

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 scheme for greenhouse gas emission allowances trading within the Community (Text with EEA relevance)

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 scheme for greenhouse gas emission allowances trading within the Community

(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<sup>(1)</sup>, 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<sup>(2)</sup> 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<sup>(3)</sup>. 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

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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

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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.

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- (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

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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

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Directive, the appropriate frequency for auctions for these allowances is at least once every two months.

- (19) To provide predictability to the secondary market, this Regulation should provide the following rules and procedures. Firstly, it should provide for determining the volumes of any allowances to be auctioned in 2011 and 2012 as soon as practicable following the adoption of this Regulation. The volumes so determined, as well as the auctioned products through which they are to be auctioned, will be listed in an Annex to this Regulation. Secondly, it should provide clear and transparent rules that determine the volume of allowances to be auctioned in each year thereafter. Thirdly, it should contain rules and procedures to establish for each calendar year a detailed auction calendar, with all relevant information for each individual auction well before the beginning of that calendar year. Any subsequent changes to the auction calendar should only be possible in a limited number of prescribed situations. Any adjustments should be made in a manner least affecting the predictability of the auction calendar.
- (20) As a rule, the volume to be auctioned in each year should be equal to the volume of allowances attributed to that year. Any allowances covered by Chapter III of Directive 2003/87/EC to be auctioned in 2011 and 2012 would be an exception. Given the expected availability of allowances banked from the second into the third trading period, the expected availability of Certified Emission Reductions (CERs) and the expected volume of allowances to be sold pursuant to Article 10a(8) of Directive 2003/87/EC, it is appropriate to address the impact from any ‘early auctions’ in 2011 and 2012 by rebalancing the volume of allowances to be auctioned in 2013 and 2014.
- (21) In line with demand on the secondary market, the volume of allowances to be auctioned in each year should be spread evenly throughout the year.
- (22) Open access is required to encourage participation and, thereby, ensure a competitive auction outcome. Equally, confidence in the integrity of the auction process, in particular *vis-à-vis* participants seeking to distort the auctions by using them as a vehicle for money laundering, terrorist financing, criminal activity or market abuse is a pre-requisite for ensuring auction participation and a competitive auction outcome. To ensure the integrity of the auctions, access to the auctions should be subject to minimum requirements for adequate customer due diligence checks. To ensure the cost-effectiveness of such checks, eligibility to apply for admission to the auctions should be given to easily identifiable, well-defined categories of participants, notably operators of stationary installations and aircraft operators covered by the emissions trading scheme, as well as regulated financial entities such as investment firms and credit institutions. Also business groupings of operators or aircraft operators, such as partnerships, joint ventures and consortia acting as an agent on behalf of their members, should be eligible to apply for admission to bid in the auctions. Thus, it would be prudent to circumscribe eligibility to apply for admission to the auctions at the beginning without precluding the possibility of enlarging access to the auctions to further categories of participants in the light of the experience acquired through the auctions or following the Commission’s examination pursuant to Article 12(1a) of Directive 2003/87/EC of whether the market for emission allowances is sufficiently protected from market abuse.

