



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 29.11.2006

**COMMISSION DECISION**

**of 29 November 2006**

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

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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 Ireland 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 12 July 2006 and registered by the Commission on 14 July 2006. Ireland submitted additional information on the notified plan by letter dated 18 September 2006, registered on 25 September 2006, in reply to questions from the Commission, and in a letter of 27 November 2006.
- (2) The Climate Change Committee<sup>2</sup> considered the national allocation plan on 22 September 2006 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 called

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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.

on the Commission to closely examine Ireland's ability to substantiate its intended use of the Kyoto mechanisms to reach its commitment under Decision 2002/358/EC. 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>3</sup> and ERUs<sup>4</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 Ireland's annual Kyoto commitment for the period from 2008 to 2012 is 63.03 million tonnes CO<sub>2</sub> equivalent (hereinafter "million tonnes"), while the most recent available figure for its annual total greenhouse gas emissions is 68.5 million tonnes for the year 2004<sup>5</sup>. The remaining gap between these two annual figures to be bridged by Ireland is therefore 5.47 million tonnes.
- (4) The national allocation plan, including the intended total quantity of allowances of 22.638 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>6</sup>. Certain aspects of the national allocation plan have been found incompatible with those criteria, and in particular with criteria 1, 5, 6, 10 and 12 in Annex III to the Directive.
- (5) The national allocation plan of Ireland contravenes criterion 1 of Annex III to the Directive because the intended total quantity of allowances to be allocated according to the national allocation plan would be inconsistent with achieving Ireland'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 Ireland fails to provide in a sufficient manner for policies and measures to be used in the transport sector, which is outside the Community scheme. Member States must indicate and substantiate intentions to use policies and measures in sectors outside the Community scheme, and the Commission's 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 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-

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

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

<sup>5</sup> 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 multiplying base year emissions (second column of Table 1) with the relative Kyoto commitment (seventh column of Table 1), i.e.  $55.8 \times (1+0.13) = 63.05$ . In mathematical terms, Ireland's relative commitment of +13% is expressed as a factor of (1+0.13). Annual total greenhouse gas emissions for the year 2004 are indicated in the third column.

<sup>6</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).

counting effects have been eliminated in the estimation of quantitative reduction effects<sup>7</sup>.

- (6) In the light of the above, Ireland has not sufficiently substantiated policies and measures in the transport sector. As publicly indicated also by the Irish authorities, emissions from transport will continue to grow significantly in Ireland<sup>8</sup>. Ireland's national allocation plan assumes emissions in the transport sector of 12.295 million tonnes in 2005 and 13.063 million tonnes in 2010<sup>9</sup>. This implies a total growth rate of 6.2%<sup>10</sup> or an annual growth rate of 1.2%<sup>11</sup> in this period. These growth figures are inconsistent with the data contained in the publication "*European Energy and Transport Trends*" of the Commission's Directorate-General for Transport and Energy<sup>12</sup>, which the Commission considers as the most accurate and reliable source for estimations of emissions in the transport sector. Baseline assumptions<sup>13</sup> are updated on a regular basis to reflect the most likely future trend and validated with the involvement of experts from Member States. These data indicate that, in the absence of significant additional measures, Ireland's emissions in the transport sector are likely to be 14.4 million tonnes in 2005 and 16.4 million tonnes in 2010<sup>14</sup>. This implies a total growth rate of 33.889%<sup>15</sup> or an annual growth rate of 2.635%<sup>16</sup> in this period. The Commission does not see a justification for the claimed moderate growth rate of transport emissions as indicated in the national allocation plan and thus considers this rate as unrealistically low, taking into account also the finding by the Irish authorities mentioned above<sup>17</sup>. 2005 emissions in the transport sector as indicated in the national allocation plan seemingly include road transport and aviation and maritime bunker fuel emissions for domestic aviation and maritime shipping, while the data contained in the publication "*European Energy and Transport Trends*" include road transport

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<sup>7</sup> As stated in paragraph 20 and Annex 6 of COM(2005)703 final.

