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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 26.3.2007

COMMISSION DECISION

of 26 March 2007

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

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(Only the French 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 France for the period 2008-2012, developed under Article 9(1) of Directive 2003/87/EC (hereinafter "the Directive"), was originally notified to the Commission by letter dated 28 September 2006 and registered by the Commission on 28 September 2006. France submitted additional information on the notified plan by letter dated 27 October 2006, registered on 8 November 2006, in reply to questions from the Commission. After withdrawing its original plan by letter of 28 November 2006, France notified an up-dated version of the plan by letter of 29 December 2006, registered on 5 January 2007, complemented by additional information notified by letter of 17 January 2007, registered on 23 January 2007, and by letters dated 13 and 15 March 2007.
- (2) The Climate Change Committee² considered the original national allocation plan and its improved up-dated version 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 verified emissions figures as a significant element for the assessment of second period national allocation

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.

plans. The Climate Change Committee also, *inter alia*, stressed the crucial importance of transparent and credible baseline data and projected emissions and urged the Commission to take into account the importance of preserving the integrity of the internal market and avoiding undue distortions of competition. In respect of the improved up-dated version of the plan, the Climate Change Committee, *inter alia*, invited the Commission to examine the growth factors and emissions trends in the industrial sectors and to ensure that installations are not allocated more allowances than needed. Moreover, the Committee urged the Commission to scrutinise the determination and use of benchmarks for new entrants as well as the size and the intended replenishment of the new entrants' reserve with particular regard to the impact on the overall amount of allowances allocated for free. The Committee noted also that the Commission should examine the admissibility under criterion 12 of Annex III to the Directive of the intended maximum amount of CERs³ and ERUs⁴ 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 132.800000 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 criteria⁵. Certain aspects of the national allocation plan have been found incompatible with those criteria, and in particular with criterion 6 and potentially with criteria 1, 2 and 3 in Annex III to the Directive.
- (4) France has proposed to include 5.108612 million tonnes of allowances in the proposed total quantity of 132.800000 million tonnes in respect of emissions of additional combustion installations annually, which have not been included in the first period plan and result from the expansion in the scope of activities covered by the Directive from the first to the second phase as applied by France in line with the Commission's further guidance⁶. Allocations to these installations need to take place in accordance with the general methodologies stated in the national allocation plan, and only take place to the extent that the emissions of these installations have been substantiated and verified. Consequently, France needs to deduct from the proposed average annual total quantity of 132.800000 million tonnes, which is consistent with criteria 1, 2 and 3 of Annex III to the Directive⁷, the part of the total quantity potentially amounting to

³ "Certified emission reduction" pursuant to Article 3(n) of the Directive.

⁴ "Emission reduction unit" pursuant to Article 3(m) of the Directive.

⁵ 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).

⁶ 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.

⁷ The precise figure for the average annual total quantity of allowances permissible under criteria 1, 2 and 3 of the Directive is 132.801430 million tonnes, as indicated in the right column of the first table below. It is calculated as the product of the total 2005 verified emissions figure, increased by a correction for remaining non-verified installations, and the relative development factors of GDP and carbon intensity from 2005 to 2010, the resulting amount being increased to take into account the effect from the increase in scope from the first to the second trading phase in line with the Commission's guidance, while using the overall figure envisaged by France to be allocated to these additional installations.

5.108612 million tonnes of allowances in respect of additional emissions of combustion installations annually to the extent that the allocation to these installations is not justified in accordance with the general methodologies stated in the national allocation plan and on the basis of substantiated and verified emission figures. The deduction of the amount unjustified in this respect from the total quantity of

The relative development factors 2005-2010 for GDP and carbon intensity used for this calculation are indicated in the second table below. GDP figures are derived from the Commission's Economic and Financial Affairs Directorate-General's "Economic Forecasts Autumn 2006", published under http://ec.europa.eu/economy_finance/publications/european_economy/2006/ee506en.pdf, with the GDP figure for 2010 indicated in "European Energy and Transport Trends", published under http://ec.europa.eu/dgs/energy_transport/figures/trends_2030_update_2005/energy_transport_trends_2030_update_2005_en.pdf, 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 publication "European Energy and Transport Trends", i.e. $(1723.1/1541.0)^{(1/5)}$, which gives 1.022590. In a second step, this annual average development factor is replaced by the more recent development factors from the "Economic Forecasts Autumn 2006" for those years, for which they are available (see p. 68 therein), i.e. the years 2006 (factor of 1.022), 2007 (factor of 1.023) and 2008 (1.021). 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. $1.022 \times 1.023 \times 1.021 \times 1.022590 \times 1.022590$. The Commission has not taken into account the figures from the interim forecast of February 2007 published by its Economic and Financial Affairs Directorate-General on 16 February 2007 because they are only available for seven Member States and do therefore not constitute a sufficiently consistent and equal data basis across the entire EU.

