

02 April 2021

Submission of An Taisce

Consultation on the Development of a new Solid Fuel Regulation for Ireland

An Taisce is strongly in favour of robust national regulation of smoky fuels, with a view to eliminating their use in the residential setting across the board in the shortest possible timeframe. An Taisce specifically supports a nationwide restriction on the sale or distribution of all smoky fuels across the entire jurisdiction. The reason for An Taisce's position is manifest, and grounded in both public health and environmental concerns. The public health ramifications of continued smoky fuel burning as a means to heat our homes are widely accepted; in the consultation document underpinning this consultation process, the Department has acknowledged that

'The WHO has recognised air pollution in general, and particulate matter especially, as causing cancer to humans. The latest evidence indicates that the health impacts of air pollution are more wide ranging.

...

Poor air quality is linked to serious health implications, both short-term (acute temporary complaints such as headache, breathing difficulty, or eye irritation) and long-term (chronic ongoing conditions, including asthma, reduced liver function, and cardiovascular disease.'

The Department's acceptance of the human health impacts of degraded air quality, caused in particular by particulate matter, is welcome. In the context of these accepted human health consequences, the most logical and consistent regulatory regime is one of nationwide prohibition of smoky fuel sale or distribution.

For the purposes of this submission, the definition of smoky fuels includes, but is not necessarily limited to: coal, peat, biomass, and wet wood. The definition of smoky fuels that is adopted should be broad and inclusive; the ultimate objective of these regulations should be to facilitate a rapid and society-wide transition away from reliance on smoky fuel use, and towards a new home heating energy framework for Ireland. The new framework should prioritize ambitious energy efficiency standards in all homes, through stricter efficiency standards for new builds and an expanded retrofitting scheme for existing homes. The residential sector should be primarily serviced for its home-heating

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needs by renewably powered electric heating, with heat pump systems for one-off houses and the installation of district heating systems for urban populations.

1. Regulation of Smoky Fuels in Ireland

There should be comprehensive regulation of all forms of smoky fuel use across the entire jurisdiction. This regulation should come in the form of a general restriction on the sale or distribution of smoky fuels for residential use. There are three leading approaches to the regulation of sale of smoky fuel. They are, in brief:

- 1) A nationwide prohibition on bituminous coal only
- 2) A nationwide prohibition on the sale or distribution of all smoky fuels
- 3) Iterative expansion of the existing system of Low-Smoke Zones.

An Taisce is advocating for the implementation of the second approach, for a number of health, environmental, and regulatory reasons.

1.1. Health Benefits of Nationwide Prohibition on Sale of Smoky Fuels

The impact of degraded air quality on human health is well established. As the public consultation document underpinning this process provides,

'Air quality is a major concern at a global level and is considered one of the most significant environmental risks to human health. Since the 1990s, medical research has demonstrated links between air pollution and both short- and long-term health impacts, including headache, breathing difficulty, eye irritation, and exacerbation of respiratory conditions and increased levels of strokes, cancer, and respiratory and cardiovascular disease.

The European Environment Agency report, *Air Quality in Europe 2020* indicates that in 2018, there were 1,300 premature mortalities linked to pollution from fine particulate matter (PM2.5) in Ireland. The same report specifies 16,200 Years of Life Lost, showing significantly earlier mortality for those deaths.'

The residential use of smoky fuel is a leading cause of degraded air quality. In particular, according to the Environmental Protection Agency, 'In Ireland, the main source – especially of the smaller and more dangerous PM2.5 particles – is solid fuel burning for home heating.'¹ The detriment to public health caused by these pollutants is profound.

¹ Environmental Protection Agency, *Air Quality in Ireland 2018 Report (2019)*

According to the World Health Organisation (WHO),

'The Health risks associated with particulate matter (PM) of less than 10 and 2.5 microns in diameter (PM10 and PM2.5) are especially well documented. PM is capable of penetrating deep into lung passageways and entering the bloodstream causing cardiovascular, cerebrovascular and respiratory impacts... in children and adults, both short- and long-term exposure to ambient air pollution can lead to reduced lung function, respiratory infections, and aggravated asthma.

