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Legal aspcts of climate change. In particular, emissions trading mechanisms (European and national perspectives)

Sources:
1. National Allocation Plan for CO2 Emission Allowances 2005 – 2007 Trading Period (further: NAP)
http://www.mos.gov.pl/mos/publikac/national_allocation/KPRU_english10.09.04doUE.pdf

2. The Act of 22nd December, 2004 on greenhouse gases and other substances emission allowance trading (further: ACT)

List of questions to be addressed

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?.*

- Does not apply to Poland

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 committments, or emission charges/taxes schemes?

There has not been much of the discussion. Most publications simply presented the directive and its content within the context of Climate Change policies, in particular commitments under the Kyoto Protocol. The basic approach has not been questioned, the more as to that the idea of tradable emission allowances have been long floating around in Poland and experience with Clean Air Amendments in USA was widely promoted. The discussion was mainly centered around economic and policy issues, while only recently legal issues have come into play. The legal issues discussed have been focused not so much on the Community system but on the national system, in particular its relation to BAT concerning SO2 and NOX.

b) *Have there been considerations in your country whether there was an EC competence in this matter* (No)
Whether Article 175(1) was the right legal basis, instead of Article 175(2)? (YES)

- **Competence**: The EC competence in the scope regulated by the Directive does not give rise to any objections. Control and reduction of greenhouse gas emissions into the air does not only realize the broadly defined objectives of the Community policy on the environment (Art. 174 EC Treaty) but also international obligations of the Community;
- However, there have been considerations concerning competence of the Commission to question a national allocation plan in relation to accession countries which are not included into the burden sharing agreement and have their own Kyoto Protocol commitments.
- **Choose of a legal basis:** firstly, the choice of Art. 175 as legal basis seems to be well-justified - in spite of the fact that the Directive in question has a certain influence on the establishing and functioning of the internal market and on competition (art. 95 EC Treaty) – the directive basically aims at limitation and stabilization of greenhouse gases in the atmosphere using the European market in greenhouse gas emission allowances as its instrument;
- As regards doubts concerning the choice between Art. 175 (1) and 175 (2), on the one hand one should take into account relations between Art. 175 (1) and 175 (2), based on the "principle -exception" relation, and in consequence the obligation of strict (restrictive) interpretation of exceptional cases provided in Art. 175 (2) justifying the procedure of unanimity - because of the subject of the regulated matter which is 'sensitive to Member States'.
- In the discussed case such restrictive interpretation needs both the expression "regulations of fiscal character" (Art. 175 (2) a) and "measures having effect on the choice of a Member State between different sources of energy" (Art. 175 (2) c). The very fact that the Directive concerns financial and legal measures (but not environmental taxes) and that its solutions support energy-saving technologies cannot be satisfactory for the selection of Art. 175 (2) as a legal basis.

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?* (No)
Has there been any thinking, whether Article 24 of Directive 2003/87 is not compatible with Article 176? (No)
What do you think of this argument?)

- **Additional sources of climate gases**: There were no considerations to include other sources of climate gases into the emission trading system than those listed in Directive 2003/87;
- At present approximately 1200 installations are covered by the scheme out of which approximately 221 installations from the ceramic sector (brick-yards) are proposed to be temporarily excluded from the first accounting/reporting period. Justification: they work seasonally, reliable data are missing, costs are too high, emissions are insignificant on the country scale, time gained to prepare participation from 2008 (source: NAP, p. 38, 45).
- **Art. 24 of the Directive and 176 TEC–** no discrepancy.