<sup>8</sup> Environmental Protection Agency, Ireland, "Environment in focus 2006, Environmental indicators for Ireland", p. 56: "*It is clear from present trends that the number of vehicles on Irish roads is set to increase. Levels are predicted to meet the European average by the end of the decade – the number of private cars in the State will reach approximately 2 million, an increase of 0.5 million over 2004. Even if the target of reducing CO<sub>2</sub> emissions to 140 g/km for new cars by 2008-2009 is achieved, as agreed under the Voluntary Agreement negotiated between the automotive industry and the EU Commission, this is unlikely to row back the ever-increasing contribution of the transport sector to Ireland's GHG emissions.*", published on website:

<http://www.epa.ie/OurEnvironment/EnvironmentalIndicators/Transport/FileUpload.10479.en.pdf>

<sup>9</sup> Table III on page 32 of the NAP

<sup>10</sup> 13.063/12.295

<sup>11</sup> (13.063/12.295)<sup>†</sup>(1/5)

<sup>12</sup> 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](http://ec.europa.eu/dgs/energy_transport/figures/trends_2030_update_2005/energy_transport_trends_2030_update_2005_en.pdf)

<sup>13</sup> Examples for baseline assumptions are future developments in population, fuel prices, etc.

<sup>14</sup> Figures for CO<sub>2</sub> emissions in the transport sector are published on the Commission's website and more specifically indicated for Ireland on page 108 on the sheet "Summary Energy Balance and Indicators (B)" under the heading "CO<sub>2</sub> emissions (Mt of CO<sub>2</sub>)" in the second last row "Transport" under the following hyperlink:

[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).

<sup>15</sup> 16.4/14.4

<sup>16</sup> (16.4/14.4)<sup>†</sup>(1/5)

<sup>17</sup> Environmental Protection Agency, Ireland, "Environment in focus 2006, Environmental indicators for Ireland", p. 56, further specified in earlier footnote.

and domestic and international aviation and maritime bunker fuel emissions. This difference in scope certainly does not explain the difference in growth rates. The Commission therefore applies the growth rate of 13.9%, as indicated in the data contained in the publication "*European Energy and Transport Trends*", to the 2005 figure of transport emissions indicated in Ireland's national allocation plan, which results in expected transport emissions of 14.002653 million tonnes<sup>18</sup> in 2010, which exceeds the expected figure for 2010 transport emissions of 13.063 million tonnes indicated in the national allocation plan by 0.939653 million tonnes. In its national allocation plan, Ireland fails to sufficiently substantiate policies and measures in the transport sector, which could off-set this gap of 0.939653 million tonnes in 2010 or otherwise lead to reversing the publicly recognised trend of significantly growing transport emissions.

- (7) The Commission considers 2010 to constitute a representative average of the relevant five-year period from 2008 to 2012 because 2010 is the year in the middle of this period and, in the Commission's view, it is appropriate from an *ex-ante*-perspective to assume a linear trend over this five-year period. Therefore, the total amount, with respect to which policies and measures are insufficiently substantiated, is 0.939653 million tonnes per year during the period referred to in Article 11(2) of the Directive. By this amount, the Commission lacks sufficient reassurance that Ireland will achieve its Kyoto commitment unless increased efforts are made. These increased efforts to be made by Ireland need to take place in the sectors covered by the Directive or those not covered. As Ireland has not demonstrated to the Commission that it can make these increased efforts solely in the sectors not covered by the Directive, the sectors covered by the Directive need to contribute their fair share, i.e. carry at least a proportionate burden, measured by the relative size of 32.7% of their emissions with respect to overall greenhouse gas emissions<sup>19</sup>. This leads to a necessary reduction of 0.307267 million tonnes on average per year to be assured by the sectors covered by the Directive, by which amount the total quantity of allowances for these sectors thus needs to be reduced.
- (8) Moreover, the national allocation plan of Ireland contravenes criterion 1 of Annex III to the Directive because the total quantity of allowances intended to be allocated according to the national allocation plan would be inconsistent with Ireland achieving its 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 Ireland of the Kyoto mechanisms is insufficiently substantiated. Member States must substantiate intentions to use the Kyoto mechanisms, and the Commission assessment is based in a cumulative manner in particular on the indication of the amount of Kyoto units planned to be purchased for compliance with the Kyoto commitment and of the type of Kyoto units, along with their respective projected or contracted purchase price, the demonstration of the existence of relevant national legislation and budget allocations, the provision of information on the progress to date in realising the planned purchases, in particular the quantity for which contracts have been signed, the indication of the envisaged time schedule of still to be effected purchases, the administrative