Carbon intensity figures are taken from PRIMES in the form of 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>, with carbon intensity being further improved by a factor of 2.5% per year, as outlined in the Commission's Communication COM(2006) 725 final of 29 November 2006, i.e. with the figure for 2010 of 227.2 tonnes of CO₂/million Euro (value year 2000) multiplied by a factor of 0.975, which gives 221.52 tonnes of CO₂/million Euro for carbon intensity in 2010, which represents the average year in the period 2008-2012.

Calculation of the allowed annual average total quantity for the period from 2008 to 2012 (all figures in million tonnes CO ₂ eq.)				
2005 verified emissions	Correction taking into account average allocated to remaining non verified installations in 2005-07	2005 verified emissions multiplied by relative development factors 2005-2010 for GDP and carbon intensity	Effect from increase in scope from 1 st to 2 nd phase	Resulting allowed annual average total quantity from 2008-2012
131.257908	0.01588	127.692818	5.108612	132.801430

Calculation element	2005	2010	Relative development factor 2005-2010	Growth rate 2005-2010
GDP	1541.0	1720.1	1.116223	11.6223%
Carbon intensity under the "low carbon constraint"-case	254.2	227.2		
Carbon intensity with additional improvement of 2.5%		221.52	0.87144	-12.856%

132.801430 million tonnes permissible under criteria 1, 2 and 3 of Annex III to the Directive only needs to take place to the extent that it leads to a new permissible figure, which is lower than the proposed total quantity of 132.800000 million tonnes. The failure by France to do so would constitute a contravention of criteria 1, 2 and 3 of Annex III to the Directive.

- (5) The Commission notes that the up-dated version of the plan provides that there shall be no issuance of allowances pursuant to Article 13(2), second sentence, of the Directive ("banking"). However, the Commission notes also that there is an existing national law in place providing for banking from the first to the second trading period which will still need to be changed by the French legislator at the proposal of the French government. The Commission underlines that the French government's decision to disallow banking from the first to the second trading period is a crucial element for the Commission's assessment of the plan. In case France were eventually not to disallow banking by changing its existing legislation, in order to assure compatibility of the national allocation plan with criterion 3 of Annex III to the Directive, one fifth of the total number of allowances which France would decide to issue pursuant to Article 13(2), second sentence, of the Directive would have to be deducted from the proposed average annual total quantity of allowances of 132.800000 million tonnes, potentially to be reduced in the light of recital 4, that is also consistent with the total quantity of allowances permissible under criteria 1, 2 and 3 of Annex III to the Directive. But this deduction only needs to take place to the extent that it is ensured that the sum of the average annual allocation and one fifth of the total quantity of allowances potentially to be issued pursuant to Article 13(2), second sentence, does not exceed the proposed total quantity of allowances of 132.800000 million tonnes, potentially to be reduced in the light of recital 4. If allowances issued pursuant to Article 13(2), second sentence, of the Directive were not taken into account in the overall allocation, the total quantity of allowances would exceed the level that is consistent with the potential to reduce emissions. Otherwise, activities covered by the Community scheme in France would in total receive more allowances than what would be necessary to cover emissions in the first five-year period mentioned in Article 11(2) of the Directive.
- (6) Pursuant to criterion 5 of Annex III to the Directive, the Commission has also examined compliance of the national allocation plan of France 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 Units⁸, which are tradable between contracting parties, any allocation directly

⁸ 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

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 France, 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. In this context, the Commission has examined the methodology by which France intends to allocate allowances at sector and installation level. France does not provide sufficiently substantiated information on the methodology applied with respect to the sectors' production forecasts and the quantitative effects of assumptions used. Moreover, France does not demonstrate that information provided by associations or companies has been verified by independent experts. Therefore, due to the lack of sufficient safeguards, the proposed allocation methodology may lead to undue and discriminatory advantages to certain sectors or installations. For these reasons, 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.

