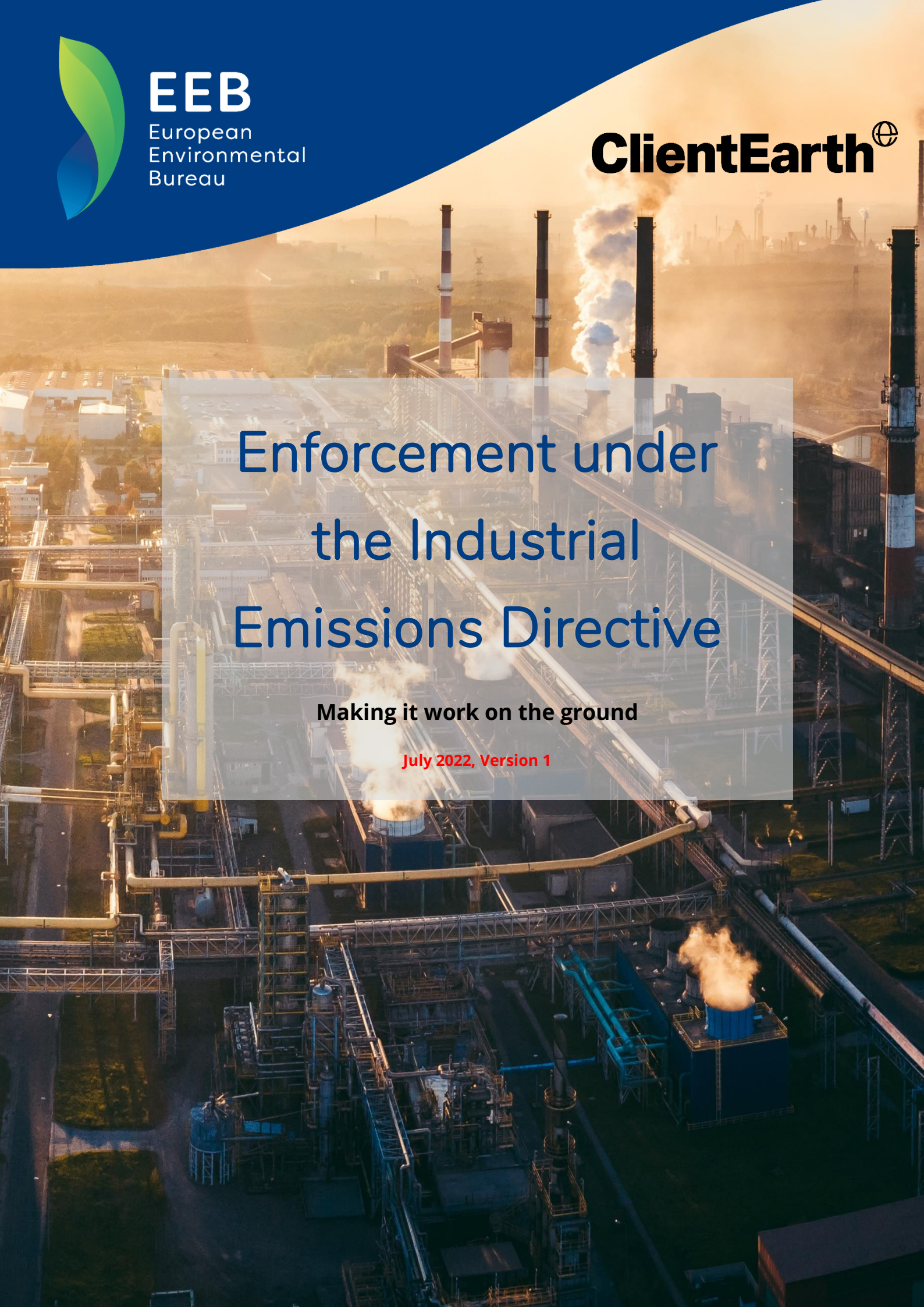
EEB
European Environmental Bureau

ClientEarth



Enforcement under the Industrial Emissions Directive

Making it work on the ground

July 2022, Version 1

Enforcement under the Industrial Emissions Directive

We are Europe's largest network of environmental citizens' organisations. We bring together over 180 civil society organisations from more than 40 European countries. Together, we work for a better future where people and nature thrive together.

