

**DIRECTIVE 2009/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**of 23 April 2009**

**amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 175(1) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee <sup>(1)</sup>,

Having regard to the opinion of the Committee of the Regions <sup>(2)</sup>,

Acting in accordance with the procedure laid down in Article 251 of the Treaty <sup>(3)</sup>,

Whereas:

- (1) Directive 2003/87/EC of the European Parliament and of the Council <sup>(4)</sup> establishes a scheme for greenhouse gas emission allowance trading within the Community (Community scheme) in order to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner.
- (2) The ultimate objective of the United Nations Framework Convention on Climate Change (UNFCCC), which was approved on behalf of the European Community by Council Decision 94/69/EC <sup>(5)</sup>, is to stabilise greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. In order to meet that objective, the overall global annual mean surface temperature increase should not exceed 2 °C above pre-industrial levels. The latest Intergovernmental Panel on Climate Change (IPCC) Assessment Report shows that in order to reach that objective, global emissions of greenhouse gases must peak by 2020. This implies the increasing of efforts by the Community, the quick involvement of developed countries and encouraging the participation of developing countries in the emission reduction process.
- (3) The European Council of March 2007 made a firm commitment to reduce the overall greenhouse gas emissions of the Community by at least 20 % below 1990 levels by 2020, and by 30 % provided that other developed

countries commit themselves to comparable emission reductions and economically more advanced developing countries contribute adequately according to their responsibilities and respective capabilities. By 2050, global greenhouse gas emissions should be reduced by at least 50 % below their 1990 levels. All sectors of the economy should contribute to achieving these emission reductions, including international maritime shipping and aviation. Aviation is contributing to these reductions through its inclusion in the Community scheme. In the event that no international agreement which includes international maritime emissions in its reduction targets through the International Maritime Organisation has been approved by the Member States or no such agreement through the UNFCCC has been approved by the Community by 31 December 2011, the Commission should make a proposal to include international maritime emissions according to harmonised modalities in the Community reduction commitment, with the aim of the proposed act entering into force by 2013. Such a proposal should minimise any negative impact on the Community's competitiveness while taking into account the potential environmental benefits.

- (4) In its resolution of 31 January 2008 on the outcome of the Bali Conference on Climate Change (COP 13 and COP/MOP 3) <sup>(6)</sup>, the European Parliament recalled its position that industrialised countries should commit to reducing their greenhouse gas emissions by at least 30 % by 2020 and by 60 to 80 % by 2050, compared to 1990 levels. Given that it anticipates a positive outcome to the COP 15 negotiations that will be held in Copenhagen in 2009, the European Union should begin to prepare tougher emission reduction targets for 2020 and beyond, and should seek to ensure that, after 2013, the Community scheme allows, if necessary, for more stringent emission caps, as part of the Union's contribution to a future international agreement on climate change (hereinafter referred to as the international agreement on climate change).
- (5) In order to contribute to achieving those long-term objectives, it is appropriate to set out a predictable path according to which the emissions of installations covered by the Community scheme should be reduced. To achieve cost-effectively the commitment of the Community to at least a 20 % reduction in greenhouse gas emissions below 1990 levels, emission allowances allocated in respect of those installations should be 21 % below their 2005 emission levels by 2020.

<sup>(1)</sup> OJ C 27, 3.2.2009, p. 66.

<sup>(2)</sup> OJ C 325, 19.12.2008, p. 19.

<sup>(3)</sup> Opinion of the European Parliament of 17 December 2008 (not yet published in the Official Journal) and Council Decision of 6 April 2009.

<sup>(4)</sup> OJ L 275, 25.10.2003, p. 32.

<sup>(5)</sup> OJ L 33, 7.2.1994, p. 11.

<sup>(6)</sup> OJ C 68 E, 21.3.2009, p. 13.

- (6) In order to enhance the certainty and predictability of the Community scheme, provisions should be specified to increase the level of contribution of the Community scheme to achieving an overall reduction of more than 20 %, in particular in view of the European Council's objective of a 30 % reduction by 2020 which is considered scientifically necessary to avoid dangerous climate change.
- (7) Once the Community and third countries conclude an international agreement on climate change in accordance with which appropriate global action will be taken beyond 2012, considerable support should be given to credit emission reductions made in those countries. In advance of such an agreement, greater certainty should none the less be provided regarding the continued use of credits from outside the Community.
- (8) While experience gathered during the first trading period shows the potential of the Community scheme and the finalisation of national allocation plans for the second trading period will deliver significant emission reductions by 2012, a review undertaken in 2007 has confirmed that a more harmonised emission trading system is imperative in order to better exploit the benefits of emission trading, to avoid distortions in the internal market and to facilitate the linking of emissions trading systems. Furthermore, more predictability should be ensured and the scope of the system should be extended by including new sectors and gases with a view to both reinforcing a carbon price signal necessary to trigger the necessary investments and by offering new abatement opportunities, which will lead to lower overall abatement costs and the increased efficiency of the system.
- (9) The definition of greenhouse gases should be aligned with the definition contained in the UNFCCC, and greater clarity should be given on the setting and updating of global warming potentials for individual greenhouse gases.
- (10) The Community scheme should be extended to other installations the emissions of which are capable of being monitored, reported and verified with the same level of accuracy as that which applies under the monitoring, reporting and verification requirements currently applicable.
- (11) Where equivalent measures to reduce greenhouse gas emissions, in particular taxation, are in place for small installations the emissions of which do not exceed a threshold of 25 000 tonnes of CO<sub>2</sub> equivalent per year, there should be a procedure enabling Member States to exclude such small installations from the emissions trading system for as long as those measures are applied. Hospitals may also be excluded if they undertake equivalent measures. This threshold offers the maximum gain, in relative terms, of reduction of administrative costs for each tonne of CO<sub>2</sub> equivalent excluded from the system, for reasons of administrative simplicity. As a consequence of the move from five-year allocation periods, and in order to increase certainty and predictability, provisions should be laid down regarding the frequency of revision of greenhouse gas emission permits. It is for Member States to propose measures applying to small installations which will achieve a contribution to emission reductions equivalent to those achieved by the Community scheme. Such measures could include taxation, agreements with industry and regulation. Taking into account the need to reduce unnecessary administrative burdens for smaller emitters, Member States may set up simplified procedures and measures to comply with this Directive.
- (12) Information on the application of this Directive should be easily accessible, in particular for small and medium-sized enterprises (SMEs).
- (13) The Community-wide quantity of allowances should decrease in a linear manner calculated from the mid-point of the period from 2008 to 2012, ensuring that the emissions trading system delivers gradual and predictable reductions of emissions over time. The annual decrease of allowances should be equal to 1,74 % of the allowances issued by Member States pursuant to Commission Decisions on Member States' national allocation plans for the period from 2008 to 2012, so that the Community scheme contributes cost-effectively to achieving the commitment of the Community to an overall reduction in emissions of at least 20 % by 2020.
- (14) This contribution is equivalent to a reduction of emissions in 2020 in the Community scheme of 21 % below reported 2005 levels, including the effect of the increased scope from the period from 2005 to 2007 to the period from 2008 to 2012 and the 2005 emission figures for the trading sector used for the assessment of the Bulgarian and Romanian national allocation plans for the period from 2008 to 2012, leading to an issue of a maximum of 1 720 million allowances in 2020. Exact quantities of emissions will be calculated once Member States have issued allowances pursuant to Commission decisions on their national allocation plans for the period from 2008 to 2012, as the approval of allocations to some installations was contingent upon their emissions having been substantiated and verified. Once the issue of allowances for the period from 2008 to 2012 has taken place, the Commission will publish the Community-wide quantity of allowances. Adjustments should be made to the Community-wide quantity in relation to installations which are included in, or excluded from, the Community scheme during the period from 2008 to 2012 or from 2013 onwards.
- (15) The additional effort to be made by the Community economy requires, inter alia, that the revised Community scheme operate with the highest possible degree of economic efficiency and on the basis of fully harmonised conditions of allocation within the Community. Auctioning should therefore be the basic principle for allocation, as it is the simplest, and generally considered to be the most

economically efficient, system. This should also eliminate windfall profits and put new entrants and economies growing faster than average on the same competitive footing as existing installations.

(16) In order to maintain the environmental and administrative efficiency of the Community scheme, avoid distortions of competition and the early depletion of the new entrants reserve, the rules on new entrants should be harmonised so as to ensure that all Member States adopt the same approach, in particular in relation to the meaning of 'significant extensions' of installations. Provisions for the adoption of harmonised rules for the implementation of this Directive should therefore be included. In these rules, 'significant extension' should, wherever appropriate, be defined as an extension by at least 10 % of the installation's existing installed capacity or a substantial increase in the emissions of the installation linked to the increase in the installed capacity. Allocation from the new entrants reserve should only take place in respect of the significant extension of the installation.

(17) All Member States will need to make substantial investments to reduce the carbon intensity of their economies by 2020 and those Member States where income per capita is still significantly below the Community average and the economies of which are in the process of catching up with the richer Member States will need to make a significant effort to improve energy efficiency. The objectives of eliminating distortions to intra-Community competition and of ensuring the highest degree of economic efficiency in the transformation of the Community economy towards a safe and sustainable low-carbon economy make it inappropriate to treat economic sectors differently under the Community scheme in individual Member States. It is therefore necessary to develop other mechanisms to support the efforts of those Member States with relatively lower income per capita and higher growth prospects. 88 % of the total quantity of allowances to be auctioned should be distributed amongst Member States according to their relative share of emissions in the Community scheme for 2005 or the average of the period from 2005 to 2007, whichever one is the highest. 10 % of the total quantity should be distributed to the benefit of certain Member States for the purpose of solidarity and growth in the Community, to be used to reduce emissions and adapt to the effects of climate change. The distribution of this 10 % should take into account levels of income per capita in 2005 and the growth prospects of Member States, and be higher for Member States with low income levels per head and high growth prospects. Member States with an average level of income per capita that is more than 20 % higher than the average in the Community should contribute to this distribution, except where the direct costs of the overall package estimated in the Commission's impact assessment accompanying the package of implementation measures for the EU's objectives on climate change and renewable

energy for 2020 exceed 0,7 % of GDP. A further 2 % of the total quantity of allowances to be auctioned should be distributed amongst Member States, the greenhouse gas emissions of which were, in 2005, at least 20 % below their emissions in the base year applicable to them under the Kyoto Protocol.

