

EURACOAL Response to European Commission Proposal

on a revision of the Industrial Emissions Directive (COM(2022) 156)

Summary

The past two years have highlighted the vulnerability of our economy, especially to energy supply disruptions. The ambitious European Green Deal and Fit-for-55 package of the European Commission coincide with an energy price shock and supply shortages linked to the global Covid-19 pandemic and Russia's aggressive war against Ukraine. Overcoming these multiple crises will require the mobilisation of all our resources, including by the energy sector which must continue to operate in challenging circumstances. Hence, as a reliable source of energy, coal will continue to be important during the energy transition.

Implementation of the latest BAT Reference Document for Large Combustion Plants (LCP BREF) and the Fit-for-55 package of proposals, in particular the revised EU Emissions Trading System (ETS), is imposing further costs on the coal sector. At the same time, Member States have agreed on coal phase outs, so emissions from coal use will continue to fall in the future. Between 2005 and 2019, air pollutant emissions have declined considerably in the EU: SO_x emissions by 76%, NO_x by 42% and dust (PM_{2.5}) by 29%.¹ The reductions since 1990 have been even more dramatic.

Given this context, it is crucial that no additional burdens are imposed on the coal sector through a revision of the IED. Additional burdens would threaten EU energy security and put at risk the already concluded compromises on a just transition and the related agreements on coal phase outs. Pollution control should not distort the EU single market. The EU ETS already limits greenhouse gas (GHG) emissions in a cost-effective manner and policymakers should take care that pollution control and other initiatives under the European Green Deal receive widespread acceptance among stakeholders, rather than becoming a lightning rod for dissatisfaction within the EU.

The Commission's IED proposal would result in the further de-industrialisation of Europe as it puts a disproportionate burden on European industry and the energy sector. More industrial activities are likely to be relocated to non-EU countries where they may have a greater impact on the environment and climate due to the lower standards found elsewhere and longer transport distances. In particular, the proposal to set emission limit values (ELVs) at the strictest end of BAT-AEL ranges² would burden many plant operators and thus accelerate the loss of industry. According to the proposal, less strict ELVs (*i.e.* values above the strictest end of BAT-AEL ranges) could only be set by way of exceptional derogations. Thus, the strictest end of BAT-AEL ranges would be given an entirely new and overriding importance which was not envisaged when existing BAT reference documents were drafted and BAT conclusions agreed. Such a fundamental change cannot be

¹ <https://www.eea.europa.eu/ims/emissions-of-the-main-air>

² BAT-AEL or BAT-associated emission level means the range of achievable emission levels associated with the application of best available techniques (BAT). These ranges are quantified in BAT conclusions.

supported without a modification of the Seville process and, in addition, an accompanying re-assessment of all BREFs. This is important because the lower ends of BAT-AEL ranges were often verified with data from very few plants, in some cases from only one plant, and for a single pollutant rather than multiple pollutants.

Moreover, the Commission seems to assume that ELVs will be set for individual plants. However, in Germany for example, limits are set in the BImSchV (Federal Emission Control Ordinances issued under the Federal Emission Control Act or BImSchG) and apply equally to all plants to ensure a level-playing-field, at least at the national level. All the current BImSchV limits comply with the applicable BREF documents, but risk being rendered obsolete. If the proposed IED enters into force, plant-specific limits would have to be set at the strictest end of BAT-AEL ranges – requiring impossibly expensive retrofits. Plant-specific exemptions from this rule would need a complex and administratively burdensome procedure which the competent authorities are not resourced to handle – particularly given the vast number of permits needed for the future investments needed to reach climate-neutrality. Such a dramatic change should be subject to a rigorous public consultation that properly considers the consequences for the affected industries.

The Commission proposal introduces many new licensing requirements (*e.g.* environmental performance limits, environmental management systems (EMS), energy audits and transformation plans) all of which must be fulfilled by plant operators and verified by the competent authorities – adding considerable bureaucracy to a confusing mix of environmental, health, safety, risk and chemicals regulation in a directive that ostensibly covers pollution emissions from industrial plants. These requirements jeopardise the legal certainty of the permitting process in a way that is neither acceptable nor practical.

Finally, we note that some amendments proposed by the Commission stem from an apparent lack of confidence in Member State competent authorities. At the same time, NGOs are to be granted new rights to information, participation and *de facto* control by enabling legal actions, including a reversal of the burden-of-proof doctrine. EURACOAL believes strongly that governments, not NGOs, should be responsible for policing.