The health detriments attributable to PM2.5 are not limited to circumstances of extreme pollution. In fact, the WHO is unambiguous in its assessment that 'there is little evidence to suggest a threshold below which no adverse health effects would be anticipated... thus any measure that is adopted to decrease concentrations of PM in ambient air should result in positive health effects for the general population.'

In addition, it is not possible to meaningfully distinguish one type of solid fuel from another in terms of their relative contributions to PM2.5 pollution in ambient air. Recent scientific evidence reveals that bituminous coal, peat, wet wood and biomass all emit similarly harmful levels of PM2.5, and should therefore be regulated in similar terms.²

It is also not feasible to meaningfully limit the regulation of these pollutants to specific geographic or population hubs. The difficulty of enforcement of regional and population-based Low Smoke Zones will be considered in due course. From a human health perspective, Low Smoke Zones are significantly less effective at improving human health outcomes than a nationwide prohibition on sale or distribution would be. This is due to the inherently transitory nature of smoky fuel air pollution. In effect, air pollution created outside a Low Smoke Zone will inevitably move beyond its immediate vicinity, and continue to impact human health across the country. As Professor John Sodeau of UCC's Centre for Research into Atmospheric Chemistry stated in an interview with the Irish Times,

'Many small Irish rural towns have no ban, and the particulates that enter the atmosphere there can move across the country. One of the main problems people don't understand about air pollution is that it floats and moves ... so-called trans-

² *The Regulation of Smoky Fuels in Ireland: Assessing Options for Reform* UCC Environmental Law Clinic (2020)

boundary events could occur between countries, so 'without a doubt', it would move between Irish towns.³

In addition, limiting regulation to specified locations inevitably leads to issues of fuel leakage, in which prohibited fuels from unregulated locations move in to restricted zones for use in those zones. It is practically impossible to enforce measures to prevent leakage, which renders their implementation crucially flawed.

In order to meaningfully protect human health from air pollution caused by solid fuel burning, a general restriction on the sale or distribution of smoky fuels for residential use must be implemented in the shortest possible timeframe.

1.2. Environmental Benefits of a Nationwide Prohibition on Smoky Fuel Use

The continued use of solid fuels for home heating has a meaningful impact on the global climate and biodiversity crisis. In a report commissioned to examine the use of wood and coal for residential heating in Europe and North America, the WHO has noted that:

'Increasing efficiency and tightening restrictions on emissions from wood and coal heating throughout the world would both slow down the current rapid speed of global warming... and reduce the burden of disease caused by combustion-derived particles ... The public needs to be better educated about the facts that... coal heating should be discontinued for both health and climate reasons.'⁴

A national prohibition on the sale or distribution of smoky fuel would also be the most consistent policy with Ireland's national climate commitments, which have been set out in national legislation and European and international agreements. Implementing a national prohibition on the sale or distribution of smoky fuel would represent concrete action on the part of Ireland toward fulfilment of those climate obligations.

Ireland is bound by European Directives on air pollution, including the Directive on Ambient Air Quality and Clean Air for Europe (2008/50/EC)(CAFÉ Directive), and the EU Clean Air Package. Both the CAFÉ Directive and the Clean Air Package include specific commitments for Member States concerning ambient air pollutants, including both PM2.5 and PM10.

³ Jack Horgan-Jones, 'Severe consequences for areas not covered by smoky coal ban – expert' *The Irish Times* (11 June 2019)

⁴ World Health Organisation, *Residential heating with wood and coal: health impacts and policy options in Europe and North America*, 2015

Implementation of a general prohibition on the sale or distribution of smoky fuel would represent a major contribution towards the realisation of those obligations.

1.3. Legal/Regulatory Rationale for Nationwide Restriction on Sale or Distribution of Smoky Fuels

In addition to the imperatives of vindication of human health and consistency with international climate obligations, a nationwide prohibition on the sale or distribution of smoky fuels has a number of important regulatory justifications. In particular, two issues arise: the principle of proportionality in the context of free movement of goods, and effective enforcement of regulations.

