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EUA DEC14 01.01.2014 to 07.03.2014 Source: ECX London

Emission News 03-2014

Practical Information for Emission Trading
Edition 10.03.2014

Opposition period for the allocation notices - Reasons for objection and Opportunities because of technical installation features

The 2014 issuance of the allocation notices commenced on the 17. February 2014 was completed by the DEHSt on 28th, February. Starting from the point of receipt of the VPS message, the 1- month period for a possible objection begins for each operator. Because of the simultaneously performed account allocations for the years 2013 and 2014 many operators only realized now how much impact the general correction factor has and what other reductions for individual technical features of the system were listed in the allocation notice.

The challenge now is to decide whether an objection is to be lodged within the prescribed period and what reason for this the operators could present. In addition some companies will now have to deal with the question in what form technical characteristics of the installation can be mapped in a revised or new deputy of allocation request to get more free allocations.

Some of these options show on our **Emission News 03-2014**, which also will address problems regarding the allocation in Poland, which is likely to have a higher impact on the price trend.

The legal position to apply for the free emission allowances

According to the relevant EU laws and national laws allocation European operators receive only partly free allowances allocated by their competent authorities in the 3rd trading period 2013-2020.

Another part will be auctioned with costs in the sale and can be purchased at places for auctions in Leipzig and London at up to 5 appointments per week.

To receive free allocation for a facility, the corresponding company has to provide an allocation request for the trading period 2013-2020 in time which had to be correct, complete, transparent and consistent. If one of these 5 criteria has not been met, serious economic disadvantages for the company could occur, since no or only a reduced free allocation was made and this may be an existential threat to the company. However, serious economic disadvantages could also occur if the aforementioned criteria were indeed met, but others were added by the operator with almost no or little influencing factors and are now leading to an unsatisfactory regulatory decision, against which one could appeal within a period.

The timing and way of objection

In contrast to the second 2008-2012 trading period in which the national authority was involved in the allocation process exclusively, for the 3rd trading period the essential role will be played by the European Commission. This controls the proposals of the individual allocations to the plant operators by the respective national authorities. This review has taken a longer period and was completed in the autumn of 2013 for almost all countries in the EU-ETS.



Germany then got its mainly approved proposal with its NIM-decision on 05.09.2013, but had to make the Commission's statement in the allocation of iron foundries and the inclusion of specialty chemical plants corrections in the plan. Likewise, the project had to be corrected, that plant who would have taken a national hardship in a scheme would get a national equalization.

The then corrected allocation table NAT (National Allocation Table) was again passed by a review of the Commission for approval. The approval for Germany was announced in mid-February, as well as previous ones by other countries in the EU-ETS.

Member State	Number of Free Allowances in millions	Base National Allocation Table; Submission Date**	Reported changes for 2013 Allocation; Submission Date***	European Commission Decision Date	Allocation Date****
Austria	22.75	5 November 2013	18 November 2013	18 December 2013	19 December 2013
Belgium	39.42	19 December 2013	19 December 2013		
Bulgaria	11.30	11 December 2013			
Croatia	5.56	20 January 2014			
Cyprus	0.94				
Czech Republic	25.74	29 October 2013	10 December 2013	17 January 2014	18 January 2014
Denmark	12.38	14 October 2013	13 December 2013	17 January 2014	18 January 2014
Estonia	3.10	7 January 2014	13 January 2014		
Finland	24.12	27 January 2014	27 January 2014		
France	88.37	12 December 2013	20 December 2013	17 January 2014	18 January 2014
Germany	172.77	19 December 2013	20 January 2014		
Greece	16.16	12 November 2013	29 November 2013	18 December 2013	19 December 2013
Hungary	12.55	10 December 2013	10 December 2013	17 January 2014	18 January 2014
Ireland	5.58	11 November 2013	13 November 2013	18 December 2013	19 December 2013
Italy	90.00	20 December 2013			
Latvia	2.86	1 November 2013	2 December 2013	18 December 2013	19 December 2013
Lithuania	6.53	24 October 2013	6 December 2013	17 January 2014	18 January 2014
Luxembourg	1.38	9 January 2014	9 January 2014		
Mallia	0	-	-	-	-
Netherlands	50.38	6 November 2013	20 November 2013	18 December 2013	19 December 2013
Poland	64.63				
Portugal	12.11	8 November 2013	25 November 2013	18 December 2013	19 December 2013
Romania	29.49	21 December 2013	20 January 2014		
Slovakia	17.08	24 October 2013	5 December 2013	17 January 2014	18 January 2014
Slovenia	2.77	3 December 2013	27 December 2013		
Spain	70.68	12 December 2013	27 January 2014		
Sweden	28.92	22 November 2013	5 December 2013	18 December 2013	19 December 2013
United Kingdom	68.97	22 October 2013	27 November 2013	18 December 2013	19 December 2013

