25TH MEETING OF THE INFORMAL TECHNICAL WORKING GROUP ON BENCHMARKS FOR THE ETS

Subgroup of Working Group 3 under the Climate Change Committee

Brussels
28 June 2011, 10:00 – 17:00

REPORT

1. Adoption of agenda and minutes

The Commission welcomed the participants. A Member State ("MS" henceforth) proposed to expand the draft agenda with an item dedicated to the potential exclusion of small installations under article 27 of the Directive. The Commission agreed. Another MS commented that the draft minutes of the 17 March 2011 meeting included a conclusion – when it related to the treatment of potentially excluded installations in case of cross-boundary heat flows – that was not in line what had been said at the meeting itself. The Commission took note of the issue raised and said that it would be checked, and that other MS still have until 8 July 2011 to comment, without which the draft minutes would be approved.

2. Draft Guidance Document 7 on New entrants and closures (GD 7)

The consultant gave an extensive presentation on the latest changes in GD 7, after which the Commission opened the floor for comments.

With reference to the allocation formula mentioned in section 3.2. (allocation of allowances for the phase before the start of normal operation of greenfield plants) a MS comments that the carbon leakage exposure factor is missing. The Commission commented that it will be included in one of the next versions.

With reference to the 2nd example mentioned in section 6.1, a MS asked if "C" included in the "HCUF" term did stand for "capacity". The consultant confirmed.

A MS referred to its written comments, and raised the four most important points: (i) request to explore a pragmatic solution for the possible negative effects of the application of the partial cessation rule where an installation shifts its production within the 3rd trading period from one benchmarked product to another without a physical change, (ii) concern about the legal basis for the 2 options mentioned to determine the initial capacity for greenfield new entrants, (iii) request for clarification on the legal basis for the procedure to be applied in case of physical changes leading to both partial cessation of operations and significant reduction of capacity, (iv) the need to have more detailed guidance on the procedures to be followed and the timing/deadlines for both Commission and Member States when handling applications for new entrants and closures. Also a participant

wondered whether a MS would have to notify again an application for a new entrant if the Commission had rejected a former application. Also another participant asked that the procedures would be made more specific in the guidance documents in order to ensure a harmonised approach.

Concerning point (i), the Commission reaffirmed its invitation to present concrete examples from the past where the described situation has indeed occurred, as the Commission needs to be persuaded the issue is not only a theoretical one. Concerning the deadline for the Commission to assess new entrant applications, the Commission underlined that the Directive does not provide any deadline for the assessment of the NIMs nor new entrant applications. Any self-commitment to a certain deadline would imply for particularly complex cases adding complexity to an already complex procedure as the NIM would then have to be rejected if the deadline comes to an end and not all issues could be sorted out. The Commission furthermore, announced that it obviously also supported a harmonised approach, but that further details on its own assessment and deadlines of the NIM or new entrant applications will not be provided for in the guidance documents, but might be given at a later stage. With respect to points (ii) and (iii), the Commission would further look into the comments.

Concerning significant capacity extensions, a MS noted that the case in which a installation exceeded the threshold expressed as an increase of more than 50 000 allowances seemed not to be addressed in the guidance document. The consultant replied that it was already explained in the guidance document. The Commission declared that it would also look into this issue; but that, in principle, the procedure was correctly presented in the GD 7.

The MS also mentioned it supported another delegation on the issue of the product switches within installations and the related application of the partial cessation rule.

Another participant announced it was preparing written comments to be sent by the end of the week. Already now, it could state preliminary that it supported another delegation's position concerning the mentioned specific issue with regards to the partial cessation rule. With respect to the procedure to be applied in case of physical changes leading to both partial cessation of operations and significant reduction of capacity, it would support a subsequent application of both rules in order to be practicable. Also another participant considered that, with reference to the capacity reduction rules, it should be clear that operators need to submit detailed information in order for specific capacity reductions not to be regarded as such. The participant also asked for a consistent interpretation of the determination of the months. And it also asked for some further clarification, especially in case of installations operating only occasionally/seasonally, on the way the 90 days period for determining the start of normal operations and the initial capacity should be calculated.

