

Flexibilities in the National Emission Ceilings (NEC) Directive: undermining effective law making

Flexibilities in the National Emission Ceilings (NEC) Directive will result in:

- **higher emissions in the target years;**
- **delay in reducing pollution;**
- **more avoidable deaths and environmental impacts;**
- **more unnecessary administration and bureaucracy; and**
- **an unenforceable Directive.**

1. General comments

While some degree of flexibility is necessary in a Directive which sets objectives over a very long time scale, too much flexibility will seriously undermine the effectiveness of the Directive and render it practically unenforceable. In the case of air pollution and the NEC Directive, it should be remembered that:

- The limits proposed by the European Commission and European Parliament are far from what is sufficient to reach air quality levels recommended by health experts. When adopted, these limits must be strictly enforced as a bare minimum, with additional action needed at national level to achieve the air quality levels recommended by the World Health Organisation (WHO).¹
- Flexibility around national emission reduction commitments (ERCs) and target years is likely to result in increased air pollution and associated health impacts, regardless of the level of ERCs.
- There is already a high degree of flexibility in the enforcement of EU Directives. The European Commission has full discretion over whether to launch infringement actions and can suspend or

¹ Country-by-country information about premature deaths, environmental impacts, and costs and benefits resulting from the emission reduction commitments proposed by the European Commission are available on the EEB interactive Air-O-Meter: www.eeb.org/air-o-meter



terminate proceedings at any point in the long procedure leading to the referral to the European Court of Justice.²

- Flexibilities, which are usually based on complex rules and methodologies, are confusing to the public, media, local authorities and business, thereby undermining both the effectiveness and the legitimacy of the new policy.
- While there are various conditions that must be satisfied for the use of some of the proposed flexibilities, these are open to abuse by Member States and depend on the willingness and capacity of the Commission to enforce them. As we saw with the conditions for time extensions under the Ambient Air Quality Directive, such conditions are not always applied consistently.³ Introducing flexibilities would therefore risk undermining the enforceability and therefore the effectiveness of the whole Directive.
- Flexibilities are inconsistent with the stated goals of the Commission's Better Regulation agenda, which aims to ensure that EU legislation provides certainty and predictability and is as effective and simple as possible while ensuring that EU Policy goals are achieved.⁴

2. Flexibilities proposed by the Commission

The Commission proposal already contains three flexibilities:

2.1. Relative rather than absolute reduction commitments

The change from absolute emission ceilings (in the 2001 NEC Directive) to percentage reduction commitments based on 2005 emissions entails some weakening because it increases uncertainty about the extent to which the targeted environmental objectives will actually be achieved.

2.2. Adjustment of emissions inventories

The proposal enables Member States, under certain conditions, to adjust their emissions inventories in cases where improved emission inventory methods would lead to non-compliance with a reduction commitment. This flexibility is likely to result in higher absolute emissions compared to what is expected at the time the Directive is adopted.

² For more information on the Commission infringement procedure see the Clean Air Handbook, at page 37: <http://documents.clientearth.org/wp-content/uploads/library/2015-11-30-clean-air-handbook-version-two-ce-en.pdf>

³ See for example Case T-396/09 in which a Dutch NGO tried to challenge the Commission's decision to grant a time extension to the Netherlands because it alleged that the conditions laid down in the Directive had not been satisfied. The Commission refused to even reconsider its decision, on the grounds that the request was legally inadmissible. It remains impossible for NGOs or citizens to challenge these types of Commission decisions.

⁴ See Commission communication "Better regulation for better results - an EU agenda": http://ec.europa.eu/smart-regulation/better_regulation/documents/com_2015_215_en.pdf



2.3. The “disproportionate costs” exemption for 2025 ERCs

The Commission proposes that, in 2025, Member States should be on a linear trajectory towards the achievement of their 2030 ERCs. However, this obligation does not apply to the extent that the necessary measures would entail “disproportionate costs”. However, no definition of “disproportionate costs” is provided. In particular, it is not clear which benefits the costs would have to be compared against in order to be deemed “disproportionate” in this context. Further, there are no additional conditions that Member States must satisfy, or any procedure for scrutiny and approval by the Commission, as there are for the formal flexibilities under Article 5.