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- (23) In addition, for reasons of legal certainty, this Regulation should provide for relevant provisions of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purposes of money laundering and terrorist financing<sup>(4)</sup> to apply to the auction platform. This is particularly important in view of the fact that the auction platform is required to provide access not only to investment firms and credit institutions but also to operators and aviation operators as well as other persons authorised to bid on their own account and on behalf of others, which are not themselves subject to Directive 2005/60/EC.
- (24) This Regulation should provide participants with the choice of accessing the auctions directly *via* either the internet or dedicated connections, through authorised and supervised financial intermediaries or other persons authorised by the Member States to bid on their own account or on behalf of clients of their main business, where their main business is not the provision of investment or banking services, subject to such other persons complying with investor protection measures and customer due diligence measures equivalent to those applicable to investment firms.
- (25) The addition of other persons authorised by the Member States to the list of persons eligible to apply for admission to bid is intended to give indirect access to operators and aviation operators not only through financial intermediaries but also through other intermediaries with whom they have an existing client relationship such as their power or fuel supplier who are exempt from Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC<sup>(5)</sup> pursuant to Article 2(1)(i) of that Directive.
- (26) In view of legal certainty and transparency, this Regulation should contain detailed provisions on other aspects of auctioning such as lot size, the possibility to withdraw or modify submitted bids, the currency used for bidding and for payment, the submission and processing of applications for admission to bid, as well as any refusal, revocation or suspension of admission.
- (27) Each Member State should appoint an auctioneer, who would be responsible for the auctioning of allowances on behalf of its appointing Member State. The auction platform should be responsible solely for conducting the auctions. It should be possible for the same auctioneer to be appointed by more than one Member State. The auctioneer should act separately on behalf of each appointing Member State. It should be responsible for auctioning the allowances on the auction platform and for receiving and disbursing the auction proceeds pertaining to each appointing Member State to that Member State. It is important for the agreement(s) between the Member States and their auctioneer to be compatible with the agreement(s) between the auctioneer and the auction platform, and in case of any conflict for the latter to prevail.
- (28) Furthermore, it is necessary for the auctioneer appointed by a Member State not participating in the common auction platform but appointing its own auction platform to be admitted not only by the auction platform appointed by the Member State concerned but also by the common auction platform. This is desirable to ensure the means for a

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smooth transition from the opt-out auction platform to the common auction platform should this be required notably in the absence of a listing of the auction platform in an Annex to this Regulation.

- (29) The requirement that the auction platform is a regulated market is founded on the desire to use the organisational infrastructure available on the secondary market for the administration of the auctions. In particular, regulated markets are bound under Directive 2004/39/EC and under Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)<sup>(6)</sup>, to provide a number of safeguards in the conduct of their operations. Those safeguards include arrangements to identify and manage the potential adverse consequences of any conflicts of interest for the operation of the regulated market or its participants; to identify and manage the risks to which they are exposed and to put in place effective measures to mitigate them; to provide for the sound management of the technical operations of their systems establishing effective contingency arrangements to cope with risks of systems disruptions; to have transparent and non-discretionary rules and procedures for fair and orderly trading and establish objective criteria for the efficient execution of orders; to facilitate the efficient and timely finalisation of the transactions executed under their systems; to have available sufficient financial resources to facilitate their orderly functioning, having regard to the nature and extent of the transactions concluded on the market and the range and degree of risks to which they are exposed.
- (30) The requirement that the auction platform is a regulated market has various further advantages. It allows relying on the organisational infrastructure, experience, capabilities and transparent mandatory operational rules of the market. This is relevant, inter alia, with regard to the clearing or settlement of transactions, as well as monitoring compliance with the market's own rules and with other legal obligations such as the prohibition of market abuse and the provision of extra-judicial dispute settlement mechanisms. This is cost-effective and helps safeguard the operational integrity of the auctions. The conflict of interest rules of regulated markets would require the auctioneer to be independent of the auction platform, its owners or its market operator so as not to undermine the sound functioning of the regulated market. Moreover, many potential participants in the auctions will already be either members of, or participants, in the various regulated markets active on the secondary market.
- (31) Under Directive 2004/39/EC, regulated markets and their market operators are authorised and supervised by the competent national authorities in the Member State where the regulated market or its market operator are either registered or situated (i.e. the home Member State). Without prejudice to any relevant provisions of Directive 2003/6/EC, notably any criminal sanctions provided for in national legislation on market abuse, the law applicable to regulated markets is the public law of the home Member State. Thus, they are subject to the jurisdiction of the administrative courts in the home Member State, as determined under national law. This regulatory framework applies to trading, as opposed to auctioning, and only to financial instruments, not to spot products. Therefore, it is appropriate for reasons of legal certainty for this Regulation to provide for the home Member State of the regulated market being



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appointed as the auction platform to ensure that its national law extends the relevant parts of the aforementioned regulatory framework to the auctions, being conducted by the auction platform coming under its jurisdiction. In addition, this Regulation should require the auction platform to provide for extra-judicial dispute resolution. Furthermore, the relevant Member State should also provide for the right to appeal decisions of the extra-judicial dispute resolution mechanism, regardless of whether the auctioned product is a financial instrument or a spot contract.