The Commission again requested more concrete and representative examples concerning the issue of partial cessation related to the shift of production of different products. According to the Commission the issue is also a direct consequence of setting different product benchmarks for the products concerned. At the time, the sector itself, however, had strongly argued in favour of this

differentiation. The Commission also took note of the other comments and mentioned it looks forward receiving the more specific comments.

A MS raised the point that during the adoption process of the harmonised allocation rules decision, the management of the New Entrants Reserve had been postponed. It found that now the issue was, however, not well elaborated in the relevant guidance paper. With reference to the start of normal operations, more details and examples would be needed with respect to sector-specific production cycles. Furthermore, the participant stated that the period for the determination of the initial installed capacity for greenfields should be considered within six months, as three months could not be enough. The MS also supported other delegations on the issue of partial cessation related to the shift of production of different products as this problem had already occurred in the MS.

Another delegation further asked to check again the definition of initial installed capacity at page16. Also enquired again about the legal basis for excluding on pages 9 and 17 the experimental verification for determining capacity for new entrants in the Guidance. A MS, supported by another one, also enquired about the possibility to introduce a rationalisation rule through the Guidance documents.

The Commission explained that, when determining the initial installed capacity, the legal text in its Article 17(4), refers to the methodology set out in Art. 7.3 and thus to the hierarchy expressed in that article. Such wording cannot be understood as a reference to the period 2005-2008 as this period has obviously elapsed when the assessment of capacities for new entrants is made. With regard to the rationalisation rule, the Commission referred to the discussions with MS on the inclusion of such a rule in the CIMs. It reiterated its position that such rule would not be in line with the EU ETS Directive. Moreover, as the CIMs do not provide for a legal basis for such a rule, it would, in any case, not be possible to introduce it at this stage as basically it would amend the CIMs through the Guidance Documents.

A delegation supported the request from another MS with regard to the rationalisation rule. It also asked to assess the issue of partial cessation related to the shift to production of different products. The Commission stated that the second point would be discussed further, but that the first point was already conclusively discussed with MS in the Climate Change Committee (CCC) when the CIMs legal text was voted.

Another participant declared having sent some comments and asked about paragraph 2.2 concerning the definition of start of normal operation of an installation as the definition proposed by the guidance appeared not correct as it assumes that all sub-installations of the installation are operational. The Commission stated that it would consider the comments in the next revision of the guidance.

A participant supported other delegations on the partial cessation issue. It also mentioned it had sent written comments and a proposed methodology to solve the potential overlap between partial cessation and significant capacity decrease involving a physical change.

Another participant referred to the wording on page 36 determining the first year in which the partial cessation rule can have effect on the allowances. The consultant answered an example would be provided.

A MS asked the Commission to provide more examples with regard to the determination of the start of normal operations of a new installation, illustrating different kinds of situations, e.g. where several sub-installations of the installation start at different times. The Commission took note and would consider this for the next version of the Guidance.

Another participant asked about the next steps towards endorsement of GD 7. The Commission replied that more discussion would be appropriate before submitting the Guidance to the CCC. Moreover, it also encouraged Member States to send written comments to the Commission at their earliest convenience in order to assess whether an endorsement of the Guidance by the Climate Change Committee in September could be envisaged.

3. AoB raised by a MS on small emitters and exclusion under article 27.

A MS declared that the level of 'maximum' emissions included in the non paper on the interpretation of Art. 27 of the ETS Directive on top of which a financial charge should be introduced, would be in most cases equal to the amount of free allowances if the installation would still be subject to ETS and that the proposed approach would therefore not make it attractive for the operators to apply for an exclusion from the EU ETS. The MS asked the Commission to introduce more flexibility. The Commission replied that the non paper sets out the main criteria against which a measure will be assessed and that the example given is only one measure that the Commission would deem as equivalent. This would not exclude that other measures could also be deemed equivalent, provided that these fulfil the criteria set out in the non paper.

