

## TO THE COMPLAINTS MECHANISM OF THE EUROPEAN INVESTMENT BANK

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## 1. The complainant

of **INSTITUTO INTERNACIONAL DE DERECHO Y MEDIO AMBIENTE (IIDMA)**, a Spanish environmental law organization declared of public utility and registered in the Associations Register of the Spanish Ministry of Home Affairs since January 1997, with registry number 161.924 and correspondence address in calle Campoamor 13-1º Izda. 28004 Madrid, Spain (please find attached by-laws and proof of incorporation in the Associations Register as documents number 1 and 2, respectively)

Contact data: with address for notification purposes at Instituto Internacional de Derecho y Medio Ambiente, calle Campoamor 13, 1º Izda Madrid, telephone and email: and [iidma@iidma.org](mailto:iidma@iidma.org).

**Consent to reveal the identity of the complainant:** The complainant authorises the European Investment Bank (EIB) Complaints Mechanism to reveal its identity during the course of the investigation of this complaint if it is admitted.

**Cooperation with the Complaint Mechanism:** The complainant is available to cooperate with the CM to the best of its availability.

## 2. The complaint

This complaint regards the loan of approximately € 26 Million granted by the EIB<sup>1</sup> (EIB Project Number: 2016-0192). IIDMA understands this loan has been granted to CUF, a Portuguese Company. This loan is to finance a project to convert a mercury-based chlorine production facility in Torrelevega, in the Autonomous Community of Cantabria, Spain [currently owned by Solvay Química S.L.] into one that utilizes membrane technology to produce chlorine.

To understand the core of our complaint, it is paramount to indicate that in July 2016 CUF and Solvay Química S.L negotiated an agreement<sup>2</sup> (attached as document number 3) which is the base for CUF to execute the project financed by the EIB. This agreement consists in the commitment of CUF to purchase Torrelavega facility to Solvay under the condition that Solvay is granted a review to its IPPC permit which allows the facility to operate after 11 December 2017 with mercury cells. This contravenes Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions<sup>3</sup> (**IED**) and **Regulation (EU) 2017/852** of the European Parliament and of the Council of 17 May 2017 **on mercury**, and repealing Regulation (EC) No 1102/2008.

Therefore, this complaint raises concerns on the assessment by the EIB of the environmental impacts of the approved loan.

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<sup>1</sup> The EIB approved the loan on 13.12.2016. See:

<http://www.eib.org/projects/pipelines/pipeline/20160192>

<sup>2</sup> See a statement by Solvay Química, S.L (Solvay's statement) distributed to its facility workers as well as to political groups in the Autonomous Community of Cantabria.

<sup>3</sup> OJ L 334, 17.12.2010.

### 3. The facts and legal context

On 29 April 2008, the Directorate General for Environment of Cantabria granted an IPPC permit to Solvay Química S.L to produce chemical products in Torrelavega facility<sup>4</sup>. Among the chemicals manufactured by this facility is chlorine. The chlorine production process uses the mercury cell technique. The permit was modified in several occasions.

The IED entered into force on 7.01.2011. According to it:

- Permits must include emission limit values for polluting substances listed in Annex II (Article 14(1) (a)). Annex II lists metal and its compounds, and mercury (Hg) is a metal.
- Best Available Techniques (BAT) conclusions shall be the reference for setting the permit conditions (Article 14 (3)).
- The competent authority shall set emission limit values that ensure that, under normal operating conditions, emissions do not exceed the emission levels associated with the best available techniques (known as BATAEL)(Article 15 (3)).
- the competent authority may, in specific cases, set less strict emission limit values when very stringent conditions are met (Article 15(4)) .
- A permit must be reconsidered and updated within 4 years of publication of decisions on BAT conclusions (Article 21(3)).

