

Brussels, 22 March 2019

**EEB input: balance representation of interest in the Sevilla Process (follow up to 13<sup>th</sup> IED Forum), Agenda point 7 "Forum membership issues"**

Dear Ms. Anita WILEMS, Dear Ian HODGSON,

We appreciate that the European Commission has initiated a discussion regarding the balance of interests in the Sevilla Process and would like to hereby follow up on the invitation to provide comments in writing, mainly in reaction to the presentation made at the 13<sup>th</sup> IED Forum of 27 February 2019, under agenda point 7 'Forum membership'.

The European Commission has identified the following two problems (slide 7 of the \*.ppt):

#1- imbalance of representation NGO versus industry interest group,

#2 - imbalance of industry interests groups versus few technique providers.

The possible solutions brought to address those problems are indicated in slide 11 of the presentation. In essence, a re-categorization of members according to level of attendance to the IED Forum is proposed. However this approach will not fully address any of the two problems pre-cited, if the criteria is solely attendance to IED Forum, it could even worsen the problem(s):

- First, as to the issue identified under #1, the other NGO Forum members (CCB, RAP, or CAN-EU) could therefore be excluded from future Forum meetings due to limited attendance. In that case, EEB would be the sole NGO representative entitled to Forum attendance. The reason for un-attendance by those organisations is a trust that the EEB delegation will represent their views in this process, no specific interest in the BREF being discussed or general lack of resources to attend the meeting and/or a combination of these.
- Secondly, that proposal would not address the identified issue of addressing the "imbalance" between the "E.NGO" stakeholder group and "industry concerned" stakeholder group (76 to 4), neither the imbalance between the industry stakeholder category identified under point b.

More importantly, the EEB regrets that the issues for reflection are not taking account of the full extent of the problems linked to the imbalance of interest of the Sevilla Process and is arbitrarily restricted to the IED Forum membership issue only. **The scope of the discussion should cover all the procedural steps of the Sevilla Process and therefore encompass the TWG level, the national BREF mirror groups and the overall procedure of BAT-C adoption.**

Ensuring proper balance of interests within the process is an essential part of the quality assurance and practical arrangement of that information exchange referred to under Article 13(3) of the IED as well as being coherent with Better Regulation principles. In the Annex to this letter we provide our alternative suggestions as to wider governance issues that would rebalance the Sevilla Process overall (*taken from the EEB submission to the IED Evaluation*).

Best regards,

*Christian Schaible,*

Policy Manager on Industrial Production [Christian.schaible@eeb.org](mailto:Christian.schaible@eeb.org)

**European Environmental Bureau**

Europe's largest network of environmental citizens' organisations

[www.eeb.org](http://www.eeb.org)

*International non-profit association – Association internationale sans but lucratif*

Rue des Deux Eglises, 14-16 - B-1000 Brussels

Tel.: +32 2 289 10 90

Email: [eeb@eeb.org](mailto:eeb@eeb.org)

*EC register for interest representatives: Identification number: 06798511314-27*

**Annex:**

**Suggestions to improve governance and balance of the Seville Process**

Background: Experience has shown various deficits in having a balanced view expressed between the various interest groups present. Article 13 of the IED states that the information exchange should be made between the following 4 interest group stakeholder categories: industry concerned, NGO promoting environmental protection, Member States and the European Commission.

The imbalance is extreme when comparing the number of operators represented within the TWGs and the IED Forum versus public interest groups NGO. Furthermore, within the “industry concerned” category, the operators are almost exclusively represented, whilst technique providers or other industry with conflicting interests are not directly presented within the “industry concerned” group and/or underrepresented (e.g. at KoM and FM). Certain Member States (MS) did / still do nominate clearly industry affiliated “experts” to represent them in the TWGs. The worst example was in the LCP BREF review but this practice has been nevertheless ongoing.

Irrespective of the imbalance of operators versus tech providers issue in terms of physical attendance, the Member States are treated in preferential manner to the other NGO stakeholder group on the following counts: **Access to confidential business information (CBI), MS have a voting power and can “overrule” consensus made at the TWG level** (*these aspects are developed further in the EEB input to the IED Evaluation*).

There is an aspiration to have consensus-based decision making. **However this aspiration should be sub-ordinate to the objective of the information exchange itself or should not lead to an absurd situation where the lowest common denominator results as the “compromise”.**

If there are technical facts which show that a certain pollution level is achievable then objections to the contrary or any weaker compromises should not be accepted, unless these are based on robust technical arguments (non-feasibility) or demonstrated negative cross-media effects in line with the integrated approach of the IED. Economic or proportionality concerns such as benefits versus cost arguments of implementing a technique should not be allowed to weaken a certain BAT-C conclusion. This should only be addressed under the possible derogation procedure as per Article 15.4.

**We suggest that other criteria should be used to rebalance the Seville Process, instead of attendance to IED forum meetings. These suggestions build on the EEB submission to the IED Evaluation Roadmap. The aim of those suggestions is to improve balancing of powers in the TWGs / IED forum / stopping political interference and safeguarding more environmental ambition:**

The following frameworks need to be put in place:

- a) **a conflict-of-interest policy** so that the experts involved in the exchange on behalf of governments do not have links to the industry concerned – a clear prohibition that operators can act within the TWG on behalf of the Member States (be it in the form of written submissions in BATIS and for the official BREF meetings). The latter is clearly settled by the European Commission (27 November 2018 IED forum). Industry of the “operator” category affiliated experts should not be allowed to be nominated within a TWG Member State delegation. This clarification letter is most welcome to address that clear conflict of interest point. However, the EIPPCB has recently taken the view that it is still ok that clearly (operators) industry affiliated persons can be listed within a national TWG delegation in the TWGs, to represent those countries, as long as there are civil servants present in that TWG delegation as well (e.g. in the SF BREF TWG two industry affiliated persons have been nominated by CZ and IT).

