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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 26.10.2007

COMMISSION DECISION

of 26 October 2007

concerning the national allocation plan for the period 2008 to 2012 for the allocation of greenhouse gas emission allowances notified by Romania in accordance with Directive 2003/87/EC of the European Parliament and of the Council

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(Only the Romanian text is authentic)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

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 Article 9(3) thereof,

Whereas:

- (1) The national allocation plan of Romania for the period 2008-2012, developed under Article 9(1) of Directive 2003/87/EC (hereinafter "the Directive"), was notified to the Commission in its preliminary version by letter dated 21 December 2006, registered by the Commission 4 January 2007. A revised version of the plan was notified to the Commission by letter dated 8 May 2007, registered 6 June 2007, and the final version of the plan was notified to the Commission by letter dated 6 August 2007, registered 7 August 2007. Romania submitted additional information on the notified plan by letter dated 4 April 2007, registered 3 May 2007, by letter dated 6 August 2007, registered 7 August 2007, and by letter dated 7 September 2007, registered 10 September 2007, in reply to questions from the Commission.
- (2) The Climate Change Committee² considered the national allocation plan and called on the Commission to assess all national allocation plans on a consistent, coherent and robust basis. In this context, the Climate Change Committee underlined the importance of using the 2005 emissions figures as a significant element for the assessment of second period national allocation plans. The Climate Change Committee, *inter alia*, expressed strong concern about the proposed total quantity of allowances and urged the Commission to take all necessary measures to ensure that

¹ 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/EC, OJ L 275, 25.10.2003, p. 32, as amended by Directive 2004/101/EC of the European Parliament and of the Council of 27 October 2004, amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in respect of the Kyoto Protocol's project mechanisms, OJ L 338, 13.11.2004, p. 18.

² Decision 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 Protocol, OJ L 49, 19.02.2004, p. 1, established under Article 9 thereof.

Romania's allocation to the trading sectors will not be more than needed. For that purpose, the Committee urged the Commission to compare Romania's proposed allocation to projections and measures for the non-trading and trading sectors, including in particular assumptions made (on growth rates and carbon intensity trends) as well as to recent historic and projected emissions, and to examine the justification for deviations from recent historic and projected emissions for the trading sector. In this context, the Committee invited the Commission to examine the justifications for the respective differences between 2005 emissions data, as far as they are available, and the proposed allocations for the period from 2008 to 2012 and use the best available data for its analysis, and the Committee urged the Commission to ensure that the cap is determined as much as possible on the basis of independently verified emissions data in order to avoid serious market distortions and allocations beyond needs as experienced in a number of Member States for the 2005 to 2007 trading period. The Committee called on the Commission to examine projections for certain sectors which are partly not based on data established independently from production companies, as to whether they are realistic and adequately explained. The Committee invited the Commission to scrutinise the compatibility of the early action bonus criteria as used by Romania in order to exclude any undue advantages for operators. The Committee also called on the Commission to examine the compatibility of the proposed rules for allocation in case of temporary and partial closures, as well for known JI projects. Moreover, the Climate Change Committee noted that the Commission should examine the admissibility under criterion 12 of Annex III to the Directive of the intended maximum amount of CERs and ERUs which may be used by operators as a percentage of the allocation of allowances to each installation. The views of the Climate Change Committee have been taken into account.

- (3) The national allocation plan, including the total annual average quantity of allowances of 95.698600 million tonnes stated therein, has been evaluated against the criteria contained in Annex III to and Article 10 of the Directive, taking into account the Commission's guidance to Member States on the implementation of these criteria³. Certain aspects of the national allocation plan have been found incompatible with those criteria, and in particular with criteria 1, 2, 3 and 10 in Annex III to the Directive.
- (4) The national allocation plan contravenes criteria 1, 2 and 3 of Annex III to the Directive because the total quantity of allowances intended to be allocated is more than would be consistent with assessments of actual and projected progress made pursuant to Decision 280/2004/EC and more than would be consistent with the potential, including the technological potential, of activities covered by the Community scheme to reduce emissions. Criteria 2 and 3 provide for a methodology using the most representative emissions figures, taking into account economic growth and carbon intensity improvements. Pursuant to criterion 1, the total quantity of allowances to be allocated shall not be more than is likely to be needed for the strict application of the criteria of Annex III.

³ Commission Communication on guidance to assist Member States in the implementation of the criteria listed in Annex III to Directive 2003/87/EC (COM(2003)830 final) and Commission Communication on further guidance on allocation plans for the 2008 to 2012 trading period of the EU Emission Trading Scheme (COM(2005)703 final).