The EEB is an 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

Published July 2022
Responsible editor: Patrick Ten Brink

For more information, please contact:
bbartolucci@clientearth.org
sustainableindustry@eeb.org

And surf: https://eipie.eu

European Environmental Bureau (EEB)
Rue des Deux Eglises 14-16
1000 Brussels, Belgium
+32 (0)2 289 1090
eeb@eeb.org
eeb.org
meta.eeb.org

With the support of the OAK foundation.

This publication reflects the authors' views and does not commit the donors.

On 5 April 2022, the European Commission adopted their proposal for a revised Industrial Emissions Directive (IED).[1] Considering the new elements presented, it doubtlessly represents a step forward towards greener industrial processes. However, there are aspects to be further strengthened and clarified. **In this briefing, we provide our assessment on the new elements included therein, focusing on enforcement provisions.**

Industrial Emissions Directive (IED): the main EU instrument regulating the environmental impact of industrial installations. The IED lays down rules in order to '**prevent or, where that is not practicable, to reduce' and as far as possible eliminate pollution,** to protect the **environment and human health**. By doing so, it seeks to comply with the '**polluter pays' principle**, and the **principle of pollution prevention**, giving **priority to intervention at source**. The Directive also aims to **prevent accidents** and limit their consequences, to ensure the **efficient use of resources incl. energy**, to **prevent the generation of waste**, and to **avoid any risk of pollution upon definitive cessation of activities** (IED Recital 2, and Article 11).
All environmental aspects are taken into account, as per the so-called '**integrated approach**', which is one of the basic pillars of the IED. **Around 50 000 industrial activities of the most polluting and climate damaging sectors listed in Annex I of the IED are required to operate in accordance with a permit.** The permit conditions are based on the IED provisions, most notably the sector-specific EU BREFs.

Best Available Techniques Reference Documents (BREFs): industry-specific documents which define the most effective techniques that industry can employ to minimise the environmental impact of their activities – the so-called 'Best Available Techniques', or BAT. BATs are already per today's definition technically and economically viable. The BAT conclusions (included in the BREFs) used as a reference to set permit conditions such as emission limit values or other environmental performance levels, which conditions industrial installations must comply with.

Best Available Techniques – Associated Emission Levels (BAT-AELs):
the emission levels achieved by the application of BAT.

Best Available Techniques – Associated Environmental Performance Levels (BAT-AEPLs):
the environmental performance levels achieved by the application of BAT.

Industrial Emissions Portal Regulation (IEPR): IEPR is the proposal for a revised Regulation establishing the European Pollutant Release and Transfer Register (E-PRTR), a Europe-wide register providing public access to key environmental data from industrial activities (incl. those covered by the IED). It is intended to implement the 2006 Kyiv Protocol on PRTRs, and refers to the triple objective of (1) enhancing public access to information that would (2) facilitate public participation in environmental decision-making, and (3) contribute to the prevention and reduction of environmental pollution. The current reporting interface is hosted by the European Environment Agency.

This briefing has been produced by ClientEarth and is endorsed in full by the EEB
Bellinda Bartolucci, Senior Lawyer, European Fossil Fuel Infrastructure
bbartolucci@clientearth.org www.clientearth.org

ClientEarth is an environmental law charity, a company limited by guarantee, registered in England and Wales, company number 02863827, registered charity number 1053988, registered office 10 Queen Street Place, London EC4R 1BE, a registered international non-profit organisation in Belgium, ClientEarth AISBL, enterprise number 0714.925.038, a registered company in Germany, ClientEarth gGmbH, HRB 202487 B, a registered non-profit organisation in Luxembourg, ClientEarth ASBL, registered number F11366, a registered foundation in Poland, Fundacja ClientEarth Poland, KRS 0000364218, NIP 701025 4208, a registered 501(c)(3) organisation in the US, ClientEarth US, EIN 81-0722756, a registered subsidiary in China, ClientEarth Beijing Representative Office, Registration No. G1110000MA0095H836. ClientEarth is registered on the EU Transparency register number: 96645517357-19. Our goal is to use the power of the law to develop legal strategies and tools to address environmental issues.

