

***Legal aspects of climate change.  
In particular, emissions trading mechanisms  
(European and national perspective).  
- Italy -\****

**The legal discussion on the emission trading scheme.  
(2.a/10)**

In the Italian legal literature the debate on the emission trading scheme is just at the beginning. The Kyoto Protocol and, particularly, Directive 2003/87/CE have aroused a growing interest on the emission trading scheme and other market-based instruments, such as voluntary commitments, clean development mechanisms and joint implementation projects<sup>1</sup>.

Three basic aspects (almost implicitly) emerge in the legal discussion.

First, these new tools of environmental policy are seen as cost-effective ways to reduce the level of pollution at a lower cost in comparison with traditional means, but up to now, in the environmental protection policy they represent only further potential means to reduce pollution, near the still predominant command-and-control paradigm policy. Indeed, the Italian approach to the new flexible instruments of pollution reduction has not the polemic tone towards the command-and-control regulation which, on the contrary, can often be perceived in the American literature, that first has known an important legal debate on the emission trading scheme<sup>2</sup>. On this point, in my opinion, a reasonable approach has to take into account that - as finally the American experience

---

\*answers prepared by Stefano Grassi and Anna Gragnani (Dipartimento di diritto pubblico dell'Università di Firenze; O.Le.A., Osservatorio sulla legislazione per la tutela dell'ambiente del CERADI- LUISS Guido Carli).

<sup>1</sup> See for an overview, M. MONTINI, *Le politiche climatiche dopo Kyoto: interventi a livello nazionale e ricorso ai meccanismi di flessibilità*, in Riv. giur. amb., 1999, 133 ff.; G. ORSINI, *La prima sperimentazione pilota italiana di Emission Trading secondo il protocollo di Kyoto*, in Gazzetta Ambiente, 2000, 31 ff.; P. MENNA, *Gli strumenti attuativi della Convenzione sui Cambiamenti Climatici: il "Protocollo di Kyoto"*, in Gazzetta ambiente, 2001, 3 ff.; B. GEBERS, *Proposta per una direttiva che istituisce una disciplina sullo scambio di quote di emissione dei gas a effetto serra nella Comunità europea*, in Riv. giur. amb., 2002, 633 ff.; F. FERRUCCI, *L'industria petrolifera italiana e l'accordo di Kyoto*, in Gazzetta Ambiente, 2002, 13 ff.; V. JACOMETTI, *Rivalutazione dei strumenti proprietari a tutela dell'ambiente: <tradable pollution rights> e <emissions trading>*, in Riv. giur. amb., 2003, 275 ff.; B. POZZO, *La nuova direttiva (2003/87/CE) sullo scambio di quote di emissione: prime osservazioni*, in Riv. giur. amb., 2004, 11 ff.; V. DI MILLA, *La disciplina comunitaria per lo scambio di quote di emissioni dei gas a effetto serra*, in Dir. com. e degli scambi internazionali, 2004, 575 ff.; G. GOLINI, *Il sistema comunitario di scambio per le quote di emissioni*, in Ambiente, 2004, 137 ff.; F. RANGHIERI, *Meccanismi flessibili e strumenti di <carbon finance> nella politica italiana per i cambiamenti climatici*, in Ambiente, 2004, 1101 ff.; A. MARRONI, *Sette anni dopo Kyoto: i risultati della Nona Conferenza delle Parti (Cop9) della Convenzione quadro sui cambiamenti climatici (UNFCCC)*, in Riv. giur. amb., 2004, 323 ff.; M. DENTE, *Il lungo cammino dell'Italia verso Kyoto. La programmazione italiana in materia di politiche dei cambiamenti climatici*, in Riv. giur. amb., 2005, 59 ff.; V. JACOMETTI, *La direttiva <Linking>: il collegamento tra il sistema comunitario di scambio di quote di emissioni e i meccanismi flessibili del Protocollo di Kyoto*, in Riv. giur. amb., 2005, 43 ff.; C. LEONARDI, *Le emissioni di gas ad effetto serra nelle politiche delle Nazioni Unite e della Comunità Europea*, in Riv. giur. amb., 2005, 7 ff.; G. GOLINI, *<Emission trading>: provvedimenti modificativi ed attuativi*, in Ambiente, 2005, 231 ff.

