

Internal document DG CLIMA

Draft Amendment to the Auctioning Regulation voted upon by the Climate Change Committee of 18 June 2013 and which is to be submitted by the Commission to the European Parliament and the Council for their scrutiny. DG CLIMA/B/1 makes this text available purely for information purposes and the Commission does not assume any liability for its contents.

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COMMISSION REGULATION (EU) No .../..

of **XXX**

amending Regulation (EU) No 1031/2010 on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances pursuant to Directive 2003/87/EC of the European Parliament and the Council establishing a scheme for greenhouse gas emission allowances trading within the Community in particular to list an auction platform to be appointed by Germany

(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/EC¹, and in particular Articles 3d(3) and 10(4) thereof,

Whereas:

- (1) Member States not participating in the joint action as provided in Article 26(1) and (2) of Commission Regulation (EU) No 1031/2010 of 12 November 2010 on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances pursuant to Directive 2003/87/EC of the European Parliament and the Council establishing a scheme for greenhouse gas emission allowances trading within the Community² may appoint own auction platforms for the auctioning of their share of the volume of allowances covered by Chapters II and III of Directive 2003/87/EC. Pursuant to the third paragraph of Article 30(5) of Regulation (EU) No 1031/2010, the appointment of such auction platforms is subject to listing of the auction platform concerned in Annex III to that Regulation.
- (2) In accordance with Article 30(4) of Regulation (EU) No 1031/2010, Germany informed the Commission of its decision not to participate in the joint action as

¹ OJ L 275, 25.10.2003, p. 32.

² OJ L 302, 18.11.2010, p. 1.

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- provided in Article 26(1) and (2) of that Regulation, and to appoint its own auction platform.
- (3) On 15 March 2013, Germany notified the Commission of its intention to appoint European Energy Exchange AG ('EEX') as an auction platform referred to in Article 30(1) of Regulation (EU) No 1031/2010.
 - (4) On 20 March 2013, Germany presented the notification to the Climate Change Committee established under Article 9 of Decision No 280/2004/EC of the European Parliament and of the Council of 11 February 2004 concerning a mechanism for monitoring Community greenhouse gas emissions and for implementing the Kyoto Protocol³.
 - (5) In order to ensure that the proposed appointment of EEX as an auction platform referred to in Article 30(1) of Regulation (EU) No 1031/2010 is compatible with the requirements of that Regulation and is in conformity with the objectives set out in Article 10(4) of Directive 2003/87/EC, it is necessary to impose a number of conditions and obligations on EEX.
 - (6) In accordance with Article 35(3)(b) of Regulation (EU) No 1031/2010, an appointed auction platform is required to provide full, fair and equitable access to bid in the auctions for small and medium enterprises (SMEs) and access to bid in the auctions for small emitters. To ensure this, EEX should provide such SMEs and small emitters with transparent, comprehensive and up-to-date information, on access possibilities to auctions conducted by EEX for Germany including all necessary practical guidance on how to make the most of such possibilities. Such information should be publicly available on EEX's webpage. In addition, EEX should report to the auction monitor to be appointed as provided for in Article 24(2) of Regulation (EU) No 1031/2010 on the coverage obtained, including on the level of geographic coverage obtained, and take the utmost account of the auction monitor's recommendations in this regard so as to ensure fulfilment of its obligations under Article 35(3)(a) and (b) of that Regulation.
 - (7) In accordance with Article 35(3)(e) of Regulation (EU) No 1031/2010, when appointing an auction platform, Member States must take into account the extent to which a candidate auction platform is able to avoid distortions of competition in the internal market including the carbon market. In particular, an auction platform should not be able to use the contract appointing it to leverage the competitiveness of its other activities, notably the secondary market it organises. An auction platform should provide candidate bidders the option to be admitted to bid in the auctions without being required to become an exchange member or a participant in the secondary market organised by itself or of any other trading place operated by it or by any third party.

³ OJ L 49, 19.2.2004, p. 1.

