



Commissioner Janez Potočnik
Environment Directorate-General
European Commission
B-1049 Brussels

10 October 2013

NGO concerns over the Transitional National Plans pursuant to the Industrial Emissions Directive 2010/75/EU

Dear Commissioner Potočnik,

The use of optional Transitional National Plans (TNP) under the Industrial Emissions Directive (IED), which allows operators of Large Combustion Plants to delay meeting emission standards until the 1st of July 2020, is of major concern to us. Based on our own analysis of the plans submitted, we would like to hereby share our concerns and recommendations for how the Commission may address them.

The Commission undertook Impact Assessment studies in preparation of the revision of the Industrial Emissions Directive. These studies confirmed that the health benefits to citizens from cleaner air are at least three to ten times greater than the costs incurred to operators of Large Combustion Plants (LCPs) from updating performance according to Best Available Techniques (BAT).¹ Clearly, strict implementation of the IED by limiting the use of derogations within TNPs is a prerequisite to achieving the EU's environmental, health and climate goals in a timely manner. Limiting the use of derogations is also crucial to ensuring a level playing field in the EU energy market.

We want to urge the Commission to reject any TNP that does not adequately address the concerns identified below. Member States should rather have to re-apply, since this is an option the Industrial Emissions Directive explicitly offers.²

- **Inadequacy of the plan with implementing rules:** A TNP has to contain installation-specific measures and provisions that will ensure timely compliance with the Emission Limit Values (ELV) by 1 July 2020. Many TNPs do not. Any shortcoming or absence of these parameters should lead to a rejection on this count. Member States' track records of compliance with EU legislation should also be considered for this assessment. It must be noted that currently ELVs are the minimum binding requirements under the IED. However, on 1 July 2020 the IED requires operation according to the standards set out in the applicable BAT reference documents (LCP BREF). Going forward, the Commission has to ensure timely compliance of individual plants contained in TNPs with the BAT conclusions i.e. the revised LCP BREF. This is a consideration the Commission must already take into account.

¹ ENTEC 2007, suggesting net benefits of €7-28 bln/year (without accounting for ecosystem damage).

² Article 32, (5), third paragraph of Directive 2010/75/EU

- **Meeting EU Air Quality Objectives:** Several LCPs that are located in zones in breach of EU ambient air quality limits have been included in TNPs. Allowing such installations to emit more pollutants is in contradiction with the IED. The Directive actually requires additional measures to be included in the LCP permit in order to safeguard Environmental Quality Standards, not the opposite by allowing a derogation. The Commission should assess whether *not* raising objections to TNPs that include such installations is compatible with its mission as “guardian of the Treaty” by compromising the EU’s Environmental Acquis (in particular, clean air). The most straightforward solution would be to require those plants contributing to breaching EU limits to be taken out of the TNP. Member States should provide additional guarantees that the attainment of air quality limits will not be compromised.
- **Strategic Environmental Assessment and Public Participation:** Many Member States have not done a Strategic Environmental Assessment (SEA) nor did they enable the public to participate in the deliberations prior to adoption of the TNP by the national government, to be sent to the Commission for approval. However, Directive 2001/42/EC requires a SEA and the Aarhus Convention (to which the EU is a Party to) requires public participation in environmental matters. These laws clearly state that these actions must happen *early* in the process. The Commission should not approve TNPs that have not correctly applied EU law.
- **IED ‘compliant’ plants:** Several TNPs include installations that appear to already meet the Emission Limit Values of the IED. As stated in the recital of the IED, only installations that still need to install necessary abatement measures may be granted sufficient time for this purpose.³ Consequently, LCPs that already meet the IED ELVs should not be eligible for derogations as it would go against the purpose of the IED itself. The Commission should identify those installations and require them to be taken out.

We understand that as part of the Commission’s TNP assessment Member States have provided additional information and clarifications. In order to ensure transparency and enable concerned civil society to understand and participate in EU processes, we request the Commission to provide us with all information on the changes to the TNPs.