  Art. 176 of the TWE can be applied exclusively within boundaries and in the manner which does not breach provisions of the Directive and its objective – the secondary law act based on Art. 175 EC Treaty and adopted at a Member State will. The Directive constitutes a basis for establishing a scheme for greenhouse emission allowance trading within the Community and to this end it lays down criteria of participation in the scheme

(including a catalogue of actions and gases) - by way of exception it permits both the temporary exclusion of certain installations (art. 27 of the Dir.) and inclusion of additional activities, installation, gases - in both cases taking into account the need to protect the internal market (art 24 of the Dir.).
Consequently, the goal of Art. 24 of the Dir. is to ensure balance between the environment protection and the internal market and the instrument – the acceptance of the planned inclusion in the Community scheme of additional actions, installations or greenhouse gases taking into account both environmental criteria (i.e. environmental integrity of the scheme, reliability of the monitoring system and accounting) and market ones (i.e. effect on the internal market, the possibility of disturbing competition, trade barriers, commencement of business activities by new entities).
The provision of Art. 24 of the Dir. lays down legal prerequisites for the inclusion of additional actions, installations and gases in the Community emission trading scheme, which were recognized by Member States as necessary for the realization of the goals of the Directive, thus sets limits within which a Member State may introduce national regulations in this scope. Such regulations bind a Member State until they are overruled or amended.

d) *When and by what legal act (if at all) was the Directive 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 Directive?

- **Transposition data:** The deadline of 1st May, 2003 was not met.
- The transposition of the Directive into Polish law took place with the Act of 22nd December, 2004 on greenhouse gases and other substances emission allowance trading – which came into force on 1st January, 2005.
- Work on executive regulations to this Act, necessary for its functioning (and also for functioning the scheme), are still in progress.
- **Public attention** (source: the justification for the Act): The draft Act was consulted with interested industries (participants in the emission allowance trading) through their associations).
- At the same time, the draft Act, like other environmental draft legal acts, was subject to public consultations via the Website page of the Ministry of the Environment – opinions and comments were analyzed and taken into account.

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)?
Are there *regional* plans in your country? (No)
Please provide exact dates of the approval/publication of the plan or plans

- **National or regional:** There is a National Allocation Plan (NAP) in Poland.
- **Approval – Publication:** The draft NAP was not approved by the Commission.
- The European Commission took the decision (8th March, 2005) on reducing of the yearly CO_2 emission limit from the level of 286,2mln tones to the level of 239,2mln tones (by nearly 50mln tones yearly - the reduction of the total number of CO_2 emission allowances by 16,5% in the period from 2005 to 2007 in comparison to the Polish proposition (source: information published on the Website page of the Ministry of the Environment Protection).

- The Ministry is currently gathering additional information concerning economic and ecological data in order to update the NAP and possible establishing of new allocations for installation. They will also be used as a material for a discussion with the European Commission (source: as above).
- Under the present circumstances both:
  - discussion with the Commission,
  - an appeal against the Commission decision and
  - an acceptance of lower limits, updating of the plan in order that companies can participate in emission trading and possibly an action against the Commission in order to obtain higher limits

  are being considered.

b) *Was the public informed of the draft national allocation plans (NAC)? Was there a possibility to comment or to rectify the original data? (*YES)
Or was the content of the plan discussed with affected industries only? (No)
*Was there a publication of the plan in draft form? (*YES)

- **Consultations with interested industries/sectors** (source: NAP) – wide participation of potential participants in the scheme; consultations with particular industries, conferences and training courses on the topic of the emission trading system were held.
- **A draft plan was published on the Website** page; the page was also used as a forum for discussions.
- **Public consultations**: Art. 17 of the Act on emission allowance trading introduces an obligation to ensure that the public has the possibility to get known with the draft NAP and make comments thereto; to this end, regulations on the public participation in the matters related to the environment protection apply respectively, which means that the public must be informed, the draft plan must be made available to it, the public must be able to make comments, comments and conclusions of the public must be taken into account, and finally the public must be informed about the adopted plan. In the transitory provisions this rule was excluded with regard to the NAP in the years 2005-2007 (work on the Act and the NAP were carried out simultaneously, the Act was adopted in December 2004 and the draft plan earlier), which does not mean avoiding public consultations at all in practice.
- As it is evident from the grounds for the draft NAP for the years 2005-2007 public consultations – in accordance with Art. 11 of the Directive – were held; there was organized a special meeting with ecological organizations in which, among other persons, representatives of NGOs grouped in the informal Climate Coalition, experts and representatives of public authorities participated. One can conclude from the grounds for the draft plan that the position of the NGOs was studied closely. Still, there is no information on the type of comments and manners of their consideration in the draft plan.
- After the acceptance of the NAP by the Commission and before its adoption by way of executory act, whose draft will be published on the Website page, which will make it possible for the public to provide comments to it. Wide public consultations are not envisaged.

