

COMMISSION DECISION (EU) 2017/126**of 24 January 2017****amending Decision 2013/448/EU as regards the establishment of a uniform cross-sectoral correction factor in accordance with 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 scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC ⁽¹⁾, and in particular Article 10a(5) thereof,Having regard to Commission Decision 2011/278/EU of 27 April 2011 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 ⁽²⁾ and in particular Article 15(3) thereof,

Whereas:

- (1) Article 10a(5) of Directive 2003/87/EC sets a maximum annual amount of allowances constituting the basis for calculating allocations free of charge to installations not covered by Article 10a(3) of Directive 2003/87/EC. This amount is the sum of two elements respectively described in points (a) and (b) of Article 10a(5) of Directive 2003/87/EC.
- (2) In order to ensure that this maximum annual amount of allowances is not exceeded, a cross-sectoral correction factor is applied if necessary, reducing in a uniform manner the allocations for all installations eligible to receive free allowances.
- (3) In accordance with Article 15(3) of Decision 2011/278/EU, the Commission determines the cross-sectoral correction factor by comparing the limit set by Article 10a(5) of Directive 2003/87/EC with the sum of the preliminary total annual amounts of free allocations for all installations covered by Directive 2003/87/EC in the territory of Member States.
- (4) The Commission determined in Decision 2013/448/EU ⁽³⁾ a uniform cross-sectoral correction factor, presented in Article 4 thereof and Annex II thereto.
- (5) The Court of Justice in its judgment of 28 April 2016 regarding the joint cases C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14 found that the Commission, when establishing the maximum annual amount of allowances in accordance with point (b) of Article 10a(5) of Directive 2003/87/EC should not have taken into account emissions resulting from the activities listed in Annex I to Directive 2003/87/EC as from 2013 in so far as those emissions were generated by installations covered by the emissions trading system prior to that date. As a consequence, the Court concluded that the Commission did not determine the maximum annual amount of allowances in accordance with the requirements of point (b) of Article 10a(5) of Directive 2003/87/EC and that the uniform cross-correction factor laid down in Article 4 of, and Annex II to Decision 2013/448/EU was also contrary to that provision. Article 4 of and Annex II to Decision 2013/448/EU were thus invalidated by the Court.
- (6) In order to implement this judgment, the Commission is required to recalculate the maximum annual amount of allowances for installations eligible to receive allocations free of charge with respect to the requirements of point (b) of Article 10a(5) of Directive 2003/87/EC and as a consequence, the uniform cross-sectoral correction factor is to be amended accordingly.

⁽¹⁾ OJ L 275, 25.10.2003, p. 32.

⁽²⁾ OJ L 130, 17.5.2011, p. 1.

⁽³⁾ Commission Decision 2013/448/EU of 5 September 2013 concerning national implementation measures for the transitional free allocation of greenhouse gas emission allowances in accordance with Article 11(3) of Directive 2003/87/EC of the European Parliament and of the Council (OJ L 240, 7.9.2013, p. 27).

- (7) The recalculation of the amount of allowances referred to in Article 10a(5) point (b) of Directive 2003/87/EC was carried out following the same methodology, using the same data as for the initial calculation in 2013. In line with the Court's judgment, whereas the Commission had initially considered emissions generated by installations covered by the EU ETS before 1 January 2013 resulting from the activities listed in Annex I to Directive 2003/87/EC only as from 2013, these had to be removed from the calculation of the maximum annual amount of allowances as defined by Article 10a(5) of Directive 2003/87/EC.
- (8) The Commission used as starting point the initial official submissions from Member States. The Commission then consulted Member States on their submission of emissions data and whenever necessary, requested additional clarifications. In accordance with Article 10a(5), only installations for which verified emissions were submitted by the Member States were taken into account.
- (9) The Commission then removed installations from the calculation where they carried out activities covered by Directive 2003/87/EC only as from 2013 but were already part of the emissions trading system before 2013. Emissions from installations which had been opted-in by Member States in accordance with Article 24 of Directive 2003/87/EC prior to 2013 were removed as well.
- (10) Installations affected between the date of the initial data collection and 2013, either by structural changes such as mergers, splits or closures or by technical changes so that they no longer met the relevant thresholds set out in Annex I to Directive 2003/87/EC were still taken into account in the recalculation exercise as these changes could not have been anticipated at the date of the data collection. Installations excluded from the system pursuant to Article 27 of Directive 2003/87/EC were also taken into account in the recalculation for the same reason.
- (11) Changes correcting mistakes in Member States' National Implementing Measures for the period 2013-2020 and implemented by end 2016 were taken into account in the recalculation exercise, because the correct values should have been in place already at the time of the original calculation of the cross-sectoral correction factor.
- (12) In its judgment of 28 April 2016, the Court explicitly limited the temporal effects of the declaration of invalidity of Article 4 of and Annex II to Decision 2013/448/EU, so that, first, the judgment does not produce effects until 10 months following the date of the delivery of this judgment. The cross-sectoral correction factor laid down in Decision 2013/448/EU is thus invalid as of 1 March 2017. Second, measures adopted until that date on the basis of the invalidated provisions cannot be called into question.
- (13) In accordance with the judgment of the Court stressing the overriding considerations of legal certainty, measures by Member States on allocations of allowances for the period 2013-2020 and any subsequent changes and additions to these taken until the entry into force of this decision remain valid. The cross-sectoral correction factor determined in this Decision is to be applied in decisions adopted as of 1 March 2017 creating or modifying allocation entitlements and involving for their determination the application of the cross-sectoral correction factor,

HAS ADOPTED THIS DECISION:

Article 1

Decision 2013/448/EU is hereby amended as follows:

1. Article 4 shall be replaced by the following:

'Article 4

The uniform cross-sectoral correction factor referred to in Article 10a(5) of Directive 2003/87/EC and determined in accordance with Article 15(3) of Decision 2011/278/EU is set out in Annex II to this Decision.'

2. Annex II shall be replaced by the text appearing in the Annex to this Decision.

Article 2

This Decision shall enter into force on 1 March 2017.

Done at Brussels, 24 January 2017.

For the Commission
The President
Jean-Claude JUNCKER

ANNEX

Annex II to Decision 2013/448/EU shall be replaced by the following:

‘ANNEX II

The cross-sectoral correction factor values applying to allocations free of charge to installations not covered by Article 10a(3) of Directive 2003/87/EC for the years 2013-2020 are the following:

Year	Cross-sectoral correction factor
2013	89,207101 %
2014	87,657727 %
2015	86,090119 %
2016	84,506152 %
2017	82,905108 %
2018	81,288476 %
2019	79,651677 %
2020	78,009186 %