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General Secretariat

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**Brussels, 20 April 2022**

**WK 5645/2022 INIT**

**LIMITE**

**CLIMA**

**ENV**

**ENER**

**TRANS**

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## **CONTRIBUTION**

From:	General Secretariat of the Council
To:	Working Party on the Environment
N° prev. doc.:	WK 5269/2022 + COR1
Subject:	Fit for 55 package - ETS revision: Follow-up to the WPE meeting on 8 April 2022 - Comments from a delegation

Following the call for comments set out in WK 5269/2022 + COR1, delegations will find attached comments from the DE delegation.

## Germany

### **Comments on the proposal for a directive amending the EU ETS Directive (2003/87/EC)**

#### **On clusters 5 and 8: Free allocation and carbon leakage; miscellaneous**

The following written comments concern specific technical questions, for which DE can already send a written proposal. DE wants to emphasize, however, that the discussion of free allocation in relationship with CBAM must not be considered closed with these comments. A thorough discussion, particularly on the topic of phase-out of free allocation, should be held with sufficient notice and prior planning.

#### **Art. 10a(1.3): Conditionality of free allocation**

DE is still in favour of making free allocation subject to conditions for at least 25% of the total amount of free allocation, including as a condition the implementation of economic energy efficiency measures. DE also considers proposals to make free allocation subject to the establishment of climate neutrality plans for large emitters. Regarding the economics of energy efficiency measures, DE supports the use of the “net present value method”.

#### **DE proposal to change COM proposal**

**Art. 10a, para 1, sub-para 3:** *In the case of installations covered by the obligation to conduct an energy audit under Article 8(4) of Directive 2012/27/EU of the European Parliament and of the Council<sup>(2)</sup> [Article reference to be updated with the revised Directive], free allocation shall only be granted fully if the recommendations of the audit report are implemented, to the extent that ~~the pay-back time for the relevant investments does not exceed five years and that the costs of those investments are proportionate~~ **relevant investment has a positive net present value calculated on the basis of the intended economic lifetime of the investment**. Otherwise, the amount of free allocation shall be reduced by 25 %. The amount of free allocation shall not be reduced if an operator demonstrates that it has implemented other measures which lead to greenhouse gas emission reductions equivalent to those recommended by the audit report. The measures referred to in the first subparagraph shall be adjusted accordingly.*

#### **Justification:**

The economics of energy efficiency measures should be assessed based on the most robust methods available.

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<sup>[2]</sup> Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC (OJ L 315, 14.11.2012, p. 1).

**Art. 10a, para 2, sub-para 3, points c and d: Calculation of the annual reduction rate for the benchmark values and less strong limitation of the maximum annual reduction rate**

DE supports the increase of the maximum annual reduction rate to 2,5% in Art. 10a, para 2, sub-para 3, point d provided that abrupt and disproportional updates of benchmark values are prevented, e.g. by adjustments to Art. 10a, para 2, sub-para 3, point c.

**DE proposal to change COM proposal**

**Art. 10a, para 2, sub-para 3, point c:** *For the period from 2026 to 2030, the benchmark values shall be determined in the same manner as set out in points (a) and (d) on the basis of information submitted pursuant to Article 11 for the years 2021 and 2022, excluding from the determination of the benchmark values data of the three least emission-intensive installations that either started operating after 2017 or received free allocation based on another benchmark, and on the basis of applying the annual reduction rate in respect of each year between 2008 and 2028.*

**Justification:**

The industrial transformation towards climate neutrality requires investment in new technologies. In their early deployment stages, such investments often receive financial aid and cannot be commercially replicated at scale. Particularly in sectors with a limited total number of installations in the EU, single installations deploying new technologies may disproportionately affect the updating of benchmarks for free allocation. This risk should be prevented by adjusting the methodology for the update of benchmarks in an administratively easy and targeted manner.

**Art. 10a, para 2, sub-para 4: Abolishing the harmonization of the benchmark update for hydrogen and syngas with the benchmark for refineries**

DE supports the COM proposal. Besides, DE is in favour of also deleting the term “syngas” and to address associated issues of harmonization in the benchmark review.

**COM proposal:**

**Art. 10a, para 2, sub-para 4:** *By way of derogation regarding the benchmark values for aromatics, ~~hydrogen~~ and syngas, these benchmark values shall be adjusted by the same percentage as the refineries benchmarks in order to preserve a level playing field for producers of those products.*

**DE Proposal:**

**Art. 10a, para 2, sub-para 4:** *By way of derogation ~~regarding~~ the benchmark values for aromatics, ~~hydrogen and syngas~~, ~~these benchmark values~~ shall be adjusted by the same percentage as the refineries benchmarks in order to preserve a level playing field for producers of those products.*

**Justification:**

Ensure harmonized allocation across chemical and petrochemical installations.

