Commission Delegated Regulation (EU) 2019/331 of 19 December 2018 determining transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87/EC of the European Parliament and of the Council (Text with EEA relevance)

COMMISSION DELEGATED REGULATION (EU) 2019/331

of 19 December 2018

determining transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87/EC of the European Parliament and of the Council

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a system for greenhouse gas emission allowance trading within the Union and amending Council Directive 96/61/EC[(1)], and in particular Article 10a(1) thereof,

Whereas:

(1) Directive 2003/87/EC sets out rules on how transitional free allocation of emission allowances should take place between 2021 and 2030.

(2) By Decision 2011/278/EU[(2)], the Commission laid down transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87/EC. As Directive 2003/87/EC was substantially amended by Directive (EU) 2018/410 of the European Parliament and of the Council[(3)] and for reasons of clarity as regards the rules applicable between 2021 and 2030, Decision 2011/278/EU should be repealed and replaced.

(3) In accordance with Article 10a(1) of Directive 2003/87/EC, transitional Union-wide and fully-harmonised measures for the free allocation of emission allowances are to determine, to the extent feasible, *ex-ante* benchmarks so as to ensure that the free allocation of emission allowances takes place in a manner that provides incentives for reductions in greenhouse gas emissions and energy efficient techniques, by taking account of the most efficient techniques, substitutes, alternative production processes, high efficiency cogeneration, efficient energy recovery of waste gases, use of biomass and capture and storage of carbon dioxide, where such facilities are available. At the same time, those measures must not provide incentives to increase emissions. In order to reduce incentives to flare waste gases, other than for safety flaring, the number of allowances allocated free of charge for relevant sub-installations should be reduced by the historical emissions from waste gases flared, with the exception of safety flaring, and not used for the purpose of the production of measurable heat, non-measurable heat or electricity. However, taking into account the special treatment accorded by Article

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10a(2) of Directive 2003/87/EC, and to provide for a transition, this reduction should only apply from 2026.

(4) For the purposes of the collection of data which are to form the basis for the adoption of the 54 benchmark values for free allocation between 2021 and 2030 by means of implementing acts to be adopted in accordance with Article 10a(2) of Directive 2003/87/EC, it is necessary to continue to provide definitions of the benchmarks, including the products and related processes, identical to those currently set out in Annex I to Decision 2011/278/EU, apart from certain improvements to legal clarity and linguistic improvements. Article 10a(2) of Directive 2003/87/EC provides that the implementing acts for the 54 benchmark values for free allocation between 2021 and 2030 should be determined using the starting points for determination of annual reduction rate for benchmark value update that were contained in Commission Decision 2011/278/EU as adopted on 27 April 2011. For reasons of clarity, those starting points should also be contained in an Annex to this Regulation.

(5) The data collection carried out prior to the allocation periods serves the purposes of determining the level of free allocation at installation level as well as providing data that will be used for the purposes of the implementing acts that will determine the 54 benchmark values that will apply between 2021 and 2030. Detailed data at sub-installation level need to be collected, as provided for in Article 11(1) of Directive 2003/87/EC.

(6) Given the economic relevance of transitional free allocation and the need for equal treatment of operators, it is important that data collected from operators and used for decisions on allocation and which will be used for the implementing acts determining the 54 benchmark values for free allocations between 2021 and 2030 are complete and consistent, and present the highest achievable accuracy. Verification by independent verifiers is an important measure for this purpose.

(7) The requirement to ensure the collection of high quality data and consistency with the monitoring and reporting of emissions within the scope of Directive 2003/87/EC is a joint responsibility of operators and Member States. For this purpose, specific rules for monitoring and reporting of activity levels, energy flows and emissions at sub-installation level should be provided for, taking duly into account the relevant provisions of Commission Regulation (EU) No 601/2012[(4)]. Data provided by industry and collected in accordance with these rules should be as accurate and high quality as possible and reflect the actual operations of installations, and be given due consideration for free allocation.