(18) Given the considerable efforts necessary to combat climate change and to adapt to its inevitable effects, it is appropriate that at least 50 % of the proceeds from the auctioning of allowances should be used to reduce greenhouse gas emissions, to adapt to the impacts of climate change, to fund research and development for reducing emissions and adaptation, to develop renewable energies to meet the Union's commitment to using 20 % renewable energies by 2020, to meet the commitment of the Community to increase energy efficiency by 20 % by 2020, to provide for the environmentally safe capture and geological storage of greenhouse gases, to contribute to the Global Energy Efficiency and Renewable Energy Fund and to the Adaptation Fund as made operational by the Poznan Conference on Climate Change (COP 14 and COP/MOP 4), to provide for measures to avoid deforestation and facilitate adaptation in developing countries, and to address social aspects such as possible increases in electricity prices in lower and middle income households. This proportion is significantly below the expected net revenues for public authorities from auctioning, taking into account potentially reduced income from corporate taxes. In addition, proceeds from the auctioning of allowances should be used to cover administrative expenses of the management of the Community scheme. This Directive should also include provisions on monitoring the use of funds from auctioning for these purposes. Providing information on the use of funds does not release Member States from the obligation laid down in Article 88(3) of the Treaty to notify certain national measures. This Directive does not prejudice the outcome of any future State aid procedures that may be undertaken in accordance with Articles 87 and 88 of the Treaty.

(19) Consequently, full auctioning should be the rule from 2013 onwards for the power sector, taking into account its ability to pass on the increased cost of CO<sub>2</sub>, and no free allocation should be given for the capture and storage of CO<sub>2</sub> as the incentive for this arises from allowances not being required to be surrendered in respect of emissions which are stored. In order to avoid distortions of competition, electricity generators may receive free allowances for district heating and cooling and for heating and cooling produced through high-efficiency cogeneration as defined by Directive 2004/8/EC of the European Parliament and of the Council of 11 February 2004 on the promotion of cogeneration based on a useful heat demand in the internal energy market <sup>(1)</sup> where such heat produced by installations in other sectors would be given free allocations.

<sup>(1)</sup> OJ L 52, 21.2.2004, p. 50.

- (20) The main long-term incentive for the capture and storage of CO<sub>2</sub> and new renewable energy technologies is that allowances will not need to be surrendered for CO<sub>2</sub> emissions which are permanently stored or avoided. In addition, to accelerate the demonstration of the first commercial facilities and of innovative renewable energy technologies, allowances should be set aside from the new entrants reserve to provide a guaranteed reward for the first such facilities in the Union for tonnes of CO<sub>2</sub> stored or avoided on a sufficient scale, provided an agreement on knowledge-sharing is in place. The additional financing should apply to projects of sufficient scale, which are innovative in nature and which are significantly co-financed by the operator covering, in principle, more than half of the relevant investment cost, and taking into account the viability of the project.
- (21) For other sectors covered by the Community scheme, a transitional system should be put in place for which free allocation in 2013 would be 80 % of the amount that corresponded to the percentage of the overall Community-wide emissions throughout the period from 2005 to 2007 that those installations emitted as a proportion of the annual Community-wide total quantity of allowances. Thereafter, the free allocation should decrease each year by equal amounts resulting in 30 % free allocation in 2020, with a view to reaching no free allocation in 2027.
- (22) In order to ensure an orderly functioning of the carbon and electricity markets, the auctioning of allowances for the period from 2013 onwards should start by 2011 and be based on clear and objective principles defined well in advance.
- (23) Transitional free allocation to installations should be provided for through harmonised Community-wide rules (ex-ante benchmarks) in order to minimise distortions of competition with the Community. Those rules should take account of the most greenhouse gas and energy-efficient techniques, substitutes, alternative production processes, use of biomass, renewables and CO<sub>2</sub> capture and storage. Any such rules should not give incentives to increase emissions and should ensure that an increasing proportion of these allowances is auctioned. Allocations must be fixed prior to the trading period so as to enable the market to function properly. Those harmonised rules may also take into account emissions related to the use of combustible waste gases when the production of these waste gases cannot be avoided in the industrial process. In this respect, the rules may provide for allowances to be allocated for free to operators of installations combusting the waste gases concerned or to operators of the installations where these gases originate. They should also avoid undue distortions of competition on the markets for electricity and heating and cooling supplied to industrial installations. Furthermore, they should avoid undue distortions of competition between industrial activities carried out in installations operated by a single operator and production in outsourced installations. Those rules should apply to new entrants carrying out the same activities as existing installations receiving transitional free allocations. To avoid any distortion of competition within the internal market, no free allocation should be made in respect of the production of electricity by new entrants. Allowances which remain in the new entrants' reserve in 2020 should be auctioned.
- (24) The Community will continue to take the lead in the negotiation of an ambitious international agreement on climate change that will achieve the objective of limiting global temperature increase to 2 °C and is encouraged by the progress made at the 13th Conference of the Parties to the UNFCCC, and 3rd Meeting of the Parties to the Kyoto Protocol, held in Bali, Indonesia from 3-14 December 2007 towards this objective. In the event that other developed countries and other major emitters of greenhouse gases do not participate in this international agreement, this could lead to an increase in greenhouse gas emissions in third countries where industry would not be subject to comparable carbon constraints (carbon leakage), and at the same time could put certain energy-intensive sectors and subsectors in the Community which are subject to international competition at an economic disadvantage. This could undermine the environmental integrity and benefit of actions by the Community. To address the risk of carbon leakage, the Community should allocate 100 % of allowances free of charge to sectors or subsectors meeting the relevant criteria. The definition of these sectors and subsectors and the measures required should be subject to reassessment to ensure that action is taken where necessary and to avoid overcompensation. For those specific sectors or subsectors where it can be duly substantiated that the risk of carbon leakage cannot be prevented otherwise, where electricity constitutes a high proportion of production costs and is produced efficiently, the action taken may take into account the electricity consumption in the production process, without changing the total quantity of allowances. The carbon leakage risk in these sectors or subsectors should be assessed, as a starting point, at a 3-digit level (NACE-3 code) or, where appropriate and where the relevant data are available, at a 4-digit level (NACE-4 code).
- (25) The Commission should therefore review the situation by 30 June 2010, consult with all relevant social partners, and, in the light of the outcome of the international negotiations, submit a report accompanied by any appropriate proposals. In this context, the Commission should identify which energy-intensive industry sectors or subsectors are likely to be subject to carbon leakage by 31 December 2009. It should base its analysis on the assessment of the inability of industries to pass on the cost of required allowances in product prices without significant loss of market share to installations outside the Community which do not take comparable action to reduce their emissions. Energy-intensive industries which are determined to be exposed to

a significant risk of carbon leakage could receive a higher amount of free allocation or an effective carbon equalisation system could be introduced with a view to putting installations from the Community which are at significant risk of carbon leakage and those from third countries on a comparable footing. Such a system could apply requirements to importers that would be no less favourable than those applicable to installations within the Community, for example by requiring the surrender of allowances. Any action taken would need to be in conformity with the principles of the UNFCCC, in particular the principle of common but differentiated responsibilities and respective capabilities, taking into account the particular situation of least developed countries (LDCs). It would also need to be in conformity with the international obligations of the Community, including the obligations under the WTO agreement.

- (26) Discussions in the European Council concerning the determination of the sectors or subsectors exposed to a significant risk of carbon leakage are of an exceptional character and in no way affect the procedures for the exercise of the implementing powers conferred on the Commission under Article 202 of the Treaty.
- (27) Member States may deem it necessary to temporarily compensate certain installations which have been determined to be exposed to a significant risk of carbon leakage for costs related to greenhouse gas emissions passed on in electricity prices. Such support should only be granted where it is necessary and proportionate and should ensure that the Community scheme incentives to save energy and to stimulate a shift in demand from 'grey' to 'green' electricity are maintained.
- (28) In order to ensure equal conditions of competition within the Community, the use of credits for emission reductions outside the Community to be used by operators within the Community scheme should be harmonised. The Kyoto Protocol sets out quantified emission targets for developed countries for the period from 2008 to 2012, and provides for the creation of certified emission reductions (CERs) from clean development mechanism (CDM) projects and emission reduction units (ERUs) from joint implementation (JI) projects and their use by developed countries to meet part of these targets. While the Kyoto framework does not enable ERUs to be created from 2013 onwards without new quantified emission targets being in place for host countries, CDM credits can potentially continue to be generated. Once there is an international agreement on climate change, additional use of CERs and ERUs should be provided for, from countries which have ratified that agreement. In the absence of such an agreement, providing for further use of CERs and ERUs would undermine this incentive and make it more difficult to achieve the objectives of

the Community regarding the increase of renewable energy use. The use of CERs and ERUs should be consistent with the goal set by the Community of generating 20 % of energy from renewable sources by 2020, and promoting energy efficiency, innovation and technological development. Where it is consistent with achieving these goals, the possibility should be foreseen to conclude agreements with third countries to provide incentives for reductions in emissions in these countries which bring about real, additional reductions in greenhouse gas emissions while stimulating innovation by companies established within the Community and technological development in third countries. Such agreements may be ratified by more than one country. Upon the approval by the Community of a satisfactory international agreement on climate change, access to credits from projects in third countries should be increased simultaneously with the increase in the level of emission reductions to be achieved through the Community scheme.

- (29) In order to provide predictability, operators should be provided with certainty about the possibility to use after 2012 CERs and ERUs up to the remainder of the level which they were allowed to use in the period from 2008 to 2012, from project types which were eligible for use in the Community scheme during the period from 2008 to 2012. As Member States cannot carry over CERs and ERUs held by operators between commitment periods under international agreements ('banking' of CERs and ERUs) before 2015, and only if Member States choose to allow the banking of those CERs and ERUs within the context of limited rights to bank such credits, this certainty should be provided by requiring Member States to allow operators to exchange such CERs and ERUs issued in respect of emission reductions before 2012 for allowances valid from 2013 onwards. However, as Member States should not be obliged to accept CERs and ERUs which it is not certain they will be able to use towards their existing international commitments, this requirement should not extend beyond 31 March 2015. Operators should be provided with the same certainty concerning such CERs issued from projects that have been established before 2013 in respect of emission reductions from 2013 onwards. It is important that credits from projects used by operators represent real, verifiable, additional and permanent emission reductions and have clear sustainable development benefits and no significant negative environmental or social impacts. A procedure should be established which allows for the exclusion of certain project types.
- (30) In the event of the conclusion of an international agreement on climate change being delayed, the possibility should be provided for to use credits from high-quality projects in the Community scheme through agreements with third countries. Such agreements, which may be bilateral or multilateral, could enable projects that generated ERUs until 2012 but are no longer able to do so under the Kyoto framework to continue to be recognised in the Community scheme.