## **Annex I: Definition of activities of installations to which the directive applies**

DE supports the changes in the definition of activities of installations with the exception of the change to the definition of carbon black.

### **Justification:**

The change to the definition of carbon black implies that installations that are currently covered by the ETS, will not be covered anymore in the future.

## **Annex I: 95% biomass threshold**

### **PRES-proposal to change COM proposal**

**Annex I (1):** *Installations or parts of installations used for research, development and testing of new products and processes ~~and are not covered by this Directive.~~ **Installations or parts of installations** where emissions from the combustion of biomass that complies with the criteria set out pursuant to Article 14 contribute to more than 95% of the total greenhouse gas emissions **during the preceding relevant five year period referred to in Article 11(1), second subparagraph,** are not covered by this Directive.*

DE considers the amendment suggested by the presidency as an improvement to the Commission proposal. It provides for a clear cut and avoids continued changes year-on-year in the coverage of installations by the EU ETS.

However, the following problems remain:

- 1) Installations excluded from the EU ETS due to their high use of biomass could increase their use of fossil fuels in the period 2026-2030 without being subject to MRV-requirements nor to compliance obligations.
- 2) Compliance with the sustainability criteria for biomass cannot be ensured for excluded installations as they are not subject to monitoring obligations anymore.
- 3) Contrary to the expectation of the Commission, DE doubts that overallocation to installations using biomass and the risk of a CSCF can be effectively reduced. The reason is that installations can avoid being excluded as the relevant period suggested by the presidency (2019-2023) is ongoing and the use of biomass can still be reduced. By doing so installations would continue to receive free allocation for 2026-2030.

DE therefore suggests the following amendments:

### **DE proposal on full coverage of installations using biomass**

**Annex I (1):** *Installations or parts of installations used for research, development and testing of new products and processes ~~and are not covered by this Directive.~~ ~~Installations or parts of installations where emissions from the combustion of biomass that complies with the criteria set out pursuant to Article 14 contribute to more than 95% of the total greenhouse gas emissions during the preceding relevant five year period referred to in Article 11(1), second subparagraph,~~ are not covered by this Directive.*

#### Rationale:

All installations carrying out ETS-activities ("combustion of fuels") should be subject to MRV-requirements and compliance obligations. This ensures the application of the new sustainability (and greenhouse gas saving criteria) for solid and gaseous biomass. For that reason, even installations using 100% biomass should be included in the EU ETS.

#### DE proposal on limitation of biomass-allocation

**Art. 10a (3) – new: By way of derogation from paragraph 2 the benchmark value for installations with large shares of biomass in total fuel consumption and with a specific emission factor on sub-installation level, calculated on the basis of the information submitted pursuant to Article 11, that is lower than the regular benchmark value, shall be adequately reduced based on the share of biomass in total fuel consumption. This reduction should be applied to transfers of heat accordingly.**

#### Rationale:

The main reason for granting free allocation is to avoid carbon leakage. The use of sustainable biomass fuels is currently privileged by the application of the emission factor Zero. These biogenic CO<sub>2</sub> emissions are not subject to the obligation to surrender allowances and therefore not subject to the CO<sub>2</sub> price of the EU ETS. Hence, there is no reasonable justification for carbon leakage concerns. From our perspective, it would even be appropriate to grant no allocation at all for the use of fuels which are not subject to a CO<sub>2</sub> price.

The proposed limitation does not jeopardize the use of sustainable biomass. Consistent incentives for improving GHG efficiencies are maintained, but incentives for doing so by the use of "sustainable biomass" are reduced in intensity. Using sustainable biomass fuels remains advantageous for the installations concerned: They benefit from the compliance privilege and a free, but limited allocation. The degree to which allocation is reduced can and should be decided in amendments to implementing legislation.

The proposed limitation also avoids uncertainties and disadvantages caused by applying a fixed threshold. Setting a hard threshold of relevant biomass use (95/100 %) leads to full (over-)allocation up to the threshold and no free allocation beyond.

Finally, the proposed limitation of free allocation is a robust way to reduce the risk of a CSCF by an amount corresponding to the over-allocation to biomass-installations as it cannot be circumvented.

#### DE proposal on ending free allocation for the oxidation of sulphur

**Art. 10a (4) – new: No free allocation shall be given for heat generated by the oxidation of sulphur or sulphurous compounds in the production of sulphuric acid or the processing of sulphide ore.**

#### Rationale:

We refer to our remarks regarding the proposal of a new Art. 10a (3). Fuels that do not lead to CO<sub>2</sub> emissions are not subject to the CO<sub>2</sub> price at all. There is no reason for granting a free allocation.