



EUROPEAN COMMISSION

Brussels, 13.7.2012
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COMMISSION DECISION

of 13.7.2012

concerning the application pursuant to Article 10c (5) of Directive 2003/87/EC of the European Parliament and of the Council to give transitional free allocation for the modernisation of electricity generation notified by Poland

Only the Polish text is authentic

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union (hereinafter TFEU),

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 (hereinafter "the Directive"), and in particular Article 10c thereof,

Whereas:

- (1) Article 10c of the Directive allows eligible Member States to provide for transitional allocation of emission allowances free of charge to installations for electricity production.
- (2) Auctioning is the rule for allocating allowances from 2013 onwards to operators in the electricity generation sector. However, in order to modernise their electricity systems, Member States eligible for using the option provided by Article 10c of the Directive may transitionally give allowances to such operators for free in the period 2013 to 2019. The allowances are deducted from the quantity that the Member State would otherwise auction as determined pursuant to Article 10(2) of the Directive. The value of the corresponding emission allowances allocated for free must then be used to finance investments in retrofitting and upgrading of the infrastructure, clean technologies, and diversification of the energy mix and sources of supply.
- (3) The application of Poland pursuant to Article 10c(5) of the Directive was notified to the Commission by letter dated 30 September 2011, registered on 3 October 2011. Upon receipt of this application, the Commission noted that the Polish application was incomplete and requested additional information from Poland. Poland submitted additional relevant information within the meaning of Article 10c(6) of the Directive, in order to complete the notified plan, by letter dated 13 January 2012, registered on 16 January 2012, in reply to questions from the Commission. Moreover, Poland

¹ OJ L 275, 25.10.2003, p. 32, (OJ L 338, 13.11.2004, p. 18).

submitted a number of amendments to its application, as well as additional relevant information within the meaning of Article 10c(6) of the Directive, by CD-ROM delivered on 6 July, as announced to the Commission by e-mail dated 5 July 2012.

- (4) The Polish application, including the total maximum quantity of allowances of 404.647.129 proposed to be allocated to installations pursuant to Article 10c over the period 2013-2019, has been assessed against the criteria set out in Article 10c of the Directive, taking into account the Commission's Communication "Guidance document on the optional application of Article 10c of Directive 2003/87/EC"² (hereinafter "the Communication") and the Commission Decision of 29 March 2011 on guidance on the methodology to transitionally allocate free emission allowances to installations in respect of electricity production pursuant to Article 10c(3) of Directive 2003/87/EC³ (hereinafter "the Decision").
- (5) In accordance with Article 10c(1)(c), in 2006, more than 30% of electricity in Poland was produced from a single fossil fuel, and the GDP per capita at market price did not exceed 50% of the average GDP per capita at market price of the Union. Poland may therefore use the option provided for by Article 10c of the Directive.
- (6) Together with its application, the Polish authorities provided a list of 145 installations for electricity production that it claimed to have been in operation by 31 December 2008 and 31 installations for electricity production for which the investment process was physically initiated by the same date.
- (7) With regard to the installations for which the investment process was physically initiated by 31 December 2008 not listed in any of the Annexes to this decision, the Polish authorities could demonstrate, by providing substantiated evidence showing that the construction of each installation has indeed started before 31 December 2008, that the investment decision was not influenced by the option of receiving free allocation of emission allowances. The Commission therefore considers the installations not listed in any of the Annexes to this decision and included in the Polish application eligible for receiving allowances free of charge pursuant to Article 10c of the Directive.
- (8) However, for the installation listed in Annex I to this Decision, the Polish authorities were not able to substantiate that it fulfils the eligibility criteria pursuant to Article 10c(1) and it therefore cannot be accepted.
- (9) In order to be eligible for receiving free allocation pursuant to Article 10c, an installation for electricity production must either be in operation by 31 December 2008 or its investment process must have been physically initiated by the same date. Likewise, as Article 10c of the Directive provides for a derogation from Article 10a(1) to (5) of the Directive, new entrants as defined by Article 3(h), of the Directive are excluded from the scope of the transitional free allocation. This means that any installation which has obtained a greenhouse gas emissions permit (hereinafter "GHG permit") for the first time after 30 June 2011 and any installation which has had a