The EEB is publishing a series of briefings on different aspects relevant to the review of the IED and IEP.
All available briefings can be accessed and downloaded here: https://eipie.eu/briefings-by-eeb/
Or scan this QR code:

What's at stake?

The most ambitious IED provisions will not have effect if there is no guarantee of their implementation in practice. Enforcement provisions are therefore key to empower Member States' authorities, civil society as well as individuals to address non-compliance with the IED. Stringent compliance with this elementary piece of EU environmental legislation will not only lead to **direct reduction of harm to human health and the environment** from large agro-industrial activities, but also **avoid distortion of competition between IED operators** in different Member States.

IED installations account for 40% of the EU's greenhouse gas emissions, leading to further environmental degradation, as well as around 20% pollutant emissions by mass to air and around 20% pollutant emissions to water[1] – pollution that can cause severe health damages such as cancer, heart diseases, mental and neurological conditions, diabetes and more, and that can lead to premature deaths.[2] As of today, the IED could have already achieved greater effects in reducing these impacts. However, it failed to do so as there are significant varieties in the manner in which the IED is applied by different Member States. This is because the IED contains too many loopholes and leaves too much discretion to the authorities as to how it is to be enforced.

In order to better implement the IED, we need to provide Member States with adequate options to **suspend activities**, to introduce **clear penalties** and grant individuals and civil society **timely access to justice** when IED rules are breached. Moreover, a **new compensation right** for individuals would finally acknowledge the need to protect the environment and people suffering from health damages that occurred as a result of an illegal operation.

The IED has huge potential to become one of the legislative flagships translating the new EU objectives under the European Green Deal, including on the protection of human health, into tangible legal obligations. However, it will only be as effective as its provisions will be enforceable in practice. The revision of the IED is now a crucial opportunity to remedy this issue.

[1] Impact Assessment Report accompanying the Proposal for the IED, Strasbourg, 5.4.2022 SWD(2022) 111 final Part 1/5, page 3, available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12306-Industrial-emissions-EU-rules-updated_en.

[2] Pathway to a Healthy Planet for All EU Action Plan: 'Towards Zero Pollution for Air, Water and Soil', Brussels, 12.5.2021 COM(2021) 400 final, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021DC0400&qid=1623311742827.

What to do?

1. Do not wait until the "fire" starts: Effectively suspend activities that contravene the law

Currently, if an IED installation fails to comply with its IED permit, the industrial activity will still continue to operate. Only if the actual breach *"poses an immediate danger to human health or threatens to cause an immediate significant adverse effect upon the environment"*, the competent authorities have the possibility to suspend the operation until IED compliance is restored (Art. 8(2) IED).

In practice, this standard is unclear and sets too high a threshold, meaning that activities are rarely suspended but continue operating, while significant harm continues to arise. Many if not most adverse effects upon the environment or human health that result from non-compliance with the IED only become **visible over time** and are **not *"immediately"***[3] apparent. In practice it is therefore very difficult to establish that there is an "immediate" threat, even though the **long-term consequences are dire**.

Example: A common example is the non-compliant storage of hazardous substances used in the industrial activity on site of IED installations. When the storage conditions are non-compliant with the IED and do not fulfil the minimum safety conditions, one of the negative consequences that can result is the start of fires within the site at a later stage.

Allowing for a suspension of the IED activity on a non-immediate basis would mean in this situation that following an inspection, the competent authority, acknowledging the non-compliance and the potential future negative effects if it persists, would have the power to decide the suspension of the IED activity at an early stage. This way, the IED operator would be forced to fix the storage issue existing on site of the IED installation in advance of the danger of fire becoming immediate.

