

**26TH MEETING OF THE INFORMAL TECHNICAL WORKING GROUP ON
BENCHMARKS FOR THE ETS**

Subgroup of Working Group 3 under the Climate Change Committee

Brussels

10 August 2011, 10:00 – 17:00

REPORT

1. Adoption of agenda and minutes

The Commission welcomed the participants, adopted the agenda and informed that the adopted minutes from the 21st (17 March 2011) and 22nd (4 April 2011) TWG meetings were sent out on the 27 July 2011, and that the draft minutes from the 23rd (13 April 2011) and the 24th (17 May 2011) TWG meetings would be sent shortly.

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 Draft Guidance Document 7 (GD 7) on New entrants and closures

The Commission gave a presentation on the main changes included in vs 15, and on some of the issues raised in the written comments recently received from Member States ("MS" henceforth).

A MS wondered whether the calculation of the initial capacity for greenfields should be determined during the same 90-day period as would be used to evaluate the start of normal operations, and whether this could result in both cases in a period of more than 90 calendar days in case of sector-specific non-continuous production cycles. The Commission confirmed, and drew the attention to the GD examples. The participant also referred to the Joint Proposal of two MS on partial cessation in case of product switch within an installation without physical change and considered the proposal to be in the spirit of Art. 23 of the CIMs since an operator would not receive more allowances than those they had been allocated before the product switch. The Commission pointed out that it had not received convincing quantitative and qualitative evidence with production figures and reiterated its request for concrete examples from Member States to facilitate the analysis.

Another delegation supported the MS on the partial cessation issue, and mentioned as example a product switch from sintered dolime to dolime. It also explained that historical product switches could be addressed by the current rules, but future occurrences risked leaving installations without allowances. The MS also mentioned that the partial cessation rule leads to an unequal treatment because product switches between products of sub-installations with product benchmark might be affected by the partial cessation rule whereas product switches between products allocated based on sub-installation with fall-back allocation would not be affected by the partial cessation rule. It however agreed that the proposal of the two MS could possibly result in an unequal treatment in case installations switch from product to heat benchmark sub-installation. The Commission pointed out that comments in the opposite sense were also received, so it would reflect further on the issue.

The Commission recalled also that the principle of non-discrimination always applied to similar situations that should not be treated differently or different situations that should not be treated alike and that there are differences between installations with product benchmarks and installations with heat benchmarks switching products.

The participant also asked whether a switch from a product at risk of carbon leakage to a product at no such risk could result in the application of the partial cessation of operations rule, as basically an existing CL product benchmark sub-installation ceases operations, and a new non-CL product benchmark sub-installation is starting its operation without further physical change. The Commission clarified that Art. 23 did not refer to the carbon leakage status of a product, but to activity levels. The Commission concluded it could consider reflecting upon a clarification that partial cessation would not apply to cases with change of carbon leakage status.

A delegation mentioned that in principle the partial cessation rule would also be triggered if an ETS heat consumer would change its heat supply in such a way that its heat no longer comes from an ETS but from a non-ETS installation. The Commission provisionally confirmed, but underlined the need for reflection, cautiousness and careful analysis.

Another MS appreciated the Commission's position on requiring historical evidence that the concerns were genuine, but underlined that the Joint proposal of two MS was oriented more towards future cases than towards past ones, and that the concerns were very real to industry sectors. It also pointed out that this issue could disproportionately affect small installations, for instance in the glass and ceramic sectors, which are characterised by more frequent product switches and market-led demand.

A delegation expressed its concern about partial cessation, preliminary supporting the proposal of two MS and further discussion on it in order to achieve a common solution.

Another MS in principle expressed sympathy for the proposal because in their view the current rules limited the possibility for operators to switch completely to another benchmarked product since then they would not receive free allowances. Doubts were expressed if the Guidance Documents, or rather the CIMs, were the right legal instrument to address this issue. In their view, in the examples mentioned, a weighted average of decrease and increase of production was needed for sound analysis and urged the Commission to show flexibility, while avoiding 'quick fixes'.

The Commission underlined that for instance in the glass sector, when discussing the feasibility of different product benchmarks, the industry associations, supported by MS, expressed clear preference for different product benchmarks, e.g. for coloured and for colourless glass. While having identified several product benchmarks might have had some advantages for the sector, it was always clear that this could also entail undesired consequences, of which the discussion on the partial cessation rule might be one of them. . The Commission also explained that partial cessation rules applied only in case of product switches without any physical change, while usually there was a physical change of some kind. The Commission therefore encouraged caution and careful analysis of the operators' data.

