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EUROPEAN COMMISSION

Brussels, 11.12.2009

COMMISSION DECISION

of 11.12.2009

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

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(Only the Polish text is authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

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 Poland for the period 2008 to 2012, developed under Article 9(1) of Directive 2003/87/EC, was notified to the Commission by letter dated 30 June 2006, registered on 6 July 2006. Poland submitted additional information in order to complete the notified plan by letter dated 29 December 2006, registered on 8 January 2007, in reply to questions from the Commission, and by letter dated 9 January 2007, registered on 23 January 2007 (the national allocation plan as amended and completed will be referred to hereinafter as "the national allocation plan").
- (2) On 26 March 2007, the Commission took the Decision C(2007)1295 final rejecting the national allocation plan. Poland has amended its national allocation plan in conformity with Decision C(2007)1295 final. Among others, it reduced the total quantity of allowances intended to be allocated. Poland implemented the amended national allocation plan according to Article 11(2) of Directive 2003/87/EC. Pursuant to Commission Regulation (EC) No 2216/2004/EC 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 Council², the Polish national allocation plan table has been entered into the Community independent transaction log and the allowances were issued to individual installations for 2008 and 2009. In parallel, Poland brought an action for annulment against Decision C(2007)1295 final (Case T-183/07). On 23 September 2009, the Court of First Instance (First Chamber) rendered a judgement annulling that decision. In contacts between Commission and Polish officials, the common understanding of the judgement has been that, independent of whether an appeal is lodged, a new decision should be taken by the Commission within three months of the judgement. Polish officials indicated that an amended national allocation plan would not be submitted beforehand. Accordingly, the Commission has reassessed the national allocation plan that was the subject of Decision C(2007)1295.

¹ OJ L 275, 25.10.2003, p. 32, (OJ L 338, 13.11.2004, p. 18).

² OJ L 386, 29.12.2004, p.1

- (3) The Climate Change Committee established under Article 9 of Decision No 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 Protocol³ considered on 22 September 2006 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 to avoid undue distortions of competition. The Climate Change Committee, *inter alia*, noted with great concern that the proposed cap substantially exceeds 2005 verified emissions and urged the Commission to scrutinise that installations are not allocated more allowances than needed. The Climate Change Committee also urged the Commission to compare the proposed allocation to Poland's projections and measures for the non-trading and trading sectors, including in particular assumptions made on growth rates and carbon intensity trends; to compare Poland's allocation to recent historic and projected emissions; and to examine the justification for deviations from recent historic and projected emissions for the trading sector. This decision takes account of and is consistent with the views of the Climate Change Committee.
- (4) The national allocation plan contravenes criteria 1, 2 and 3 of Annex III to Directive 2003/87/EC because the total quantity of allowances intended to be allocated is more than would be consistent with assessments of actual and projected progress made pursuant to Decision No 280/2004/EC and more than would be consistent with the potential, including the technological potential, of activities covered by the Community scheme to reduce emissions. Criteria 2 and 3 provide for a methodology comparing Poland's proposed figures to the most representative emissions figures, taking into account economic growth and carbon intensity improvements. Pursuant to criterion 1, the total quantity of allowances to be allocated shall not be more than what is likely to be needed for the strict application of the criteria of Annex III to Directive 2003/87/EC.
- (5) With respect to criterion 2, the actual verified greenhouse gas emissions of the sectors covered by the Community scheme in Poland in 2005 are reported as being 203.149576 million tonnes CO₂ equivalent, compared to an allocation in the Community scheme for that year of 237.566730 million tonnes, more than 34 million tonnes higher than actual emissions. In 2006, the actual greenhouse gas emissions of the sectors covered by the Community scheme in Poland are reported as being 209.616290 million tonnes, compared to an allocation in the Community scheme for that year of 237.566730 million tonnes, more than 27 million tonnes higher than actual emissions. In 2007, the actual greenhouse gas emissions of the sectors covered by the Community scheme in Poland in 2007 are reported as being 209.618357 million tonnes, compared to an allocation in the Community scheme for that year of 237.551820 million tonnes, more than 27 million tonnes higher than actual emissions. The total excess of allocation over emissions from 2005 to 2007 is 90.273757 million tonnes. These emission figures are reliable and accurate emissions figures for the Commission to compare with Poland's proposed figures for the assessment under

³ OJ L 49, 19.2.2004, p. 1.

criteria 2 and 3 because they have been reported by individual installations in Poland falling under the Community scheme and have been independently verified pursuant to Article 15 of Directive 2003/87/EC.