- (7) Moreover, pursuant to criterion 5 of Annex III to the Directive, the Commission underlines that in case France were not to change its existing legislation in line with its up-dated version of the plan so as not to make use of Article 13(2), second sentence, of the Directive ("banking"), any national provisions related to banking would have to be notified by France to the Commission pursuant to Article 88(3) of the Treaty. The Commission at this stage considers that any issuance of allowances pursuant to Article 13(2), second sentence, of the Directive which is not based on an environmental counterpart by beneficiaries in terms of proven real emission reductions during the three year period referred to in Article 11(1) of the Directive could constitute State aid which would likely be found incompatible with the common market should it be assessed in accordance with Articles 87 and 88 of the Treaty.
- (8) Pursuant to criterion 6 of Annex III to the Directive, the plan shall contain information on the manner in which new entrants will be able to begin participating in the Community scheme. The Commission notes that the methodology used to allocate to new entrants remains intransparent as it does not explain how the sectoral information on which the allocation is based has been verified. It also notes that the eligibility criteria for access to allowances need to be further defined. This contravenes criterion 6 because the information contained is insufficient to assess whether the other criteria of Annex III to the Directive and Article 10 thereof are respected.
- (9) In order to bring the national allocation plan in conformity with the criteria listed in Annex III to the Directive, the plan should be amended. The Commission should be notified of the amendments made to the plan in accordance with this Decision by France as soon as possible, taking into account the time-scale necessary to carry out the national procedures without undue delay. Were France 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 5, 6

the Council and Decision No 280/2004/EC of the European Parliament and of the Council, OJ L 386, 29.12.2004, p. 1.

and 7, the Commission considers that 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.

- (10) Information in the national allocation plan not relevant for the allocation of allowances for the period referred to in Article 11(2) of the Directive has not been taken into account for the purposes of this Decision. Information in the national allocation plan relating to France's intended unilateral inclusion of additional activities and gases pursuant to Article 24 of the Directive has not been taken into account for the purposes of this Decision but will be subject to a separate application by France and decision by the Commission as provided for in Article 24 of the Directive.
- (11) 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 the Directive.
- (12) 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, decreasing 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 decrease 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.
- (13) 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.
- (14) 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 has expired, other than those made to correct the incompatibilities indicated in the respective Commission decision on a national allocation plan⁹. The interpretation of

⁹ 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

the deadline of 31 December 2006 specified in 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 France for the first five-year period mentioned in Article 11(2) of the Directive are incompatible respectively with:

1. criteria 1, 2 and 3 of Annex III to the Directive potentially: the part of the total quantity potentially amounting to 5.108612 million tonnes of allowances in respect of additional emissions of combustion installations annually to the extent that this is not justified in accordance with the general methodologies stated in the national allocation plan and on the basis of substantiated and verified emission figures and only to the extent that the deduction of the amount unjustified in this respect from the total quantity of 132.801430 million tonnes permissible under criteria 1, 2 and 3 of Annex III to the Directive leads to a new permissible figure, which is lower than the proposed total quantity of 132.800000 million tonnes;
2. criterion 6 of Annex III to the Directive: the information on the manner in which new entrants will be able to begin participating in the Community scheme.

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 any difference between the allocations to combustion installations in respect of additional emissions and the 5.108612 million tonnes set aside annually for these installations but only to the extent that the deduction of the amount unjustified in this respect from the total quantity of 132.801430 million tonnes permissible under criteria 1, 2 and 3 of Annex III to the Directive leads to a new permissible figure, which is lower than the proposed total quantity of 132.800000 million tonnes;
2. information is provided on the manner in which new entrants will be able to begin participating in the Community scheme, in a way that complies with the criteria of Annex III to the Directive and Article 10 thereof.

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.

Article 3

1. The total annual average quantity of allowances of 132.800000 million tonnes, reduced by any difference between the allocations to additional combustion installations and the 5.108612 million tonnes set aside annually for these installations but only to the extent that the deduction of the amount unjustified in this respect from the total quantity of 132.801430 million tonnes permissible under criteria 1, 2 and 3 of Annex III to the Directive leads to a new permissible figure, which is lower than the proposed total quantity of 132.800000 million tonnes, to be allocated by France 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 French Republic.

Done at Brussels, 26 March 2007

For the Commission