- (5) With respect to criterion 2, considering that Romania acceded to the European Union only on 1 January 2007 and that therefore the most recent Commission's assessment⁴ made pursuant to Decision 280/2004/EC does not include Romania in respect of 2005 verified emissions figures, the Commission has critically assessed the 2005 emissions figures for the trading sector as indicated by Romania in the plan, taking into account external expert advice. The Commission has hereby found that the 2005 emissions figures as indicated by Romania in the plan do not deviate significantly from the figures following from its own assessment and external expert advice. For this reason, the Commission accepts the 2005 emissions figures for the trading sector indicated by Romania in its plan as the starting point of analysis for the assessment under criteria 2 and 3.
- (6) The Commission is aware of the opinion brought forward by some Member States, but not endorsed by the Climate Change Committee, in favour of averaging 2005 emissions figures with Member States' estimates of emissions over other years in order to smooth out singular events in one particular year. However, in each year there are several factors, including weather patterns, influencing aggregate emissions that generally balance each other out over one year in their effects on total annual emissions. The Commission has examined the availability and quality of other data concerning emissions and energy use prior to 2005. The Commission does not have sufficient indications that a clear majority of exceptional circumstances manifestly pointed in one direction in 2005 and that therefore 2005 emissions figures cannot be regarded as representative. Consequently, the Commission considers that there are no sufficient reasons with respect to Romania to adjust emissions figures for 2005.
- (7) The Commission underlines that this approach is also compatible with the Commission's guidance that allocations to individual installations should not be based on changes in the emissions of those installations within the first phase⁵. The determination of the total quantity of allowances, on the one hand, and the distribution of the total quantity to individual installations, on the other hand, are separate issues and subject to different considerations. Similarly, the Commission's guidance concerning the reward for early action relates to sector and installation level allocations, but not the total quantity of allowances, as is clear from the heading of the relevant chapter⁶.
- (8) With respect to criterion 3, the Commission notes that for a national allocation plan to be consistent with the potential, including the technological potential, of activities covered by the scheme to reduce emissions a rigorous assessment of total allocations is required in accordance in particular with projections of economic growth and improvements in carbon intensity⁷. The Commission has assessed the figures at its disposal, including those in the public domain, with a view to calculating Romania's projected emissions. In order to derive the total quantity of allowances that is consistent with the potential, including the technological potential, of activities covered by the Community scheme to reduce emissions, the 2005 aggregate emission figures of installations in the Community scheme have been multiplied with two factors: firstly, the projected gross domestic product (thereafter "GDP") growth rate

⁴ COM(2006)658 final of 27 October 2006 and Annex SEC(2006)1412 of 27 October 2006.

⁵ Chapter 3.7, point 27 of COM(2005)703 final.

⁶ Chapter 3.7, point 28 of COM(2005)703 final.

⁷ See in particular point 11 of COM(2005) 703 final.

and, secondly, the rate for carbon intensity improvement, each in the period from 2005 to 2010. The resulting figure is compared with Romania's proposed allocation so as to determine to what extent it is in line with criterion 3. Of all data at its disposal, including those in the public domain, the Commission considers the data indicated in the PRIMES model⁸ as the most accurate and reliable estimations of both GDP growth⁹ and carbon intensity improvement rates. The PRIMES model has been used for analysis of energy and climate policy for a long time and the baseline assumptions¹⁰ are updated on a regular basis to reflect the most likely future trend. Furthermore, baseline assumptions are validated with the involvement of experts from Member States. There is no other data source at the disposal of the Commission, which offers a comparable degree of consistency and uniform accuracy across all Member States.

- (9) The PRIMES model has been concretely applied on the basis of a coherent set of assumptions and methodologies. The baseline used for the analysis of the national allocation plans of the 25 Member States prior to 2007 was based on information established in 2005 and published in the document "*European Energy and Transport Trends to 2030*" of the Commission's Directorate-General for Transport and Energy¹¹ and in the document of its Environment Directorate-General containing the calculation of baseline scenarios for the revision of the National Emission Ceilings Directive¹².

⁸ PRIMES is a modelling system that simulates a market equilibrium solution for energy supply and demand in the EU Member States. The model determines the equilibrium by finding the prices of each energy form such that the quantity producers find best to supply match the quantity consumers wish to use. The equilibrium is static (within each time period) but repeated in a time-forward path, under dynamic relationships. The model is behavioural but also represents in an explicit and detailed way the available energy demand and supply technologies and pollution abatement technologies. The system reflects considerations about market economics, industry structure, energy/environmental policies and regulation. These are conceived so as to influence market behaviour of energy system agents. The modular structure of PRIMES reflects a distribution of decision making among agents that decide individually about their supply, demand, combined supply and demand, and prices. Then the market integrating part of PRIMES simulates market clearing. PRIMES is a general purpose model. It is conceived for forecasting, scenario construction and policy impact analysis. It covers a long-term horizon. It is modular and allows either for a unified model use or for partial use of modules to support specific energy studies. More information can be found on the following website: <http://www.e3mlab.ntua.gr/>.

