EURACOAL
European Association
for Coal and Lignite
AISBL

EURACOAL Response to Public Consultation

on a possible revision of the Industrial Emissions Directive (Ares(2020)1738021 – 24 March 2020)

Background

The Industrial Emissions Directive (IED 2010/75/EU) is the main legislative measure to control pollutant emissions from large combustion plants at EU level. Under this directive, permits are issued to plant operators by national authorities with conditions based on the use of Best Available Techniques (BAT). The European Commission has undertaken its second scheduled review of the IED according to Article 73. The review found that the directive largely works well, but there are a number of areas for improvement, notably in its implementation. In summary:

- the IED scope could be widened;
- Member States' implementation of the IED, including BAT conclusions, might not be uniform;
- there may be trade-offs between industrial emissions to water and air; and
- concerns have been raised about the elaboration of BAT conclusions.

The European Green Deal, as outlined in a Commission communication (COM(2019) 640), proposes a review of EU measures to address pollution from large industrial installations and how to make these fully consistent with climate, energy and circular economy policies.

Legal basis

The legal basis for the IED is Articles 191 and 192 of the Treaty on the Functioning of the European Union (TFEU) on the environment. The objective of the IED is to reduce and as far as possible eliminate pollution arising from industrial activities. Given the EU principles of subsidiarity and proportionality, a general legal framework at the EU level ensures Member States can deal with environmental pollution in a way that avoids transboundary pollution and does not compromise the single market, but leaves Member States free to choose how to manage pollution within agreed limits, while taking into account the economic situation and specific local characteristics of industrial activities. An integrated approach means air, water and soil pollution are controlled in balance to protect the environment as a whole, without ignoring waste management, energy efficiency and accident prevention.

Covid-19 crisis

The current crisis comes at a moment when important new policy initiatives on climate, energy and the environment are being tabled by the European Commission. Overcoming the Covid-19 crisis will require the mobilisation of all our resources, including in the energy sector which must continue to operate in difficult circumstances. The anticipated scheduling of these new initiatives

must now reflect this unprecedented challenge. EURACOAL urges the Commission to slowdown, take stock of the dire economic situation that we now face in Europe and reflect on its policy priorities. New initiatives should take the likely impact of the crisis into account. **Avoiding any additional burdens on the energy sector is absolutely essential to make sure that energy companies survive and recover rapidly once the crisis is over.**

EURACOAL calls on the European Commission to concentrate all its efforts on the essential actions needed to mitigate the health and economic impacts of the Covid-19 crisis, putting on hold EU initiatives that could increase costs for energy companies. **This means extending the duration of public consultations at the EU level or even postponing some consultations.** In respect of the European Green Deal and its related legislative proposals, it should be remembered that the current social distancing measures hinder *all* public dialogue and prevent proper stakeholder involvement. Once the crisis is over, there will need to be a period of reflection when proposals should be prioritised to rebuild the EU economy.

EURACOAL responses to the preliminary Inception Impact Assessment

Baseline Scenario: No change to the current situation. BREF reviews continue and there is a continued progress in reducing industry environmental impacts.

The IED itself is well-drafted and provides a structured framework for a techno-economic process for the preparation of BAT conclusions. However, the "Seville process" appears to be in need of improvement. Based on our experience with updating the LCP BREF, the process was biased towards political considerations rather than the technical and economic factors specified in the IED. We explore this in more detail in the attached paper *"EURACOAL commentary on the Review of the Industrial Emissions Directive"* dated 6 December 2019 (rev.03).

Inclusion of additional sectors: The evaluation identified possible sectors that it might be advantageous to include in the IED, for example cattle farms, mixed farms, extractive industries, aquaculture and installations in current sectors just below the existing thresholds.

In the case of combustion plants, existing legislation gives comprehensive coverage, namely the IED for large combustion plants and, for smaller plants, the Medium Combustion Plant Directive ((EU) 2015/2193). There is no need to extend the scope of either directive as there are no gaps.

