

**ASSOCIATION DES PRODUCTEURS
EUROPEENS DE POTASSE
EUROPEAN POTASH PRODUCERS ASSOCIATION**

APEP

Association des Producteurs Européens de Potasse – European Potash Producers Association
c/o Norton Rose

European Commission
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**Revision of the Directive 2003/87/EC to Enhance Cost-Effective Emission
Reductions and Low-Carbon Investment; Position of the European Potash
Industry, represented by APEP**

Dear [REDACTED],

APEP, the European Potash Producers Association, expressed its special interest in the revision of the Directive No. 2003/87/EU by letter of 15.01.2014 to the European Commission. APEP's members are energy intensive companies in mining and processing of potash. They fall within the scope of the currently applicable Carbon Leakage List (see Decision of the Commission of 27.10.2015, OJ L 308/114).

Following the Commission's proposal of 15.07.2015 (COM (2015)337 Final) APEP intensively pursues the discussions and proposals in the European Parliament and the Council of Ministers. A number of planned but still discussed amendments of the current Directive could affect the European Potash Industry directly.

In view of the importance of this matter APEP's Board of Directors decided to represent the interests of the European Potash Industry directly vis-à-vis the European Institutions, regardless of the statements of other European Associations (Euromines, Fertilizers Europe and EU-Salt) in which EU Potash manufacturers are directly or indirectly members.

APEP has worked out a Position Paper relating to five items specifically critical for the potash industry being

- Benchmark - Reduction Factor
- Electricity price compensation - indirect costs
- Maintenance of qualitative criteria
- Tiered approach
- Cross-Sectoral Correction Factor

The Position Paper is based on the Commission's proposal as well as up to now published opinions of the competent Committees of the European Parliament and first conclusions of the Council of Ministers. It will be dispatched to the Council as well as to the competent Ministries in those Member States in which the Potash Industries are located (Germany, Spain, UK and France).

Depending on the outcome of further discussions and conclusions the European Parliament and the Council an adaptation of APEP's position paper may be required.

APEP would welcome the opportunity of discussing the above mentioned five items and their implementation directly with the Commission at an appropriate moment, probably before the tripartite meetings. APEP would be grateful for a brief note from the Commission and the Commission considers such a meeting useful.

At the moment APEP is counting on a timetable in the legislative proceeding according to which the European Parliament will vote on the report of the ENVI in February 2017. As far as we know the Council has not yet been able to arrive at a common position of the Member States.

May we ask the Commission to kindly inform APEP on the timetable of all decisive activities concerning the revision of the Emission Trading System to be expected in 2017.

Many thanks in advance for your support

With kind regards,
on behalf of APEP's President



Counsel to APEP



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Annex 1

Association des Producteurs Européens de Potasse – European Potash Producers Association
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**Position Paper
of the European Potash Producers Association (APEP)
to the European Commission's proposal
for an amending Directive 2003/87/EC
to enhance cost-effective emission reductions
and low carbon-investments
under the point of view of the potash industry**

I.

Introduction

**The Union potash industry - EU Emission Trading System
- risk factors and competitiveness - need of access to the highest possible
volume of free allocations**

- (1) The Union potash industry consists of two company groups (K+S-Group and ICL-Group), with production facilities in Germany, Great Britain, Spain and France. The companies manufacture mineral fertilizers (po-

tassium chloride, (KCL), potassium sulphate (K_2SO_4) and magnesium sulphate), which are directly used as agricultural fertilizers, or are blended with other fertilizers as NPK fertilizer (nitrogen, phosphorus and potassium).

