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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 31 August 2007

COMMISSION DECISION

of 31 August 2007

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

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(Only the Danish text is authentic)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC¹, and in particular Article 9(3) thereof,

Whereas:

- (1) The national allocation plan of Denmark 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 7 March 2007 and registered by the Commission on 8 March 2007. Denmark submitted additional information in order to complete the notified plan by letters dated 2 and 8 May 2007 registered on 4 and 11 May 2007 respectively, in reply to questions from the Commission, and by communication of 2 July 2007, registered on 3 July 2007.
- (2) The Climate Change Committee² 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 Committee urged the Commission inter alia to closely scrutinise the substantiation of other policies and measures to reduce greenhouse gases in the non-trading sectors to reach Denmark's target under Decision 2002/358/EC. In addition, the Climate Change Committee called on the Commission to closely examine Denmark's ability to substantiate its intended use of the Kyoto mechanisms to reach its target under Decision 2002/358/EC. The

¹ Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ L 275, 25.10.2003, p. 32, as amended by Directive 2004/101/EC of the European Parliament and of the Council of 27 October 2004, amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in respect of the Kyoto Protocol's project mechanisms, OJ L 338, 13.11.2004, p. 18.

² Decision 280/2004/EC of the European Parliament and of the Council of 11 February 2004 concerning a mechanism for monitoring Community greenhouse gas emissions and for implementing the Kyoto Protocol, OJ L 49, 19.02.2004, p. 1, established under Article 9 thereof.

Committee notes that the Commission should examine the admissibility under criterion (12) of Annex III to the Directive of the intended maximum amount of CERs and ERUs which may be used by operators as a percentage of the allocation of allowances to each installation.

- (3) The Commission notes that Denmark's annual Kyoto commitment for the period from 2008 to 2012 is 54.765 million tonnes CO₂ equivalent (hereinafter "million tonnes"), while the most recent available figure for its annual total greenhouse gas emissions is 68.1 million tonnes for the year 2004³. The remaining gap between these two annual figures to be bridged by Denmark is therefore 13.335 million tonnes.
- (4) The national allocation plan, including the intended total quantity of allowances of 24.5 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 criteria⁴. Certain aspects of the national allocation plan have been found incompatible with those criteria, and in particular with criterion 12 in Annex III to the Directive.
- (5) Pursuant to criterion 5 of Annex III to the Directive, the Commission has examined compliance of the national allocation plan of Denmark 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 Units⁵, 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

³ 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 Denmark 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 54.765435 million tonnes (=273.827177/5). Annual total greenhouse gas emissions for the year 2004 are indicated in the third column of Table 1 in the Annex to the Progress Report SEC(2006) 1412 of 27 October 2006.

⁴ 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).

⁵ 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.

Commission therefore at this stage considers that the plan could potentially imply State aid pursuant to Article 87(1) of the Treaty. Pursuant to criterion 5, the Commission has also examined the methodology by which Denmark intends to allocate allowances at installation level. Allocations to installations established before 1.1.2004 are based on the average emissions or production in the 1998-2004 period or on emissions/production in the single year 2004 in case the figure for this year is the highest. Denmark indicated that the share of allowances allocated with 2004 as base year amounts to 50%. The approach appears unduly favourable for those installations that had exceptionally high emission or production levels in 2004. Such discrimination could not be justified by any environmental objectives. Therefore the Commission at this stage and on the basis of the currently available information cannot exclude that the allocation methodology leads to undue and discriminatory advantages to certain installations. Consequently, the Commission cannot exclude that potential aid involved may be partially incompatible with the common market should it be assessed in accordance with Articles 87 and 88 of the Treaty.

- (6) 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 Denmark's supplementarity obligations under the Kyoto Protocol and decisions adopted pursuant to the UNFCCC or the Kyoto Protocol. Decision 2/CMP.1⁶ 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 supplementarity, 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 supplementarity 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.
- (7) In application of this method, the effort undertaken by Denmark is 17.735 million tonnes⁷. 50 % of the effort undertaken is 8.8675 million tonnes. Taking into account

⁶ 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.

⁷ Denmark's Kyoto commitment, expressed in absolute figures, is 54.765 million tonnes. Base year emissions are 69.3 million tonnes, 2004 emissions are 68.1 million tonnes and 2010 projected emissions with existing policies and measures are 72.5 million tonnes according to the Progress Report

that 100% of the intended government purchase is recognised as sufficiently substantiated, 4.1675 million tonnes constitutes the maximum absolute amount for use by operators per year permitted for Denmark. The relative maximum figure for use by operators is obtained by dividing the absolute amount by the allowed total quantity of allowances of 24.5 million tonnes⁸, which gives 17.010%⁹. Consequently, the maximum amount of CERs and ERUs of 19%, as indicated in Denmark'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 Denmark's supplementarity obligations under the Kyoto Protocol and decisions adopted pursuant to the UNFCCC or the Kyoto Protocol, to the extent that it exceeds 17.010%.

- (8) 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 Denmark as soon as possible, taking into account the time-scale necessary to carry out the national procedures without undue delay. Where Denmark to amend its NAP in a non-discriminatory manner in accordance with Article 2 of this Decision, and duly taking into account the observation in recital 5, the Commission considers that any State aid involved is likely to be found compatible with the common market should it be assessed in accordance with Article 87 and 88 of the Treaty.
- (9) 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.
- (10) 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.
- (11) 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

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 17.735 million tonnes. Dividing this effort by two gives 8.8675 million tonnes of which the intended amount of government purchase of 4.7 million tonnes need to be deducted which gives 4.1675 million tonnes (8.8675-4.7 million tonnes) representing the maximum absolute amount, up to which Denmark's operators may use CERs and ERUs.

⁸ Proposed allowed total quantity of allowances in million tonnes.

⁹ 4.1675/24.5.

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.

- (12) 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.
- (13) 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 plan¹⁰. 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 aspect of the national allocation plan of Denmark for the first five-year period mentioned in Article 11(2) of the Directive is incompatible with: 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 Denmark's supplementarity obligations under the Kyoto Protocol and decisions adopted pursuant to the UNFCCC or the Kyoto Protocol, to the extent that it exceeds 17.010%.

Article 2

No objections shall be raised to the national allocation plan, provided that the following amendment to the national allocation plan is 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: the overall maximum amount of

¹⁰ See Court of First Instance, ruling of 23 November 2005 in case T-178/05, OJ C 22, 28.1.2006, p. 14, full text <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005A0178:EN:HTML>; point 7 of the Commission Communication on further guidance on allocation plans for the 2008 to 2012 trading period of the EU Emission Trading Scheme, COM(2005)703 final, published under http://ec.europa.eu/environment/climat/pdf/nap_2_guidance_en.pdf; Commission Decision of 22 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.

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 17.010%.

Article 3

1. The total quantity of allowances of 24.5 million tonnes to be allocated by Denmark 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 Denmark.

Done at Brussels, 31 August 2007

For the Commission