In the absence of any clear definition of “disproportionate costs” or any procedural safeguards, Member States could ignore their 2025 commitments entirely if they think that the cost of any additional measures is disproportionate. A clear and binding obligation for 2025 would be much more effective in ensuring timely emission reductions, providing clarity to the public and certainty to business.

3. Additional flexibilities proposed by the Council

The Council accepts all the Commission’s flexibilities and proposes five more:⁵

3.1 2025 non-linear ERCs

The Council proposes to introduce further flexibility around the 2025 indicative ERC. Firstly, Member States would be under no obligation to achieve a linear trajectory by 2025; this would merely be an “indicative level”. Member States may set themselves a non-linear trajectory if this is economically or technically more efficient. Without any definition, the term “economically or technically more efficient” is practically meaningless. This amendment therefore essentially allows Member States to set their own ERC for 2025. Secondly, the Member States are not even under a clear obligation to achieve this self-determined target, as their obligation is only to “endeavour” to limit their emissions by 2025 rather than the Commission’s wording of “take all appropriate measures (not entailing disproportionate cost)”. In the event that they breach their self-determined target, they need only explain the reasons for this to the Commission.

Taken together, these further flexibilities render the Commission’s already very weak obligations for 2025 almost worthless.

Past experience, particularly from the implementation of the Ambient Air Quality Directive, has shown that Member States will choose to defer taking action and make emission reductions later. This will lead to further health and environmental impacts, delayed compliance with ambient air quality objectives and thousands more early deaths.

⁵ These flexibilities can be found under articles 4 and 5 and annex IV of the Council’s general approach adopted on 16 December 2015: <http://data.consilium.europa.eu/doc/document/ST-15401-2015-INIT/en/pdf>



3.2. Three year average

The Council proposes to allow Member States to calculate their emissions based on a three-year average in the event of a particularly cold winter or dry summer or unforeseen variations in economic activities. This raises several concerns:

- Dry summers and cold winters exacerbate air quality problems as they are dominated by high pressure weather systems and low wind speeds, which prevent dispersion. It is therefore important that Member States minimise pollution during these periods by using low or zero emissions techniques to meet increased demand for heating and air conditioning. A three-year average would allow Member States to pollute more at the very time it is most important that they reduce pollution. Member States need to anticipate such weather conditions and include specific measures in their national programmes to deal with them.
- Without any clear definition, “particularly” dry summers and cold winters and “unforeseen variations in economic activities” are too general and this exemption is very likely to be abused by some Member States. Economic activities are inherently variable and unpredictable.
- Calculation of three-year averages would delay by at least a year the time that the Commission could determine whether a breach had occurred, further delaying the prospect of effective enforcement.

3.3. Five year time extension

The Council proposes a new flexibility that would excuse breaches of an ERC for a maximum of five years where the Member State cannot comply after having implemented all cost-effective measures. This flexibility is subject to the condition that in the period of deemed compliance, the Member State makes equivalent emission reductions of another pollutant. This flexibility only applies to those ERCs that are set at a more stringent level than the cost-effective reduction identified in TSAP 16.

Whether measures are cost-effective has been a point of disagreement between Member States and the Commission throughout the course of negotiations. Without an agreed common basis for determining whether measures are cost-effective, Member States will inevitably claim that they have taken all cost-effective measures. The Commission will have to take this information on trust. These ERCs will therefore be practically unenforceable.

The requirement that Member States make equivalent reductions to other pollutants does not adequately mitigate the resulting negative impacts on human health and the environment. Different pollutants have different characteristics and different health and environmental effects. For example, emitting an extra ton of primary PM_{2.5} will be much more harmful to human health than emitting a tonne of any other air pollutant.