We would furthermore be interested in hearing whether any of our points raised in this and in previous letters⁴ to the Commission have already been addressed through requests for revisions to individual TNPs.

In light of our concerns, we would be grateful for the possibility to meet in person to discuss them in more detail and to hear from the Commission how they might be addressed. Please find a more detailed explanation of our findings and recommendations attached to this letter.

Yours Sincerely,



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³ Recital 43 of the Industrial Emissions Directive 2010/75/EU.

⁴ Letter sent by the Environmental Law Service about the Czech TNP, 1 Aug 2013; Letter sent by CAN Europe about the Hungarian TNP, 7 Aug 2013; Letter sent by Greenpeace CEE about the Polish TNP, 10 July 2013; Letter sent by Focus about the Slovenian TNP, 9 July 2013.

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Issues of Concern with the Transitional National Plans

No or insufficient measures

a) Likely breach of formal requirements

Several TNPs do not contain proper provisions and measures required according to paragraph 4 of Article 32 of the IED and rather offer ‘shopping list of options’ of what might be done. Some TNPs do not list any measures at all. This does not comply with the Commission’s Implementing Decision 2012/115/EU on TNPs, which explicitly requires the TNP to include a list of measures.⁵ The combustion plants in the TNP will have to jointly meet a decreasing linear pathway. Only if the measures are planned per power plant, can the Commission and government be reasonably confident this linear decrease of the emissions ceiling will be met. Also, the Commission needs to be able to assess that total emissions are not increased if a LCP included in the TNP is closed or no longer falls within the scope of Chapter III. For that purpose it is important that plant-specific information based on Art 32(3) is available. It is also clear the any monitoring and reporting as well as measures are specifically set for each plant according to Art 32(4) of the IED.

As a condition for approval for a TNP, the Commission should receive a precise and detailed list of the planned measures together with information on implementation from the national level, i.e. commitments and clear timelines by the individual operators. The Commission needs to be confident that the ELVs will indeed be timely ensured, as required by the IED. Member States’ track records of compliance with EU legislation should also be considered for this assessment.

b) Concerns with qualitative requirements of the measures: importance of LCP BREF

Furthermore, the compliance with the relevant ELVs of Annex V are only the minimum requirement for large combustion plants.⁶ In no way are these to be considered as sufficient for ensuring compliance with the IED, which is set on BAT based performance benchmarks. These are set out in the relevant BREF documents. Yet the TNPs and measures contained therein only focus on the IED ELVs. The danger we anticipate is that necessary abatement investments will be delayed further once the TNP comes to an end, by providing yet another IED exemption on economic grounds so that operators do not have to make another investment to comply with the BREF.

The Commission will therefore need to make sure that the ELV “that will apply from 1 July 2020 onwards” will be based on the applicable BATAEL (for NO_x, SO₂ and dust). These are set out in the BAT conclusions of the revised LCP BREF. It is anticipated that the BAT conclusions will be published by 2015 at the latest. This means that compliance and setting of ELVs based on BAT will have to be implemented within 4 years of the date of publication i.e. by the end of 2019.⁷ Hence, to ensure proper and timely implementation, the Commission will need to formulate in its TNP decisions conditional acceptance criteria based on the above points. The Commission must be able to withdraw its approval of a TNP by the compliance deadline for the new LCP BAT conclusions.

Since it is anticipated that the publication of the new BAT conclusions will take place before the beginning of the TNP, a review clause needs to be provided in order to take account of the new requirements set in the new LCP BREF.

⁵ Directive Commission implementing decision 2012/115/EU Art. 2 (1), subpara (a): „a list of the measures that shall be applied to ensure that all combustion plants that are included in the plan comply on 1 July 2020 at the latest with the applicable emission limit values set out in Annex V to Directive 2010/75/EU.“

⁶ Chapter III and Annex V are to be considered as the EU safety net which should not be exceeded, see Art 15.4, Art 30 and Art 73(1) .