- (31) LDCs are especially vulnerable to the effects of climate change, and are responsible only for a very low level of greenhouse gas emissions. Therefore, particular priority should be given to addressing the needs of LDCs when revenues generated from auctioning are used to facilitate developing countries' adaptation to the impacts of climate change. Given that very few CDM projects have been established in those countries, it is appropriate to provide certainty on the acceptance of credits from projects started in LDCs after 2012, even in the absence of an international agreement on climate change, when these projects are clearly additional and contribute to sustainable development. This entitlement should apply to LDCs until 2020 provided that they have by then either ratified an international agreement on climate change or a bilateral or multilateral agreement with the Community.
- (32) Once an international agreement on climate change has been reached, additional credits of up to half of the additional reduction taking place in the Community scheme may be used, and high quality CDM credits from third countries should only be accepted in the Community scheme from 2013, once those countries have ratified the international agreement.
- (33) The Community and its Member States should only authorise project activities where all project participants have headquarters either in a country that has concluded the international agreement relating to such projects, so as to discourage 'free-riding' by companies in States which have not concluded an international agreement, except where those companies are based in third countries, or in sub-federal or regional entities which are linked to the Community scheme.
- (34) The fact that certain provisions of this Directive refer to the approval of an international agreement on climate change by the Community is without prejudice to the conclusion of that agreement also by the Member States.
- (35) In the light of experience, the provisions of the Community scheme relating to monitoring, reporting and verifying emissions should be improved.
- (36) The Union should work to establish an internationally recognised system for reducing deforestation and increasing afforestation and reforestation, supporting the objective, within the UNFCCC, of developing financing mechanisms, taking into account existing arrangements, as part of an effective, efficient, equitable and coherent financial architecture within the international agreement on climate change to be reached in the Copenhagen Conference on Climate Change (COP 15 and COP/MOP 5).
- (37) In order to clarify the coverage of all kinds of boilers, burners, turbines, heaters, furnaces, incinerators, calciners, kilns, ovens, dryers, engines, fuel cells, chemical looping combustion units, flares, and thermal or catalytic post-combustion units by Directive 2003/87/EC, a definition of 'combustion' should be added.
- (38) In order to ensure that allowances can be transferred between persons within the Community without any restriction, and to ensure that the Community scheme can be linked to emissions trading systems in third countries and sub-federal and regional entities, from January 2012 onwards, all allowances should be held in the Community registry established under 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 Protocol <sup>(1)</sup>. This should be without prejudice to the maintenance of national registries for emissions not covered by the Community scheme. The Community registry should provide the same quality of services as national registries.
- (39) From 2013 onwards, the environmentally safe capture, transport and geological storage of CO<sub>2</sub> should be covered by the Community scheme in a harmonised manner.
- (40) Arrangements should be provided to enable the mutual recognition of allowances between the Community scheme and other mandatory greenhouse gas emissions trading systems capping absolute emissions established in any third country or sub-federal or regional entity.
- (41) Third countries neighbouring the Union should be encouraged to join the Community scheme if they comply with this Directive. The Commission should make every effort in negotiations with, and in the provision of financial and technical assistance to, candidate countries, potential candidate countries and countries covered by the European neighbourhood policy to promote this aim. This would facilitate technology and knowledge transfer to these countries, which is an important means of providing economic, environmental and social benefits to all.
- (42) This Directive should provide for agreements to be made for the recognition of allowances between the Community scheme and other mandatory greenhouse gas emissions trading systems with absolute emissions caps, which are compatible with the Community scheme taking into account the level of environmental ambition and the presence of a robust and comparable emissions monitoring, reporting and verification mechanism and compliance system.

<sup>(1)</sup> OJ L 49, 19.2.2004, p. 1.

- (43) Taking into account experience under the Community scheme, it should be possible to issue allowances in respect of projects that reduce greenhouse gas emissions, provided that these projects take place in accordance with harmonised rules adopted at Community level and these projects would not result in the double-counting of emission reductions or impede the extension of the scope of the Community scheme or the undertaking of other policy measures to reduce emissions not covered by the Community scheme.
- (44) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission <sup>(1)</sup>.
- (45) In particular, the Commission should be empowered to adopt measures for the harmonisation of rules on the definition of 'new entrant', the auctioning of allowances, the transitional Community-wide allocation of allowances, the establishment of the criteria and modalities applicable to the selection of certain demonstration projects, the establishment of a list of sectors or subsectors which are exposed to a significant risk of carbon leakage, the use of credits, the monitoring, reporting and verification of emissions, the accreditation of verifiers, the implementation of harmonised rules for projects as well as the amendment of certain annexes. Since those measures are of general scope and are designed to amend non-essential elements of Directive 2003/87/EC, inter alia, by supplementing it with new non-essential elements, they must be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC.
- (46) Directive 2003/87/EC should therefore be amended accordingly.
- (47) It is appropriate to provide for an early transposition of those provisions which prepare for the revised operation of the Community scheme from 2013 onwards.
- (48) In order to correctly complete the trading-period from 2008 to 2012, the provisions of Directive 2003/87/EC, as amended by Directive 2004/101/EC <sup>(2)</sup>, Directive 2008/101/EC <sup>(3)</sup> and Regulation (EC) No 219/2009 <sup>(4)</sup>,

<sup>(1)</sup> OJ L 184, 17.7.1999, p. 23.

<sup>(2)</sup> 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>(3)</sup> Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community (OJ L 8, 13.1.2009, p. 3).

<sup>(4)</sup> Regulation (EC) No 219/2009 of the European Parliament and of the Council of 11 March 2009 adapting a number of instruments subject to the procedure referred to in Article 251 of the Treaty to Council Decision 1999/468/EC with regard to the regulatory procedure with scrutiny Adaptation to the regulatory procedure with scrutiny — Part Two (OJ L 87, 31.3.2009, p. 109).

should continue to apply without affecting the possibility for the Commission to adopt the measures necessary for the revised operation of the Community scheme from 2013 onwards.

- (49) The application of this Directive is without prejudice to Articles 87 and 88 of the Treaty.
- (50) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.
- (51) Since the objectives of this Directive cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Directive be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.
- (52) In accordance with point 34 of the Interinstitutional Agreement on better lawmaking <sup>(5)</sup>, Member States are encouraged to draw up, for themselves and in the interests of the Community, their own tables illustrating, as far as possible, the correlation between this Directive and the transposition measures, and to make them public,

HAVE ADOPTED THIS DIRECTIVE:

#### Article 1

#### Amendments to Directive 2003/87/EC

Directive 2003/87/EC is hereby amended as follows:

1. The following paragraphs shall be added to Article 1:

'This Directive also provides for the reductions of greenhouse gas emissions to be increased so as to contribute to the levels of reductions that are considered scientifically necessary to avoid dangerous climate change.

This Directive also lays down provisions for assessing and implementing a stricter Community reduction commitment exceeding 20 %, to be applied upon the approval by the Community of an international agreement on climate change leading to greenhouse gas emission reductions exceeding those required in Article 9, as reflected in the 30 % commitment endorsed by the European Council of March 2007.;

<sup>(5)</sup> OJ C 321, 31.12.2003, p. 1.

2. Article 3 shall be amended as follows:

(a) point (c) shall be replaced by the following:

‘(c) “greenhouse gases” means the gases listed in Annex II and other gaseous constituents of the atmosphere, both natural and anthropogenic, that absorb and re-emit infrared radiation;’

(b) point (h) shall be replaced by the following:

‘(h) “new entrant” means:

- any installation carrying out one or more of the activities indicated in Annex I, which has obtained a greenhouse gas emissions permit for the first time after 30 June 2011,
- any installation carrying out an activity which is included in the Community scheme pursuant to Article 24(1) or (2) for the first time, or
- any installation carrying out one or more of the activities indicated in Annex I or an activity which is included in the Community scheme pursuant to Article 24(1) or (2), which has had a significant extension after 30 June 2011, only in so far as this extension is concerned.’

(c) The following points shall be added:

‘(t) “combustion” means any oxidation of fuels, regardless of the way in which the heat, electrical or mechanical energy produced by this process is used, and any other directly associated activities, including waste gas scrubbing;

(u) “electricity generator” means an installation that, on or after 1 January 2005, has produced electricity for sale to third parties, and in which no activity listed in Annex I is carried out other than the “combustion of fuels”.’

3. In Article 3c(2), the word ‘Article 11(2)’ shall be replaced by ‘Article 13(1)’;

4. In Article 3g, the words ‘the guidelines adopted pursuant to Article 14’ shall be replaced by ‘the regulation referred to in Article 14’;

5. Article 4 shall be replaced by the following:

‘Article 4

#### **Greenhouse gas emissions permits**

Member States shall ensure that, from 1 January 2005, no installation carries out any activity listed in Annex I resulting in emissions specified in relation to that activity unless its

operator holds a permit issued by a competent authority in accordance with Articles 5 and 6, or the installation is excluded from the Community scheme pursuant to Article 27. This shall also apply to installations opted in under Article 24.’;

6. Article 5(d) shall be replaced by the following:

‘(d) the measures planned to monitor and report emissions in accordance with the regulation referred to in Article 14.’;

7. Article 6 shall be amended as follows:

(a) In paragraph 1, the following subparagraph shall be added:

‘The competent authority shall, at least every five years, review the greenhouse gas emissions permit and make any amendments as are appropriate.’;

(b) In paragraph 2, point (c) shall be replaced by the following:

‘(c) a monitoring plan that fulfils the requirements under the regulation referred to in Article 14. Member States may allow operators to update monitoring plans without changing the permit. Operators shall submit any updated monitoring plans to the competent authority for approval.’;

8. Article 7 shall be replaced by the following:

‘Article 7

#### **Changes relating to installations**

The operator shall inform the competent authority of any planned changes to the nature or functioning of the installation, or any extension or significant reduction of its capacity, which may require updating the greenhouse gas emissions permit. Where appropriate, the competent authority shall update the permit. Where there is a change in the identity of the installation’s operator, the competent authority shall update the permit to include the name and address of the new operator.’;

9. Article 9 shall be replaced by the following:

‘Article 9

#### **Community-wide quantity of allowances**

The Community-wide quantity of allowances issued each year starting in 2013 shall decrease in a linear manner beginning from the mid-point of the period from 2008 to 2012. The quantity shall decrease by a linear factor of 1,74 % compared to the average annual total quantity of allowances issued by Member States in accordance with the Commission Decisions on their national allocation plans for the period from 2008 to 2012.



The Commission shall, by 30 June 2010, publish the absolute Community-wide quantity of allowances for 2013, based on the total quantities of allowances issued or to be issued by the Member States in accordance with the Commission Decisions on their national allocation plans for the period from 2008 to 2012.

The Commission shall review the linear factor and submit a proposal, where appropriate, to the European Parliament and to the Council as from 2020, with a view to the adoption of a decision by 2025.;

10. The following Article shall be inserted:

*'Article 9a*

**Adjustment of the Community-wide quantity of allowances**

1. In respect of installations that were included in the Community scheme during the period from 2008 to 2012 pursuant to Article 24(1), the quantity of allowances to be issued from 1 January 2013 shall be adjusted to reflect the average annual quantity of allowances issued in respect of those installations during the period of their inclusion, adjusted by the linear factor referred to in Article 9.