In the case of extractive industries, we see no need to address this sector given that mines, quarries, plant and mobile machinery are already covered under existing legislation. Extractive industries are tied to particular mineral deposit locations, and their environmental impacts are not comparable to those of industries covered by the IED. Furthermore, mining and quarrying are fully regulated under other EU and national legislation: there are no gaps. The mining sector is well regulated with an unavoidable diversity of approaches, because each mining operation has developed unique ways to manage the natural conditions found at particular locations. Hence, regulation is also unique.

Implementation issues: Options to enhance consistency of Member State implementation of IED requirements will be explored.

In accordance with TFEU Article 193, the IED does not prevent Member States from maintaining or introducing more stringent protective measures, provided that such measures are compatible with the Treaties and are notified to the Commission. The EU principles of subsidiarity and proportionality mean that Member States should be given flexibility on how to achieve pollution control objectives. The IED has provided that flexibility and it should remain. There is no one-size-fits-all solution to pollution control that can be applied across the EU. If there are inconsistencies, these need to be examined only in respect to the objective of controlling overall levels of pollution, not at the micro level of how pollution control is actually implemented at particular installations in Member States.

BREF process: Options to improve the BREF elaboration process will be explored.

The *"EURACOAL commentary on the Review of the Industrial Emissions Directive"* dated 6 December 2019 (rev.03) examines in detail the BREF elaboration process. This is attached, but in summary:

When selecting certain emission limit values in the revised LCP BREF, we believe that the Commission went beyond its delegated powers. In particular, the BAT-associated emission levels for NOx and mercury ignore the IED requirement for techniques to be available "under economically and technically viable conditions", thus placing a disproportionate burden on plant operators. This gives us the impression that emission levels were based on political considerations and not on a true techno-economic assessment.

For the future, and in line with the *Better Regulation Guidelines* (SWD(2017) 350), impact assessments should be required when Commission decisions, "are likely to have significant economic, environmental or social impacts". Thus, pollution control legislation should be proportionate in terms of the potential emission reduction per euro invested compared with other possible measures.

In the IIA, the Commission writes, "Where it has been possible to assess, the societal benefits from the IED have substantially outweighed its economic costs." When proposing the IED, the Commission published an impact assessment that promised benefits of €7-28 billion per year in the case of LCPs.[1] This was largely determined by the value assigned to a statistical life (VSL) – any reduction in industrial pollution being assumed to save or extend lives. Today, the Commission assumes a VSL of €0.98 million to €2.2 million, while the OECD recommends €3 million and the US EPA an even higher figure of around €6 million.[2] Hence, the calculation of societal benefits, based as it is on the value of a statistical life, includes assumptions with wide ranges of values that

[1] Commission Staff Working Document accompanying document to the Proposal for a Directive of the European Parliament and of the Council on industrial emissions (integrated pollution prevention and control) (recast), SEC(2007) 1679, Commission of the European Communities, Brussels, 21.12.2007, p.107.

[2] "Ex-post assessment of costs and benefits from implementing BAT under the Industrial Emissions Directive", draft final report for European Commission DG Environment under Service Request 7 of Framework Contract ENV.C.4/FRA/2015/0042, Ricardo ED10483 Issue No. 5, Ricardo Energy & Environment, 05.09.2018, p.93.

differ even between Member States and is therefore subject to much uncertainty. To use these benefits in policy making, as if they reflect real monetary benefits that can be balanced against actual economic costs, is misleading. At the end of the day, politicians must make political decisions on how much money should be invested in pollution control in the knowledge that once allocated, it cannot then be invested elsewhere in the economy.

Access to information, participation in decision making and access to justice: Weaknesses will be identified and options for addressing them explored.

EURACOAL fully supports actions brought by groups of citizens where there is a clearly defined failure to implement environmental law which has led to an identifiable and specific harm. Our comments here are based on a related public consultation on access to environmental justice (Ares(2020)1406501 – 6 March 2020).