- (32) Competition between different potential auction platforms must be ensured by the competitive procurement process for the appointment of the auction platform where required by either Union or national procurement law. The auction platform should be connected to at least one clearing system or settlement system. More than one clearing system or settlement system may connect to the auction platform. The appointment of the common auction platform should be for a limited period of maximum five years. The appointment of opt-out auction platforms should be for a limited period of maximum three years renewable for another two years during which the arrangements governing all auction platforms should be reviewed. Providing for a period of three years for the opt-out auction platform is designed to ensure a minimum term of appointment for the opt-out platform whilst allowing the appointing Member State to join the common platform if it chooses to do so after the three year period has elapsed, without prejudice to the ability of the appointing Member State to renew the appointment of the opt-out platform for a further two years pending the outcome of the review by the Commission. Upon expiry of each appointment period there should be a new competitive procurement process where a procurement process is required by either Union or national procurement law. Any impact on the secondary market resulting from the selection of a common auction platform to carry out the auctions is expected to be limited, as only allowances with delivery within five days at the latest should be auctioned.
- (33) The conduct of the auctions, the establishment and management of the auction calendar and various other tasks relating to the auctions, such as maintaining an up-to-date website accessible throughout the Union, require joint action by the Member States and the Commission, within the meaning of the third subparagraph of Article 91(1) of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities<sup>(7)</sup> (the Financial Regulation). The need for such joint action is derived from the Union-wide ambit of the emissions trading scheme, the overarching policy objectives of the review of Directive 2003/87/EC, and the fact that the Commission is directly responsible under Directive 2003/87/EC for the detailed implementation of a number of features of the emissions trading scheme which have a direct impact in particular on the auction calendar and on the monitoring of the auctions. Therefore, this Regulation should provide for the competitive procurement process for the appointment of the common auction platform and the auction monitor to be carried out through a joint procurement by the Commission and the Member States within the meaning of Article 125c of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No

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1605/2002 on the Financial Regulation applicable to the general budget of the European Communities<sup>(8)</sup>. Article 125c of Regulation (EC, Euratom) No 2342/2002 allows for the use of the procurement rules applicable to the Commission to a joint procurement between the Member States and the Commission. Given the Union-wide ambit of the procurement, it is appropriate to apply, to the relevant extent, the procurement rules of the Financial Regulation and Regulation (EC, Euratom) No 2342/2002 to the joint procurement process. This Regulation should specify the auctioning services to be procured by Member States and the technical support services to be procured by the Commission, in particular with respect to potential decisions on completion of incomplete Annexes to this Regulation, the appropriate frequency of the auctions, on the coordination of the auction calendars of the various auction platforms, on the imposition of a maximum bid-size, and any amendment to this Regulation, in particular as regards linkage to other schemes and services to foster a proper understanding of the auctioning rules outside the Union. It is appropriate for the Commission to procure such services from the common auction platform with the most experience in conducting auctions on behalf of more than one Member State. This does not prejudice any consultation of other auction platforms or other stakeholders.

- (34) The auction platforms should be procured through an open, transparent and competitive selection procedure unless the appointment of the auction platform by a Member State not participating in the joint action is not subject to procurement rules under both Union and national procurement law. In appointing the auction platforms and the clearing system or settlement system connected to them, account should be taken of the solutions offered by candidates to provide for cost-efficiency, full, fair and equitable access to bid in the auctions for small and medium-sized enterprises and access for small emitters, and robust auction supervision including the provision of an extra-judicial dispute resolution mechanism. The auction platform auctioning forwards or futures may, by way of exception, be procured on the basis that it may apply the access provisions, payment and delivery rules and market supervision rules applicable on the secondary market. The specific procedures to be followed for the procurement of the common auction platform should be specified in an agreement agreed between the Commission and Member States, in which the practical modalities for the evaluation of the requests for participation or the tenders and the award of the contract, as well as the law applicable to the contract and the competent court for hearing disputes should be set out as required by Article 125c of Regulation (EC, Euratom) No 2342/2002.
- (35) Subject to any applicable public procurement rules, including those concerning the avoidance of conflicts of interest and maintaining confidentiality, Member States not participating in the joint action to procure the common auction platform may be given observer status in whole or in part to the joint procurement process upon terms and conditions agreed between the Member States participating in the joint action and the Commission, as set out in the joint procurement agreement. Such access could be desirable to facilitate convergence between the opt-out auction platforms and the common auction platform with respect to aspects of the auction process that are not fully harmonised in this Regulation.