Another MS enquired about the legal justification for considering the carbon leakage exposure status of the installation when proposing an equivalent measure. The Commission explained that otherwise the exclusion of small emitters could give rise to distortions of competition and undermine the provisions of the Directive related to the issue of carbon leakage.

A participant stressed the need to introduce some flexibility in the system to avoid putting a burden on small emitters which are responsible for only a few percent of EU ETS emissions but according to research undertaken in a MS, face relatively higher costs than the bigger emitters in the system. The Commission reiterated that according to recital 11 of the ETS Directive, Art. 27 should alleviate administrative costs for small emitters, but not other costs.

Another participant asked if the Commission could accept a request for excluding installations under Art. 27 looking like the opt-out request by another MS in 2004. The Commission said the assessment of an "opt-out" request in 2004 can not exactly be compared with the assessment of an "exclusion" request in 2011, but and stated that – if proposed – it would require the same analysis as mentioned in the non-paper.

A delegation asked whether the Commission assessed the potential overlap with the revision of Energy taxation Directive. The Commission will monitor this aspect. However, the relevant proposal has not yet been adopted and could still change.

Another delegation came back on their previous point on the carbon leakage exposure factor. Art. 27 does not mention the necessity to assess potential distortions of competition, unlike Art. 24 where it is explicitly mentioned. The Commission replied that this is one of the basic principles of EU ETS Directive and the Union itself.

A participant asked whether the Commission was planning to change the non paper in the light of the discussion. The Commission answered in the negative, but indicated openness with regard to equivalent measures provided that the principles and criteria set in the non paper are respected.

4. NIM templates

The Commission presented the timing foreseen for discussing the NIM-list template and NIM methodology report template, after which the consultant gave a presentation on both subjects.

A MS wanted to know which information within the NIM-list template is legally binding and which is not. The Commission replied that this relates to both implementation of Article 15, par. 2 and Article 7, par. 9 of the CIMs.

Another MS pointed out that the NIM-list template looked very detailed and that it would lead to confidentiality issues when all the mentioned information would become public. The MS, supported by other delegations underlined that the Commission should address this issue.

A participant underlined the importance of harmonisation and the need for a complete data assessment by the Commission.

Another participant also asked about the legal basis for the requested data as it recognised the possibility for submitting more detailed data under Art.7.9 but it wondered whether the NIM-list as it was presented was supposed to be a public document or a document to answer requests under 7.9.

A delegation declared to agree on the need for harmonisation but it asked to avoid submitting unnecessary data as it would only increase the burden on the Competent Authority and delay the process. It also wondered about the real necessity for statistics requested within the NIM-methodology report template.

Another MS echoed other delegations in asking for the legal basis of the data requested in the templates and asked about the possibility for having an own template.

A participant showed flexibility given that the consultant promised to deliver a tool that would automatically generate the NIM-list template, putting no additional burden on the competent authorities.

The consultant explained that the shown template represents a draft containing the complete set of data that could be used for assessing the need and it has been provided like this in order to enable the Member States to comment as it is always easier to simplify than adding further details later on.

Concerning the confidentiality issue, the Commission declared to be aware and that it was preparing for providing solutions via, for example, encryption tools. Concerning the comments on the level of detail, the Commission echoed the consultant in underling the importance for having the broadest picture possible at this stage in order to gather the comments. Moreover it stressed on the fact that the availability of the complete set of data would save time both on the side of the Commission and that of the Competent authorities, also highlighting the fact that there will be an automatic tool to fill in the table. The Commission also underlined its right to request whatever data is needed to ensure a harmonised implementation of the rules.

5. Data collection in the Member States

A MS gave a presentation on "Lessons learned from [national] data collection". The Commission asked if the MS knew already the amount of free allowances that would be distributed for free. The participant stated that in mid-summer the public consultation would be started. Another participant asked how many verifiers were involved and their time normally spent on a verification. The MS declared to have around 9 verification agencies but that it had no data for the man days spent.