<sup>2</sup> See among other important contributions, B. A. ACKERMAN, R. B. STEWART, *Reforming Environmental Law*, in *Stan. L. Rev.*, 1985, 1333; L. Heinzerling, *Selling Pollution, Forcing Democracy*, in *Stan. Env'tl. L.J.*, 1995, 300 ff.; R. B. STEWART, *The future of environmental regulation: United States environmental regulation: a failing paradigm*, in *J. L. & Com.*, 1996, 585 ff. For an overview, A. W. REITZE JR., *The legislative history of U.S. Air Pollution Control*, in *Hous. L. Rev.*, 1999, 679 ff.; D. H. COLE, P. Z. GROSSMAN, *When is command and control efficient? Institutions, technology, and the comparative efficiency of alternative regulatory regimes for environmental protection*, in *Wis. L. Rev.*, 1999, 887 ff.; L. THOMS, *A Comparative Analysis of International Regimes on Ozone and Climate Change with Implication for Regime Design*, in *Colum. J. Transnat'l L.*, 2003, 795 ff.

has attested – any emission trading scheme should be integrated into the “pre-existing superstructure”<sup>3</sup> of command-and-control regime and that, so far in actual fact even in the United States, emission trading could play an appreciable role, but not a leading one<sup>4</sup>. Thus, different instruments of environmental governance should coexist and should be harmonized<sup>5</sup>.

Second, although from an abstract point of view the emission trading model meets a general consensus, from a practical point of view, it is already clear that in our country there is much to do in order to realize preconditions required for a workable trade emission system. As the American experience attests, the system of marketable emission permits requires adequate legislation for administrative simplification and an efficient and transparent information system, moreover it complicates the problem of monitoring and certification. On this point it is meaningful that Italy has not yet fully implemented Directive 2003/87/EC.

Third, among the so called “Kyoto instruments”, the possibility to link different flexible tools, such as clean development mechanism, joint implementation and emission trading, gives the opportunity to integrate developing countries into a global environmental protection policy, but – as it has been noticed – the same opportunity presents also the risk of heavy weakening and substantial derogation of the pollution reduction goals of the trading emission system<sup>6</sup>. A fair use of these instruments requires indeed severe preconditions of transparency and a well organized monitoring system.

Besides, on this point it is worth to notice that the Italian allocation plan moves from the assumption that the development of joint implementation projects and clean development mechanisms has for our country a strategic importance<sup>7</sup>.

Apart from the just mentioned aspects, some crucial questions related to the emission trading scheme need still a close examination with reference to our legal and political system.

In our opinion, for instance, a closer investigation of the following issues could result useful to understand the exigencies of environmental governance, even beyond the particular aspects related to the European trading emission system:

- 1) a compared evaluation of command-and-control regulation and flexible instruments, such as the emission trading scheme, from the standpoint of compliance with democratic values;
- 2) a closer investigation of the concrete significance of the polluter pays principle through the perspective of tradable market permits;
- 3) the so called problem of “hot spots”, which can arise within a trading emission system, could open interesting perspectives to find reasonable settlements for the difficult question of division of power relating to the environmental protection policy in a federal or regional State.

### **Transposition of Directive 2003/87/EC.**

#### **(2.d)**

Italy missed the 31 December 2003 deadline, set for transposing of Directive 2003/87/EC into national law, (the national delay has been criticized on the major newspapers and by affected associations, but it has not received a great attention from the public opinion).

Afterwards, the Italian State has adopted some legislative provisions, administrative regulations and administrative measures to comply with the E.C. Directive, but Italy has not yet fully implemented it. Consequently the E.C. Commission has taken legal action over non transposition<sup>8</sup>. Meanwhile, in the proceeding of Directive 2003/87/EC implementation, the following steps have already been undertaken.

#### 1 - Legislative provisions.

---

<sup>3</sup> See A. W. WOLMAN, Effluent trading in the United States and in Australia, in *Great Plains Nat. Resources J.*, 2003, 1 ff.

<sup>4</sup> See among other contributions, T. W. MERILL, Symposium: Innovations in Environmental policy: Explaining Market Mechanisms, in *U. Ill. L. Rev.*, 2000, 275 ff.

<sup>5</sup> On this point see F. FERRUCCI, *L'industria petrolifera italiana e l'accordo di Kyoto*, cit., 16.

<sup>6</sup> See G. GOLINI, *Il sistema comunitario di scambio per le quote di emissioni*, 140.

