EURACOAL
European Association
for Coal and Lignite
AISBL

EURACOAL Response to Public Consultation and Targeted Stakeholder Survey (TSS)

on a revision of the Industrial Emissions Directive and European Pollutant Release and Transfer Register Regulation (IED-EPRTR-Revision-OPC-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).

In 2020, the European Commission undertook the second scheduled review of the IED according to Article 73. It found that the directive largely works well, but highlighted a number of areas for possible improvement:

- the IED scope could be widened;
- implementation of the IED, including BAT conclusions, may not be consistent across all Member States – this could impact the single market and environmental quality;
- 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 Commission intends to revise this directive to bring it in line with its European Green Deal policies, in particular the zero-pollution ambition and consistency with climate, energy and circular economy policies. A legislative proposal is foreseen for the fourth quarter of 2021 accompanied by an impact assessment.

The European Pollutant Release and Transfer Register (E-PRTR regulation (EC) 166/2006) reports annual pollution data on mass releases (and transfers) to air, water and land for 91 pollutants from some 30 000 industrial facilities across Europe. Mining is covered by the E-PRTR, but not by the Industrial Emissions Directive.

The E-PRTR contributes to transparency and public participation in environmental decision-making, as required under the UNECE Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

A 2016 evaluation of the E-PRTR concluded that the regulation is fit for purpose, although some elements could be simplified to save costs and the scope of the regulation could be extended to improve coherence with the IED scope, EU waste law (*e.g.* reporting requirement for transfers, treatment and disposal), EU Emissions Trading System activities and thresholds, EU water legislation, and the INSPIRE (INfrastructure for SPatial InfoRmation in Europe) Directive.

Rue de la Science 14b ■ 1040 Brussels ■ Belgium
n° d'entreprise 0408.290.816 ■ EU transparency register no. 19853116579-64
+32 2 775 31 70 ■ euracoal@euracoal.eu ■ www.euracoal.eu

Summary response

The EU coal industry is subject to strict European pollution control legislation and has successfully implemented this to meet some of the world's highest standards. The coal sector has invested heavily in pollution control and achieved impressive results – for example, sulphur dioxide (SO_2) and oxides of nitrogen (NOx) emissions from coal use in the EU have fallen by between 60% and 90% since 1990.

EURACOAL welcomes the aim of more effective pollution control policies with the Industrial Emissions Directive playing a central role. This directive already sets high standards and contributes to a cleaner planet for all. However, a zero-pollution ambition must be examined carefully; it might be preferable to think in terms of impacts and risks. The costs of reaching zero would tend towards infinite and a disaggregation would be needed between "natural" pollution (*e.g.* SO_2 from Mount Etna) and "man-made" pollution. A risk-based approach would recognise the concentrations at which substances are safe, posing no risk to health or the environment.

In our response, we highlight some improvements that could be made to the procedural aspects of IED implementation.

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 local specificities 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 and legal challenge

The Covid-19 crisis comes at a time when important new legislative proposals on climate, energy and the environment are being tabled by the European Commission. Overcoming the crisis will require the mobilisation of all our resources, including in the energy sector which must continue to operate in difficult economic circumstances. Any new legislation should take into account the likely impact of the crisis. **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.** Also, EURACOAL is aware of issues with *current* emission limit values in the recently revised LCP BREF which must be in place by mid-2021. The Court of Justice of the European Union (CJEU) ruled on 27 January 2021 that the European Commission must present a new implementing decision with BAT conclusions for approval by Member States.

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 and ready to run – including 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 funds away from the diversification options needed for the energy transition. **A pragmatic approach is called for that recognises the growing number of coal-fired power plants operating under closure plans.**

Revision of the IED and the "Seville process"

The regular reviews of EU environmental legislation are not conducive to long-term investment. For example, the IED is reviewed by the Commission every three years, with the possibility of amendment; in addition, the related BAT reference documents are updated at least every eight years. This frequency of review and change has not provided the legal and planning certainty needed for stable investment.