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- (36) It is appropriate that Member States that decide not to participate in a joint action for the appointment of the common auction platform but decide to appoint their own auction platform should inform the Commission of their decision within a relatively short period following the entry into force of this Regulation. In addition, it is necessary for the Commission to assess whether Member States appointing their own auction platform take the necessary measures to ensure that the auction process satisfies the provisions of this Regulation as well as the objectives of Article 10(4) of Directive 2003/87/EC. Furthermore, it is necessary for the Commission to coordinate the detailed auction calendars proposed by auction platforms other than the common auction platform with the auction calendars proposed by the common auction platform. Once the Commission has conducted its assessment for all opt-out auction platforms, it should list such auction platforms, their appointing Member States and any applicable conditions or obligations, including any conditions or obligations relating to their respective auction calendars in an Annex to this Regulation. Such listing would not constitute endorsement by the Commission of the compliance of the appointing Member State with any procurement rules applicable to the appointment of their chosen auction platform.
- (37) Article 10(3) of Directive 2003/87/EC provides that Member States determine the use of revenues generated from the auctioning of allowances. For the avoidance of any doubt, this Regulation should provide for the transfer of the auction proceeds directly to the auctioneer appointed by each Member State.
- (38) Given that the auctioning of allowances consists of their primary issuance into the secondary market instead of allocating them directly to operators and aircraft operators free of charge, it is inappropriate for the clearing system(s) or settlement system(s) to be bound by any obligations of specific performance of the delivery of allowances to successful bidders or their successors in title in the event of any failure in delivery, outside its control. Thus, this Regulation should provide that the only remedies available to successful bidders or their successors in title in the event of any failure to deliver auctioned allowances should be to accept deferred delivery. However, it is important to allow for auctioned allowances that are not delivered due to failure of payment in full to be auctioned in forthcoming auctions organised by the same auction platform.
- (39) It is not appropriate for Member States to have to deposit collateral other than the allowances themselves when auctioning, since the Member States' only commitments relate to the delivery of allowances. Thus, this Regulation should provide that the only obligations of Member States when auctioning two-day spot or five-day futures as defined in this Regulation consist of pre-depositing allowances being auctioned into an escrow account held in the Union registry by the clearing system or settlement system acting as custodian.
- (40) However, it is necessary for an auction platform, including any clearing system or settlement system connected to it to implement adequate collateral and any other risk management processes necessary to ensure that auctioneers receive full payment for the allowances auctioned at the auction clearing price regardless of any payment default by a successful bidder or its successor in title.