Overview of the state of the national allocations

Source: EU http://ec.europa.eu/clima/policies/ets/cap/allocation/docs/process_overview_nat_en.pdf

Until the 26.02.2014 the final approval of all further open NAT-tables from 13 countries followed, so that including the problem candidate Poland the job was done from the EU Commission's perspective.

The corresponding physical allocations to the accounts tab of the plant operators were made in Germany starting on 17.02.2014 with the allocation in 2013 and ended on 28.02.2014 with the full output of the allocation in 2014. In parallel, the operators of the allocation notice has been sent via the VPS of DEHSt, according to its respective input the appeal period began to run. Thus, almost all relevant states in the EU - except Poland - its operators issued the free allocation. On the problem case Poland and the potential impact on the EUA-price, see section at the end of the issue the letter.

Objection periods and legal ways

If a company is of the opinion that it would have received too little free allocation for the period 2013-2020, it can file an contradicton against this in its national authority DEHSt within a period of one month after receipt of the notice. The prescribed way of Objection is to be proposed through the VPS (Virtuelle Post Stelle - Virtual Post Office) as a formal notification to the authorities. Whether one wants to use a lawyer's help at this stage already is each operators own decision. However, it is known that an operator has more time to come up with a reason why he is making a Objection. Whether he should consult a legal expert for advice for drafting submitted justification depends on the situation.

If at a later date the national authority refuses the proposed contradicton (an unfavorable appeal decision), the operator has the possibility to bring an action against it at the Administrative Court in Berlin.

However, any potential applicants should be aware that he does not take action against a decision which is based on national rules only. Rather it's based on the allocation rules which are based on uniform and harmonized rules in all participating nations of the EU ETS in the 3rd Trading period and therefore the assessment of the objection may ultimately be a decision of the EuGH (European Court). A corresponding length of the proceedings, specialized lawyers and higher costs would then be the result.

The reasons for objection

Plant operators wishing to submit an opposition against a decision, however, should think twice against what they actually want to raise objections. These can be the possible reasons roughly divided into 4 categories:

- because of the amount of the applied correction factor
- due to the non-consideration of a hardship case
- because of a failure to take account for carbon leakage
- due to various reasons that are in the technical area of the plant

Depending on what reasons a Objection should be based a plant operator should select its legal counsel or take specialized consultants to help.



Objection because of the correction factor/factor reduction

The on the free allocation for all operators applied reduction factor amounting to an average of 11.5 % results to a reduction of 5.7 % starting in 2013 and increasing to 17.6 % until 2020.

The basic idea was that the overall EU budget should be safely maintained and sufficient quantities applied for all installations. Whether the reduction factor has been overestimated and how this has ever been charged, currently remains largely in the dark.

According to some law chambers, it is realistic to achieve a reduction of the factor by the courts, if the calculation mode is attacked itself and reserves that may have formed are presented. For this course, the basis of calculation and the relevant data must be known, which are requested by the companies concerned in Brussels. How and with what methods and on which bases the reduction factor emerged will certainly be the major topic of debate in the coming years.

It at least seems that between the EU-Commission and the lobbying industry associations a consensus exists that a subsequent correction mechanism is missing which allows the determination of the certificates ceiling for the industry and the relevant amount of the reduction of coefficient certificates. Such kind of concessions suggest that it could be decided in a possible test case to the EuGH that the factor must be recalculated and then be redefined.

Whether then decisions which have become res judicata nationally (by "non - Objection") will also be amended in a positive sense by the relevant national authority is to be considerably doubted.

