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 (Text with EEA relevance)

[[F1]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**]**

(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 scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC[(1)], and in particular Articles 3d(3) and 10(4) thereof,

Whereas:

(1) Directive 2003/87/EC was revised and amended by 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[(2)] and 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[(3)]. One of the improvements determined in the revision of Directive 2003/87/EC was that auctioning should be the basic principle for allocation, as it is the simplest and generally considered to be the most economically efficient means of doing so. The efficiency of the emissions trading scheme relies on a clear carbon price signal to achieve abatement of greenhouse gas emissions at least cost. Auctioning should support and strengthen such a carbon price signal.

(2) Article 10(1) of Directive 2003/87/EC requires Member States to auction allowances covered by Chapter III of that Directive not allocated free of charge. Thus, Member States must auction allowances not allocated free of charge. They may not use any other means of allocation, nor could they withhold or cancel allowances not allocated for free instead of auctioning them.

(3) Article 10(4) of Directive 2003/87/EC lays down various objectives for the auctioning process. It should be predictable, in particular as regards the timing and sequencing

of auctions and the estimated volumes of allowances to be made available. Auctions should be designed to ensure that small and medium-sized enterprises covered by the emissions trading scheme have full, fair and equitable access, that small emitters are granted access, that participants have access to information at the same time, that participants do not undermine the operation of the auctions, and that the organisation of and participation in the auctions is cost-efficient avoiding undue administrative costs.

(4) These objectives should be read in the context of the overarching aims of the revision of Directive 2003/87/EC, which include, inter alia, more harmonisation, avoidance of distortions of competition and greater predictability, all of which should reinforce the carbon price signal to achieve abatement of emissions at least cost. Indeed, the increased emissions reduction effort requires the highest possible degree of economic efficiency on the basis of fully harmonised conditions of allocation within the Union.

(5) Article 3d(1) of Directive 2003/87/EC provides for the auctioning of 15 % of allowances covered by Chapter II of that Directive in the period from 1 January 2012 to 31 December 2012 whilst Article 3d(2) provides for the auctioning of the same percentage of allowances covered by Chapter II of Directive 2003/87/EC in the period from 1 January 2013 onwards. Article 3d(3) requires the adoption of a regulation containing detailed provisions for the auctioning by Member States of allowances covered by Chapter II not required to be issued free of charge in accordance with Article 3d(1) and (2) or Article 3f(8) of Directive 2003/87/EC.

(6) According to the majority of stakeholders involved in the consultation prior to the adoption of this Regulation, the overwhelming majority of Member States and the impact assessment carried out by the Commission, a common auctioning infrastructure where a common auction platform conducts the auctions best achieves the overarching objectives of the review of Directive 2003/87/EC. Such an approach avoids any distortions of the internal market. It allows for the highest degree of economic efficiency and permits allowances to be allocated through auctioning on the basis of fully harmonised conditions within the Union. Moreover, conducting the auctions by means of a common auction platform best strengthens the carbon price signal required for economic operators to make the investment decisions necessary to achieve abatement of greenhouse gas emissions at least cost.

(7) According to the majority of stakeholders involved in the consultation prior to the adoption of this Regulation, the overwhelming majority of Member States and the impact assessment carried out by the Commission, a common auctioning infrastructure where a common auction platform conducts the auctions also best achieves the objectives in Article 10(4) of Directive 2003/87/EC. Such an approach is the most cost-effective means of auctioning allowances without an undue administrative burden that would necessarily ensue from using multiple auctioning infrastructures. It best provides for open, transparent and non-discriminatory access to the auctions, both de jure and de facto. Such a common approach would ensure the predictability of the auction calendar and best strengthens the clarity of the carbon price signal. A common auctioning infrastructure is particularly important for providing equitable access to small and medium-sized enterprises covered by the emissions trading scheme

and access to small emitters. Indeed, the cost of becoming familiar and registering with, as well as participating in, more than one auction platform would be particularly burdensome for such companies. A common auction platform facilitates the widest participation from across the Union and, thereby, best mitigates the risk of participants undermining the auctions by using them as a vehicle for money laundering, terrorist financing, criminal activity or market abuse.

(8) Nevertheless, to mitigate any risk of reduced competition in the carbon market, this Regulation provides for the possibility for Member States to opt-out of the common auction platform by appointing their own auction platforms subject to the listing of these opt-out platforms in an Annex to this Regulation. Such listing should be based on a notification of the opt-out platform by the appointing Member State to the Commission. However, this possibility inevitably implies less than full harmonisation of the auction process and, therefore, the arrangements put in place in this Regulation should be reviewed within an initial five-year period and in consultation with stakeholders with a view to making any changes deemed necessary in the light of the experience acquired. Following receipt of a notification in relation to an opt-out platform from a Member State, the Commission should act without undue delay in relation to the listing of that opt-out platform.

(9) In addition, it should be possible for a Member State to request the auction monitor to draw up a report about the functioning of the auction platform it intends to appoint, for instance when preparing any amendment of this Regulation to list opt-out auction platforms. Moreover, the auction monitor should keep under review the compatibility of all auction platforms with this Regulation and the objectives of Article 10(4) of Directive 2003/87/EC and report thereon to the Member States, the Commission and the auction platform concerned. Such review should include the impact of the auctions on the market position of the auction platforms on the secondary market. To avoid auctioning Member States unwittingly becoming locked-into any auction platform beyond its term of appointment, any contracts appointing an auction platform should contain appropriate provisions requiring an auction platform to hand over of all tangible and intangible assets necessary for the conduct of the auctions by an auction platform's successor.