A MS enquired about the status of an installation which was not covered by the ETS but due to a capacity increase reached the relevant threshold and needed to be included in the ETS. The Commission clarified that it should be treated as a "new entrant" and the rules mentioned in the GD on 'greenfields' would apply.

Another participant welcomed most changes in the GD and raised some other points. It gave the example of the syngas and hydrogen sector, with growing production consolidation (one producer - several consumers), and enquired how such cases should be treated. The Commission took note of the example, and underlined that according to the CIMs physical changes are a prerequisite for significant capacity changes. In cases of continuous subsequent increase of production capacity, more than one application as new entrant could be introduced according to the CIMs. Another delegation then asked whether new pipelines would be considered as physical changes. The same point was also raised by a MS in the context of the first example quoted in section 4.1 of the GD, in particular if the building of an extra pipeline constituted a physical change. In the same line, another MS enquired about a case when a unit was producing unused excess heat and if the building of a pipeline to distribute it to consumers could be considered as a physical change. The Commission explained that distribution was not included within the system boundaries, and therefore a new pipeline could not be a physical change. It also explained that the physical change in the example was the construction of a recovery unit enabling the use of the excess heat. According to the CIMs, the change had to occur within the sub-installation system boundaries as defined in Annex 1 and considering in general new pipelines delivering heat to consumers as a physical change would not be in line with the legal definitions.

A MS also asked for explicit clarification in the GD why experimental verification could not be used for capacity determination. The Commission referred to footnote 13 of the GD.

The participant enquired if the formula on page 9, section 3.2 (in respect of allocation in respect of the period prior to the start of normal operations) referred also to heat and if it was consistent with GD 6 on cross-boundary heat flows. The Commission took note of the issue and stated that it would look into it.

The MS requested also more precise wording in the section of the partial cessation rule, if an installation increases again its activity levels. The Commission took note of the question and stated that it would evaluate whether further clarification is needed.

Also, the participant asked when the forthcoming support documents for dealing with new entrant applications would be discussed and finalised. The Commission confirmed that such documents were envisaged but are not its priority at the moment. If MS would already want to "open" the possibility to receive new entrants' applications for the 3rd trading period, they would be entitled to regardless of the supporting documents' status.

The Commission concluded that it would evaluate the comments received, aiming to incorporate them in an amended version of the GD to be sent before the next TWG meeting.

3. NIM templates

The Commission gave an extensive presentation on the "NIMs templates", and opened the floor for comments.

A representative of a MS, supported by three other MS, suggested a two-step approach for the NIMs submission, where Member States first notify all data required under Art.15 of the CIMs and secondly on a risk-prone basis submit at the request from EC data from specific installations (for instance those producing specific products, or using heat benchmark), arguing that notifying a larger number of data would cause delays. A MS commented that even notifying very specific data might be insufficient for in-depth analysis since some important data are included in the methodology and verification reports, which for an in-depth analysis therefore should also be submitted. The Commission took note of the remarks, and confirmed its intention to certainly thoroughly examine the data for a sample of installations selected on risk-prone basis. It also underlined that with the semi-automatic IT tool proposed, the creation of detailed NIMs out of the individual data collection templates from the operators would be very easy, very quick and would also considerably save time if the same information would have to be provided to the Commission for a selection of individual installations. Also the detailed NIM table could be a very good basis for MS to do consistency checks.

Another MS expressed its appreciation for the semi-automatic tool to generate the detailed NIM table and enquired if MS would also receive tools to allow the Competent Authorities to check potentially questionable allowance calculations. Two MS supported this request. The MS, echoed later by another delegation, expressed concerns about business confidentiality which would worry operators if detailed NIM tables would have to be provided. The Commission took note of the comments and the issue would be further discussed, while ensuring Member States that business confidentialities would be kept to utmost standards. The Commission welcomed the idea of sharing some consistency check IT tools with MS but expressed concerns about timing, since the tools would only become available to the Commission at the earliest in October, while MS would need them earlier.

The consultant also clarified that MS can already now - with the already provided Integrity Checking Tool - check whether operators did change some settings of the data collection template. A participant confirmed that the tool already provided works very well.

A MS asked which data would be public and which confidential, since the NIMs list was listed as 'public', but on the other hand Art.15(2)(c) requires production data, which are sensitive and should remain confidential. Another delegation supported the MS and expressed the view that even allowance data from sub-installations could be confidential, since indirectly production volumes could be calculated. The Commission took note of the comments and explained that not all information submitted under Art.15(2) would be public, and would reflect on considering some elements of the NIMs list, such as capacities, to be made confidential. It explained that according to Art.11 of the ETS Directive, Member States are legally obliged to publish a list of installations and

allowances allocated, while Art.15 CIMs does not address publication at all. The nature of the data could be discussed. Providing data in accordance with Art.15 CIMs did not necessarily mean that all information would be public. Furthermore, the information which could be deducted from product benchmark sub-installations does not seem to be as sensitive since it would only lead to knowledge of median values in preceding years.

Another MS asked if the way installations are listed in the NIMs would be harmonised, since currently most installations are listed by name of the company, but some Member States use codes. The Commission replied that it will further evaluate, but confirmed that certainly installation IDs will have to be notified, as in any case these can be linked to installations/operators via the CITL. For transparency reasons, it might be asked to also provide both "installation" and "operator" names.

A participant supported another one on confidentiality and another delegation on the two-step approach and specified it could have three stages: NIMs list, a list according to Art.15(2) and more in-depth checks if necessary. Also, it reminded that it had sent comments concerning the Methodology Report and considered some of the questions burdensome and requiring intensive research. The Commission took note and would look closely into the comments made and re-evaluate whether some data now foreseen could be deleted in the next version of the methodology report template.

The Commission warned against the risk of Member States providing too little information and thus slowing down and hampering the assessment process. The Commission underlined the usefulness of semi-automatic tools, especially for those MS using the data collection template provided. If using other templates, MS could request external consultants to design a tool to construct the detailed NIMs table, which should be not too difficult for IT experts.

4. NIM assessment process

The Commission gave a presentation on 'NIMs assessment process'.

A MS enquired on the procedure if a NIM list would be rejected. The Commission underlined that it aimed at a constructive assessment, not focussing on the rejection of the NIMs. However, if inevitable, the entire list would be rejected and then need to be re-submitted. In case of diverging interpretations of the CIM, operators could appeal the Member State's allocation decision.

A participant, echoed by another one, asked if it is possible to reject only one installation. The Commission replied that the CIMs were addressed to a MS and referred to Art.11 of the ETS Directive, allowing the Commission also to refuse the inscription of an installation in the NIMs list. The Commission underlined that it was checking the list as such, and not individual allocation decisions which were the remit of MS, which are also responsible of the final calculation of allowance allocation.

The representative also enquired if decisions not rejecting the list under the condition to correct some aspects of the NIM would be possible. The Commission stated that it was currently analysing the legal issues related to such an approach.

Another MS enquired if there would be a separate decision for potential opt-outs of small installations subject to equivalent measures. The Commission confirmed.

A participant made a comparison with the wording of the decisions for the NAPs in Phase I and II, and urged the Commission to show flexibility. The Commission reiterated its intention to look for constructive solutions, but also referring to the differences of the current situation compared to the NAPs.

Another MS enquired if there was a possibility for an installation to receive 0 allowances. The Commission highlighted that there were various possibilities for MS to adjust the NIMs list and that the aim was to ensure harmonisation across the EU and not to analyse individual applications.

The MS also enquired how many resubmissions were allowed. The Commission indicated there was no formal limit, but pointed to practical limits. The participant also enquired how resubmissions would affect the cross-sectoral correction factor. The Commission explained it could only be calculated once there was final decision for all Member States. National legal proceedings would, however, not have suspensive effect.

A MS enquired if it was legally acceptable that some installations do not apply for free allocation. The Commission replied that it would be, as long as there was a deadline for installations to apply for free allocation.

The Commission took note of the comments made by Member States, stating that it would revisit the topic in a few months when more concrete cases will be available.

5. Progress on NIMs implementation process – see table in Annex 1

6. Further supporting material and opportunity for additional support for MS

The consultant gave a presentation on the 'Integrity checking tool'. The Commission explained the updates made to the Q&A document and to Guidance Document No. 9.

