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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 22/II/2006  
C (2006) 426 final

**COMMISSION DECISION**

**of 22/II/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**

**(Only the English text is authentic)**

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(Only the English 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 the United Kingdom for the period 2005-2007, developed under Article 9(1) of Directive 2003/87/EC, was notified to the Commission on 7 May 2004 and registered on 10 May 2004. The United Kingdom submitted additional information completing the notified plan by letter registered on 15 June 2004 in reply to questions from the Commission. On 7 July 2004, the Commission adopted a decision on the notified national allocation plan, rejecting certain aspects of it because they were found incompatible with the criteria listed in Annex III to the Directive, in particular with criteria 6 and 10.
- (2) By letter of 10 November 2004, registered on 16 November 2004 and last up-dated by letter of 18 February 2005, registered on 23 February 2005, the United Kingdom notified the Commission of a proposed amendment to its national allocation plan implying an increase in the total quantity of allowances to be allocated in the United Kingdom by 19.8 Mt CO<sub>2</sub>eq.
- (3) On 12 April 2005, the Commission took the decision C(2005) 1081 final stating that the proposed amendment to the national allocation plan notified by the United Kingdom to the Commission on 10 November 2004, last up-dated on 18 February 2005, implying an increase of the emission allowance allocations by 19.8 Mt. CO<sub>2</sub>eq is

<sup>1</sup> OJ L 275, 25.10.2003, p. 32, as amended by Directive 2004/101/EC, OJ L 338, 13.11.2004, p. 18.

inadmissible. The United Kingdom appealed against this decision (case T-178/05). On 23 November 2005, the Court of First Instance (First Chamber) rendered a judgment annulling this decision.

- (4) Point 63 of this judgment reads: “... *It follows from the express terms of the Directive, as well as from the general structure and objectives of the system which it establishes, that the United Kingdom was entitled to propose amendments to its NAP after it had been notified to the Commission and until its adoption of its decision under Article 11(1), ...*”. The judgment continues in point 71: “*The Commission implicitly relies on the fact that the United Kingdom should have taken its decision under Article 11(1) of the Directive by 30 September 2004 and that it was not entitled to propose any amendments after that date. It is worth mentioning in that regard that, even though this fact was referred to in the sixth recital in the preamble to the contested decision, it was not the basis for that decision. The amendments were rejected as inadmissible because they exceeded the total quantity fixed by the Decision of 7 July 2004.*”
- (5) Against the backdrop of the Court’s findings as mentioned above, the Commission hereby confirms its interpretation of the Directive that Member States are not entitled to propose any amendments to national allocation plans after the deadline of 30 September 2004 specified in Article 11(1) of the Directive, other than those required by the respective Commission decision on a national allocation plan. The whole procedure comprising the notification to and possible rejection by the Commission of the national allocation plans and the final allocation decisions to be taken by Member States has been conceived by the Directive in a tight schedule and implemented by the decisions taken pursuant to its Article 9(3) so as to ensure that the system can start effectively on 1 January 2005 with a minimum of uncertainty for market participants. Thus, for the three-year period beginning 1 January 2005, Article 11(1) of the Directive requires the decision concerning the final allocation to have been taken by 30 September 2004 (“*at least three months before the beginning of the period*”).
- (6) Member States, which up to 30 September 2004 have not complied with their obligation, can thereafter only undertake the necessary steps for taking the decision concerning the final allocation as soon as possible. After 30 September 2004, only those amendments which are required by the respective Commission decision taken on a national allocation plan are admissible. Accordingly, the United Kingdom could not submit proposals for amendments after this deadline as the Commission had already taken a final decision on its national allocation plan and the proposed amendments were not necessary to rectify the incompatibilities identified in the Commission decision of 7 July 2004.
- (7) The interpretation of the deadline of 30 September 2004 specified in Article 11(1) 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. The emissions trading scheme relies