- (2) The companies of the potash industry are represented by APEP, the European Potash Producers Association.¹ At the same time the potash manufacturers are (at least partly) direct or indirect members of the associations Euromines and Fertilizers Europe.
- (3) Potash mineral is a mining product. In Germany, Spain and the UK there exist eight mines. The majority of the mines is located in Germany. After the extraction and haulage of the crude salt (raw ore), the raw material undergoes a processing in factories near by the mines. Potassium chloride and the other products are generally commercialized in either standard / powder-form or in non-standard forms including a granular form.
- (4) In terms of the EU Emission Trading System (ETS), the European potash industry belongs to the sub-sector which is deemed to be exposed to a significant risk of carbon leakage. This industry is included in the CL-List pursuant to the Commission's decisions of 24th December 2009 (for the period 2009 to 2012) and of 18th December 2013 (for the period 2015 to 2019).² As a combination of the mining of fertilizer minerals and the manufacturer of fertilizers the potash industry falls under the NACE-Codes 08.91 or 20.15 depending on a total value added assessment and other criteria.
- (5) The manufacturing of potash and other products is energy-intensive. The energy for the production is mainly sourced from high-efficient combined heat and powerplants (CHP) for internal consumption. Other

¹ See Transparency Register for all issues which have to be solved on the European level

² Decision of the Commission of 27th October 2014, O.J. L308/114

sources are electricity from the grid and partly oil. Due to high investments of the companies in the previous years, the powerplants are operating with high efficiency.

- (6) The major purpose of free allocation of allowances within the Emission Trading System is to safeguard a national and international competitiveness of the EU energy-intensive industries. Union producers on the national markets and Union potash markets are in a severe competition against low-priced potash imports mainly from Russia and Belarus as neighboring countries and from Canada.

On third country markets (i.e. China, Brazil, India) they compete in addition with potash producers in Chile and other smaller countries. Canada, Russia, Belarus and China occupy the first four places in the global potash market. The competitors from these countries are producing the material at relatively low costs and this in countries, in which an Emission Trading System either has not yet been installed or is not applied effectively⁴.

- (7) For reasons of potash deposits in Europe and the local conditions of exploiting, the production costs for mining crude salt in the EU are higher than in Russia, Belarus or Canada. Additional costs in the scope of the Emission Trading System would affect the competitive situation of the EU potash industry considerably. CO₂-prices up to 30 €/t as envisaged by certain politicians would have a disastrous effect. In order to avoid carbon leakage, investment leakage and job leakage, the free allocation of allowances is vital to the EU potash industry.

The CO₂-costs on potash cannot be passed on to the customers due to the severe price competition on the Union market and the world market, which is actually characterized by over-capacity. Price leaders on the world potash markets are MOP manufacturers in Russia, Belarus and Canada. On the Union potash market the Russian and Belarus manu-

facturers have already obtained a market share of more than 30% in the last years. This market share allows them to influence selling prices in the EU decisively.

- (8) In the period from 1992 to July 2011, the Union potash industry was protected by antidumping measures imposed on imports of potassium chloride originating in Belarus and Russia. These measures have periodically been confirmed/reimposed in the scope of review proceedings.³ After the expiry of the measures in 2011 the Russian and Belarus potash producers practice a price policy, which on the one hand cannot be characterized as injurious dumping, on the other hand the exporters were able to constantly increase their market share on the EU potash market by selecting the bigger customers (mainly MPK manufacturers) and by a still skillful pricing.

II.

Items of major concern to the EU potash industry with respect to the proposal for amending the Directive 2003/87/EC by the EU Commission and the opinions of the European Parliament and the Council

- (9) APEP is well aware of the Commission's proposal of July^{15th} 2015 for amending Directive 2003/87/EC to enhance cost-effective emissions, reductions and low-carbon investments. Furthermore, APEP analysed the high number of amendments by the European Parliament, which have been introduced into the discussion as well as the position of various Member States in the Council. Finally, APEP is aware of the statements of trade associations, which are close to the potash industry (in particular, Fertilizers Europe and Euromines). APEP in principal shares

³ The last Council Regulation No. 1050/2006 of 11th July 2006, O.J. L191/1 of 12th July 2006

⁴ Canada, the Russian Federation and Belarus lack behind in fighting climate change. These countries did not announce a coherent and ambitious policy frame work for their national industries or a plan towards it, yet. The policies of these countries are not comparable to the EU ETS.

the view of the other trade associations of the mining and fertilizer industries. Nevertheless, there are additional clarifying arguments, which APEP wants to put forward in its own position paper.