In reality, whether a non-compliant activity is suspended, should depend on the severity of the non-compliance, on the potential foreseen effects that it may have on the natural resources and human health, and on whether it is likely to reoccur[4] – but not depend mainly on whether the harm is "immediate". This way, the suspension would ensure that the IED operator is **incentivised** to focus on correcting the non-compliance **as soon as possible, keeping the harm to the environment and human health at a minimum**. Such a provision would implement the EU's polluter pays principle, the principle that environmental harm should be prevented at the source, and in particular the precautionary principle in light of the protection of human health, as enshrined in Art. 191 TFEU.

In short, effective suspension in time would require that the competent authority has the competence to generally impose a suspension irrespective of whether the harmful impact on the

[3] There is no express definition of immediate in the IED or other EU environmental law pieces of legislation. Nevertheless we consider it is reasonably to interpret this in the same line as "imminent threat of danger" in relation to which the Environmental Liability Directive provides for a definition at Art. 2(9): *"imminent threat of damage" means a sufficient likelihood that environmental damage will occur in the near future*".

[4] The non-compliance performed by the same IED operator in a recurrent manner should be sanctioned with the suspension of the IED activity until the IED operator ensures the compliant functioning of the IED installation.

environment based on non-compliance occurs immediately, **as long as the negative effects on the environment and/or human health of the IED breach are foreseeable.**

While the Commission's revised IED proposal *allows* (instead of asking for) suspension if an IED breach continues to occur under certain condition, it still upholds the requirement of an "immediate" danger/threat in the first place. A new amendment should focus on the "foreseeable" environmental impacts and make the suspension tool effective to prevent further environmental and human health damage as soon as possible.

2. Avoid breaches in the first place: Making fines dissuasive in practice

Fines are a classic instrument to address illegal operation. One of the main roles of penalties, however, is to discourage the IED operators from breaching IED obligations and to ensure compliance in the first place. As of today, the IED is asking Member States to determine penalties applicable for IED infringements that *"shall be effective, proportionate and dissuasive"* (Art. 79 IED), without any further clarification what that means. This general wording gives a lot of discretion to the Member States. In practice, a number of Member States have set penalties at levels that do not effectively dissuade IED operators from breaching the IED. Moreover, the variety and differences of implementation at national level creates huge discrepancies in IED enforcement within the EU, leading to unequal treatment for IED operators functioning in different geographies.

Example: In Romania, IED breaches are sanctioned with fines up to 20,000 Euros only (and can be reduced by 50% if the fine is paid within 15 days of the communication of the sanctioning decision). Penalties can be even lower if the operator does not obtain an IED permit at all rather than to contradict 'only' specific permit conditions. This is clearly insufficient to discourage operators from breaching even the most important IED obligations.

To ensure that the fines are indeed effective, proportionate, dissuasive all over the EU, it is necessary to **harmonize the minimum requirements** in the IED itself. In particular, there should be **clear criteria to determine the amount of penalties (e.g., depending on the nature, gravity, duration, damages of the infringement etc.) as well as a minimum threshold of the fines**. When assessing the exact amount of the fine, the **company global turnover** should be taken into consideration, too.[5] This would ensure a level playing field for all operators across the EU. It would also ensure that EU law uniformly protects people affected.

The Commission's proposal includes some of the key criteria listed above. Its amendment should be supported and further improved upon. In particular the determination of a "minimum" amount of fines (instead of a minimum of the maximum amount, as suggested in the revised Art. 79) should ensure a dissuasive effect.

[5] In this sense the revised IED can follow the example of other EU legislation, in which specific thresholds for the applicable fines are expressly provided (e.g., GDPR, Unfair Commercial Practice Directive, EU ETS Directive).

3. Public scrutiny: Improving possibilities for individuals and NGOs to access to justice, strengthening environmental protection via national courts

The role of the national courts is instrumental in reaching effective implementation of EU legislation designed to protect the environment and human health. In order for the national courts to have the power to actually contribute to this, individuals and NGOs need to be given standing under EU law to rule on such issues ("access to justice"), including on a wide variety of IED breaches.

Example: Issues that are often very difficult to challenge in the national courts relate in particular to inspections carried out or not carried out in relation to IED activities. This leads to insufficient control of the real operation of the installation.