<sup>7</sup> See the Italian National allocation plan, 3, in [www.minambiente.it](http://www.minambiente.it).

<sup>8</sup> See Press release 19 January 2004, at <http://www.europa.eu.int>.

On November 12th 2004, the Government issued *Decreto-legge* no. 273, (d.l. 273/2004)<sup>9</sup>, “*Disposizioni urgenti per l’applicazione della direttiva 2003/87/CE in materia di scambio di quote di emissione dei gas ad effetto serra nella Comunità europea*”, (“Urgent provisions for the implementation of Directive 2003/87 on greenhouse gases emission trading in the European Community”). Aim of this d.l. was first of all to avoid the paralysis of those activities emitting greenhouse gases that, according to article 4 of the Directive, from 1 January 2005 can not be undertaken unless their operators hold a permit issued by a competent authority. Thus, d.l. 273/2004 sets a few rules concerning the conditions for the issue of greenhouse gas emission permit<sup>10</sup> and identifies the General Director of environmental research and development of the Ministry of Environment and Soil Protection and the General Director for energy and mineral resources of the Ministry of Productive Activities, as the “competent authority” for the issue of greenhouse gas emission permits, provided in article 4 of the Directive<sup>11</sup>. D.l. 273/2004 also establishes that follow-up instructions concerning the issue of permit for greenhouse emission should be set in a decree of the Ministry of Environment and the Ministry of Productive Activities<sup>12</sup>.

Besides, d.l. 273 designates the Ministry of Environment as the “Competent Authority” provided in article 18 of Directive 2003/87/EC<sup>13</sup>.

Moreover, d. l. 273/2004 provides a few rules on data collection in order to develop the National allocation plan provided in article 11 of Directive 2003/87/EC<sup>14</sup>, and it establishes that follow-up instructions on this matter should be set in a decree of Ministry of Environment and Ministry of Productive Activities<sup>15</sup>.

Concerning the National allocation plan, d.l. 273/274 provides that the plan drawn by the Ministry of Environment and the Ministry of Productive Activities and notified to the E.C. Commission on July 15th 2004, (therefore subject to the E.C. Commission amendments and to the adjustments required as a consequence of the comments of the public), should be considered as the national allocation plan over the years 2005-2007<sup>16</sup>. On this point it is worth to notice that, on the basis of article 41 of our Constitution, planning affecting freedom of enterprise is reserved to Parliament legislation. Maybe, according to a substantial, and not merely formal meaning of this rule, a second parliamentary discussion and assessment of the National allocation plan should be appropriate, (on this point see also, in the following, article 3, law 316/2004)<sup>17</sup>.

As according to art. 77 of the Italian Constitution, legislative rules established by the Government in the form of *decreto-legge* are merely provisional and can be kept in force only if the Parliament confirms them in the way of “enactment in law”, the Government asked the Parliament the enactment of d.l. 273/2004. On December 30th the Parliament enacted d.l. 273/2004 by law no. 316/2004<sup>18</sup>. This law confirms the above illustrated provisions of d.l. 273 and introduces further rules concerning administrative penalties for the infringements of the national provisions adopted to implement Directive 2003/87/EC. Law 316/2004 also provides that the National allocation plan should be updated at latest on June 30th 2005 and that, as soon as it is revised, it will be notified to the Parliament for the advice of the competent Parliamentary Committees<sup>19</sup>. Moreover, according to law 316/2004, the Government is required to introduce each year, in the Document for economic

---

<sup>9</sup> See Decreto-legge 273/2004 in Italian Official Journal, 15 November 2004, no. 268.

<sup>10</sup> See article 1, d.l. 273/2004.

<sup>11</sup> See article 1, § 4, d.l. 273/2004.

<sup>12</sup> See article 1, §3, d.l. 273/2004.

<sup>13</sup> See article 3, d.l.273/2004.

<sup>14</sup> See article 2, d.l. 273/2004.

<sup>15</sup> See article 2, d.l. 273/2004.

<sup>16</sup> See article 3, d.l. 273/2004.

<sup>17</sup> The question is similar to that aroused in Germany, see C.-S. SCHWEER, B. LUDWIG, *Das erste nationale Zuteilungsplan für handelbare Emissionszertifikate*, in *DVBl*, 2004, 932 ff.