⁹ The GDP growth assumptions are based on the Commission's Economic and Financial Affairs Directorate-General's forecasts of April 2007 for the short term (2006-2008) as well as the long term (2005-2030). More specifically, short terms forecasts are taken from European Commission Economic Forecasts, Spring 2007 (EUROPEAN ECONOMY. No. 2/ 2007. Office for Official Publications of the EC. ISBN XXYY), also published on the website: http://www.ec.europa.eu/economy_finance/publications/european_economy/forecasts_en.htm Long-term forecasts are taken from European Commission, DG ECFIN "Long Run Labour Productivity and Potential Growth Rate Projections for the EU25 Countries up to 2050 (information note for Members of the EPC's working group on ageing populations)", ECFIN/50485/04-EN.

¹⁰ Examples for baseline assumptions are future developments in population, fuel prices, etc.

¹¹ European Energy and Transport, Trends to 2030 – update 2005, European Commission, Directorate-General for Energy and Transport, 2006, prepared by the Institute of Communication and Computer Systems of National Technical University of Athens (ICCS-NTUA), E3M-Lab, Greece, Authors: Dr. L. Mantzos and Prof. P. Capros, published on the Commission's website under the following hyperlink: http://ec.europa.eu/dgs/energy_transport/figures/trends_2030_update_2005/energy_transport_trends_2030_update_2005_en.pdf.

¹² Directive 2001/81/EC of the European Parliament and of the Council of 23 October 2001 on national emission ceilings for certain atmospheric pollutants (hereinafter the National Emissions Ceilings Directive). The baseline scenarios are published on the Commission's website under the following hyperlink: <http://ec.europa.eu/environment/air/baseline.htm>

However, Romania acceded to the European Union only on 1 January 2007, leading to the need to notify its plan only as of that date. Moreover, the most recent baseline for Romania with a high degree of accuracy was established in 2007 and therefore later than for the 25 other Member States. The baseline for Romania established before accession did not show a comparable degree of quality as for the other Member States. Therefore for Romania the analysis of the national allocation plan is based on an update¹³ of the document "*European Energy and Transport Trends to 2030*" of the Commission's Directorate-General for Transport and Energy established in 2007¹⁴.

- (10) The Commission considers that this level of carbon intensity improvement does not appropriately reflect most likely future trends because it does not take account of all relevant factors, including recent developments. In addition to the economic incentives created by the Community scheme, operators will be likely to increasingly invest in energy efficient technologies in order to lower their fuel and electricity costs. Moreover, they will increasingly be encouraged by policies and measures of the EU and Member States as well as public opinion to accelerate efforts with regard to innovation in energy saving production methods and thus take effective action against climate change. At EU level, collective efforts to reduce dependency of energy imports as well as measures identified in the new Energy Efficiency Action Plan¹⁵ with a view to realising the EU's energy saving potential, will further spur efforts to achieve better energy efficiencies, reducing in general also carbon intensity.
- (11) The Commission considers that the combined effect of reinforced energy efficiency measures identified in the Energy Efficiency Action Plan and the existence of a carbon constraint due to the Community scheme will lead to an annual improvement rate in carbon intensity for each Member State in excess of the rate reflected in the "low carbon constraint"-case. Consequently, the Commission considers it necessary to further improve the absolute value of carbon intensity arising from the "low carbon constraint"-case. While the "low carbon constraint" under the Community scheme leads at EU level to an average annual improvement rate in carbon intensity of 2.37%¹⁶, the Commission considers that the magnitude and importance of additional

¹³ The 2007 update to the document "*European Energy and Transport Trends to 2030*" of the Commission's Directorate-General for Transport and Energy is based on a scenario that corresponds to a "low carbon constraint/no CCS - scenario". This scenario is identical to the one contained in the calculation of baseline scenarios for the revision of the National Emission Ceilings Directive, and assumes that the carbon price in 2010, which is an important determinant of the carbon intensity trend development from 2005 to 2010, will increase as compared to the scenario established in the publication "*European Energy and Transport Trends to 2030*" published in 2005. The introduction of the Community scheme in 2005 and the strong commitments by the EU and Member States to combat climate change provide a clear and sustained signal to installations covered by the Community scheme that there is an economic cost to emitting greenhouse gases, which will become even more important in the future. This reinforces long-term economic incentives to reduce emissions. As a consequence, carbon intensity will improve over time at least at a rate as indicated in the above mentioned scenario which corresponds to the "low carbon constraint / no CCS"-case. The update to the document "*European Energy and Transport Trends to 2030*" of the Commission's Directorate-General for Transport and Energy is available at: <http://ec.europa.eu/environment/pubs/studies.htm>.

