EUROPEAN COMMISSION
DIRECTORATE-GENERAL
CLIMATE ACTION

Directorate B - European and International Carbon Markets

Guidance Document n°10
on the harmonised free allocation methodology for the EU ETS post 2020

Guidance on allocation for mergers and splits

Final version issued on 21 June 2019

The guidance does not represent an official position of the Commission and is not legally binding. However, this guidance aims to clarify the requirements established in the EU ETS Directive and the FAR and is essential to understanding those legally binding rules.

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1 Scope of this guidance document

This guidance document is part of a group of documents, which are intended to support Member States, and their Competent Authorities, in the consistent implementation throughout the Union of the allocation methodology for the fourth trading period of the EU ETS (post 2020), established by the Delegated Regulation of the Commission 2019/331 on "Transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of the EU ETS Directive" (FAR)[1]. Guidance Document 1 on General Guidance to the Allocation Methodology provides an overview of the legislative background to the group of guidance documents. It also explains how the different Guidance Documents relate to each other and provides a glossary of terminology used throughout the guidance[2].

The current Guidance Document provides guidance to Competent Authorities on how to deal with installations that have merged or split after the baseline data collection for phase 4 of the EU ETS[3].

Chapter 2 of this document presents the definitions of mergers and splits, as well as rules on how to deal with different situations that may arise. A summary of the main possible situations is provided in Table 1.

Chapter 3 illustrates the rules with some examples.

References to articles within this document refer to the revised EU ETS Directive and the FAR.

Note on outstanding issues in this version of the Guidance Document

As decision-making on the allocation methodology is not yet finalized, certain elements of this Guidance Document are as yet undefined. This especially includes issues related to the implementing act still to be adopted on the detailed rules on the changes to allocations of free allowances and the update of the benchmark values. In addition, it can also apply to references to the outstanding legislation itself or to accompanying Guidance Documents that are still in preparation.

[1] FAR is available at: http://data.europa.eu/eli/reg_del/2019/331/oj

[2] All Guidance Documents can be found at: https://ec.europa.eu/clima/policies/ets/allowances_en#tab-0-1

[3] Installations that have merged or split during the baseline period or shortly after are expected to fill in their baseline data collection report considering the legal situation at the time the report is submitted, i.e. as if the merger or the split had taken place at the start of the baseline period or in the first year of operation.

2 General rules on mergers and splits

2.1 Articles relating to mergers and splits in the FAR

Definitions and allocation rules in this Guidance Document are based on the FAR. Relevant articles are:

- The definitions in:
  - Article 2(17) on merger;
  - Article 2(18) on split.
- Article 25 on mergers and splits

2.2 Definition of mergers and splits

The definition of a **merger** in Article 2(17) of the FAR states that:
'merger' means a fusion of two or more installations already holding greenhouse gas permits provided that they are technically connected, operate on the same site and the resulting installation is covered by one greenhouse gas permit.

The following conditions therefore need to be met for a merger to take place:

- Two or more former installations are merged into a single new one;
- The former installations need to each have held a greenhouse gas permit;
- The former installations need to be technically connected;
- The former installations need to operate on the same site;
- The new installation must be covered by a single greenhouse gas permit.

The definition of a **split** in Article 2(18) of the FAR states that:
'split' means a division of an installation into two or more installations that are covered by separate greenhouse gas permits and are run by different operators.

The following conditions therefore need to be met for a split to take place:

- A single former installation is split into two or more new installations;
- Each new installation must be covered by its own greenhouse gas permit;[4]
- The new installations must be run by different operators.

[4] It should be noted that the sale or transfer of part of an EU ETS installation to another existing installation does not meet this definition. This case will be dealt with via the rules on activity level changes (*for more information, see Guidance Document 7 on new entrants and closures*).