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- (8) In accordance with Article 35(3)(h) of Regulation (EU) No 1031/2010, when appointing an auction platform, Member States have to take into account the extent to which adequate measures are provided to require an auction platform to hand over all tangible and intangible assets necessary for the conduct of the auctions by an auction platform's successor. Such measures should be laid down in a clear and timely manner in an exit strategy that should be reviewed by the auction monitor. Not only EEX as appointed by Germany, but all auction platforms should develop such an exit strategy and take utmost account of the auction monitor's opinion thereon.
- (9) In light of the experience gained, the provisions of Regulation (EU) No 1031/2010 concerning the procurement procedures for appointing auction platforms and the auction monitor, and the holding of auctions should be amended.
- (10) Since the allowances must be delivered within five days from the auction, and since these allowances themselves are tradable, the auctioned product does not need to be tradable.
- (11) On occasion, an auction platform is required to consult the auction monitor. Replying to such consultations entail a responsibility and liability for the auction monitor. In order to mitigate such responsibility and liability, in particular in urgency cases, the consulting auction platform should be allowed to proceed with the intended measure already before obtaining an opinion from the auction monitor. The obligation on the auction platform to take the utmost account of the auction monitor's opinion, where delivered, should remain.
- (12) The determination of auction calendars should also be reviewed. First, it is not practicable nor necessary to determine the auction calendars as early as February and March of the preceding year. Second, volumes to be auctioned in August should be half of the volumes auctioned in other months, which may be achieved by holding fewer auctions as well as by auctioning smaller volumes. Third, Article 3d of Directive 2003/87/EC determines the volumes and Member State's share of the aviation allowances to be auctioned and the provision in Regulation (EU) No 1031/2010 on the annual volume of aviation allowances to be auctioned should take account of uncertainties of some of the underlying factors determining those volumes and shares. In addition, given the uncertainty on the outcome of international negotiations, some greater flexibility for spreading the volume of aviation allowances to be auctioned over a given calendar year is justified. Fourth, in case of consecutive cancellations, the allowances should be spread over a greater number than the next four scheduled auctions. Finally, provisions should be added as regards the auction calendar for auctions by the common auction platform for a Member State which has decided not to join the joint action, but which has to make use of the common auction platform pending the appointment of an own auction platform. These provisions should mirror the provision for the auction calendars to be determined by auction platforms appointed by such Member States.

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- (13) Admission to the auctions shall not be dependent on becoming a member of or a participant in the secondary market organised by the auction platform or any other trading place operated by the auction platform or by any third party. This requirement should apply to any auction platform, and not only to the auction platforms appointed by Member States not participating in the joint action for procuring common auction platforms.
- (14) An auction platform may offer one or more alternative means of accessing its auctions, where the main means of access are inaccessible for whatever reason, provided that such alternative means of access are secure and reliable and their use does not lead to any discrimination between bidders. For the avoidance of doubt, it should be clarified that Member States may require an auction platform to offer such alternative means.
- (15) The implementation of a prohibition on Member States disclosing inside information to persons working for an auctioneer may be impracticable or negatively impact the efficiency of the work of the appointed auctioneer or persons working for the auctioneer. Auctioneers only have a limited role in the conduct of auctions and a range of measures exist to mitigate risks of insider dealing, including measures that address situations where the auctioneer or persons working for the auctioneer would have access to inside information. In this context, a complete prohibition is disproportionate. Nevertheless, Member States should be responsible to ensure that an appointed auctioneer has appropriate measures to prevent insider dealing in place before they disclose such inside information.
- (16) The notification by a Member State that does not participate in the joint action of procuring common auction platforms of the auction platform it intends to appoint cannot contain the full auction calendar, but should contain the relevant information for coordinating auction calendars at a later stage.
- (17) The review of Regulation (EU) No 1031/2010 should benefit from the auction monitor's report on the auction conducted in 2014, which can be expected to be delivered in the beginning of the subsequent year.
- (18) Regulation (EU) No 1031/2010 provides that an auction platform must be regulated market. In order to benefit from relevant experience and expertise, and mitigate the risks in the execution of the auctions, it is appropriate to clarify that this should be a regulated market, whose operator organises a market in allowances or allowances derivatives.
- (19) As the auction monitor may be paid from the auction revenues, it may be desirable for an auction platform to act as a payment agent for the costs of the auction monitor.
- (20) A restricted procurement procedure for the appointment of the auction monitor has not resulted in a contract as no candidates submitted a request to participate in this joint procurement. A new procedure will have to address complex issues e.g. concerning the