(10) It is obviously clear, that the revision of the Directive shall strengthen the EU Emission Trading System - a goal which is fully supported by APEP. On the other hand, the impact of the Emission Trading System on the competitive position of the potash industry as a subsector must play a decisive role in the assessment of a number of items under revision. Therefore, these comments truly and repeatedly underlined that Europe's industrial competitiveness must be protected. Furthermore, it has been stressed that competitiveness does not only mean "carbon leakage" (avoidance of relocation due to high carbon costs), but also "investment leakage", "job leakage" and other factors, influencing the companies structure and cost, the structure of the market etc.

(11) APEP will concentrate its comments and proposals on a limited number of items, which are:

- Benchmark - Reduction Factor (a)
- Electricity price compensation - indirect costs (b)
- Maintenance of qualitative criteria (c)
- Tiered approach (d)
- Cross-Sectoral Correction Factor (e)

a) Benchmark - Reduction Factor

(12) APEP is not in favor of the introduction/maintenance of an automatic factor for a yearly reduction of free allocation of allowances in view of an achievable technical progress. Based on updated production figures, the relevant volume of free allowances shall be newly calculated either at the beginning of the 4th trading period (2020) or, if necessary, one

time within the trading period (2025). This petition is based on the following reasons:

- (13) Potash manufacturers, as far as they generate the energy in own high-efficient combined heat and power plants have already obtained a high technological standard. For further efficiency improvement, there exist close limits (between 90 % and 92 %). A yearly reduction of the volume of free allowances by an automatic factor would have two disadvantages for the potash industry: First of all: The reduction would be based on inappropriate criteria. Secondly, the application of an automatic factor would lead to a worse position of those companies, which have already increased the efficiency of their power plants by high investments.
- (14) An automatic reduction factor would contradict the principles of justice and legal certainty. The principal of legal certainty would be infringed if for all sectors and subsectors, covered by the CL-lift, only one factor would be introduced (the factors of 1.5 %, 0,5 %, 0,3 %, 0,2 % are under discussion). The principal of justice would be violated because the factor is more or less arbitrary and could be amended during a trade period to the disadvantage of the companies concerned.
- (15) A precise reduction factor would not be able to take into account and to mirror the actual competitive situation of the sector or subsector of industries (here: potash industry). The competitive situation not only results from the "carbon leakage" but, at the same time, from "investment leakage", "job leakage" as well as other competitive elements (transport costs, market structure, market development etc.).
- (16) In order to assess the current conditions of competition correctly, it is - after dropping the idea of an automatic reduction factor - advisable, to recalculate the "benchmarks" for the sectors and subsectors of the industries concerned on the basis of actual data at the beginning of the

4th trade period. For the potash industry, the trade intensity plays an important role. The proposed methodology would ensure that the industry sector or subsector concerned would receive the quantity of free allowances, which is necessary to compensate the specific competitive disadvantages of this sector/subsector.

b) Electricity price compensation - indirect costs

- (17) A complete compensation of indirect costs which occur for certain companies by passing on the CO₂-costs via the electricity price by electricity companies, is an important issue for the potash industry. A number of mines and factories are totally or partially supplied with energy from the grid. In the relevant countries of European potash production (Germany, Spain and UK) even today, the CO₂-costs included in the price of electricity, are compensated by national law, however, tied to the CO₂-price.
- (18) For the potash industry, an energy-intensive industry, these indirect costs are substantial. The member states should legally be obliged to compensate these indirect costs. There shall be a total compensation of these costs. The amount of compensation should be adapted to the applicable - presumably increasing - CO₂-price.
- (19) An authorizing regulation is necessary in order to ensure equal treatment and the avoidance of a distortion of competition. At the same time, such a regulation would allow the companies to select the source of energy for each factory (due to the circumstances) and this without any negative impact on the compensation of CO₂-costs (either by free allowances or by national aids). Due to the competitive situation on the national and international potash markets, as described above, the CO₂-costs which are included in the electricity price, cannot be shifted to the customers of the potash industry.