- (6) The Commission notes that Poland has increased the scope of activities covered by Directive 2003/87/EC from the first to the second period in line with the Commission's guidance⁴. The actual verified greenhouse gas emissions of the sectors covered by the Community scheme in Poland in 2008 are reported as being 204.107419 million tonnes, and these figures correspond to the scope of installations included by Poland in the Community scheme in the second period. The Commission has compared this figure to the Polish proposed allocation figure for 2008 of 284.648332 million tonnes, which is therefore more than 80 million tonnes (or 39%) higher than the actual verified figures reported by Polish installations for 2008.
- (7) The verified emission figures mentioned in recitals 5 and 6, in particular the overestimation of emissions in 2008 by more than 80 million tonnes, put also into question the reliability of the methodology of the national allocation plan and its emission projections for the years 2009 to 2012.
- (8) With respect to criterion 3, the Commission notes that for a national allocation plan to be consistent with the potential, including the technological potential, of activities covered by the scheme to reduce emissions requires assessment of total allocations in accordance in particular with projections of economic growth and improvements in carbon intensity⁵. The Commission has assessed the figures at its disposal, including those in the public domain, with a view to comparing these to Poland's projected emissions. In order to estimate which total quantity of allowances is consistent with the potential, including the technological potential, of activities covered by the Community scheme to reduce emissions, the 2005 aggregate independently verified emission figures of installations in the Community scheme have been multiplied with two factors: firstly, the projected gross domestic product (thereafter "GDP") growth rate and, secondly, the rate for carbon intensity improvement, each in the period from those independently 2005 verified figures to 2010. 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. The resulting figures are compared with Poland's proposed allocation so as to determine to what extent it is in line with criterion 3, taking into account the expansion in the scope of activities covered by Directive 2003/87/EC from the first to the second period as applied by Poland in line with the Commission's further guidance⁶. The Commission considers the data indicated in the PRIMES model⁷ reliably estimates both GDP growth and

⁴ Point 36 of COM(2005)703 final, as clarified by the "co-ordinated definitions" of additional combustion installations contained in the minutes of the Climate Change Committee of 31 May 2006.

⁵ See in particular point 11 of COM(2005) 703 final.

⁶ Point 36 of COM(2005)703 final, as clarified by the "co-ordinated definitions" of additional combustion installations contained in the minutes of the Climate Change Committee of 31 May 2006.

⁷ PRIMES is a modelling system that simulates a market equilibrium solution for energy supply and demand in the Member States. The model determines the equilibrium by finding the prices of each energy form such that the quantity producers find best to supply match the quantity consumers wish to use. The equilibrium is static (within each time period) but repeated in a time-forward path, under dynamic relationships. The model is behavioural but also represents in an explicit and detailed way the available energy demand and supply technologies and pollution abatement technologies. The system reflects considerations about market economics, industry structure, energy/environmental policies and regulation. These are conceived so as to influence market behaviour of energy system agents. The modular structure of PRIMES reflects a distribution of decision making among agents that decide

carbon intensity improvement rates, for comparison with Poland's proposed figures. The PRIMES model has been used for analysis of energy and climate policy for a long time, including for the impact assessment of the EU climate and energy package, and the baseline assumptions⁸ are updated on a regular basis to reflect the most likely future trend. Furthermore, baseline assumptions are validated with the involvement of experts from Member States. Calculating the technical potential based on these factors and data available at the time Decision C(2007)1295 final was adopted yields the following results⁹:

2005 verified emissions (in t CO ₂ eq.)	GDP development factor 2005-2010	Carbon intensity improvement factor 2005-2010	Resulting estimated emissions in 2010 (in t CO ₂ eq.)	Scope change from the first to the second trading period (in t CO ₂ eq.)	Resulting annual average estimated emissions during the second trading period (in t CO ₂ eq.)
203149576	1.264803	0.786510	202089177	6288400	208377577

