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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 26.2.2007

**COMMISSION DECISION**

**of 26 February 2007**

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

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

(Only the Spanish 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/EC<sup>1</sup>, and in particular Article 9(3) thereof,

Whereas:

- (1) The national allocation plan of Spain for the period 2008-2012, developed under Article 9(1) of Directive 2003/87/EC, (hereinafter "the Directive"), was notified to the Commission by letter dated 30 November 2006 and registered by the Commission on 4 December 2006. Spain submitted additional information on the notified plan by letter dated 1 February 2007, registered on 5 February 2007, in reply to questions from the Commission, and by letter dated 22 February 2007.
- (2) The Climate Change Committee<sup>2</sup> 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 verified emissions figures as a significant element for the assessment of second period national allocation 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. The Committee expressed concern that Spain relies to a

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<sup>1</sup> 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.

<sup>2</sup> 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.

large extent on measures to reduce greenhouse gases in the non-trading sectors and urged the Commission to closely scrutinise the substantiation of these measures. The Committee urged the Commission to closely examine Spain's ability to substantiate its intended use of the Kyoto mechanisms to reach its commitment under Decision 2002/358/EC<sup>3</sup>. The Committee strongly called on the Commission to examine the admissibility under criterion (12) of Annex III to the Directive of the intended maximum amount of CERs<sup>4</sup> and ERUs<sup>5</sup> 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 Commission notes that Spain's annual Kyoto commitment for the period from 2008 to 2012 is 332.79 million tonnes CO<sub>2</sub> equivalent (hereinafter "million tonnes"), while the most recent available figure for its annual total greenhouse gas emissions is 427.9 million tonnes for the year 2004<sup>6</sup>. The remaining gap between these two annual figures to be bridged by Spain is therefore 95.11 million tonnes.
- (4) The national allocation plan, including the intended total quantity of allowances of 152.673 million tonnes stated therein, has been evaluated against the criteria 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 criteria<sup>7</sup>. Certain aspects of the national allocation plan have been found incompatible with those criteria, and in particular with criteria 1, 6, 10 and 12 in Annex III to the Directive.
- (5) The national allocation plan of Spain contravenes criterion 1 of Annex III to the Directive because the total quantity of allowances to be allocated according to the national allocation plan is inconsistent with achieving Spain's commitment under Decision 2002/358/EC and the Kyoto Protocol. The total quantity of allowances is considered to be more than is likely to be needed for the strict application of criterion 1 because the intended use by Spain of other policies and measures in sectors not covered by the Directive is insufficiently substantiated. Member States must substantiate intentions to use such policies and measures, and the Commission assessment is based in a cumulative manner in particular on the indication of implemented and additional policies and measures, the approximate level of current greenhouse gas emissions represented by the activity targeted by each policy or

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<sup>3</sup> Council Decision 2002/358/EC of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder, OJ L 130, 15.5.2002, p. 1.

<sup>4</sup> "Certified emission reduction" pursuant to Article 3(n) of the Directive.

<sup>5</sup> "Emission reduction unit" pursuant to Article 3(m) of the Directive.

<sup>6</sup> Commission Decision 2006/944/EC of 14 December 2006 determining the respective emission levels allocated to the Community and each of its Member States under the Kyoto Protocol pursuant to Council Decision 2002/358/EC, OJ L 358, 16.12.2006, p. 87; Progress Report COM(2006)658 final of 27 October 2006, Table 1 in the Annex SEC(2006) 1412 of 27 October 2006. The annual Kyoto commitment for the period from 2008 to 2012 expressed in absolute figures is obtained by dividing by a factor of five the definitive emission level allocated to Spain equivalent for the first quantified emission limitation and reduction commitment period under the Kyoto Protocol contained in the Annex to Commission Decision 2006/944/EC, which gives 332.793482 million tonnes (=1663.967412/5). Annual total greenhouse gas emissions for the year 2004 are indicated in the third column of Table 1 in the Annex SEC(2006) 1412.

<sup>7</sup> 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).

measure and quantified emissions reductions, assumptions and methodologies, quantitative indicators to demonstrate effectiveness of implemented policies and measures, how policies and measures are reflected in emissions projections presented in the plan, any developments and trends potentially counteracting the reduction effects, and any overlapping effects and how such double-counting effects have been eliminated in the estimation of quantitative reduction effects<sup>8</sup>.

