

Why can't new investments in Polish power generators benefit from derogation laid down in Article 10c of the Directive EU ETS

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There is a threat, that new investments of Polish power generators can't benefit from derogation provided for in Article 10c of the Directive 2003/87/WE – contrary to intentions, which were expressed by politicians and negotiators during December 2008 negotiations of climate - energy package.

From the European Commission appeared rumors, that necessary condition to make use of derogation form Article 10c by new investments in power generators (in Member States that generally qualify under that provision) is obtaining emission permit by 2011.

Such a view surprised members of the public in Poland, because in 2008 many investments in new power generators had been initiated and many energy companies hoped, that free allowances under Article 10c of the Directive would be available. The date 2011 as the final term for obtaining emission permit is unrealistic (nearly impossible) for almost all of them.

As the said opinion of the Commission was not publicized yet, rationale for this and legal substantiation are today unknown.

Let's try to guess – taking part in the current discussion – what sort of legal substantiation could support such a rigorous views. There is no doubt, that opinion under consideration here, isn't advantageous to Polish power generators and may cause – if it will be sustained – severe effects for Polish economy.

No free allowances for new entrants

Article 10c (Option for transitional free allocation for the modernisation of electricity generation) of the Directive EUETS (2003/87/EC as amended by the Directive 2009/29/EC) was inserted in the text of the Directive in December 2008 during hard negotiations between governments of Member States. This provision was presented to the public as a form of compromise, under which Member States with high carbon dependency assumed climate - energy package.

I'm afraid, that analyzes in Poland made so far in relation to derogation laid down in Article 10c of the Directive EUETS took not enough attention to the change in the definition of the "new entrant" provided for in the Article 3(h) of the Directive.

According to the said Article 3 (h) "new entrant" means:

*"- any installation carrying out one or more of the activities indicated in Annex I, which has obtained a greenhouse gas emissions permit for the first time after 30 June 2011,
- any installation carrying out an activity which is included in the Community scheme pursuant to Article 24(1) or (2) for the first time, or
- any installation carrying out one or more of the activities indicated in Annex I or an activity which is included in the Community scheme pursuant to Article 24(1) or (2), which has had a significant extension after 30 June 2011, only in so far as this extension is concerned."*

So, installations, which obtain a greenhouse gas emissions permit for the first time after 30 June 2011, are new entrants in the meaning of the Directive.

But the Directive in Article 10a (7) explicitly states, however, that:

„No free allocation shall be made in respect of any electricity production by new entrants.”

Lacking derogations in Article 10c

Article 10c (1) of the Directive provides, that Member States may give - *“by derogation from Article 10a(1) to (5)”* - a transitional free allocation to installations for electricity production in operation by 31 December 2008 or to installations for electricity production for which the investment process was physically initiated by the same date -.

We are passing by the question, what does it mean: *“investment process was physically initiated”* – this issue is also contentious at this stage.

But much more dangerous for Member States with high carbon dependency is listing of derogations in Article 10c (1) – which is obviously too short.

So, new installations wishing to benefit from derogation provided for in Article 10c must obtain emission permit before 30 June 2011, because after that date they became “new entrants” and for “new entrants” there are no free emission allowances. The conclusions would be different, if in the Article 10c were explicit derogation from Article 10a (7).

Unfortunately, we find there derogations from Article 10a (1) – (5) only.

Summing - up, comparison of provisions of Article 10c (1), Article 10a (7), as well as Article 3 (h) of the Directive can substantiate – from legal point of view – assumption of a date 30 June 2011 as a deadline for obtaining emission permit by new installations applying for a derogation on the base of Article 10c.

If in Article 10c were reference to Article 10a (7) – and not only to Article 10 (1) – (5) – the situation would be different and much more advantageous for carbon dependent new Member States (mainly Poland, but not only). So, one cipher is lacking – exactly seven.

Real arguments of European Commission will probably be demonstrated in the near future and there is a big chance that hard negotiation will begin once more.