<sup>18</sup> See law 30 December 2004, n. 316 in the Italian Official Journal, 4 January 2005, no. 2.

<sup>19</sup> See article 3, § 2-ter, law 316/2004.

and financial planning, a report on the implementation of the Kyoto Protocol and its proposals concerning the necessity of integrations or amendments of the National allocation plan<sup>20</sup>.

Finally, in order to accomplish the proceeding of implementation of Directive 2003/87/EC and other EC directives, the Government has presented to the Parliament the legislative draft for the so called “Legge comunitaria 2004” (EC law 2004). On April 15th 2005, the law draft was approved. Concerning Directive 2003/87, the law voted by the Parliament delegates the Government to enact a legislative decree in the form of “Decreto legislativo”, (legislative decree). The most important principles which should guide the Government in the exercise of the delegated legislative power for the transposition of the EC Directive are the following ones: the efficiency of the national energy system and the competitiveness of Italian industrial system is preserved; the use of renewable energy sources is promoted; the principle of free competition is preserved; dissuasive penalties for the infringements of regulations concerning greenhouse gas emission trading should be provided; the publicity of these infringements and penalties is granted; the use of clean development mechanism and of joint implementation is developed; the National allocation plan has to be consistent with the national plan for greenhouse gases emission reduction and for greenhouse gases increasing absorption; for the years 2008-2012 the National allocation plan will be revised in the ways prescribed by the decision of December 19th 2002 of the Interdepartmental Committee for Economic Planning<sup>21</sup>.

#### Administrative regulations.

According to article 1 of d.l. 273/2004, enacted in law 316/2004, the Ministry of Environment and the Ministry of Productive Activities issued the Ministerial decree 16 November 2004, no. DEC/RAS/1715/2004, which provides detailed rules concerning the application for a greenhouse gas emissions permit. This decree was published at <http://www.minambiente.it> on November 17th 2004; a notice of the decree issue was given in the Official Journal 28 January 2005, no. 22.

According to article 2, d.l. 273/2004, the Ministry of Environment and the Ministry of Productive Activities issued the Ministerial decree 29 November 2004, no. DEC/RAS/1877/2004, which provides detailed instructions concerning the reporting of information required for the allocation of greenhouse gas emissions allowances over the years 2005-2007. This decree was published at <http://www.minambiente.it> on November 30th 2004; a notice of the decree was given in the Official Journal, 28 January 2005, no. 22.

#### Administrative measures.

The most important administrative measures referred to the implementation of Directive 2003/87/EC are those relating to the drafting of the National allocation plan; the permits for greenhouse gases emission and, within these activities, measures implementing the required access to information for the public and the rules concerning the National interpretation of the E.C. Decision 29 January 2004, establishing guidelines for the monitoring and reporting of greenhouse gas emission.

#### Permits for greenhouse gas emissions.

In the Official Journal 22 March 2005, no. 67, appears the notice that the Decrees of the Ministry of Environment and the Ministry of Production Activities providing greenhouse gases emissions permits have been published at <http://www.minambiente.it>. Actually these decrees were published at the just mentioned web address only later, exactly on March 30th 2005.

#### National interpretation of E.C. Commission Decision establishing guidelines for the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87/EC.

As it is stated in the interdepartmental decrees providing greenhouse gases emissions permits<sup>22</sup>, on February 14th 2005, the Ministry of Environment and the Ministry of Productive Activities approved a document providing the national interpretation of E.C. Commission Decision

---

<sup>20</sup> See article 3, § 2-ter, law 316/2004.

<sup>21</sup> Interdepartmental Committee for Economic Planning decision was published in the Italian Official Journal, 22 March 2002, no. 68.

<sup>22</sup> See article 3 of each above mentioned interdepartmental decree.

establishing guidelines for the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87/EC. The document was published at <http://www.minambiente.it>. The public could email its remarks relating to this document at [info-ET@minambiente.it](mailto:info-ET@minambiente.it), within March, 1st 2005.

### **The National allocation plan. (3. a/b/c/)**

The National allocation plan was concerted by the Ministry of Environment and the Ministry of Productive Activities.

The “Scheme of the National allocation plan” was laid down after a series of meetings with the most important concerned industries and industrial associations. Various industrial associations have played an important role in the activity of information of the Government<sup>23</sup>.