1.3.1. Free Movement of Goods

The Free movement of goods is a fundamental freedom of the European Union. A nationwide prohibition on certain fuel types, or any other product, inherently runs contrary to that fundamental freedom. There are, however, specific justifications for restrictions on products, which are specified in the Treaty on the Functioning of the European Union (TFEU). The TFEU permits restrictions on imports in circumstances where they are justified on grounds including 'the protection of health and life of humans'.⁵

Air pollution is estimated to have caused 1,180 premature deaths in 2016 alone, with PM2.5 accounting for the majority of these.⁶ In 2013, the financial cost of air pollution, including 382,00 lost workdays, was estimated to be greater than €2 billion.⁷ It is clear that there is a legitimate objective in measures designed to address the primary source of PM pollution.⁸

While the grounds justifying a restriction on imports listed in the TFEU are exhaustive,⁹ the Court of Justice of the European Union (CJEU) has accepted other grounds where measures are applied equally to both domestically produced and imported goods. These measures, termed 'indistinctly applicable measures', are subject to the 'rule of reason' as formulated in the *Cassis de Dijon* case.¹⁰ While the Luxembourg courts have not set out an exhaustive list

⁵ TFEU Art. 36

⁶ EPA, *Air Quality in Ireland 2018*

⁷ Department of Communications, Climate Action and Environment, *Air Quality Overview – Health effects of Air Pollution*

⁸ EPA, *Air Quality in Ireland 2018*

⁹ *Commission v Ireland*, C-113/80

¹⁰ *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, C-120/78 (20 February 1979)

of grounds justifying indistinctly applicable measures they have long accepted 'protection of the environment' as one such 'mandatory objective'.¹¹ As any widescale change of fuel use is likely to have an impact on the environment, including on green-house gas (GHG) emissions, the impact of any proposal should be estimated to the extent that is possible. Where a proposal is likely to reduce GHG emissions it would be further justified in protecting the environment.¹²

Although the purpose of further regulation would not be to restrict imports it might, depending on its form, amount to a 'measure having an equivalent effect to quantitative restrictions' (MEEQR). To assess whether the purported benefits are an adequate justification for the restriction of free movement of goods the proposals must be considered in light of the overriding principle of proportionality in EU law.¹³

The CJEU also clearly set out the application of a proportionality test where an indistinctly applicable MEEQR restricts a fundamental EU freedom in the case of *Cassis de Dijon*. The rule of reason is in essence a proportionality test as it reads:

'...obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements.'¹⁴

The European Courts generally set out the test for proportionality in three parts:

- (i) The measure must be appropriately aimed at a legitimate objective;
- (ii) The measure must be necessary, with no less restrictive means of achieving the objective available;
- (iii) The measure must be proportionate or balanced, in that any injury restriction caused should be offset by the benefits gained without the measure being discriminatory.

For the avoidance of doubt, it may be permissible for member states to enact MEEQRs despite entailing restrictions on trade in order to satisfy mandatory requirements relating to, *inter alia*, the protection of public health.

¹¹ *Commission v Denmark*, C-302/86 (20 September 1988)

¹² *The Regulation of Smoky Fuels in Ireland: Assessing Options for Reform* UCC Environmental Law Clinic (2020)

¹³ *The Regulation of Smoky Fuels in Ireland: Assessing Options for Reform* UCC Environmental Law Clinic (2020)

¹⁴ *Cassis de Dijon*

There is no question that a nationwide prohibition on the sale or distribution of smoky fuels would satisfy the mandatory requirement of public health. A nationwide prohibition is the most acceptable policy in terms of adherence to the principles of free movement of goods within the EU.

1.3.2. *Enforcement*

A nationwide prohibition on the sale or distribution of smoky fuels is both more effective in health and environmental terms, and more easily enforceable than the alternatives. The issue of fuel leakage has been considered briefly in Section 2.1, and also arises in the specific context of enforcement.