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<sup>18</sup> 12.295\*1.13889

<sup>19</sup> More specifically, the trading sector's share is most accurately calculated as 2005 verified emissions for the trading sector divided by 2004 total 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. 22.4/68.5.

arrangements put in place for realising the planned purchases and of details about the contributions of multilateral or private carbon purchase funds and the expected delivery of credits, and the demonstration of the existence of contingency measures applicable in the event that planned purchases and signed purchase agreements result in the delivery of a lower than expected amount of Kyoto units<sup>20</sup>.

- (9) Out of these required cumulative elements, Ireland has for the entire envisaged volume of government purchases of Kyoto credits not sufficiently demonstrated to the Commission that, in particular, it has put in place adequate administrative arrangements for realising the planned purchases, such as national programmes or purchase tenders for purchasing Kyoto units; that it has adopted the relevant national legislation and budget allocations; that it has contributed to any multilateral or private carbon purchase funds and expects delivery of credits; and that it has contingency measures to be applied in the event that planned purchases and signed purchase agreements result in the delivery of a lower than expected amount of Kyoto units.
- (10) The total amount, with respect to which the intended use by Ireland<sup>21</sup> of the Kyoto flexible mechanisms is insufficiently substantiated, is 3.607 million tonnes per year during the period referred to in Article 11(2) of the Directive. By this amount, the Commission lacks sufficient reassurance that Ireland will achieve its commitment under Decision 2002/358/EC and the Kyoto Protocol unless increased efforts are made. These increased efforts to be made by Ireland need to take place in the sectors covered by the Directive or those not covered. As Ireland has not demonstrated to the Commission that it can make these increased efforts solely in the sectors not covered by the Directive, the sectors covered by the Directive need to carry at least a proportionate burden, measured by the relative size of 32.7% of their emissions with respect to overall emissions. In respect of this issue, this leads to a necessary reduction of 1.179489<sup>22</sup> million tonnes per year to be assured by the sectors covered by the Directive, by which amount the total quantity of allowances for these sectors thus needs to be reduced further.
- (11) In the light of the above, the annual average total quantity of allowances, with respect to which the national allocation plan of Ireland contravenes criterion 1 of Annex III to the Directive, adds up to 1.486756 million tonnes, i.e. the sum of 0.307267 million tonnes for the insufficient substantiation of policies and measures in the transport sector and of 1.179489 million tonnes for the insufficient substantiation of the intended use by Ireland of the Kyoto mechanisms. Consequently, the allowed annual average total quantity of allowances in the period from 2008 to 2012 is 21.151244 million tonnes, i.e. the annual average allocation on basis of the proposed national allocation plan of 22.638000 million tonnes, reduced by the part of 1.486756 million tonnes, which contravenes criterion 1.
- (12) Pursuant to criterion 5 of Annex III to the Directive, the Commission has also examined compliance of the national allocation plan of Ireland 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

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<sup>20</sup> As stated in paragraphs 18-19 and Annex 5 to COM(2005)703 final.

<sup>21</sup> Page 7 of the NAP

<sup>22</sup> 3.607\*0.327

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>23</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 Ireland, 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 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.

- (13) Pursuant to criterion 5 of Annex III to the Directive, the Commission has also examined the separate new entrant reserves for the cement and power generation sectors and for combined heat and power installations which Ireland intends to create, the different maximum levels of allowances to be allocated in any year to individual new entrants from different sectors and the absence of such a maximum level in the case of new entrants in the power generation sector. The Commission recognises that in the light of criterion 8 of Annex III to the Directive high efficiency combined heat and power installations may be treated more favourably because of their environmental benefits as recognised in established Community policy<sup>24</sup>, as long as the allocations do not exceed the expected needs of the installations concerned as determined by the BAT-benchmark. Therefore, a separate reserve limited to this purpose and respecting the requirement not to allocate beyond needs may be created by Ireland. However, other sector specific new entrants' reserves unjustifiably discriminate between various groups of new entrants in automatically resulting in an undue advantage for certain groups of new entrants in case the general new entrant reserve is depleted first. The reason is that in such a case certain groups of new entrants still receive an allocation of allowances for free while others need to buy allowances on the market. Ireland brings forward that the establishment of sector

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<sup>23</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.

