

## IED - CONSIDERATION OF TRANSITION PERIODS FOR THE IMPLEMENTATION OF NEW ART

### 15.3 AND 15.3a

#### BACKGROUND TO ISSUE

The CZ Presidency initiated a discussion on 25/11/2022 for a possible transition period(s) (WK1603/2022), the Swedish presidency proposes to resume that discussion. It seems that transition periods shall exclude in the upcoming years the application of the revised rule on how to apply emission limit values (ELVs) based on BAT Conclusions (Art. 15.3) and other environmental performance levels (Art. 15.3a).

Some Member States argue that transition periods are needed to be able to handle the administrative burden that comes with the application of Article 15.3 and 15.3a, in particular for existing activities/new activities based on existing BAT Conclusions (BAT-C) and/or to transpose the Directive into national law. However, there are strong concerns against “transition periods” for implementing Art 15.3 and 15.3a:

- a) The new provision merely clarifies that it is for the MSCA to implement the “strictest possible” ELVs consistent with the lowest emissions achievable by applying BAT, as described in the BAT Conclusions, in the installation. The reference point is crystal-clear and ensures legal certainty since it refers to the adopted and published BAT-C under the current IED. The BAT-C were published in the OJEU at least 10 years ago (for I&S,CLM, GLS, PP, REF, TAN, ), more than 7 years ago (for CWW, LCP, NFM, WBP); or between 5 and 1 years ago (for IRPP, WT, LVOC, STS, WI,FDM, TXT, FMP, WGC). The very few remaining BAT-C expected to be published in 2023 are the SF and SA BAT-C. If not published according to schedule, only 2 (LVIC, STM) may be published after entry into force of the revised IED. The IED provisions are sufficiently clear and provide a maximum of 4 years compliance deadline following their publication in the OJEU for those cases. **To conclude: It is most likely to be expected that within the next decade, only 2 sectors will apply the new Art. 15.3 if there is the suggested transition period (applicable only to BAT-C that got adopted after the entry into force of the revised IED).**
- b) It is for the operators to provide the necessary evidence as to why the “clarified approach” on the strictest possible BAT-AE(P)L implementation is not feasible in their installation. If the integrated approach is preserved, there is no need for any transposition provisions to make the revised Article 15.3 operational. Earlier conclusions made on the adopted BAT-C (based on EU reference plants running under economically viable conditions) are not put to question under the revised IED. It is not disputed by Member States that there has been a mis-use of the BAT-AEL ranges (default alignment to the lenient range in around 80% of the permits across the EU), also for the purpose of the use of general binding rules

(GBR), pursuant to Article 17. For most BAT-C there are no quantitative BAT-AEPL in place, hence keeping further workload to the minimum.

- c) Restarting a BREF revision prior to the application of the ‘clarified approach’ of the revised IED does not provide any legal certainty but rather a gamble into the future as to how those BAT-C will look like. Many resources (time and finance) have been put in the EU BREF reviews, not just by industry and Member States but also by European Commission services and NGO stakeholders that have contributed to data gathering, commenting on drafts, forum discussions and voting (LCP first vote passed with a very tiny voting margin but all others met a high level of consensus support from industry and Member States). Implementation at national level and enforcement actions already took place. It is questionable whether any tighter BAT-AE(P)L are likely to emerge from future BREFs, notably those that have been reviewed within the last 5 years. Whether a transition period would effectively reduce administrative burden is to be seriously questioned.

***To address the concerns of potential administrative burdens, the solution should be sought in combining any updates of Art. 15.3 and Art. 15.3a in already existing permit reviews, or in giving MSCA prioritization criteria at hand.***

**OPTIONS FOR CONSIDERATION, proposals for “transition periods”, relating to enforcement of Art 15.3 and 15.3a:**

**Option A: Applicable automatically with new permit reconsideration according to Art. 21 (following entry into force of the revised IED)** This option implements the current approach and leaves the maximum flexibility for the MSCA.

