securing competitive energy for industry

Preliminary view on Advocate General's Opinion on EU ETS Cross Sectoral Correction Factor (CSCF)

Some serious shortcomings… 15 December 2015

IFIEC Europe is concerned about the stringency of the Commission Decision on the cross-sectoral correction factor (CSCF) which hampers competitiveness of energy-intensive industries in Europe. Therefore, IFIEC has a high interest in the CSCF legal case at the Court of Justice of the European Union (CJEU). The CJEU held its Oral Hearing on 3 September 2015 and subsequently the Advocate General provided an Opinion on 12 November 2015. The Court's Judgement will follow in due course. The Opinion is non-binding to the Court.

IFIEC Europe's preliminary analysis reveals incorrect views and issues that were not addressed in the Advocate General's Opinion.

Key incorrect views of the Advocate General are – in order of appearance in the Opinion:

- Main disputed issues deal with the "asymmetry" issue; the issue of different definitions/boundaries of the industry cap (based on emissions) and preliminary allocation (based on allowances, incl. for waste gases, heat from CHP, scope changes to phase 2 and phase 3 (wholly or partially absent in the industry cap)). **The Advocate General confuses emissions for allowances** when it comes to the reference years 2005 to 2007 for determination of the industry cap.[1] This contributes to dismissal of issues linked with asymmetry.
- The Opinion states that the **carbon prices might disproportionally increase** if the share of industry in the total quantity of allowances would increase.[2] Instead, the total quantity of allowances in the EU ETS does not change when revising the CSCF and hence the carbon price would structurally not be affected.
- The recurring flawed reasoning is that granting **fewer free allowances to industry would increase the overall EU ETS environmental benefit**.[3] This is incorrect – the incentive to reduce CO_2 emissions is set by the carbon market price resulting from the overall EU ETS cap, which is independent of the value of the CSCF.[4] Same incorrect reasoning has been applied to dismiss the claims regarding emissions from waste gases and heat from cogeneration to be included in the Industry Cap.
- An essential part of the Advocate General's reasoning is the supposed purpose that the **existing equilibrium in EU ETS allowances between industry and electricity production should not change**.[5] This reasoning, based on the three previous incorrect and the latter two mutually inconsistent assumptions, would make beforehand any change of the CSCF for the benefit of industry by definition impossible.
- The Advocate General claims that there would be **no legal basis to include emissions of new activities as from 2013 onwards in existing installations** in phase 2 in the industry cap.[6] (Although the French version of the ETS Directive on the Industry Cap leaves no doubt.[7]) The Advocate General claims that there would be an alleged "lack of clear legislator statements". But the European Parliament and the Council have clearly expressed in 2009 that any adjustment in the coverage of the ETS shall be matched with a corresponding adjustment of the non-ETS obligations.[8] The later Commission Decision of 2011 is consistent: "...the relevant amount of emissions which are only included in the Union scheme from 2013 onwards" shall be considered.[9]
- The Opinion dismisses emissions which are only part of EU ETS as from 2008, for inclusion in the Industry Cap. The Advocate General defends that **only EUTL data of the years 2005-2007 would qualify as "verified" emissions to determine the Industry Cap**.[10] The Directive however does not refer to the EUTL emissions – verified emissions are by definition not limited to EUTL emissions only.[11]

contact: Annette Loske, Chair WP Climate & Efficiency

IFIEC Europe
International Federation of Industrial Energy Consumers
Av. Louise 250, box 80 | 1050 Brussels
www.ifieceurope.org | ifieceurope@ifieceurope.org | Phone: +32 888 52 69 | Mobile: +49 172 26 99 063
a.i.s.b.l. NI 436 343 513 | VAT: BE 0436.343.513 | EU Transparency Register: 1978775156-31

The Advocate General's Opinion does not address the following two issues – though raised by companies:

- The sizeable amount of lower allocation due to **unallocated[12] allowances** by closures, partial cessations and significant capacity reductions **have not been fully taken into account in determining the CSCF**. However, the EU ETS Directive is very clear on this point.[13]
- Due to conflicting statements of the Commission, it remains unclear whether a 100% carbon leakage factor or the real carbon leakage factors 2013-2020 for non-exposed sectors has been applied for the CSCF calculation. The EU ETS Directive is very clear on this point; the **real carbon leakage factors must be used**.[14]

Background

On 5 September 2013 the European Commission published its Commission Decision 448/2013 to apply a cross-sectoral correction factor (CSCF) to reduce the total number of free allocation given to the industry. Industry is entitled to receive free allowances according to agreed performance benchmarks and historic production volumes under the rules of the current EU emissions trading scheme 2013-2020.