The starting point<sup>24</sup> for the drafting of the allocation plan was the National plan for reduction of greenhouse gases emissions, assessed by the Interdepartmental Committee for Economic Planning on December 19th 2002<sup>25</sup>. The just mentioned plan was drawn according to article 2 of law 1 June 2002, no. 120<sup>26</sup>, “Ratification and implementation of the Kyoto Protocol to the United Nation Convention on climate change, 11 December 1997”.

On April 20th 2004 the Scheme of the National allocation plan was published at the web page of the Ministry of Environment, <http://www.minambiente.it> and at the web page of the Ministry of Productive Activities<sup>27</sup>.

The public could email its comments on the National allocation plan to [EU-ETS.consultazioni@minambiente.it](mailto:EU-ETS.consultazioni@minambiente.it), from April 15th to May 14th. An announcement of the public consultation<sup>28</sup> was published on the most important national newspapers and at the web address [http://www.minambiente.it/Sito/news/pna\\_quote\\_ghg.asp](http://www.minambiente.it/Sito/news/pna_quote_ghg.asp). Goals of the public consultation were to inform the public on the decisions that had already been taken and to receive its advice and suggestions on the following questions: annual greenhouse gases emission growth for each sector of activity provided in Directive 2003/87/EC; criteria for allowances allocation for each installation; rules concerning new entrants and procedure to manage allowances allocated to closing installations; rules concerning allowances banking in the time frame from 2005 to 2007 and in the time frame from 2008 to 2012<sup>29</sup>.

The public was informed that the Scheme of the National allocation plan had been previously discussed with the affected industries.

On July 22th 2004, the National allocation plan was published at the web address of the Ministry of Environment, <http://www.minambiente.it><sup>30</sup>.

The public could submit its remarks within one month from the date of the plan publication<sup>31</sup>.

The National allocation plan was notified to the European Commission. Concerning the date of notification, d.l. 273/2004 and law 316/2004 indicate July 15th 2004, in the following document, “Integration of the national allocation plan”, the date of the same notification is indicated as July 21th 2004. The permits for greenhouse gases emissions issued by the decrees of the Ministry of Environment and the Ministry of Productive Activities of December 28th 2004, December 31th 2004 and January 3th 2005, indicate as date of the same notification July 15th 2004.

---

<sup>23</sup> See National allocation plan, 30, at <http://www.minambiente.it>; *Protocollo di Kyoto: la situazione italiana*, at <http://www.bvq.it>, referring to the role of the most important industrial associations.

<sup>24</sup> See the National allocation plan, 5-6.

<sup>25</sup> See the Decision of the Interdepartmental Committee for Economic Planning, 19 December 2004, no. 123/2002, published in the Italian Official Journal, 22 March 2002, no. 68.

<sup>26</sup> Article 2, law 120/2002 provides the National plan for reduction of greenhouse gases emissions, in order to implement the forthcoming E.C. decisions and rules relating to the Kyoto Protocol.

<sup>27</sup> Source [www.minambiente.it/Sito/news/pna-quote\\_ghg.asp](http://www.minambiente.it/Sito/news/pna-quote_ghg.asp).

<sup>28</sup> See the Italian National allocation plan, 30-31, at <http://www.minambiente.it>.

<sup>29</sup> Source [http://www.minambiente.it/Sito/news/pna\\_quote\\_ghg.asp](http://www.minambiente.it/Sito/news/pna_quote_ghg.asp).

<sup>30</sup> Source [www.minambiente.it/Sito/news/news2004.asp](http://www.minambiente.it/Sito/news/news2004.asp).

<sup>31</sup> Source Italian allocation plan, 31.

On February 24th 2005, the Integration of the national allocation plan and the related Explanatory report were notified to the European Commission.

The just mentioned documents were published at <http://www.minambiente.it>.

The public could email its comments on the integration documents to the Ministry at [info-ET@minambiente.it](mailto:info-ET@minambiente.it), by March 15th 2005.

As the Commission has declared, the European assessment of the Italian allocation plan is now ongoing<sup>32</sup>.

The National allocation plan was laid down according to the following basic criteria:

- competitiveness of the Italian industrial system and national energy security is ensured;
- the plan takes into the due account the result of the Italian energy efficiency policy of the last twenty years;
- emission credits relating to clean development mechanism and joint implementation are suitable to comply with the emission limits.

