Commission Delegated Regulation (EU) 2019/1868 of 28 August 2019 amending Regulation (EU) No 1031/2010 to align the auctioning of allowances with the EU ETS rules for the period 2021 to 2030 and with the classification of allowances as financial instruments pursuant to Directive 2014/65/EU of the European Parliament and of the Council (Text with EEA relevance)

COMMISSION DELEGATED REGULATION (EU) 2019/1868

of 28 August 2019

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(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a system for greenhouse gas emission allowance trading within the Union and amending Council Directive 96/61/EC[(1)], and in particular Articles 3d(3), 10(4) and 10a(8) thereof,

Whereas:

(1) Since 2012, emission allowances are auctioned in accordance with Commission Regulation (EU) No 1031/2010[(2)]. The auctioning of allowances is conducted by a common auction platform for 25 Member States and three EEA EFTA states and by a small number of opt-out platforms.

(2) Directive 2003/87/EC has been amended by Directive (EU) 2018/410 of the European Parliament and of the Council[(3)] to enhance cost-effective emission reductions and low-carbon investments through the system for greenhouse gas emission allowance trading within the Union ('EU ETS') as from 2021. The auctioning of allowances remained the general rule for allocation of allowances whereby the share of allowances to be auctioned should be 57 % of the total quantity of allowances.

(3) It is appropriate to incorporate the new elements introduced by Directive (EU) 2018/410, related to the determination of the annual auction volume, into Regulation (EU) No 1031/2010. In particular, it is necessary to take into account the possibility to reduce the auction volume by up to 3 % of the total quantity of allowances to increase the amount available for free allocation (free allocation buffer). Furthermore, the revised Directive 2003/87/EC allows for changes to be made to the annual auction volumes due to: voluntary cancellation of allowances by the Member States in the event of closure of electricity generation capacity; the reintroduction into the EU ETS of installations that emit less than 2 500 tonnes of carbon dioxide; and the flexibility established between

the ETS and non-ETS sectors to facilitate the achievement of Member States national reduction targets in non-ETS sectors as provided for by Article 6 of Regulation (EU) 2018/842 of the European Parliament and of the Council[4].

(4) Directive 2003/87/EC establishes the Modernisation Fund to improve energy efficiency and modernise the energy systems of certain Member States and the Innovation Fund to support investments in innovative technologies. Both funds are financed through the auctioning of allowances on the common auction platform by the European Investment Bank ('EIB'). To this end, the EIB should become the auctioneer for the two funds without becoming part of the joint procurement procedure for the common auction platform. The relevant volumes of allowances should be auctioned at the same auctions as the volumes auctioned by the Member States and the EEA EFTA states participating in the common auction platform.

(5) In view of establishing the Modernisation Fund, Directive 2003/87/EC provides that 2 % of the total quantity of allowances are to be auctioned and, in addition, the eligible Member States may add to this fund allowances under Articles 10(2)(b) and 10c of Directive 2003/87/EC. The EIB is required to ensure that those allowances are auctioned in accordance with the principles and modalities of the auctioning process, where the equal distribution of auction volumes is a key element.

(6) To ensure the availability of funds for innovation in low carbon technologies and the proper functioning of the carbon market, the volumes of the Innovation Fund should in principle be auctioned in equal annual volumes. However, the Commission should review in two-year intervals the distribution of allowances to be auctioned for the Innovation Fund taking into account the results of each call for proposals. The first review should be carried out no later than by 30 June 2022.

(7) With a view to enable that a Member State can cancel allowances from its auction volumes in the event of closure of electricity generation capacity in its territory, a notification procedure should be established. The Member State concerned should notify the Commission of its intention to cancel allowances using a uniform template providing evidence and information about the closed installation, the intended volume and timing of the cancellation. To preserve the functioning of the market stability reserve ('MSR') established by Decision (EU) 2015/1814 of the European Parliament and of the Council[5], the volume of the cancellation should be deducted from the auction volumes of the Member State only after the MSR adjustments are made for the respective year. To ensure transparency, the Commission should publish the information provided by the Member States in accordance with the template, except where this information is protected for reasons of confidentiality.

(8) In order to reinforce the integrity of the carbon market, since 2018, allowances are classified as financial instruments by Directive 2014/65/EU of the European Parliament and of the Council[6]. Previously, Directive 2004/39/EC of the European Parliament and of the Council[7] recognised only derivatives of allowances as financial instruments. The new classification brings the secondary market spot trade in allowances in the scope of, inter alia, Directive 2014/65/EU, Regulation (EU) No 596/2014 of the European Parliament and of the Council[8] and Regulation (EU) No 600/2014 of the European

Parliament and of the Council[9]. However, the process of auctioning of allowances (primary market) is only in the scope of Regulation (EU) No 596/2014.

(9) To align the auctioning of allowances with the new financial market regulatory regime, the system established for monitoring and reporting of auctions should be revised. Because the scope of Regulation (EU) No 596/2014 has been extended and applies also to the auctioning of allowances, the functions of monitoring and preventing market abuse with respect to auctions are a responsibility of the competent national authorities. The competent national authorities are required by Regulation (EU) No 596/2014 to actively detect and investigate occurrences of market abuse. The necessary auction monitoring functions should be carried out by the auction platforms, the Commission, the Member States and the competent national authorities and the provisions laying down an obligation to appoint an auction monitor should be deleted. Further, as Regulation (EU) No 596/2014 applies directly to auctions, the specific market abuse provisions of Regulation (EU) No 1031/2010 have become redundant and should be deleted.