2.3 Mergers and splits in practice

Article 25 of the FAR, on **mergers and splits**, states that:

1. *The operators of new installations resulting from a merger or a split shall provide the following documentation to the competent authority, as appropriate:*
    - *(a) names, addresses and contact data of the operators of the previously separate or single installations;*
    - *(b) names, addresses and contact data of the operators of the newly formed installation;*
    - *(c) a detailed description of the boundaries of the installation parts concerned if applicable;*
    - *(d) the permit identifier and the identification code of the newly formed installation(s) in the Union Registry.*
2. *Installations resulting from mergers or splits shall submit to the competent authority the reports referred to in Article 4(2). If the installations before the merger or split were new entrants, operators shall report to the competent authority the data from the start of normal operation.*
3. *Mergers or splits of installations, including splits within the same corporate group shall be assessed by the competent authority. The competent authority shall notify the Commission of the change of operators.*
   Based on the data received pursuant to paragraph 2, the competent authority shall determine the historical activity levels in the baseline period for each sub-installation of each newly formed installation after the merger or split. In the case that a sub-installation is split into two or more sub-installations, the historical activity level and allocation to the sub-installations after the split shall be based on the historical activity levels in the baseline period of the respective technical units of the installation before the split.
4. *Based on the historical activity levels after the mergers or splits, the free allocation of allowances of the installations after mergers or splits shall correspond to the final amount of free allocation, before the mergers or splits.*
5. *The Commission shall review each allocation of allowances of the installations after mergers or splits and communicate the results of that assessment to the competent authority.*

2.3.1 The case of mergers

Based on Article 25 of the FAR, the installations merging will need to provide the following data to the Competent Authority:

- The documentation listed in paragraph 1 of Article 25;
- The following documents, in line with Article 4(2) of the FAR:
    - The verified NIMs baseline data report including data for the baseline years considering the new legal situation, i.e. as if the merger had taken place at the start of the baseline period or in the first year of operation;
    - The Monitoring Methodology Plan relating to the monitoring of future data in the new installation;
    - The Verification Report on the baseline data report.

If the merger concerns installations of which at least one is an incumbent EU ETS installation, the baseline years to be used are the baseline years of the current allocation period (i.e. 2014 to 2018 for the first allocation period in Phase 4). The data should be entered as if the merger had taken place at the start of the baseline period (or in the first year of operation in case one of the installations started operation during the baseline period). The activity levels for each year should be the sum of the activity levels of each of the former installations.

If the merger concerns only new entrant installations[5], the data should be collected using the new entrant data template instead of the NIMs baseline data report. In this case, the activity level of the new installation should be based on the activity level of the oldest of the two installations in its first full calendar year of operation, or of the sum of the activity levels of the two former installations in that year if the second installation was already operating during the first full calendar year of operation of the first one.

In all cases, care must be taken that the new installation emerging from the merger reports data consistent with the sum of the data that would have been reported by the former installations individually (e.g. the sum of the previous activity levels when relevant must be identical to the sum of the later activity levels). Moreover, the data before and after the merger must be equivalent, taking into account possible impacts of the change (e.g. on the status of electricity generator, on the de minimis rule etc.). In line with Guidance Document 5 on Monitoring and Reporting in Relation to the FAR, this can be ensured by doing an analogous merger of the MMP, such that the method of merging the data sets are clearly described.

[5] For the definition of a 'new entrant' please refer to Article 3(h) of Directive 2003/87/EC. See also Guidance Document 7 on new entrants and closures.

2.3.2 The case of splits

Based on Article 25 of the FAR, an installation splitting into one or more installations will need to provide the following data to the Competent Authority:

- The documentation listed in paragraph 1 of Article 25;
- The following documents, in line with Article 4(2) of the FAR:
    - A verified NIMs baseline data report for each new installation, including data for the baseline years considering the new legal situation, i.e. as if the split had taken place at the start of the baseline period or in the first year of operation;
    - A Monitoring Methodology Plan for each new installation, describing both the methodology on how the baseline data is split between the two installations for each sub-installation, and the monitoring methodology of future data[6];
    - A Verification Report on the baseline data report for each new installation.

