

**Article 27 of the Revised ETS Directive (2009/29/EC)**  
**Exclusion of small installations and hospitals subject to equivalent measures**

1. The Revised ETS Directive aims to improve and extend the ETS and to provide for a more efficient, more harmonised and fairer system. In order to increase the cost effectiveness of the EU ETS for small installations, the Directive gives Member States discretion to exclude small installations and hospitals from the EU ETS from 1 January 2013 provided that specific criteria and certain conditions are complied with.
2. The purpose of Article 27 is to reduce the administrative burden on small installations while ensuring that the environmental goals of the EU ETS are preserved. The list of installations to be excluded is required to be submitted to the European Commission for approval before 30 September 2011 at the latest.

**Article 27 and its transposition**

3. Recital 11 of the Revised ETS Directive states that *"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."*
4. Article 27 of the Directive specifically deals with the exclusion of small installations subject to equivalent measures and it provides that Member States may exclude certain installations from the ETS where those installations meet specific criteria and where the Member State complies with a number of conditions. Regulation 5 of the European Communities (Greenhouse Gas Emissions Trading) (Amendment) Regulations 2010 (S.I. No. 161 of 2010) transposed Article 27 into Irish law.
5. Regulation 5 provides that the EPA, with the approval of the Minister for the Environment, Heritage and Local Government, and following consultation with the operator, may exclude from the EU ETS an installation which meets specific criteria and where the EPA complies with certain conditions. However, it should be noted that Article 27 is a discretionary provision and as such, if Ireland wants to invoke Regulation 5 and submit to the Commission the exclusion of an installation, it will necessitate primary legislation. This is because where a Directive leaves a matter of principle or policy to be determined by a national authority, such matter requires implementation by means of an Act of the Oireachtas<sup>1</sup>. Such primary legislation is required to be completed and notified to the Commission in support of any exclusion from the list. It should also be noted that the ultimate national decision with respect to any exclusion will rest with the Government, because it will be up to the Government to

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<sup>1</sup> Meagher v. Minister for Agriculture [1994]

decide on the introduction of the necessary primary legislation to invoke the discretionary provision.

### **Eligibility Criteria**

6. In order to be considered eligible to be excluded from the EU ETS under Regulation 5, an installation is required to meet the following criteria:
  - the installation should have reported to the EPA emissions of less than 25,000 tonnes of CO<sub>2</sub> equivalent in each of the years 2008, 2009 and 2010; and such emissions should exclude emissions from biomass;
  - where the installation carries out combustion activities (as listed in their permit), the rated thermal input capacity is below 35 MW; this threshold is applicable and must be met in each of the years 2008, 2009 and 2010; and
  - the installation is subject to measures that will achieve an equivalent contribution to emission reductions.
7. Hospitals may be excluded irrespective of the thresholds for emissions and thermal capacity. As such, a hospital may be eligible to be excluded from the EU ETS under Regulation 5 if it is subject to measures that will achieve an equivalent contribution to emission reductions.
8. DG Climate Action of the Commission has advised that the text of Article 27 should be read as follows: The combined threshold (emissions and thermal capacity) applies where the activity at the installation is combustion of fuels only, and both thresholds (25,000 tonnes of CO<sub>2</sub> equivalent and 35 MW) must be met in each of the 3 years; and only the emission threshold is applicable if there is an activity other than combustion of fuels.

### **Reintroduction to the EU ETS**

9. Where an installation is successful in being excluded from the EU ETS, that installation will be reintroduced into the scheme only where emissions exceed 25,000 tonnes of CO<sub>2</sub> equivalent (excluding emissions from biomass), in any one calendar year or where the equivalent measure applying is no longer in place.
10. It is noted that the Directive does not provide for the reintroduction of any installation where the 35 MW threshold is exceeded; the emissions threshold has to be exceeded to facilitate the reintroduction of an installation.
11. The Directive does not provide for any other circumstances whereby an installation could be considered to be reintroduced into the scheme.

### **EPA Obligations**

12. The exclusion of an installation under Regulation 5 may be considered provided that the EPA complies with the following conditions:
  - the EPA should notify the Commission of the proposed exclusion of an installation before or on 30 September 2011 (i.e. when the EPA are publishing and submitting the list of installations under Regulation 4 of the above-mentioned Regulations);
  - the EPA should specify the equivalent measures applying to the installation that will achieve an equivalent contribution to emission reductions;

- the EPA should confirm that monitoring arrangements are in place to assess whether the installation is continuing to meet the emissions thresholds;
  - the EPA should confirm that where an installation fails to meet the thresholds or the equivalent measures are no longer in place that the installation will be reintroduced into the EU ETS; and
  - the EPA should publish the information for public comment.
13. In order for the EPA to comply with the above conditions, the operator of an installation or hospital being considered for exclusion would be required to provide certain information to the EPA.

