

## **Introductory note by the Executive Body Bureau**

In the 4<sup>th</sup> joint WGE-EMEP meeting, September 2018 in Geneva, a question of general interest was raised in connection with the presentation of the results of the review of the 2017 inventory adjustment applications. The EMEP Steering Body acknowledged that there could be a legal ambiguity regarding the interpretation of the Executive Body decisions 2012/3, 2012/12 and 2014/1 providing guidance on inventory adjustment applications. It was decided to bring the issue to the attention of the Executive Body for further discussion.

The Executive Body discussed the matter at its 38th session in December 2018. It requested the ad hoc group of legal experts to clarify whether *the phrase “the emission factor or methodology used for determining emissions from this source category at the time that the emission reduction commitment was set” in paragraph 2 bis (b) as inserted by decision 2014/1 amending decision 2012/12, implies that, where the EMEP/EEA air pollutant emission inventory guidebook is used, the 1999 (or 1996) version of this Guidebook should be used for the assessment of an adjustment.*

The legal ad hoc group was asked to report back to EB39. Subsequently the Executive Body Bureau also asked the legal ad hoc group to, in addition to the reporting back to the EB39, compile their conclusions in a written note to the Bureau.

In response to this request, the attached note was sent to the Executive Body Bureau in September 2019 and is now made available to all parties for information purposes.

In the meantime, the situation has evolved. With the recent entry into force of the amended Gothenburg Protocol moving from fixed emission ceilings for 2010 to commitments for 2020 and onwards expressed as percentage reductions from 2005 levels, the need for inventory adjustments is expected to decrease for parties that have ratified the amended Protocol.

In addition, EB39 will consider a draft decision on the review of compliance of Parties to the Gothenburg Protocol which could facilitate resolution of the issue. The draft decision (document ECE/EB.AIR/2019/10) requests the Implementation Committee to cease reviewing compliance with 2010 ceilings for Parties who have accepted the amended Protocol.

This matter and the way forward in the new context of the amended Protocol now in force will be further discussed during EB39.

## Convention on Long-range Transboundary Air Pollution: Gothenburg Protocol

### Note of Legal Advice on the wording of paragraph 2 bis (b) of decision 2012/12

**From:** Ad Hoc Legal group members; Katharina Isepp (Austria); Wendy Altobello (Belgium); Johan Lindh (Sweden); Elizabeth Morrow (UK); Andrew Neustaetter (US).

**To:** Executive Body

**Date:** October 28, 2019 [*The content of this Note is identical to the draft Note emailed to the Secretariat on September 9, 2019.*]

1. This Note is a response to the following request recorded in the summary of the 2018 meeting of the Executive Body:
  - i. 18. The Executive Body:
    - (b) [...]
    - (c) Requested the ad hoc group of legal experts to clarify whether the phrase “the emission factor or methodology used for determining emissions from this source category at the time that the emission reduction commitment was set” in paragraph 2 bis (b) as inserted by decision 2014/1 amending decision 2012/12, implies that, where the EMEP/EEA air pollutant emission inventory guidebook is used, the 1999 (or 1996) version of this Guidebook should be used for the assessment of an adjustment;
2. The ad hoc legal experts group considered the request but did not reach a consensus view.
3. The majority of the ad hoc legal group concluded: In the case where a Party is seeking an adjustment in the circumstances described in paragraph 6 of Decision 2012/3, the proposed adjustment should be assessed by reference to the emission factor or methodology that was, in fact, used in setting the Party’s original emission reduction commitment.
4. One member of the ad hoc legal group expressed a different view and concluded: In the case where a Party is seeking an adjustment in the circumstances described in paragraph 6 of Decision 2012/3, the proposed adjustment should be assessed by reference to, at least, the 1996 version of the EMEP/EEA air pollutant emission inventory guidebook.
5. The reasoning for each of these views is set out below.
6. To the extent that there are continuing differences of views amongst Parties about the application of prior decisions on the adjustment procedure, the Executive Body may wish to consider whether further clarifications are warranted to provide clarity going forward.