- (6) Spain has not sufficiently substantiated the intended policy and measure of a more rapid increase of the share of biofuels used for road transport. According to the 2005-2007 Action Plan on the Strategy for Energy Saving and Efficiency in Spain 2004-2012 referred to in Spain's national allocation plan, 3.8 million tonnes of emissions would be avoided due to this policy and measure during the period 2005 to 2007. This gives an annual average reduction of 1.266667 million tonnes in that period. In the absence of an explicit quantification by Spain of the expected annual emissions reductions of this policy and measure during the period 2008 to 2012, the Commission assumes that the average annual reduction during the period 2005 to 2007 applies also during the period 2008 to 2012 because there is no reason for the emissions reductions effect assumed to be realised in the first period not to fully extend into the second trading period. However, Spain did not fully reach its target of 2% under this policy and measure in 2005 but only to the extent of 0.44%. This means that the remaining gap of 1.56% could not be realised in time, and there are no sufficient indications that Spain will be able to accelerate its future improvement of the share of biofuels for road transport to close this shortfall having occurred in 2005. The Commission takes note that in 2006 Spain had a production capacity for biofuels of 591389 toe/year in 17 projects, and that more plants are under construction with a production capacity of up to 2107800 toe/year. Spain claims that if the total production capacity came online in due time Spain would be in a position to reach a biofuels consumption of at least 5.75 % by 2010. However, the number of these new plants and their state of construction or expected start of operation are not indicated. Moreover, the Commission has no indication from Spain whether the quoted maximum figure of 2107800 toe/year is the maximum production capacity or a realistic estimate of actual output, taking into account that it is unrealistic to assume that capacity will be fully used. Furthermore, Spain has not demonstrated that the entire theoretical production would be consumed in Spain and thus reduce Spanish greenhouse gas emissions. For these reasons, the Commission considers the use of biofuels by Spain with respect to reaching its Kyoto commitment still as insufficiently substantiated. Therefore, the Commission considers that the remaining gap of 1.56% will continue to persist until the end of the second trading period. Consequently, the annual average reduction of 1.266667 million tonnes mentioned above corresponding to 2% for the use of biofuels in road transport is insufficiently substantiated to the extent of 1.56%. Proportionately, this corresponds to a shortfall in absolute figures of annual average emission reductions of 0.988000 million tonnes<sup>9</sup>. By this amount, the Commission lacks sufficient reassurance that Spain will achieve its Kyoto commitment unless increased efforts are made. These increased efforts to be made by Spain need to take place in the sectors covered by the Directive or those not covered. As Spain has not sufficiently demonstrated to the Commission that it can make these increased efforts solely in the sectors not covered

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<sup>8</sup> As stated in paragraph 20 and Annex 6 of the Commission's guidance COM(2005)703 final.

<sup>9</sup> Calculated as follows: 1.267 million tonnes divided by the factor of 2[%] and multiplied by 1.56[%] gives the annual average amount of emissions reductions which is insufficiently substantiated during the second trading period.

by the Directive, the sectors covered by the Directive need to carry at least a proportionate burden, measured by the relative size of 42.74 % of their emissions covered by the Directive with respect to overall greenhouse gas emissions<sup>10</sup>. This leads to a necessary reduction of 0.422271<sup>11</sup> million tonnes per year to be borne by the sectors covered by the Directive, by which amount the total quantity of allowances for these sectors thus needs to be reduced. Consequently, the allowed annual average total quantity of allowances in the period from 2008 to 2012 is 152.250729 million tonnes, i.e. the annual average allocation on basis of the proposed national allocation plan of 152.673 million tonnes, reduced by the part of 0.422271 million tonnes, which contravenes criterion 1.

- (7) Pursuant to criterion 5 of Annex III to the Directive, the Commission has also examined compliance of the national allocation plan of Spain 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 Units<sup>12</sup>, 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 Spain, 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 criterion 1 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 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.

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<sup>10</sup> More specifically, the trading sector's share is most accurately calculated as 2005 verified emissions for the trading sector divided by 2004 total greenhouse gas emissions according to the Progress Report COM(2006)658 final of 27 October 2006 and Table 5 in the Annex SEC(2006)1412 of 27 October 2006, i.e. 182.9/427.9.

<sup>11</sup> 0.988000\*0.4274

<sup>12</sup> 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.