On 11.12.2013, the Commission Implementing Decision of 9 December 2013 establishing the best available techniques (BAT) conclusions, under Directive 2010/75/EU of the European Parliament and of the Council on industrial emissions, for the production of chlor-alkali was published<sup>5</sup> (BAT conclusions for the chlor-alkali sector). This document contains legally binding BATs conclusions for chlorine production affirming that the mercury cell technique cannot be considered BAT under any circumstances<sup>6</sup>. By application of Article 21(3) of the IED, Member States have a maximum period of 4 years to review conditions of permits

<sup>4</sup> IPPC permit available at:

[http://www.medioambientecantabria.es/documentos\\_contenidos/22273\\_1.1.pdf](http://www.medioambientecantabria.es/documentos_contenidos/22273_1.1.pdf)

<sup>5</sup> OJ L 332, 11.12.2013. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013D0732&from=EN>

<sup>6</sup> According to that Commission Implementing Decision, "Cell technique BAT 1: BAT for the production of chlor-alkali is to use one or a combination of the techniques given below. **The mercury cell technique cannot be considered BAT under any circumstances**", see page 39 of the OJ L 332. In addition, BAT 8 which refers to the air emissions limit values (ELVs) associated to BATs do not include Hg and the very same happens with BAT 13 which refers to the water ELVs associated to BATs.

granted to the chlorine facilities to put them in line with the BATs. This implies that all IPPC permits held by chlorine facilities in the EU must be reviewed by 11 December 2017 and ban to use of mercury cells beyond that date.

On 7.07.2016, the DG for Environment of Cantabria initiated the administrative procedure to review the IPPC permit granted to Solvay Química to comply with the IED requirements on BATs.

On 29.07.2016, Solvay Química S.L., filed a request to that DG to be granted an extension of 24 months to continue operating with mercury cells beyond the deadline of 11.12.2017 provided by the IED<sup>7</sup>.

It was precisely in July 2016 when Solvay and CUF reached the acquisition agreement conditioned to the obtaining by Solvay of a revised IPPC permit that approves a 24 months derogation and allows the Torrelavega facility to continue its operation after 11.12.2017 using mercury cells<sup>8</sup> to produce chlorine.

On 28.04.2017 the DG for Environment of Cantabria issued a draft resolution of Solvay's IPPC permit review procedure which includes the intention to grant the derogation (see pages 15, 30 and 31 of the draft resolution attached as document num.3).

It is important to emphasize that the requested derogation does not fulfill the conditions under article 15(4) of the IED which provides:

*4. By way of derogation from paragraph 3, and without prejudice to Article 18, the competent authority may, in specific cases, set less strict emission limit values. **Such a derogation may apply only where an assessment shows that the achievement of emission levels associated with the best available techniques as described in BAT conclusions would lead to disproportionately higher costs compared to the environmental benefits due to:***

- (a) the geographical location or the local environmental conditions of the installation concerned; or*
- (b) the technical characteristics of the installation concerned.*

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<sup>7</sup> See page 5 of the draft resolution of 28.04.2017 of the DG for Environment of Cantabria reviewing the Solvay IPPC permit, attached to this complaint as document num.3.

<sup>8</sup> See Solvay's statement.

*The competent authority shall document in an annex to the permit conditions the reasons for the application of the first subparagraph including the result of the assessment and the justification for the conditions imposed.*

*The emission limit values set in accordance with the first subparagraph shall, however, not exceed the emission limit values set out in the Annexes to this Directive, where applicable.*

*The competent authority shall in any case ensure that no significant pollution is caused and that a high level of protection of the environment as a whole is achieved.*

***On the basis of information provided by Member States in accordance with Article 72(1), in particular concerning the application of this paragraph, the Commission may, where necessary, assess and further clarify, through guidance, the criteria to be taken into account for the application of this paragraph.***

*The competent authority shall re-assess the application of the first subparagraph as part of each reconsideration of the permit conditions pursuant to Article 21.*

The requested derogation does not fulfill the IED conditions because:

- a) Solvay has not made the previous assessment referred to in the first sentence of that Article,
- b) Solvay cannot apply for less strict emission limit values (ELV) of mercury (Hg) given that in application of the BAT conclusions, Hg is not a BAT and as a result there is no ELV associated to BAT (the so-called BATAEL),
- c) The Kingdom of Spain has not notified the European Commission as required by this Article and Article 72(1), as far as we know.