² OJ C 99, 31.03.2011, p. 3

³ C(2011) 1983 final

significant extension after the same date, insofar as the extension is concerned, cannot be considered eligible for receiving free allocation pursuant to Article 10c. For the installation listed in Annex I, the information submitted by the Polish authorities, however, shows that the GHG permit was only issued on 7 July 2011. On the basis of the information received, the Commission cannot therefore consider this installation eligible pursuant to Article 10c(1).

- (10) With regard to the allocation of emission allowances pursuant to Article 10c, allocations to installations listed in Annex II to this Decision have not been found in compliance with the requirements of Article 10c(3) and Article 1 of the Decision. Furthermore, allocations to installations not listed in Annexes I and II to this Decision to which Poland intends to allocate allowances on the basis of verified emissions do not comply with Article 3(1) of the Decision. It is therefore appropriate for the Commission to object to these elements of the Polish application pursuant to Article 10c of the Directive.
- (11) In accordance with Article 10c(3) of the Directive, allocations should either be based on verified emissions in 2005-2007 or an ex-ante efficiency benchmark. According to Article 1(1) of the Decision, the same allocation methodology shall apply to all eligible installations for which data on verified emissions for the period from 2005 to 2007 exist. In other words, installations for which data on verified emissions for the period from 2005 to 2007 exist should be allocated either on the basis of those verified emissions or on the basis of an ex-ante efficiency benchmark. Where no such data exists, the allocation can only be based on an ex-ante efficiency benchmark. However, only one allocation methodology should apply to each installation.
- (12) With regard to the allocations to the entity listed in point A of Annex II, Poland qualified this entity as a "sub-installation" of another installation in operation before 31 December 2008. In this regard, the Commission notes that whereas the Directive refers to the extension of an existing installation, it does not refer to the concept of sub-installations. The Commission therefore assessed in detail whether the "sub-installation" listed in point A of Annex II relates to another installation included in the application or whether it is indeed a separate installation eligible for an allocation.
- (13) With regard to the entity listed under point A of Annex II, the Commission notes that Poland submitted for the "sub-installation" a GHG permit amending the permit of another installation listed in the application and allocated on the basis of verified emissions. Irrespective of the fact that, pursuant to Article 6(1) of the Directive, a GHG permit may cover one or more installations on the same site operated by the same operator, the Commission cannot, however, on the basis of the content of the GHG permit submitted by Poland, exclude that the "sub-installation" is part of another installation allocated on the basis of verified emissions. Considering at the same time that only one allocation methodology shall apply to each installation, an allocation based on a benchmark for this entity is excluded as long as the installation to which it relates is allocated based on verified emissions. Therefore, the Commission cannot consider the allocation to this entity in compliance with the requirements of Article 10c(3) of the Directive and Article 1 of the Decision and allocation to this entity cannot be accepted.