(10) The choices as regards the number of auction platforms and the type of entity that may become an auction platform underpin the provisions adopted in this Regulation for a predictable auction calendar as well as the measures on accessing the auctions, the design of the auctions, and the provisions on the management of collateral, payment and delivery and on auction supervision. Such provisions could not be adopted by the Commission in a fully harmonised regulation without knowing the number of auction platforms and the specific capabilities of the entity chosen to conduct the auctions. Therefore, the measures adopted in this Regulation are based on auctions being conducted through a common auction platform whilst providing for a procedure to ascertain the number and quality of any other auction platform a Member State may decide to use.

(11) In view of the constraints outlined in recital (10), it is appropriate for the listing of an opt-out auction platform in an Annex to this Regulation to be made subject to conditions or obligations. The listing of an opt-out platform in an Annex to this Regulation is without prejudice to the powers of the Commission to propose the delisting of an auction platform in particular in the event of any breach of this Regulation or the objectives of Article 10(4) of Directive 2003/87/EC. In the absence of listing, the auctioning Member State should auction its allowances through the common auction platform. The Commission should provide in the Commission regulation adopted pursuant to Article 19(3) of Directive 2003/87/EC for measures suspending the execution of processes pertaining to the auctioning of allowances in circumstances where the opt-out platform is in breach of this Regulation or the objectives of Article 10(4) of Directive 2003/87/EC.

(12) The detailed provisions pertaining to the auction process to be conducted by the opt-out auction platform should be assessed by the Commission and should be subject to consultation of the Committee referred to in Article 23(3) of Directive 2003/87/EC in accordance with the regulatory procedure with scrutiny provided for in Article 10(4) of Directive 2003/87/EC. Such an assessment is necessary to ensure that the appointment of the opt-out auction platform, conducted at national level by each opting-out Member State, is subject to a similar level of scrutiny as that to which the appointment of the common auction platform is subject under the joint action provided for in this Regulation. Member States participating in the joint procurement of the common auction platform will be doing so together with the Commission which will be involved in the entire process. Moreover, opt-out Member States will be given observer status in the joint procurement process, subject to appropriate terms and conditions agreed by the Commission and participating Member States, in the joint procurement agreement.

(13) This Regulation should apply to the auctioning of allowances covered by Chapter II and Chapter III of Directive 2003/87/EC from, respectively, 1 January 2012 onwards and 1 January 2013 onwards. It should also apply to the auctioning of any allowances covered by Chapter III of Directive 2003/87/EC prior to the start of the period from 2013, if necessary to ensure an orderly functioning of the carbon and electricity markets.

(14) For reasons of simplicity and accessibility, the allowances auctioned should be available for delivery within five trading days at the latest. Such short-term delivery deadlines would limit any potential negative impact on competition between the auction platforms and trading places in the secondary market for allowances. Moreover, short-term delivery deadlines are simpler, encourage wide participation thereby mitigating the risk of market abuse and better ensure accessibility for small and medium-sized enterprises covered by the scheme and small emitters. Rather than providing forwards and futures in the auctions, it is for the market to offer optimal solutions to respond to the demand for allowance derivatives. It is appropriate to provide for a choice between two-day spot and five-day futures to be made during the process for the appointment of the auction platform to assess the best solution for the optimal auctioned product to be selected. Whilst two-day spot is not a financial instrument under Union financial market

legislation, five-day futures are financial instruments within the meaning of Union financial market regulation.

(15) The choice of whether or not the auctioned product should be a financial instrument should be part of the procedures for selecting the auction platform and should be made on the basis of an overall assessment of the costs and benefits of the solutions offered by candidates taking part in the competitive procurement process. This assessment should concern, notably, cost efficiency, equitable access for small and medium-sized enterprises covered by the scheme and small emitters, adequate protections and market supervision.

(16) For as long as the legal measures and technical means necessary to deliver allowances are not in place, it is appropriate to provide for an alternative means of auctioning allowances. To this end, this Regulation provides for the possibility of auctioning futures and forwards with delivery no later than 31 December 2013. Such futures and forwards are financial instruments which allow the auctioneer and bidders alike to benefit from protections analogous to those available to them within the context of the regulatory framework applicable to financial markets. For the purposes of this Regulation, futures differ from forwards in that whilst the former are subject to cash variation margining, the latter are variation margined through non-cash collateral. It is appropriate to provide the Member States with the option of choosing which type of product to use for the auctioning of allowances in line with which margining provisions would best meet their budgetary situation. If it were necessary to resort to such alternative means of auctioning allowances, futures and forwards would be auctioned on a provisional basis through one or two auction platforms.

(17) In view of the desire for simplicity, fairness and cost-efficiency and the need to mitigate the risk of market abuse, auctions should be carried out by means of a single-round, sealed-bid and uniform-price format. Moreover, tied bids should be resolved by means of a random process, as this generates uncertainty for bidders making collusion on the price they are bidding unsustainable. The auction clearing price can be expected to be closely aligned to the prevailing secondary market price, whereas an auction clearing price significantly under the prevailing secondary market price is likely to indicate a deficiency of the auction. Allowing such an auction clearing price to prevail could distort the carbon price signal, disturb the carbon market and would not ensure that bidders pay fair value for the allowances. Therefore, in such a situation, the auction should be cancelled.

(18) A relatively high frequency of the auctions is desirable to limit the impact of the auctions on the functioning of the secondary market, whilst ensuring that auctions are large enough to attract sufficient participation. A relatively high frequency reduces the risk of market abuse because it decreases the value at stake for bidders in individual auctions and increases their flexibility to make use of later auctions to adjust their trading positions. For these reasons, this Regulation should provide for a frequency of at least weekly auctions for allowances covered by Chapter III of Directive 2003/87/EC. Given the much smaller volume of allowances covered by Chapter II of the same