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choice of the tender procedure, the form of the contract and the precise description of the tasks, which take time to resolve. The absence of an auction monitor does not, however, entail a risk for the conduct of the auctions to the extent that they should be stopped pending the appointment of the monitor.

- (21) An auction platform may allow the submission of an electronic application for admission to bid but it should also be allowed to require such submission by means of paper documents.
- (22) In case the auction platform appointed by a Member State not participating in the joint action for the procurement of common auction platforms is not able to hold the auctions, the Member State concerned should turn to the common auction platform for the auctioning of its share in the volume of allowances to be auctioned. It should be clarified that the arrangements between the common auction platform and auctioneers appointed by those Member States need to be in place before any such auctioning on a common auction platform, but not earlier.
- (23) All auction platforms should determine an exit strategy and consult the auction monitor thereon. This obligation should not apply exclusively to auction platforms appointed by Member States not participating in the joint action to appoint common auction platforms.
- (24) The measures provided for in this Regulation are in accordance with the opinion of the Climate Change Committee.
- (25) The contract between Germany and EEX in its capacity of the transitional opt-out auction platform expires in December 2013. In order to ensure predictable and timely continuation of the auctions by EEX, this Regulation should enter into force as a matter of urgency.
- (26) Regulation (EU) No 1031/2010 should therefore be amended accordingly,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EU) No 1031/2010 is amended as follows:

- (1) In Article 4, paragraph 1 is replaced by the following:

‘1. Allowances shall be offered for sale on an auction platform by means of standardised electronic contracts (‘the auctioned product’).’
- (2) In Article 7, paragraphs 7 and 8 are replaced by the following:

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‘7. Before an auction is started, the auction platform shall determine the methodology for the application of paragraph 6, after consulting the auction monitor, if appointed, and notifying the competent national authorities referred to in Article 56.

In between two bidding windows on the same auction platform, the auction platform concerned may modify the methodology. It shall notify the auction monitor, if appointed, and the competent national authorities referred to in Article 56 without delay.

The auction platform concerned shall take the utmost account of the auction monitor's opinion, where provided.

8. Where one or more auctions are cancelled pursuant to paragraphs 5 or 6 consecutively, the combined volume of allowances of those auctions shall be distributed evenly over the following auctions scheduled on the same auction platform.

In the case of allowances covered by Chapter III of Directive 2003/87/EC the number of auctions over which the combined volume to be auctioned must be distributed shall equal four times the number of auctions that were cancelled.

In the case of allowances covered by Chapter II of Directive 2003/87/EC the number of auctions over which the combined volume to be auctioned must be distributed shall equal two times the number of auctions that were cancelled.’

(3) Article 8 is amended as follows:

(a) paragraph 3 is replaced by the following:

‘3. In exceptional circumstances, any auction platform may, after consulting the auction monitor, if appointed, change the times of any bidding window, by giving notice to all persons likely to be affected. The auction platform concerned shall take the utmost account of the auction monitor's opinion, where delivered.’

(b) paragraph 5 is replaced by the following:

‘5. The volume of allowances covered by Chapter III of Directive 2003/87/EC to be auctioned on the auction platform appointed pursuant to Article 26(1) or (2) shall be distributed evenly over the auctions held in a given year, except that volumes auctioned in August of each year shall be half of the volume auctioned in auctions held in other months of the year.