2. In respect of installations carrying out activities listed in Annex I, which are only included in the Community scheme from 2013 onwards, Member States shall ensure that the operators of such installations submit to the relevant competent authority duly substantiated and independently verified emissions data in order for them to be taken into account for the adjustment of the Community-wide quantity of allowances to be issued.

Any such data shall be submitted, by 30 April 2010, to the relevant competent authority in accordance with the provisions adopted pursuant to Article 14(1).

If the data submitted are duly substantiated, the competent authority shall notify the Commission thereof by 30 June 2010 and the quantity of allowances to be issued, adjusted by the linear factor referred to in Article 9, shall be adjusted accordingly. In the case of installations emitting greenhouse gases other than CO<sub>2</sub>, the competent authority may notify a lower amount of emissions according to the emission reduction potential of those installations.

3. The Commission shall publish the adjusted quantities referred to in paragraphs 1 and 2 by 30 September 2010.

4. In respect of installations which are excluded from the Community scheme in accordance with Article 27, the Community-wide quantity of allowances to be issued from 1 January 2013 shall be adjusted downwards to reflect the average annual verified emissions of those installations in the period from 2008 to 2010, adjusted by the linear factor referred to in Article 9.;

11. Article 10 shall be replaced by the following:

*'Article 10*

**Auctioning of allowances**

1. From 2013 onwards, Member States shall auction all allowances which are not allocated free of charge in accordance with Article 10a and 10c. By 31 December 2010, the Commission shall determine and publish the estimated amount of allowances to be auctioned.

2. The total quantity of allowances to be auctioned by each Member State shall be composed as follows:

- (a) 88 % of the total quantity of allowances to be auctioned being distributed amongst Member States in shares that are identical to the share of verified emissions under the Community scheme for 2005 or the average of the period from 2005 to 2007, whichever one is the highest, of the Member State concerned;
- (b) 10 % of the total quantity of allowances to be auctioned being distributed amongst certain Member States for the purpose of solidarity and growth within the Community, thereby increasing the amount of allowances that those Member States auction under point (a) by the percentages specified in Annex IIa; and
- (c) 2 % of the total quantity of allowances to be auctioned being distributed amongst Member States the greenhouse gas emissions of which were, in 2005, at least 20 % below their emissions in the base year applicable to them under the Kyoto Protocol. The distribution of this percentage amongst the Member States concerned is set out in Annex IIb.

For the purposes of point (a), in respect of Member States which did not participate in the Community scheme in 2005, their share shall be calculated using their verified emissions under the Community scheme in 2007.

If necessary, the percentages referred to in points (b) and (c) shall be adapted in a proportional manner to ensure that the distribution is 10 % and 2 % respectively.

3. Member States shall determine the use of revenues generated from the auctioning of allowances. At least 50 % of the revenues generated from the auctioning of allowances referred to in paragraph 2, including all revenues from the auctioning referred to in paragraph 2, points (b) and (c), or the equivalent in financial value of these revenues, should be used for one or more of the following:

- (a) to reduce greenhouse gas emissions, including by contributing to the Global Energy Efficiency and Renewable Energy Fund and to the Adaptation Fund as made operational by the Poznan Conference on Climate Change (COP 14 and COP/MOP 4), to adapt to the impacts of climate change and to fund research and development as

well as demonstration projects for reducing emissions and for adaptation to climate change, including participation in initiatives within the framework of the European Strategic Energy Technology Plan and the European Technology Platforms;

- (b) to develop renewable energies to meet the commitment of the Community to using 20 % renewable energies by 2020, as well as to develop other technologies contributing to the transition to a safe and sustainable low-carbon economy and to help meet the commitment of the Community to increase energy efficiency by 20 % by 2020;
- (c) measures to avoid deforestation and increase afforestation and reforestation in developing countries that have ratified the international agreement on climate change, to transfer technologies and to facilitate adaptation to the adverse effects of climate change in these countries;
- (d) forestry sequestration in the Community;
- (e) the environmentally safe capture and geological storage of CO<sub>2</sub>, in particular from solid fossil fuel power stations and a range of industrial sectors and subsectors, including in third countries;
- (f) to encourage a shift to low-emission and public forms of transport;
- (g) to finance research and development in energy efficiency and clean technologies in the sectors covered by this Directive;
- (h) measures intended to increase energy efficiency and insulation or to provide financial support in order to address social aspects in lower and middle income households;
- (i) to cover administrative expenses of the management of the Community scheme.

Member States shall be deemed to have fulfilled the provisions of this paragraph if they have in place and implement fiscal or financial support policies, including in particular in developing countries, or domestic regulatory policies, which leverage financial support, established for the purposes set out in the first subparagraph and which have a value equivalent to at least 50 % of the revenues generated from the auctioning of allowances referred to in paragraph 2, including all revenues from the auctioning referred to in paragraph 2, points (b) and (c).

Member States shall inform the Commission as to the use of revenues and the actions taken pursuant to this paragraph in their reports submitted under Decision No 280/2004/EC.

4. By 30 June 2010, the Commission shall adopt a regulation on timing, administration and other aspects of auctioning to ensure that it is conducted in an open, transparent, harmonised and non-discriminatory manner. To this end, the process should be predictable, in particular as regards the timing and sequencing of auctions and the estimated volumes of allowances to be made available.

Auctions shall be designed to ensure that:

- (a) operators, and in particular any SMEs covered by the Community scheme, have full, fair and equitable access;
- (b) all participants have access to the same information at the same time and that participants do not undermine the operation of the auction;
- (c) the organisation and participation in auctions is cost-efficient and undue administrative costs are avoided; and
- (d) access to allowances is granted for small emitters.

That measure, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3).

Member States shall report on the proper implementation of the auctioning rules for each auction, in particular with respect to fair and open access, transparency, price formation and technical and operational aspects. These reports shall be submitted within one month of the auction concerned and shall be published on the Commission's website.

5. The Commission shall monitor the functioning of the European carbon market. Each year, it shall submit a report to the European Parliament and to the Council on the functioning of the carbon market including the implementation of the auctions, liquidity and the volumes traded. If necessary, Member States shall ensure that any relevant information is submitted to the Commission at least two months before the Commission adopts the report.;

12. The following Articles shall be inserted:

*'Article 10a*

**Transitional Community-wide rules for harmonised free allocation**

1. By 31 December 2010, the Commission shall adopt Community-wide and fully-harmonised implementing measures for the allocation of the allowances referred to in paragraphs 4, 5, 7 and 12, including any necessary provisions for a harmonised application of paragraph 19.

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3).

The measures referred to in the first subparagraph shall, to the extent feasible, determine Community-wide ex-ante benchmarks so as to ensure that allocation takes place in a manner that provides incentives for reductions in greenhouse gas emissions and energy efficient techniques, by taking account of the most efficient techniques, substitutes, alternative production processes, high efficiency cogeneration, efficient energy recovery of waste gases, use of biomass and capture and storage of CO<sub>2</sub>, where such facilities are available, and shall not provide incentives to increase emissions. No free allocation shall be made in respect of any electricity production, except for cases falling within Article 10c and electricity produced from waste gases.

For each sector and subsector, in principle, the benchmark shall be calculated for products rather than for inputs, in order to maximise greenhouse gas emissions reductions and energy efficiency savings throughout each production process of the sector or the subsector concerned.

In defining the principles for setting ex-ante benchmarks in individual sectors and subsectors, the Commission shall consult the relevant stakeholders, including the sectors and subsectors concerned.

The Commission shall, upon the approval by the Community of an international agreement on climate change leading to mandatory reductions of greenhouse gas emissions comparable to those of the Community, review those measures to provide that free allocation is only to take place where this is fully justified in the light of that agreement.

2. In defining the principles for setting ex-ante benchmarks in individual sectors or subsectors, the starting point shall be the average performance of the 10 % most efficient installations in a sector or subsector in the Community in the years 2007-2008. The Commission shall consult the relevant stakeholders, including the sectors and subsectors concerned.

The regulations pursuant to Articles 14 and 15 shall provide for harmonised rules on monitoring, reporting and verification of production-related greenhouse gas emissions with a view to determining the ex-ante benchmarks.

3. Subject to paragraphs 4 and 8, and notwithstanding Article 10c, no free allocation shall be given to electricity generators, to installations for the capture of CO<sub>2</sub>, to pipelines for transport of CO<sub>2</sub> or to CO<sub>2</sub> storage sites.

4. Free allocation shall be given to district heating as well as to high efficiency cogeneration, as defined by Directive 2004/8/EC, for economically justifiable demand, in respect of the production of heating or cooling. In each year subsequent to 2013, the total allocation to such installations in respect of the production of that heat shall be adjusted by the linear factor referred to in Article 9.

5. The maximum annual amount of allowances that is the basis for calculating allocations to installations which are not covered by paragraph 3 and are not new entrants shall not exceed the sum of:

- (a) the annual Community-wide total quantity, as determined pursuant to Article 9, multiplied by the share of emissions from installations not covered by paragraph 3 in the total average verified emissions, in the period from 2005 to 2007, from installations covered by the Community scheme in the period from 2008 to 2012; and
- (b) the total average annual verified emissions from installations in the period from 2005 to 2007 which are only included in the Community scheme from 2013 onwards and are not covered by paragraph 3, adjusted by the linear factor, as referred to in Article 9.

A uniform cross-sectoral correction factor shall be applied if necessary.

6. Member States may also adopt financial measures in favour of sectors or subsectors determined to be exposed to a significant risk of carbon leakage due to costs relating to greenhouse gas emissions passed on in electricity prices, in order to compensate for those costs and where such financial measures are in accordance with state aid rules applicable and to be adopted in this area.

Those measures shall be based on ex-ante benchmarks of the indirect emissions of CO<sub>2</sub> per unit of production. The ex-ante benchmarks shall be calculated for a given sector or subsector as the product of the electricity consumption per unit of production corresponding to the most efficient available technologies and of the CO<sub>2</sub> emissions of the relevant European electricity production mix.

7. Five percent of the Community-wide quantity of allowances determined in accordance with Articles 9 and 9a over the period from 2013 to 2020 shall be set aside for new entrants, as the maximum that may be allocated to new entrants in accordance with the rules adopted pursuant to paragraph 1 of this Article. Allowances in this Community-wide reserve that are neither allocated to new entrants nor used pursuant to paragraph 8, 9 or 10 of this Article over the period from 2013 to 2020 shall be auctioned by the Member States, taking into account the level to which installations in Member States have benefited from this reserve, in accordance with Article 10(2) and, for detailed arrangements and timing, Article 10(4), and the relevant implementing provisions.

Allocations shall be adjusted by the linear factor referred to in Article 9.

No free allocation shall be made in respect of any electricity production by new entrants.