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- (41) For cost-efficiency reasons, successful bidders should be able to trade the allowances they have been allocated in the auction already before these allowances are delivered. An exception to this requirement of tradability can only be made when the allowances are delivered within two trading days after the auction. As a corollary, this Regulation provides for the option of accepting payment from and making delivery to a successor in title of a successful bidder, instead of the successful bidder itself. However, this option should not allow for circumvention of the requirements for eligibility to apply to bid in the auctions.
- (42) It is appropriate for the structure and level of fees applied by auction platforms and the clearing system or settlement system connected to them to be no less favourable than comparable fees and conditions applied to transactions on the secondary market. In the interests of transparency, all fees and conditions should be comprehensible, itemised and publicly available. As a general rule, the costs of the auction process should be borne by the fees paid by the bidders as set out in the contract appointing the auction platform. However, it is important for the procurement of a cost-effective common auction platform for Member States to participate in the joint action from the outset. For this reason, it is appropriate that Member States that participating in the joint action at a later stage may be required to bear their own costs and for these amounts to be deducted from the costs otherwise borne by bidders. Such provisions should, however, not disadvantage Member States wishing to participate in the joint action following the expiry of the appointment of an opt-out platform. Neither should Member States be disadvantaged when they temporarily participate in the joint action due to the absence of listing of a notified opt-out platform. The auctioneer should pay only for access to the auction platform, if anything, but the costs of the clearing and settlement system, if any, should be borne by the bidders as provided for under the general rule.
- (43) Nevertheless, it is appropriate to provide for the costs of the auction monitor to be borne by the Member States and to be deducted from the auction proceeds. Furthermore, it is appropriate for the contract appointing the auction monitor to distinguish between costs of the auction monitor which vary primarily according to the number of auctions and all other costs. The determination of the precise delineation between these costs should be left to the joint procurement process.
- (44) An impartial auction monitor should be appointed to monitor and report on compliance of the auction process with the objectives of Article 10(4) of Directive 2003/87/EC, on the compliance with the provisions of this Regulation, and on any evidence of anti-competitive behaviour, or market abuse. The monitoring of the auctions requires joint action by Member States and the Commission, as for auctions, and, therefore, a joint procurement is appropriate. The auction platforms, the auctioneers and the competent national authorities responsible for supervising the auction platform, investment firms or credit institutions or other persons authorised to bid on behalf of others participating in the auctions or for the investigation and prosecution of market abuse, should be required to cooperate with the auction monitor in fulfilling its functions.
- (45) To ensure the auction monitor's impartiality, the requirements for appointing the auction monitor should take account of candidates with the least risk of conflict of interest or

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- market abuse having regard, in particular, to their activities on the secondary market, if any, and their internal processes and procedures to mitigate the risk of conflict of interest or market abuse, without affecting their ability to fulfil their functions, in a timely manner, in accordance with the highest professional and quality standards.
- (46) Anti-competitive behaviour and market abuse is incompatible with the principles of openness, transparency, harmonisation and non-discrimination which underpin this Regulation. Therefore, this Regulation should include appropriate provisions to mitigate the risk of such behaviour in auctions. A common auction platform, a simple auction design, a relatively high frequency, random resolution of tied-bids, adequate access to the auctions, equal information disclosure and transparency of rules all help to mitigate the risk of market abuse. Financial instruments as a means for auctioning allowances enable the auctioneer and bidders alike to benefit from the protections available to them within the context of the regulatory framework applicable to financial markets. This Regulation should provide rules similar to those applicable to financial instruments in order to mitigate risk of market abuse in case the auctioned product is not a financial instrument. An impartial auction monitor should assess the entire auction process, including the auctions themselves and the implementation of the rules applicable to these.
- (47) Moreover, it is essential to ensure the auctioneer's integrity. Therefore, when appointing the auctioneer, Member States should take account of candidates with the least risk of conflict of interest or market abuse having regard in particular to their activities on the secondary market, if any, and their internal processes and procedures to mitigate the risk of conflict of interest or market abuse, without affecting their ability to fulfil their functions, in a timely manner, in accordance with the highest professional and quality standards. A corollary of this requirement is for Member States to be expressly prohibited from sharing any inside information regarding the auctions with their auctioneer. Contravention of this prohibition should be subject to effective, proportionate and dissuasive sanctions.
- (48) In addition, it is desirable to provide for the auction platform to monitor the behaviour of bidders and to notify the competent national authorities in the event of market abuse, money laundering and terrorist financing, in line with the reporting obligations laid down in Directive 2003/6/EC and by applying the reporting obligations laid down in Directive 2005/60/EC.
- (49) When applying the national measures transposing, to the relevant extent, Titles III and IV of Directive 2004/39/EC and Directive 2003/6/EC competent authorities of the Member States concerned should give due regard to the corresponding provisions of Union measures implementing those Directives.
- (50) Moreover, it is desirable for this Regulation to provide for the option of imposing a maximum limit on what a single bidder can bid for as a share of the total volume of allowances to be auctioned in individual auctions or over a given calendar year, or any other appropriate remedial measures. In view of the potential administrative burden that this option could generate, the option should only be activated after the competent national authorities have been notified of any market abuse, money laundering and

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terrorist financing, and have decided not to act, provided that the need for its activation and its effectiveness are demonstrated. Activation of this option should be subject to obtaining the Commission's prior opinion thereon. Before giving its opinion, the Commission should consult the Member States and the auction monitor on the proposal made by the auction platform. The Commission's own assessment of whether the market for emissions allowances is sufficiently protected from market abuse pursuant to Article 12(1a) of Directive 2003/87/EC will also be relevant to its opinion.