- (8) In the light of criterion 5 of Annex III to the Directive, the Commission has also examined the methodology by which Spain intends to allocate allowances in the power generating sector. Within this sector, coal fired power plants receive an allocation based on average emission factor of the plants concerned, whereas combined cycle gas turbines receive an allocation on the basis of an emission factor corresponding to best available technique. This could constitute an advantage to the former group. The use of coal entails higher emissions than the use of gas, so favouring the former would not serve the purposes of Directive 2003/87/EC. Therefore, it is not excluded that the advantage is undue. Consequently, the Commission, at this stage, 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.
- (9) Furthermore, in the light of criterion 5 of Annex III to the Directive, the Commission has examined the methodology by which Spain intends to allocate allowances to different installations within the group of coal fired power plants. The allocation rules are likely to provide for a favourable treatment, firstly, of installations using domestic coal rather than imported coal and, secondly, of installations having made investments in order to reduce their SO<sub>2</sub> and NO<sub>x</sub> levels. Thirdly, further allowances are intended to be allocated on the basis of no other criterion than remaining free capacity, not taking into account in any way expected or past capacity utilisation at installation level. As regards the first point, it is not excluded that the favourable treatment of power plants using domestic coal is undue, since it cannot be justified by any environmental consideration. Although the existence of agreements to purchase certain quantities of domestic coal makes a certain level of capacity utilisation likely, that does not necessarily exclude that other plants have similar capacity utilisation rates, but they nevertheless might receive a lower allocation resulting from the fact that they use imported coal. As regards the second point, it is not excluded that the potentially favourable treatment of installations having invested in order to reduce their SO<sub>2</sub> and NO<sub>x</sub> emissions is undue. It does not serve the objectives of Directive 2003/87/EC or Directive 2001/80/EC<sup>13</sup>, since the investments would be required in any event in case the plants decide to produce certain quantities, i.e. the aid involved in the allocation would not lead to any improvement of the relevant Community standard. As regards the third point, it is not excluded that the potentially favourable treatment by means of allocating further allowances on the basis of no other criterion than remaining free capacity brings a relative advantage to those installations that for reasons such as low operating efficiency or the need to comply with the production limitation of Article 4(4)(a) of Directive 2001/80/EC, are likely to use such free capacity less than others, and that some of these installations receive an allocation beyond expected needs, and could therefore be undue. It does not serve any environmental purpose either. The Commission therefore, at this stage, 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. Furthermore, the Commission at present cannot exclude that the allocations based on the use of domestic coal entail non-direct benefit for the coal mining sector in Spain. However, that aspect would require further examination when applying the provisions of the Regulation No 1407/2002 of 23 July 2002 on State aid to the coal industry<sup>14</sup>.

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<sup>13</sup> Directive 2001/80/EC of the European Parliament and of the Council of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants, OJ L 309, 27.11.2001, p.1.

<sup>14</sup> OJ L 205, 2.8.2002, p. 1

- (10) 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 plan does not contain provisions on the consequences for operators in case the new entrants' reserve is depleted and for a number of sectors the plan does not specify in sufficient detail the levels of allocations to be granted to new entrants. 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. Moreover, in the light of criterion 5 of Annex III to the Directive, the Commission has also assessed the provisions on allocations from the new entrants' reserve. In general, these allocations will be calculated on basis of best available techniques. There are, however, some exceptions possible. Such exceptions potentially provide for an undue favourable treatment that is not available to others. Consequently, the Commission, at this stage, 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.
- (11) The list of installations set out in the national allocation plan is incomplete and therefore contravenes criterion 10 since it does not include the quantities of allowances intended to be allocated to each installation situated within the territory of Spain, to which Directive 2003/87/EC applies.
- (12) Pursuant to criterion 12 of Annex III to the Directive, the Commission has assessed the maximum amount of CERs and ERUs which may be used by operators in the Community scheme as a percentage of the allocation of the allowances to each installation that is consistent with Spain's complementarity obligations under the Kyoto Protocol and decisions adopted pursuant to the UNFCCC or the Kyoto Protocol. Decision 2/CMP.1<sup>15</sup> requires that use of the mechanisms be supplemental to domestic action, with a view to narrowing per capita differences in emissions between developed and developing countries. In order to obtain a quantified figure for complementarity, the Commission applies a formula which takes into account the effort undertaken by each Member State, which is expressed in terms of the difference between actual emissions and the absolute Kyoto commitment, and the intended government purchase of Kyoto units to the extent that it is sufficiently substantiated. The effort undertaken by each Member State is calculated by taking the highest figure out of the following three conceivable alternatives: deducting the absolute Kyoto commitment from, first, total base year greenhouse gas emissions; second, the most recent total greenhouse gas emissions, i.e. the year 2004; or, third, projected 2010 total greenhouse gas emissions, representing the average actual emissions in the first Kyoto commitment period. The Commission holds that the notion of complementarity implies in any event that use by operators may not lead to a situation where more than half of the effort undertaken by a Member State, taking into account government purchase, is made through Kyoto flexible mechanisms. In order to ensure this, the Commission divides the effort undertaken by each Member State by a factor of two and calculates the permitted maximum absolute amount for use by operators by deducting the volume of substantiated government purchases from this figure. Finally, the respective relative figure is obtained by dividing the permitted maximum absolute amount by the allowed total quantity of allowances.

