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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 17.12.2008
C(2008) 7867

COMMISSION DECISION

of 17.12.2008

concerning the unilateral inclusion of additional greenhouse gases and activities by the Netherlands in the Community emissions trading scheme pursuant to Article 24 of Directive 2003/87/EC of the European Parliament and of the Council

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(Only the Dutch text is authentic)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC¹, and in particular Article 24(1) thereof,

Whereas:

- (1) The Netherlands submitted an application for the unilateral inclusion in the Community scheme of the emission of nitrous oxide (N₂O) associated with the production of nitric acid (HNO₃) as an additional gas and activity pursuant to Article 24 of Directive 2003/87/EC (hereinafter "the ETS Directive") on 17 June 2008, registered on 19 June 2008.
- (2) According to the application, this inclusion concerns six installations managed by three operators. The requested starting date for the opt-in is 1 January 2008. The application of the following declining benchmark is proposed: 1.7 kg N₂O/t HNO₃ for the years 2008 and 2009, 1.5 kg N₂O/t HNO₃ for the years 2010 and 2011 and 1.3 kg N₂O/t HNO₃ for the year 2012. That represents 1.54 kg N₂O/t HNO₃ on average for the period 2008-2012. This declining benchmark is applied to the average production level of the base years (3 years out of the 2001-2005 period). No growth factor will be used. As a result, a total of 5 628 209 tonnes CO₂ equivalent will be allocated to these installations for the period 2008-2012. According to the application, a reserve amounting to 74 400 tonnes of CO₂ equivalent for the entire period is created for allocation to new entrants, which will be allocated using a benchmark that will not exceed 0.12 kg N₂O/t HNO₃. A reserve to address the outcome of any potential litigation related to the allocation will be limited to 28 141 tonnes of CO₂ equivalent. Finally, according to the application any allowances in the reserves remaining at the end of the budget period will be reconverted into AAUs and will not be allocated in the EU ETS.
- (3) In accordance with Article 24 of the ETS Directive, the Commission assessed the application under all relevant criteria, in particular the effects on the internal market, potential distortions of competition, the environmental integrity of the scheme and the reliability of the planned monitoring and reporting system. The Commission had

¹ OJ L 275, 25.10.2003, p. 32.

commissioned a study² on the technological possibilities to reduce N₂O emissions from European nitric acid plants and the economic effects such reductions would have when the installations are included in the EU ETS (hereinafter "the Study").

- (4) Environmental integrity requires most importantly that the inclusion in the EU ETS of an additional gas and activity should result in a real reduction of emissions compared to business as usual and the number of allowances created by inclusion in the EU ETS should not exceed emission levels that can be expected pursuant to other environmental legislation, notably Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control³ (hereinafter "the IPPC Directive").
- (5) As The Netherlands propose, it is appropriate to base the allocation on a benchmark that can be applied to historical production of nitric acid from existing installations regardless of their technical specifications. 'Benchmarking' is more in line with the 'polluter pays principle' than basing allocations on historical emissions ('grandfathering'), as it does not reward producers that have high emission levels per unit of production. Therefore, it is generally perceived as a fairer allocation methodology. For the same reason, it also avoids distortions of competition to a larger extent. Moreover, benchmarking offers significant advantages of simplicity and transparency.
- (6) The benchmark level shall not only take into account levels that can be achieved by the application of best available techniques (BAT), but also the levels of emissions that can be expected after inclusion in the EU ETS and the cost of abatement measures to reduce emissions below the maximum level required by the IPPC Directive.
- (7) Industrial installations producing nitric acid (HNO₃) fall under the scope of the IPPC Directive (paragraph 4.2(b) of Annex I of the IPPC Directive). Article 3 of the IPPC Directive requires that "*all the appropriate preventive measures are taken against pollution, in particular through application of the best available techniques*". Article 9(4) of the same directive requires that "*emission limit values [...] shall be based on the best available techniques, without prescribing the use of any technique or specific technology, but taking into account the technical characteristics of the installation concerned, its geographical location and the local environmental conditions*". Article 5(1) of the IPPC Directive sets a deadline of 30 October 2007 for reaching compliance with this requirement.
- (8) On 30 August 2007 the Commission adopted⁴ the Reference Document (BREF) on BAT for the manufacture of large volume inorganic chemicals – ammonia, acids and fertilizers (hereinafter the "BREF LVIC-AAF") pursuant to Article 17(2) of the IPPC Directive, which covers the production of HNO₃. This document has established that emission levels of 0.12–1.85 kg N₂O/t HNO₃ are associated with BAT for existing installations⁵ and should be achieved through the implementation of the IPPC Directive. Any benchmark level exceeding these values would not respect the

² Entec UK Limited, „Support for the Development and Adoption of Monitoring and Reporting Guidelines and Harmonised Benchmarks for N₂O Activities for Unilateral Inclusion in the EU ETS for 2008-12”, Final Report, February 2008, see:

http://ec.europa.eu/environment/climat/emission/pdf/entec_study_2008.pdf

³ OJ L 24, 29.1.2008, p. 8.