- (14) With regard to the allocations to the entities listed in point B of Annex II, Poland indicated that these installations allocated based on benchmarks have been extended in the period after 2007. Due to the extension, Poland considers that the available data on verified emissions in the period 2005-2007 for each of these installations do not constitute a correct basis for the allocation of allowances as the configuration of the installation has changed since then. In this regard, the Commission notes that the allocation to installations pursuant to Article 10c that have had a significant extension after the period 2005-2007 can, in principle, be based on an ex-ante efficiency benchmark instead of verified emissions in the period 2005-2007. However, such benchmark-based allocation must take due account of the fact that new entrants are excluded from the scope of Article 10c. Thus, no free allocation, neither on the basis of verified emissions nor on the basis of benchmarks, should be provided to installations which have had a significant extension after 30 June 2011, insofar as this extension is concerned. On the basis of the information provided by Poland with regard to the installations listed in point B of Annex II, however, the Commission cannot exclude that the installations listed in point B of this Annex have had a significant extension justifying an allocation on the basis of benchmarks for the installation only after 30 June 2011. Consequently, the Commission cannot exclude that the allocation methodology applied by the Polish authorities for these installations leads to an allocation pursuant to Article 10c, at least partly, to new entrants that are, however, excluded from the scope of the derogation provided by this provision. For this reason, the Commission cannot consider the allocations to these installations in compliance with the requirements of Article 10c(3) of the Directive and the Decision and the allocation to these installations cannot be accepted.
- (15) Where an installation should be allocated emission allowances on the basis of verified emissions of eligible installations in the period from 2005 to 2007, Article 3(1) of the Decision provides that the annual average verified emissions in the period 2005 to 2007 should be adjusted with a view to reflecting the performance of each installation in terms of emissions based on the relation between the total annual average emissions of eligible installations in the period from 2008 to 2010 and the total annual average emissions of eligible installations in the period from 2005 to 2007. This adjustment ensures that the individual performance of each installation in terms of emission reductions over the entire period 2005 to 2010 compared to the relevant national average is reflected in the level of free allocation to each installation under Article 10c of the Directive as from 2013. In this respect, the Commission notes that the adjustment applied by Poland only compares the individual performance of the installation in the relevant periods, but does not reflect the individual performance of each installation compared to the national average performance of eligible installations in the period 2008 to 2010. The application thereby does not comply with the requirements of Article 3(1) of the Decision in this respect. The Commission considers that Poland must allocate to all installations for which the allocation is based on verified emissions of eligible installations in the period from 2005 to 2007 in accordance with Article 3(1) of the Decision. The relevant allocations therefore cannot be accepted.
- (16) The Commission notes that in its application Poland lists particular units of one installation as separate installations for the purposes of the allocation. However, it follows from the relevant GHG permits submitted to the Commission that these entities are in fact one installation. Considering, however, that listing these entities

separately in the application has no effect on the actual number of emission allowances that may be granted to the installations, the Commission considers the Polish application may be accepted in this respect.

- (17) As part of its national plan, Poland has proposed investments in retrofitting and upgrading of the infrastructure, clean technologies, and diversification of the energy mix and sources of supply. However, the Commission considers the proposed investments listed in Annex III not compatible with the requirements of Article 10c(1) of the Directive and thus not eligible for being financed by the value of the allowances allocated pursuant to Article 10c.
- (18) In view of the title and the objective of Article 10c of the Directive, investments eligible under this provision need to be directly linked to the modernisation of the electricity generation sector. In other words, it needs to be demonstrated for each investment funded by the gains accruing from the allocation of allowances free of charge pursuant to Article 10c that it indeed contributes to the modernisation of the electricity generation sector. Any installation eligible for receiving free allocation pursuant to Article 10c(1) is required to use the value of these allowances to finance such investments. Accordingly, the modernisation requirement embedded in Article 10c does not exclude that a Member State provides in its national plan for investments that relate to installations for which the investment process was physically initiated by 31 December 2008. However, in such a case, the modernisation requirement entails, just as for investments relating to installations in operation by 31 December 2008, that the investment provides an added value in terms of the modernisation of the electricity generation sector. The Commission therefore considers that this requirement is not complied with where the investment provided in the national plan is identical to the investment process of an installation for electricity production physically initiated by 31 December 2008.
- (19) According to the replies from the Polish authorities to questions from the Commission, the investments in the national plan listed in Annex III relate to installations for which the investment process was physically initiated by 31 December 2008. Upon request, the Polish authorities could not substantiate that the investment included in the national plan goes beyond the initial investment plan in order to contribute to the modernisation of the installation. It could thus not be established that the investments listed in Annex III are not identical to the related investment process of the installation physically initiated by 31 December 2008 and provide an added value in terms of the modernisation of electricity generation.
- (20) Moreover, the mere fact that an investment relating to an installation for which the investment process was physically initiated by 31 December 2008 provides new electricity generation capacities is not sufficient to satisfy the modernisation requirement. Article 10c requires that the decision underlying this investment process has been taken irrespective of the prospects offered by Article 10c of the Directive. Notwithstanding the fact that the modernisation of the electricity generation sector represents a permanent task and is not triggered by Article 10c, such investments cannot be considered as generally entailing an added value for the modernisation of electricity generation even though they provide new electricity generation capacities.