¹⁴ Due to Romania's accession to the EU on 1 January 2007 the time horizon for the assessment of the national allocation plan of Romania started only as of this date, which constituted also the deadline for notifying its national allocation plan.

¹⁵ Commission Communication on an Action Plan for Energy Efficiency: Realising the Potential (COM(2006)545 final).

¹⁶ As indicated in the "low carbon constraint"-case for "EU25" in the baseline scenarios for the revision of the National Emission Ceilings Directive under <http://ec.europa.eu/environment/air/baseline.htm>, the

measures identified in the new Energy Efficiency Action Plan justifies in principle assuming a similar quantitative effect for the latter. Recognising however the potential partial overlaps between both policy instruments and also that not all the measures identified in the Energy Efficiency Action Plan may be fully implemented by 2010, the Commission considers that the corresponding additional average annual rate for carbon intensity improvements should be adjusted downwards. More specifically, in order to exclude any potential overestimation of the total effects, the Commission takes a conservative estimate of an additional average annual rate of 0.5% for carbon intensity to improve further, which corresponds to a total additional carbon intensity improvement of 2.5%¹⁷ over the entire period from 2005 to 2010 compared to the "low carbon constraint"-case. Therefore, in order to appropriately reflect reality, the Commission considers it necessary to base the assessment under criterion 3 in Annex III to the Directive on a rate of carbon intensity improvement exceeding the "low carbon constraint"-case by 2.5% during the five-year period from 2005 to 2010.

- (12) In the light of the above, the following table indicates the data for the developments from 2005 to 2010 of both GDP and carbon intensity in Romania in absolute terms. The corresponding relative development factors and growth rates from 2005 to 2010 are also indicated:

Calculation element	2005	2010	Relative development factor 2005-2010	Growth rate 2005-2010
GDP ¹⁸	79.3	108.23 ¹⁹	1.364817 ²⁰	36.4817% ²¹
Carbon intensity ²² under the "low carbon constraint"-case	1131.3	911.8		

absolute figure for the EU's absolute carbon intensity in 2005 is 391.0 tonnes per million Euro GDP (in year 2000 value). For 2010, the corresponding figure is 346.8 tonnes per million Euro GDP. Therefore, the total improvement in the period from 2005 to 2010 can be calculated as $346.8/391$, which gives 0.887 or 11.3%. The EU's annual average carbon intensity improvement rate is calculated as $(346.8/391)^{1/5}$, which gives 0.9763 or 2.37%.

¹⁷ $1.005^5 = 1.02525$, which corresponds to 2.5% (after rounding).

¹⁸ This figure is expressed in thousand million Euro value year 2005.

¹⁹ The GDP growth assumptions are based on the Commission's Economic and Financial Affairs Directorate-General's forecasts of April 2007 for the short term (2006-2008) as well as the long term (2005-2030). More specifically, short terms forecasts are taken from European Commission Economic Forecasts, Spring 2007 (EUROPEAN ECONOMY, No. 2/ 2007. Office for Official Publications of the EC. ISBN XXYY), also published on the website: http://www.ec.europa.eu/economy_finance/publications/european_economy/forecasts_en.htm

As stated above, the time horizon for the assessment of national allocation plan of Romania is the first half of 2007 due to their accession to the EU only as of 1 January 2007, which constituted also the deadline for notifying their plans. In order to take into account the most recent figures available to the Commission, the GDP figure for 2010 indicated in the PRIMES-model up-date of 2007 has been adapted as follows: In a first step, the average annual GDP development factor from 2005 to 2010 is calculated on the basis of the figures contained in the PRIMES-model update of 2007, i.e. $(104.9/79.3)^{1/5}$, which gives 1.057. In a second step, this annual average development factor is replaced by the more recent development factors from the "Economic Forecasts Spring 2007" for those years, for which they are available (see p. 95 therein), i.e. the years 2006 (factor of 1.077), 2007 (factor of 1.067) and 2008 (1.063). For the years 2009 and 2010, the average annual development factor as calculated in the first step is taken. In a third step, the overall development factor from 2005 to 2010 is calculated by multiplying the indicated annual development factors, i.e. $1.077 * 1.067 * 1.063 * 1.057 * 1.057$.

²⁰ $108.23/79.3$.

²¹ $((108.23/79.3)-1)\%$.