As court proceedings are already pending in the Netherlands, who have the reduction factor as their target, one must assume that it is in everyone's interest to a test case in Luxembourg according to the result, then the national authorities will judge. In this respect, one would have to recommend any operator to insert a suitable Objection.

Objection due to non-recognition of the hardship provision

Some German companies had argued hardship according to the national rules against the EU-Commission, which in individual cases where necessary purchases of high quantities of

certificates occurred would lead to unreasonable and livelihood risk loads.

After the non-recognition of national hardship possibility the requesting operators have filed lawsuits. The EU-Commission now fears a distortion of competition in a total of six German operators. Since the lawsuits were allowed, the Commission is now confronted with the exchange of factual arguments. However, it has already signaled that it would be acceptable in the interest of a uniform EU-wide regulation without hardship provision if individual firms therefore would have to cease production.

Infobox

Agreement in the emissions trading of air transport for 2013-2016

The EU Commission agreed on 4. March 2014 on a revised plan for emissions trading of aircraft which is intended to provide planning certainty until 2016.

According to this plan emissions trading will initially be implemented according to a preliminary agreement between the European Parliament members and the EU-Member-States only in stripped down form, starting 2017 on a larger scale. The agreement must be approved by the Plenum of Parliament and the Environment Committee and also the Member States.

According to this new proposal, it is clear that initially only intra-European flights are accounted for emissions trading. The previous plan had provided that all flights that take off or land, including intercontinental flights in the EU, are concerned. Also a previous smaller version is now off the table, the intercontinental flights should include on EU territory in emissions trading.

The original plan in which the entire intercontinental routes will be included in emissions trading will then be applied starting 2017. Alternatively provides the compromise that there is a global agreement on climate protection in aviation with ICAO (International Civil Aviation Organization) and thus its own climate agreement regulates international air traffic.

Objection because of a failure to take account for carbon leakage

To be considered for carbon leakage an industrial company with its products had to present the corresponding NACE code which was listed on the lists of the EU. Only through these respective codes the operator could avoid a melting of its free allocation. If the operator produced products on his premises which were not found on the list of carbon leakage risk for industries and products, then he had to resign in the application of its free



allocation. If products due to their NACE affiliation and prodcomnumber were not carbon leakage capable, but came very close (such as competitors' products) then in individual cases in the application process the prodcomnumber could be changed so that the product was capable of carbon leakage. Plant operators that hadn't taken this complex approach at the time could make another attempt now by way of the opposition proceedings, as this would indeed provide an enormous additional potential of free allowances in case of success. Such an approach is particularly promising when the product spectrum has shifted so that a CL-enabled product now dominates.

Objection or new application because of various reasons that are in the technical area of the plant

Based upon experiences of Emissionshändler.com® low allocations that have technical reasons in many cases are a lack of efficiency and therefore are based on a failure to achieve a given **benchmark value** or to **missing data** or to increase of the production since 01.07.2011, so they were not considered in the messages for operation (MzB).

Inefficiency and benchmark values

The EU-wide prescribed benchmark values (energy consumption per quantity of product) are based on empirical values which were measured on modern systems. Therefore it may also be that for a specific company the low allocation is due to outdated production methods that require a high and specific energy consumption. In such cases a match between allocation and demand for emission rights can only be achieved through modernization of production processes. This should always be preceded by a detailed study in which the possibilities of upgrading a thorough cost-benefit-analysis are carried out. On the basis of a list of priorities for actions to be taken is then created.

Missing data and non-optimal allocation applications

While in a not so efficient plant when applying to 3rd trading period usually not enough free allocation could be achieved this is at a plant in which the application procedure were missing data not the case.

Legally the amount of a grant is calculated on the 3rd HP on the basis of the reported activity levels of a company. These are either measured (for example) steam flow measurement and vapor state measurement or calculated from the heat value of the fuel burned based on a utilization ratio. A too low value used here will result in a too low allocation.