#### BACKGROUND

7. Article 3 of the Gothenburg Protocol (the Protocol) provides that a Party must comply with the emission reduction commitment in Annex II. Annex II, Table 1, sets an emission ceiling (expressed in thousands of tonnes per year) for each of the years 2010 to 2020.

8. The emission ceilings were set in 1999, and based on emissions levels for 1990 as estimated at the time.
9. Article 13(2) of the Protocol, as added through an amendment in 2012 and provisionally applied, provides that a party may propose an adjustment of its emission reduction commitments already listed in Annex II. Adjustments are reviewed as specified in a decision of the Executive Body, and are adopted by consensus of the Parties. The present question relates to a proposal to adjust a Party's emission reduction commitment.
10. Article 13 was amended by Decision 2012/2<sup>1</sup>. Prior to the 2012 amendment, the Protocol did not provide for Parties to propose adjustments to emissions reduction commitments already listed in Annex II (other than through a proposal to amend the text of Annex II in accordance with the amendment procedures).<sup>2</sup> Article 13(2) in the 2012 amendment was provisionally applied in 2012,<sup>3</sup> and will enter into force for those Parties that have ratified it on October 7, 2019, following ratification by a two-third majority of the Parties in accordance with Article 13 of the Protocol.
11. The Protocol itself does not contain criteria for reviewing adjustments, but specifies that adjustments shall be reviewed as specified in a decision of the Executive Body. The Executive Body has accordingly developed criteria for review by a series of decisions. Decision 2012/3<sup>4</sup> sets out the circumstances in which an adjustment is applicable – see paragraph 6:

*Decides* that the circumstances under which such an adjustment under paragraph 2 or 3 could be applied are extraordinary and fall into three broad categories where:

- (a) Emission source categories are identified that were not accounted for at the time when emission reduction commitments were set;
- (b) Emission factors used to determine emissions levels for particular source categories for the year in which emissions reduction commitments are to be attained are significantly different than the emission factors applied to these categories when emission reduction commitments were set; or
- (c) The methodologies used for determining emissions from specific source categories have undergone significant changes between the time when emission reduction commitments were set and the year they are to be attained;

12. By Decision 2012/12<sup>5</sup>, the EB adopted Guidance for adjustments (the 2012 Guidance for adjustments). Paragraphs 2(d)(ii) and (iii) of the 2012 Guidance (which are relevant provisions in the present case) provide:

A Party's supporting documentation for an adjustment to its emission inventory or emission reduction commitments shall include:

- (a) [...]

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<sup>1</sup>[https://www.unece.org/fileadmin/DAM/env/documents/2013/air/ECE\\_EB.AIR\\_111\\_Add.1\\_\\_ENG\\_DECISION\\_2.pdf](https://www.unece.org/fileadmin/DAM/env/documents/2013/air/ECE_EB.AIR_111_Add.1__ENG_DECISION_2.pdf)

<sup>2</sup> Original Protocol available here: [https://treaties.un.org/doc/Treaties/1999/11/19991130%2004-16%20PM/Ch\\_XXVII\\_01\\_hp.pdf](https://treaties.un.org/doc/Treaties/1999/11/19991130%2004-16%20PM/Ch_XXVII_01_hp.pdf)

<sup>3</sup>[https://www.unece.org/fileadmin/DAM/env/documents/2013/air/ECE\\_EB.AIR\\_111\\_Add.1\\_\\_ENG\\_DECISION\\_4.pdf](https://www.unece.org/fileadmin/DAM/env/documents/2013/air/ECE_EB.AIR_111_Add.1__ENG_DECISION_4.pdf)

<sup>4</sup>[https://www.unece.org/fileadmin/DAM/env/documents/2013/air/ECE\\_EB.AIR\\_111\\_Add.1\\_\\_ENG\\_DECISION\\_3.pdf](https://www.unece.org/fileadmin/DAM/env/documents/2013/air/ECE_EB.AIR_111_Add.1__ENG_DECISION_3.pdf)

<sup>5</sup>[https://www.unece.org/fileadmin/DAM/env/documents/2012/EB/Decision\\_2012\\_12.pdf](https://www.unece.org/fileadmin/DAM/env/documents/2012/EB/Decision_2012_12.pdf)

(d) A full demonstration that the adjustment is consistent with one or more of the three circumstances listed in paragraph 6 of decisions 2012/3, with supporting evidence provided as follows [...]