*Legal wording: It could be clarified that Art. 15.3 and Art. 15.3a will be automatically applied when reconsidering a permit according to Art. 21. Similar to the 4 year implementation period in Art. 21(3), these updates should happen within 4 years after the entry into force of the revised Directive:*

<i>Text proposed by the Commission</i>	<i>Amendment</i>
	<i>Art. 15(3) and (3a) shall apply to any granting of a permit or reconsideration or updating of a permit after the entry into force of this Directive, and in any case for the first time no later than 4 years after the entry into force of this Directive.</i>

## **Option B: Provide for harmonized compliance deadlines for both operators and MSCA e.g. 2026 to update the permit conditions**

The proposal is allowing for the maximum legal certainty and expectations management since the BAT-C reference points are clear and a target date is provided. Amendments tabled in the ENVI committee aim for a compliance deadline of 01/01/2024. It is true that operators could start already now preparing the elaboration of the non-feasibility assessment since the reference points are clear, this attitude will also demonstrate real commitment and willingness to improve on their environmental performance. Operators should provide those assessments **at least 2 years** prior to the deadline for MSCA to update the new permit conditions. In order to allow engagement of other stakeholders to the permit reviews e.g. Technique providers, E.NGOs, IMPEL etc it would be advisable that any “non feasibility assessments” are put on an online access database for potential scrutiny checks, thus supporting the evaluation actions by the MSCA.

*Legal wording: Possible addition in the transposition section: “Operators of installations carrying out activities referred to in Annex I shall provide the non-feasibility of the assessment referred to under Article 15(3) and 15(3)a to the competent authorities [or on another publicly available online platform] at the latest [OP please insert the date = 01/01/2024]. Member States shall ensure the permit conditions are updated and consistent with the provisions of Article 15(3) and 15(3a) at the latest by [OP please insert the date = 01/01/2026].*

*Additionally, as provided in article 21(3) \*(if wording of the current Commission proposal is unchanged), it should be ensured that where the main activity of an installation carrying out activities referred to in Annex I is not subject to BAT Conclusions adopted under Directive 2010/75/EU by the first mentioned date, the maximum compliance deadline may be extended up to 4 years of the date of publication of the decision on the BAT conclusions pursuant to this Directive, whichever the sooner. ”*

## **Option C: Prioritisation criteria: relevance of environmental/human health pollution load and impacts (sector level approach)**

The proposal would require earlier compliance deadlines for those IED activities which contribute most in terms of pollution load (compared to other IED sectors). The MSCA shall take into account the corresponding load of the pollutants in question, the operating hours of the installation, and the relative contribution of the installation and sector to the relevant Environmental Quality Standards such as ambient environmental quality, water quality, or resource use impacts in comparison to other (transboundary) industrial sources. This approach will allow Member States to set their own national priorities whilst keeping the environmental impact focus in mind, thereby supporting a sound prioritisation approach as to admin burden v. desired impact prevention for wider public benefits. The following Annex I activities are proposed as priority

sectors: Energy intensive industries such as Section 1 (energy industries), 2.1 (metal ore), 2.2 (iron and steel), 3.1 (production of cement, lime and magnesium oxide) , 4.1-4.3 (chemical industry)\*, possibly thermal and physico-chemical treatment of waste. \*Activity 4.4 on pesticides and biocides production is subject to a dedicated risk management regulatory framework; air pollutants from Pharmaceutical production is covered by the WGC BREF and water related impacts due to be better regulated through pharmaceutical legislation / UWWTP-D. This option would however need an EU harmonized approach as to sector level priorities across the MS so to prevent distortion and environmental unlevel playing field. A severe limitation of these sectors is induced by the loss of Annex II - permit writers have no legal obligation anymore to set ELVs (not based on BAT-AELs) for most of these sectors' pollutant.

*Legal wording: Possible addition in the transposition section: Same as option B but listing explicitly the Annex I activities that need to be amended in priority (see deadlines above). For other activities the deadline may get extended by e.g. + 2 years.*

**Option D: prioritisation criteria: hazardous properties of the pollutants concerned (hazard to human health or PBT properties)**

This approach is similar to option C but would give more weighting on whether the activity involves release of substances of concern, such as those with hazardous properties to human health and/or the environment or otherwise problematic for ensuring full compliance with the EQS (notably the objective of phase out of substances that have properties of being Persistent, Bioaccumulative and Toxic or very Persistent and very Bioaccumulative).

*Legal wording: Possible addition in the transposition section: Same as option B but prioritizing activities involving release of pollutants with hazardous properties to human health or properties of persistence, bioaccumulation and toxicity.*

*Furthermore, to ensure a high level of the protection of the environment as a whole needed to comply with the zero pollution targets by 2030, one should add the following provisions:*