The IED itself is well-drafted and provides a structured framework for a techno-economic process for the preparation of BAT conclusions. However, this "Seville process" appears to be in need of improvement. Based on our experience with updating the LCP BREF, the process is biased towards political considerations rather than the technical and economic factors specified in the IED. We examined this in more detail in a paper *"EURACOAL commentary on the Review of the Industrial Emissions Directive"* dated 6 December 2019.[1] The European Commission should acknowledge that pollution control is, in practice, a political process in which decisions are not entirely objective. In many cases, subjective judgements have to be made, with many diverse factors to consider. **The concept of *consensual* agreement in the Article 13 Forum is flawed and should be replaced by a more transparent process with voting rights.**

BREF revision process

When selecting certain emission limit values in the revised LCP BREF and BAT conclusions published in the OJ on 17 August 2017 ((EU) 2017/1442), 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.

[1] Response to Public Consultation on a possible revision of the Industrial Emissions Directive (with a detailed commentary on the IED review in an annex), EURACOAL aisbl, Brussels, 21 April 2020.

In the Inception Impact Assessment prior to this public consultation (Ares(2020)1738021, 24 March 2020), 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.[2] 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.[3] 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 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.

EURACOAL responses to the Targeted Stakeholder Survey prepared by Ricardo plc

Inclusion of additional sectors (TSS 1.1.1)

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 (MCPD – (EU) 2015/2193). The Commission is considering whether to move plants in the 20-50 MWth capacity range from the MCPD to the IED. EURACOAL notes that there is no need to extend the scope of either directive as there are no gaps, and does not consider it important to match thresholds in the EU ETS, IED and MCPD as each directive serves a different and clear purpose. The Commission already decided against integrating medium combustion plants into the IED in 2015, and hence created the MCPD. In its 2013 impact assessment,[4] the Commission concluded that including medium combustion plants into the IED would lead to a substantial increase of administrative costs due to the heavier integrated permitting procedure, reflected in option R1 (integrated permitting) as opposed to option R2/3. The MCPD has not yet fully entered into force and no evaluation has been conducted. It would be premature to abandon a directive before knowing its effects.

In the case of mining/quarrying or extractive industries, we see no need to include this sector under the IED 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 unique and specific 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:

---

[2] 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.

[3] "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.

[4] Impact Assessment accompanying the Communication on a Clean Air Programme for Europe and legislative package, European Commission Staff Working Document, SWD(2013) 531 final, Brussels, 18 December 2013, p.71.

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 safely manage the natural conditions found at particular locations.

Moreover, by reducing the scale of its activities over many decades, the coal mining sector has made a very significant contribution to reducing environmental impacts in the EU. Any remaining impacts will decline even further in the coming years, as coal phase-out plans by Member States will further reduce coal mining activities, rendering these impacts insignificant. **It would serve no purpose to further regulate at EU level a sector that will disappear as a result of EU climate policy.**

Subsidiarity and permitting (TSS 1.1.2, 1.1.3, 1.1.4 & 1.1.5)

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 – so it would be wrong to demand emission limits in permits are set by default to the lower end of BAT-AEL ranges. 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 and monitoring is actually implemented at particular installations in Member States. A "stricter regime" would lead to less diversity in pollution control measures and less possibility for competition as production processes become centrally managed.

It is crucial that national permitting authorities retain some flexibility to grant derogations under IED Article 15(4). Such derogations are already very limited and only possible in exceptional cases following cost-benefit analyses, taking into account the geographical location or the local environmental conditions, or technical characteristics of a particular plant. **All mitigation efforts should be encouraged, in line with the EU's zero-pollution ambition, so coal power plants that continue to operate under a closure plan should be eligible for derogations under Article 15(4).** Any such derogations should be fully justified by cost-benefit analyses. The European Commission should give guidance on a politically acceptable price per unit of pollutant (*e.g.* EUR/kg) to be used as a shadow price in cost-benefit analyses and thus move away from analysis based on the value of a statistical life (VSL) and value of life years lost (VLYL) which is known to have "a methodologic error that has become a social problem" (Morfeld *et al.*, 2019).[5]

Moreover, the effects of water treatment plants must be taken into account when determining emission limit values for installations, as stipulated in IED Article 15(1), so that an integrated approach to pollution control can be pursued by the competent authorities in Member States. Often, special water treatment plants are better suited for removing pollutants, rather than installations within the site boundaries of IED-regulated plants.

[5] Hammitt, James K., Peter Morfeld, Jouni Tuomisto, and Thomas C. Erren, "Premature Deaths, Statistical Lives, and Years of Life Lost: Identification, Quantification, and Valuation of Mortality Risks", presentation at the Risk Assessment, Economic Evaluation, and Decisions Workshop on 26-27 September 2019, Harvard Center for Risk Analysis, 29 August 2019.