Against this background, EURACOAL finds the Commission's proposal to revise the IED fundamentally unacceptable and recommends that it be withdrawn at least until the current energy crisis is resolved and the Commission has had time to reconsider major elements of its proposal. The environmental objectives of the IED are being achieved in a way that preserves the single market. The BAT revision or Seville process, while not perfect, ensures that best available techniques for industrial plants are regularly reviewed, deployed and developed. The IED revisions proposed by the Commission are a distraction in the broader picture of industrial transformation.

1. Background

The Industrial Emissions Directive (IED) 2010/75/EU is the main legislative measure to control pollutant emissions from large combustion plants and other industrial installations at the EU level. Under the IED, permits are issued to plant operators in Member States by “competent authorities”, with conditions based on the use of best available techniques (BAT) as detailed in BAT Reference Documents (BREFs). After an evaluation of the IED in 2020 and an inception impact assessment in 2021 followed by public consultations, the European Commission has proposed a revision of the IED in a communication dated 5 April 2022 (COM(2022) 156). With this proposal, the European Commission aims to align the IED with the European Green Deal, in particular with its aims on climate, energy, the circular economy and zero-pollution.

2. Legal basis

The legal basis for the IED is Articles 191 and 192 on the environment of the Treaty on the Functioning of the European Union (TFEU). 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 respects 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 specific local characteristics of industrial activities. An integrated approach means air, water and soil pollution are controlled in balance to protect the environment, without ignoring waste management, energy efficiency and accident prevention. In the current proposal, the Commission would be empowered to bypass the subsidiarity principle by harmonising many detailed aspects of IED implementation across the EU via delegated acts, including Union-wide minimum requirements for emission limit values (**Article 73**). EURACOAL considers this to be an example of Commission overreach that would see a directive morph into a regulation.

3. Subsidiarity and permitting

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 strictest ends of BAT-AEL ranges. This would lead to premature power plant closures in many Member States, in particular of ageing coal plants with limited remaining operating hours as retrofits would not be economically viable, even where these plants are needed to ensure security of supply. 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 implemented at particular installations in Member States. A “stricter regime” would result in a less diverse range of environmental protection measures as operators would feel constrained under a centralised system that gives little scope for innovative process optimisation.

In all of this, it remains unclear how Articles 15(3) and 15(4) would relate to each other. Article 15(3) introduces a new option to set “different emission limit values”, but with no clarity on how this differs from derogations under Article 15(4). It is crucial that the competent authorities retain some **flexibility to grant derogations under 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 as a general rule be allowed any necessary derogations under Article 15(4), alongside derogations granted in other justified cases.**

4. Delegated powers

After the revision comes into force, the Commission proposes to make many more detailed changes by way of implementing acts on a proposed Innovation Centre for Industrial Transformation and Emissions (INCITE), EMS, transformation plans, permit summary formats, a harmonised methodology for **Article 15(4)** derogations, common measurement rules for assessing ELV compliance under **Article 15a**, and a standardised methodology for assessing the disproportionality between the costs of implementing BAT conclusions and the potential environmental benefits. EURACOAL considers the Commission is seeking powers without respecting the principle of subsidiarity whereby Member States should be free to choose how directives are implemented. Moreover, the other EU institutions should continue to have a say in what is enacted into EU environmental law as the details mentioned above will determine exactly how the IED affects EU companies.

5. Integration with EU climate policies

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 with the greatest environmental impacts, *e.g.* SO_x, NO_x and particulates. Over the years, the list of pollutants to be mitigated 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 monitoring and controlling pollutants.³ 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. However, the Commission’s thematic link leads to the erroneous assumption that the IED should in some way be used to limit CO₂ emissions.

Industry will 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 ETS which should remain the principle means at the EU level of reducing CO₂ emissions**

³ “Commission proposes to review all permits of large combustion plants in order to tackle pollution”, European Commission – Daily News, Brussels, 31 July 2017.

in a predictable, cost-effective way to meet politically agreed targets via a market-based mechanism. The proposed transformation plans (**Article 27d**) are an unnecessary distraction on the road to climate neutrality. The same holds true for obligatory AEPLs under Article 15(3a), *e.g.* on energy efficiency.

