

Climate change: legal aspects, in particular of emission 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 fairness; 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?

Under the Kyoto Protocol, The Netherlands is obliged to reduce CO₂ emissions by 8%. The EC has introduced the idea of burden sharing. Not everybody in the Netherlands was happy with this system (or the burden placed on The Netherlands). It was said that The Netherlands (and its industry) was being “punished” for always having taken an active approach to climate control. Because Dutch companies have already made efforts to produce in a climate-friendly way, The Netherlands would be allocated fewer allowances. After negotiations of burden sharing in the EC, The Netherlands now has to realize a reduction of 6%.²

2. Directive 2003/87 (OJ L 275/203 p. 32) introduces a system of how emission rights shall be allocated and 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 system of tradable emission allowances was easily accepted. There was very little discussion about frictions with BAT-approaches.³ The government mainly discussed procedural tuning between this Directive and the IPPC-directive.⁴

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

No.

2.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? Has there been any thinking, whether Article 24 of Directive 2003/87 is not compatible with Article 176? What do *you* think of this argument?

There are plans to introduce a system of tradable emission allowances for NO_x gasses as well.⁵ At first this was combined with the implementation of Directive 2003/87, but has now (for efficiency reasons) become a separate system from the CO₂ system.⁶

¹ Thanks to Marijke Leliveld for her research assistance.

² MvT TK 29 565 nr. 3 p. 8-9.

³ MvT TK 29 565 nr.3 p. 14 et seq.

⁴ MvT TK 29 565 nr. 3 p. 14 et seq.

⁵ TK 26 578 nr. 1 and 29 766.

My views on Article 176 EC are well known (I guess). I do not see any problem with respect to Article 24. Article 176 EC does not preclude full harmonisation. See recently on Article 176 EC case C-6/03, judgment of 14 April 2005.

2.d. When and by what legal act (if at all) was the Directive transposed into national law?

The Directive was transposed into national law mainly by incorporating it into our existing national legislation (“formele wetten”: Wet milieubeheer and Algemene wet bestuursrecht).⁷ In support of this executing statutes were enacted: “Besluit handel in emissierechten”⁸, adopted on September 17th 2004 and a “Regeling monitoring handel in emissierechten”.

3. According to Article 9 of the Directive 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)?

There are no regional plans in The Netherlands. The draft national allocation plan was published in February 2004.⁹ The definite national allocation plan was approved and published on August 20th 2004.¹⁰

3.b. Was the public informed of the draft national allocation plans (NAC)? Was there a possibility to comment? Or was the content of the plan discussed with affected industries only? Was there a publication of the plan in draft form?

The Minister of Economic Affairs (Brinkhorst) invited people to comment on the draft national allocation plan; any person was welcome to comment.¹¹ With this invitation he wrote a summary of the plan. The entire plan could be found on the internet (www.co2-emissiehandel.novem.nl) or at the Ministry of Housing, Spatial Planning and the Environment (VROM). The public was given the opportunity to comment. In total 137 reactions were received and commented on by the Minister of Economic Affairs and the state secretary of Housing, Spatial Planning and the Environment and discussed in parliament.¹²

3.c. What allocation criteria were followed in your country? Or does the plan just mirror political power play?

The national allocation plan was based on the criteria of the Directive and on existing policy. The current policy is incorporated in the “convenant Benchmarking energie-efficiency” and “Meerjarenafspraken energie-efficiency”, both national agreements between government and industry about energy-efficiency.¹³

⁶ Cf. TK 29 565 nr. 4 p. 3.

⁷ Staatsblad 2004, 511.

⁸ Staatsblad 2004, 737.

⁹ Staatscourant 24 February 2004, nr. 37, p. 9

¹⁰ Staatscourant 20 August 2004, nr. 159, p. 7

¹¹ Oproep tot inspraak, Staatscourant 24 February 2004, nr. 37, p. 9

¹² Allocatieplan CO2-emissierechten 2005-2007. Nederlands national toewijzingsplan inzake de toewijzing van broeikasgasemissierechten aan bedrijven (NAP), p. 5.

¹³ TK 29 565 nr. 4 p 7 and also MvT p. 16 et seq and NAP p.11.

3.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 cases?

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

Yes, in my view Article 10 allows Member States to recur to Article 176 EC Treaty. The Netherlands has distributed all the allowances free of charge.

3.f. What is the weight of Clean Development Mechanisms as compared with pure „reductions“ in emissions?

The Dutch government has proposed to expand the possibility of emissions by 20 megaton per year using CDM en JI. This creates a total emission possibility of 219 megatons per year for the years 2008-2012.¹⁴

4.a. 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?

The total number of allowances was decided in the national allocation plan. As noted in 3.b. it was possible for any person to comment on the plan and on the total number of allowances. The subsequent repartition on each installation was presented in the draft "toewijzingsbesluit" in August 2004, with a transparent annex showing each installation and its number of allowances.¹⁵ It was possible for members of the public to comment on the repartition.¹⁶

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

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

a) How is trading supervised in your country?