If the former installation that is split is an incumbent installation, the baseline years to be used are the baseline years of the current allocation period (i.e. 2014 to 2018 for the first allocation period in Phase 4). The activity levels should be recalculated as if the split had taken place at the start of the baseline period (or in the first year of operation in case the initial installation started operation during the baseline period). The activity level of each new installation should be recalculated for each year, based on the new perimeter of the installations after the split. Special care must be taken that the sum of the activity levels of each new installation is equal to the activity level of the former installation.

If the former installation that is split is a new entrant, the data should be collected using the new entrant data template instead of the NIMs baseline data report. In this case, the operators will report to the competent authority the data of the former installation split accordingly since the start of normal operation (i.e. as if the split had taken place when the former installation started operation). The first full calendar year after the start of operation should be used as a basis for the calculation of the historical activity levels of each new installation.

In all cases, care must be taken that the new installations emerging from the split report data which when summed up, are consistent with the data that were reported by the former. Moreover, the data before and after the split must be equivalent, taking into account possible impacts of the change (e.g. on the status of electricity generator, on the de minimis rule etc.). In line with Guidance Document 5 on Monitoring and Reporting in Relation to the FAR, this can be ensured by doing an analogous split of the MMP, such that the method of splitting the data sets are clearly described.

[6] For better readability, the operator may provide two versions of the MMP: one covering only the methodology for splitting historic data, and one (for each new installation) describing the monitoring methodology of future data.

2.3.3 Role of the Competent Authority

In line with Article 25 of the FAR, the Competent Authority must assess the merger or split applications. This is in particular done by:

- Assessing the documentation provided by the operators (cf. sections 2.3.1 and 2.3.2), and ensuring that the necessary conditions for a merger or a split are met. For example, in the case of a merger, the CA must ensure that the former installations are technically connected and operate on the same site[7], and that the new installation is covered by a single GHG permit. In the case of a split, the CA must ensure that the new installations each have their own GHG permit. The CA should assess the structure of the group and ensure that the two installations will not be operated by the same operator;
- Calculating the historical activity levels in the baseline year(s) for each sub-installation of each new installation after the merger or split;
- Ensuring that the amount of allowances allocated for free to the new installation(s) correspond to the total final amount of free allocation before the merger or split. In particular, when a sub-installation is split into two or more sub-installations, the HAL and allocation of the sub-installations after the split should be calculated based on the HAL in the baseline period of the corresponding technical units of the installation before the split.

The Competent Authority will then notify the Commission of the change of operators for review. Changes will be taken into account in the first full calendar year after the date of the split or merger.

2.4 Overview of the different cases

Table 1 presents an overview of the different situations that can occur, and which tools and baseline years are to be used in each case. The examples given present the new installations as having different names from the former installations for the purpose of clarifying the new status. The different names do not impose that the name or accounts of the new installations should be different. Most likely in the case of a merger, the new installation keeps the name of one of the former installations or in the case of a split, one of the new installations keeps the name of the former one.

[7] The definition of a **site** is of relevance here and has been questioned before (cf. European Court of Justice case C 158/15). See the annex of this guidance document for further considerations on this topic.

Table 1: Overview of different cases of mergers and splits

Event	Former installation(s)	New installation(s)	Data collection tool	Baseline year(s) to be used for the HAL[8]
Merger	Incumbent A	Installation C	NIMs baseline data template	2014-2018
	Incumbent B			
	Incumbent A	Installation C	NIMs baseline data template	2014-2018[9]
	New entrant B			
	New entrant A	Installation C	New entrant data template	1st full calendar year of operation of A (if A started operating before B)[10]
	New entrant B			
Split	Incumbent A	Installation B	NIMs baseline data template	2014-2018
		Installation C	NIMs baseline data template	2014-2018
	New entrant A	Installation B	New entrant data template	1st full calendar year of operation of A
		Installation C	New entrant data template	1st full calendar year of operation of A

[8] 2014-2018 should be replaced by 2019-2023 in this column in the case of the second allocation period in phase 4.