The volume of allowances covered by Chapter II of Directive 2003/87/EC to be auctioned on the auction platform appointed pursuant to Article 26(1) or (2) shall in

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principle be distributed evenly over the auctions held in a given year, except that volumes auctioned in August of each year shall be half of the volume auctioned in auctions held in other months of the year.’

- (4) Article 9 is replaced by the following:

‘Article 9

Circumstances preventing the conduct of auctions

Without prejudice to the application of the rules referred in Article 58 where appropriate, an auction platform may cancel an auction where the proper conduct of that auction is disrupted or is likely to be disrupted. Where one or more auctions are cancelled consecutively, the combined volume of allowances of those auctions shall be distributed evenly over the following auctions scheduled on the same auction platform.

In the case of allowances covered by Chapter III of Directive 2003/87/EC the number of auctions over which the combined volume to be auctioned must be distributed shall equal four times the number of auctions that were cancelled consecutively.

In the case of allowances covered by Chapter II of Directive 2003/87/EC the number of auctions over which the combined volume to be auctioned must be distributed shall equal two times the number of auctions that were cancelled consecutively.’

- (5) Article 11 is amended as follows:

- (a) paragraph 1 is replaced by the following:

‘1. The auction platforms appointed pursuant to Article 26(1) or (2) of this Regulation shall determine and publish the bidding windows, individual volumes, auction dates as well as the auctioned product, payment and delivery dates of the allowances covered by Chapter III of Directive 2003/87/EC to be auctioned in individual auctions each calendar year, by 30 September of the previous year, or as soon as practicable thereafter, having previously consulted the Commission and obtained its opinion thereon. The auction platforms concerned shall take the utmost account of the Commission's opinion.’

- (b) paragraph 4 is replaced by the following:

‘4. The calendar for individual auctions of allowances covered by Chapter III of Directive 2003/87/EC conducted by an auction platform other than the auction platforms appointed pursuant to Article 26(1) or (2) of this Regulation shall be determined and published pursuant to Article 32 of this Regulation.

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Article 32 shall also apply with respect to the auctions conducted pursuant to the second subparagraph of Article 30(7) by the auction platform appointed pursuant to Article 26(1) or (2).'

(6) Article 12 is replaced by the following:

Article 12

Annual volumes of auctioned allowances covered by Chapter II of Directive 2003/87/EC

1. The volume of allowances covered by Chapter II of Directive 2003/87/EC to be auctioned each year shall be 15% of the expected volume of those allowances in circulation for that year. Where the auctioned volume in a given year is more or less than 15% of the volume actually put in circulation for that year, the volume to be auctioned in the subsequent year shall correct for the difference. Any allowances that remain to be auctioned after the last year of a trading period shall be auctioned in the first four months of the subsequent year.

The volume of allowances to be auctioned in the final year of each trading period shall take account of allowances remaining in the special reserve referred to in Article 3f of Directive 2003/87/EC.

2. For each calendar year in a given trading period, each Member State's share of allowances to be auctioned covered by Chapter II of Directive 2003/87/EC shall be determined in accordance with Article 3d(3) of that Directive.

(7) Article 13 is amended as follows:

(a) the first subparagraph of paragraph 2 is replaced by the following:

'2. As from 2013, the auction platforms appointed pursuant to Article 26(1) or (2) of this Regulation shall in principle determine and publish the bidding windows, individual volumes, auction dates as well as the auctioned product, payment and delivery dates of the allowances covered by Chapter II of Directive 2003/87/EC to be auctioned in individual auctions for each calendar year by 30 September of the previous year, or as soon as practicable thereafter, having previously consulted the Commission and obtained its opinion thereon. The auction platforms concerned shall take the utmost account of the Commission's opinion.'

(b) in paragraph 4, the following second subparagraph is added:

'Article 32 shall also apply with respect to the auctions conducted pursuant to the second subparagraph of Article 30(7) by the auction platform appointed pursuant to Article 26(1) or (2).'

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(8) Article 16 is amended as follows:

(a) the following paragraph 1a is inserted:

‘1a. Admission to the auctions shall not be dependent on becoming a member of or a participant in the secondary market organised by the auction platform or any other trading place operated by the auction platform or by any third party.’