(ii) For significantly different emission factors used for determining emissions from specific source categories:

(a) A description of the original emission factors, including a detailed description of the scientific basis upon which the emission factor was derived;

(b) Evidence that the original emission factors were used for determining the emission reductions at the time when they were set;

[...]

(iii) For significantly different methodologies used for determining emissions from specific source categories:

(a) A description of the original methodology used, including detailed information on the scientific basis upon which the emission factor was derived;

(b) Evidence that the original methodology was used for determining the emission reductions at the time when they were set;

[...]

13. By Decision 2014/1<sup>6</sup>, the EB amended the 2012 Guidance for adjustments – including the new paragraph 2 bis (2) which is the text about which the Executive Body requested clarification from the ad hoc group of legal experts:

2 bis. For the purpose of demonstrating that the proposed adjustment falls within one of the three categories ((i)-(iii)) set out in paragraph 2(d) above, the following guidelines apply:

(a) [...]

(b) An emission factor or methodology for determining emissions from a specific emission source category will only be assessed as significantly different from the emission factor or methodology used for determining emissions from this source category at the time that the emission reduction commitment was set if the change in the emission factor or methodology is the result of improved scientific understanding of the source since the emission reduction commitment was set and has resulted in a revision of the *EMEP/EEA air pollutant emission inventory guidebook* or the applied country-specific emission factor or methodology.

#### **LEGAL ANALYSIS: majority view**

14. Our understanding is that EB is querying how to assess whether a proposed adjustment should be approved on the basis that it falls within the following categories identified in paragraph 6 of decision 2012/3:

(b) Emission factors used to determine emissions levels for particular source categories for the year in which emissions reduction commitments are to be attained are significantly different than the emission factors applied to these categories when emission reduction commitments were set; or

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<sup>6</sup>[https://www.unece.org/fileadmin/DAM/env/documents/2014/AIR/EB/Decision\\_2014\\_1.pdf](https://www.unece.org/fileadmin/DAM/env/documents/2014/AIR/EB/Decision_2014_1.pdf)

(c) The methodologies used for determining emissions from specific source categories have undergone significant changes between the time when emission reduction commitments were set and the year they are to be attained;

15. Paragraph 2 bis (b) of the Guidance for the application of adjustments to emission inventories and to emission reduction commitments does not expressly (i.e. on the face of the text) specify that particular guidance should have been used to determine emissions at ‘the time that the emission reduction commitment was set’. Paragraph 2 bis (b) refers only to the emission factor or methodology that was, in fact, used.
16. The plain meaning of the text in paragraph 2 bis (b) is further supported by looking at the context of the adjustment process overall and the documentary evidence that a party must submit. At paragraph 12 above, we refer to the 2012 Guidance for adjustments, and the part of that guidance that describes the supporting documentation to be submitted by a Party seeking an adjustment on grounds of a significant change in emission factor or methodology (paragraph 2.ii and iii). This part of the guidance refers only to ‘the original emission factor’ or ‘the original methodology used’, respectively, and does not suggest that the emission factor or methodology must have been drawn from any particular version of the Emissions Inventory Guidebook. This further confirms that the inquiry for considering adjustments is based on the actual emissions factor or methodology that the party used when the commitment was set.
17. For the reasons outlined above, we consider that the adjustment should be assessed by reference to the emission factor or methodology that was actually used to produce the data that was, in turn, used to set the emission reduction commitment.