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<sup>15</sup> Decision 2/CMP.1 of the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol "Principles, nature and scope of the mechanisms pursuant to Articles 6, 12 and 17 of the Kyoto Protocol" of December 2005, FCCC/KP/CMP/2005/8/Add. 1, page 4.



- (13) In application of this method, the effort undertaken by Spain is 103.51 million tonnes. 50% of the effort undertaken is 51.755 million tonnes. Taking into account that 100% of its intended government purchases are recognised as sufficiently substantiated, 19.925 million tonnes constitutes the maximum absolute amount for use by operators per year permitted for Spain<sup>16</sup>. The relative maximum figure for use by operators is obtained by dividing the absolute amount by the allowed total quantity of allowances of 152.250729<sup>17</sup> million tonnes<sup>18</sup>. However, the Commission recognises the general importance of promoting the international carbon market, and therefore allows a minimum threshold in any event. In respect of Member States whose allowed total quantity is below their 2005 verified emissions and also below the total quantity of allowances in line with criteria 1, 2 and 3 of Annex III to the Directive<sup>19</sup>, the Commission considers that the figure calculated on the basis of the effort or the general threshold of 10% of the allowed total quantity of allowances may be replaced by a percentage figure derived instead on the basis of the lower one of the following two figures: either 2005 verified emissions figures of the Member State or the total quantity of allowances in line with criteria 1, 2 and 3 of Annex III to the Directive. For Spain, this percentage figure is calculated by dividing the difference between the allowed total quantity of allowances of 152.250729 million tonnes and the lower one of these two figures, i.e. 2005 verified emissions figures of Spain<sup>20</sup>, by the allowed total quantity of allowances of 152.250729 million tonnes.

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<sup>16</sup> See recital 3 for more reference. Spain's Kyoto commitment, expressed in absolute figures, is 332.79 million tonnes. Base year emissions are 289.4 million tonnes, 2004 emissions are 427.9 million tonnes and 2010 projected emissions with existing policies and measures are 436.3 million tonnes according to the Progress Report COM(2006)658 final of 27 October 2006, Tables 1 and 2 in the Annex SEC(2006) 1412 of 27 October 2006. The latter emissions figure being the highest of these three alternatives, the relevant effort with respect to the Kyoto commitment is 103.51 million tonnes. Dividing this effort by two gives 51.755 million tonnes. The intended government purchases of CERs and ERUs amount to 31.83 million tonnes. The difference between the total need for CERs and ERUs and the planned government purchase is  $51.755 - 31.83 = 19.925$  million tonnes, which represents the maximum absolute amount, up to which Spain's operators may use CERs and ERUs.

<sup>17</sup> Calculated as follows: Proposed total quantity of allowances of 152.673 million tonnes minus 0.422271 million tonnes for non-substantiation of other policies and measures in the transport sector.

<sup>18</sup>  $19.925/152.250729$ , which gives 13.087%.

<sup>19</sup> In application of the methodology for the assessment under criteria 1, 2 and 3 of Annex III to the Directive outlined in the Commission's Communication COM(2006) 725 final of 29 November 2006 (published under [http://ec.europa.eu/environment/climat/pdf/nap2006/com\\_2006\\_725\\_en.pdf](http://ec.europa.eu/environment/climat/pdf/nap2006/com_2006_725_en.pdf)), the total quantity of allowances in line with criteria 1 (as regards the aspect of the strict application of all criteria), 2 and 3 of Annex III to the Directive exceeds the total quantity of allowances of 152.250729 million tonnes allowed under criterion 1 of Annex III to the Directive.

<sup>20</sup> 2005 verified emissions figures of Spain are in any event lower than the total quantity of allowances in line with criteria 1, 2 and 3 of Annex III to the Directive because for the calculation of the latter figure 2005 verified emissions figures are multiplied with a factor exceeding one. This is because the combined effect from GDP growth and carbon intensity development between 2005 and 2010 results in a factor of 1.0158, equalling the product of the respective relative development factors of 1.17508 for GDP and 0.86446 for carbon intensity with an additional improvement of 2.5% per year. These figures are indicated in the below table.