(b) paragraph 3 is replaced by the following:

‘3. An auction platform may offer, and Member States may require an auction platform to offer, one or more alternative means of accessing its auctions, should the main means of access be inaccessible for whatever reason, provided that such alternative means of access are secure and reliable and their use does not lead to any discrimination between bidders.’

(9) In Article 18(1), point (a) is replaced by the following:

‘(a) an operator or an aircraft operator having an operator holding account or an aircraft operator holding account, bidding on its own account, including any parent undertaking, subsidiary undertaking or affiliate undertaking forming part of the same group of undertakings as the operator or the aircraft operator;’

(10) In Article 20, paragraph 2 is replaced by the following:

‘2. An application for admission to bid made under paragraph 1 shall be made by submitting a completed application form to the auction platform. The application form and its access through the internet shall be provided and maintained by the auction platform concerned.’

(11) Article 22 is amended as follows:

(a) paragraph 3 is replaced by the following:

‘3. For Member States not participating in the joint actions as provided in Article 26(1) and (2), the auctioneer shall be appointed by the appointing Member State so as to conclude and implement the necessary arrangements with the auction platforms appointed pursuant to Article 26(1) and (2), including any clearing system and settlement system connected to them, to enable the auctioneer to auction allowances on behalf of the appointing Member State on such auction platforms upon mutually agreed terms and conditions, pursuant to the second subparagraph of Article 30(7) and the first subparagraph of Article 30(8).’

(b) paragraph 4 is replaced by the following:

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‘4. Member States shall refrain from disclosing inside information to persons working for the auctioneer unless the person working or acting for the Member State makes such disclosure on a need-to-know basis in the normal course of the exercise of their employment, profession or duties and the Member State concerned is satisfied that the auctioneer has in place appropriate measures to prevent insider dealing, within the meaning of Article 3(28) or as prohibited by Article 38, by any person working for an auctioneer, additional to the measures foreseen in Article 42(1) and (2).’

(12) In Article 24(1), the third subparagraph is replaced by the following:

‘Where reasons of *force majeure* prevent the auction monitor from performing its tasks in respect of a given auction, in full or in part, the auction platform concerned may decide to conduct that auction provided that it takes appropriate measures to ensure adequate monitoring of the auction itself. The foregoing shall also apply until the moment that the first auction monitor appointed pursuant to paragraph 2 starts monitoring the auctions concerned as more particularly specified in the contract appointing it.’

(13) In Article 25, paragraph 6 is replaced by the following.

‘The auction monitor shall provide opinions pursuant to Articles 7(7), 8(3), 27(3) and 31(1) and as provided in Annex III. Opinions shall be delivered within a reasonable time.’

(14) In Article 27, the following paragraph 3 is added:

‘3. Within three months from the date of its appointment, the auction platform shall submit its detailed exit strategy to the Commission, who will consult the auction monitor thereon. Within two months from the date of receipt of the auction monitor's opinion pursuant to Article 25(6), the auction platform shall review, and where appropriate amend, its exit strategy, taking the utmost account of that opinion.’

(15) In Article 30(6), point (c) is replaced by the following:

‘(c) the auctioned product and any information necessary for the Commission to assess whether the envisaged auction calendar is compatible with any prevailing or envisaged auction calendar of the auction platforms appointed pursuant to Articles 26(1) or (2) as well as other auction calendars proposed by other Member States not participating in the joint action provided for in Article 26 but opting to appoint their own auction platforms;’

(16) In Article 31, paragraph 1 is replaced by the following:

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‘1. Any auction platform appointed pursuant to Article 30(1) shall carry out the same functions as the auction platform appointed pursuant to Article 26(1) as provided for in Article 27.

However, an auction platform appointed pursuant to Article 30(1) shall be exempted from the provisions of Article 27(1)(c) and it shall submit the exit strategy referred to in Article 27(3) to the appointing Member State, who must consult the auction monitor thereon.’