- (21) What is more, if such investments were to be considered eligible under Article 10c, undue distortions of competition could not be excluded. In the event that the decision to invest in new generation capacities was affected by the prospects to receive free emission allowances under Article 10c, the decision to invest may either not have been taken without these prospects and the value of the allowances granted under Article 10c would thus be used to finance non-competitive generation capacities or would lead to windfall profits.
- (22) Therefore, on the basis of information provided by Poland, the Commission at this stage cannot conclude that the investments listed in Annex III to this Decision contribute to the modernisation of the sector as required by Article 10c and can thus not consider these investments eligible pursuant to Article 10c of the Directive.
- (23) Poland confirmed that all investments in the national plan not listed in Annex III to this Decision have been undertaken from 25 June 2009 or will be undertaken in the future. They comply with the requirements of Article 10c(1) and, to the extent possible, with the principles set out in point 23 of the Communication. The Commission finds that they are therefore eligible for being financed by the value of the allowances allocated pursuant to Article 10c.
- (24) In view of the objective of Article 10c of the Directive to modernise the electricity generation sector, the value of the allowances provided pursuant to Article 10c(1) should not be used to increase the electricity generation capacity to supply a growing market demand. Investments made with a view to matching electricity supply and demand would happen irrespective of the allocation pursuant to Article 10c. Where new electricity generation capacities are funded from the value of free emission allowances provided pursuant to Article 10c(1), the added value in terms of modernisation required by Article 10c must be ensured through a proportionate and timely de-commissioning of existing less-efficient electricity generation capacities. In its application, Poland confirmed that where an investment leads to an increase in the electricity generation capacity of an installation, less efficient capacity will be de-commissioned elsewhere.
- (25) The Commission has also examined the provisions with regard to monitoring and enforcement as regards the intended investments. In particular, Poland proposes to only issue the allowances to the operator once the latter has demonstrated in a report due by 15 February of each year to the satisfaction of the competent authority that an eligible investment from the national plan of a value equivalent to the free allowances has indeed been carried out in previous years. Allowances will be issued no later than 31st December 2019 unless the national plan foresees that the investment should take place thereafter or the investment is delayed. Allowances cannot be issued later than 28 February 2020. Allowances not issued to the operator will, in accordance with Article 10(1) and (4) of the Directive, be auctioned.
- (26) In order to establish the value of free emission allowances granted under Article 10c, Poland uses in its application the methodology used to determine the values set out in Annex VI to the Communication, indexed to the price level in 2010. The value of submitted investments should also be expressed at the price level of 2010.

- (27) An operator that does not carry out an investment included in the national plan may nevertheless receive allowances provided they at least partly finance another investment carried out by the PSE Operator or the Gas System Operator, including entities within their capital groups, through an investment bond system. In order to receive the allowances, they will be required to provide evidence of expenses incurred by the PSE Operator or the Gas System Operator and to purchase corresponding bonds.
- (28) The mechanism proposed by Poland allows close monitoring and effective enforcement of the national plan and ensures that the allowances allocated under Article 10c are clearly mirrored by investments in the modernisation of the electricity generation sector. Investments are subject to the competent authority's scrutiny and proper reporting to the Commission in accordance with Article 10c(1) and (4) is foreseen. Therefore, the Commission considers this mechanism sufficient to ensure proper execution of the investments in the national plan.
- (29) Without prejudice to the considerations above, the Commission takes the view that the allocation of free allowances as proposed by Poland in its application does not result in undue distortions of competition within the meaning of Article 10c(5)(e) of the Directive as it is consistent, in particular, with points 11, 44 and 58 of the Communication. At the same time, the Commission considers that the allocation of allowances free of charge to installations for electricity production and the financing of corresponding investments involve state aid within the meaning of Article 107(1) TFEU which Poland will notify to the Commission for approval in accordance with the notification requirement pursuant to Article 108(3) TFEU. Poland cannot put into effect the proposed aid measures until the Commission has adopted a final decision that the state aid involved is compatible with the internal market.
- (30) The scheme set out in the application must be implemented in accordance with Directive 2003/87/EC and with other relevant provisions of Union law, including Directive 2001/42/EC. Poland may, in accordance with Article 10c(2) of the Directive, reduce the total transitional free allocation provided in the application or decide to give transitional free allocation pursuant to Article 10c of the Directive for a period shorter than 2013-2019 provided that no inconsistency with the Directive or other Union law is thereby created. It is also without prejudice to measures taken at national level, in compliance with Union law, relating to the national energy policy and to the right of Member States to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply,

