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## IFIEC Comments on European Commission's "Guidance paper to identify electricity generators" (20.10.2009)

### Introduction

"Electricity generator" is a crucial term for the understanding and the adequate implementation of the amended EU-ETS Directive for the 3<sup>rd</sup> trading period. The newly included definition of an "electricity generator" (Article 3(u)) gives a comprehensive set of criteria which have to apply to be considered an "electricity generator" in the sense of the Directive.

The Commission's Guidance paper is meant to gather the necessary data from Member States to *"determine and publish the estimated amount of allowances to be auctioned"* pursuant to Article 10(1). Article 10a(5) is key here, since it gives the rules for calculating the allowance volume to be deducted (volume dedicated to "electricity generators") from the total cap in order to arrive at the volume left for free allocation under Article 10a. The remaining volume is referred to as the *"maximum annual amount of allowances that is the basis for calculating allocations to installations which are not covered by paragraph 3 and are not new entrants"*.

This wording of the Directive makes very clear that this Article is not only key for the calculation but has direct impact on the allocations to all installations which are not considered "electricity generators" (referred to in paragraph 3).

Therefore, the statement in the Guidance paper *"It is worth stressing that the implementation of this guidance paper has no direct impact on the individual allocation decisions"* has to be put into perspective. Based on recital 19 and Article 10a(1) and 10a(3) full auctioning applies to the power sector, defined as electricity generators. Free allocation according to the complex rules of Article 10a is consequently the allocation basis for the rest, i.e. the "non-electricity generators" in the sense of the Directive's definition.

A properly conducted exercise to identify the installations which are considered to be an "electricity generator" in the sense of the Directive is therefore not only important to identify the auctioning volume, but also to realize and apply the transitional Community-wide rules for harmonized free allocation for the rest of the ETS sectors.

In this respect IFIEC makes the below remarks to the content of the Guidance paper.

## Comments

1. **Different national approaches to define installation boundaries should not lead to major distortions.** The Guidance paper sees the definition of installations (criterion 1 to be an “electricity generator”) as a matter of subsidiarity. This might be a pragmatic approach. However, IFIEC Europe sees here a potential source of major distortions and a conflict with the EU-wide approach for EU ETS post 2012. In this respect the following has to be taken into account:

- The Directive includes a definition of an “installation” (Article 3(e)). Thus, this definition has to be regarded when interpreting Article 3(u) and its use of the term “installation”.
- By leaving it to the Member States with currently widely deviating practices of defining an installation (depending on national permitting procedures) a significant potential to deviate from the principle of a level playing field is created. Significant consequences both for the calculation and the allocation would e.g. be based on the application of criterion 4 of the definition of an electricity generator – no other Annex I activity than “combustion of fuels” is carried out in one installation. While an industrial power plant would not be regarded an “electricity generator” in a Member State with a wide permitting approach (only one permit for a complex site including e.g. the CHP heat and power supply), the result would be the opposite in a Member State with the practice of separate permits within a single site. Such significant distortions cannot be acceptable in an EU-wide system as introduced with the ETS Directive.

According to the definition of an “installation” in Article 3(e), all activities directly associated within a single site and which could have an effect on emissions and pollution are regarded as one single installation. That means that a relatively wide definition is given. Such an approach is indeed appropriate for the purposes of the Directive, since it can safeguard the aggregation of operations that serve a common purpose. It could also solve several connected problems, which otherwise would occur. By applying this definition properly:

- Non-ETS sectors such as the sugar sector, mentioned in the Guidance paper, would be correctly classified and treated as part of an ETS-installation, since sugar production is normally part of a combustion installation (in ETS if the rated capacity is above 20MWth). By including the sugar production process within the installation boundaries any discrimination against other plants such as paper production could be avoided.
- The ownership problem explained below would be avoided upfront.

2. **Ownership cannot make a difference.** The Guidance paper clearly states that “*ownership does not matter*”, which is totally in line with recital 23: “*undue distortions of competition between industrial activities carried out in installations operated by a single operator and production in outsourced installations (should be avoided)*”. Contrary to this, however, footnote 4 of the Guidance paper sees the relevance of any contracts as a distinctive characteristic to be considered as “electricity generator”. As a consequence, the Guidance paper includes CHP installations under a contract or a similar agreement into the list of electricity generator examples. Such argumentation is highly contradictory and has no legal basis in the Directive.

Often CHP and other utilities are constructed and operated in joint ventures or fully outsourced to serve multiple industrial clients within an industrial park. Any punishment of naming such constructions “electricity generator” – in contrast to any parallel installations operated under differing contractual structures – has not been intended but clearly opposed by the legislator (see recital 23).

3. **The criterion “sales to third parties” must be recognized properly.** The Guidance paper deals with the criterion “sales to third parties” in a way that makes its relevance totally negligible. This is

done by simply assuming that no optimized operation is possible if sales are excluded. It gives the burden of proof that no single unit of produced power has been sold to third parties over the period 2005 to 2009 to the single installations. If the proof is not delivered, the criterion would be considered to be fulfilled and the installation will be treated as an “electricity generator”. Such a narrow application of this criterion is against the real-life-practice and against the spirit and aims of the Directive.

There must be the possibility for installations to sell a certain volume of produced electricity beyond the volume for own use without being immediately considered an electricity generator in the sense of the Directive (power sector). There is a clear difference between power plants built to supply the public on the one hand and power generation installations in an industrial context on the other hand. Such distinction must not be “killed” by applying an unrealistic sales criterion. The Guidance paper itself makes a proposal which could be a starting point for a more realistic consideration, namely an installation does not fulfill the criteria of an electricity generator “*if the total electricity consumption of the installation concerned exceeded its total electricity generation*”. However, this approach must be thought through further: It would make no sense if in the opposite situation (total electricity consumption smaller than its total electricity generation) all such electricity generation would qualify as “electricity generator”. Therefore, other approaches should be considered with regard to the criteria “sales to third parties” to really reflect normal operational practices (e.g. thresholds, differentiation between generation volumes by purposes).

4. **Electricity from waste gases should not qualify as “electricity generator”.** Waste gases used to generate electricity are mentioned to represent fuels in the sense of the first activity (combustion of fuels) listed in Annex I of the Directive (point 8). This is true. But for completeness, there will be an allocation of allowances for electricity from waste gases according to Article 10a (1). Therefore electricity produced from waste gases does not qualify as “electricity generator”.

## Conclusion

The application of the rules given in the Guidance paper would lead to a patchwork of “electricity generators”, depending on the non-harmonised assessment of accidental situations and on different permitting situations within and between Member states. This is contrary to the requirements of the EU ETS Directive and would furthermore result in:

1. a too low volume calculated as per Art. 10 a 5, and
2. defining a too narrow group for which the transitional Community-wide rules for harmonized free allocation would apply.

A review of the rules defining an “electricity generator” is therefore urgently needed to ensure a proper and harmonised implementation of the EU ETS Directive.

### For questions, please contact:

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### About IFIEC Europe

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