As a claimant in a significant case brought to the Court of Justice of the European Union (CJEU) concerning environmental regulation under the IED, EURACOAL has close experience with the issues raised in this consultation (Case T-739/17). The court dismissed our application on the grounds that the association and its members were *not directly affected*, despite the fact that EURACOAL members are operators of power plants that must comply with the IED.

NGOs should not be afforded any special rights over and above those available to others. Moreover, we question if NGOs actually represent the broader European public in the way anticipated by the Aarhus Convention. In our experience, NGOs actually reflect the interests of their funders (*NGOs for sale – ONGs à vendre*, EURACOAL, October 2015). We find little evidence that NGOs, especially at the European level, are representative of European citizens as there are no processes in place whereby the views of citizens are reflected in the activities and position forming of NGOs. In fact, NGOs appear to operate with little citizen contact, but rather support each other in their advocacy work and legal actions.

EURACOAL supports equal access to justice for all. If NGOs are granted greater rights to legal redress in the field of environmental protection, then enterprises, industry associations and trade unions should have the same rights to defend themselves from any far-reaching environmental legislation where *a priori* impact assessments fail to reveal the true socio-economic impacts at the micro and macro levels. Given the importance of social dialogue on the European Union's political agenda, we believe it is wrong to favour the access of NGOs to justice.

Contribution to the circular economy: The untapped potential for the IED to further contribute to circular economy objectives will be explored including options for realising that potential.

Large combustion plants used in the heat and power sector make a substantial contribution to the circular economy, for example:

- bottom ash is used in block making for the construction industry,
- fly ash is used for cement production, and
- gypsum from flue gas desulphurisation is used to manufacture wall board.

The drivers here are economic: using power plant by-products is cheaper than mining raw materials. It is unnecessary and outside the scope of pollution control legislation to insist on such recycling of materials. It already takes place and new opportunities are being explored all the time. To regulate such activity would stifle innovation.

Interaction with decarbonisation of industry: Industry regulated by the IED will need to largely decarbonise over the next thirty years. To optimise the benefit to society that process should ensure that changes also deliver improvements in all other environmental aspects. The options to support this transition will be explored.

The Inception Impact Assessment (IIA) correctly states that, "Industry is likely to need to make significant investments in the future to support the move to climate neutrality." However, these investments are driven by other policy measures, such as the EU Emissions Trading System which should remain the principle means at the EU level of reducing CO_2 emissions in a predictable, cost-effective way to meet politically agreed targets via a market-based mechanism.

Since the European Community first legislated on combating air pollution from industrial plants in the 1980s (84/360/EEC), the aim has been to set emission standards for those pollutants regarded as most hazardous, *e.g.* SOx, NOx and particulates. Over the years, the list of most hazardous pollutants has grown.

On 31 July 2017, the European Commission announced that it had adopted an implementing act to bring into effect a Large Combustion Plants BREF with revised limits for controlling hazardous pollutants.[3] In its announcement, the Commission links these tighter environmental standards with the on-going energy transition and EU commitments to reduce GHG emissions made under the Paris Agreement.

Carbon dioxide is the principal GHG emitted by combustion processes. It is a non-toxic gas required for life and so has never been included in the IED or any preceding legislation covering industrial emissions.

The Commission proposes to examine how to make pollution control legislation fully consistent with its climate, energy and circular economy policies. To do so would carry many risks as it could massively extend the scope of industrial emissions legislation to cover GHG emissions which do not directly harm human health or the quality of the environment. One must therefore ask about the limits to the powers granted under TFEU Articles 191 and 192. It would be possible to argue that the "climate emergency", as declared in a resolution of the European Parliament on 28 November 2019 by 429 votes to 225 (19 abstentions), trumps all else, *e.g.* social, economic, fiscal, foreign and security policies. More debate is needed, before giving such precedence to environment law.