⁴ OJ C 202/2 30.8.2007, p. 2.

⁵ With the exception of “Dual Low/Medium pressure” plants, for which no BAT conclusions were drawn in the BREF LVIC-AAF.

requirement of environmental integrity. The range of emission levels specified in the BREF LVIC-AAF for new installations is 0.12-0.6 kg N₂O/t HNO₃. So similarly, any benchmark exceeding these values for installations that received the first environmental permit after the adoption of the BREF LVIC-AAF would not respect the requirement of environmental integrity. The Commission notes that for all the existing installations to be covered by the proposed opt-in the proposed declining benchmark is below the maximum emission values that would derive from the application of the IPPC-Directive.

- (9) The inclusion of N₂O from nitric acid into the EU ETS will create an incentive for the Dutch installations to invest and apply abatement measures which will significantly reduce emissions below the level that results from the application of the IPPC Directive alone. The abatement measures required for such additional reductions entail costs which installations not unilaterally included in the EU ETS may not otherwise undertake. If the opt-in results in emission levels below the benchmark, the operators will be able to sell part of their allocation. This can be accepted to a certain level since the measures needed for the additional reductions induced by the ETS inclusion involves costs and risks, particularly as it may lead to the application of advanced emission abatement techniques without much lead time for testing. In this context, the Commission considers that the declining benchmark proposed by the Netherlands gives the appropriate balance between the environmental benefit of the EU ETS and acceptable economic consequences and technical risks for individual installations. With the proposed benchmarks, the additional N₂O abatement costs induced by the opt-in (under conservative assumptions) are in the range of the expected benefit from inclusion in the EU ETS. The inclusion thus rewards the risks involved for the abatement measures that go beyond the minimum measures required to comply with the IPPC-Directive, without creating excessive financial gains or losses for the installations. The declining benchmark proposed by the Netherlands, furthermore, takes duly into account that the economic impact of inclusion is sensitive to parameters such as abatement efficiency, abatement costs and allowance price and puts included installations neither into a favourable nor into an unfavourable position compared to non-included competitors.
- (10) Coherence between the level of the benchmark and the production base to which the benchmark is applied, is best ensured if the production base represents an appropriate indicator of future production levels without, however, relying on variables or estimates that are difficult to establish and verify in an objective manner. The approach as regards the historical production base proposed by the Netherlands is appropriate, because it takes into account base values of production which can be considered representative.
- (11) With respect to the new entrants' reserve the Commission agrees with the proposed approach given the high reduction potential for new installations as well as the much lower values envisaged for them in the BREF LVIC-AAF.
- (12) The unilateral inclusion of nitric acid production is consistent with the policies and measures submitted with the national allocation plan and will not make it more difficult for the Netherlands to achieve its Kyoto-target.
- (13) The monitoring and reporting system applied by the Netherlands since 1 January 2008 complies with the criteria set out in Commission Decision 2007/589/EC⁶ as amended

⁶ OJ L 229, 31.8.2007, p. 1.

by Commission Decision C(2008)8040⁷. Therefore, the Commission considers that the planned monitoring and reporting system is reliable and accepts the retroactive application of the opt-in from 1 January 2008.

- (14) The Commission also made a preliminary assessment of the compliance of the opt-in proposed by the Netherlands with Articles 87 and 88 of the Treaty. 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 as 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, 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 proposed opt-in could potentially imply State aid pursuant to Article 87(1) of the Treaty. At this preliminary stage, the Commission has no indication that any State aid potentially involved may be found incompatible with the common market should it be assessed in accordance with Article 87 and 88 of the Treaty.
- (15) The measures provided for in this Decision are in accordance with the opinion of the Climate Change Committee established by Article 9 of 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 Protocol⁸.

HAS ADOPTED THIS DECISION:

Article 1

The application submitted by the Netherlands for the unilateral inclusion in the Community scheme of the emission of nitrous oxide (N₂O) associated with the production of nitric acid (HNO₃) as an additional gas and activity is approved.

Article 2

This decision shall apply as of 1 January 2008.

Article 3

This Decision is addressed to the Kingdom of The Netherlands.

⁷ Commission Decision amending Decision 2007/589/EC so as to include monitoring and reporting guidelines for emissions of nitrous oxide, C(2008)8040

⁸ OJ L 49 19.02.2004, p.1.

Done at Brussels, 17.12.2008

For the Commission

Member of the Commission