The determined activity rate is - if it is not measured directly as steam power - a back calculation from the fuel heat, lowered by the boiler efficiency. If this activity rate specified is too small it will reduce the allocation. The in the emissions report determined CO₂-tax (which then also returns the amount of emission rights equivalent) is not thereby reduced, since it does not matter in the calculation of the efficiency. A too low specified activity rate inevitably leads therefore to a shortfall of emission rights. The in the law prescribed emission report in which the emission amount is reported is based on the amount of unburned fuel and multiplies this by the specific emissions of the fuels. The determined amount of CO₂ is as it were an "objective" amount, which largely is also understandable by the calculations of the fuel supplier.

Example calculation of the effects of missing data in the application process

The classic situation for this example is that a company operates a natural gas -fired steam boiler plant and the generated steam is provided to the company for the manufacturing of its products. Since the company is allocated an amount of 60,000 free allowances in the period 2013-2020, but has a requirement of around 170,000 certificates in this period approximately 13,700 certificates are missing per year until 2020. This represents a shortfall of around 55 % and has in consequence that additional costs of about 770,000 EUR to the company devote (110,000 t x 7 EUR/t).

Reason for this loss of allocation is to not exploit the possible opportunities in the allocation application from 2013 to 2020. In the former application for the monthly bills of utility were applied and verified via the emission reports from the respective years.

The data base of the standard value was 33 adopted in 2008, for the calorific value between 2005 and



2007 was calculated using the Hu of the emission report. As efficiency of the system of "standard efficiency" has been accepted by 70% due to missing data, the resulting results were determined and rounded by MS Excel. This is the main reason for a lack of allocation amount equal to 30%.

Another reason for a lack of certificates is an increase in production in 2012, which was not considered in the messages for the operation (MzB). There were opportunities to apply for an allocation increase with a skillfull act, which has not happened in the example in September 2013 and January 2014.

The approach for a subsequent increase in the allocation

In our example the aforementioned company assumed a boiler efficiency of 70% in its former allocation request because this is regulated by law when occurring missing data. However, it is known that good vessels have an efficiency of 90% or more. So it is clear that the said activity rate is higher by about 30% in reality than specified in the allocation request. So in this case – according to the lack of knowledge about specific application procedures and possibilities - a possible 30% increase in allocation was disregarded.

Subsequent optimization by specialized consultants has the approach that the company "has adopted the standard efficiency of 70% due to missing data". Here are the 70% no default value, but a fallback value if no better data is available. However, since data had been submitted but it wasn't complete enough, they can be completed now with special methods later on so that they avoid the fallback value of 70%.

For this purpose, it is known that routinely exhaust gas measurements must be made and documented by independent bodies to the boilers. From the values of the exhaust gas measurements and knowledge of the amount of degassing steam and drain water the boiler system efficiencies are clearly derived.

By a created report of a specialized consultant, an efficiency of 90% plus or minus a few percent can be determined and recognized in most cases.

Regarding the increase in production there are other ways to a subsequent allocation increase as long as provided technical changes to the system can be made/are, which are then in the MzB (perhaps even retroactively) reported to the DEHSt. Due to a favorable course of a subsequent revision of the allocation decision by the DEHSt a much better allocation situation can then arise.

Infobox

Adoption of grey/ineligible CER/ERU and EUA Remaining Stocks

Emissionshändler.com® as a dealer offers to all German and Polish plant operators to take over their remnants of grey CER/ERU. Also remaining stocks of green CER/ERU or EUA/ aEUA are welcome to be adopted.

- *For the acquisition of grey/ineligible/pending CER/ERU Emissionshändler.com® pays 0.5 Euro Cents/t, a maximum of 250,00 EUR per operator, with a minimum total of 1.00 EUR*
- *For the acquisition of green/eligible CER/ERU Emissionshändler.com® pays 9 Euro Cents/t, but at least a total of 1.00 EUR*
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*Should the seller be a company which is already **eliminated from emissions trading** and **only grey/ineligible/ pending or green/eligible CER/ERU** then it depends on the amount, whether this transaction can be conducted by Emissionshändler.com® without fees.*

*In any case, the seller receives a word template as a file, with which he can create an invoice for **a minimum of 1.00 EUR** to Emissionshändler.com® in the event that it is CER/ERU.*

*If the account holder need help in setting up the necessary trust account, **DE-121-5022235-0-16** from Emissionshändler.com®, a free help and solution is offered, even if only **one** authorised representative to the operator is present.*

To request a sales form or questions, interested system operators shall apply Emissionshändler.com® under info@emissionshaendler.com or Tel. +49 (30)-398872110

However, it should be pointed out at this point that a shortfall in the allocation amounts, resulting from energy consumption for the production of electrical energy can be compensated in any case by Objection. For the energy requirements for producing electrical energy no free allocation is generally performed in Germany.