[9] The data relating to installation B will be 0 for all years of the baseline period.

[10] The data relating to installation B will be 0 if it wasn't yet operating in that year.

3 Examples

<u>Example 1</u>: Merger of [incumbent A + incumbent B]
Installations A and B are both incumbent installations; A started operating before 2014, while B started operating in 2015. These installations are merged in 2022 to create installation C.
In order for installation C to be included in the EU ETS, its operator must send to the Competent Authority:

- The documentation listed in paragraph 1 of Article 25;
- The verified NIMs baseline data report for installation C. This report will include:
    - **For year 2014, only data from installation A will appear as installation B was not yet operating;**
    - **For each year from 2015 to 2018, activity level values and emissions values that were in the NIMs baseline data reports of installations A and B respectively will be summed up (or consolidated taking into account values from each former installation)**;
    - The HAL of incumbent installation C will be calculated based on these data as well as the final allocation, which will be subject to adjustments due to activity level changes as from the first year of allocation.
- The Monitoring Methodology Plan relating to the monitoring of future data in installation C;
- The Verification Report on the baseline data report.

<u>Example 2</u>: Merger of [incumbent A + new entrant B]
Installation A is an incumbent installation that started operating before 2014, and installation B is a new entrant in phase 4 of the EU ETS as it started operating in 2020. These installations are merged in 2022 to create installation C.
In order for installation C to be included in the EU ETS, its operator must send to the Competent Authority:

- The documentation listed in paragraph 1 of Article 25;
- The verified NIMs baseline data report for installation C. This report will include **only data from installation A for all baseline years (2014 to 2018), as installation B was not yet operating**;
- The new entrant data report of installation B, as data from this report will also need to be taken into account;
- The Monitoring Methodology Plan relating to the monitoring of future data in installation C;
- The Verification Report on the baseline data report.

In this case, the allocation for installation C in 2023 will be calculated as follows:

- *For all sub-installations that are present in both installations A and B:*
  The HAL of each of these sub-installations is based on data from installation A, and their allocation follows the rules of activity level changes taking also into account data from installation B as of the data of the merger;
- *For all sub-installations of installation B that are not present in installation A:*
  The HAL of these sub-installations are calculated in 2022 based on the activity levels of 2021 and their allocation follows the rules of activity level changes.

Example 3: Merger of [new entrant A + new entrant B]

Installations A and B are both new entrant installations in phase 4 of the EU ETS; A started normal operation on 6 September 2019, and B started normal operation on 15 November 2020. These installations are merged in 2022 to create installation C.
In order for installation C to be included in the EU ETS, its operator must send to the Competent Authority:

- The documentation listed in paragraph 1 of Article 25;
- The verified new entrant data report for installation C. This report will include **data relating to installation A for year 2020, to which data relating to installation B is to be added**;
- The Monitoring Methodology Plan relating to the monitoring of future data in installation C;
- The Verification Report on the new entrant data report.

As in example 2, the allocation for installation C in 2023 will be calculated using the rules on activity level changes, based on the comparison of the average of the sum of activity levels of installations A and B in years 2021 and 2022, with the HAL calculated for installation C based on its new entrant data report.

Example 4: Split of incumbent A into [ETS B + ETS C]

Installations A is an incumbent installation that started operating before 2014. This installation is split into installations B and C in 2022, each covered by its own GHG permit.
In order for installations B and C to be accepted as new installations under EU ETS, the operators must send to the Competent Authority:

- The documentation listed in paragraph 1 of Article 25;
- The verified NIMs baseline data report relating to its installation. **For installation B (respectively installation C), this report will include activity level and emission data for years 2014 to 2018 recalculated as if the split had occurred since 2014, to include only data relating to the perimeter of installation B (respectively installation C)**;
- The Monitoring Methodology Plan describing the methodology of how the baseline data was split between installation B and installation C, as well as the monitoring methodology of future data for installation B (respectively installation C)[11];
- The Verification Report on the baseline data report relating to its installation.