⁷ See Art 21(3)b) IED.

Needless to say, the correct and full transposition of the IED should be a pre-condition to be able to use the TNP derogation. We are aware of the infringement procedures underway, and we call for Commission to ensure proper and full transposition of the IED. We also recommend that the Commission should make explicit the necessity to transpose Article 32 as a prerequisite to be able to use the derogation.

Conflict between TNPs and EU Environmental Quality Standards

Many of the installations in the TNPs are located in zones in breach with ambient air quality limits. We have pointed out several of those in our earlier letters to the Commission. This only increases our concern over the absence of detailed measures in particular for these installations. It raises the question as to whether a 'Commission approved' TNP will be in conflict with the goal set forth in Directive 2008/50/EC on ambient air quality and cleaner air for Europe aiming at limiting the exceedance period in the particular zones to be as short as possible (Art 23 Air quality plans).⁸

The most straightforward way to avoid a conflict between two EU directives is to require these plants to be taken out of the TNP. At a minimum, the Commission should require of the Member State to provide a detailed explanation of what additional measures will be implemented and to explain how the inclusion of these power plants in the TNP will not lead to a continued breach of the EU Ambient Air Quality Directive. Doing so is required by Art. 18 of the IED: *"Environmental quality standards: Where an environmental quality standard requires stricter conditions, additional measures shall be included in the permit, without prejudice to other measures which may be taken to comply with environmental quality standards."* (emphasis added). Adding a TNP derogation to a permit would be the opposite to what Art. 18 requires.

The other matter is the fulfillment of the Maximum Allowable Concentration (MAC) limits set by the Environmental Quality Standards Directive,⁹ in particular for mercury. The Commission should consider the cross-media benefit for the attainment of the EQS with regards to water quality from secondary abatement techniques that would need to be implemented, if no TNP derogation would be granted.

Negative effects on the EU's Single Energy Market and competition

Certain operators and member states have over the years continuously granted one flexibility and derogation after the other for a large number of their Large Combustion Plants and to certain operators. A continuation of this 'chain exemption' is not only detrimental to the environment and citizen's health. This preferential treatment is also increasingly creating distortions in the EU's Single Energy Market and raises competitiveness concerns.

Additional plants to be put under particular Commission scrutiny

There are additional plants, which should receive further attention by the Commission. A 2013 EEA report has found the following: "EU-27 NO_x emissions from LCPs considered in this study have the potential to be 36 % lower than in 2009 if all plants meet the IED ELVs and 69 % lower if plants achieve the more stringent BAT AEL. For SO₂, the potential emission reductions are 66 % and 94 %, respectively, and 64 % and 79 %, respectively, for dust. *Most of the potential reduction can be achieved from just a relatively few very large coal and coal co-combustion plants.*" (emphasis added).¹⁰ A number of the plants referred to in this EEA statement are included in the TNPs. According to the established polluter-pays and proportionality principles these plants need to be required to invest in the necessary BAT pollution reduction standards.

⁸ As expressed by Commissioner Potočnik himself: 'The first is to ensure full compliance with our existing air quality policies and our international commitments, by 2020 at the very latest' - http://europa.eu/rapid/press-release_SPEECH-13-504_en.htm

⁹ Directive 2008/105/EC as regards priority substances in the field of water policy , amended by Directive 2013/39/EU of 12 August 2013; OJEU L 226/1

¹⁰ <http://www.eea.europa.eu/publications/reducing-air-pollution-from-electricity>

Strategic Environmental Assessment and Public Participation

Most if not all TNPs fulfill the criteria of the 2001/42/EC Directive on the basis of which a Strategic Environmental Assessment (hereinafter “SEA”) has to be undertaken prior to their adoption. Pursuant to the Directive 2001/42/EC, a SEA is to be done early in the process and reasonable alternatives are to be proposed and assessed throughout the process.¹¹ The SEA process shall also provide for the effective participation of the public. This is also required by the Aarhus Convention, to which the EU is a party.