The Commission asked whether also all data needed for the calculation of free allowances were requested from small installations. The participant confirmed as this is also needed for calculation of cross-sectoral correction factor, and also specified that only the 'status' of small emitters was requested but that it did not represent in itself an application for exclusion. Another MS asked about the quality check of the methodology reports and if all the verification statements received were positive. The participant answered that the methodology report was included in the data collection template itself and that the verification was carried out on both elements at the same time. No specific information was immediately available on the number of positive statements.

6. Progress on the NIMs implementation process

A MS declared that the legislation was adopted and would be published in the following days. Workshops with operators and verifiers had been done, and a further discussion/workshop with verifiers was scheduled. All verified baseline data reports should be submitted by operators by 29 July 2011. A workable solution for small emitters was not found and for this reason there will most probably not be any request.

A delegation declared that 18 August 2011 is the deadline for operators to submit verified data collection templates. After receipt, UBA has some weeks to check the data, and also the operators will be further involved during a 4-6 weeks consultation phase. Several meetings were already held

with operators and associations. It mentioned that the implementation of the cross boundary heat flows rule was a challenge. Concerning the legal framework, it declared that it most likely would not be finalised before summer break, and therefore also the 30 September 2011 deadline to submit the NIM-list would most likely not be met. On the possible exclusion of small emitters, it mentioned there was interest from a specific sector, but it was not clear yet whether it really would be implemented.

Another MS declared it had organised a workshop with operators on 6th April 2011, launched the data collection on 20 April 2011, and fixed the deadline for verified data collection templates on the 30th June 2011. Some operators and verifiers asked for more time. Issues that were challenging had been the splitting up of heat benchmark sub-installations into CL and non-CL, and allocation for 'by-products'. A 3 weeks lasting public consultation would be held end of August, which let the MS conclude it might make the 30 September 2011 deadline for the NIM-list. Small emitters showed no interest for the application under art. 27.

A participant declared that data collection was launched after another MS's version was available. The underlying legislation was signed as of today. Deadline for operators was set on 15 July 2011, but this would be applied in a flexible way. It declared the biggest challenges were discussions about the system boundaries of product benchmarks, heat and fuel exchangeability and process emissions sub-installations. Verification would not end before mid July 2011. Consultation would be organised with operators on a bilateral basis to check whether errors occurred in the calculations. Notification of the NIM-list was foreseen for end 2011. Concerning small emitters, after the issuance of the non paper from the Commission, it realised its initial proposal would not be accepted, and discussion on it decreased.

A MS launched data collection when the version of another MS became available, and fixed the deadline on 1 July 2011. One third was already received, and deadline would probably be extended. At this moment, they were checking whether all documents in the submitted templates were inserted. Challenges were the treatment of heat for office buildings. Concerning the potential exclusion of small installations, it was said that operators were not really interested.

A participant declared that there was no additional law needed for the data collection, which was launched when the MS's version became available. Deadline for operators is fixed at the end of July 2011. The delegation said they had translated all Guidance documents and had published also Q&As. With reference to small installations, it declared no decision had been taken on the equivalent measure yet and that it would decide on it end of August 2011.

Another delegation declared it had organised 3 stakeholder meetings, both with operators and verifiers. It had and is struggling a bit with the legislation, which is expected to be adopted end of June 2011. Deadline for operators to submit the data collection template was originally 31 July 2011, but was postponed to 31 August 2011 because of the lack of verifiers. The biggest challenge was the treatment shale oil. On Article 27, it announced that no final decision was taken.

A MS declared that due to the political situation, the amendments needed to provide the legal basis for the data collection, would not be in place before August 2011. However, data collection already started, and deadline for operators was foreseen to be 1 August 2011, but this will be postponed to 1 September 2011.Operators asked several questions related to the template, and verifiers seemed to be "uninformed". Any operator of small installations showed interest in the exclusion from the scheme.

Another MS declared it had organised a workshop with operators in May 2011. Deadline for operators to submit verified baseline data templates is set at 31 July 2011. No decision on Article 27 was taken already.

A MS declared it will start data collection early next week. Workshops with operators were already organised, a workshop with verifiers was scheduled. A translation of guidance documents had been done and completed. Deadline for operators to submit data will probably be mid-September 2011. It still considered the possibility for excluding small installations according to Art. 27.