### **Eligible Installations**

14. Based on verified emissions for 2008 and 2009 and thermal input capacity data currently stated in GHG permits submitted to the EPA, **22** manufacturing installations and **3** hospitals could be eligible to be excluded from the EU ETS under Regulation 5, details are outlined in Appendix 1. It would be necessary to obtain verified emissions for 2010 and thermal input capacity data (where applicable) for each year 2008-2010 to confirm these potentially eligible installations. The final list of eligible installations should be available shortly. (Thermal input capacity is only applicable for combustion installations.) These installations represent 24% of the number of installations administered by the EPA and 0.74% of Ireland's ETS emissions. It may be the case that some of these installations and hospitals may not be interested in being excluded from the EU ETS.

### **Equivalent Measures**

15. Article 27 of the Directive refers to measures that will achieve an equivalent contribution to emission reductions, however, it does not elaborate on what constitutes such measures. Recital 11 makes reference to taxation and the Commission's impact assessment on the then proposed Directive referred to a "*CO<sub>2</sub> tax might be preferable to the EU ETS in the case of small emitters excluded from the EU ETS*".
16. It is also noted that in the Commission's Communication, *Analysis of options to move beyond 20% greenhouse gas emission reductions and assessing the risk of carbon leakage*, published in May 2010, the Commission considered that "*the introduction of taxes that target CO<sub>2</sub> emissions in sectors not covered by the ETS represents a straightforward market-based instrument to incentivise lower emissions at national or European level*". It stated that such a carbon tax "*could make an important contribution to meet stepped up targets*". It would appear that the Commission supports carbon tax as an emission reduction measure and it has recently signalled a proposed EU-wide carbon tax as part of the revision of the 2003 Energy Taxation Directive.
17. The EU ETS as currently designed will deliver a 21% reduction in emissions by 2020 compared to 2005 levels. Similar levels of ambition as those of the EU ETS may be required from excluded installations in order to meet the Directive's equivalence test. Since the cap for installations in ETS over the period 2013-2020 reduces by 1.74% per annum it could be argued that the installations being excluded would have to demonstrate that they will produce an equivalent average annual reduction in that period.

18. The Commission has recently clarified that the EU ETS cap guarantees the achievement of the environmental objectives and any other proposed measure should guarantee that. It considers that the equivalent measures should compensate for not being in the EU ETS. It regards that *"measures that would also apply to an installation in addition to the EU ETS if it was not excluded cannot qualify as equivalent measures"*.
19. In Ireland's case, the carbon tax could be considered in general as an equivalent measure that could achieve an equivalent contribution to emission reductions. Other carbon reduction programmes in the energy efficiency area, such as the energy standard/energy agreements programme/negotiated energy agreements, facilitated by the SEAI may also be considered as an equivalent measure. A domestic trading market may be considered also as a potential equivalent measure and research into the development of such a market is currently being sponsored by the EPA. However, for each of these measures, the initial question is whether these could be deemed to be "equivalent measures" having regard to the Commission's clarification on this issue. The only measure, currently in existence in Ireland that might meet the Commission's test is the carbon tax. It is noted that some aspects of the carbon tax are applicable to those installations within the EU ETS, however those aspects are required to accommodate provisions of the Energy Taxation Directive and Commission Decisions on State Aids. The level of the Irish carbon tax will need to be evaluated by the Commission to determine its ultimate suitability. The Commission may also seek information on the way the carbon tax is enforced and the legislation underpinning it.
20. As regards the equivalent contribution, the Commission considers that the installations being excluded will need to demonstrate at national level (collectively) a reduction of 1.74% per annum. This is because the ETS cap will need to be adjusted to take account of the exclusion of the small installations and there needs to be synchronisation with the Effort Sharing Decision national targets so that ultimately the ETS cap and the Effort Sharing Decision national targets add up to the 20% reduction to be achieved by 2020 (Climate Energy Package 2008 refers). The Commission also acknowledge that all installations do not reduce emissions by a uniform amount. As such, in Ireland's case, we need to consider how much emission reductions will be achieved by those installations seeking to be excluded using the carbon tax as the equivalent measure.

#### **Issues for Installations and Hospitals**

21. Industrial installations and hospitals need to consider whether exclusion from the EU ETS would be in their financial interest, and if their administrative burden would be reduced. Exclusion could include some reduction in an operator's administration costs including costs associated with: monitoring, verifying and reporting emissions; understanding the scheme's rules and regulations including the purchase, sale and registering of allowances; and procedures and systems. However, some administration costs would remain even if an installation or hospital was excluded because monitoring and verification arrangements would be required for those installations where an emissions threshold applies and for the alternative to the EU ETS.