Carbon intensity with additional improvement of 2.5%		889.005 ²³	0.785826 ²⁴	-21.4174% ²⁵
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On the basis of this, the following table shows the calculation of the annual excess allocation for the period from 2008 to 2012, i.e. the difference between the annual average allocation proposed by Romania and the allocation resulting from the strict application of criteria 2 and 3. Concretely, the latter is calculated as the product of the total 2005 emissions figure and the relative development factors of GDP and carbon intensity from 2005 to 2010, as indicated in the above table, taking into account that Romania applies the scope of activities covered by the Directive in line with the Commission's guidance²⁶:

Calculation of the annual excess allocation for the period from 2008 to 2012 (all figures in million tonnes CO ₂ eq.)				
2005 emissions	2005 emissions multiplied by relative development factors 2005-2010 for GDP and carbon intensity	Resulting allowed annual average total quantity from 2008-2012	Annual average allocation on basis of proposed national allocation plan	Annual average excess allocation
70.810000	75.944352 ²⁷	75.944352	95.698600	19.754248 ²⁸

Accordingly, given that in the years 2008 to 2012 proposed allocations exceed emissions taking into account GDP growth and carbon-intensity improvements, the Commission finds that the annual average excess allocation by Romania in the period 2008 to 2012 amounts to 19.754248 million tonnes, which contravenes criteria 1, 2 and 3.

- (13) Pursuant to Article 3(1) of Decision 2006/780/EC²⁹, Romania is required to include in the total quantity of allowances for the period 2008 to 2012 a set-aside of allowances drawn up for each project activity if, prior to the deadline for the notification of its national allocation plan set out in Article 9(1) of the Directive, Romania has issued letters of approval as a host country, pledging to issue emission reduction units ("ERUs") for project activities which result in emission reductions or limitations in installations falling under the scope of the Directive. Pursuant to Article 3(2) of Decision 2006/780/EC, Romania may also include in the total quantity of allowances for the period 2008 to 2012 an additional set-aside of allowances if after the decision pursuant to Article 11(2) of the Directive it intends to issue letters of approval for JI projects that pledge to issue ERUs before 31 December 2012 for project activities

²² This figure is expressed in terms of CO₂ Emissions to GDP (tonne of CO₂/million Euro value year 2005).

²³ $911.8 \cdot (1 - 0.025)$.

²⁴ $911.8 \cdot (1 - 0.025) / 1131.3$.

²⁵ $((911.8 \cdot (1 - 0.025) / 1131.3) - 1) \%$. The negative figure indicates an improvement in carbon intensity, meaning that the amount of CO₂ emitted to produce one unit of GDP decreases over time.

²⁶ Point 36 of COM(2005)703 final, as clarified by the "co-ordinated definitions" of additional combustion installations contained in the minutes of the Climate Change Committee of 31 May 2006.

²⁷ $70.810000 \cdot 1.3654817 \cdot 0.785826$.

²⁸ $95.698600 - 75.944352$.

²⁹ Commission Decision 2006/780/EC of 13 November 2006 on avoiding double counting of greenhouse gas emission reductions under the Community emissions trading scheme for project activities under the Kyoto Protocol pursuant to Directive 2003/87/EC of the European Parliament and of the Council, OJ L 316/12, 16.11.2006.

which result in emission reductions or limitations in installations falling under the scope of the Directive. Romania has approved such projects and has indicated that pursuant to Article 3(1) of Decision 2006/780/EC a set-aside is proposed to be established. However, the set-aside table in the national allocation plan is incomplete in that it does not contain information on all project activities approved by Romania but only on such project activities that Romania considers to result in emission reductions or limitations in installations falling under the scope of the Directive. As a result, the Commission cannot assess whether the total amount of allowances as set out in the set-aside is equal to all emission reductions or limitations in installations falling under the scope of the Directive. The non-inclusion of all project activities approved by Romania contravenes criterion 3 of Annex III to the Directive because the information provided is insufficient to assess whether the total quantity of allowances is consistent with the potential, including the technological potential of activities covered by this scheme to reduce emissions.

- (14) Pursuant to criterion 5 of Annex III to the Directive, the Commission has also examined compliance of the national allocation plan of Romania with the provisions of the Treaty, and in particular Articles 87 and 88 thereof. The Commission considers that the allocation of allowances free of charge to certain activities confers a selective economic advantage to undertakings which has the potential to distort competition and affect intra Community trade. The allocation of allowances for free appears to be imputable to the Member State and to entail the use of State resources to the extent that more than 90% of allowances are given for free. The aspects of imputability and State resources are further strengthened in the second trading period as the participation as of 2008 in international emissions trading and in the other flexible mechanisms, the Joint Implementation and the Clean Development Mechanism, enables the Member States to take further discretionary decisions influencing their budgets and the number of EU allowances granted to industry. In particular, as all allocations must as from the start of the second trading period be covered by Assigned Amount Units³⁰, which are tradable between contracting parties, any allocation directly reduces the quantity of Assigned Amount Units that the Member State can sell to other contracting parties or increases the need to buy such Assigned Amount Units. The Commission therefore at this stage considers that the plan could potentially imply State aid pursuant to Article 87(1) of the Treaty. On the basis of information provided by Romania, the Commission at this stage cannot consider with certainty that any potential aid granted under the national allocation plan is consistent with and is necessary to achieve the overall environmental objective of the Directive. Non-compliance with criteria 1, 2 and 3 fundamentally jeopardises the overall environmental objective of the emission trading scheme. The Commission considers that in such a case the environmental benefit of any aid included in the allowances may not be sufficient to outweigh the distortion of competition referred to above. The Commission notes in particular that an allocation exceeding projected emissions will not require beneficiaries to deliver an environmental counterpart for the benefit they receive. The Commission at this stage therefore cannot exclude that any aid involved would be found incompatible with the common market should it be assessed in accordance with Articles 87 and 88 of the Treaty.