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?

- All the preparations of NAP were in fact commissioned to a private consultant. TOR for tendering procedure in this respect envisaged granting the contract to a consultant who inter alia would ensure preparing draft NAP meeting the criteria. The consortium led by ENERGSYS won the contract.
- The draft NAP meets formal requirement of the directive together with 11 criteria as defined in the Annex I to it.
- In practice preparations were heavily influenced by industrial lobbies.
- Allocation criteria on national, sectoral and installation level: achievement of targets related to CO2 emission levels as defined by the Kyoto Protocol for the country as a whole (macro scale), analyses of the situation and development prospects of individual companies and sectors (micro scale) (source: NAP, p. 43; on details see annex I to this document, which include this fragments of NAP which concern 'criteria details')
- Gathering and verification of data: There is no complete register of installations and emissions in Poland. Therefore it was necessary to (source: NAP, p.44-46):
    - compile existing data from various sources: (database of the Central Statistical Office (GUS), data of public bodies which issue necessary license/permits, as IPPC permits or licenses for energy installations, data gathered by the Voivodship Inspectorates for Environmental Protection who coordinate the National Monitoring of Environment, data *„concerning fees paid for the economic use of the environment"* gathered by the competent authority;
    - collecting missing ones (data prepared by "*the interested employers' associations*" and gathered as a result of announcement at Website)
    - use the information gathered by questionnaire filled by operators

  according to the NAP data *„were checked for consistency and verified in substantive terms by a group of experts – verifiers responsible for particular sectors"*.

Rumours however have been widely known that some operators had long before the scheme was even initiated taken steps to claim bigger share than technologically needed.

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?

- The Commission, in accordance with the Directive, may reject the plan within 3 months solely due to reasons listed in Art. 9 paragraph 3. The expiry of the time limit and lack of the Comission's decision must be looked upon as an approval of the presented draft plan and a 'resignation' of competence granted to it.
- Lack of practice in similar cases.

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

- Pursuant to Art. 10 of the Directive "Member States shall allocate at least 95% of the allowances free of charge" which means that Member States may allocate a bigger percent free of charge but not less. Consequently, recurring to Article 176 is not possible.

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

The legal scheme for CDM is purely elaborated in Polish law. There is not much discussion about it in Poland. The entire scheme is considered as predominantly a chance for Polish companies to benefit from selling allowances.

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? (YES, but in a limited scope)

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

- **Public consultations with respect to the draft NAP** for the years 2005-2007 which defines:

  1) the total number of emission allowances to be allocated in the given accounting period; 2) the total number of emission allowances for particular types of installations covered by the system; 3) a list of installations together with the number of emission allowances allocated to them; 4) the number of emission allowances which will constitute a national emission reserve in each accounting year

  were rather limited (see point 3b herein).
- **Public consultation with respect to the draft of executive regulations adopting NAP:** After the acceptance of the NAP by the Commission and before its adoption by way of executive regulations, draft of which will be published on the Website page, which will make it possible for the public to provide comments to it. Wide efforts to ensure public involvement are not envisaged.
- For new installations or installations in which changes were made, allowances are granted by way of an administrative decision within limits provided for in the adopted NAP – participation of the public in the matter of issuing of these decisions is not envisaged.
- **Distributional choices:** see Annex I to this document.