[3] "Commission proposes to review all permits of large combustion plants in order to tackle pollution", European Commission – Daily News, Brussels, 31 July 2017.

Coherence with other EU legislation: Some areas have been identified where the IED might better support other EU legislation. The potential to do this and the options to achieve it including enhanced coherence with the E-PRTR Regulation (EC) 166/2006 will be explored.

At the present moment, EURACOAL sees no need to further complicate what is already a fully functional and effective directive.

Better Regulation: The specific options and associated measures will be further refined during the Impact Assessment process and may include simplification of procedures, provisions to further harmonise the implementation of certain procedures and provisions and measures to reduce unnecessary regulatory and administrative burdens.

As noted above, the impact assessment should take into account the current economic crisis caused by the Covid-19 pandemic. Already, EURACOAL is aware of issues in implementing *current* emission limit values in the recently revised LCP BREF which must be in place by mid-2021. Supply of the necessary pollution control equipment is delayed, because of the crisis, and schedules are slipping. Leniency is called for.

Looking ahead, it will be more difficult for industry to make the necessary investments to meet ever-stricter emission limit values. Perversely, this could lead to less investment in renewable energy sources. Sufficient conventional power plant capacity must be kept available, ready to run – including in strategic reserves – to guarantee power supply security at all times. Requiring these plants to be retrofitted (again) with expensive pollution control equipment would draw available investment funding away from the diversification options needed for energy transition.

21 April 2020

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EURACOAL commentary on the

Review of the Industrial Emissions Directive

The European Commission is engaged in a scheduled review of the Industrial Emissions Directive (IED 2010/75/EU). According to IED Article 73, the Commission shall submit a report to Council and Parliament every three years reviewing the implementation of the directive. The Commission submitted its first report on 4 December 2017 and the next review is now in progress, in line with the Commission's Better Regulation Guidelines (SWD(2015) 111) on "fitness-check" reviews.

EURACOAL, which represents coal and lignite producers and users across Europe, has experience with the implementation of certain aspects of the IED and wishes to take this opportunity to offer our views. In particular, we wish to comment on the process by which BREF documents are revised, as it is not the IED itself that needs to be revised, rather the "Seville process" appears to be in need of improvement. The IED provides a well-structured and sufficient framework for a techno-economic procedure for the preparation of BAT conclusions. However, based on our experience in the recent update and transposition of the LCP BREF, the procedure was primarily based on political considerations instead of technological and economical principals as specified in the IED.

Background

The large combustion plants (LCP) BAT Reference Document (BREF) presents best available techniques (BATs) as well as associated emission levels (BAT-AELs) to be applied by competent authorities when granting operating permits for large combustion plants. Every few years, the BREF is reviewed by a technical working group of member states, industry and NGO representatives, chaired by DG Environment. This so-called "Seville process" is co-ordinated by the European Integrated Pollution Prevention and Control Bureau (EIPPCB) in Seville to determine the "best available techniques" which are to be used to derive new emission limit values. Once complete, the review outcome in the form of "BAT conclusions" is forwarded to the European Commission for comitology and adoption. BREFs should not be political documents, but techno-economic ones with sound technical and economic bases according to the IED.

Technical Working Group and verified data

During the LCP BREF revision process, essential technical information was misinterpreted or only partially used. Unverified data from non-EU plants were used and even unproven performance data for new plants that had never operated. This led to a number of AELs that are too stringent. When assessing BAT-AELs, the ideal situation would be one of perfect knowledge about the actual performance of all large combustion plants. In practice, the data collected came from a small minority of better performing plants and do not fully reflect the complexities of designing and operating combustion plants across Europe.

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The "best" techniques have to be "available", *i.e.* developed on a scale which allows their implementation in the relevant industrial sector, under economically and technically viable conditions. In the case of large power plants, this must reflect the current and future market situation in the electricity sector. In the case of oxides of nitrogen, carbon monoxide, sulphur dioxides, dust, mercury and hydrogen chloride, EURACOAL submitted many technical comments during the revision process and still has concerns about the now adopted BAT conclusions.