- (9) The Commission notes that this estimate of achievable emissions under consideration of potentials is 4 million tons higher than the reported verified emissions of Poland in 2008. Consideration of recent GDP data, which leads to a lower GDP development factor¹⁰, indicates that emissions could be even lower than 208 million tonnes per year, although the effect of lower GDP growth on emissions may be partly compensated by an induced slower improvement in the carbon intensity factor. Nevertheless, available statistical data show a significant improvement in carbon intensity by 9.9% between 2005 and 2007¹¹.
- (10) The methodology used in the Polish national allocation plan assumes growth rates over the second trading period of more than 5% per year. These are significantly higher than recent GDP estimates which are clearly below 2% for 2009 and 2010 and around 3% for 2011. This implies that the need for allowances is significantly overestimated in the power sector and the industrial sectors since the national allocation plan relies largely on these GDP projections for allowance allocation.
- (11) According to the national allocation plan, the largest amount of allowances is intended to be allocated to the heat and power generation sector. For its largest subsector, utility power plants, the overall allocation is determined based on an estimation of the growth of electricity demand and a replacement balance (table Z3 in annex 1). In the national

individually about their supply, demand, combined supply and demand, and prices. Then the market integrating part of PRIMES simulates market clearing. PRIMES is a general purpose model. It is conceived for forecasting, scenario construction and policy impact analysis. More information can be found on the following website: <http://www.e3mlab.ntua.gr/>.

⁸ Examples for baseline assumptions are future developments in population, fuel prices, etc.

⁹ Formula recalculated with updated 2005 emissions.

¹⁰ Combining actual GDP real growth data 2005 to 2008 as published by Eurostat and data for 2009 and 2010 from the European Commission European Economic Forecast of autumn 2009 (European Economy 10/2009, http://ec.europa.eu/economy_finance/publications/publication16055_en.pdf) yields a GDP development factor of 1.226912.

¹¹ The calculation is based on data on energy-related CO₂ emissions, as reported in the Polish UNFCCC 2009 greenhouse gas inventory and presented in the EEA data viewer (<http://dataservice.eea.europa.eu/PivotApp/pivot.aspx?pivotid=475>), and on data on GDP at market prices and real GDP growth rates in Euro as reported by Eurostat.

allocation plan (annex 1, table Z1) power demand is estimated based on the above mentioned GDP assumptions and an assumed stable electricity / GDP ratio of 0.85. This is significantly higher than the Polish historical trend. The national allocation plan shows that in nine of ten years between 1996 and 2005 the ratio has been below 0.5. Both elements indicate a very significant overestimation of electricity demand by the national allocation plan. This is confirmed by available empirical data: while the projected electricity generation is 168.17 TWh for 2007 and 174.81 TWh for 2008, Eurostat reports a value of 159.35 TWh for 2007 and a market report by Business Monitor International a thermal power generation of 151.7 TWh in 2008¹². The European Network of Transmission System Operators for Electricity reports a further 3.4% decrease in fossil-fuel based power generation for the first quarter of 2009¹³. These data show also clearly that electricity generation growth rates have continued to be significantly below GDP growth rates until 2009. Furthermore, it is unclear if expected carbon efficiency increases and corresponding technical potentials due to normal progress and the carbon price signals of the Community scheme have been included in the allowance allocation formula. Hence power sector emissions are overestimated significantly in view of recent GDP growth figures and more realistic assumptions on the relation between electricity demand and GDP growth. This overestimate is confirmed by the Polish energy policy plan of October 2009¹⁴. That plan indicates a potential to decrease (gross) electricity demand from 2006 to 2010 (from 151 to 141 TWh) and a slight increase from 2010 to 2015 (from 141 to 153 TWh), compared to a projected electricity demand of 198.24 TWh in 2012 in the national allocation plan.