Backloading the expedited procedure adopted and already effective

Thanks to the excess of 2 to 2.4 billion tons of certificates existing in the EU-system, the price of EUA certificates has sunk in 2013 to around 3 EUR/t.

According to the now in February 2014 in all details decided backloading, a subset of the sale is to be moved backward in time, so the price is stabilized and should be on a higher level. The at the end of 2013 revised EU-directive will be implemented starting March 2014. Thereafter the Commission may adapt the schedule of auctions under special circumstances in the third allocation period to ensure the proper functioning of the market. After that they may withhold EUAs once in the third allocation period and that only with 900 million tons of EUA maximum.

24.2.2014. Thus, the reductions in the auction are already in place starting March 2014.



Daily price fluctuations up to 12% ahead of the backloading decisions



High of 7.41 EUR/t followed by a decline of 10% in the run-up to the backloading decisions

To implement this action the Auctioning Regulation must now be changed so 400 million tons EUAs less than initially planned will be auctioned in 2014. In 2015, it should be still 300 million tons to be retained and in 2016 another 200 million tons. The amount in 2019 is attributed with 300 million tons EUAs and in 2010 with 600 million tons EUAs.

The European Parliament agreed to this change to the Auctioning Regulation on an expedited basis on 06.02.2014. The Council of the Member States on

Plant operators in Poland are getting increasingly nervous - The risk of a too late allocation is more than 60 %

According to a leading industry representative the risk that a polish electricity production plant operator doesn't get his free allocation to the end of April 2014 is higher than 60%. According to statements by Michal Mazurkiewicz, the deputy director of the finance department of the state utility PGE, the allocation for 2013 is going to be late with higher probability for the date 30.04.2014 and so will cost the polish utilities a total of 580 mil. EUR (2,436 billion Zloty). He no longer trusts soothing statements by polish authorities, since he believes only a computational time allocation, if he has the account.

According to him, the probability rises every day that this scenario happens as stated. The aforesaid sum that he calculated is the amount that the polish system operator would have to pay to prematurely hedge by purchases of EUAs in the market in order to even begin to make their submission, if they would get no more allocation before the end of April 2014.

The background is that in eight mostly eastern european countries the distribution of additional free emission rights are coupled to 2019 and these governments investment in the modernization of their electricity industries which also requires the



presentation of an investment plan. So far only Hungary and the Czech Republic have provided such plans in accordance with approval of the European Commission, which is why no free allocation to plant operators may be issued in Poland and in five other countries. It will be interesting whether the EU Commission will allow the Polish Ministry of the Environment the request to issue a timely allocation to the non-power-producing plants. Whether such a plan exists at all is questionable. Fact seems to be that there in this case is no legal link to the tax liability of the law to timely free allocation.

This means that in case of a late free allocation after 30.04.2014 even non-power-producing plants will have to pay a fine of 100 EUR/t. This is precisely the reason why Michal Mazurkiewicz of PGE warns the smaller plants in his country, that they are responsible for their safety themselves.

It is clear that Mazurkiewicz sees a general panic that can spread faster and will lead to higher and higher EUA prices because each operator must purchase at the end of April to ensure its delivery in 2013 in time. This is what the great Polish utilities will do in particular since they are driving the price high very quickly in a short time thanks to their large amounts.

If one tries to achieve or get an opinion on this topic in the Polish Ministry responsible, then they are either asked for patience or no comments are given at all. The recent statements on this subject are already a few months old. In November 2013 a spokeswoman for the Ministry of Environment expressed by saying that there would be great risk and so the issue of free allocation to April 2014 will be delayed by "the bottlenecks in the administration".

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All price curves shown here are based on data from the ICE London, generated from a Reuters information system.

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Kind emission regards

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