(8) The operator of an installation should start monitoring the data required in accordance with Annex IV as soon as this Regulation enters into force to ensure that data for the year 2019 can be collected in line with the provisions of this Regulation.

(9) To limit the complexity of the rules for monitoring and reporting of activity levels, energy flows and emissions at sub-installation level, it is appropriate not to apply a tiered approach.

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(10) To ensure comparable data for the implementing acts that will determine the benchmark values applicable for free allocation between 2021 and 2030, it is necessary to lay down detailed rules for assigning activity levels, energy flows and emissions to sub-installations, consistent with guidance documents produced for the purpose of benchmark data collection for the 2013–2020 period.

(11) The monitoring methodology plan should describe the instructions to the operator in a logical and simple manner, avoiding duplication of effort and taking into account the existing systems in place at the installation. The monitoring methodology plan should cover the monitoring of activity levels, energy flows and emissions at sub-installation level and serve as a basis for the baseline data reports as well as the annual activity level reporting required for the purpose of adjusting transitional free allocation in accordance with Article 10a(20) of Directive 2003/87/EC. Where possible, the operator should make use of synergies with the monitoring plan approved in accordance with Regulation (EU) No 601/2012.

(12) The monitoring methodology plan should require approval by the competent authority in order to ensure consistency with the monitoring rules. Due to time constraints, approval by the competent authority should not be required for the baseline data report due for submission in 2019. In this case, verifiers should assess compliance of the monitoring methodology plan with the requirements set out in this Regulation. To limit administrative burden, only significant changes to the monitoring methodology plan should require approval by the competent authority.

(13) To ensure consistency between verification of annual emissions reports required by Directive 2003/87/EC and verification of reports submitted to apply for free allocation as well as to make use of synergies, it is appropriate to use the legal framework set by measures adopted pursuant to Article 15 of Directive 2003/87/EC.

(14) To facilitate the data collection from operators and the calculation of the emission allowances to be allocated by Member States, inputs, outputs and emissions of each installation should be assigned to the sub-installations. Operators should ensure that activity levels, energy flows and emissions are correctly attributed to the relevant sub-installations, respecting the hierarchy and mutual exclusivity of sub-installations, and that there are no overlaps between sub-installations. Where relevant, this division should take account of the production of products in sectors deemed to be exposed to a risk of carbon leakage as determined in accordance with Article 10b(5) of Directive 2003/87/EC.

(15) Member States should submit national implementation measures to the Commission by 30 September 2019. In order to promote equal treatment of installations and to avoid distortions of competition, these submissions should include all installations that will be included under the European Union Emissions Trading System (EU ETS) pursuant to Article 24 of Directive 2003/87/EC, in particular where allocations have previously taken place to such installations in respect of heat during the period between 2013 and 2020.

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(16) In order to avoid any distortion of competition and to ensure an orderly functioning of the carbon market, operators should ensure that when determining the allocation of individual installations no double counting of material or energy flows and no double allocation take place. In this context, operators should pay particular attention to cases where a benchmarked product is produced in more than one installation, where more than one benchmarked product is produced in the same installation, and where intermediate products are exchanged across installation boundaries. Member States should check applications to this end.

(17) Article 10a(4) of Directive 2003/87/EC provides for free allocation for district heating and high efficiency cogeneration. In accordance with Article 10b(4) of that Directive, the carbon leakage factor applied to non-carbon leakage sub-installations is to decline in a linear manner from 30 % in 2026 to 0 % in 2030, except for district heating, and subject to review pursuant to Article 30 of the Directive. Due to this distinction introduced between district heating and all other heat eligible under heat benchmark sub-installations, a separate heat sub-installation for district heating needs to be introduced in order to provide a clear approach in terms of formulae and baseline data template requirements. District heating should include measurable heat used for the purpose of space heating and cooling of buildings or sites that are not covered by the EU ETS or for the production of domestic hot water.