The EEB disagrees with this interpretation of the rules and proposes the following alternative solution: First, the nomination should be checked as to possible “conflict of interest” which “*means any situation where an individual has an interest that may compromise or be reasonably perceived to compromise the individual’s capacity to **act independently and in the public interest** when providing advice to the Commission **in relation to the subject of the work performed by the expert group or sub-group in question**”.* It is obvious to the EEB staff that employees or other experts with commercial interests with an operator or association of industry, subject to the BAT Conclusions being revised, does not act independently and neither in the public interest, at least it is reasonable to perceive that this person should act in the interest of its employer. A possible solution could be to accept Member State public servants to nominate some national industry representatives within the “industry group”, without having to pass through a nomination of the industry umbrella organisations of the Forum.

Conditions and incentives that guarantee that the BREF authors will act in the public interest and their work outputs are aligned to the policy objectives of the IED should be introduced. A BREF author pre—screening board should be put in place that includes a balanced representation of the Member States, the ENGO and the industry group.

- b) **Enhanced rules enabling a balanced representation of interests** -as currently industry is over-represented whereas NGOs are under-represented in the process-. If no equal seat allocation is feasible then the balanced representation should be ensured through **giving more weight to NGOs (differentiated weighting in the consensus finding);**
- c) **Adapted rules for the decision-making process e.g. for consensus finding when critical decisions are to be made.** Consensus should mean consensus between the various interest groups present and not a number counting exercise of TWG delegates around the table.

MS: the Council majority rules could be used, those countries that have implemented previous BREF standards should have a higher standing compared to counterparts that did not require their industry to implement the previous BREF benchmarks. This way countries that have made efforts towards meeting the IED objectives should have a higher standing in terms of legitimacy for discussing adequacy of BAT-C.

For the industry concerned group: it is proposed to split these in 3 sub-categories:

- the “operators”
- the “technique providers” (independent from the operators) and
- the “competing industry” (e.g. specialised waste industry groups versus cement industry or operators of LCP versus Energy Efficiency solutions providers). These sub-industry groups should be represented in a balanced way. Due to certain concerns by technique providers not to upset their future clients it is proposed to set up a special working environment where these could contribute more frequently and freely: E.g. when applicability restrictions, costs or performance levels are challenged by the operators the technique providers should be able to provide a differentiated assessment only with a restrictive group (operators not present).

*E.NGOs:* because they are the most neutral stakeholder category vis-a-vis affected industry, NGO representatives should have a special power to balance a certain decision which does not meet consensus in a certain direction. This could take the form of:

**Option i) a dedicated NGO objection right,** based on outcome-oriented criteria (i.e. an improved BAT derivation methodology and environmental outcomes eligibility criteria). This

objection right could be invoked during the TWG and prior to the finalisation of the EIPPCB opinion contained in the Background documents.

**Option ii) establishment of "IED compatibility scrutiny board".**

The IED compatibility scrutiny board, composed of public interest NGOs and chaired by an experienced NGO in the Sevilla process, should provide its favourable opinion on the final draft text submitted to the TWG (Background papers) and Member States prior to the vote (final draft BAT-C). Its opinion would change the voting pattern by the Member States. Any requested change by a Member State or the European Commission or by other stakeholders would be considered by that IED compatibility scrutiny board. The consultation of the scrutiny board should take place prior to:

- the establishment of the opinion of the EIPPCB in the Background documents
- translation of the final draft BAT-Conclusion following the IED Forum in a draft Commission Implementing decision,

If the proposed amendment / proposal receives a favourable opinion (or no opinion), a qualified majority by the MS in favour would suffice to adopt the amendment and the draft Commission Implementing text. In case of a negative opinion, that amendment / draft Commission Implementing text could only be amended and adopted if there is a qualified absolute majority of MS in favour.

- d) **the same considerations as mentioned under points (a-c) should also apply to the information exchange at Member States level i.e. national BREF mirror groups**, the IED Article 13 should be amended accordingly in order to be explicit that the balanced representation between the various interest groups should also be ensured at national level.
- e) **output performance indicators should be laid down on the Commission services in charge of organising the BREF reviews**. These could relate to the following:
  - time efficiency for publication in the OJ of the revised standard
  - improvement level of the revised BREF as to scope, pollutants and issues addressed and in particular the ambition level compared to previous BREF (what is the possible added value for human health and environmental protection, ecological transition of the industry etc).
- f) **The voting by Member States to confer binding status of the BAT-C should be reconsidered**. During the IED co-decision, the European Parliament proposed an automatic IED safety net extension/update procedure. There have been unacceptable moves to change substantive elements of agreed outcomes at Final TWG and non-consensual change requests to the worse just because of threats of Member States not to adopt the BAT-C (due to industry lobbying). Examples: the introduction of the Bubble approach for Refineries, the exclusion of LLD and CHP plants from the LCP BREF scope.

The voting power by Member States should be reconsidered and conditional to purpose oriented interventions aligned to the IED objectives – not short-term (national) industry interests. An alternative proposal in this sense is the dedicated NGO objection right and establishment of "IED compatibility scrutiny board".

**g) The involvement of independent scientific community should be promoted.**

Nothing has been proposed by the European Commission on that aspect as to IED Forum / TWG membership. It would be worth to consider inviting the EEA, ECHA and representatives from Universities / independent research institution working on the ecological transition of industry.