22. The Commission has recently clarified that in relation to emissions, the monitoring, reporting and verification arrangements should be the same as before the exclusion. In relation to equivalent measures, the Commission considers that additional monitoring, reporting and verification may have to be introduced by Member States. While the Directive does provide for simplified monitoring, reporting and verification, the Commission feels that there may not be much scope for further simplification.
23. The Commission also considers that to ensure that monitoring and reporting arrangements still apply and to avoid any administrative complexities when reintroduced, the permitting arrangements should continue. As such, installations being excluded should continue to hold a permit. The registry requirements are not entirely clear but it would appear that operator holding accounts will continue to be required so as to facilitate the recording of verified emissions.
24. Remaining within the EU ETS may be more cost effective for some installations and hospitals because the costs of compliance may be lower depending on the investment that operators have already made through their participation in the scheme, the free allocation, if any that such installations might receive in the third trading period, the cost of purchasing allowances to offset emissions, and the costs associated with the alternative equivalent measures. It is also noted that these installations are all entitled to some form of free allocation on a sliding scale from 80% to 30% of a benchmark of some sort. Some of them may be covered by carbon leakage and get 100% of a benchmark. The extent of the free allocation that the installations and hospitals will receive in the third trading period should now be clear in view of the recent agreement by the Climate Change Committee of the Commission's Free Allocation Rules. It is expected that these Rules will be adopted by the Council and the European Parliament, and published in the Official Journal in April 2011.
25. Rather than having to invest in abatement measures, operators of installations and hospitals may choose to purchase allowances so as to meet their EU ETS obligations, or if they are being excluded, they may choose to pay the carbon tax. Such operators would have a better understanding of the cost and resource implications of participation in the EU ETS and in the equivalent measures i.e. the carbon tax.
26. **It would seem reasonable to identify those installations and hospitals that would be interested in being excluded from the EU ETS, and to identify the extent of the emission reduction that would be achieved by the carbon tax at its current level (account would need to be made of the Energy Taxation Directive aspect referred to earlier). It is considered that the operators of such installations and hospitals are best placed to provide information on the extent of the emission reductions as the EPA and the Government would not be privy to the choices that such operators will make in the future. And such information will be necessary to inform the consideration by the EPA and Government on the exclusion of any installation and hospital.**

#### **Issues for the EPA**

27. As identified in paragraph 14 above, excluding 22 manufacturing installations and 3 hospitals from the EU ETS would represent 0.74% of Ireland's ETS emissions and 24% of the

installations being administrated by the EPA. It would appear that the administrative burden on the EPA will not be reduced greatly because of the continuing need for permitting, monitoring, reporting and verification.

28. The removal of such emissions from Ireland's ETS sector would mean an increase of approximately 0.3% in the level of emissions in the non-ETS sector. However, it is considered that such increase would be minor and would not cause any significant difficulties in this regard. The Effort Sharing Decision should accommodate such emissions.
29. In order to satisfy the Commission, the EPA would be required to have details of the equivalent measures applying to the installations (i.e. the level of the carbon tax) that would achieve an equivalent contribution to emission reductions and the extent of such emission reduction by each installation.
30. Depending on the manufacturing installations and hospitals being excluded from the EU ETS, a further issue may arise in relation to competitiveness and whether there is potential for any competitive distortions arising from the exclusion of an installation while other similar installations may remain within the EU ETS.

### **Next Steps**

31. If installations are to be considered for exclusion from the EU ETS, the Commission is required to be notified before September 2011 and as such, primary legislation would need to be enacted before Summer 2011 to provide for this. However, such legislation would not be progressed unless the case exists for the exclusion of installations from the EU ETS and Government approval would be required for this.
32. As outlined in the paragraphs above and in order to identify if there is a case to exclude installations from the EU ETS, it is proposed that the following steps should be undertaken:
  - (i) Identify those manufacturing installations and hospitals that would be interested in being excluded from the EU ETS.
  - (ii) Identify the extent of the emission reductions that they would achieve by the carbon tax at its current level and taking account of the Energy Taxation Directive aspect.
  - (iii) Determine whether emission reductions in the order of 1.74% per annum will be achieved on a national basis by these installations.

Climate Policy Section  
Department of the Environment,  
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Environmental Protection Agency  
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## **Appendix 1**

### **List of Installations and Hospitals that could be eligible to be excluded from the EU ETS based on verified emissions for 2008 and 2009 and thermal capacity data submitted to the EPA**

Allergan Pharmaceuticals Ireland  
Bristol-Myers Squibb Cruiserath  
CBIL Manufacturing Facility  
Elan  
Farragh Proteins  
Finsa Forest Products Ltd  
Genzyme Waterford Facility  
Janssen Pharmaceutical Ltd.  
Killeshandra Site  
Lagan Brick (Kingscourt Brick)  
Lagan Brick - The Swan  
Mallinckrodt Medical Imaging Ireland  
Novartis Ringaskiddy Limited  
NUTRICIA MACROOM  
Pfizer Ireland Pharmaceuticals (Dublin Sterile Operations)  
Pfizer Ireland Pharmaceuticals, Little Island  
Premier Proteins (2000) Ltd.  
Schering Plough (Avondale) Company  
Slaney Proteins  
St. Francis Abbey Brewery  
Swords Laboratories, Watery Lane, Swords  
United Fish Industries

Beaumont Hospital  
St. James's Hospital  
University College Hospital Galway