Finally, real-time reporting of emission data by private operators raises quite severe concerns on competition within the EU internal market. If an operator can signal to another operator his current level of production, then this information could be used in ways that do not benefit consumers. The regulatory authorities need to find ways to give public access to data that is reliable, consistent, accurate and up to date, so all stakeholders have trust in the reported data. That is unlikely to be possible in real time.

Overlap with REACH regulation (TSS 1.2)

Coal mining companies do not produce chemicals registered under regulation EC 1907/2006 on Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH). Chemicals used on site are already recorded in companies' occupational health and safety management systems and chemical use is thus well regulated. We do not see any need to expand the IED towards areas where it would overlap with existing, well-functioning regulations such as REACH.

Integration with EU climate policies (TSS 2)

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.[6] 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.

Industry is likely to need to make significant investments in the future to support the move to climate neutrality. However, these investments are largely 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. Further discussion would be needed before contemplating the inclusion of any GHG not currently covered by the EU ETS.

Despite the above, 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

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

Parliament in November 2019 trumps all else, *e.g.* social, economic, fiscal, foreign and security policies. More debate is needed, before giving such precedence to environment law.

Contribution to the circular economy (TSS 3.2 & 3.3)

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. Resource efficiency requirements in BATs should be carefully considered and weighed against the possible forced disclosure of confidential business information. To ensure that resource efficiency incentives do not lead to market distortions, Member States' authorities should retain the right to apply a differentiated approach.

Nevertheless, EURACOAL welcomes RTD support to further increase our sector's contribution to the circular economy, including during post-mining activities. If well designed, a circular economy can reduce resource exploitation, strengthen the resilience of the EU's industrial value chain and increase the efficiency of companies.

Industrial symbiosis (IS) – the practice of inter-firm resource use by related or traditionally separate industry sectors in a collaborative, but commercial approach – has always been practiced by the coal industry. Wastes from coal mining and power generation have become inputs to many other sectors. For example, flue gas desulphurisation residues from coal power plants have almost entirely replaced the mining of gypsum in Europe, being advantageous both economically and in terms of product quality.

Overall, there should be no need to regulate the flow of materials in society as these flows are established in response to a natural supply-demand balance that sets prices for every resource, regardless of its source. Nevertheless, EURACOAL is in favour of promoting new IS opportunities, for example through EU guidance on good practices and evolving techniques.

Public access to information, participation in decision making and action under law (TSS 5)

EURACOAL supports the principle of public access to information on permitting processes, but not to the extent that the public becomes a party to the negotiations with competent authorities who have been entrusted in law to act on behalf of the public. Information disclosure should be sufficient for the public to understand what decisions have been taken and the impact of those decisions. For example, during permitting procedures, companies often have to disclose sensitive business information to the responsible authorities. If made public, this information could harm EU competitiveness and lead to unnecessary economic damage for companies operating in the EU. The Commission should act very carefully when weighing transparency concerns against data protection.

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.

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 public in the way anticipated by the Aarhus Convention. In our experience, NGOs actually reflect the interests of their funders.[7] We find little evidence that NGOs, especially at the European level, are representative of EU 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.

European Pollutant Release and Transfer Register (E-EPRTR)

Following an evaluation of the E-PRTR regulation in 2017 and an implementation review in early 2020, the Commission identified areas where the regulation might be extended to cover more sectors, *e.g.* agro-industrial, additional pollutants and smaller releases. In addition, the Commission would like to collect data that contribute to the circular economy and decarbonisation, such as consumption of energy, water, raw materials.

The Inception Impact Assessment (Ares(2020)5067014 dated 28 September 2020) cites many benefits of a revised E-PRTR Regulation, such as easier public access to environmental information. It dwells less on the costs and burdens which EURACOAL hopes will be quantified in the impact assessment that will be carried out as part of the decision-making process. In particular, we are interested to better understand the real costs to industry of data collection, and issues related to commercial confidentiality and competitiveness as the Commission drills ever further down to reveal sensitive data on production processes. Companies in non-EU countries may unwittingly benefit from knowing the strengths and weaknesses of the EU's industrial producers.

2 April 2021

[7] *NGOs for sale – ONGs à vendre*, EURACOAL aisbl, Brussels, October 2015.