In the case of most TNPs a Strategic Environmental Assessment was not done prior to adoption by the government and sending it to the Commission. Equally, in many cases the public was not given any opportunity to participate in the preparation of the TNPs that are now before the Commission. In general, TNPs were prepared and adopted on the national level prior to their submission to the Commission and their current form is very much advanced.

The Commission has referred to the FAQ on the Commission website, which states that the SEA can be done at a later stage as part of the national implementation process. We disagree with this reading: The Aarhus Convention as well as the SEA Directive are very clear in that public participation is to take place *early* in the process when all options are open and the comments from the public can be taken into consideration in the decision-making. It is highly questionable in what manner the comments from the public will be taken into consideration after the approval of the Commission is given and the preparation process on the national level is closed. The question of public participation is even more urgent with regard to the affected public from the zones in continuous breach with EU ambient air quality limits.

It should be noted, that due to the transboundary nature of air pollution and existing frequent episodes of breaches in e.g. East Germany and Berlin on days with east winds (this was analysed for their air quality management plans) an appropriate transboundary consultation should be part of SEAs.¹²

The Commission should ensure that the SEA process is not a *pro forma duty* laid down on the Member States and that the effective public participation takes place in the development of the TNPs. Otherwise, it would amount to a breach of the relevant provisions of the SEA Directive as well as the Aarhus Convention. The Commission is the institution responsible for ensuring EU law is properly applied throughout all Member States and one of its main roles is to enforce EU law. Therefore, the Commission cannot and should not approve documents that were adopted in breach of the EU law.

It follows that prior to their approval the Commission should require the information on the results on the SEA carried out for the TNPs and on how the comments from the public were taken into consideration, including the matter of transboundary impacts and consultations.

Plants already in line with IED Emission limits should not be included in the TNP

In their TNPs member states have included installations, which in our understanding already meet the IED ELVs or will do so by 1 January 2016. The inclusion of these plants in the TNP means that not only are installations exempted from meeting the IED ELVs by 1 January 2016, they will also be able to pollute even more.

This is in our reading of the IED in conflict with the overall environmental objective of the Directive.

¹¹ Directive 2001/42/EC, Article 5: “Environmental report. 1. Where an environmental assessment is required under Article 3(1), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex I.”

¹² Senatsverwaltung für Stadtentwicklung und Umwelt (2013): Luftreinhalteplan Berlin 2011-2017, pages 94-97, http://www.stadtentwicklung.berlin.de/umwelt/luftqualitaet/de/luftreinhalteplan/download/Luftreinhalteplan_Berlin_2011.pdf.

Furthermore, Recital 43 of the IED states the following: *“In order to provide existing installations with sufficient time to adapt technically to the new requirements of this Directive, some of the new requirements should apply to those installations after a fixed period from the date of application of this Directive. Combustion plants need sufficient time to install the necessary abatement measures to meet the emission limit values set out in Annex V.”* A derogation is to be used for those plants only if they need time to install the necessary abatement measures. It follows that plants that will already meet the ELVs will not require any measures and thus can and should not be included.

The ‘logic’ of the derogation of a joint ceiling will still function without those ‘already compliant’ plants. It simply means that some plants have to install their abatement technologies soon in the TNP time period to secure the downward linear trend.

We understand that the derogation under the Large Combustion Plant Directive 2001/80/EC similar to the Art. 32 on TNPs, the National Emissions Reduction Plan, allowed for the inclusion of ‘already compliant’ plants. We would like to point out that IED and LCPD are not identical Directives. The LCPD does not have a paragraph equivalent to the recital paragraph 43 of the IED. The IED prioritizes environmental objectives more strongly than its predecessor Directive.