- (51) It is also appropriate that other persons authorised by Member States to bid on behalf of clients of their main business abide by the conduct rules provided for in this Regulation to ensure that their clients are adequately protected.
- (52) It is necessary for this Regulation to provide for the language regime applicable to any auction platform, in a way that ensures transparency and balances the objective of non-discriminatory access to the auctions whilst providing for the most cost-efficient language regime. Documentation not published in the *Official Journal of the European Union* should be published in a language customary in the sphere of international finance, namely English. The use of a language customary in the sphere of international finance has already been provided for in Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC<sup>(9)</sup>.
- (53) Member States may provide, at their own cost, for the translation of all documentation into their national official language(s). Where a Member State chooses to do so, opt-out platforms should also translate all documentation relating to their own auction platform into the language(s) of the Member State in question, at the cost of the Member State that has appointed the opt-out platform concerned. As a corollary, the auction platforms should consequently be able to handle all oral and written communications from applicants for admission to bid, persons admitted to bid or bidders bidding in an auction, in any language where a Member State has provided for a translation at its own cost, if requested to do so by such persons. The auction platforms cannot charge such persons for the additional cost of doing so. Instead, these costs should be borne equally by all bidders on the auction platform concerned to ensure equal access to the auctions throughout the Union.
- (54) In view of legal certainty and transparency, this Regulation should contain detailed provisions on other aspects of auctioning such as publication, announcement and notification of the auction results, protection of confidential information, correction of errors in any payment or allowance transfers made and collateral given or released under this Regulation, right to appeal the decisions of the auction platform, and entry into force.
- (55) For the purposes of this Regulation, investment firms submitting bids relating to financial instruments on their own account or on behalf of clients should be considered to be performing an investment service or activity.
- (56) This Regulation does not prejudice the Commission's examination pursuant to Article 12(1a) of Directive 2003/87/EC of whether the market for emission allowances is

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sufficiently protected from market abuse, nor any proposals the Commission may bring forward to ensure such protection. This Regulation aims at ensuring that trading conditions are fair and orderly pending the outcome of the Commission's examination.

- (57) This Regulation is without prejudice to the application of Articles 107 and 108 of the Treaty, for instance in the context of arrangements for ensuring fair, full and equitable access for small and medium-sized enterprises covered by the Union's emissions trading scheme and access to small emitters.
- (58) This Regulation is without prejudice to the application of any applicable internal market rules.
- (59) This Regulation respects the fundamental rights and observes the principles recognised, in particular, by the Charter of Fundamental Rights of the European Union, and in particular by Article 11 thereof, and Article 10 of the European Convention on Human Rights. In this regard, this Regulation does not in any way prevent Member States from applying their constitutional rules relating to freedom of the press and freedom of expression in the media.
- (60) In order to ensure predictable and timely auctions, this Regulation should enter into force as a matter of urgency.
- (61) The measures provided for in this Regulation are in accordance with the opinion of the Committee referred to in Article 23(1) of Directive 2003/87/EC,

HAS ADOPTED THIS REGULATION:

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- (1) OJ L 275, 25.10.2003, p. 32.
- (2) OJ L 8, 13.1.2009, p. 3.
- (3) OJ L 140, 5.6.2009, p. 63.
- (4) OJ L 309, 25.11.2005, p. 15.
- (5) OJ L 145, 30.4.2004, p. 1.
- (6) OJ L 96, 12.4.2003, p. 16.
- (7) OJ L 248, 16.9.2002, p. 1.
- (8) OJ L 357, 31.12.2002, p. 1.
- (9) OJ L 345, 31.12.2003, p. 64.



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