- (12) Electricity demand projections are also an important input for the allocation to the heat and power plant subsector, hence the same observations apply. Clearly, lower GDP growth rates have also a downward effect on heat demand. Moreover, the projection of allowance demand (table 7.2 of the national allocation plan) does not assume any carbon efficiency improvement between 2008 and 2012, thus neglecting the technical potential for emission reductions.
- (13) For the utility heat sector, the allowance allocation seems to be based on industry information. No efficiency improvement parameter is included. Moreover, the amount of 7503500 tonnes for the new entrant's reserve is very high compared to the average annual quantity of allowances of 12107000 tonnes. This suggests an increase in heat demand of more than 60%. Such an increase is significantly higher than the expected GDP growth and higher than the 5% growth in CO₂ emissions from the heat sector under the draft Polish energy plan.¹⁵
- (14) These observations together demonstrate an allocation of allowances to the heat and power sector significantly in excess of needs. The Polish energy policy plan shows that it is technically feasible to reduce energy related emissions from 188.5 million tonnes to 170.3 in 2010 and down to 167.7 million tonnes in 2015. CO₂ emissions

¹² Summary of Business Monitor International report published under <http://www.mindbranch.com/Poland-Power-Q4-R302-8590/>

¹³ <http://www.entsoe.eu/>

¹⁴ See Ministerstwo Gospodarki "Polityka energetyczna Polski do 2030 roku", i.e. Załącznik 2. Prognoza Zapotrzebowania, Na Paliwa I Energie do 2030 Roku (pages 14 to 15). <http://www.mg.gov.pl/Gospodarka/Energetyka/Polityka+energetyczna/>

¹⁵ See Ministerstwo Gospodarki "Polityka energetyczna Polski do 2030 roku", i.e. Załącznik 2. Prognoza Zapotrzebowania, Na Paliwa I Energie do 2030 Roku (page 19). <http://www.mg.gov.pl/Gospodarka/Energetyka/Polityka+energetyczna/>

from power generation could drop from 155 million tonnes in 2006 to 132 in 2010 and 130 in 2015¹⁶.

- (15) Accordingly, the Commission finds that the Polish proposed figure of 284648332 tonnes for each of the years 2008-2012 is inconsistent with criteria 1, 2 and 3 of Annex III to Directive 2003/87/EC.
- (16) Pursuant to criterion 5 of Annex III to Directive 2003/87/EC, the Commission has also examined compliance of the national allocation plan with the provisions of the Treaty on the Functioning of the European Union (hereinafter “TFEU”), and in particular Articles 107 and 108 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 trade between Member States. 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 Commission notes that Poland intends, as allowed under Article 10 of Directive 2003/87/EC, to auction close to 10% of the allowances but it cannot be excluded that more than 90% of the allowances will be allocated for free. In addition, 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 of the Kyoto Protocol, 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 in accordance with Article 45 of Regulation (EC) No 2216/2004, which are tradable between contracting parties to the Kyoto Protocol, 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 107(1) TFEU. On the basis of information provided by Poland, 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 Directive 2003/87/EC. Non-compliance with criteria 1, 2 and 3 fundamentally jeopardises the overall environmental objective of the Community 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 107 and 108 TFEU.
- (17) Moreover, pursuant to criterion 5 of Annex III to Directive 2003/87/EC, the Commission takes the view that any national provisions related to the intended use by Poland of Article 13(2), second sentence, of Directive 2003/87/EC must be notified by Poland to the Commission pursuant to Article 108(3) TFEU. The Commission at this stage considers that any issuance of allowances pursuant to Article 13(2), second

¹⁶ See Ministerstwo Gospodarki "Polityka energetyczna Polski do 2030 roku", i.e. Załącznik 2. Prognoza Zapotrzebowania, Na Paliwa I Energie do 2030 Roku (pages 18 to 19). <http://www.mg.gov.pl/Gospodarka/Energetyka/Polityka+energetyczna/>

sentence, of Directive 2003/87/EC which is not based on an environmental counterpart by beneficiaries in terms of proven real emission reductions during the three year period referred to in Article 11(1) of Directive 2003/87/EC could constitute State aid which would likely be found incompatible with the common market should it be assessed in accordance with Articles 107 and 108 TFEU.