Trading is supervised by the *Nederlandse Emmissie-autoriteit* (<http://www.nederlandse-emissieautoriteit.nl/EN-index.html>), which is a "zelfstandig bestuursorgaan" (independent public authority). I guess Richard would call it a quango.

5.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?

¹⁴ MvT TK 29 565 nr. 3 p. 19.

¹⁵ Staatscourant 20 August 2004, nr. 159, p. 9. Cf. www.novem.nl.

¹⁶ Staatscourant 20 August 2004, nr. 159, p. 9

It is possible for others than installations to take part in the trading. In fact it is possible for any natural or legal person to buy and sell allowances, provided they hold a registered account.¹⁷

5.c. To what extent is transparency for the public ensured? (in knowledge of trading transactions etc.)

Permits and the emissions reports linked to the permits are made public. Allowances given to each installation are also made public. The public also has access to the information of the register of transactions as a report of the register is published yearly.¹⁸

5.d. Has there been much discussion about other areas of law that might be relevant to this issue (eg property rights, insolvency, securities laws and taxation)

Allowance was translated into “recht”, meaning (subjective) right. It is considered a “vermogensrecht” (property right).¹⁹

5.e.

Trading in rights is widely accepted in The Netherlands.

5.f.

There has been some discussion about how liability, property rights and administrative law relate to the trading of emission allowances.²⁰

6.a. Arts. 14 – 16 provide guidance for monitoring, verification and penalties.

a) How is monitoring and verification organised in your country? Do you except enforcement deficits of the kind known in command and control concepts?

The Nea is responsible for permits, monitoring, verification and penalties.²¹ The permit will not be given if the installation does not provide a sufficient monitoring protocol.²² An “AMvB” (Crown statute) will dictate the requirements a vericator and the verification must meet, which will at least include the requirements of annexes IV and V of the Directive.²³ In the future an international standard will dictate these requirements.²⁴

6.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 comparable to national sanctions in similar, comparable cases? Is there any fear that penalties might be too divergent from one country to the other?

The penalties include fines, “naming and shaming”, “dwangsom”, compensation, loss of permit and being prohibited from trading allowances.²⁵ Most of these penalties are

¹⁷ MvT TK 29 565 nr. 3 p. 6.

¹⁸ MvT TK 29 565 nr. 3. p. 77.

¹⁹ Cf. J.M. Bazelmans, “De implementatie van Europese handel in emissierechten in Nederland” in M&R 2004/p214-220, p.218 and 219.

²⁰ Cf. Bazelmans in TMA

²¹ MvT TK 29 565 nr. 3 p. 48 et seq.

²² Art. 16.10 Wm.

²³ Art. 16.14 Wm.

²⁴ MvT TK 29 565 nr. 4. p. 12.

²⁵ MvT 29 565 nr. 3 p. 56 et seq.

of an administrative nature and can be given by the Nea. Some penalties take on a criminal nature when there are aggravating circumstances like fraud.²⁶ The mandatory fine, naming and shaming and ban from trading are new to the Dutch system. The Netherlands has gone very far in its penalties.

6.c. How is transparency of monitoring and verification results ensured?

It is compulsory to disclose certain information concerning monitoring and verification. This includes the permits and emissions reports.²⁷

7. The emission allowance scheme and traditional BAT approach under the IPPC Directive 96/61 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.

The discussion about frictions between this Directive and the IPPC-directive has been avoided.

7.b. Inversely, Article 26 provides that permits under Directive 96/61 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)?

In my interpretation of Article 176 EC: no.

8. Directive 2004/101 (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?

The government has decided to use CDM and JI.²⁸ Some people have said that The Netherlands will have a difficult time meeting the 6% decrease in emissions without using CDM and JI.

8.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?

The fair use of JI and CDM is ensured by the fact that the Nea, “zelfstandig bestuursorgaan” which can be considered an independent public authority, controls the Dutch government’s use of CDM and JI.²⁹

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

To be discussed at the meeting.

²⁶ MvT 29 565 nr. 3 p. 60

²⁷ MvT 29 565 nr. 3 p. 76 et seq and 16.12 Wm.

²⁸ MvT 29 565 nr. 3 p. 9

²⁹ MvT TK 29 565 nr.3 p. 47

10. Can you give an overview of the extent to which emissions trading has been discussed in your national legal literature – (i) academic and (ii) practitioner

See annex to this survey.

11. Besides emissions trading and national plans, does your national legislation create other kinds of devices, such as a specific permit for releasing greenhouse gas 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?

The Netherlands only introduces the permit for greenhouse gases as specified in the Directive. Without the permit it is not allowed to emit greenhouse gases.

Sources

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