It is also important to highlight that the draft resolution of Solvay's IPPC permit review procedure does not consider any of the BATs included in the Commission Implementing Decision (EU) 2016/902 of 30 May 2016 establishing best available techniques (BAT) conclusions, under Directive 2010/75/EU of the European Parliament and of the Council, for common waste water and waste gas treatment/management systems in the chemical sector<sup>9</sup>. According to the last sentence of article 21(3) of the IED, "*the reconsideration (of a permit) shall take into account all the new or updated BAT conclusions applicable to the installation and adopted in accordance with Article 13(5) since the permit was granted or last reconsidered*".

At the time of submitting this complaint, the DG for Environment of Cantabria has not granted the reviewed permit yet. However, according to

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<sup>9</sup> OJ L 152, 9.6.2016.

news in the local media it seems that DG intends to grant the derogation in the reviewed permit in line with the draft resolution (see: <http://www.eldiariomontanes.es/economia/201705/26/gobierno-remitira-informes-europa-20170526182323.html><sup>10</sup>).

Meanwhile, Regulation (EU) 2017/852 on mercury entered into force on 14 June 2017 and will become applicable from January 2018 with the exception of point (d) of Part I of Annex III that shall apply from 11 December 2017<sup>11</sup>. This exception applies to the production of chlorine with mercury cells. According to Part I of Annex III to this Regulation the use of mercury as an electrode in chlor-alkali processes is prohibited from 11 December 2017.

In spite of this legal context, CUF applied for a loan to the EIB to finance a project which intentionally contravenes EU environmental Law. Solvay is trying to obtain the derogation and the DG for Environment of Cantabria intends to grant that derogation in light of the draft resolution.

On 17.05.2017 IIDMA sent a letter to the European Commission Director General for the Environment to share our concern about the risk that a violation of EU environmental law by the authorities of Cantabria might take place (the letter is attached to this complaint as document num. 4). The Director General replied to our letter stating that the EC initiated an investigation on this (see reply letter as document num. 5).

We would like to call to the attention of the EIB Complaints Mechanism of a letter dated on 23.05.2017 that the Director General for Environmental Assessment and Quality and Nature Protection of the Spanish Ministry for Agriculture, Fisheries, Food and the Environment addressed to the DG for Environment of Cantabria warning him of the potential violation of EU law in case the permit finally approves the derogation (see this letter as document num. 6).

## 4. The EIB loan approval

According to the EIB project cycle, within the project appraisal phase environmental considerations are assessed. However, for the reasons

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<sup>10</sup> The Cantabria government alleges the false dichotomy development vs. environmental protection to sustain a decision against EU Law. The IED and the BAT conclusions gave a reasonable period of four years to convert. The Torrelavega facility has not to close but to operate according to the Law.

<sup>11</sup> Article 24. Regulation (EU) 2017/852.

explained above and those below, it is questionable that the project appraisal has taken into consideration the EIB environmental standards.

#### 4.1. The EIB Statement of Environmental and Social Principles and Standards.

Paragraph 10 of the EIB Statement of Environmental and Social Principles and Standards states that the EIB finances projects in the EU in support of a number of EU policy objectives. Paragraph 23 emphasizes that **EU environmental law is the primary source of EIB environmental principles**. However, the loan approved to finance the conversion project of Torrelavega facility is not in line with EU Environmental Law for the reasons listed in section 4 of this complaint. In addition, the project to be financed is not in line with the emission standards contained in paragraph 33 of that EIB Statement.

#### 4.2. The 2013 EIB Environmental and Social Standards Handbook

The Handbook "provide(s) an operational translation of those policies, principles and standards", "Volume I of the Handbook provides external actors with a description of the standards to achieve" and "Volume II describes how the services are expected to carry out that important work within the procedures and processes supporting EIB's activities"<sup>12</sup>.

According to the foreword of that handbook EIB encourage promoters to align with EU standards and those provided in Volume I.

##### Volume I: EIB Environmental and Social Standards

We have extracted the following relevant pieces from Volume I which are relevant to our complaint:

- "3. (...) **operations within the EU, Candidate and potential Candidate countries must comply with EU horizontal and/or applicable sectoral legislation** (Chapter 1.- 1. Assessment and Management of Environmental and Social Impacts and Risks, page 12)"
- "2. As the official financing institution of the EU, the **EIB is committed to: (...)** requiring that **its operations are in conformity and coherent with EU environmental principles and standards as included in the EU environmental acquis, mainly related to industrial emissions(...)**.  
3. The objectives of this Standard are:
  - avoidance of any deterioration in the quality of human health or the environment (...)

