AVOSETTA MEETING

Madrid, April 2005

Legal aspects of climate change: the case of Emissions Trading

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1 – Council Decision 2002/358 introduced, among others, a compulsory burden sharing for EC Member States as regards the commitments under the Kyoto Protocol (Annex II). Was there any legal discussion in your country as regards the method of calculation of this burden sharing, and its faireness; was there any participation of the public as regards the opportunity to accept the political burden sharing of 1997 and its legal fixation of 2002?

No, the method of calculation of the EU BSA was not part of any legal discussion in Italy. Moreover, there was no relevant participation of the public in this issue.

2 – Directive 2003/87/EC (OJ L 275/203 p.32) introduces a system of how emission rights shall be allocated nad how they can be traded.

a) Was there any legal discussion of the major elements of this directive in your country? Was the basic approach – i.e. tradable emission allowances – easily accepted? Were frictions discussed in relation to BAT-approaches, voluntary commitments, or emission charges/taxes schemes?

The basic approach of directive 2003/87/EC (EATD), namely the trading of allowances (EUAs), was easily accepted in Italy and no relevant frictions are to be reported among stakeholders. By the same token, tha basic approach of emissions trading was easily accepted in Italy, where the presence of voluntary agreements and/or emission taxes is not relevant.
For instance, in 2000, the government signed with ENEL (the major national productor and distributor of electricity) the first voluntary agreement aimed at the reduction of GHG with a reduction goal of 20% in the period 1990-2006. In addition, a carbon tax on CO_2 emissions coming from the combustion of fossil fuels was introduced in 1998, but then substantially reduced and suspended afterwards.

b) Have there been considerations in your country whether there was an EC competence in this manner; whether Article 175(1) was the right legal basis, instead of Article 175(2)?

There have been no considerations in Italy with regard to the legal basis of the EATD. In fact, Article 175(2) could have been the right legal basis for the adoption of the EATD, if one assumes that it "significantly" affects the national energy policy of the Member States. However, it should be considered that the directive 2003/87/EC primarily aims at

curbing CO_2 emissions, leaving to the Member States the effective choice among the different energy sources.

c) Were there any considerations in your country to recur to Article 176 and to include other sources of climate gases into the emission trading system than those listed in Directive 2003/87/EC? Has there been any thinking, whether Article 24 of EATD is not compatible with Article 176? What do you think of this argument?

No discussion on opting-in other climate gases. Article 24 EATD and Article 176 TEC seem to be compatible. Both articles require that any modification of the system has to be notified to the Commission for approval.

d) When and by what legal act (if at all) was the EATD transposed into national law? Was it transposed in due time? What kind of public attention was given to the performance of the country in the transposition of the EATD?

EATD has not been transposed into national law yet and Italy did not comply with the related legal deadline settled (31.12.2003) under Article 31 EATD. In January, the European Commission announced court action over Italy for substantially failing to transpose EATD in time. National authorities explain the failing to transpose the EATD in time into national law with the particular charachteristics of the Italian legal system. In general, Law 89/1989 – so-called "Legge comunitaria" – is the main instrument issued every year and regulating the transposition of Community law into the national system. "Legge comunitaria" for the year 2003 was adopted on 31 October 2003 and therefore did not make any reference to the implementation of the EATD (adopted by the Council and the European Parliament on 25 October 2003) into national law. The implementation of directive 2003/87/EC has been finally foreseen by the "Legge comunitaria" 2004 which was adopted by the Italian Parliament on 15 April 2004 (not published yet on the Official Journal).
In the meantime, a few legislative and administrative provisions have been adopted by the Ministry for Environment and Territory setting the necessary procedures for a correct start of the EATD.
Not much public attention was given to the Italian delay in the transposition.

3- According to Article 9 of the EATD national allocation plans have to be established.

a) Do they have to be national or could they also be regional? Compatibility with Article 175/176 (interference with rights of the regions)? Are there regional plans in your country? Please provide exact dates of the approval/publication of the plan or plans.