For almost 30 years, the rules on access to justice to the national courts in relation to large agro-industrial installations have not changed (today in Art. 25 IED).[6] The *"public concerned"*[7] can challenge in national courts **only limited categories of decisions** which are in breach of the IED,[8] the most common being when new IED permits are issued. This means that other relevant IED infringements that are frequently encountered in practice cannot be brought to the attention of the national judge due to the lack of their inclusion in the IED "access to justice" provisions (Art. 25 IED).

However, access to justice must be granted in any case. This is the only way to ensure compliance with the EU's own international obligations: under the Aarhus Convention, the EU must enable the public to *"have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities"* in all cases in which an alleged violation of law relating to the environment has taken place (Art. 9(3) Aarhus Convention). Moreover, such a provision would ensure the right to an effective remedy as laid down in Art. 47 of the EU's Charter of Fundamental Rights.

The Commission's revised IED proposal does partly broaden the access to justice provision related in some way to the IED permitting (Art. 25 in conjunction with Art. 24), but it is still limited to specific cases only. While we support this proposal, we consider it should be further improved as to **cover all relevant IED breaches by the operator or the competent authority** to ensure full access to justice.

4. If damage occurred: Granting compensation for individuals suffering from human health damages caused by illegal IED installations

Even with the best regulation, large agro-industrial activities will still sometimes fail to comply with the IED and cause severe damage to human health. Such illegal IED operations can lead to multiple types of pollution: for example the emissions of toxic substances into air, water, soil

[6] The provisions are still based on the first predecessor of the IED, the IPCCD, see also Impact assessment report – Revision of the IED, SWD(2022) 111 final, part 2/5, page 180, available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12306-Industrial-emissions-EU-rules-updated_en.

[7] Definition of the *"public concerned"* is provided at Art. 3(17) IED.

[8] Currently, access to justice is provided only in the situations covered by Art. 24 IED, as referred to in Art. 25 IED.

noise pollution, or the generation of waste – and all of them can impact human health. Sanctions or suspensions to be applied by authorities will not help the people affected if damage has already occurred. This is why the revised IED must expressly provide for a legal route through which people can request and obtain compensation from the non-compliant IED operator.

In theory, all Member States have a system in place to claim damages where harm occurs. However, these "classic" civil liability routes are usually inappropriate and ineffective for human health damages caused by diffuse environmental damage (e.g., air pollution, water pollution etc). One of the biggest problems is that in practice, for individuals affected it will be of **utmost difficulty to prove the causal link between one specific pollution arising from the IED breach and the damage** they suffered.

In order for such a claim to be effectively enforced, it is necessary that the burden and the standard of proof showing the causal link between the IED non-compliance and the human health damage are not practically impossible or excessively difficult to demonstrate. When an individual can provide prima facie proof that they suffered health impacts from the IED permit, 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 that person.

Example: 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 under the Ambient Air Quality 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, water or soil pollution, which may impact people's health. In all these cases, the causal link is currently very difficult to prove in court following the routes under existing national civil law provisions.

*See cases (1) Farida T. , (Tribunal Administratif de Montreuil 2019), N° 1802202 , (2) N., (Tribunal de Paris, 2019), N°1709333/4-3, (3) M. G., (Tribunal de Paris, 2019), N°1814405/4-3 , (4) D.E., (Tribunal Administratif de Grenoble, 2020), N° 1800067. One of these actions has recently resulted in two preliminary questions being referred by the Administrative Court of Appeal of Versailles to the CJEU (case C-61/21, pending).

Introducing this new compensation right will finally acknowledge the link between environmental pollution and human health damages such as cancer, heart diseases and many others as well as premature deaths. It will also help to implement the right to an effective remedy as laid down in Art. 47 of the Charter of Fundamental Rights and serve to protect the fundamental rights of persons harmed by pollution, such as the right to life and integrity of the person under Art. 2 and 3 of the Charter. Finally, damage claims 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.

The Commission's proposal for the IED revision does contain an amendment in this regard, provided under the proposed revision of Art. 79a. This provision should be supported and further improved upon.

EEB
European
Environmental
Bureau

eeb.org

A better future where people and nature thrive together