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<sup>12</sup> See Foreword of the Handbook.

- promotion of an integrated approach to prevention and control of emissions into air, water and soil(...)
- 4. The **Standard applies during the environmental and social impacts and risks identification process**(...)
- 5. **All operations located in the EU, Candidate or potential Candidate countries will be designed and will operate in compliance with the applicable EU environmental requirements and standards as they are laid down in the Community environmental acquis (...)**
- 8. In order to prevent, reduce and as far as possible eliminate pollution arising from different activities and to establish a general framework for the control of these activities, giving priority to intervention at source, ensuring prudent management of natural resources and taking into account, when necessary, the economic situation and specific characteristics of the location in which the activity is taking place, during the whole project lifecycle. This includes project design, construction, operation and decommissioning. **The promoter shall provide, as a basic obligation, that the following general principles are applied: (...)**
  - **the best available techniques and/or any emerging techniques are applied, including those already defined in available Reference Documents – so-called BREFs (...)** (Chapter 2.- Pollution Prevention and Abatement, pages 24-25).

In spite of this it is striking that the condition to undertake the financed project is based on preemptive violation of EU environmental acquis, in light of the acquisition of the Torrelavega facility negotiated agreement.

## Volume II: Environmental and Social Practices and Procedure

We have also extracted the following relevant pieces from Volume II which are relevant to our complaint:

- " I. The Environmental and Social Procedures and Practices Handbook (herein referred to as **the "Handbook"**) **provides to EIB project teams advice on the planning and management of the environmental and social appraisal and monitoring of EIB operations in accordance with the established EIB environment and social policy framework** (A.- Rationale and Concepts, page 96).
- "Role of the EIB. 8. **The EIB's role is to support sound operations that have been designed and structured so as to meet EIB E&S standards and requirements as well as international best practice. This includes:**
  - **assessing the operation against the relevant legal framework;**
  - **assessing the operation against EIB E&S principles and standards;**(...) (A3. Roles and Responsibilities, page 97)
- To all its operations and activities, the EIB applies a number of core environmental and social standards and processes that reflect international standards and best practice. **All EIB-supported operations, independently of the form of financial commitment, i.e. lending, blending or advising, should:**
  - **Comply with host country laws and regulations;**
  - **Observe the Universal Declaration on Human Rights;**



- **Comply and/or align with the EU environmental acquis; (...) Apply "best available techniques" (BAT), as appropriate;** (A5.- Environmental and Social Assessment Guiding Principles, pages 101-102).

Nevertheless, the EIB supported operation which is the subject matter of this complaint does not comply with Spanish law neither with the IED nor the BAT established in accordance to that Directive.

The EIB Environmental and Social Data Sheet<sup>13</sup> of that project only mentions that "The process for receiving the renewed Integrated Environmental Permit has been launched, including the environmental assessment and public participation procedure which form part of this permitting process". According to that E&S Data Sheet the EIB only requires the promoter to timely inform the Bank on:

"- the approval the Integrated Environmental Permit (IPPC permit) from the Competent Authorities as required under the EU Industrial Emissions Directive; (...)".

However, as explained in the facts section of this complaint, the promoter is seeking to operate with a renewed permit that would contravene the IED and EU Regulation on Mercury requirements, among others. Thus, it seems that the EIB services has not and will not check whether that permit is in line with the EU *acquis*.

In light of the above,

## 5. IIDMA's request to the EIB Complaints Mechanism

IIDMA respectfully requests the EIB Complaints Mechanism to open an investigation and:

1. In case the loan contract has not been signed yet, to warn the EIB competent department of the potential violation of the EU environmental *acquis* by the promoter and to recommend establishing conditions in the contract to ensure the project complies with EU environmental *acquis*.
2. In case the loan contract has been signed, to recommend the EIB competent department to suspend the loan until corrective measures are introduced in the financed operation.

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<sup>13</sup> Available at: <http://www.eib.org/infocentre/register/all/67339896.pdf>

In Madrid, 4 July 2017.