5. Art. 12 provides that the trading of emission allowances shall be possible (source: The ACT).

a) How is trading supervised in your country?

- Through the obligation to notify to the National Register about every concluded contract of sale of emission allowances.
- It is the obligation of the operator of installations located in the territory of the Republic of Poland to notify the National Register within three working days since the day of the conclusion of the contract, otherwise the contract being null and void.

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?

- In the case of the national system (other substances than greenhouse gases), the Act explicitly states that contracts of sale can be concluded exclusively by and between operators of installations who have been granted emission allowances.
- In the case of the Community system (greenhouse gases) there are no such restrictions, so answer is yes .

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

- The National Register which contains information about emission allowances sold and transferred, among others, is open to the public (free access). Provisions on public access to information on the environment, including the rules concerning restrictions on access to environmental information apply respectively.

d) *How has „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)*

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)

- "Allowance" – "uprawnienie"
- Firstly, the term 'greenhouse emission allowance" does not correspond closely with the concept of subjective rights. Operators have no right to claim allowance allocation and authorities have no obligation to allocate an allowance in every case – even if because of binding national limits (an objective prerequisite).
- Utilization of allocated allowances (their actual utilization or sale) requires a special permit (a permit for participation in the community emission trading scheme); obtaining such a permit is conditional upon meeting prerequisites concerning monitoring and reporting (an objective prerequisite); if so an operator has a claim to receive a permission;
- after having met those two requirements – obtaining of allowance allocation (administrative allocation) and a permit to participate in the Community system – an operator becomes, in the scope and under terms laid down in those acts, a disposer of "the right to pollute" granted to him - in this sense we can speak about " the subject's right" understood as a sphere of the possibility to act in a defined manner by the operator of the installation (using the allowances or selling them).

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.)*

It has not been much of a legal discussion about this dogmatic issues. Allowances are considered to create proprietary rights.
The entire scheme seems to be rather located within the tax law domain than administrative law domain.

6. Arts. 14 – 16 provide guidance for monitoring, verification and penalties (source: the ACT).

a) *How is monitoring and verification organized in your country?*

- An operator of an installation is obligated to monitor emissions and give account for allowances. Allowances accounts should be submitted by 30 April of each year basing on reports verified with respect to the conformity of provided information with the state of facts by authorized auditors or voivodeship inspectors of the environment protection. Such verifications are made at the cost of an operator of an installation.

- An operator of an installation submits a verified yearly report to a competent authority and to the National Administrator (the Act provides for the appointment of the National Administrator of the Emission Allowance Trading Scheme who administers the scheme, i.e. gathers information on: permits, allowances, annulment of allowances, quantity of emission allowed and annulled which are included in the National Register).
- Basing on the verified report the number of allowances corresponding to the real emission is annulled. Allowances not used in the given year can be used in subsequent years. In the case of exceeding quantity of allowances granted for the given year, the Act provides for a conditional possibility of covering the balance with allowances granted for the following year. The Act allows also the use units of certified reduction in accounting for allowances (as a result of the realization of the project of clean development mechanism).

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 Act provides for administrative financial penalties for lack of allowances to cover the true emission in particular years of the accounting period – the equivalent in PLN of EUR 40 (years 2005 -2007)– these penalties are higher than other financial penalties in similar cases (infringement of ecological permits)
- An administrative financial penalty for violation of ecological permits is a commonly used economic-legal instrument in the environment protection.
- There are no clearcut provisions transposing Article 16.2 ("name and shame").
- Whether the sanctions are to be effective, proportionate and dissuasive remains to be seen. For the time being they are considered as relatively high.