In its 2012 submission on the Smoky Coal Regulations, the EPA identified that the ban was less effective where the Low Smoke Zone area is small as 'bituminous coal can be easily sourced outside the ban area and used within the ban area'.¹⁵ By way of example, the report pointed to the town of Wexford where 'despite a ban on the sale of bituminous coal in the town, levels of PM10 measured were similar to those found in towns without a coal ban'.¹⁶ The report identified that the coal ban area in Wexford was too small for the size of the town leaving some new housing estates outside the ban area. In addition, 'anecdotal evidence suggests some residents were purchasing bituminous coal, available legally in local shops just outside the current ban area, to use within the coal ban area'.¹⁷ More recently, it has been reported that Letterkenny, Co. Donegal (a Low Smoke Zone since 2013) experienced poor air quality in late 2019, due to the use of bituminous coal.^{18,19}

In addition to the question of fuel leakage, any policy measure short of a nationwide prohibition on sale or distribution, is likely to lead to issues of mis-labelling, smuggling and fraudulent behaviour, which is effectively impossible to enforce under geographic or population-based models. For example,

It was reported in The Irish Times on 10th December 2019 that smoky coal is being labelled as smokeless coal and sold in areas where it is banned.²⁰ The article noted:

¹⁵ EPA, *Review of the Smoky Coal Regulations*, 2012

¹⁶ EPA, *Review of the Smoky Coal Regulations*, 2012

¹⁷ EPA, *Review of the Smoky Coal Regulations*, 2012

¹⁸ Stephen, 'Surveys Show Damage on Letterkenny Air Quality Still Being Caused by Coal Burning' *Donegal Daily* (22 November 2019).

¹⁹ *The Regulation of Smoky Fuels in Ireland: Assessing Options for Reform* UCC Environmental Law Clinic (2020)

²⁰ Jack Horgan-Jones, 'Smoky coal labelled as smokeless to get around ban, says CPL' (The Irish Times, 10 December 2019)

Samples of fuel for sale, labelled as smokeless, in areas covered by the ban were tested by CPL Fuels, which has been pushing for the introduction of a long-delayed nationwide smoky coal ban by the Government.

The six tests, run at different points between January and December of this year [2019], show that sulphur content of the fuels tested ranged from 4 per cent to 5.74 per cent.

Under the Air Pollution Act, the sulphur content of a low-smoke solid fuel has to be less than 2 per cent. The fuel samples were purchased in areas with a smoky coal ban, including Ennis, Letterkenny, Cork city, Tralee and Sligo...

CPL, the company that ran the tests, said 100,000 tonnes of high-sulphur fuel was being smuggled across the border from Northern Ireland, where it is not banned, and sold in the Republic as smokeless coal.'

Irrespective of the regulatory model that is ultimately favoured, it is imperative that the EPA is properly resourced to improve its environmental enforcement performance reporting. The EPA prepares a local authority environmental enforcement performance report annually. The air enforcement performance indicators examine, among other issues, the enforcement of the ban on distribution and use of specified solid fuels. It also assesses the rate of completion of planned local authority inspections. The controls on specified solid fuels are enforced by inspections of solid fuel merchants.²¹

The 2018 report found that:

- The performance assessment for solid fuel inspections has decreased to 'Below Target' in 2018, (from 'Target' in 2016). Although this is above the 2014 baseline of 'Minimum', it is a deeply concerning regression. Inspection numbers have decreased by approximately 200 in 2018, when compared with 2017 and 2016 levels.
- Enforcement of the air indicators examined continues to be inconsistent nationwide, with some local authorities completing all planned inspections and others having a very low percentage completion rate or not undertaking any inspections.²²

There is a fundamental need to extend the current level of PM10 and PM2.5 monitoring to all populated areas in the country, and in the first instance, to all extant and proposed Low Smoke Zones. Active monitoring of approximately 50% of these sites is not considered sufficient to

²¹ *The Regulation of Smoky Fuels in Ireland: Assessing Options for Reform* UCC Environmental Law Clinic (2020)

²² EPA *Air Quality Report 2018*

adequately determine with any confidence whether the country is on track to meet with the 2020 PM2.5 exposure reduction targets as set out by EU Directive 2008/50/EC. Whilst the Government has announced its intention to invest €5m to improve the network of air monitoring stations, over the next five years, the detail of the proposals are not known. Consequently, it is not possible to assess the adequacy of the initiative.

It is clear that the current enforcement regime is hampered by the issues of leakage (in terms of prohibited fuels into Low Smoke Zones); the migration of air pollution; the application and abuse of fuel labelling; and a below target regime of solid fuel inspections by local authorities. These issues are clearly and unambiguously resolved by the implementation of a general nationwide ban on the use of smoky fuels.