<sup>24</sup> See for instance point 90 of COM(2003)830 final.

specific separate reserves is actually intended to mitigate discrimination between installations and ensures that relatively small installations in the general sector are not unduly penalised and are protected from large requirements of power generation operators and cement plants. The Commission, however, considers that the creation of separate reserves for new entrants in the power generation and cement sectors is not suitable to achieve that purpose. Instead, the creation of separate reserves automatically results in an undue advantage for new entrants in the power generation and cement sectors if the general new entrant reserve is depleted before the separate reserves.

- (14) Similarly, the different yearly maximum levels of allowances to be allocated to generic new entrants and new entrants in the cement sector and the absence of a maximum level in the case of new entrants in the power generation sector unjustifiably discriminate between various groups of new entrants. They automatically result in an undue advantage for certain undertakings or activities in the power generation and cement sectors where the latter receive a higher allocation from the new entrant reserve despite having similar levels of expected emissions as a generic new entrant.
- (15) Therefore, the Commission considers that sector specific new entrants reserves for the cement and power generation sectors and different yearly maximum levels of allowances to be allocated to generic new entrants and new entrants in the cement sector and the absence of a maximum level in the case of new entrants in the power generation sector contravene criterion 5 of Annex III to the Directive. Moreover, the Commission at this stage and on the basis of the currently available information cannot exclude that any State aid involved therein may be found incompatible with the common market should it be assessed in accordance with Articles 87 and 88 of the Treaty.
- (16) 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 sufficiently explain the methodology proposed for allocating to new entrants and 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.
- (17) The intention of Ireland to adjust the allocation of allowances to an installation listed in the national allocation plan and operating in its territory in the event of closure of an installation in that the closing installation would retain 75% of its annual allocation up to a maximum of 25000 allowances per annum for the remainder of the period<sup>25</sup> 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 that 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 that Directive. For the same reason, it is furthermore not compatible with criterion 10 in Annex III to the Directive to recalculate the allocation of allowances and to submit a revised national allocation

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<sup>25</sup> Page 17 of the national allocation plan.



plan table to the Commission in the event of an installation not commencing any installed capacity by the expected starting date contained in the permit<sup>26</sup>.

- (18) Such so-called 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.
- (19) 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.
- (20) 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.
- (21) 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 Ireland's complementarity obligations under the Kyoto Protocol and decisions adopted pursuant to the UNFCCC or the Kyoto Protocol. Decision 2/CMP.1<sup>27</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

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<sup>26</sup> Footnote 17 on page 17 of the national allocation plan.

<sup>27</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.

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.

- (22) In application of this method, the effort undertaken by Ireland is 9.27 million tonnes<sup>28</sup>. Taking into account that 0% of its intended government purchases is recognised as sufficiently substantiated, 50% of the effort undertaken of 4.635 million tonnes constitutes the maximum absolute amount for use by operators per year permitted for Ireland. The relative maximum figure for use by operators is obtained by dividing the absolute amount by the allowed total quantity of allowances of 21.151244 million tonnes<sup>29</sup>, which gives 21.914%<sup>30</sup>. Consequently, the maximum amount of CERs and ERUs of 50%, as indicated in Ireland's national allocation plan, which may be used by operators in the Community scheme as a percentage of the allocation of the allowances to each installation is inconsistent with Ireland's complementarity obligations under the Kyoto Protocol and decisions adopted pursuant to the UNFCCC or the Kyoto Protocol, to the extent that it exceeds 21.914%.
- (23) 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 Ireland as soon as possible, taking into account the time-scale necessary to carry out the national procedures without undue delay. Were Ireland to amend its national allocation plan in accordance with Article 2 of this Decision, 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.
- (24) 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.
- (25) 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

