

To: Ms Veronica MANFREDI, Ms Aneta WILLEMS, Mr Serge ROUDIER, Mr. Olivier GUERSENT

RE: Confidential business information and industry infiltration within Member State delegations in Technical Working Group (EU BREF process) Brussels, 20th January 2021

Dear Ms Veronica MANFREDI, Dear Ms Aneta WILLEMS, Dear Mr Serge ROUDIER, Dear Mr. Olivier GUERSENT,

We welcome the organisation of 'closed web-based sessions' between representatives of NGO, Member States and industry representatives (which are not actual competitors) enabling to assess information considered as 'confidential business information' (CBI), proposed by the European IPPC Bureau (EIPPCB) in the context of the Ferrous Metals Processing (FMP) BREF and the Waste Gas from Chemical Industry (WGC) BREF review. However, we see the following serious flaws that need to be remediated:

- there is a recurring situation of industry infiltration within certain Member State TWGs, with a further negative side-effect on sharing CBI data (developed below).
- the EIPPCB does not foresee to circulate the information electronically in advance to NGOs but only to MS civil servants (to which the EEB strongly objected to orally and in writing 7/12/2020);
- a 'minimal 5 datasets' threshold has been mentioned (WGC);
- industry claim that even with best intentions, they may not be allowed to exchange information on consumption data or production volumes because of EU competition law, however this claim has not yet been soundness-checked by DG COMP;

The EEB would wish to address those points under the 'AOB' at the next IED Forum meeting on 25th January 2021. Allow us to develop further our views and proposals to the two interrelated issues

1) Issue of industry infiltration (conflict of interest and link with CBI debate):

The EEB learned that the main concern of some EUROFER members about sharing perceived 'CBI data' under the FMP BREF is actually linked to the problematic issue of the Czech and the Slovakian Member States TWG delegation being infiltrated by experts affiliated to "industry"¹.

The EEB raised its concerns about this clear conflict-of-interest situation by email to your services. However, the EIPPCB response (18/12/2020) was, in a nutshell: this situation is fine and in accordance with the Expert group rules. The TWG expert rules state in Article 9(2) that "*Type D and E members shall only be represented by civil servants or public employees.*" DG ENV clarified in its communication of 1 March 2018 that while Member State representatives may be assisted in the information exchange by other experts, it is essential for a Member State delegation to be led by a civil servant or public employee for it to be permitted to participate in the work of the Forum or its subgroups.

We strongly disagree with the conclusion of the absence of a conflict-of-interest situation or that those rules are complied with in the present case given that it was actually the employees of 'operators' / companies that did all the talking during that Final TWG FMP meeting. The set-up of Commission expert groups, as outlined in the Commission Decision of 30 May 2016, clearly envisages five distinct categories of members (Article 7) and if members from one category can sit behind the nameplate and speak on behalf of members of another category, this is in clear breach of the intention behind the delineation of categories and raises serious governance issues. While DG ENV's clarification that a Member State delegation must be led by a civil servant or public employee was helpful, its reference to the possibility for representatives to be 'assisted in the information exchange by other experts' is now being stretched beyond any reasonable limit when it is considered to justify (according to the EIPPCB response of 18 December 2020) industry

¹ For CZ this concerns a representative from the Czech and Slovak steelmakers EUROFER branch <https://www.ocelarskaunic.cz/>, for SK this concerns a representative for US Steel Kosice s.r.o. owned by US steel corporation



representatives not only participating in Member State delegations but even serving as their principal spokespersons. Article 13(1) of the Industrial Emissions Directive (IED) is very clear that there are 4 distinct stakeholder groups (Member States, industry concerned, E.NGO and COM), an "industry concerned" affiliated representative, such as an operator, cannot be a Member State. For the CBI debate, this situation led to a mistrust of some national industry groups to allow the Member States delegates of those countries to receive the CBI dataset due to their close ties with their national industries/ companies.

We therefore call on the Commission to reclarify the meaning of the rules in such a way as to preclude a situation where operators / industry may serve as part of a Member State delegation. Instead, they should be categorised as "industry" e.g. EUROFER-CZ or EUROFER-SK. Private interest affiliations are still listed within certain IED Forum member contacts in BATIS: e.g. Croatian Chamber of Commerce (HR), TSCR (CZ). TWG subgroups affiliations should be verified to prevent conflict of interest situations. If this cannot be resolved swiftly, we will consider seeking the opinion of the Ombudsperson, since fundamental issues of administration and governance are at stake here.

1) Way forward on handling CBI data:

At the 18/12/2020 Final Meeting for the FMP BREF meeting EUROFER was offered the floor to present at length its "3 alternative options" for handling CBI data. During that meeting, echoing strong reservations made by the Member States to EUROFER options, the EEB tabled an alternative "4th option" to consider: to go ahead with a virtual closed session meeting but only on datasets where industry (national level) and the Member States concerned already got an approval response for its sharing following the consultation process; independent on whether the industry delegation may take part because of being in a "competitive situation". Since the EUROFER proposals did not receive any support, the EIPPCB tabled back the initial EIPPCB proposal. The alternative EEB compromise option was not even mentioned. Only EUROFER raised its flag (opposed) and the EIPPCB concluded it will not take place.

We feel that the EIPPCB has allowed EUROFER to hijack the way forward on CBI data exchange, effectively giving it a veto, whilst in the case of the WGC BREF it was claimed that 'consensus' was reached to only have MS delegates to receive the CBI data in advance, despite clear NGO stakeholder group (EEB) objection. We regard this differentiated approach to finding consensus not consistent.

Further, the current situation may lead to a situation where the information basis behind the derivation of consumption level BAT-AE(P)L will not be transparent, or at worst be either deleted or become 'indicative' due to the CBI excuse, therefore acting against the objective(s) of the BREF review process and serving those industry agenda (no binding BAT-AE(P)Ls) which withhold information.

Reception of the CBI data in advance is necessary for the good conduct of the preparations, we regard this as a condition for being able to participate effectively in the upcoming CBI workshop(s) and in accordance with the provisions of Article 13(2) of the IED. **Finally, we reiterate our views that the procedure for handing CBI requests needs to be clarified once and for all in the light of the relevant legal provisions, such as Article 15 and 101 TFEU, Regulations 1049/2001 and 1367/2006, the Aarhus Convention and the IED and shall apply to all BREF reviews consistently.**

We hope that Commission services, in particular DG COMP, will agree with the main legal arguments put forward in the Annex to this letter, requiring an adaptation of the proposed way forward on CBI in BREF reviews, and hope those considerations are equally relevant within the ongoing E-PRTR review.

Yours sincerely,

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