(20) For the regulation of the future electricity price compensation various alternatives exist. A different structure of production of energy and thus the carbon output (KW/h) in their electricity production of the companies concerned may be taken into account. The most appropriate methodology shall depend on the opinion and final proposal of the European Parliament and the Member States.

c) Maintenance of qualitative criteria

(21) The Commission's proposal provides a deletion of paragraph 12 to 18 of Art. 10 a) of the Directive. On the other hand, the EU Commission proposes the insertion of Art. 10 b) with allows a qualitative assessment in support of certain energy-intensive industries, in case of carbon leakage.

(22) APEP assumes, that the companies of the European potash industry will qualify for an inclusion in the CL-list due to quantitative criteria also in the period after the year 2019, so that they may expect the allocation of a sufficient number of free allowances. Nevertheless, the criteria which have been defined in Art. 10 b) of the proposed amended regulation may be important for the potash industry. According to the criteria, the intensity of trade with third countries will become a decisive criteria for CL-assessment. In previous inquiries, the trade intensity has been calculated for the potash industry with an average factor of more than 50%.

(23) The provision of Art. 10 b) (draft) opens the opportunity for justice in single cases for specific factors/subsectors according to legally clearly defined criteria. They allow the avoidance of competitive disadvantages and particularly in relationship to those competitors manufacturing potash in third countries without the burden of CO₂-costs according to a comparable Emission Trading System. In the potash sector, the major competitors are located in Russia and Belarus. These competitors pro-

ducing large quantities of potash, are present on all European and Non-European markets.

d) Tiered approach

(24) The proposal of the EU Commission in view of Art. 10 b) (1), Directive 2003/ 87/EC reads:

- Sectors and subsectors where the product exceeds 0.2 from multiplying the intensity of trade with third countries by the emission intensity shall be deemed to be at risk of carbon leakage: Allocated allowances free of charge at 100 % up to 2030.
- Sectors and subsectors where the product undercuts the factor of 0.2 : Free of charge allowances of only 30 %.

In APEP's opinion, the possibility of a qualitative assessment should remain and a factor lower than 0.18 is desirable (two level approach). For any other differentiation there are no objective and justified criteria. Any further differentiation would lead to the disadvantage of various sectors or subsectors of industries. By no means should any differentiation be based on the fact whether and to which extent the CO₂-cost can be passed on over the product price to the customers. The possibility of passing on the CO₂-costs is a question of the intensity of competition and in particular of the price situation on the markets. Experiences show that prices may change rather quickly and substantially on the potash markets.

(25) The proposal to differentiate according to the carbon leakage risk of an industry sector is not practicable. This proposal ignores that an exact determination of the risks in terms of factual existence and relevant period is not possible. Furthermore, this proposal does not take into consideration that the allocation of free of charge certificates shall also reduce the "investment risk" and the "job risk".

- (26) In APEP's view, the criteria of a qualitative assessment which had been defined in Art. 10 a) (2), is at appropriate basis in order to elaborate a justified administrative decision in concrete cases, taking into account all relevant risk factors.

e) Cross-Sectoral Correction Factor

- (27) The Cross-Sectoral Correction Factor (CSCF), which has been introduced by the Commission's decision 2013/448/EU during the 3rd trade period, has the purpose of preserving environmental integrity of the EU-ETS and safeguard the member states auctioning revenues for phase 4. It is uncertain, whether there is any further need for a correction factor in view of the new framing of the system, the economic development and a surplus of certificates free of charge.

- (28) In APEP's view, Art. 10 a) (5) of the Directive, should be deleted for an Emission Trading System applicable as of 2020. In case of the emergence of a situation in which the established total volume of free charge available allowances has been reached, lacking allowances should be made available from the market stability reserve. If so required, even the share reserved for auctioning (57 %) should be reduced in favor of the share of free allowances (43 %) by a limited volume.

- (29) Furthermore, the introduction of a Cross-Sectoral Correction Factor would comprise significant legal risks. This can be demonstrated by the judgment of the European Court of Justice of 28.04.2016 (combined cases C-191/11 pp. Nos. 86, 94, 95, 98 and 99) in which the application of the factor has been annulled. Furthermore, a linear correction factor could limit the allocation of free of charge allowances in a manner, which is unjustified in view of the carbon leakage risk and all other risks which shall be compensated.

f) Final remarks

(30) APEP would be grateful of any opportunity to explain its position and its arguments in more detail orally.



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