6. Public access to information, participation in decision making & action under law

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 limited to what is necessary to assess impacts, so that the public directly affected can be involved in decision-making. For example, during permitting procedures, companies often have to disclose confidential business information to the competent authorities. If made public, this information could harm EU competitiveness and lead to unnecessary economic damage for EU companies.

The proposed additions and amendments to **Article 24** would result in the public being more involved with all stages of permitting, including updating and renewal. This would – contrary to all efforts – lengthen permitting procedures and it is not clear whether this is a correct interpretation of what is required under the Aarhus Convention. The Commission should reconsider how transparency and data protection can both be assured.

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 first-hand experience (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, and EURACOAL itself participated in the decision-making procedures. The proposed **Article 25(1)** would remove even this requirement.

7. Disclosure of confidential information

According to the proposed **Article 13**, plant operators would be obliged to share confidential business information or commercially sensitive information with not only the Commission and competent authorities, but also with NGOs. In addition, **Article 5(4)** would require the full texts of permits to be published (as well as summaries) while **Article 14a** and **Article 27d** would require the publication of EMS and transformation plans for thousands of individual plants.

The IED offers no clarity on which NGOs could receive information, only that they should meet requirements under national law or practice and promote the protection of the environment. The Aarhus Regulation (EC) No. 1367/2006 is concerned with environmental information and lays down certain requirements for an NGO to have entitlements, including that it has existed for more than two years. These requirements are much too weak and would allow a largely unknown and unverified person or entity to establish themselves in a Member State with the sole purpose of spying on EU industry. This would be an unacceptable abuse of regulatory powers and leave the EU open to intellectual property theft by entities funded by non-EU actors.

It would be wrong to oblige EU industrial companies to publish forward-looking transformation plans in order to contribute to the emergence of a sustainable, clean, circular and climate-neutral economy by 2050. Such plans would be anathema to a market-based economy and non-EU companies would surely welcome such information on the long-term strategic direction of their EU competitors using a reporting format to be determined by the European Commission sometime before 30 June 2028.

8. Comments on specific articles

Article 1: Health impacts

The IED is a piece of environmental legislation enacted at EU level because pollution can have cross-border impacts. The proposal of the Commission would see the IED become a piece of health legislation whereby citizens and NGOs could seek compensation from industry for damage to human health (**Article 79a**). Given the transboundary and long-range impacts of certain pollutants, as well as the multiple sources of pollution, many of which are not covered by the IED, it is difficult to determine causality when health damage emerges and impossible to determine the precise impact of any particular pollution source or even of a particular country. The Commission's proposal to allow collective actions to be brought by NGOs would open the floodgates to many legal actions. The courts would become clogged with actions designed to frustrate industrial sectors, such as coal mining and coal-fired power generation, that certain NGOs consider to be undesirable. The frankly bizarre legal notion that it would be for plant operators to prove that a violation did not cause or contribute to health damage is **a very worrying reversal of the basic burden-of-proof legal principle that a person is "innocent until proven guilty"**.

In its Inception Impact Assessment (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." So, in its proposed revision of the IED, the Commission reports a cost-benefit factor of 13 (€2.8 billion benefits v. €210 million costs). Earlier, the Commission published an impact assessment that promised benefits of €7-28 billion per year in the case of LCPs.⁴ 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.⁵ 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.

⁴ 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.

⁵ "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.

Article 9: Energy efficiency and GHG emissions

The IED recognises that greenhouse gas (GHG) emissions are well regulated under the EU Emissions Trading System (ETS) Directive. For the energy sector, CO₂ emissions and energy efficiency are closely related and **Article 9(2)** of the IED allows Member States to decide whether or not to impose energy efficiency requirements under the IED. The Commission proposal would remove this flexibility. EURACOAL believes it would blur the purpose of the IED if permitting were to become an extension of EU climate policy to control GHG emissions that are already controlled in a cost-effective way under the EU ETS.

Article 14a: Environmental management systems

The introduction of mandatory environmental management systems (EMS) would be an unwelcome additional burden on industrial plant operators who respect the EMAS Regulation (EC) No. 1221/2009 and typically operate according to the ISO 14001 environmental management standard. The Commission should reconsider why it is trying to duplicate an international standard that has existed since 1996.