By 31 December 2010, the Commission shall adopt harmonised rules for the application of the definition of "new entrant", in particular in relation to the definition of "significant extensions".

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3).

8. Up to 300 million allowances in the new entrants' reserve shall be available until 31 December 2015 to help stimulate the construction and operation of up to 12 commercial demonstration projects that aim at the environmentally safe capture and geological storage (CCS) of CO<sub>2</sub> as well as demonstration projects of innovative renewable energy technologies, in the territory of the Union.

The allowances shall be made available for support for demonstration projects that provide for the development, in geographically balanced locations, of a wide range of CCS and innovative renewable energy technologies that are not yet commercially viable. Their award shall be dependent upon the verified avoidance of CO<sub>2</sub> emissions.

Projects shall be selected on the basis of objective and transparent criteria that include requirements for knowledge-sharing. Those criteria and the measures shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3), and shall be made available to the public.

Allowances shall be set aside for the projects that meet the criteria referred to in the third subparagraph. Support for these projects shall be given via Member States and shall be complementary to substantial co-financing by the operator of the installation. They could also be co-financed by the Member State concerned, as well as by other instruments. No project shall receive support via the mechanism under this paragraph that exceeds 15 % of the total number of allowances available for this purpose. These allowances shall be taken into account under paragraph 7.

9. Lithuania, which, pursuant to Article 1 of Protocol No 4 on the Ignalina nuclear power plant in Lithuania, annexed to the 2003 Act of Accession, has committed to the closure of unit 2 of the Ignalina Nuclear Power Plant by 31 December 2009, may, if the total verified emissions of Lithuania in the period from 2013 to 2015 within the Community scheme exceed the sum of the free allowances issued to installations in Lithuania for electricity production emissions in that period and three-eighths of the allowances to be auctioned by Lithuania for the period from 2013 to 2020, claim allowances from the new entrants reserve for auctioning in accordance with the regulation referred to in Article 10(4). The maximum amount of such allowances shall be equivalent to the excess emissions in that period to the extent that this excess is due to increased emissions from electricity generation, minus any quantity by which allocations in that Member State in the period from 2008 to 2012 exceeded verified emissions within the Community scheme in Lithuania during that period. Any such allowances shall be taken into account under paragraph 7.

10. Any Member State with an electricity network which is interconnected with Lithuania and which, in 2007, imported more than 15 % of its domestic electricity consumption from Lithuania for its own consumption, and where emissions have increased due to investment in new electricity generation, may apply paragraph 9 *mutatis mutandis* under the conditions set out in that paragraph.

11. Subject to Article 10b, the amount of allowances allocated free of charge under paragraphs 4 to 7 of this Article in 2013 shall be 80 % of the quantity determined in accordance with the measures referred to in paragraph 1. Thereafter the free allocation shall decrease each year by equal amounts resulting in 30 % free allocation in 2020, with a view to reaching no free allocation in 2027.

12. Subject to Article 10b, in 2013 and in each subsequent year up to 2020, installations in sectors or subsectors which are exposed to a significant risk of carbon leakage shall be allocated, pursuant to paragraph 1, allowances free of charge at 100 % of the quantity determined in accordance with the measures referred to in paragraph 1.

13. By 31 December 2009 and every five years thereafter, after discussion in the European Council, the Commission shall determine a list of the sectors or subsectors referred to in paragraph 12 on the basis of the criteria referred to in paragraphs 14 to 17.

Every year the Commission may, at its own initiative or at the request of a Member State, add a sector or subsector to the list referred to in the first subparagraph if it can be demonstrated, in an analytical report, that this sector or subsector satisfies the criteria in paragraphs 14 to 17, following a change that has a substantial impact on the sector's or subsector's activities.

For the purpose of implementing this Article, the Commission shall consult the Member States, the sectors or subsectors concerned and other relevant stakeholders.

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3).

14. In order to determine the sectors or subsectors referred to in paragraph 12, the Commission shall assess, at Community level, the extent to which it is possible for the sector or subsector concerned, at the relevant level of disaggregation, to pass on the direct cost of the required allowances and the indirect costs from higher electricity prices resulting from the implementation of this Directive into product prices without significant loss of market share to less carbon efficient installations outside the Community. These assessments shall be based on an average carbon price according to the Commission's impact assessment accompanying the package of implementation measures for the EU's objectives on climate change and renewable energy for 2020 and, if available, trade, production and value added data from the three most recent years for each sector or subsector.

15. A sector or subsector shall be deemed to be exposed to a significant risk of carbon leakage if:

- (a) the sum of direct and indirect additional costs induced by the implementation of this Directive would lead to a substantial increase of production costs, calculated as a proportion of the gross value added, of at least 5 %; and
- (b) the intensity of trade with third countries, defined as the ratio between the total value of exports to third countries plus the value of imports from third countries and the total market size for the Community (annual turnover plus total imports from third countries), is above 10 %.

16. Notwithstanding paragraph 15, a sector or subsector is also deemed to be exposed to a significant risk of carbon leakage if:

- (a) the sum of direct and indirect additional costs induced by the implementation of this Directive would lead to a particularly high increase of production costs, calculated as a proportion of the gross value added, of at least 30 %; or
- (b) the intensity of trade with third countries, defined as the ratio between the total value of exports to third countries plus the value of imports from third countries and the total market size for the Community (annual turnover plus total imports from third countries), is above 30 %.

17. The list referred to in paragraph 13 may be supplemented after completion of a qualitative assessment, taking into account, where the relevant data are available, the following criteria:

- (a) the extent to which it is possible for individual installations in the sector or subsector concerned to reduce emission levels or electricity consumption, including, as appropriate, the increase in production costs that the related investment may entail, for instance on the basis of the most efficient techniques;
- (b) current and projected market characteristics, including when trade exposure or direct and indirect cost increase rates are close to one of the thresholds mentioned in paragraph 16;
- (c) profit margins as a potential indicator of long-run investment or relocation decisions.

18. The list referred to in paragraph 13 shall be determined after taking into account, where the relevant data are available, the following:

- (a) the extent to which third countries, representing a decisive share of global production of products in sectors or subsectors deemed to be at risk of carbon leakage, firmly commit to reducing greenhouse gas emissions in the relevant

sectors or subsectors to an extent comparable to that of the Community and within the same time-frame; and

- (b) the extent to which the carbon efficiency of installations located in these countries is comparable to that of the Community.

19. No free allocation shall be given to an installation that has ceased its operations, unless the operator demonstrates to the competent authority that this installation will resume production within a specified and reasonable time. Installations for which the greenhouse gas emissions permit has expired or has been withdrawn and installations for which the operation or resumption of operation is technically impossible shall be considered to have ceased operations.

20. The Commission shall, as part of the measures adopted under paragraph 1, include measures for defining installations that partially cease to operate or significantly reduce their capacity, and measures for adapting, as appropriate, the level of free allocations given to them accordingly.

#### Article 10b

#### **Measures to support certain energy-intensive industries in the event of carbon leakage**

1. By 30 June 2010, the Commission shall, in the light of the outcome of the international negotiations and the extent to which these lead to global greenhouse gas emission reductions, and after consulting with all relevant social partners, submit to the European Parliament and to the Council an analytical report assessing the situation with regard to energy-intensive sectors or subsectors that have been determined to be exposed to significant risks of carbon leakage. This shall be accompanied by any appropriate proposals, which may include:

- (a) adjustment of the proportion of allowances received free of charge by those sectors or subsectors under Article 10a;
- (b) inclusion in the Community scheme of importers of products which are produced by the sectors or subsectors determined in accordance with Article 10a;
- (c) assessment of the impact of carbon leakage on Member States' energy security, in particular where the electricity connections with the rest of the Union are insufficient and where there are electricity connections with third countries, and appropriate measures in this regard.

Any binding sectoral agreements which lead to global greenhouse gas emissions reductions of the magnitude required to effectively address climate change, and which are monitorable, verifiable and subject to mandatory enforcement arrangements shall also be taken into account when considering what measures are appropriate.

2. The Commission shall assess, by 31 March 2011, whether the decisions made regarding the proportion of allowances received free of charge by sectors or subsectors in accordance with paragraph 1, including the effect of setting ex-ante benchmarks in accordance with Article 10a(2), are likely to significantly affect the quantity of allowances to be auctioned by Member States in accordance with Article 10(2)(b), compared to a scenario with full auctioning for all sectors in 2020. It shall, if appropriate, submit adequate proposals to the European Parliament and to the Council, taking into account the possible distributional effects of such proposals.

#### Article 10c

#### Option for transitional free allocation for the modernisation of electricity generation

1. By derogation from Article 10a(1) to (5), Member States may give a transitional free allocation to installations for electricity production in operation by 31 December 2008 or to installations for electricity production for which the investment process was physically initiated by the same date, provided that one of the following conditions is met:

- (a) in 2007, the national electricity network was not directly or indirectly connected to the network interconnected system operated by the Union for the Coordination of Transmission of Electricity (UCTE);
- (b) in 2007, the national electricity network was only directly or indirectly connected to the network operated by UCTE through a single line with a capacity of less than 400 MW; or
- (c) in 2006, more than 30 % of electricity was produced from a single fossil fuel, and the GDP per capita at market price did not exceed 50 % of the average GDP per capita at market price of the Community.

The Member State concerned shall submit to the Commission a national plan that provides for investments in retrofitting and upgrading of the infrastructure and clean technologies. The national plan shall also provide for the diversification of their energy mix and sources of supply for an amount equivalent, to the extent possible, to the market value of the free allocation with respect to the intended investments, while taking into account the need to limit as far as possible directly linked price increases. The Member State concerned shall submit to the Commission, every year, a report on investments made in upgrading infrastructure and clean technologies. Investment undertaken from 25 June 2009 may be counted for this purpose.

2. Transitional free allocations shall be deducted from the quantity of allowances that the respective Member State would otherwise auction pursuant to Article 10(2). In 2013, the total transitional free allocation shall not exceed 70 % of the annual average verified emissions in 2005-2007 from such electricity generators for the amount corresponding to

the gross final national consumption of the Member State concerned and shall gradually decrease, resulting in no free allocation in 2020. For those Member States which did not participate in the Community scheme in 2005, the relevant emissions shall be calculated using their verified Community scheme emissions under the Community scheme in 2007.

The Member State concerned may determine that the allowances allocated pursuant to this Article may only be used by the operator of the installation concerned for surrendering allowances pursuant to Article 12(3) with respect to emissions of the same installation during the year for which the allowances are allocated.

3. Allocations to operators shall be based on the allocation under the verified emissions in 2005-2007 or an ex-ante efficiency benchmark based on the weighted average of emission levels of most greenhouse gas efficient electricity production covered by the Community scheme for installations using different fuels. The weighting may reflect the shares of the different fuels in electricity production in the Member State concerned. The Commission shall, in accordance with the regulatory procedure referred to in Article 23(2), provide guidance to ensure that the allocation methodology avoids undue distortions of competition and minimises negative impacts on the incentives to reduce emissions.