(10) To provide the necessary reporting data to the competent national authorities responsible for surveillance of market abuse in a cost-efficient and proportionate manner, Regulation (EU) No 1031/2010 should mirror the necessary transaction reporting obligations set out in Regulation (EU) No 600/2014 and make them applicable to auction platforms with respect to reporting on auction transactions. This is necessary since Regulation (EU) No 596/2014 that is now applicable to auctions, does not establish a self-standing transaction reporting mechanism, but relies on data collection under Regulation (EU) No 600/2014.

(11) It is essential to ensure a competitive procurement process for auction platforms and that the relevant criteria are set accordingly. In relation to the fees to be paid by the successful bidders, it should be possible to increase the current maximum fee level in a limited manner where this is foreseen by the procurement procedure and the annual auction volumes are reduced by more than 200 million allowances due to the operation of the market stability reserve.

(12) The public procurement for the common auction platform may provide for expanding the selection criteria also to regulated markets in energy products which have not yet established a secondary market in emission allowances. In case such regulated market is selected to become an auction platform, it should be required to put it in place at least 60 trading days prior to the first auction. This is necessary to establish the price of the secondary market at the time of the auctions (‘reserve price’) for the cases of cancellation of auctions, and the bidder’s fees, which are linked to the comparable fee paid in the secondary market. In addition, the Commission and the participating Member States should be able to extend the current five years maximum duration of the contracts to seven years in accordance with the provisions of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council[10] (‘Financial Regulation’) in circumstances which would be difficult to foresee by a diligent contracting authority. In order to verify the market conditions and to prepare the new procurements during

Changes to legislation: *There are currently no known outstanding effects for the Commission Delegated Regulation (EU) 2019/1868. (See end of Document for details)*

the contract duration, the Commission should be able to undertake preliminary market consultation in accordance with the Financial Regulation.

(13) To simplify the auction process, the setting of the annual auction volumes should be made more flexible in case changes up to 50 000 allowances are needed. Any change below that threshold should not lead to changing the auction volume of the subsequent year, unless a Member State explicitly requests so. Furthermore, the procedure for the determination and publication of auction calendars should be simplified in the sense that the Commission would no longer provide an opinion thereon. However, the auction calendar should be published after the Commission takes an internal decision on the auction table corresponding to the auction calendar under the delegated acts adopted pursuant to Article 19(3) of Directive 2003/87/EC.

(14) To simplify the reappointment of opt-out platforms, an amendment to Annex III to Regulation (EU) No 1031/2010 should be required only for the listing of new entities as opt-out platforms, or for a re-listing under changed conditions. Thus, in case the same opt-out platform is appointed by its Member State under the same conditions, its listing should be prolonged under the same terms and conditions as the initial listing without an amendment to Annex III to Regulation (EU) No 1031/2010. This should be subject to a confirmation from the Member State and the Commission that the requirements of this Regulation and the objectives of Article 10(4) of Directive 2003/87/EC are satisfied.

(15) To avoid accumulation of cancelled volumes in case several auctions are cancelled, it should be made possible that the cancelled volumes are distributed evenly over the next auctions that do not include cancelled volumes from previously cancelled auctions.

(16) Regulation (EU) No 1031/2010 should therefore be amended accordingly,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EU) No 1031/2010 is amended as follows:

(1) The title is replaced by the following:
Commission Regulation (EU) No 1031/2010 of 12 November 2010 on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances pursuant to Directive 2003/87/EC of the European Parliament and of the Council establishing a system for greenhouse gas emission allowances trading within the Union.

(2) Article 3 is amended a follows:

(a) points (1) and (2) are deleted;

(b) points (3) and (4) are replaced by the following:

3. “two-day spot” means allowances auctioned for delivery at an agreed date no later than the second trading day from the day of the auction;

4. “five-day futures” means allowances auctioned for delivery at an agreed date no later than the fifth trading day from the day of the auction;;

(c) points (8), (9) and (10) are replaced by the following:

8. "investment firm" means the same as in point (1) of Article 4(1) of Directive 2014/65/EU of the European Parliament and of the Council[(11)];

9. "credit institution" means the same as in Article 4(1) of Regulation (EU) No 575/2013 of the European Parliament and of the Council[(12)];

10. "financial instrument" means the same as in point (15) of Article 4(1) of Directive 2014/65/EU;;

(d) points (12), (13) and (14) are replaced by the following:

12. "parent undertaking" means the same as in Article 2(9) of Directive 2013/34/EU of the European Parliament and of the Council[(13)];

13. "subsidiary undertaking" means the same as in Article 2(10) of Directive 2013/34/EU;

14. "affiliate undertaking" means the same as in Article 2(12) of Directive 2013/34/EU;;

(e) points (17) to (19) are replaced by the following:

17. "money laundering" means the same as in Article 1(3) of Directive (EU) 2015/849 of the European Parliament and of the Council[(14)] having regard to Article 1(4) and (6) of that Directive;

18. "terrorist financing" means the same as in Article 1(5) of Directive (EU) 2015/849 having regard to Article 1(6) of that Directive;

19. "criminal activity" means the same as in Article 3(4) of Directive (EU) 2015/849;;

(f) point 21 is replaced by the following:

21. "nominated holding account" means one or more type of holding account provided for in the applicable delegated acts adopted pursuant to Article 19(3) of Directive 2003/87/EC for the purposes of participating in or conducting the auction process including the holding of allowances in escrow, pending their delivery under this Regulation;;

(g) points (23) and (24) are replaced by the following:

23. "customer due diligence measures" means the same as the customer due diligence measures in Article 13 of Directive (EU) 2015/849 and the enhanced customer due diligence measures in Article 18, Article 18a and Article 20 having regard to Articles 22 and 23 of that Directive;

24. "beneficial owner" means the same as in Article 3(6) of Directive (EU) 2015/849;;

(h) points (26), (27) and (28) are replaced by the following: