

Guidance paper to identify electricity generators

This paper appears necessary to contribute to a harmonised implementation of the revised EU ETS Directive¹ and has to be seen in the context of the publication of the estimated amount of allowances to be auctioned pursuant to Article 10(1) of the revised EU ETS Directive, which asks for publication by 31 December 2010. It is based on a template that allows the identification of electricity generators pursuant to the definition of an electricity generator laid down in Article 3(u) of the revised EU ETS Directive. This template will be handed over to Member States with a view to facilitating the identification of electricity generators and to ensuring a common input format to the work the Commission will have to do in the framework of Article 10(1). The flow chart in the annex of this paper details out the different steps embedded in the template, according to which the paper is arranged.

Pursuant to Article 10(1) of the revised EU ETS Directive, “the Commission shall determine and publish the estimated amount of allowances to be auctioned”. To this end, the Commission has to take into account relevant provisions of Article 10a, in particular paragraphs (3) to (5). Especially Article 10a(3) requires a sound understanding of the definition of electricity generator, in order to define the contribution of incumbent installations to the maximum annual amount available for free allocation, as required by Article 10a(5) letter a.

Therefore, the paper aims at providing guidance to Member States on how to identify electricity generators. Proper and harmonised identification of electricity generators is considered key in determining the estimated amount of allowances to be auctioned.

It is worth stressing that the implementation of this guidance paper has no direct impact on the individual allocation decisions. Irrespective of this guidance paper and the fact that an installation might qualify as electricity generator, it is not excluded that such an installation might receive free allocation on the basis of Article 10a(4). More details will be made available in the framework of the Community-wide rules for free allocation.

Implementation of the definition of electricity generator

The definition of “electricity generator” is laid down in Article 3(u) and reads:

'Electricity generator' means an installation that, on or after 1 January 2005, has produced electricity for sale to third parties, and in which no activity listed in Annex I is carried out other than the "combustion of fuels".

The definition contains four criteria, the understanding of which will be explained in the paragraphs below (see points 1 to 12). An installation must comply with each of these criteria, in order to qualify as electricity generator. Non-compliance with only one criterion would be sufficient not to consider an installation an electricity generator. The reference date, at which these criteria should apply, should be 31 March 2010², in order

¹ Directive 2009/29/EC, OJ L140 of 5.6.2009, p 63

² New entrants and opt-ins after 31 March 2010 would need to be dealt with in a different procedure.

to arrive at the most up-to-date data set. In addition, the paper contains procedural suggestions for Member States, in order to identify electricity generators.

Pursuant to the above definition, the four criteria to qualify as electricity generator are:

- (1) An electricity generator has to be an installation (see also Article 3e of the revised EU ETS Directive).
- (2) An electricity generator has to produce electricity.
- (3) An electricity generator has produced or produces electricity for sale at any time from 1 January 2005.
- (4) An electricity generator must not carry out any activity listed in Annex I other than the "combustion of fuels".

The paper is arranged according to the steps indicated in the flowchart (see Annex to this paper).

Step 1 (implementing criterion 1): Installation

1. An electricity generator has to qualify as an installation³. Pursuant to Article 20(1) of Directive 2003/87/EC in combination with the relevant provisions of Commission Regulation 2216/2004, as amended by Commission Regulation 916/2007 and Commission Regulation 994/2008, all installations covered by the EU ETS have been assigned operator holding accounts in the CITL. Therefore, the CITL does not only represent a complete overview of all installations in the EU ETS, but also provides legal certainty that the operator holding accounts in the CITL represent installations in the sense of the (revised) EU ETS Directive. As a consequence, Member States should assess all installations with an operator holding account in the CITL with a view to deciding on whether they qualify as electricity generator or not. For this purpose, a database extract from the CITL will be made available to all Member States.

Step 2 (implementing criterion 2): Production of electricity

2. In order to qualify as an electricity generator under criterion 2, the installation concerned must perform the activity « combustion of fuels » with a view to generating electrical energy, i.e. electricity. Combustion of fuels with a view to generating exclusively heat or mechanical energy does not comply with criterion 2.
3. However, installations generating electricity in combination with producing heat, mechanical or any other kind of energy would comply with criterion 2.
4. Waste gases used to generate electricity are considered to represent fuels in the sense of the first activity (combustion of fuels) listed in Annex I of the Directive.

³ For the definition of an installation in the sense of the revised EU ETS Directive, see Article 3e of this Directive.

Step 3 (implementing criterion 4): No other Annex I activity than “combustion of fuels”

5. In order to qualify as electricity generator, combustion of fuels in the sense of the revised EU ETS Directive⁴ must be the only activity covered by Annex I of the revised EU ETS Directive. In that regard, the interpretation of clause 4 of Annex I to the Directive is important⁵. If an installation generates electricity for another activity which is covered by Annex I and which is carried out by the same installation that generates the electricity in question, the installation concerned cannot be considered an electricity generator. This may apply to many industrial CHP or electricity generating plants, if both activities (combustion of fuels and another Annex I activity) are carried out by a single installation. Note that these installations would not qualify as electricity generator, no matter how much of the electricity generated they use for the execution of another Annex I activity and how much they sell. A specific issue arises from the thresholds of Annex I activities other than combustion of fuels (see points 8 and 9).
6. Installations generating both electricity and heat (CHP), but not carrying out any other Annex I activity would only perform combustion of fuel. Like installations only generating electricity, they do not carry out another Annex I activity than “combustion of fuels” and would also comply with criterion 4 of the definition of electricity generator. Subject to compliance with the other criteria, they would qualify as electricity generator.
7. Special attention should be drawn to the fact that operators of new sectors and gases to be included in the EU ETS as from 2013 might figure among installations with the (current) main activity code 1 in the CITL. With an extended scope of the ETS, as applied from 2013 onwards, some of the activities of these installations would be covered by an activity in the Annex I of the revised EU ETS Directive that is not "combustion of fuels" and therefore these installations should be considered not to comply with criterion 4 (*no* other activity than combustion of fuels, as indeed they carry out another activity). For example, aluminium producing installations may currently appear in the CITL with main activity code 1, since, on the basis of the current legal framework, the reason for their inclusion in the ETS is combustion of fuels. As from 2013, production of aluminium is listed as a separate Annex I activity. This means that those installations, on the assumption that they carry out both combustion of fuels and production of aluminium, would not comply with criterion 4 and thus not qualify as electricity generators.

Step 4 (implementing criterion 4): Annex I activities below the thresholds laid down in Annex I of the revised EU ETS Directive

⁴ Annex I of the revised EU ETS Directive restricts "combustion of fuels" to "combustion of fuels in installations with a total rated thermal input exceeding 20 MW (except in installations for the incineration of hazardous or municipal waste). Article 3 point t of the revised Directive lays down that "combustion" means any oxidation of fuels, regardless of the way in which the heat, electrical or mechanical energy produced by this process is used, and any other directly associated activities, including waste gas scrubbing.

⁵ For details, see the Commission's guidance on the scope of the EU ETS from 2013 onwards.

8. Installations only exceeding the threshold of combustion of fuels, which produce electricity and, possibly, heat, and which would not exceed the threshold defined for other Annex I activities must be considered to comply with criterion 4. Note that, although they may carry out another Annex I activity, they would only be included because of the "combustion of fuels" activity. For this reason, they should be considered to comply with criterion 4, since "combustion of fuels", in terms of the revised EU ETS Directive, is the only activity that matters. It is submitted that the fact that they carry out another activity, according to which on a stand-alone basis they would not be covered by the EU ETS, cannot be taken into account, as such activity cannot be considered to represent an Annex I activity in the sense of Article 3(u). In such a case, confirmed compliance with the sale criterion (see point 10 and 11) in the sense that no sales of electricity took place may become important for a final decision whether or not the installations concerned would qualify as electricity generators.

Step 5 (implementing criterion 4): Industrial activities not covered by Annex I of the revised EU ETS Directive

9. Installations generating electricity for their own consumption, and for the execution of another industrial activity not covered by Annex 1 would also qualify as electricity generator under criterion 4. In such a case, confirmed compliance with the sale criterion (see point 10 and 11) in the sense that no sales of electricity took place may become important for a final decision whether or not the installations concerned would qualify as electricity generators.

Step 6 (implementing criterion 3): Sale of electricity

10. All installations generating electricity at any time from 1 January 2005 would meet criterion 3 including those generating electricity for own use. In the latter case, too, sales cannot be excluded, if electricity generating installations wish to optimize their operation. The definition of the Directive does not contain any threshold for sales, which means that any sales of electricity are covered⁶. For this reason all installations generating electricity would meet the second (production) and third (sale) criterion of the definition. If an electricity generating installation considers it does not comply with this criterion, it should provide relevant evidence to its competent authorities. The evidence should extend over the whole time period in question, i.e. 2005 – 2010⁷.
11. In practice, however, the latter requirement would very often not need to be met, since an installation generating electricity not for sale to third parties, but only for own use, is very likely to carry out another activity, for which the electricity generated is used. As long as this other activity figures among the activities of Annex I, the installation would not qualify as electricity generator anyway (see

⁶ The question, whether the electricity in question is generated with a view to selling it (intention), does not matter on the grounds explained in point 10.

⁷ Where data for 2005 and/or 2006 is not available, in particular because installations were not subject to the relevant monitoring, reporting and verification provisions established under Directive 2003/87/EC, relevant data may only be provided for the period, where it is available.

criterion 4). However, if the alternative activity (other than combustion of fuels) is not listed in Annex I (e.g. food industry), the requirement to prove non-compliance with the sale criterion becomes obvious. In order to avoid too onerous and complex investigations for the competent authorities of Member States, a Member State has to assume that no sales took place, if the total electricity consumption of the installation concerned exceeded its total electricity generation on a yearly basis. The relevant period to be assessed should cover full years during the operational time of the EU ETS, i.e. from 1 January 2005 until 31 December 2009⁸.

12. It is, however, important to note that this approach would only apply to installations which may qualify as electricity generator due to the fact that the non-combustion of fuel activity that they perform, too, is not covered by Annex I (see point 8 and 9).

Some (not exhaustive) Examples of Electricity Generators

- A. Electricity utilities supplying electricity to customers under a contract or a similar agreement are supposed to qualify as electricity generators⁹.
- B. CHP installations for supply of electricity and heat to customers under a contract or a similar agreement are supposed to qualify as electricity generators (see also footnote 3).
- C. Installations carrying out combustion of fuels and another industrial activity not listed in Annex I, subject to point 5 above are supposed to qualify as electricity generators.

These examples are only for illustrative reasons and do not prejudice the outcome of a detailed assessment to be carried out by the competent authorities of Member States.

Procedure for the identification of electricity generators

⁸ Where data for 2005 and/or 2006 is not available, in particular because installations were not subject to the relevant monitoring, reporting and verification provisions established under Directive 2003/87/EC, relevant data may only be provided for the period, where it is available.

⁹ This would also go for so-called "outsourced" installations, which are usually installations generating electricity and heat (CHP) or only electricity for sale to dedicated customers. They only perform combustion of fuels, but no other Annex I activity. "Outsourced" installations reflect the fact that they (mainly) sell electricity and/or heat to specific customers and are adapted to the needs of specific customers in terms of capacity, location (no transmission fees) etc. Companies which do not consider generating electricity as part of their core business, "outsource" this activity with a view to saving costs and/or gaining efficiency, not least through the possibility to focus on their core business only. Obviously, outsourcing always involves contractual relations (contractual relations involve at least two legal subjects, as one cannot conclude a contract with oneself). In the sense of the revised EU ETS Directive, these installations comply with the criteria of the revised EU ETS Directive defining an electricity generator and for this reason, qualify as electricity generator. It is important to note that ownership does not matter in this respect nor does the corporative relations. If such an entity is considered to represent an installation in the sense of the Directive, all criteria would apply to it.

- a) All criteria listed above must apply to an installation in order to qualify as electricity generator. For instance, if criterion 4 (no other Annex I activity) does not apply in the sense that the installation concerned performs another Annex I activity, it would not matter whether the installation concerned sells electricity and how much it sells. In such a case, criterion 3 becomes irrelevant.
- b) Member States should indicate the registry code, the name, the installation identity and the permit identity of the installation concerned.
- c) Member States should check, whether the installation concerned carries out the activity “combustion of fuels”. Please note that this information should also be available from the GHG permit, which, pursuant to Article 6(2) letter (b) shall contain a description of the activities of the installation concerned. If the installation carries out the activity "combustion of fuels", the following steps should be carried out:
 - i. If the installation concerned generates electricity only, Member States would need to find out, whether another activity figuring in Annex I (in addition to the activity “combustion of fuels”) is carried out by the same installation. If this is the case, the installation would not qualify as electricity generator. If no other Annex I activity than “combustion of fuels” is performed, the installation would qualify as electricity generator.

The considerations set out above have to be taken into account.

- ii. If the installation concerned generates heat only, no further assessment would need to be carried out, if the installation concerned confirms to the competent authorities that it has not produced *and* sold any electricity at any time from 1 January 2005. In this case, the installation is not considered to constitute an electricity generator in the sense of the revised EU ETS Directive. If the installation is not able to submit this confirmation, Member States would need to find out, whether another activity figuring in Annex I (in addition to the activity “combustion of fuels”) is carried out by the same installation. If this is the case, the installation would not qualify as electricity generator, otherwise it would.

The considerations set out above have to be taken into account.

- iii. If the installation concerned generates both electricity and heat, Member States would need to find out, whether another activity figuring in Annex I (in addition to the activity “combustion of fuels”) is carried out by the same installation. If this is the case, the installation would not qualify as electricity generator. If no other Annex I activity than “combustion of fuels” is performed, the installation would qualify as electricity generator.

The considerations set out above have to be taken into account.

Member States should notify the list of electricity generators to the Commission before 30 June 2010.

Annex: Flowchart on steps to identify electricity generators in the sense of Article 3(u) of the revised EU ETS Directive (Directive 2003/87/EC as amended by Directive 2009/29/EC)