³⁰ Article 45 of the Commission Regulation (EC) No 2216/2004 of 21 December 2004 for a standardised and secured system of registries pursuant to Directive 2003/87/EC of the European Parliament and of the Council and Decision No 280/2004/EC of the European Parliament and of the Council, OJ L 386, 29.12.2004, p. 1.

- (15) Furthermore, pursuant to criterion 5 of Annex III to the Directive, the Commission has examined the methodology by which Romania intends to allocate allowances at sector and installation level. The Commission notes that individual allocations to installations rely on growth projections for the sector prepared by the government. Such estimates can depend on many subjective assumptions which are difficult to verify in an objective manner and Romania has not demonstrated that the estimates used are sufficiently substantiated. Finally, the Commission has not received appropriate information to assess whether the early action bonus is granted in a consistent manner. For these reasons, due to the lack of sufficient safeguards, the proposed allocation methodology may lead to undue advantages to certain sectors or installations in the light of criterion 5 of Annex III to the Directive. Therefore, the Commission at this stage and on the basis of the currently available information cannot exclude that State aid involved in the allocations may partially be found incompatible with the common market should it be assessed in accordance with Articles 87 and 88 of the Treaty.
- (16) The intention of Romania to adjust the allocation of allowances to installations listed in the national allocation plan and operating in its territory in application of the procedures provided in the plan, as outlined in the below recitals, contravenes criterion 10 in Annex III to the Directive which requires the quantity of allowances to be allocated to each installation to be stated *ex-ante* in the national allocation plan covering the period referred to in Article 11(2) of the Directive and not to adjust the allocation of allowances set out in the national allocation plan after the adoption of the decision referred to in Article 11(2) of the Directive. Following the final allocation decision the number of allowances to be allocated and issued for each installation is fixed and may not be changed, except in the case of full closure and withdrawal of the greenhouse gas permit of that same installation.
- (17) In this respect, the Commission has examined the provisions in the proposed plan relating to the envisaged allocation of allowances from the new entrants' reserve for, firstly, installations where changes occur in the installation or technology that lead to an increase of emissions due to an increase in production of at least 20% compared to the previous year of operation and, secondly, installations obtaining an update of their greenhouse gas permit due to an increase in CO₂ emissions because of compliance with legal provisions. The Commission finds that any such production increase subsequent to the notification to the Commission of the national allocation plan cannot be subsumed under the definition of "new entrant" pursuant to Article 3(h) of the Directive according to which a "new entrant" means any "installation carrying out one or more of the activities indicated in Annex I, which has obtained a greenhouse gas emissions permit or an update of its greenhouse gas emissions permit because of a change in the nature of functioning or an extension of the installation, subsequent to the notification to the Commission of the national allocation plan". The Commission interprets this definition in the light of the objective of the Directive "to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner" and its rationale. Accordingly, any "extension of the installation" can only relate to extensions of capacities of activities in an installation which have a direct bearing on emissions and which would require a new or an update of the respective greenhouse gas emission permit pursuant to the Directive. As the Directive applies to installations carrying out the various activities set out in Annex I of the Directive, any "change in the nature or functioning or an extension of the installation" needs to occur strictly with regard to the activity by virtue of which the particular installation is falling under the Directive, regardless of any other activities that may be carried out in that installation. Therefore, if an activity is not defined in Annex I to the Directive by

referring to its final product (e.g. steel), but rather to the process (e.g. combustion of a fuel) that is taking place in the installation (as is the case for "*combustion installation*"), the extension of an installation's production capacity that is not accompanied by the extension of the relevant activity indicated in Annex I to the Directive cannot be considered a new entrant. In other words, it is decisive that the emission-relevant activity of the installation covered by the Directive is extended, since for mere extensions of production capacity, in particular productions not covered by the Directive, a new greenhouse gas permit or update of an existing greenhouse gas permit is not mandatory.