1.3.2.1. An All-Island Approach to Enforcement

Effective and comprehensive enforcement of a general restriction on the sale or distribution of smoky fuels in Ireland would be complemented and enhanced by regulatory alignment on the issue with Northern Ireland. The issue of transboundary air pollution is well-established: particulate matter created on one side of the border is likely to impact people in both jurisdictions. In addition, and most crucially, the absence of coherent and complementary regulation on the sale of smoky fuels in Northern Ireland is likely to lead to a position of transboundary purchase and import of fuels prohibited in the Republic of Ireland from Northern Irish vendors. For example, CPL Fuels estimated that 100,000 tonnes of high sulfur coal was imported into the Republic of Ireland and sold as smokeless coal in 2019. This lacuna should clearly be addressed as a matter of urgency.

In 2016, the North South Ministerial Council (NSMC) commissioned a report entitled "Residential Solid Fuel and Air Pollution Study", which examined the impact of solid fuel burning across the island of Ireland. The report found air pollution from solid fuel burning to be a serious issue across both jurisdictions, with increased morbidity and ill health across all regions as a result. In Northern Ireland, air pollution was estimated to have had a mortality burden equivalent to 553 adult deaths, while in the Republic of Ireland, that figure was estimated at 1,143 deaths.

The imperative for co-operation on regulation with Northern Ireland is clear, and successful regulatory alignment would undoubtedly increase the efficacy of regulations in this jurisdiction. However, in the absence of effective co-operation, a general restriction on the sale of smoky fuels for residential use in Ireland should still be pursued. Political difficulties with regulatory alignment with Northern Ireland should not be viewed as a barrier to action in this jurisdiction. A general restriction on the sale of smoky fuels for residential use in Ireland will be highly effective even in the absence of absolute alignment with Northern Irish regulations. In fact, a general restriction on sale of smoky fuels in Ireland is likely to be easier to enforce in the absence of regulatory alignment with Northern Ireland than the existing Low Smoke Zones or a ban on bituminous coal only, as it provides certainty and clarity across the

entire jurisdiction, without lacunae which would otherwise be open to exploitation by fuel smugglers.

2. Supporting the transition away from smoky fuel burning

The implementation of a nationwide prohibition on the sale or distribution of smoky fuels in Ireland will be a drastic change from current practices. In effect, the new regulations will herald the commencement of a new energy regime for Ireland. A sea-change in policy of that type entails broad impacts for the public, for business and for cultural attitudes to home heating in general. In light of the scale of change in question, issues of social justice and equity must be made central throughout the process. This change, which will bring about dramatic improvements in public health and our environment, cannot marginalise or disadvantage sectors of society who have, through circumstances largely beyond their control in many instances, historically relied on solid fuels for home heating.

2.1. Just Transition

A nationwide prohibition on the sale or distribution of smoky fuels will involve critical issues of social justice. Identifying and meaningfully addressing these issues is essential, so that the realisation of an inclusive and fair transition away from smoky fuels is not burdensome on ordinary people. Equally, it is vital that vulnerable and socially marginalised groups do not bear the weight of the necessary policy changes. The concept of just transition recognises that there are socio-economic factors which can determine the extent of people's ability to make decisions regarding fuel choices (including to choose options which are better for human health or are more environmentally sustainable); and involves progressing away from industries and practices which negatively impact the environment towards more sustainable alternatives while supporting the individuals and communities affected by such a transition.

The Just Transition Alliance has explained that, 'a Just Transition aims to secure the future and livelihoods of workers and their communities in the transition to a low-carbon economy.' The implementation of increased measures restricting the sale (and therefore use) of smoky fuels would likely result in vast socio-economic impacts in the Irish context. People with lower economic means and/or those living in rural areas of Ireland are more likely to be dependent on the use of smoky fuels for energy purposes and not to have access to alternative forms of residential heating. Similarly, issues of just transition may be particularly relevant terms of rural employment. With the extraction and use of peat concentrated predominantly in the midlands and in western regions of Ireland increased restrictions on the sale of smoky fuels would have the effect of disproportionately impacting people in these locations. Local workers from smoky fuel industries, and their communities, must be supported during the transition away from smoky fuels to enable people to re-skill and continue to be meaningfully employed. Those who cannot do so must especially be assisted by the authorities.