(18) It is appropriate that the product benchmarks take account of the efficient energy recovery of waste gases and emissions related to their use. To that end, for the determination of the benchmark values for products of which the production generates waste gases, the carbon content of those waste gases should be taken into account to a large extent. Where waste gases are exported from the production process outside the system boundaries of the relevant product benchmark and combusted for the production of heat outside the system boundaries of a defined benchmarked process, related emissions should be taken into account by means of allocating additional emission allowances on the basis of the heat or fuel benchmark. In the light of the general principle that no emission allowances should be allocated for free in respect of any electricity production, to avoid undue distortions of competition on the markets for electricity supplied to industrial installations and taking into account the inherent carbon price in electricity, it is appropriate that, where waste gases are exported from the production process outside the system boundaries of the relevant product benchmark and combusted for the production of electricity, no additional allowances are allocated beyond the share of the carbon content of the waste gas accounted for in the relevant product benchmark.

(19) To avoid distortions of competition and to incentivise the use of waste gases, in the absence of information on the composition of relevant gas streams, CO_2 emissions occurring outside the system boundaries of a product benchmark sub-installation resulting from the reduction of metal oxides or similar processes should only be partially assigned to process emissions sub-installations if they are not emitted as result of the energy use of waste gases.

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(20) Indirect emissions related to the production of electricity were considered for the determination of certain benchmark values in Decision 2011/278/EU, on the basis that direct emissions and indirect emissions from electricity production were to a certain extent interchangeable. Where those benchmarks apply, the indirect emissions of an installation should continue to be deducted applying the standard emissions factor that is also used for assessing sectors' exposure to potential carbon leakage as determined in accordance with Article 10b(5) of Directive 2003/87/EC. The relevant provisions should be kept under review, inter alia, with a view to enhancing equal treatment of activities producing the same product and for updating the reference year of 2015 for transitional free allocations between 2026 and 2030.

(21) Where measurable heat is exchanged between two or more installations, the free allocation of emission allowances should be based on the heat consumption of an installation and take account of the risk of carbon leakage, as appropriate. Thus, to ensure that the number of free emission allowances to be allocated is independent from the heat supply structure, emission allowances should be allocated to the heat consumer.

(22) The amount of allowances to be allocated free of charge to incumbent installations should be based on historical activity data. The historical activity levels should be based on the arithmetic mean activity during the baseline periods. The baseline periods are sufficiently long to ensure that they can be considered representative for the allocation periods which cover five calendar years as well. For new entrants, as defined in Article 3(h) of Directive 2003/87/EC, the determination of activity levels should be based on the activity level of the first calendar year of operation, after the year of the start of normal operation, as the activity level reported for a full year is considered more representative than a value for the first year of operation that could cover only a short period. Compared to the allocation period 2013 – 2020, due to the introduction of allocation adjustments in accordance with Article 10a(20) of Directive 2003/87/EC, there is no need to maintain the concept of significant capacity change.

(23) To ensure that the EU ETS delivers reductions over time, Directive 2003/87/EC provides for the Union-wide quantity of allowances to decrease in a linear manner. As regards electricity generators, according to Article 10a(4) of that Directive, a linear reduction factor is applied, using the year 2013 as a reference, unless the uniform cross-sectoral correction factor is applicable. The value of the linear reduction factor is increased to 2,2 % per year from 2021.

(24) For new entrants, the linear reduction factor is applied with the first year of the relevant allocation period as reference.

(25) The uniform cross-sectoral correction factor that is applicable in each year of the period from 2021 to 2025 and from 2026 to 2030 to installations that are not identified as electricity generators, and that are not new entrants, pursuant to Article 10a(5) of Directive 2003/87/EC, should be determined on the basis of the preliminary annual amount of emission allowances allocated free of charge over each allocation period, calculated for these installations pursuant to this Regulation, excluding the installations that are excluded by Member States from the EU ETS in accordance with Article 27 or 27a of that Directive. The resulting amount of free emission allowances allocated in