The National allocation plan, as it is explicitly stated in the document, was not drawn up on the basis of an up-to-date and detailed information<sup>33</sup>, consequently it will be revised as soon as new data are available<sup>34</sup>. On this point it is worth to notice that the Interdepartmental Committee is now revising the above mentioned National plan for reduction of greenhouse gases emissions. Moreover, up-to-date information will be collected as soon as transposition of Directive 2003/87/EC is accomplished. As it is provided in article 3, law 316/2004, the plan will be amended according to up-to-date information latest on June 30th 2005.

### **The National allocation plan and the role of the Regions in the greenhouse gases reduction policy.**

#### **(3.a/b)**

Italian Regions obviously can not exercise their own legislative and administrative powers beyond the regional territory, consequently only the central Government has the power to adopt the National allocation plan provided in article 9 Directive 2003/87/CE. However, since the plan affects legislative and administrative regional powers<sup>35</sup>, Regions take part in the proceeding of its approval. Exactly, article 3 of law 316/2004 provides that the National allocation plan notified on July 15th to the European Commission is the National allocation plan valid over the years 2005-2007, but it is subject to eventual integrations required by the European Commission and eventual amendments and integrations concerted by the *Conferenza unificata Stato-Regioni, Città e Autonomie Locali*<sup>36</sup>, which is a permanent conference of central State, regional and local delegates.

Moreover, delegates of the *Conferenza Stato-Regioni* are members of the Technical Committee for greenhouse gases emissions, which is a committee organized within the Interdepartmental Committee for Economic Planning. As above mentioned, the National plan for reduction of greenhouse gases emissions, assessed by the Interdepartmental Committee for Economic Planning, can be considered an important starting point for the drafting of the National allocation plan.

Referring to the greenhouse gases emission reduction policy from a more general perspective, it is then important to point out that some Regions have undertaken significant local actions such as the regional energy plans, (concerning the use of renewable energy sources),

---

<sup>32</sup> Source European Commission, press release 8 March 2005, at the web address [www.europa.eu.int](http://www.europa.eu.int).

<sup>33</sup> See the National allocation plan, p. 10.

<sup>34</sup> See the National allocation plan, p. 15.

<sup>35</sup> On this point it is worth to notice that, according to article 117 of the Italian Constitution, the central State has an exclusive legislative and administrative regulation power in the fields of environmental protection, civil law, setting of the essential standard of services referring to civil and social rights; coordination of state, regional and local statistical survey and coordination of state, regional and local information system; whereas in the field of energy, transport, scientific and technological research, Regions have the legislative power, except for the basic principles which is reserved to the central State. According to article 118 of the Italian Constitution the administrative power is allocated according to the subsidiarity principle.

<sup>36</sup> See Decreto legislativo, 28 August 1997, no. 281.

provided in article 5, law 1st January 1991, no. 10<sup>37</sup> and have shown ambitious goals, (see, for instance, the regional plan for *atmosphere protection* and reclamation of the Region Veneto<sup>38</sup>). In particular, relating to the emission trading scheme it is important to mention:

- the pilot-project *LIFE Environment <Des.Air>* of the Region Lombardia, that is an experimental emission trading system;

- Article 22 of Tuscany regional law, 24 February 2005, no. 39, concerning economic incentives relating to greenhouse gases emissions credits. Tuscany policy for greenhouse gases reduction moves on the direction of expanding the scope of implementation of Directive 2003/87/EC according with article 24 of the EC Directive which provides that from 2008, Member States may apply emission allowance trading to activities and installations and greenhouse gases which are not listed in the annex I of the same directive<sup>39</sup>.

### **The European Commission and the National allocation plan.**

#### **(3.d)**

In my opinion, the Commission can exercise its power only within three months from the date of the plan notification. Afterwards the plan is implicitly assessed. The suggested interpretation is coherent with the prescribed statement of reason, only for reject decisions and with the goal of an equal participation of Member States to the emission trading system. Indeed, as the consequence of the plan rejection is the interdiction to allocate and issue of greenhouse gases emissions allowances valid in the European trading system, this purpose would be frustrated if the Commission could exercise its power over different temporal limits (beyond the provided three months).