There are no regional plans in Italy, where environmental protection is a matter of exclusive competence of the central State (Article 117 – Italian Constitution).
At national level, a first incomplete draft NAP was submitted to the EC Commission in July 2004. A Complete final draft NAP (integration of previous one), which was submitted on 24 February 2004, has not been so far formally rejected or accepted by the Commission.

At regional level, there are no specific plans, but the Regions have a role in planning activities which may have an impact on climate change.

b) Was the public informed of the draft national allocation plans (NAP)? Was there a possibility to comment or to rectify the original data? Or was the content of the plan discussed with affected industries only? Was there a publication of the plan in draft form?

From 15.04.04 to 14.05.04 guidelines for the preparation of the first draft of the NAP were available on an official web page for public consultation. Moreover, both drafts of the NAP were officially open to comments from the public. The final draft has been open to comments until 15.03.2005. Comments will be considered before the formal allocation to installations, in accordance with criteria established by EATD, in particular those mentioned in Annex III. Obviously, affected industries played a substantial role in the definition of the details of the NAP.

c) What allocation criteria were followed in your country? Or does the plan just mirror political power play? What kind of empirical information was used in order to draft the plan? Was it really accurate/updated?

In Italy, allocation of European Allowance Units (EUAs) was based on grandfathering, with no space left to auctioning. The NAP actually reflects the power of actors involved in negotiations, namely covers the outcomes of several meetings organized by the Ministry for Environment with industrial associations and operators. Energy sector, namely electricity, responsible for the main part of CO_2 emissions in Italy were made a lot of concessions in the final draft in terms of distribution of allowances (over estimation).
No exhaustive empirical information were used to draft the NAP (in particular the first one): "values for the year 2000 were calculated on the basis of national official statistics (National Energy Balance and National GHG Emissions Inventory)" but those data "were not sufficiently detailed to allow an accurate calculation of CO2 emissions for each activity under the ET Directive (for example national official statistics do not allow to calculate CO_2 emissions for combustion installations with a rated thermal input exceeding 20MW, as requested by the ET Directive)". In fact, such values were reviewed on the basis of information on CO_2 emissions of installations covered by the EATD collected in December 2004 in accordance with Decree 29 November 2004 – OJ n.268, 15 November 2004, implementing the EATD.
Annual growth rates of CO_2 used to calculate allowances to be distributed at each activity in the period 2005-2007 were determined on the basis of the annual growth rates estimation for the period 2000-2010 adjusted according to possible technological developments in the sectors and to the national economic development needs between the first and second period.
Allocation criteria for existing plants were based on historical emissions, except for electricity which were based on expected production.

d) What happens if the Commission exceeds the three months attributed to it under Article 9(3)? What is the situation in your country in similar legislative case?

Article 9(3) doesn't regulate the case of the Commission's silent after three months from the submission of NAPs. In Italy, in similar cases, normally there no sanction. However, in some cases, under administrative law, the so-called "silent-consent" procedure is used.

e) Would Article 10 allow Member States to recur to Article 176 EC Treaty? If so, did your state allocate lower percentages?

Italy followed Article 10 prescriptions, by assigning free of charge a 100% of the EUAs on a grandfathering basis. It seems that Article 176 could not be easily used to lower Article 10 percentage (at least 95%), insofar it is not proven that this would represent a "more stringent protective measure".

f) What is the weight of Clean Development Mechanism as compared with pure "reductions" in emissions?

In Italian law, CDM is recalled in both the National Reduction Plan (2003-2010) (12 $MtCO_2eq.$ of carbon credits from JI/CDM in the 2010 reference scenario) and the Law of Ratification 120/2002 as a measure to reduce GHG emissions. The implementation of the Kyoto Protocol flexible mechanisms is also explicitly mentioned among the objectives of the final draft of the NAP. This document indicates carbon credits from JI/CDM projects and ET (additional measures to the reference scenario of the NRP) of 20,5-48 $MtCO_2eq.$ (revision of NRP 2003-2010 undertaken by the Technical Committee on Greenhouse-gas Emissions –CTE- in the second half of 2003). In sum, it seems that CDM should represent a great percentage of the total national reduction emissions.