4. Any Member State applying this Article shall require benefiting electricity generators and network operators to report every 12 months on the implementation of their investments referred to in the national plan. Member States shall report on this to the Commission and shall make such reports public.

5. Any Member State that intends to allocate allowances on the basis of this Article shall, by 30 September 2011, submit to the Commission an application containing the proposed allocation methodology and individual allocations. An application shall contain:

- (a) evidence that the Member State meets at least one of the conditions set out in paragraph 1;
- (b) a list of the installations covered by the application and the amount of allowances to be allocated to each installation in accordance with paragraph 3 and the Commission guidance;
- (c) the national plan referred to in the second subparagraph of paragraph 1;
- (d) monitoring and enforcement provisions with respect to the intended investments pursuant to the national plan;
- (e) information showing that the allocations do not create undue distortions of competition.

6. The Commission shall assess the application taking into account the elements set out in paragraph 5 and may reject the application, or any aspect thereof, within six months of receiving the relevant information.

7. Two years before the end of the period during which a Member State may give transitional free allocation to installations for electricity production in operation by 31 December 2008, the Commission shall assess the progress made in the implementation of the national plan. If the Commission considers, on request of the Member State concerned, that there is a need for a possible extension of that period, it may submit to the European Parliament and to the Council appropriate proposals, including the conditions that would have to be met in the case of an extension of that period.;

13. Articles 11 and 11a shall be replaced by the following:

*Article 11*

**National implementation measures**

1. Each Member State shall publish and submit to the Commission, by 30 September 2011, the list of installations covered by this Directive in its territory and any free allocation to each installation in its territory calculated in accordance with the rules referred to in Article 10a(1) and Article 10c.

2. By 28 February of each year, the competent authorities shall issue the quantity of allowances that are to be allocated for that year, calculated in accordance with Articles 10, 10a and 10c.

3. Member States may not issue allowances free of charge under paragraph 2 to installations whose inscription in the list referred to in paragraph 1 has been rejected by the Commission.

*Article 11a*

**Use of CERs and ERUs from project activities in the Community scheme before the entry into force of an international agreement on climate change**

1. Without prejudice to the application of Article 28(3) and (4), paragraphs 2 to 7 of this Article shall apply.

2. To the extent that the levels of CER and ERU use, allowed to operators or aircraft operators by Member States for the period from 2008 to 2012, have not been used up or an entitlement to use credits is granted under paragraph 8, operators may request the competent authority to issue allowances to them valid from 2013 onwards in exchange for CERs and ERUs issued in respect of emission reductions up until 2012 from project types which were eligible for use in the Community scheme during the period from 2008 to 2012.

Until 31 March 2015, the competent authority shall make such an exchange on request.

3. To the extent that the levels of CER and ERU use, allowed to operators or aircraft operators by Member States for the period from 2008 to 2012, have not been used up or an entitlement to use credits is granted under paragraph 8, competent authorities shall allow operators to exchange CERs and ERUs from projects that were registered before 2013 issued in respect of emission reductions from 2013 onwards for allowances valid from 2013 onwards.

The first subparagraph shall apply to CERs and ERUs for all project types which were eligible for use in the Community scheme during the period from 2008 to 2012.

4. To the extent that the levels of CER and ERU use, allowed to operators or aircraft operators by Member States for the period from 2008 to 2012, have not been used up or an entitlement to use credits is granted under paragraph 8, competent authorities shall allow operators to exchange CERs issued in respect of emission reductions from 2013 onwards for allowances from new projects started from 2013 onwards in LDCs.

The first subparagraph shall apply to CERs for all project types which were eligible for use in the Community scheme during the period from 2008 to 2012, until those countries have ratified a relevant agreement with the Community or until 2020, whichever is the earlier.

5. To the extent that the levels of CER and ERU use, allowed to operators or aircraft operators by Member States for the period from 2008 to 2012, have not been used up or an entitlement to use credits is granted under paragraph 8 and in the event that the negotiations on an international agreement on climate change are not concluded by 31 December 2009, credits from projects or other emission reducing activities may be used in the Community scheme in accordance with agreements concluded with third countries, specifying levels of use. In accordance with such agreements, operators shall be able to use credits from project activities in those third countries to comply with their obligations under the Community scheme.

6. Any agreements referred to in paragraph 5 shall provide for the use of credits in the Community scheme from project types which were eligible for use in the Community scheme during the period from 2008 to 2012, including renewable energy or energy efficiency technologies which promote technological transfer and sustainable development. Any such agreement may also provide for the use of credits from projects where the baseline used is below the level of free allocation under the measures referred to in Article 10a or below the levels required by Community legislation.

7. Once an international agreement on climate change has been reached, only credits from projects from third countries which have ratified that agreement shall be accepted in the Community scheme from 1 January 2013.

8. All existing operators shall be allowed to use credits during the period from 2008 to 2020 up to either the amount allowed to them during the period from 2008 to 2012, or to an amount corresponding to a percentage, which shall not be set below 11 %, of their allocation during the period from 2008 to 2012, whichever is the highest.

Operators shall be able to use credits beyond the 11 % provided for in the first subparagraph, up to an amount which results in their combined free allocation in the period from 2008 to 2012 and overall project credits entitlement equal to a certain percentage of their verified emissions in the period from 2005 to 2007.

New entrants, including new entrants in the period from 2008 to 2012 which received neither free allocation nor an entitlement to use CERs and ERUs in the period from 2008-2012, and new sectors shall be able to use credits up to an amount corresponding to a percentage, which shall not be set below 4,5 %, of their verified emissions during the period from 2013 to 2020. Aircraft operators shall be able to use credits up to an amount corresponding to a percentage, which shall not be set below 1,5 %, of their verified emissions during the period from 2013 to 2020.

Measures shall be adopted to specify the exact percentages which shall apply under the first, second and third subparagraphs. At least one-third of the additional amount which is to be distributed to existing operators beyond the first percentage referred to in the first subparagraph shall be distributed to the operators which had the lowest level of combined average free allocation and project credit use in the period from 2008 to 2012.

Those measures shall ensure that the overall use of credits allowed does not exceed 50 % of the Community-wide reductions below the 2005 levels of the existing sectors under the Community scheme over the period from 2008 to 2020 and 50 % of the Community-wide reductions below the 2005 levels of new sectors and aviation over the period from the date of their inclusion in the Community scheme to 2020.

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3).

9. From 1 January 2013, measures may be applied to restrict the use of specific credits from project types.

Those measures shall also set the date from which the use of credits under paragraphs 1 to 4 shall be in accordance with these measures. That date shall be, at the earliest, six months from the adoption of the measures or, at the latest, three years from their adoption.

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3). The Commission shall consider submitting to the Committee a draft of the measures to be taken where a Member State so requests.;

14. In Article 11b(1) the following subparagraph shall be added:

'The Community and its Member States shall only authorise project activities where all project participants have headquarters either in a country that has concluded the international agreement relating to such projects or in a country or sub-federal or regional entity which is linked to the Community scheme pursuant to Article 25.;

15. Article 12 shall be amended as follows:

(a) the following paragraph shall be inserted:

'1a. The Commission shall, by 31 December 2010, examine whether the market for emissions allowances is sufficiently protected from insider dealing or market manipulation and, if appropriate, shall bring forward proposals to ensure such protection. The relevant provisions of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) (\*) may be used with any appropriate adjustments needed to apply them to trade in commodities.

(\*) OJ L 96, 12.4.2003, p. 16.;

(b) the following paragraph shall be inserted:

'3a. An obligation to surrender allowances shall not arise in respect of emissions verified as captured and transported for permanent storage to a facility for which a permit is in force in accordance with Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide (\*).

(\*) OJ L 140, 5.6.2009, p. 114.;

(c) the following paragraph shall be added:

'5. Paragraphs 1 and 2 apply without prejudice to Article 10c.;

16. Article 13 shall be replaced by the following:

'Article 13

#### **Validity of allowances**

1. Allowances issued from 1 January 2013 onwards shall be valid for emissions during periods of eight years beginning on 1 January 2013.



2. Four months after the beginning of each period referred to in paragraph 1, allowances which are no longer valid and have not been surrendered and cancelled in accordance with Article 12 shall be cancelled by the competent authority.

Member States shall issue allowances to persons for the current period to replace any allowances held by them which are cancelled in accordance with the first subparagraph.;

17. Article 14 shall be replaced by the following:

*'Article 14*

### **Monitoring and reporting of emissions**

1. By 31 December 2011, the Commission shall adopt a regulation for the monitoring and reporting of emissions and, where relevant, activity data, from the activities listed in Annex I, for the monitoring and reporting of tonne-kilometre data for the purpose of an application under Articles 3e or 3f, which shall be based on the principles for monitoring and reporting set out in Annex IV and shall specify the global warming potential of each greenhouse gas in the requirements for monitoring and reporting emissions for that gas.

That measure, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3).

2. The regulation referred to in paragraph 1 shall take into account the most accurate and up-to-date scientific evidence available, in particular from the IPCC, and may also specify requirements for operators to report on emissions associated with the production of goods produced by energy intensive industries which may be subject to international competition. That regulation may also specify requirements for this information to be verified independently.

Those requirements may include reporting on levels of emissions from electricity generation covered by the Community scheme associated with the production of such goods.

3. Member States shall ensure that each operator of an installation or an aircraft operator monitors and reports the emissions from that installation during each calendar year, or, from 1 January 2010, the aircraft which it operates, to the competent authority after the end of that year in accordance with the regulation referred to in paragraph 1.

4. The regulation referred to in paragraph 1 may include requirements on the use of automated systems and data exchange formats to harmonise communication on the monitoring plan, the annual emission report and the verification activities between the operator, the verifier and competent authorities.;

18. Article 15 shall be amended as follows:

(a) the title shall be replaced by the following:

**'Verification and accreditation';**

(b) the following paragraphs shall be added:

'By 31 December 2011, the Commission shall adopt a regulation for the verification of emission reports based on the principles set out in Annex V and for the accreditation and supervision of verifiers. It shall specify conditions for the accreditation and withdrawal of accreditation, for mutual recognition and peer evaluation of accreditation bodies, as appropriate.

That measure, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3).;

19. The following Article shall be inserted:

*'Article 15a*

### **Disclosure of information and professional secrecy**

Member States and the Commission shall ensure that all decisions and reports relating to the quantity and allocation of allowances and to the monitoring, reporting and verification of emissions are immediately disclosed in an orderly manner ensuring non-discriminatory access.