HAS ADOPTED THIS DECISION:

Article 1

1. No objections are raised in respect of the Polish application, pursuant to Article 10c (5) of the Directive, to give transitional free allocation for the modernisation of electricity generation, provided that:

- Poland does not grant free allowances pursuant to Article 10c(1) of the Directive to the installations listed in Annex I and Annex II;
 - without prejudice to the first and third sub-paragraph of the second paragraph, Poland does not grant free allowances, pursuant to Article 10c(1) of the Directive, to operators on the basis of verified emissions, in accordance with Article 3(1) of the Decision, where the adjustment of allocation is incomplete, that is to say, where it does not reflect the individual performance of each installation compared to the total annual average emissions of eligible installations in the period 2008 to 2010; and
 - Poland excludes the investments listed in Annex III from its national plan.
2. No objections are raised should Poland amend the allocation of allowances to individual installations included in the Polish application but not listed in Annex I and II and grant free allowances pursuant to Article 10c(1) of the Directive to operators referred to in the second indent of the first paragraph, on the basis of verified emissions, to the extent that the amendment consists of implementing a complete adjustment of the allocation to operators in order to reflect the individual performance of each installation compared to the total annual average emissions of eligible installations in the period 2008 to 2010 in accordance with Article 3(1) of the Decision.

No objections are raised should Poland amend the allocation of allowances to individual installations included in the Polish application but not listed in Annex I and II, to the extent that the amendment consists of redistributing the allowances within the total quantity laid down in the application, using the same methodology for the distribution of allowances specified in the Polish application.

No objections are raised should Poland amend the allocation of allowances to individual installations included in the Polish application and listed in point B of Annex II, to the extent that the amendment consists of excluding any extension of the installation after 30 June 2011 from the allocation. Where this leads to an allocation to the installation on the basis of verified emissions in accordance with Articles 1 and 3 of the Decision, such amendment is subject to the second indent of the first paragraph.

Any such amendment shall be notified to the Commission as soon as possible, and in any case no later than 1 January 2013.

Article 2

This Decision is addressed to the Republic of Poland.

Done at Brussels, 13.7.2012

*For the Commission
Connie HEDEGAARD
Member of the Commission*

ANNEX I

Number of installation as submitted in the Polish application pursuant to Article 10c(5) of the Directive

PL-197

ANNEX II

Point A

Number of entity as submitted in the Polish application pursuant to Article 10c(5) of the Directive

PL-180

Point B

Number of entity as submitted in the Polish application pursuant to Article 10c(5) of the Directive

PL-183

PL-187

PL-194

PL-196

Annex III

Number of investment as submitted in the Polish application pursuant to Article 10c(5) of the Directive
PL-\$-0017
PL-\$-0018
PL-\$-0025
PL-\$-0026
PL-\$-0034
PL-\$-0042
PL-\$-0047
PL-\$-0048
PL-\$-0049
PL-\$-0050
PL-\$-0051
PL-\$-0052
PL-\$-0065
PL-\$-0087
PL-\$-0098
PL-\$-0099
PL-\$-0100
PL-\$-0108
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PL-\$-0172
PL-\$-0180
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PL-\$-0274
PL-\$-0352