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

- By entry of information in the National Register containing data on: permissions, allowances admitted, emission allowances sold and transferred, emission annulled and quantity of possible and real emission. The Register is open to the public (free access).
- By access to environmental documents – decisions on the application of administrative penalties and verified reports according to provisions of the Environment Protection Law Act on public access to information on the environment.
- Information on those documents is provided in the „Lists of Data on Documents Accessible to the Public " which are available to the public, which results in the special manner of making these documents available – on the day of submitting an application and free of charge in the case when they are looked for and studied at authority office

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.

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)?

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?

For the time being Poland is rather considered as potential beneficiary of JI and CDM but there is no systematic approach to the issue. Moreover, the Directive 2004/101 does not seem to be transposed sufficiently.

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?*

There is no discussion as yet on those issues.

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

The Government considers commissioning some studies to examine possibility of introducing emission trading into the water sector.

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

Emissions trading is subject to extensive discussion in economic literature but there is as yet no thoruogh theoretical discussion in legal literature. Most legal texts are rather descriptive and address practical problems related to introduction of the scheme.
Even a special book concerning Climate Change in Community Law (Z.Bukowski , Ochrona klimatu w prawie wspolnoty Europejskiej, Bydgoszcz, 2004) is meant to serve as a manual for industry rather than as academic discussion.

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?

ANNEX I

Source: **National Allocation Plan for CO2 Emission Allowances**
2005 – 2007 Trading Period
http://www.mos.gov.pl/mos/publikac/national_allocation/KPRU_english10.09.04doUE.pdf
(p.12-13, 33-36).

a. Total quantity of allowances:

1. As to identify the total quantity of allowances intended to be allocated the following activities were taken:

„a) the national assigned amount set by the Kyoto Protocol for the period of 2008 – 2012 was divided between CO2 and the other greenhouse gases;

b) the national emission targets were established for the period of 2005-2007, separately for CO2 and the other greenhouse gases;

c) the CO2 emission cap was set for the period of 2005-2007 for installations covered by the emission allowance trading scheme".

"Annex III to Directive 2003/87/EC requires the total quantity of allowances allocated within the NAP prior to 2008 to be consistent with a path towards the achievement of the targets under the Kyoto Protocol.

- *Therefore, first, the share of emissions from installations covered by the NAP was established on the basis of historical data.*
- *Subsequently, the baseline scenario for Poland's economic development and the corresponding projections of CO2 emissions were developed. As part of the preparation of the scenario, the development potential of the sectors covered by the emission allowance trading scheme was analysed, along with change in CO2 emissions resulting from the development of their activities.*
- *Moreover, analysis was performed of the projected CO2 emissions from sectors not covered by the emission allowance trading scheme, i.e. transport, commercial, services and households sectors".*

b. Allocation at sectoral level– defining the amount of allowances for each sector

"For all sectors, the procedure consisted of:

1. Defining the baseline emissions for installations of a given sector, as the average amount of emissions from three years in the period of 1999-2002, excluding the year with lowest emissions;

2. Defining the forecast emissions for each sector, considering baseline emissions and assuming emission growth factors for each sector;

3. Defining the amount of allowances for new entrants in each sector and defining the base allocation for each sector by deducting the new entrant part from all the forecast emissions;

4. Calculating the early action - and cogeneration effects, individually for each installation and their total amounts for sectors.

5. Agreeing the base amount allocation method for installations and defining factors for early action and cogeneration bonuses.

6. Calculating the quantity of allowances to be allocated for each installation in a given sector (base allocation, early action bonus, cogeneration bonus".

C) Allocation at installation level – within the limit of establish amount for particular sectors and the basis of the choosen criteria for particular sectors. These criteria are:

- historical data (‘grandfathering“ (10 sectors)
- level of production in the chosen period (cement and sugar industry)
- for power plants sector three criteria were used: “*historical emissions in years 2001-2003, the maximum capacity of the installation and the maximum capacity used in years 1999-2002*”.
- for coking plants: “*production capacity in each plant according to forecasts for years 2005-2007 and their emissions, resulting from the amount of coke-oven gas produced during coke production*”