4- Article 11(1) provides that before 1 October 2004 Member States shall decide on the total number of allowances and their repartition on each installation, "taking due account of comments from the public".

a) Did the public have the opportunity to make comments? How did this procedure develop? Was the draft decision published? Was it transparent?

See point 3-b above. The public was provided with an official email address to send messages to. The draft NAP was available on the web site of the Ministry for Environment and Territory

b) What distributional choices were involved in the repartition on the single installations?

With regard to the distributional choice to at the installation level, the initial distribution was made through grandfathering – for free. Each plant is classified within a reference activity for which a corresponding allocation is defined.
The following are considered as "new entrants" – treated differently in terms of allocation of allowances - in the system by the Italian NAP:

- new plants;
- repowering;

- return to operation.

The allocation of allowances was based on historical emissions for all activities, except for the electricity sector for which allocation criteria is based on expected emissions.

5- Art. 12 provides that the trading of emission allowances shall be possible.

a) How is trading supervised in your country?

Until the transposition into national law of the EATD, the Ministry for Environment – Directorate for Environmental Research, together with APAT (Agency for the Protection of Environment) and ENEA (Agency for new technologies, energy and environment) will function as the competent national authority. A stock exchange is not place yet.

b) Is trading also possible for other bodies than installations, such as a fund, a charity, a millionaire who has an interest in preventing climate change?

Trading of EUAs is possible for any person – any natural or legal person - within the Community. This is stated under Articles 3(g) and 19(2). No provision on this issue is contained in the Italian legislation.

c) To which extent is transparency for the public ensured? (knowledge of trading transactions, etc)

Though EATD does not foresee any stock exchange at the Community level, a couple of domestic stock exchange are already in place (Nordpool in Norway and EEX in Germany) providing all relevant information through their web pages. According to Commission Regulation (EC) 2216/2004 for a standardised and secured system of registries, pursuant to directive 2003/87/EC of the European Parliament and of the Council and decision 280/2004/EC of the European Parliament and of the Council, national authorities will have to establish national registries to track allowances in order to ensure transparency of the market.

d) How as “allowance” been translated in your country? Does your national linguistic version of the term “allowance” convey the idea of a “right” (subjective/objective) to pollute? (like the Spanish does)

Allowance is translated in Italian as “quota di emissioni”, which does not immediately convey the idea of “trading” on “rights”. However, the “quota” explicitly entail the right to trade and it obviously represents a commodity which can be traded on the market.

e) What is the legal nature of the “trading”? Is there any doctrinal controversy about the possibility of “trading” on “rights”? (provided the question to “d” was positive)

The discourse on the legal nature of EUAs - units actually traded under the regime representing an allowance to emit 1 tCO2 eq. during a specified period of time – is still open to different interpretations.

f) Has there been much discussion about other areas of law that might be relevant to this dogmatic issues (eg. property rights, tax law, administrative law, etc.)

There has not been very much discussion yet on these issues in other areas of the law. Some affected areas could be for instance property law and tax law.

6- Art. 14 – 16 provide guidance for monitoring, verification and penalties.

a) How is monitoring and verification organised in your country?

Monitoring and reporting under the EATD in Italy is based on the requirements indicated in Commission Decision C(2004)130 of 29.01.2004. More exactly, monitoring and reporting is regulated on Articles 3 and 4 of Decree of 28.12.2004 which recalls respectively the mentioned Commission Decision and the guidelines released by the Italian Ministry for Enviromnent and the Ministry for Productive Activities on 14.02.2005.
Installations covered by the EATD were required by Decree of 29.11.2004 to submit information on CO2 emissions in order to enable the initial distribution of allowances by the national authorities.

b) What about the penalties that were fixed according to Article 16? Are they effective, proportionate and dissuasive? Are they of criminal, administrative or civil law nature? Are they compatible to national sanctions in similar, comparable cases? Is there any fear that penalties might be too divergent from one country to the other?