The International Labour Organisation (ILO)'s 'Guidelines for a Just Transition towards environmentally sustainable economies and societies for all' lists a number of important points in this context. For example:

'In the transition to environmentally sustainable economies and societies, the world of work can benefit from some major opportunities, for example: ... social inclusion through improved access to affordable, environmentally sustainable energy and payments for environmental services, for instance, which are of particular relevance to women and residents in rural areas; ... and faces some major challenges, for example: ... adverse effects on the incomes of poor households from higher energy and commodity prices.'

2.2. Fuel Poverty and Energy Justice

Socio-economic vulnerabilities and the issue of fuel poverty must be given due regard by policy-makers when implementing policies in the energy context. In many instances, fuel choices can be determined by income and means. In fact, the 2016 Report on Solid Fuel Burning, commissioned by the North-South Ministerial Council found that 'almost all of the identified residential pollution hot spots in Ireland are in deprived or very deprived areas. These areas predominantly use coal or peat for heating with little use of oil or gas and thus the potential exists for impacts on air quality to elevate mortality and add to deprivation in these areas.'

Households may already be struggling to provide for their fuel needs and restrictions on the use of smoky fuels may then present further challenges to such households. Indeed, fuel restrictions may force rural households to install new heating systems- such as connecting to gas networks- which may not be an affordable or a practical solution. Switching to environmentally friendly heating solutions such as retrofitting homes or using renewable energy may similarly not be affordable or practical options for many households. Social Justice Ireland has commented regarding retrofitting that:

Energy efficient homes help reduce our carbon footprint as they require less fuel to heat. Despite two Government strategies specifically aimed at tackling energy poverty, barriers persist to accessing grants for low income households. These are the households who are most likely to use solid fuels such as coal and peat; the very households that policy should be targeting. The upfront costs associated with accessing sustainable energy grants can act as a barrier for those on low incomes. Yet with almost 58,500 homes having the lowest BER rating of G, it is imperative that Government support these households by redesigning these schemes to make them more accessible.²³

²³ Social Justice Ireland, *Social Justice Matters: 2020 guide to a fairer Irish Society*, March 2020

Issues relating to fuel poverty and socio-economic factors must therefore be central to the design of the new regulations. Amendments to the Fuel Allowance social welfare payment should be considered, such as a potential widening of the scope of applicants who can apply for this. Consideration should also be given to the potential creation of new grant or support schemes.

The enforcement of a general restriction on the sale or distribution of smoky fuels could present issues in the context of social justice. Any potential enforcement measures which might involve criminalising or implementing taxes for the use of prohibited fuels could present issues of social justice and conflict with the principles of energy justice. Instead, solutions which should be pursued by policy-makers include ensuring that renewable or cleaner energy is affordable and readily available; and providing economic incentives for its use to people with lower incomes. It is for these reasons that An Taisce is advocating for a nationwide restriction on the sale or distribution, rather than use, of smoky fuels. This restriction must be complemented with measures to support those previously employed in the sale or distribution of smoky fuels, in line with principles of just transition.

It must also be noted that any attempt to combat social justice issues such as fuel/energy poverty through the use of fossil fuel subsidies would be flawed because doing so would not fulfil the demands of energy justice or just transition.

3. Conclusion

An Taisce is in favour of the implementation of a general restriction on the sale or distribution of all smoky fuel for residential use in Ireland, as a matter of utmost urgency. This approach is the most beneficial for public health and the environment. A general nationwide prohibition on the sale or distribution of smoky fuels is also the most efficient and optimal regulatory approach – from an EU law perspective, it presents no issues with respect to the freedom of movement of goods across the internal market, nor does it create any conflict with principles of competition law. In addition, it is the most easily and effectively enforced approach, for all of the reasons outlined in these submissions. Crucially, the transition to this new energy regime for Ireland must be supported by robust measures to ensure just transition for workers, and energy justice for disadvantaged and marginalised groups.²⁴

²⁴ This submission was prepared [REDACTED] behalf of An Taisce.

With thanks to Benjamin Harrington, Graham Keeffe & Emer Slattery, authors of *The Regulation of Smoky Fuels in Ireland: Assessing Options for Reform* (2020), which informed this submission.