This proposed flexibility is similar to the time extension procedure introduced by the Ambient Air Quality Directive in 2008, which allowed Member States up to five additional years to achieve limit



values where certain conditions were met.⁶ The Commission eventually rejected around 50% of time extensions, but the process allowed Member States to avoid infringement for several years: the Commission did not start infringement action against any Member States for breaching nitrogen dioxide limits until mid-2015, by which time they had been in breach of their legally binding obligations for five years after the original 2010 deadline. It will likely be 2019 before these cases receive judgment from the Court. As the ClientEarth case in the UK demonstrated, this provision also prevented enforcement by national courts for nearly five years.⁷

3.4. Exceptional events related to the energy sector

The Council proposes a flexibility that would excuse breaches of an ERC where it was caused by unforeseeable events leading to a sudden interruption of the power or heat supply. EU law deals with exceptional and unforeseeable events using the concept of “force majeure”. Many EU Directives contain force majeure provisions to absolve Member States of their obligations, but only in a very limited range of extreme circumstances, such as war, terrorism and natural disasters. It is important to limit force majeure clauses to those types of events, which are genuinely unforeseeable and beyond the control of Member States, in order to ensure a level playing field, consistency with other related EU policies and to avoid abuse by Member States.

3.5. Adjustment of emission factors for 2025 and 2030

The Council proposes to extend the flexibility to adjust emission factors used for determining emissions from specific sources to also apply for the years 2025 and 2030.⁸

This flexibility would essentially allow greater emissions in cases where emission factors turn out to be greater than expected, as was recently found to be the case with emissions of oxides of nitrogen (NOx) from diesel cars. Following the recent Volkswagen scandal and concerns over governments’ ability to protect citizens’ health, Member States should be under the obligation to take immediate action to compensate for possible unforeseen emissions from one sector. This flexibility proposes to do just the opposite – to absolve government of responsibility in cases of unforeseen pollution from one particular sector. This is likely to result in increased emissions and associated health and environmental impacts, as well as possible discrepancies between sectors in efforts towards reducing air pollution.

⁶ Directive 2008/50/EC article 22.

⁷ For a full explanation of the ClientEarth case and its significance, please see the following briefing: <http://documents.clientearth.org/wp-content/uploads/library/2015-09-17-the-uk-supreme-court-ruling-in-the-clientearth-case-consequences-and-next-steps-ce-en.pdf>

⁸ Council General Approach, annex IV: the Council deletes the following sentence: “As from 2025, emission factors significantly different than expected from the implementation of a given norm or standard shall not be considered for the adjustment”.



4. Conclusion

The Commission included three flexibilities in the original proposal, to which the Council has added five more. Together, these flexibilities will delay action to tackle air pollution while making the Directive a complex, incomprehensible and unenforceable instrument. The flexibilities are drafted in such a way that compliance with the ERCs is likely to become the exception rather than the rule, rendering the Directive ineffective in ensuring the targeted air pollution reductions by 2025 and 2030.

In addition to adding new flexibilities, the Council position significantly weakens the actual level of ambition of ERCs by changing the percentages in Annex II. ERCs have been weakened for the large majority of Member States and for all pollutants, with some drastically lowered ambition for PM_{2.5} and ammonia – by as much as ten percentage points in some cases.

This combination of lower and more flexible targets is the worst outcome for human health and the environment.

It is currently difficult to assess the effects of such weakening of the Directive because the Council has not provided an impact assessment for their general approach. However, estimates by the Commission show that it is likely to result in around 16,000 additional annual premature deaths in 2030, compared with the Commission's original proposal and the European Parliament's position.⁹ The cumulative death toll for the 10-year period 2021-2030 will be far higher.¹⁰

We therefore call upon the three institutions to minimise the use of flexibilities in the Directive.

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⁹ In his speech at the Environment Council's debate on 16 December 2015, EU Environment Commissioner Vella estimated that every percentage change from the 52% health improvement target proposed by the Commission would result in around 4,000 additional premature deaths in the year 2030. The four percentage cut proposed by the Council is therefore estimated to cause around 16,000 additional premature deaths in the year 2030.

¹⁰ This is a rough estimation of the effects of the Council's new annex II ERCs, but does not take into account the effects of all the above-mentioned flexibilities added by the Council. The latter are likely to increase this overall death toll significantly, leading to additional health costs and damage to the environment.