In Italy, penalties have been established by Law 316 of 30 December 2004 as to follow:
- for failure to submit to competent authorities request for greenhouse gas emissions permit to operate in accordance with Articles 5 and 6 (euro 40 per each CO2 ton);
- for false information as to the previous point (euro 40 per each CO2 ton);
- for failure to submit to competent authorities or for false information as the sources of emissions of gases listed in Annex I from the installation (euro 10 per each CO2 ton).
In addition, also the temporary suspension of the activity of the plant may be ordered by the competent authorities. Penalties seem to be effective, proportionate and dissuasive and are of administrative nature.

c) How is transparency of monitoring and verification results ensured?

See point 6a). No regulation on monitoring and verification at the moment.

7- The emission allowance scheme and traditional BAT approach under the IPPC Directive 96/61/EC somewhat conflict with each other.

a) Is there a discussion in your country on whether there are vested rights and permits of industry disallowing to turn them into allowances which must finally be purchased.

Yes, in Italy a Green Certificate System for the promotion of renewable sources is already in place and a Energy White Certificate System started in 2005. A legislation regulating how to combine the EATD and their EUAs and the mentioned systems (white and green certificates) is not in place yet. Thus, there is a lack of coordination among the different credits/units: green certificates, white certificates and EUAs.

b) Conversely, Article 26 provides that permits under Directive 96/61/EC shall not contain emission limit values for greenhouse gases, when the installation participates in emission trading. Is there any discussion in your country, whether this is a departure from the concept of "best available technology"? May countries not provide for this derogation (under Article 176 EC)?

It seems that Member States could possibly use the legal basis of Article 176 EC to derogate from Article 26 of the EATD, if they wished to limit emissions from a certain plant, even when no significant local pollution is caused. In Italy, however, there has not be a decision in this sense.

8- Directive 2004/101/EC (OJ 338/2004 p.18) provides a framework for joint implementation (JI) (see Art. 6 Kyoto Protocol) and the clean development mechanism (CDM) (see Art. 12 Kyoto Protocol).

a) Is there a discussion in your country about whether JI and CDM will be used?

Yes, the Revision of the National Reduction Plan (2003-2010), the Law of ratification of the KP and the draft NAP under EATD all refer to the implementation of the flexible mechanisms as a important tool for meeting the Kyoto Protocol GHG reduction obligations.

b) What will be the organisational devices in your country ensuring the requirements of a fair use of JI and CDM, and in particular its additionality, truthfulness and transparency?

A full and complete system for fair use of JI and CDM is not yet in place in Italy. The Ministry of the Environment is the *interim* relevant authority.

9- Could or should emission trading be introduced in other sectors (waste, water)?

ET could and should be introduced for other activities, installations and/or gases and this is explicitely foreseen by the EATD procedure under Article 24 (opting-in). Nothing seems to prevent the extension of ET to other sectors, at national level, in the absence of any EC legislation on the topic. However, the issue has not been discussed yet in Italy.

10- To which extent emissions trading has been discussed so far in your national legal literature?

Legal literature on this topic is still very limited in Italy.

11- Besides emissions trading and national plans, does your national legislation create other kinds of devices, such as a specific permit for releasing greenhouse gases emissions? If this is the case, what is the relation between the plan, the trading mechanism and the permit? What body/level of Administration is responsible for performing the respective duties and responsibilities?

See point 7a). The Green Certificate scheme, as well as the White Certificate system deals, though indirectly, with greenhouse gas emissions. They are not related among themselves.