The Italian allocation plan notified to the European Commission on July 2004, did not contain the list of the installations covered by Directive 2003/87/EC with the quantities of allowances intended to be allocated to each one, as Annex III, 10 of the same Directive requires<sup>40</sup>. Consequently the Commission sent to Italy final written wordings, the so called "Reasoned Opinions"<sup>41</sup>. On February 25th, Italy notified the Integration to the National allocation plan and a related Explanatory report. According to article 9 of the E.C. Directive, Member States can not take decisions related to allocation and issue of allowances until the Commission assesses the amendments submitted by the Italian Government.

### **Article 10 Directive 2003/87/CE.**

#### **(3.e)**

In the starting stage the Italian State allocates allowances free of charge<sup>42</sup>.

### **Clean Development Mechanism and Joint Implementation.**

#### **(3.f/8)**

In order to fulfil commitments agreed under the Kyoto Protocol, clean development mechanisms and joint implementation projects have a crucial importance in the Italian strategy and a consistent weight in comparison with actual reduction of greenhouse gases emissions<sup>43</sup>. The Kyoto commitments are very ambitious for Italy. In our country greenhouse gases emissions have increased. On this point the governmental policy has been severely criticised by environmentalist associations, such as W.W.F.<sup>44</sup>, and by members of the opposition party, "D.S."<sup>45</sup>.

---

<sup>37</sup> See for example Region Liguria, Energy environmental plan 2 December 2003; Region Piemonte, Energy environmental plan, 3 February 2004; see also Provincia di Trento, Energy environmental plan, 3 October 2003, providing on the matter of emission trading. Regions shall adopt a regional energy plan on the basis of article of law 9 January 1991, no. 10.

<sup>38</sup> See the proposal for a regional plan for atmosphere protection and reclamation of the Region Veneto, 11 November 2004.

<sup>39</sup> See Communication to the Giunta Regionale 12 July 2004, at [www.regione.toscana.it](http://www.regione.toscana.it).

<sup>40</sup> See Integration to the National allocation plan, 28.

<sup>41</sup> See press release 18 January 2005, at <http://www.europa.eu.int>.

<sup>42</sup> See the Italian National allocation plan, 16.

<sup>43</sup> See the Italian National allocation plan, 3-6 and the above mentioned Decision of the Interdepartmental Committee for Economic Planning, 19 December 2004, no. 123/2002.

<sup>44</sup> See Commenti del WWF allo schema di piano nazionale di assegnazione dei permessi di emissione di gas serra, at <http://www.wwf.it/ambiente/dossier/osservazioninap.pdf>.

The use of clean development mechanisms is also provided in article 2, no. 3, law June 1st 2002, no. 120.

Italy has also founded the Italian Carbon fund, (ICF)<sup>46</sup>, to purchase greenhouse gases emission reduction credits from clean development mechanisms provided in the Kyoto Protocol. The sharers of the fund receive emission credits resulting from the clean development mechanisms provided in the portfolio, proportionally to their contribution.

Moreover, our country has undertaken contacts for implementing clean development mechanisms for example with China, North Africa Congo and the Balkans<sup>47</sup>.

#### **Article 11 (1) Directive 2003/87/EC.**

##### **(3.a)**

As above pointed out, Italy missed the deadline established for the notification of the National allocation plan. The integration of the National allocation plan, required by the European Commission, was notified only on February 25th 2005. The Commission has not yet assessed the Italian plan and can exercise its power within three months from notification. Consequently, according to article 11(1) Directive 2003/87/EC, Italy can not take any decision upon the total number of allowances and their allocation to the operator of each installation<sup>48</sup>.

Moreover it is worth to notice that, as it is expressly stated in the Explanatory Report, the allocation proposed in the Integration of the National allocation plan will be revised. So far, the Government has not yet all the required information for allowances allocation. For 71 installations the Government lacks the required data; for 1210 installations data are available; anyway, as it is stated in the Explanatory Report, the Government will verify again all the available data. Consequently the allocation plan notified to the European Commission is subject to some reassessments.

#### **Article 12 Directive 2003/87/EC.**

##### **(5.a/b/c)**

Italy has not yet implemented art. 12 Directive 2003/87/EC.

##### **(5.d/e)**

The term “allowance” is translated in the Italian version of Directive 2003/87/EC as “quota di emissioni” which is defined as “the right to emit...”. The concept is similar to the Spanish one: the right to emit something. The English and German versions are maybe more adequate in a perspective of environmental protection. Anyway I do not think that the expression used in the Spanish and in the Italian version of the EC Directive calls up *exactly* the idea of a (tradable) “pollution right”, as it is often used in the American legal literature. Perhaps, these expressions simply evoke the idea of the right to emit something, in the exercise of the freedom of enterprise, which is a right that meets some limits, for instance greenhouse gases emission limits.