The consultant gave a presentation on 'Options for further technical support to Member States'. A participant enquired if such technical support could be extended to equivalent measures design. Another participant stated they would need further support, especially concerning new sectors and expressed regret for the late opportunity for verifiers' workshops.

7. Any other business

The Commission informed Member States that some court cases concerning the CIMs have been filed during the last weeks.

A participant posed a question concerning the NACE code applied to oil and gas extraction.

The Commission expressed the intention to aim for endorsement of the current version of Guidance Paper No.7 on the upcoming CCC meeting in the afternoon of 14 September 2011. If deemed necessary, a time slot for discussion will be foreseen also within the WG 3 meeting preceding the CCC.

The next meeting of the TWG is scheduled for 15 September 2011.

Annex 1: Progress on NIMs implementation process

Member State	Legislation	Small emitters	Deadline for data collection	Time for NIM preparation	Public consultation	Estimated NIM notification date
Austria	Law did not pass parliamentary scrutiny, possible delays. Draft law for small emitters by 30 Sept.	Discussing, draft commitment by operators, unknown number interested.	Week of 15-19 Aug, some delays due to verification problems. All data expected 1 st half Sept.			Probably Oct.-Nov.
Belgium	Wallonia: law approved 7 July Flanders: legislation not finished	Wallonia: discussion ongoing Flanders: probably not to be used	Wallonia: finalised 12 Aug, except 1 installation Flanders: 15 July, complex installations not submitted yet	Wallonia: data assessment ongoing Flanders: data assessment ongoing, many complex cases	Wallonia: 1 month from end Aug	Flanders: hopefully end 2011
Bulgaria		Considering not implementing the provision	15 Aug, 60% of operators cannot meet it, many questions			In best case 30 Oct
Croatia	Permitting ongoing		Collecting first verified emissions for 2010			Negotiating ETS inclusion date
Denmark		No exclusion	All applications received, except 10 installations	Cross-checking data, discussion with verifiers after holidays		Expect to meet deadline
Finland	Legal basis entry into force 1 May, law on data collection end May	No exclusion	End Aug.		Scrutiny in case of disagreement	End 2011, depending on data quality
France		Sent a proposal	50% of data received			End Dec - beg Jan 2012
Germany	Finalised basic law, entry into force end July, National Ordinance to be approved by Cabinet, into force 15 Sept.		3 months for data collection	3 months	Foreseen after submission of NIMs	Probably end March 2012
Ireland		No requests	All data is submitted		Foreseen after submission of	Working to meet deadline

					NIMs	
Latvia	Approved 1 August	No decision yet	15 Aug, significant part of operators submitted all templates	Submissions to be approved by regional environmental boards by 01 Sept.	For 2 weeks after approval by regional boards.	Emergency elections in Sept, probably not on time
Netherlands		Maybe for horticulture sector	1 Sept, need for flexibility due to lack of verifiers	3 months for checking	6 weeks	March 2012
Norway		No exclusion	15 Sept			End of year
Poland		250+ small installations, but not sure if will make equivalent measures	Deadline postponed from 1 July to 8 Aug, not all submitted due to lack of verifiers	Processing data, Draft NIMs to be ready before end Aug		Trying to meet deadline
Portugal	Not published yet, publication date cannot be foreseen	Considering not implementing the provision	95% of data from ETS operators received, the 5% that did not deliver yet correspond to installations which are now non-ETS	Assessment started, using the Integrity Checking Tool		Trying to meet the 30 Sept, but it will be difficult to accomplish due to the lack of law and resources
Slovakia	New law adopted 1 March, new verification permits in May		Data submissions started June, expected to end mid-end Aug			Cannot confirm final date due to staff shortage
Slovenia		Exploring equivalent measures	7 Aug, most documents received			Maybe on time
Spain			Data submitted to regions until 18 July, some delays probable	Receiving and analysing submissions	1 months after assessing submissions	End 2011
Sweden	Adopted end July	No exclusion	15 Sep	6 weeks assessment	3 weeks	Before end 2011
United Kingdom		Finalising proposal	Finalised, discussing data provided with some operators		10 weeks starting end Aug	

The Commission reminded of the formal deadline and strongly urged those MS that announced late notification dates to do their best to submit the NIMs as soon as possible and to encourage operators for timely and full submissions. The Commission noted that there were mixed messages concerning the deadline for NIMs submission, but fortunately no significant problems were encountered in later stages of the process.