[11] As indicated in section 2.3.2, two versions of the MMP can be submitted if preferred, for better readability.

<u>Example 5</u>: Split of new entrant A into [ETS B + ETS C]

Installations A is a new entrant installation in phase 4 of the EU ETS, which started normal operation on 1 October 2019. This installation is split into installations B and C in 2022, each covered by its own GHG permit.

In order for installations B and C to be accepted as new installations under EU ETS, the operators must send to their Competent Authority:

- The documentation listed in paragraph 1 of Article 25;
- The verified new entrant data report relating to its installation. **For installation B (respectively installation C), this report will include activity level and emission data for year 2020 recalculated as if the split had occurred before 2020, to include only data relating to the perimeter of installation B (respectively installation C)**;
- The Monitoring Methodology Plan describing the methodology of how the new entrant data was split between installation B and installation C, as well as the monitoring methodology of future data for installation B (respectively installation C)[12];
- The Verification Report on the new entrant data report relating to its installation.

<u>Example 6</u>: 'Merger' of [incumbent A + non-ETS B]

Installation A is an incumbent installation which started operating before 2014. Installation B is a non ETS installation. Installations A and B are merged in 2022.

This situation is not considered a merger in the context of the EU ETS and the definition of the FAR. This change will be dealt with using the rules on activity level changes.

<u>Example 7</u>: 'Split' of incumbent A into [ETS B + non-ETS B]

Installation A is an incumbent installation which started operating before 2014. This installation is split into installations B and C in 2022. B is covered by its own GHG permit, however C is a non-ETS installation.

This situation is not considered a split in the context of the EU ETS and the definition of the FAR. This change will be dealt with using the rules on activity level changes.

[12] As indicated in section 2.3.2, two versions of the MMP can be submitted if preferred, for better readability.

Annex – considerations on the definition of “site”

The EU ETS Directive refers in several places to "installations". The definition of an **installation** in Article 3(e) of the Directive states that:
‘installation’ means a stationary technical unit where one or more activities listed in Annex I are carried out and any other directly associated activities which have a technical connection with the activities carried out on that site and which could have an effect on emissions and pollution;

In particular when an operator wants to merge installations (e.g. for simplicity of reporting or baseline data collection), the question is raised whether a constellation of production units can be considered one installation. One installation means there must be the possibility to cover it by one permit, which depends on two criteria:

- There must be one operator per installation; and
- The units which should form an installation must belong to one “site”.

The second point is often decided on a case-by-case basis. For example the mere existence of a fence or the ownership of the land by the operator are not sufficiently convincing as site definition. Based on the definition of an installation, the existence of a technical connection between land areas may be an indication that these areas belong to one installation, and hence to one site.

This view was confirmed by the European Court of Justice in case C 158/15. In this case, the court found that a coal storage site situated approximately 800 metres from the power plant, which is separated from it by a public road, should be considered part of the installation due to a clear technical connection (a conveyor belt, without which the installation cannot be operated).

However, it can be assumed that the mere transport of materials between the areas by mobile machinery (truck, train or ship) does not qualify as technical connection, except if the transport would take place on a non-public (not grid-connected) road, railway or waterway, which itself could also be considered part of the installation (in particular if there is evidence that it was built only for the purpose of providing a link between the areas forming a site, without which the installation would not function).

Installations which are not closely connected geographically, which have formerly been operated independently by different operators and did not share any directly associated activities, if acquired by the same operator, will not be in a situation to be considered as merged in the context of the EU ETS. On the other hand, if specific technical connections exist (even if the distance between former installations is long), or if there was already previously a joint installation that was later split, the conditions of a merger could be met.