#### **LEGAL ANALYSIS: minority view**

18. Just like the majority, my understanding is that the EB is querying how to assess whether a proposed adjustment should be approved on the basis that it falls within the following categories:
  - (b) Emission factors used to determine emissions levels for particular source categories for the year in which emissions reduction commitments are to be attained are significantly different than the emission factors applied to these categories when emission reduction commitments were set; or
  - (c) The methodologies used for determining emissions from specific source categories have undergone significant changes between the time when emission reduction commitments were set and the year they are to be attained;

In Paragraph 2 bis (b) of the Guidance for the application of adjustments to emission inventories it was clarified what is meant by the term “significantly different”.

An emission factor or methodology for determining emissions from a specific emission source category will only be assessed as significantly different from the emission factor or methodology used for determining emissions from this source category at the time that the emission reduction commitment was set if the change in the emission factor or methodology is the result of improved scientific understanding of the source since the emission reduction commitment was set and

has resulted in a revision of the *EMEP/EEA air pollutant emission inventory guidebook* or the applied country-specific emission factor or methodology.

If the essence of this provision would be set into categories a and b this would be the result.

(b) Emission factors used to determine emissions levels for particular source categories for the year in which emissions reduction commitments are to be attained are significantly different (*i.e. the change in the emission factor or methodology is the result of improved scientific understanding of the source since the emission reduction commitment was set and has resulted in a revision of the *EMEP/EEA air pollutant emission inventory guidebook* or the applied country-specific emission factor or methodology.*) than the emission factors applied to these categories when emission reduction commitments were set; or

(c) The methodologies used for determining emissions from specific source categories have undergone significant changes different (*i.e. if the change in the emission factor or methodology is the result of improved scientific understanding of the source since the emission reduction commitment was set and has resulted in a revision of the *EMEP/EEA air pollutant emission inventory guidebook* or the applied country-specific emission factor or methodology.*) between the time when emission reduction commitments were set and the year they are to be attained;

Seen like this it seems obvious that with Paragraph 2 bis (b) of the Guidance for the application of adjustments to emission inventories could never been interpreted taken out of its context, but must be read together with the provisions that it should clarify.

19. Further, I consider such an interpretation to be in line with the general rules for interpretation of treaties in the Vienna convention<sup>7</sup>. According to article 31 of this convention *a treaty should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and its purpose. Together with the context any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions should also be taken into account. This means that a certain provision of a Convention should never be interpreted taken out of its context. Additionally, the overall objectives of the LRTAP Convention should always be the basis out of which the Convention, its Protocols as well of its amendments shall be interpreted.*
20. Emission reduction commitments were originally set in 1999, at a time when the EB had decided<sup>8</sup> that the Parties to the Convention should make use of the EMEP/CORINAIR Atmospheric Emission Inventory Guidebook when reporting emission data. The further decisions by the EB must thus be interpreted against this decision. In this particular case such an interpretation gives at hand that paragraph 2 bis (2) of the Guidance implies that adjustments are to be based on the assumption that a Party used the EMEP/CORINAIR Atmospheric Emission Inventory Guidebook (First Edition, published 1996 – or possibly the Second Edition, published 1999) to produce the data on which that Party's emission reduction commitment was set. Accordingly, if there have been no significant change as between the methodology

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<sup>7</sup> Vienna Convention on the law of treaties (with annex). Concluded at Vienna on 23 May 1969

<sup>8</sup> ECE/EB.AIR/49

specified in the 1996 (1999) Edition of the Emission Inventory Guidebook, and the methodology specified in the current edition of that Guidebook, then there can be no case for an adjustment.

21. To my understanding it is not clear whether or not the 1999 guidebook was decided and valid at the time when the emission reduction commitments were set. The answer to the request by the EB is thus the following: In the case where a Party is seeking an adjustment in the circumstances described in paragraph 6 of Decision 2012/3, the proposed adjustment should be assessed by reference to, at least, the 1996 version of the EMEP/EEA air pollutant emission inventory guidebook.

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