##### **(5.f)**

In the Italian legal system, the basic idea of the trading of “lower limits” related to a right, in comparison with “the extension” of the limits originally imposed, is not new.

In the environmental law we can refer to the case of “Green Certificates” which are related to the duty of producing or buying (in the trading system of these certificates) a certain quantity of renewable source of energy<sup>49</sup>.

In civil and administrative law a similar scheme has been used for several years. We refer to the so called “cessione di cubatura”<sup>50</sup>, which is the trading of cubage related to the construction standards of a certain area, known in the American system as “transferable development rights”. The wide legal debate developed on the just mentioned trading system is very interesting, but I do

---

<sup>45</sup> See the Report of ISSI (Institute for the sustainable development, Italy), November 2004, at [www.issi.it/ISSI\\_Prot\\_Kyoto\\_04.pdf](http://www.issi.it/ISSI_Prot_Kyoto_04.pdf).

<sup>46</sup> See F. RANGHIERI, Italian carbon fund: strumenti alternativi di riduzione dei gas ad effetto serra, in *Ambiente*, 2004, 791 ff. and Cosa significa amministrare l'Italian Carbon Fund, in *Ambiente*, 2004, 893 ff.

<sup>47</sup> See information available at <http://www.minambiente.it>.

<sup>48</sup> See [http://www.minambiente.it/Sito/settori\\_azione/pia/att/pna\\_c02.asp](http://www.minambiente.it/Sito/settori_azione/pia/att/pna_c02.asp)

<sup>49</sup> See G. GOLINI, I certificati verdi: prime valutazioni e tendenze, in *Ambiente*, 2003, 1147 ff.

<sup>50</sup> See N. A. CIMMINO, La cessione di cubatura nel diritto civile, in *Riv. del Notariato*, 2003, 113 ff.



not believe that, from a dogmatic point of view, it could be relevant for the questions aroused by the greenhouse gases emission trading system, held that the EC rules on one hand resolve most of the problems discussed in the legal literature referring to the above mentioned similar schemes, on the other hand pose new questions.

**Monitoring, verification and penalties  
(6.a/b/c)**

As above mentioned, Italy has not yet fully implemented Directive 2003/87/EC. Anyway law 316/2004 provides some administrative penalties: 40 Euro for one tonne of carbon dioxide emitted without the prescribed permit; the same penalty is provided for untrue declarations concerning article 5, Directive 2003/87/EC<sup>51</sup>; 10 Euro for one tonne of carbon dioxide emitted by the operator which infringes the duties concerning data collection provided in article 2 of law 316/2004. In the same cases the installation is closed until the legislative provisions are not respected. Law 316/2004 provides that this provisions are in force as long as Directive is not fully implemented.

Moreover the interdepartmental decrees enacting greenhouse gases permit<sup>52</sup> provide the temporary suspension<sup>53</sup> of the emission permit in case of infringement of the rules concerning monitoring and information duties. They also provides rules concerning monitoring.

**Directive 2004/101/EC  
(8.a/b)**

Joint implementation projects and clean development mechanisms have aroused a growing interest in our country and their implementation has a crucial importance in the governmental strategy to comply with the Tokyo commitments. Anyway I think that Italy has still much to do to ensure the requirements of transparency and truthfulness in the implementation of all the flexible instruments provided in the Kyoto Protocol.

**Extension of the Greenhouse gases Emission trading scheme.  
(9)**

As the American experience has attested, the emission trading scheme may be a workable instrument of environmental protection in different areas, for instance referring to waste and water pollution. On this point we can mention the waste management plan of the Region Lombardia which proposes an experimental emission trading referred to waste pollution<sup>54</sup>.

---

<sup>51</sup> See article 2-*bis*.

<sup>52</sup> See, decrees of the Ministry of Environment and the Ministry of Productive Activities of December 28th 2004, December 31th 2004 and January 3th 2005.

<sup>53</sup> See article 6 of each decree.

<sup>54</sup> See Giunta Regione Lombardia, Proposal for a regional waste management plan, decision 23 December 2004, no. 7, in Official Journal of the Region Lombardia, 31 Januar 2005, no. 5.