<i>Text proposed by the Commission</i>	<i>Amendment</i>
<p><b><i>(b) setting different emission limit values than those referred to under point (a) in terms of values, periods of time and reference conditions.</i></b></p>	<p>Article 15.3 subparagraph 1, point b is amended as follows:</p> <p><b><i>“b) with supplementary load limits achieving a high level of pollution prevention for any pollutant with properties of concern that is emitted from the installation. For pollutants with hazardous properties to human health, those should be subject to at least hourly load limits.</i></b></p> <p><i>The competent authority shall demonstrate how the high level of environmental and human health protection is ensured, and shall, at least annually, assess the results of emission monitoring in order to ensure that the emissions under normal operating conditions have not exceeded the pollution load associated with the best available techniques.”</i></p>
	<p>The following paragraph is added to Article 15.3 and 15.3a</p> <p><b><i>“The competent authority shall demonstrate how the high level of environmental and human health protection is ensured, and shall, at least annually, assess the results of emission monitoring in order to ensure that the emissions under normal operating conditions have not exceeded the <b>pollution load</b> associated with the best available techniques”.</i></b></p>

**Option E: Prioritisation criteria: margin of progress on pollution prevention/ reduction potential (sector level approach)**

Another pragmatic approach would be to assess the progress margin within a sector at a given Member State from moving from upper BAT-AEL level / current emissions level towards the stricter BAT-AE(P)L range in comparison to the average performance levels of the sector within the given Member State. The knowledge of average environmental performance should be available in the assessment of the annual compliance reports, pursuant to Article 14 of the IED (at least for the 2014-2021 period). Where the margin of pollution prevention/reduction progress exceeds [20%] for a given pollutant or potential of resource savings by applying the strictest BAT-AE(P)Ls, the permits of all corresponding activities and the pollutant / BAT-C concerned shall be updated in priority.

This approach is similar to option C but would give more weighting on actual pollution reduction potential / opportunities. It would thus provide for a good ratio of admin burden or operators efforts commitments v. public benefits.

*Legal wording: Possible addition in the transposition section: Same as option B but providing a default improvement potential factor with clarification provisions as to its implementation.*

**Option F: Prioritisation criteria: effort sharing by MSCA depending on ambition level set in the General Binding Rules (national safety net measures in place)**

A further pragmatic approach is based on a combination of options C, D and E. It would allow those Member States that use general binding rules (GBRs) as a BAT-C implementation strategy to give more time for case by case permitting review, provided that those Member States can demonstrate that the national safety net provisions (GBR) in place would provide for an equivalent level of environmental and human protection compared to the case by case Art 15.3 'clarified approach'. This could be the case when the ELVs and environmental performance limit values would be consistent with the strict BAT-AE(P)L level set. The shadow rapporteur of RENEW and other MEPs suggest setting this level of the GBRs on the average performance of the best 10% installations of the given category in the Union. In that case, a simple reference could be made to such rules in the permit (see Amendment 923).

As a fallback the “mid point” range could be proposed, which is the conclusion reached in ST3 of the Taxonomy, relating to the Chemicals BREFs, including the WGC and other IPPC BREFs.

*Legal wording: Possible addition in the transposition section: The legal transition provision shall provide that the GBR are updated by that date to reflect those performance levels. Allow for*

possible time extensions or just a reference only where the following changes are made to Article 17:

Text proposed by the Commission	Amendment
<p>1. When adopting general binding rules, Member States shall ensure an integrated approach and a high level of environmental protection equivalent to that achievable with individual permit conditions.</p>	<p>"1. When adopting general binding rules, Member States shall ensure an integrated approach and a high level of environmental protection equivalent to that achievable with individual permit conditions <b>either by:</b></p> <p><b>(a) basing a set of general binding rules on the average performance of the best 10% installations of the given category in the Union, with permits simply including a reference to such rules, or</b></p> <p><b>(b) a two-step approach whereby the adoption of the general binding rules is followed by an individual permit-granting process pursuant to Article 15.</b></p>
<p>2. General binding rules shall be based on the <b>best available techniques, without prescribing the use of any technique or specific technology</b> in order to ensure compliance with <b>Articles 14 and 15.</b></p>	<p>2. General binding rules shall be based on the <b>most effective combination of best available techniques</b> in order to ensure compliance with <b>the objectives of this Directive.</b></p>
<p>3. Member States shall ensure that general binding rules are updated to <b>take into account developments in best available techniques</b> and in order to ensure compliance with Article 21.</p>	<p>3. Member States shall ensure that general binding rules are updated to</p> <p><b>(a) reflect best performance achieved by the use of the most effective best available techniques and their developments</b> in order to ensure compliance with Article 21</p> <p><b>(b) promote the uptake of the most effective techniques as laid down in the decisions on BAT conclusions referred to in Article 15(3) or the deployment of the emerging techniques referred to in Article 27.</b></p>

4. *General binding rules adopted in accordance with paragraphs 1 to 3 shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication.*

4. General binding rules adopted in accordance with paragraphs 1 to 3 of **this Article** shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. ***These rules shall be regarded as minimal requirements set at national level.***