- (18) Consequently, the Commission finds that the provisions relating to the envisaged allocation of allowances from the new entrants' reserve for, firstly, installations where changes occur in the installation or technology that lead to an increase of emissions due to an increase in production of at least 20% compared to the previous year of operation and, secondly, installations obtaining an up-date of their greenhouse gas permit due to an increase in CO₂ emissions because of compliance with legal provisions and leading to an increase of allowances allocated after the allocation decision has been taken, constitute an ex-post adjustment that contravenes criterion 10 in Annex III to the Directive.
- (19) Such ex-post adjustments contradict the essential concept of a "cap-and-trade" system as conceived by the Directive. Under the Community scheme, each installation is allocated a certain amount of allowances in the decision referred to in Article 11(2) of the Directive, whose value it can freely dispose of with a view to taking optimal economic decisions. Three major alternatives exist, which are equally legitimate: investing in emissions reductions and selling freed allowances, reducing production volume and selling freed allowances, or maintaining/expanding production volume while buying additional allowances needed.
- (20) The Commission considers that there is no administrative need or any other justification for ex-post adjustments. Member States are required to use the best data available when deciding on allocations up-front. As a matter of fact, the use of prognoses always requires to a certain degree an ex-ante estimation of emissions the actual volume thereof may eventually deviate in reality. This is an inherent feature of any "cap-and-trade" scheme and can thus certainly not justify a retroactive change to the allocation already decided upon up-front. Moreover, the reasons for such a deviation cannot be reliably identified and may well be the result of emissions reductions due to real investments having been carried out by operators in line with the economic incentives created by the scheme.
- (21) The Directive allows only for two adjustments following the decision referred to in its Article 11(2) where such retroactive change does not occur or does not have a detrimental impact on the functioning of the Community scheme: firstly, where an installation is closed during the trading period, that Member States determine that there is no longer an operator to whom allowances will be issued; and, secondly, where allocation takes place to new entrants from the reserve, that Member States determine the exact allocation to each new entrant.
- (22) In order to bring the national allocation plan in conformity with the criteria listed in Annex III to Directive 2003/87/EC, the plan should be amended. The Commission should be notified of the amendments made to the plan in accordance with this Decision by Romania as soon as possible, taking into account the time-scale necessary

to carry out the national procedures without undue delay. Were Romania to amend its national allocation plan in a non-discriminatory manner in accordance with Article 2 of this Decision and duly taking into account the Commission's observations in recitals 14 and 15, the Commission considers that any potential aid is likely to be compatible with the common market should it be assessed in accordance with Articles 87 and 88 of the Treaty.

- (23) Information in the national allocation plan not relevant for the allocation of allowances for the period referred to in Article 11(2) of Directive 2003/87/EC has not been taken into account for the purposes of this Decision.
- (24) The reports on the implementation of policies and measures and the use of the Kyoto Protocol's mechanisms submitted by Member States pursuant to Decision 280/2004/EC are important sources of information for the evaluation of the national allocation plans pursuant to criterion 2 of Annex III to Directive 2003/87/EC.
- (25) Pursuant to Article 9(3), second sentence, of the Directive, the Member State shall only take a decision under Article 11(2) of the Directive if proposed amendments are accepted by the Commission. The Commission accepts all modifications of the allocation of allowances to individual installations within the total quantity to be allocated to installations listed therein resulting from technical improvements to data quality. No further prior assessment and acceptance by the Commission is necessary because the allocation methodology and the total quantity of allowances remain unchanged. As the modification is limited to mechanically adjusting the result from the use of data of higher quality having become available more recently to the intended allocation, any such modification cannot be conceived to be incompatible with the criteria of Annex III to or Article 10 of the Directive. Similarly, changing the share of allocation of allowances free of charge within the limits set in Article 10 of the Directive is accepted, since it requires no prior assessment by the Commission. The Commission considers that such a change cannot *per se* be conceived to discriminate between companies or sectors in such a way as to unduly favour certain undertakings or activities in the light of criterion 5 or contravene any other criteria of Annex III to the Directive.
- (26) The whole procedure comprising the notification to, assessment and possible rejection by the Commission of the national allocation plans and the final allocation decisions to be taken by Member States is foreseen by the Directive in a short schedule and implemented by the decisions taken pursuant to its Article 9(3) so as to ensure that the system operates effectively with a minimum of uncertainty for market participants.
- (27) Accordingly, Member States are not entitled to propose any amendments to national allocation plans, including to the total quantity of allowances stated therein, given that the deadline of 31 December 2006 specified in Article 11(2) of the Directive, which lies before accession on 1 January 2007, has expired, other than those made to correct the incompatibilities indicated in the respective Commission decision on a national allocation plan³¹. The interpretation of the deadline of 31 December 2006 specified in