- (18) Pursuant to criterion 5 of Annex III to Directive 2003/87/EC, the Commission has also examined the intended bonuses granted to certain installations in view of early action, the use of biomass and co-generation. These bonuses are in accordance with criteria 7 and 8 of Annex III to Directive 2003/87/EC, but since they come in addition to the allocations calculated on the basis of the expected needs of installations, they lead to final allocations to certain installations going beyond expected needs. The wish to encourage early action, the use of renewable sources of energy and co-generation may justify a certain differentiation of allocations, but it cannot justify allocations to installations going beyond their expected needs as this constitutes undue advantages to installations concerned in breach of criterion 5 of Annex III to Directive 2003/87/EC. For the same reasons, the Commission at this stage and on the basis of the currently available information cannot exclude that State aid involved in the allocations may partially be found incompatible with the common market should it be assessed in accordance with Articles 107 and 108 TFEU.
- (19) Pursuant to criterion 5 of Annex III to Directive 2003/87/EC, the Commission has also examined the methodology by which Poland intends to allocate allowances at sector and installation level. The Commission notes that allocations heavily rely on growth projections prepared by the operators of installations and sectors associations concerned and there are different allocation approaches for different sectors. The estimates depend on many subjective assumptions which are difficult to verify in an objective manner. Experts independent from the beneficiaries have been involved in the verification of the data, but Poland has not demonstrated that this verification has been done in a consistent manner and with the appropriate coverage. It appears to the Commission that the data has not been critically and systematically reviewed in the light of e.g. capacity utilisation and capacity limits, import and export trends, technological and macro-economic developments. Despite the Commission's request, Poland has not provided details of the underpinning of intended allocations significantly above 2005 verified emissions multiplied by the average growth figure. In this respect, it must also be noted that the difference between the technical potential of emissions estimated by the Commission and the sum of the sector needs and allowances as notified by Poland is very significant. For these reasons, due to the lack of sufficient safeguards, the proposed allocation methodology may lead to undue advantages to certain sectors or installations in the light of criterion 5 of Annex III to Directive 2003/87/EC. Therefore, the Commission at this stage and on the basis of the currently available information cannot exclude that State aid involved in the allocations may partially be found incompatible with the common market should it be assessed in accordance with Articles 107 and 108 TFEU.
- (20) Furthermore, pursuant to criterion 5 of Annex III to Directive 2003/87/EC, the Commission has also examined the methodology by which Poland intends to allocate allowances to the power generating sector. The allocations are based on no other historical data than 2005 production figures and on CO₂ emission levels. The narrow historical base appears as insufficient to reflect average production conditions of individual installations for the second period. The approach may not avoid allocation beyond expected needs for those installations that had exceptionally high production

levels in 2005 and is likely to discriminate against those installations that for whatever reasons had low production levels in that year. Such discrimination cannot be justified by any environmental objectives. Also the allocation on the basis of CO₂-emissions discriminates certain installations to the disadvantage of others and it may lead to an allocation beyond expected needs for those installations with lowest CO₂-emissions. Such differentiation may have to be considered undue, since it does not serve the objectives of Directive 2003/87/EC. It may neither serve the objectives of 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 plants¹⁷, since investments to reduce CO₂-emissions would be required in any event in case the plants wish to produce certain quantities, i.e. it is not clear to what extent the aid involved in the allocation leads to any improvement on Community standards and how such aid would be compatible with the "polluter pays principle". Having invested in installations to reduce CO₂ emissions may give an indication of intended use of the installations and such installations may actually have higher CO₂ emissions, but differences in capacity utilisation among the installations concerned can still be significant. The Commission therefore, at this stage and on the basis of the available information, cannot exclude that any aid involved would be found incompatible with the common market should it be assessed in accordance with Articles 107 and 108 TFEU.

- (21) Pursuant to criterion 6 of Annex III to Directive 2003/87/EC, 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 is lacking, firstly, information on the provisions to be applied to a potential remainder of the reserve and, secondly, a sufficiently clear and objective methodology for allocating allowances to new entrants, in particular with respect to the assumptions (e.g. as regards capacity utilisation) and benchmarks used in determining the amount to be allocated to new entrants. Poland has also failed to clarify whether allocations to new entrants will never exceed the level that can be achieved by the use of best available technique. This contravenes criterion 6 because the information contained is insufficient to assess whether the other criteria of Annex III to Directive 2003/87/EC and Article 10 thereof are respected. Due to this lack of clarity, and due to the risk of using inappropriate criteria like "costs of resources and labour"¹⁸, the Commission cannot exclude either that any aid involved in the allocation to new entrants would be found incompatible with the common market should it be assessed in accordance with Articles 107 and 108 TFEU.
- (22) The intention of Poland to transfer allowances from an installation in the coking industry to a power generator in the event of the sale of coke oven gas by the former to the latter¹⁹ contravenes criterion 10 in Annex III to Directive 2003/87/EC 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 Directive 2003/87/EC 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 Directive 2003/87/EC. Following the final allocation decision the number of allowances to be allocated and issued for each installation is fixed and may not be

¹⁷ OJ L309 of 27.11.2001, p.1.