crucially on Member States respecting the specified deadlines in order to reduce uncertainty for market participants to the minimum. Market participants build up legitimate expectations in that there is a 'cut-off date' beyond which Member States can no longer submit further amendments to national allocation plans which they have notified and on which the Commission has already taken a decision. The same rules apply to all Member States, and therefore increased flexibility for one Member State would enable all Member States to follow the same course of action which would introduce widespread instability into the trading scheme. Member States have, on the other hand, a fair chance to comply with these deadlines while fully using their discretion with respect to the content of their national allocation plans by organising the schedule for national decision-making, including the required public consultations, in a proper way. If a Member State fails to organise such due process and hereby misses the deadline of 30 September 2004, it is justified to limit the margin of manoeuvre for the Member State in order to ensure the Community interest in the functioning of the scheme. This interpretation also ensures that there is a strong incentive for a Member State to take without undue delay its final allocation decision pursuant to Article 11(1) or Article 11(2), which is the *conditio sine qua non* for the start of emissions trading within the Member State in each trading period. Otherwise, the start of emissions trading could be significantly delayed in each trading period. This could jeopardise the effectiveness of the EU ETS as a climate-policy instrument.

- (8) As point 71 of the Court judgment states, the decision taken on 12 April 2005 was not based on the deadline of 30 September 2004 having been missed by the United Kingdom but on other grounds. As the latter have been rejected by the Court and the Commission has the obligation to take a new decision in the light of the judgment such new decision can be based on the fact that the United Kingdom's request, having been submitted to the Commission by letter of 10 November 2004, registered on 16 November 2004, and therefore after the relevant deadline of 30 September 2004, came too late.
- (9) The Commission's letter of 11 October 2004, which replies to the United Kingdom's letter of 30 September 2004, does not lead to any other conclusion. Pursuant to Article 2 of the Commission's decision on the United Kingdom's national allocation plan of 7 July 2004, the Commission had raised no objections to the national allocation plan provided that two specified amendments are made to the national allocation plan and notified to the Commission by 30 September 2004, i.e., firstly, information is provided on the manner in which new entrants will be able to begin participating in the Community scheme and, secondly, the list of installations is amended to include the installations situated within Gibraltar and the quantities of allowances intended to be allocated to them.
- (10) In order to comply with this provision, the United Kingdom requested from the Commission an extension of the deadline of 30 September 2004 specified in the decision of 7 July 2004 to provide the necessary

information. The Commission extended this deadline by its letter of 11 October 2004 in urging the United Kingdom authorities to notify the necessary information to the Commission as soon as possible.

- (11) The Court dealt with this issue in point 72 of its judgment. However, this extension of the deadline for the two tasks to be carried out does not exclude that the new decision is taken on the basis that the date of 30 September 2004 is a 'cut-off'-deadline as mentioned above. Indeed, in mentioning in its letter of 11 October 2004 'the progress that your [the United Kingdom] authorities are making towards fulfilling the requirements of the decision', the Commission did not welcome in any way progress potentially being made with respect to other issues like e.g. a potential increase of the total quantity of allowances. On the contrary, the sentence clearly refers to 'the requirements of the decision', which cannot be anything else but the two incompatibilities specified in the decision of 7 July 2004 and to be rectified by the deadline of 30 September 2004 stipulated in that decision. The United Kingdom's request is therefore inadmissible and to be rejected,

HAS ADOPTED THIS DECISION:

*Article 1*

The proposed amendment to the national allocation plan notified by the United Kingdom to the Commission on 10 November 2004 and last up-dated on 18 February 2005 implying an increase of the emission allowance allocations by 19.8 Mt. CO<sub>2</sub>eq is inadmissible.

*Article 2*

This Decision is addressed to the United Kingdom of Great Britain and Northern Ireland.

Done at Brussels, 22/II/2006.

*For the Commission*  
*Stavros DIMAS*  
*Member of the Commission*