(17) In Article 32(4), the first subparagraph is replaced by the following:

‘4. The auction platforms appointed pursuant to Article 30(1) or (2) of this Regulation shall determine and publish the bidding windows, individual volumes, auction dates as well as the auctioned product, payment and delivery dates of the allowances, covered by Chapters II and III of Directive 2003/87/EC, to be auctioned in individual auctions each year, by 31 October of the previous year or as soon as practicable thereafter. The auction platforms concerned shall make their determination and publication only after the determination and publication pursuant to Articles 11(1) and 13(1) of this Regulation by the auction platforms appointed pursuant to Article 26(1) or (2) of this Regulation, unless such an auction platform has not yet been appointed. The auction platforms concerned shall make their determination and publication only after having consulted the Commission and obtained its opinion thereon. The auction platforms concerned shall take the utmost account of the Commission's opinion.’

(18) In Article 33, the first subparagraph is replaced by the following:

‘Upon delivery by the auction monitor of the annual consolidated report concerning the auctions conducted in 2014, the Commission shall review the arrangements provided for in this Regulation including the operation of all auction processes.’

(19) In Article 35, paragraph 1 is replaced by the following:

‘1. Auctions shall only be conducted on an auction platform authorised as a regulated market whose operator organises a market in allowances or allowances derivatives.’

(20) In Article 44, paragraph 2 is replaced by the following:

‘2. An auction platform including the clearing system(s) or settlement system(s) connected to it shall transfer the payments made by the bidders or any successors in title arising from the auctioning of allowances covered by Chapter II and III of Directive 2003/87/EC to the auctioneers that auctioned the allowances in question, except for any amount for which it is asked to act as a payment agent in respect of the auction monitor.’

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- (21) Annex III is amended in accordance with the text set out in the Annex to this Regulation.

Article 2

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission
Commissioner Hedegaard

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ANNEX

The table set out in Annex III to Regulation (EU) No 1031/2010 is amended as follows:

In part 1, following name of the auction platform appointed by Germany, the following row is added:

	Legal basis	Article 30(2)
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In part 2, following name of the auction platform appointed by the United Kingdom, the following row is added:

	Legal basis	Article 30(1)
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The following part 3 is added:

'Auction platforms appointed by Germany		
3	Auction Platform	European Energy Exchange AG (EEX)
	Legal basis	Article 30(1)
	Term of appointment	From [<i>Note to Publications Office: Insert date of entry into force of this Regulation here</i>] at the earliest until [<i>Note to Publications Office: the last day of a 5-year period following the first date inserted</i>] at the latest, without prejudice to the second subparagraph of Article 30(5).
	Conditions	Admission to the auctions shall not be dependent on becoming a member of or a participant in the secondary market organised by EEX or of any other trading place operated by EEX or by any third party.
	Obligations	1. Within two months from [<i>Note to Publications Office: Insert date of entry into force of this Regulation here</i>], EEX shall submit its exit strategy to Germany for consultation of the auction monitor. The exit strategy shall be without prejudice to the obligations upon EEX pursuant to the contract with the Commission and the Member

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		<p>States concluded pursuant to Article 26 and the rights of the Commission and those Member States under that contract.</p> <p>2. EEX shall draw up and maintain on its webpage a comprehensive and up-to-date list of members admitted to bid that are licensed to bid on behalf of SMEs and small emitters with readily comprehensible practical guidance informing SMEs and small emitters of the steps they need to take to access the auctions through such members.</p> <p>3. Within six months after the start of the auctions or two months from the appointment of the auction monitor, whichever is the latest, EEX shall report to the auction monitor on the coverage obtained, including the level of geographic coverage and take the utmost account of the auction monitor's recommendations in this regard so as to ensure fulfilment of its obligations under Article 35(3)(a) and (b).</p> <p>4. Germany shall notify the Commission of any substantive changes in relevant contractual relations with EEX notified to the Commission on 15 March 2013 and communicated to the Climate Change Committee on 20 March 2013.'</p>
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