¹⁸ See reply by Poland to the Commission's question number 31.

¹⁹ See reply by Poland to the Commission's question number 22.

changed, except in the case of full closure and withdrawal of the greenhouse gas permit of that same installation.

- (23) Such so-called ex-post adjustments contradict the essential concept of a "cap-and-trade" system as conceived by Directive 2003/87/EC. Under the Community scheme, each installation is allocated a certain amount of allowances in the decision referred to in Article 11(2) of Directive 2003/87/EC, 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.
- (24) 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 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.
- (25) Directive 2003/87/EC 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 of that same installation 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.
- (26) Pursuant to criterion 12 of Annex III to Directive 2003/87/EC, the Commission has assessed the maximum amount of certified emission reductions (hereinafter "CERs") and emission reduction units (hereinafter "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 Poland's complementarity obligations under the Kyoto Protocol and decisions adopted pursuant to the UNFCCC or the Kyoto Protocol. Decision 2/CMP.1²⁰ 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

²⁰ 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 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.

- (27) In application of this method, the effort undertaken by Poland is 34.1 million tonnes²¹. Taking into account that Poland does not intend to perform any government purchases of Kyoto flexible mechanisms, 50% of the effort undertaken is 17.05 million tonnes and constitutes the maximum absolute amount for use by operators per year permitted for Poland. The relative maximum figure for use by operators is obtained by dividing the absolute amount by the estimated total quantity of allowances, which gives about 8.2%²². However, the Commission recognises the general importance of promoting the international carbon market so that every Member State should be entitled to allow its operators at least a certain positive limit in order to facilitate their involvement in international transactions. Therefore, the Commission considers that, irrespective of the effort undertaken and the volume of government purchases, every Member State may allow its operators to use CERs and ERUs up to a maximum relative threshold of 10%. Consequently, the maximum amount of CERs and ERUs of 25%, as indicated in the 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 Poland's supplementarity obligations under the Kyoto Protocol and decisions adopted pursuant to the UNFCCC or the Kyoto Protocol, to the extent that it exceeds 10%.
- (28) Therefore the Commission concludes that the national allocation plan contravenes criteria 1, 2, 3, 5, 6 and 12 of Annex III to Directive 2003/87/EC and must therefore be rejected.

²¹ 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; Progress Report COM(2006)658 final of 27 October 2006 with 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 Poland 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 534.7 million tonnes (=2673.4963/5). Base year emissions are 568.8 million tonnes, 2004 emissions are 388.5 million tonnes and 2010 projected emissions with existing policies and measures are 438.4 million tonnes according to the figures underlying Commission Decision 2006/944/EC of 14 December 2006, which have been up-dated with respect to those contained in 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 former emissions figure being the highest of these three alternatives, the relevant effort with respect to the Kyoto commitment is 34.1 million tonnes. Dividing this effort by two gives 17.05 million tonnes, representing the maximum absolute amount, up to which Poland's operators may use CERs and ERUs, since no government purchases are envisaged.

²² 17.05/208.377577

- (29) In order to bring the national allocation plan in conformity with the criteria listed in Annex III to Directive 2003/87/EC, Poland should notify to the Commission a new national allocation plan without undue delay.
- (30) Pursuant to Article 9(3), second sentence, of Directive 2003/87/EC, the Member State shall only take a decision under Article 11(2) of Directive 2003/87/EC if the new national allocation plan is accepted by the Commission.

HAS ADOPTED THIS DECISION:

Article 1

The Commission rejects the national allocation plan of Poland for the first five-year period mentioned in Article 11(2) of Directive 2003/87/EC.

Article 2

This Decision is addressed to the Republic of Poland.

Done at Brussels, 11 December 2009

For the Commission