- For the control of **oxides of nitrogen (NOx)** at existing coal- and lignite-fired power plants, there are good economic reasons to use primary techniques, in particular at lignite-fired power plants, or secondary techniques, such as selective non-catalytic reduction (non-SCR). The revised BAT-AELs, for which no impact assessment was carried out, can only be met with more expensive SCR techniques. Here, the dissenting views of a small number of stakeholders in the Technical Working Group outweighed the views of expert stakeholders.

- In the case of the BAT-AELs for **carbon monoxide (CO)**, indicative emissions levels were given without reference to particular techniques or to the performance of actual plants. This is not in accordance with the IED.

- **Oxides of sulphur (SO_2):** EURACOAL's position is that the desulphurisation rate of 96% for indigenous fuel should have been retained and an additional absolute emissions limit should have been set at 400 mg/Nm^3. Many of the power plants potentially affected were recently retrofitted to achieve the stringent desulphurisation rate of 96% required by the IED from 1 January 2016. It is not appropriate to force operators of these plants to again renew equipment by 2021.

- **Dust:** best performance might be achieved at new plants fitted with a combination of the most advanced secondary techniques, *e.g.* a pre-filter and wet-FGD system. In cases where other SO_2 removal techniques are applied, *e.g.* dry sorbent injection (DSI) which may be applied for economic reasons at existing plants, then the upper end of the BAT-AELs range for dust may not be achievable.

- Regarding **mercury (Hg)** emissions, the BAT-AELs range for existing lignite-fired power plants with pulverised combustion (PC) boilers should have been 5 to 9 µg/Nm^3, based on a rigorous application of BAT principles to the available data from a limited number of mainly high-performing power plants. If all available data from existing coal- and lignite-fired power plants ≥300 MW_{th} had been taken into account, as foreseen in the Seville process, then the BAT-AELs range for mercury should have been 3 to 20 µg/Nm^3.

Based on the above, EURACOAL draws attention to procedural errors in the Seville process. According to the IED and Commission Implementing Decision 2012/119/EU of 10 February 2012 (*BAT Guidelines*), the BAT conclusions must be based only on sound technical information and expertise, which in turn means that considerations of a political nature should be excluded. This requirement was disregarded and emission limit values selected without a sound technical basis.

In confirmation of our view that the process became politicised, the European Commission issued a daily news briefing on 31 July 2017 to accompany the revised BAT conclusions in which is wrote, "To tackle pollution from large combustion plants is in line with this Commission's Energy Union priorities to steer the on-going energy transition towards a low emission economy. Clean energy transition is a priority for the Commission and the *Clean Energy for all Europeans* package presented last November aims at providing a stable regulatory framework to deliver on the transformation of the energy system, which will be crucial for the implementation of the Paris Agreement." This briefing conflates pollution control under the IED with the need to reduce greenhouse gas emissions, a task outside the scope of the IED.

Article 30 Committee and consensus

In the Article 30 Committee of stakeholders, the European Commission uses the term "consensual" to describe points where there is apparently unanimous agreement among stakeholders. These are typically technical points for which there should be enough data to find a "correct" rather than a "consensual" answer. Moreover, in searching for a consensus, the European Commission hands enormous power to minority stakeholders – anyone can object merely by raising their hand. In fact, two green NGOs countered almost all the technical submissions made by EURACOAL, meaning that the Commission recorded "split views" and effectively dismissed valid submissions. This allowed DG Environment itself to select particular limits.

