC and EUROFER for the two BREF examples) but may in certain cases also comprise companies / operators, that could be considered as "undertakings". *See STEP 3 on how to allow exchange of information, even on information validated as CBI.*

Condition c) it is unclear on whether and how the release of information in a BREF document, which is made publicly available in average 4 years after the date the 'CBI' information may harm a legitimate economic interest. Revealing good environmental performers may yield other advantages (reputational benefit), revealing bad environmental performers / breach of permit conditions may indeed harm an economic actor (reputational harm), however it is a legitimate interest for competent authorities and E.NGO to see information enabling verification of compliance with permit conditions. In the case T-189/14, Deza v. ECHA, para. 56 the Court held that evidence must be provided that disclosure would *"**seriously undermine** the commercial interest of a legal person."* Commercial information is normally commercial strategies, customer relations, specific expertise, sales figures, market shares and business relations, specialised scientific information (see C-280/11, C-365/12, T-578/13). Those type of information are not part of the BREF information exchange. Exact tonnage of the substance manufactured was presumed confidential only if it reveals market shares and due to the presumption explicitly made in a legal provision (REACH Art 118(2)c)), however even in those cases the overriding public interest balance test and reality of commercial interest being seriously harmed test had to be carried out (see para178 of case T-245/1). A presumption of confidentiality does not exist in the IED context: production volumes and market shares play no role in defining BAT-AE(P)Ls and the IED provides for a requirement to address in the information exchange (i.e. the BREF review process), in particular, information relating to consumption and nature of raw materials, including energy and water. There is therefore a presumption in favour of full transparency regarding the information exchange process.

Condition d) implies a balancing test that can only be case by case. The EU BREF process is about setting state of the art technical standards aimed to improve human health and environmental protection, whilst levelling the playing field for industry. The precited Article 101(3) of the TFEU may lift antitrust restrictions when a decision or agreement *contributes to improving the production or distribution of goods or to promoting technical [or economic] progress, whilst allowing consumers a fair share of the resulting benefits (provided it does not impose on the undertakings restrictions that are not indispensable or eliminate competition in respect of a substantial part of the products in question).*

The information exchange on EU BREFs is about promoting technical progress / improving environmental performance of (industrial) production, consumer benefits are provided due to improved level of environmental and human health protection, improved trust in more transparent and open EU standards making process. In the case ACCC/C/2007/21 the Committee stated, "*in situations where there is a significant public interest in disclosure of certain environmental information and a relatively small amount of harm to the interests involved, the Convention would require disclosure*".

European Environmental Bureau
Europe's largest network of environmental citizens' organisations
www.eeb.org
Rue des deux églises 14-16
1000 Brussels, Belgium
+32 2 289 10 90
eeb@eeb.org

International non-profit association
Association internationale sans but lucratif (AISBL)
EC register for interest representatives:
Identification number: 06798511314-27
BCE identification number: 0415.814.848
RPM Tribunal de l'entreprise francophone de Bruxelles

- **Step 2.2:** the contact point of the representative(s) of Environmental NGOs acts as (**second level controller**) on the validated CBI claims, shared by email or password protected BATIS folder; pending the outcome of the CBI validation, STEP 3 is taken in parallel
- **Step 2.3** A working document listing at least the name of the operators claiming a CBI, the questionnaire fields this request relates to, the date of reception of the claim, contact information on the data controller and status of processing of the claim is provided in the dedicated BATIS folder and kept up to date by the EIPPCB;
- **Step 2.4** The filled-in questionnaire version without the confidential information is uploaded to BATIS;
- **Step 2.5:** *When information is nevertheless accepted as being confidential (following to step 1 and 2), it may nevertheless be published via aggregated and/or anonymised form in the final BREF. The aggregation and/or anonymisation process should be made in consultation with the representative(s) of the Member State and E.NGO contact point and the confidential information will be kept under the EICCPB´s responsibility and will not be distributed without prior consultation with the data holder.*

STEP 3: Way forward on how to enable information exchange on "CBI" tagged information during standards making process (applicable for information exchange between TWG members that are not actual competitors and applicable as from STEP 2.2)

If after STEP 1 and 2.1 certain data provided for the information exchange is validated to constitute CBI or pending that decision being finalised, the full set of questionnaires containing data not to be disclosed due to competition rules should still be visible to "non-commercial interest" TWG members only (i.e. representatives of public authorities, the Commission and from E. NGOs) either on a password protected subfolder on BATIS or by other appropriate means. At this stage there is no disclosure in the public domain.

Unlike representatives of industry trade associations or operators, representatives of E.NGO cannot be considered as "competitor" in the sense of EU competition law, since they do not have any commercial interest in the regulated sector. This is because E.NGOs do not operate on the same market, nor is there any real and concrete possibilities that the ENGOs would join the market (see by analogy the CJEU's state aid case law, e.g. C-234/89 *Delimitis*, para. 21).

The Industry concerned TWG stakeholder group, is normally represented by its sector group trade association, those may in those cases nominate a third-party representative bound by a non-disclosure agreement. The European Commission would ensure in that setting that any "validated or pending CBI status information" is not made available to TWG stakeholders that are actual competitors, which concerns only representatives of the industry category.

This approach will enable a transparent exchange on the robustness and technical basis for deriving a BAT-AE(P)Ls, as notably required by Article 13(2) of the IED. Based on previous experience so far (Refineries BREF, FDM BREF), the fact that information was labelled as CBI (e.g. water and energy consumption) by industry led to either removing the BAT-Conclusions on that parameter or to declare those as purely 'indicative' (non-binding and hence less effective / useful for delivering improved environmental protection outcomes), on the basis that the data derivation basis was claimed as either not transparent or robust enough to derive a sound standard.

We therefore conclude that it is a correct assumption that a collective decision or agreement promoted by industry undertakings to withhold CBI information that may serve as a basis or needed to transparently define possible BAT standards (e.g. BAT-AEPL on energy and water consumption) would act against the interest to promote technical progress and should therefor not be promoted by the European Commission services.

European Environmental Bureau
Europe's largest network of environmental citizens' organisations
www.eeb.org
Rue des deux églises 14-16
1000 Brussels, Belgium
+32 2 289 10 90
eeb@eeb.org

International non-profit association
Association internationale sans but lucratif (AISBL)
EC register for interest representatives:
Identification number: 06798511314-27
BCE identification number: 0415.814.848
RPM Tribunal de l'entreprise francophone de Bruxelles