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<sup>28</sup> See recital 3 for more reference. Ireland's Kyoto commitment, expressed in absolute figures, is 63.03 million tonnes. Base year emissions are 55.8 million tonnes, 2004 emissions are 68.5 million tonnes and 2010 projected emissions with existing policies and measures are 72.3 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 9.27 million tonnes. Dividing this effort by two gives 4.635 million tonnes, representing the maximum absolute amount, up to which Ireland's operators may use CERs and ERUs, unless it is used up by sufficiently substantiated government purchases.

<sup>29</sup> Calculated as follows: Proposed total quantity of allowances of 22.638 million tonnes minus 0.307267 million tonnes for non-substantiation of other policies and measures in the transport sector minus 1.179489 million tonnes for non-substantiation of government purchase of Kyoto flexible mechanisms.

<sup>30</sup> 4.635/21.112445

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.

- (26) 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.
- (27) 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.
- (28) Accordingly, Member States are not entitled to propose any amendments to national allocation plans, including to the total quantity of allowances stated therein, after the deadline of 31 December 2006 specified in Article 11(2) of the Directive, other than those foreseen in the respective Commission decision on a national allocation plan<sup>31</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,

HAS ADOPTED THIS DECISION:

#### *Article 1*

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

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<sup>31</sup> 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).

1. criterion 1 of Annex III to the Directive: the part of the intended total quantity of allowances related to Ireland's intended use of policies and measures that is insufficiently substantiated, namely in the transport sector, amounting to the equivalent of on average 0.307267 million tonnes per year, and the part of the intended total quantity of allowances related to Ireland's intended use of the Kyoto Protocol's mechanisms, amounting to the equivalent of on average 1.179489 million tonnes per year, in total amounting to the equivalent of on average 1.486756 million tonnes per year, in relation to Ireland achieving its commitment under Decision 2002/358/EC;
2. criterion 5 of Annex III to the Directive: the creation of separate new entrant reserves for new entrants in the power generation and cement sectors, the absence of a maximum level of allowances to be allocated in any year to new entrants in the power generation sector and the different maximum level of allowances to be allocated in any year to new entrants in the cement sector as compared to generic new entrants;
3. 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;
4. criterion 10 of Annex III to the Directive: the intention of Ireland to adjust the allocation of allowances to an installation listed in the national allocation plan and operating in its territory in the event of closure of an installation in that the closing installation retains 75% of its annual allocation up to a maximum of 25000 allowances per annum for the remainder of the period, as well as to recalculate the allocation of allowances and to submit a revised national allocation plan table to the Commission in the event of an installation not commencing any installed capacity by the expected starting date contained in the permit;
5. 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 Ireland's complementarity obligations under the Kyoto Protocol and decisions adopted pursuant to the UNFCCC or the Kyoto Protocol, to the extent that it exceeds 21.914%.

## *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 1.486756 million tonnes CO<sub>2</sub> equivalent of allowances per year;
2. there are no separate new entrant reserves for new entrants in the power generation and cement sectors and there is no different treatment with respect to maximum levels of allowances to be allocated in any year to new entrants in the power generation and cement sectors as compared to generic new entrants;

3. 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;
4. the quantity of allowances allocated to an installation that is listed in the national allocation plan and operating in its territory is not subject to adjustments in the event of closure of an installation in that the closing installation retains 75% of its annual allocation up to a maximum of 25000 allowances per annum for the remainder of the period, as well as in the event of an installation not commencing any installed capacity by the expected starting date contained in the permit;
5. 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 to no more than 21.914%.

#### *Article 3*

1. The total quantity of allowances of 21.151244 million tonnes to be allocated by Ireland 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 other amendments of the national allocation plan, apart from those made to comply with Article 2 of this Decision, must be notified by the deadline of 31 December 2006 referred to in Article 11(2) of the Directive and require prior acceptance by the Commission pursuant to Article 9(3) of the Directive.

#### *Article 4*

This Decision is addressed to Ireland.

Done at Brussels, 29 November 2006

*For the Commission*