Government representatives from Member States come to the Article 30 Committee with negotiating briefs agreed in their capital cities. Similarly, industry representatives from trade associations must agree positions with their members prior to the committee meeting. This is evident at the meetings. What is also evident is that representatives of NGOs, who claim to represent civil society, do not appear to follow such negotiating briefs and are thus able to make statements and proposals in Committee that others in the room are not authorised to respond to. In this way, NGOs can push forward agendas without opposition. Finally, it is difficult to understand who certain NGOs actually represent: they enjoy operating grants from the European Commission and do not appear to have any internal structures or procedures by which positions are established and approved with their stakeholders. Indeed, the European Environment Bureau, a green NGO with a governmental-sounding name, is aware that its core funding from the European Commission might pose a conflict of interest problem (EEB Accountability Report 2014, p.36).

Article 75 Committee and procedural issues

In the Article 75 Committee, the European Commission held a trial vote and tabled amendments to the draft decision concerning the revised LCP BREF which had not been previously circulated to members of the committee, thus breaching mandatory deadlines under Article 3(3) of the Comitology Regulation (EU) No. 182/2011. A final vote was then held on these amendments without objectively seeking the widest possible support from the Committee, as required under Article 3(4) of the Comitology Regulation:

> *"The chair shall endeavour to find solutions which command the widest possible support within the committee. The chair shall inform the committee of the manner in which the discussions and suggestions for amendments have been taken into account, in particular as regards those suggestions which have been largely supported within the committee."*

The Commission exercised its position as chair of the Committee in an unfair and incorrect manner through an apparently tactical approach in which it sought the support of particular Member States by agreeing a sub-package of amendments favourable to those Member States.

The final text of the BAT conclusions adopted in the course of the *political* comitology should not undermine findings made at the technical level. Therefore, drafting any far-reaching amendments at Article 75 Committee meetings should be strictly avoided. It should be noted that the effective application of BAT conclusions is assured by the technical expertise, therefore the scope of amendments tabled during the political comitology phase should be strictly limited to the issues which were raised during the technical discourses at the meetings of the Article 13 Forum or Technical Working Groups. **Any amendments based on political reasons alone should not be introduced at the very last committee meeting**.

According to the *Better Regulation Guidelines*[1], an impact assessment is required for Commission initiatives that, "are likely to have significant economic, environmental or social impacts". **It should be emphasised that the exchange of information between Member States, the industries concerned, NGOs promoting environmental protection and the Commission, as referred to in Article 13(1) of the IED, cannot be interpreted as conducting a thorough and detailed impact assessment of BAT conclusions**. The scope of exchange of information, as detailed in Article 13(2) of the IED, does not include any impact assessment of the techniques currently used and those proposed as the best available techniques in a given sector. Therefore, the exchange of information is limited to very detailed, technical data and no comprehensive impact assessment is being prepared during the work of the Technical Working Groups. Therefore, **the formal impact assessment concerning the relevant BAT conclusions proposal should be made *before* the final Article 75 Committee meeting**.

More attention should be paid to the coherence of the LCP BREF with the IED itself. As far as BAT conclusions are adopted via an implementing act, their scope of application should not extend the scope of the IED. Therefore, **BAT conclusions should not set out emission limits for pollutants which are not listed in the IED**. This conclusion follows from the narrow scope of implementing acts, as envisaged by the provisions of the Article 291(2) TFEU.

[1] SWD(2015) 111 final, *Better Regulation Guidelines*, Strasbourg, 19.5.2015.

Conclusion

EURACOAL concludes that the Commission exceeded its delegated powers when selecting certain emission limit values in the revised LCP BREF. In particular, the BAT-associated emission levels for NOx and mercury fundamentally disregard the requirement of the Industrial Emissions Directive for availability of techniques "under economically and technically viable conditions", thereby placing a disproportionate burden on plant operators. This inevitably gives us the impression that the derivation of emission levels was based on political considerations – an approach which is entirely at odds with the techno-economic procedure defined in the directive for the preparation of BAT conclusions.

For the future, and in line with the *Better Regulation Guidelines*, impact assessments should be required when Commission decisions, "are likely to have significant economic, environmental or social impacts". Thus, pollution control legislation should be proportionate in terms of the potential emission reduction per euro invested compared with other possible measures.

6 December 2019 rev.03