Article 15(3): Maintaining the principle of flexibility

The Commission proposal seeks to end the important principle of flexibility that is built into the IED: emission limit ranges allow a certain degree of flexibility when issuing pollution control permits to reflect the performance variations between plants. This avoids the one-size-fits-all problem of fixed limits. Competent authorities should “set the strictest possible emission limit values that are consistent with the lowest emissions achievable by applying BAT in the installation, and that ensure that, under normal operating conditions, emissions do not exceed the emission levels associated with the best available techniques (BAT-AELs) as laid down in the decisions on BAT conclusions referred to in **Article 15(3)**.” This proposal to give overriding importance to the strictest end of ELV ranges would reverse the principle of flexible ranges that the BREF process was designed around. It would thus constitute a complete reversal of one of the fundamental principles of the IED. Also, it would require several Member States to reverse their policy of nationwide ranges or general binding rules based on BAT – as allowed under **Article 17** – and oblige them to switch to a plant-specific regime. Such a reversal would create uneven playing fields at the national level and add significantly to plant operators’ costs. *In extremis*, as the lower ends of BAT-AEL ranges for Hg and NO_x are not technically and economically achievable for most coal power plants, these plants would have to close – at a time when they are urgently needed to guarantee security of supply. The many operators seeking exemptions would have to prove the non-feasibility of meeting the strictest limits in assessments which would overburden both plant operators and the competent authorities. Given the recent adoption of a revised LCP BREF and its implementation since 18 August 2021, it is also questionable when the proposed stricter BAT-AEL principle would enter into force, and how it would affect recently issued permits.

Article 15(3a): Environmental performance limit values

Environmental performance limit values and environmental performance levels associated with best available techniques (BAT-AEPLs) would be new additions to the IED under **Article 15(3a)**. The definition and setting of environmental performance limit values and their relationship to BAT-AEPLs is unclear, but they are not pollutant emission related and certainly go beyond the regulatory intent and content of the current IED. For example, benchmarks or environmental

performance limit values on “consumption levels, resource efficiency and reuse levels, levels of covering materials, levels of water and energy resources, waste levels [and] other levels obtained under specified reference conditions” should not become binding as this could lead to the closure of industrial plants that are important to the EU economy, but deemed less energy-efficient than the most-modern plants.

Article 15(4) derogations

The Commission proposes derogations under **Article 15(4)** – which allow competent authorities in specific cases to set less strict emission limit values – should be reviewed every 4 years. This would mean not only more bureaucracy for operators and the competent authorities, but also less secure operating permits and hence a less secure energy system.

Article 18: Environmental quality standards

The Commission proposes in **Article 18** that the competent authorities should set stricter ELVs where this is required to achieve environmental quality standards (EQS). Such standards are based on guidance provided by the World Health Organization and can change. So, permitting would become a dynamic exercise, subject to change under **Article 21(5c)**. Moreover, the Commission offers no guidance on how competent authorities would decide which plants are responsible for any air quality standard exceedances, or even whether any plants are responsible given that air pollution comes from many other sources such as transport, and not just from plants falling under the IED.

Article 27a: Innovation Centre for Industrial Transformation and Emissions (INCITE)

It is unclear whether the proposed INCITE is to be a unit of the existing European Integrated Pollution Prevention and Control Bureau (EIPPCB) in Seville or an entirely new organisation. Either way, there appears to be no justification for setting up a new bureaucratic process to mirror what is already carried out by the EIPPCB. Responsibilities would become less clear and, most importantly, INCITE could become **a parallel regulatory process** to the BAT revision process, including under **Article 27c** BAT-AELs for emerging technologies. This would create confusion and legal uncertainty for Member States who would be obliged to consider both when granting permits. Plant operators could find themselves facing additional requirements as determined by INCITE that go beyond BAT. Finally, despite its title, it is unlikely that INCITE would stimulate the development of new technologies as it could only report on developments taking place elsewhere. INCITE would not add value and should not be established.

Article 79: Penalties

There is no justification for imposing penalties based on turnover. Competition law applies such penalties for good reason – to prevent the abuse of market power and price gouging – but such a formulation has no place in environmental law where margins are generally determined in a competitive marketplace and are often low.

Article 82: Transitional provisions

There are no transitional provisions for dealing with BREFs that have come into force or are in the process of being revised. In addition, transitional provisions should be defined for existing units.

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