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](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](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.  $(801.8/693.4)^{(1/5)}$ , which gives 1.0295. In a second step, this

- (14) Consequently, the maximum amount of CERs and ERUs of 37% (70% for the power sector and 20% for the other industries)<sup>21</sup>, as indicated in Spain's national allocation plan, which may be used by operators in the Community scheme as a percentage of the allocation of allowances to each installation is inconsistent with Spain's supplementarity obligations under the Kyoto Protocol and decisions adopted pursuant to the UNFCCC or the Kyoto Protocol, to the extent that it exceeds the percentage figure resulting from dividing the difference between the allowed total quantity of allowances of 152.250729 million tonnes and the 2005 verified emissions figures of Spain by the allowed total quantity of allowances of 152.250729 million tonnes.
- (15) 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 Spain as soon as possible, taking into account the time-scale necessary to carry out the national procedures without undue delay. Were Spain to amend its national allocation plan in accordance with Article 2 of this Decision and duly taking into account the Commission's observations in recitals 8, 9 and 10, 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.
- (16) 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.

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. 65 therein), i.e. the years 2006 (factor of 1.038), 2007 (factor of 1.034) and 2008 (1.033). 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.  $1.038 \times 1.034 \times 1.033 \times 1.0295 \times 1.0295$ . The Commission has not taken into account the more recent figures from the up-dated spring forecast published by its Economic and Financial Affairs Directorate-General on 16 February 2007 because they are only available for the six largest Member States and do therefore not constitute a sufficiently consistent and equal data basis across the entire EU. Carbon intensity figures 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 404.3 tonnes of CO<sub>2</sub>/million Euro (value year 2000) multiplied by a factor of 0.975, which gives 394.2 tonnes of CO<sub>2</sub>/million Euro for carbon intensity in 2010, which represents the average year in the period 2008-2012:

Calculation element	2005	2010	Relative development factor 2005-2010	Growth rate 2005-2010
GDP	693.4	814.8	1.17508	17.508%
Carbon intensity under the "low carbon constraint"-case	456.0	404.3		
Carbon intensity with additional improvement of 2.5%		394.2	0.86446	-13.554%

<sup>21</sup> In its plan, Spain calculated the intended overall limit for use of CERs and ERUs as 39% but expressed it in relation to the proposed allocation to existing installations of 144.848 million tonnes. However, the Commission considers that the limit needs to be expressed in relation to the proposed total allocation of 152.673 million tonnes. Therefore, the intended overall limit for use of CERs and ERUs constitutes 37% ( $=39\% \times 144.848 / 152.673$ ).

- (17) 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.
- (18) 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.
- (19) 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 are 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.
- (20) 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 plan<sup>22</sup>. The interpretation of 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,

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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](http://ec.europa.eu/environment/climat/pdf/nap_2_guidance_en.pdf); Commission Decision of 22 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](http://ec.europa.eu/environment/climat/pdf/uk_final_2006_en.pdf).

HAS ADOPTED THIS DECISION:

*Article 1*

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

1. criterion 1 of Annex III to the Directive: the part of the intended total quantity of allowances related to Spain's intended use of policies and measures that is insufficiently substantiated in relation to Spain achieving its commitment under Decision 2002/358/EC, amounting to the equivalent of on average 0.422271 million tonnes per year;
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;
3. criterion 10 of Annex III to the Directive: the lack of a complete list of all installations with the quantities of allowances intended to be allocated to each installation situated within the territory of Spain, to which Directive 2003/87/EC applies;
4. criterion 12 of Annex III to the Directive: the maximum overall amount of CERs and ERUs which may be used by operators in the Community scheme as a percentage of the allocation of the allowances to each installation that is inconsistent with Spain's supplementarity obligations under the Kyoto Protocol and decisions adopted pursuant to the UNFCCC or the Kyoto Protocol, to the extent that it exceeds the percentage figure resulting from dividing the difference between the allowed total quantity of allowances of 152.250729 million tonnes and the 2005 verified emissions figures of Spain by the allowed total quantity of allowances of 152.250729 million tonnes.

*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 0.422271 million tonnes CO<sub>2</sub> equivalent of allowances per year;
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;
3. a complete list of all installations covered by the Directive in Spain is provided with the quantities of allowances intended to be allocated to each installation;
4. the overall maximum amount of CERs and ERUs which may be used by operators in the Community scheme as a percentage of the allocation of the allowances to each installation is reduced no more than the percentage figure resulting from dividing the

difference between the allowed total quantity of allowances of 152.250729 million tonnes and the 2005 verified emissions figures of Spain by the allowed total quantity of allowances of 152.250729 million tonnes.

#### *Article 3*

1. The total quantity of allowances of 152.250729 million tonnes to be allocated by Spain 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 Kingdom of Spain.

Done at Brussels, 26 February 2007

*For the Commission*