A participant stated that data collection had started on 18 May 2011 (the day after the decision was published in the OJ), deadline for operators to submit the verified data was set to 18 July 2011. A dedicated email address was created for questions from the operators. Translations of the methodology report and GD 3 had been provided to operators. With reference to Article 27, the delegation stated that the legislation was already in place and that the regional authorities were the competent authority.

Another MS declared not to have in place the legal basis yet but that the data collection started and the foreseen deadline was set on 15 September 2011. As after that date, still checks will need to be performed, the notification of the NIM-list was foreseen not to happen before the end of 2011. A lot of meetings with operators had been organised, most questions were related to the heat and process emissions sub-installations, and how to fill in the template. There would not be an exclusion of small installations.

A MS started the data collection on 27 May 2011, deadline for operators was set at 1 July 2011, but this might be extended to end of July 2011, if operators can show delay was due to lack of verifiers. A public consultation would be organised in November 2011. It pointed out that it had difficulties explaining operators of industrial CHPs that they would not get free allowances for the electricity production part. It also declared with regard to small installations the delegation also declared, that the draft equivalent measures elaborated at national level were not consistent with the criteria set by the Commission in the non paper. The notification of the NIM-list was expected by end 2011.

Another MS sent out the data collection template to operators end of May 2011, and put the deadline to submit verified data end of August 2011. It had organised a lot of workshops, and translated the GD 1-4 and 6 to the official language. Until now, it had received one application. Public consultation would be organised in October 2011, and notification of NIM-list was expected to be done by the end of the year. Article 27 related to small installations would not be applied.

A delegation declared to have delays transposing the revised ETS Directive: it has been adopted by the Parliament, but now it also has to go through the Council leading to additional consultation. It hoped to finalise this transposition in the summer break. In parallel, an amendment of the current data collection ordinance was being prepared but also faces some delays, through which adoption is not expected before September 2011. As the data collection can then only start, the MS did not expect to finalise the data collection before the end of 2011. Concerning the small installations, it declared to have foreseen equivalent measures in the legislation but that it was not clear whether operators would want to apply. The Commission asked the MS to try to accelerate the process.

A representative declared to have started the data collection in May 2011, with a deadline for operators set at 1 September 2011, even if there were plans to extend this deadline. Some complaints from verifiers had been received with reference to the quality of the submitted methodology reports. The delegation also mentioned the MS had 160 installations meeting the definition of small installations, and confirmed the intention to only evaluate further a possible exclusion for approximately 80 installations in the horticulture sector.

Another participant mentioned the absence of a legal basis certainly until September 2011 due to the difficult political situation, but that it had taken a pragmatic approach and already started data collection. Deadline for the submission was initially 30 June 2011, but this was extended to 15 July 2011 to take into account the lack of verifiers. Six installations did submit the templates as of today. Several workshops were already held in May 2011. GD 3 was translated in the official language. On Art 27, no law would be made until September 2011, so it is still unclear whether it would be implemented.

The Commission thanked for this clear overview, and also reiterated that it will have to wait for a decision on the last NIM-list in order to be able to calculate the cross-sectoral correction factor.

7. Further supporting documents

The consultant gave a presentation on the way to use the “NIMs Integrity Tool”. No comments by MS were raised.

The consultant gave a presentation on the “Q&A" that would be published on the EC website. A MS asked for the possibility to publish a draft by the following week and the possibility to include other suggestions coming from MS. The consultant agreed. Another participant asked for having a bit of time to provide for comments before the publication of the Q&As. The Commission also agreed.

The Commission gave a presentation on “Complementary instructions”. No comments by MS were raised.

The Commission gave a presentation on the “Corrigendum" of GD 2, and mentioned it would be available online very soon. No comments by MS were raised.

8. Any other business

A delegation asked some explanations about the process of the NIMs assessment (e.g. what happens if the EC would reject a NIM, etc.) and the process of the small installations submission. The Commission answered it might come back to this in a subsequent meeting.

The following meeting of was scheduled for 10 August 2011. After that meeting, the subsequent one was scheduled for 15 September 2011.