Information covered by professional secrecy may not be disclosed to any other person or authority except by virtue of the applicable laws, regulations or administrative provisions.;

20. In Article 16, paragraph 4 shall be replaced by the following:

'4. The excess emissions penalty relating to allowances issued from 1 January 2013 onwards shall increase in accordance with the European index of consumer prices.;

21. Article 19 shall be amended as follows:

(a) paragraph 1 shall be replaced by the following:

'1. Allowances issued from 1 January 2012 onwards shall be held in the Community registry for the execution of processes pertaining to the maintenance of the holding accounts opened in the Member State and the allocation, surrender and cancellation of allowances under the Commission Regulation referred to in paragraph 3.

Each Member State shall be able to fulfil the execution of authorised operations under the UNFCCC or the Kyoto Protocol.;

(b) the following paragraph shall be added:

'4. The Regulation referred to in paragraph 3 shall contain appropriate modalities for the Community registry to undertake transactions and other operations to implement arrangements referred to in Article 25(1b). That Regulation shall also include processes for the change and incident management for the Community registry with regard to issues in paragraph 1 of this Article. It shall contain appropriate modalities for the Community registry to ensure that initiatives of the Member States pertaining to efficiency improvement, administrative cost management and quality control measures are possible.;

22. Article 21 shall be amended as follows:

(a) in paragraph 1, the second sentence shall be replaced by the following:

'That report shall pay particular attention to the arrangements for the allocation of allowances, the operation of registries, the application of the implementing measures on monitoring and reporting, verification and accreditation and issues relating to compliance with this Directive and on the fiscal treatment of allowances, if any.;

(b) paragraph 3 shall be replaced by the following:

'3. The Commission shall organise an exchange of information between the competent authorities of the Member States concerning developments relating to issues of allocation, the use of ERUs and CERs in the Community scheme, the operation of registries, monitoring, reporting, verification, accreditation, information technology, and compliance with this Directive.;

23. Article 22 shall be replaced by the following:

*'Article 22*

#### **Amendments to the Annexes**

The Annexes to this Directive, with the exception of Annexes I, IIa and IIb, may be amended in the light of the reports provided for in Article 21 and of the experience of the application of this Directive. Annexes IV and V may be amended in order to improve the monitoring, reporting and verification of emissions.

Those measures, designed to amend non-essential elements of this Directive, inter alia, by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3).;

24. The following paragraph shall be added to Article 23:

'4. Where reference is made to this paragraph, Article 4 and 7 of Decision 1999/468/CE shall apply, having regard to the provisions of Article 8 thereof.;

25. Article 24 shall be replaced by the following:

*'Article 24*

#### **Procedures for unilateral inclusion of additional activities and gases**

1. From 2008, Member States may apply emission allowance trading in accordance with this Directive to activities and to greenhouse gases which are not listed in Annex I, taking into account all relevant criteria, in particular the effects on the internal market, potential distortions of competition, the environmental integrity of the Community scheme and the reliability of the planned monitoring and reporting system, provided that inclusion of such activities and greenhouse gases is approved by the Commission

(a) in accordance with the regulatory procedure referred to in Article 23(2), if the inclusion refers to installations which are not covered by Annex I; or

(b) in accordance with the regulatory procedure with scrutiny referred to in Article 23(3), if the inclusion refers to activities and greenhouse gases which are not listed in Annex I. Those measures are designed to amend non-essential elements of this Directive by supplementing it.

2. When the inclusion of additional activities and gases is approved, the Commission may at the same time authorise the issue of additional allowances and may authorise other Member States to include such additional activities and gases.

3. On the initiative of the Commission or at the request of a Member State, a regulation may be adopted on the monitoring of, and reporting on, emissions concerning activities, installations and greenhouse gases which are not listed as a combination in Annex I, if that monitoring and reporting can be carried out with sufficient accuracy.

That measure, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3).;

26. The following Article shall be inserted:

*'Article 24a*

#### **Harmonised rules for projects that reduce emissions**

1. In addition to the inclusions provided for in Article 24, implementing measures for issuing allowances or credits in respect of projects administered by Member States that reduce greenhouse gas emissions not covered by the Community scheme may be adopted.

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3).

Any such measures shall not result in the double-counting of emission reductions nor impede the undertaking of other policy measures to reduce emissions not covered by the Community scheme. Measures shall only be adopted where inclusion is not possible in accordance with Article 24, and the next review of the Community scheme shall consider harmonising the coverage of those emissions across the Community.

2. Implementing measures that set out the details for crediting in respect of Community-level projects referred to in paragraph 1 may be adopted.

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3).

3. A Member State can refuse to issue allowances or credits in respect of certain types of projects that reduce greenhouse gas emissions on its own territory.

Such projects will be executed on the basis of the agreement of the Member State in which the project takes place.;

27. In Article 25, the following paragraphs shall be inserted:

'1a. Agreements may be made to provide for the recognition of allowances between the Community scheme and compatible mandatory greenhouse gas emissions trading systems with absolute emissions caps established in any other country or in sub-federal or regional entities.

1b. Non-binding arrangements may be made with third countries or with sub-federal or regional entities to provide for administrative and technical coordination in relation to allowances in the Community scheme or other mandatory greenhouse gas emissions trading systems with absolute emissions caps.;

28. Articles 27, 28 and 29 shall be replaced by the following:

'Article 27

**Exclusion of small installations subject to equivalent measures**

1. Following consultation with the operator, Member States may exclude from the Community scheme installations which have reported to the competent authority emissions of less than 25 000 tonnes of carbon dioxide equivalent and, where they carry out combustion activities, have a rated thermal input below 35 MW, excluding emissions from biomass, in each of the three years preceding the notification

under point (a), and which are subject to measures that will achieve an equivalent contribution to emission reductions, if the Member State concerned complies with the following conditions:

- (a) it notifies the Commission of each such installation, specifying the equivalent measures applying to that installation that will achieve an equivalent contribution to emission reductions that are in place, before the list of installations pursuant to Article 11(1) has to be submitted and at the latest when this list is submitted to the Commission;
- (b) it confirms that monitoring arrangements are in place to assess whether any installation emits 25 000 tonnes or more of carbon dioxide equivalent, excluding emissions from biomass, in any one calendar year. Member States may allow simplified monitoring, reporting and verification measures for installations with average annual verified emissions between 2008 and 2010 which are below 5 000 tonnes a year, in accordance with Article 14;
- (c) it confirms that if any installation emits 25 000 tonnes or more of carbon dioxide equivalent, excluding emissions from biomass, in any one calendar year or the measures applying to that installation that will achieve an equivalent contribution to emission reductions are no longer in place, the installation will be reintroduced into the Community scheme;
- (d) it publishes the information referred to in points (a), (b) and (c) for public comment.

Hospitals may also be excluded if they undertake equivalent measures.

2. If, following a period of three months from the date of notification for public comment, the Commission does not object within a further period of six months, the exclusion shall be deemed approved.

Following the surrender of allowances in respect of the period during which the installation is in the Community scheme, the installation shall be excluded and the Member State shall no longer issue free allowances to the installation pursuant to Article 10a.

3. When an installation is reintroduced into the Community scheme pursuant to paragraph 1(c), any allowances issued pursuant to Article 10a shall be granted starting with the year of the reintroduction. Allowances issued to these installations shall be deducted from the quantity to be auctioned pursuant to Article 10(2) by the Member State in which the installation is situated.

Any such installation shall stay in the Community scheme for the rest of the trading period.

4. For installations which have not been included in the Community scheme during the period from 2008 to 2012, simplified requirements for monitoring, reporting and verification may be applied for determining emissions in the three years preceding the notification under paragraph 1 point (a).

#### Article 28

#### **Adjustments applicable upon the approval by the Community of an international agreement on climate change**

1. Within three months of the signature by the Community of an international agreement on climate change leading, by 2020, to mandatory reductions of greenhouse gas emissions exceeding 20 % compared to 1990 levels, as reflected in the 30 % reduction commitment as endorsed by the European Council of March 2007, the Commission shall submit a report assessing, in particular, the following elements:

- (a) the nature of the measures agreed upon in the framework of the international negotiations as well as the commitments made by other developed countries to comparable emission reductions to those of the Community and the commitments made by economically more advanced developing countries to contributing adequately according to their responsibilities and respective capabilities;
- (b) the implications of the international agreement on climate change, and consequently, options required at Community level, in order to move to the more ambitious 30 % reduction target in a balanced, transparent and equitable way, taking into account work under the Kyoto Protocol's first commitment period;
- (c) the Community manufacturing industries' competitiveness in the context of carbon leakage risks;
- (d) the impact of the international agreement on climate change on other Community economic sectors;
- (e) the impact on the Community agriculture sector, including carbon leakage risks;
- (f) the appropriate modalities for including emissions and removals related to land use, land use change and forestry in the Community;
- (g) afforestation, reforestation, avoided deforestation and forest degradation in third countries in the event of the establishment of any internationally recognised system in this context;
- (h) the need for additional Community policies and measures in view of the greenhouse gas reduction commitments of the Community' and of Member States.

2. On the basis of the report referred to in paragraph 1, the Commission shall, as appropriate, submit a legislative proposal to the European Parliament and to the Council amending this Directive pursuant to paragraph 1, with a view to the amending Directive entering into force upon the approval by the Community of the international agreement on climate change and in view of the emission reduction commitment to be implemented under that agreement.

The proposal shall be based upon the principles of transparency, economic efficiency and cost-effectiveness, as well as fairness and solidarity in the distribution of efforts between Member States.

3. The proposal shall allow, as appropriate, operators to use, in addition to the credits provided for in this Directive, CERs, ERUs or other approved credits from third countries which have ratified the international agreement on climate change.

4. The proposal shall also include, as appropriate, any other measures needed to help reach the mandatory reductions in accordance with paragraph 1 in a transparent, balanced and equitable way and, in particular, shall include implementing measures to provide for the use of additional types of project credits by operators in the Community scheme to those referred to in paragraphs 2 to 5 of Article 11a or the use by such operators of other mechanisms created under the international agreement on climate change, as appropriate.

5. The proposal shall include the appropriate transitional and suspensive measures pending the entry into force of the international agreement on climate change.

#### Article 29

#### **Report to ensure the better functioning of the carbon market**

If, on the basis of the regular reports on the carbon market referred to in Article 10(5), the Commission has evidence that the carbon market is not functioning properly, it shall submit a report to the European Parliament and to the Council. The report may be accompanied, if appropriate, by proposals aiming at increasing transparency of the carbon market and addressing measures to improve its functioning.;

29. The following Article shall be inserted:

#### *'Article 29a*

#### **Measures in the event of excessive price fluctuations**

1. If, for more than six consecutive months, the allowance price is more than three times the average price of allowances during the two preceding years on the European carbon market, the Commission shall immediately convene a meeting of the Committee established by Article 9 of Decision No 280/2004/EC.