Industry believes that the Commission has miscalculated the level of the cap, and that it has not been fully transparent in its decision-making process. Next to this, the real preliminary allocation was significantly lower than the preliminary allocation used in the CSCF calculation by the Commission, which also led to a less favourable CSCF.

Companies see the reduction of free allocation as unnecessary and unlawful, imposing an extra, unnecessary cost burden, on top of stringent top 10% benchmark requirements. Industry experts argue that due to flaws in the Commission's methodology, industry emissions have been underestimated by circa 175 Mton $CO_{2\text{-equiv}}$.

---

[1] Advocate General Opinion Paragraphs 48, 49 and 60

[2] Advocate General Opinion Paragraph 59

[3] Advocate General Opinion Paragraph 63

[4] On installation level this incentive of a project to reduce emissions is the carbon price multiplied with the carbon reduction. In the allocation rules based on benchmarking, this is the sum of avoided cost and revenue of sale of allowances, which is independent of the CSCF value. E.g. if the benchmark allocation is 100 units (or 105 units with a less stringent CSCF) and the carbon reduction is to reduce the emission from 110 to 90 units, the project incentive is: 10 (or 5) units avoided cost + 10 (or 15) units revenue of sale of allowances = always 20 allowances, to be multiplied with the CO_2-price.For installations under full auctioning, the incentive to reduce emissions is avoided cost, in this example also 20 units.

[5] Advocate General Opinion Paragraph 58

[6] Advocate General Opinion Paragraph 111

[7] "b) des émissions annuelles totales moyennes vérifiées au cours de la période 2005-2007 qui ne sont incluses dans le système communautaire qu'à partir de 2013 et qui ne sont pas couvertes par le paragraphe 3, adaptées à l'aide du facteur linéaire visé à l'article 9".

[8] In Decision 406/2009/EC of the European Parliament and Council of 23 April 2009, the legislator has clearly expressed that the meaning of Art. 9a(2) is consistent with Art. 10a(5b) (recital 25 and Art. 10). The two subsequent Commission Decisions in 2013 concerning the non-ETS obligations of Member States are consistent with the first Decision, in the latter Art. 9a(2) plays an important role.

[9] Next to this, Commission Decision 2011/278/EU also clearly speaks in Art. 15(3) about "...the relevant amount of emissions which are only included in the Union scheme from 2013 onwards".

[10] Advocate General Opinion Paragraph 122

[11] For example the data collection electronic templates submitted by the Member States to the Commission also contain verified emissions data.

[12] The Commission has published that the volume of unallocated allowances is 40.7 Mton, 59.4 Mton and 65.3 Mton allowances in respectively 2013, 2014 and 2015 due to closures, partial cessations and significant capacity reductions. The latter two caused a lower allocation of 34.96 Mton in 2013.

[13] The whole Art. 10a of the EU ETS Directive determines the rules for the free allocation of allowances and paragraphs 19 (about closures) and 20 (about partially ceased operations and significant capacity reductions) are an integral part of these rules, just like paragraph 5 for the industry cap and the CSCF.

[14] Art. 10a (11) of the EU ETS Directive determines that the real carbon leakage factors for non-exposed sectors (80% in 2013 going down to 30% in 2020) are clearly also applicable for Art. 10a(5), which regulates the CSCF. Art. 10a (11) explicitly refers also to Art. 10a(5) about the industry cap and the CSCF: "the amount of allowances allocated free of charge under paragraphs 4 to 7".

contact: Annette Loske, Chair WP Climate & Efficiency

IFIEC Europe

International Federation of Industrial Energy Consumers

Av. Louise 250, box 80 | 1050 Brussels

www.ifieceurope.org | ifieceurope@ifieceurope.org | Phone: +32 888 52 69 | Mobile: +49 172 26 99 063

a.i.s.b.l. NI 436 343 513 | VAT: BE 0436.343.513 | EU Transparency Register: 1978775156-31