³¹ See Court of First Instance, ruling of 23 November 2005 in case T-178/05, OJ C 22, 28.1.2006, p. 14, full text <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005A0178:EN:HTML>; point 7 of the Commission Communication on further guidance on allocation plans for the 2008 to 2012 trading period of the EU Emission Trading Scheme, COM(2005)703 final, published under http://ec.europa.eu/environment/climat/pdf/nap_2_guidance_en.pdf; Commission Decision of 22

Article 11(2) as a "cut-off deadline" is proportionate in balancing the interest of a Member State to exert its discretion on substantive issues and the interest of the Community to ensure the functioning of the emissions trading scheme,

HAS ADOPTED THIS DECISION:

Article 1

The following aspects of the national allocation plan of Romania for the first five-year period mentioned in Article 11(2) of Directive 2003/87/EC are incompatible respectively with:

1. criteria 1, 2 and 3 of Annex III to the Directive: the part of the intended total quantity of allowances, amounting to 19.754248 million tonnes CO₂eq per year, that is not consistent with assessments made pursuant to Decision 280/2004/EC and not consistent with the potential, including the technological potential, of activities to reduce emissions;
2. criterion 3 of Annex III to the Directive: the non-inclusion of all project activities approved by Romania in the set-aside for allowances pursuant to Article 3 of Decision 2006/780/EC;
3. criterion 10 of Annex III to the Directive: the provisions of the national allocation plan contained in:
 - Annex D, Section D1.3., relating to the envisaged allocation of allowances from the new entrants' reserve for installations where changes occur in the installation or technology that lead to an increase of emissions due to an increase in production of at least 20% compared to the previous year of operation;
 - Annex D, Section D1.3, relating to the envisaged allocation of allowances from the new entrants' reserve for installations obtaining an update of their greenhouse gas permit due to an increase in CO₂ emissions because of compliance with legal provisions;to adjust the allocation of allowances to an installation listed in the national allocation plan and operating in its territory after the decision pursuant to Article 11(2) of the Directive has been taken.

Article 2

No objections shall be raised to the national allocation plan, provided that the following amendments to the national allocation plan are made in a non-discriminatory manner and notified to the Commission as soon as possible, taking into account the time-scale necessary to carry out the national procedures without undue delay:

1. the total quantity to be allocated for the Community scheme is reduced by 19.754248 million tonnes CO₂eq of allowances per year;

February 2006 concerning the proposed amendment to the national allocation plan for the allocation of greenhouse gas emission allowances notified by the United Kingdom in accordance with Directive 2003/87/EC of the European Parliament and of the Council, C (2006) 426 final, published under http://ec.europa.eu/environment/climat/pdf/uk_final_2006_en.pdf.

2. all project activities approved by Romania in the set-aside for allowances pursuant to Article 3 of Decision 2006/780/EC are included, providing sufficient information to assess whether the total quantity of allowances is consistent with the potential, including the technological potential of activities covered by this scheme to reduce emissions;
3. the allocation of allowances to an installation listed in the national allocation plan and operating in its territory, contrary to what is provided by the plan in:
 - Annex D, Section D1.3, relating to the envisaged allocation of allowances from the new entrants' reserve for installations where changes occur in the installation or technology that lead to an increase of emissions due to an increase in production of at least 20% compared to the previous year of operation;
 - Annex D, Section D1.3, relating to the envisaged allocation of allowances from the new entrants' reserve for installations obtaining an update of their greenhouse gas permit due to an increase in CO₂ emissions because of compliance with legal provisions;

is not adjusted after the decision pursuant to Article 11(2) of the Directive has been taken.

Article 3

1. The total annual average quantity of allowances of 75.944352 million tonnes, to be allocated by Romania according to its national allocation plan to installations listed therein and to new entrants shall not be exceeded.
2. The national allocation plan may be amended without prior acceptance by the Commission if the amendment consists in modifications of the allocation of allowances to individual installations within the total quantity to be allocated to installations listed therein resulting from improvements to data quality or to reduce the share of the allocation of allowances free of charge within the limits set in Article 10 of the Directive.
3. Any amendments of the national allocation plan made to correct the incompatibilities indicated in Article 1 of this Decision but deviating from those referred to in Article 2 must be notified as soon as possible, taking into account the time-scale necessary to carry out the national procedures without undue delay, and require prior acceptance by the Commission pursuant to Article 9(3) of the Directive. Any other amendments of the national allocation plan, apart from those made to comply with Article 2 of this Decision, are inadmissible.

Article 4

This Decision is addressed to the Republic of Romania.

Done at Brussels, 26 October 2007

For the Commission