2. If the price evolution referred to in paragraph 1 does not correspond to changing market fundamentals, one of the following measures may be adopted, taking into account the degree of price evolution:

- (a) a measure which allows Member States to bring forward the auctioning of a part of the quantity to be auctioned;
- (b) a measure which allows Member States to auction up to 25 % of the remaining allowances in the new entrants reserve.

Those measures shall be adopted in accordance with the management procedure referred to in Article 23(4).

3. Any measure shall take utmost account of the reports submitted by the Commission to the European Parliament and to the Council pursuant to Article 29, as well as any other relevant information provided by Member States.

4. The arrangements for the application of these provisions shall be laid down in the regulation referred to in Article 10(4).;

30. Annex I shall be replaced by the text appearing in Annex I to this Directive;

31. Annexes IIa and IIb shall be inserted as set out in Annex II to this Directive;

32. Annex III shall be deleted.

#### *Article 2*

#### **Transposition**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 December 2012.

However, they shall bring into force the laws, regulations and administrative provisions necessary to comply with Article 9a(2) of Directive 2003/87/EC as inserted by Article 1(10) of this Directive and with Article 11 of Directive 2003/87/EC as amended by Article 1(13) of this Directive by 31 December 2009.

Member States shall apply the measures referred to in the first subparagraph from 1 January 2013. When Member States adopt the measures referred to in the first and second subparagraphs, those measures shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive. The Commission shall inform the other Member States thereof.

#### *Article 3*

#### **Transitional provision**

The provisions of Directive 2003/87/EC, as amended by Directive 2004/101/EC, Directive 2008/101/EC and Regulation (EC) No 219/2009, shall continue to apply until 31 December 2012.

#### *Article 4*

#### **Entry into force**

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

#### *Article 5*

#### **Addressees**

This Directive is addressed to the Member States.

Done at Strasbourg, 23 April 2009.

*For the European Parliament*  
*The President*  
H.-G. PÖTTERING

*For the Council*  
*The President*  
P. NEČAS

## ANNEX I

Annex I to Directive 2003/87/EC shall be replaced by the following:

## 'ANNEX I

**CATEGORIES OF ACTIVITIES TO WHICH THIS DIRECTIVE APPLIES**

1. Installations or parts of installations used for research, development and testing of new products and processes and installations exclusively using biomass are not covered by this Directive.
2. The thresholds values given below generally refer to production capacities or outputs. Where several activities falling under the same category are carried out in the same installation, the capacities of such activities are added together.
3. When the total rated thermal input of an installation is calculated in order to decide upon its inclusion in the Community scheme, the rated thermal inputs of all technical units which are part of it, in which fuels are combusted within the installation, are added together. These units could include all types of boilers, burners, turbines, heaters, furnaces, incinerators, calciners, kilns, ovens, dryers, engines, fuel cells, chemical looping combustion units, flares, and thermal or catalytic post-combustion units. Units with a rated thermal input under 3 MW and units which use exclusively biomass shall not be taken into account for the purposes of this calculation. "Units using exclusively biomass" includes units which use fossil fuels only during start-up or shut-down of the unit.
4. If a unit serves an activity for which the threshold is not expressed as total rated thermal input, the threshold of this activity shall take precedence for the decision about the inclusion in the Community scheme.
5. When the capacity threshold of any activity in this Annex is found to be exceeded in an installation, all units in which fuels are combusted, other than units for the incineration of hazardous or municipal waste, shall be included in the greenhouse gas emission permit.
6. From 1 January 2012 all flights which arrive at or depart from an aerodrome situated in the territory of a Member State to which the Treaty applies shall be included.

Activities	Greenhouse gases
Combustion of fuels in installations with a total rated thermal input exceeding 20 MW (except in installations for the incineration of hazardous or municipal waste)	Carbon dioxide
Refining of mineral oil	Carbon dioxide
Production of coke	Carbon dioxide
Metal ore (including sulphide ore) roasting or sintering, including pelletisation	Carbon dioxide
Production of pig iron or steel (primary or secondary fusion) including continuous casting, with a capacity exceeding 2,5 tonnes per hour	Carbon dioxide
Production or processing of ferrous metals (including ferro-alloys) where combustion units with a total rated thermal input exceeding 20 MW are operated. Processing includes, inter alia, rolling mills, re-heaters, annealing furnaces, smitheries, foundries, coating and pickling	Carbon dioxide
Production of primary aluminium	Carbon dioxide and perfluorocarbons
Production of secondary aluminium where combustion units with a total rated thermal input exceeding 20 MW are operated	Carbon dioxide
Production or processing of non-ferrous metals, including production of alloys, refining, foundry casting, etc., where combustion units with a total rated thermal input (including fuels used as reducing agents) exceeding 20 MW are operated	Carbon dioxide

Activities	Greenhouse gases
Production of cement clinker in rotary kilns with a production capacity exceeding 500 tonnes per day or in other furnaces with a production capacity exceeding 50 tonnes per day	Carbon dioxide
Production of lime or calcination of dolomite or magnesite in rotary kilns or in other furnaces with a production capacity exceeding 50 tonnes per day	Carbon dioxide
Manufacture of glass including glass fibre with a melting capacity exceeding 20 tonnes per day	Carbon dioxide
Manufacture of ceramic products by firing, in particular roofing tiles, bricks, refractory bricks, tiles, stoneware or porcelain, with a production capacity exceeding 75 tonnes per day	Carbon dioxide
Manufacture of mineral wool insulation material using glass, rock or slag with a melting capacity exceeding 20 tonnes per day	Carbon dioxide
Drying or calcination of gypsum or production of plaster boards and other gypsum products, where combustion units with a total rated thermal input exceeding 20 MW are operated	Carbon dioxide
Production of pulp from timber or other fibrous materials	Carbon dioxide
Production of paper or cardboard with a production capacity exceeding 20 tonnes per day	Carbon dioxide
Production of carbon black involving the carbonisation of organic substances such as oils, tars, cracker and distillation residues, where combustion units with a total rated thermal input exceeding 20 MW are operated	Carbon dioxide
Production of nitric acid	Carbon dioxide and nitrous oxide
Production of adipic acid	Carbon dioxide and nitrous oxide
Production of glyoxal and glyoxylic acid	Carbon dioxide and nitrous oxide
Production of ammonia	Carbon dioxide
Production of bulk organic chemicals by cracking, reforming, partial or full oxidation or by similar processes, with a production capacity exceeding 100 tonnes per day	Carbon dioxide
Production of hydrogen (H <sub>2</sub> ) and synthesis gas by reforming or partial oxidation with a production capacity exceeding 25 tonnes per day	Carbon dioxide
Production of soda ash (Na <sub>2</sub> CO <sub>3</sub> ) and sodium bicarbonate (NaHCO <sub>3</sub> )	Carbon dioxide
Capture of greenhouse gases from installations covered by this Directive for the purpose of transport and geological storage in a storage site permitted under Directive 2009/31/EC	Carbon dioxide
Transport of greenhouse gases by pipelines for geological storage in a storage site permitted under Directive 2009/31/EC	Carbon dioxide
Geological storage of greenhouse gases in a storage site permitted under Directive 2009/31/EC	Carbon dioxide

Activities	Greenhouse gases
<p>Aviation</p> <p>Flights which depart from or arrive in an aerodrome situated in the territory of a Member State to which the Treaty applies.</p> <p>This activity shall not include:</p> <ul style="list-style-type: none"> <li>(a) flights performed exclusively for the transport, on official mission, of a reigning Monarch and his immediate family, Heads of State, Heads of Government and Government Ministers, of a country other than a Member State, where this is substantiated by an appropriate status indicator in the flight plan;</li> <li>(b) military flights performed by military aircraft and customs and police flights;</li> <li>(c) flights related to search and rescue, fire-fighting flights, humanitarian flights and emergency medical service flights authorised by the appropriate competent authority;</li> <li>(d) any flights performed exclusively under visual flight rules as defined in Annex 2 to the Chicago Convention;</li> <li>(e) flights terminating at the aerodrome from which the aircraft has taken off and during which no intermediate landing has been made;</li> <li>(f) training flights performed exclusively for the purpose of obtaining a licence, or a rating in the case of cockpit flight crew where this is substantiated by an appropriate remark in the flight plan provided that the flight does not serve for the transport of passengers and/or cargo or for the positioning or ferrying of the aircraft;</li> <li>(g) flights performed exclusively for the purpose of scientific research or for the purpose of checking, testing or certifying aircraft or equipment whether airborne or ground-based;</li> <li>(h) flights performed by aircraft with a certified maximum take-off mass of less than 5 700 kg;</li> <li>(i) flights performed in the framework of public service obligations imposed in accordance with Regulation (EEC) No 2408/92 on routes within outermost regions, as specified in Article 299(2) of the Treaty, or on routes where the capacity offered does not exceed 30 000 seats per year; and</li> <li>(j) flights which, but for this point, would fall within this activity, performed by a commercial air transport operator operating either: <ul style="list-style-type: none"> <li>— fewer than 243 flights per period for three consecutive four-month periods, or</li> <li>— flights with total annual emissions lower than 10 000 tonnes per year.</li> </ul> </li> </ul> <p>Flights performed exclusively for the transport, on official mission, of a reigning Monarch and his immediate family, Heads of State, Heads of Government and Government Ministers, of a Member State may not be excluded under this point.'</p>	<p>Carbon dioxide</p>



## ANNEX II

The following Annexes shall be inserted as Annex IIa and Annex IIb to Directive 2003/87/EC:

## ‘ANNEX IIa

**Increases in the percentage of allowances to be auctioned by Member States pursuant to Article 10(2)(a), for the purpose of Community solidarity and growth in order to reduce emissions and adapt to the effects of climate change**

	MemberState share
Belgium	10 %
Bulgaria	53 %
CzechRepublic	31 %
Estonia	42 %
Greece	17 %
Spain	13 %
Italy	2 %
Cyprus	20 %
Latvia	56 %
Lithuania	46 %
Luxembourg	10 %
Hungary	28 %
Malta	23 %
Poland	39 %
Portugal	16 %
Romania	53 %
Slovenia	20 %
Slovakia	41 %
Sweden	10 %

## ANNEX IIb

**DISTRIBUTION OF ALLOWANCES TO BE AUCTIONED BY MEMBER STATES PURSUANT TO ARTICLE 10(2)(c) REFLECTING EARLY EFFORTS OF SOME MEMBER STATES TO ACHIEVE 20 % REDUCTION OF GREENHOUSE GAS EMISSIONS**

Member State	Distribution of the 2 % against the Kyoto base in percentages
Bulgaria	15 %
CzechRepublic	4 %
Estonia	6 %
Hungary	5 %
Latvia	4 %
Lithuania	7 %
Poland	27 %
Romania	29 %
Slovakia	3 %