

briefing

Energy

September 2003

EU Emissions Trading Scheme approved

The EU Emissions Trading Scheme ("EU ETS") will have implications for around 12,000 installations in Europe. Is your company an Operator of affected installations? Governments of Member States are drawing up plans to allocate allowances worth millions of euros. Operators should begin to plan a strategy for energy and carbon management to help them minimise any costs and maximise benefits associated with the mandatory scheme.

On 22 July 2003 the EU Council accepted the final amendments adopted by the European Parliament to the Directive establishing a scheme for greenhouse gas emission allowance trading within the Community (the "ETD")¹. The ETD will come into force once the Council formally adopts it (which is likely to occur shortly) and will be implemented in two phases: 2005-2007 and 2008-2012.

The ETD will create conditions to establish an EU-wide market for trading greenhouse gas emission allowances. It will form part of the EU strategy for reaching the target set under the Kyoto Protocol of an overall reduction of greenhouse gas emissions by 8% below their 1990 level in the period 2008 to 2012².

Scope

The EU ETS will be a mandatory cap and trade scheme. During the first phase of implementation (2005-2007) it will apply

to CO₂ emissions from all installations³ involved in the following activities:

- energy activities (combustion installations with a rated thermal input exceeding 20 MW⁴ and mineral oil refineries and coke ovens);
- production and processing of ferrous metals (including metal ore, pig iron and steel);
- mineral industry (production of cement clinker, lime, glass and ceramic products); and
- industrial plants for the production of pulp and paper.

The EU ETS will have a significant impact on the power sector, in particular, those energy companies with pan European generation businesses such as RWE, Eon and ENEL as well as energy traders. Such businesses will have to come to terms with potentially differing and complex approaches to the implementation of the ETD across Member States.

Member States will be able to apply to the European Commission for installations (but not sectors) to be temporarily excluded from the EU ETS until 31 December 2007. In deciding whether to approve the opt-out, the European Commission will consider "equivalence of effort", namely, whether the installations will, as a result of national policies, limit their emissions as

[continued on next page ►](#)

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If you would like further information on any matters in this briefing, please contact one of the people listed on page 5.

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◀ continued from previous page

much as would be the case under the ETD and be subject to equivalent monitoring, reporting and verification requirements, as well as penalties at least equivalent to those under the ETD in the event of non-fulfilment of national requirements.

The European Commission will review the EU ETS in 2004 and, again, in 2006 with a view to the possible extension of the scheme to other relevant sectors, for example, the transport, chemical and aluminium sectors and other greenhouse gases⁵. Furthermore, from 2008 Member States may extend emissions allowance trading to additional activities, installations and greenhouse gases, subject to the European Commission's approval.

How will it work?

Permits

From 1 January 2005 all operators of installations covered by the ETD will need to hold a greenhouse gas emissions permit issued by a competent authority.

Allowance allocation process

In relation to the first phase, each Member State must prepare and publish a National Allocation Plan ("NAP") and submit it by 31 March 2004 to the European Commission for approval. The NAP will state the total quantity of allowances that the Member State intends to allocate for the period and how it proposes to allocate them.

In determining the quantity of allowances to be allocated for the relevant period, each Member State will need to take into account its national burden-sharing target⁶ representing a percentage reduction below 1990 levels of CO₂ emissions by 2008-2012 and the Kyoto Protocol. It will also need to have regard to the proportion of overall emissions that these allowances represent in comparison with emissions from sources not covered by the ETD, any national energy policies and climate change programmes, other EC legislative and policy instruments and the potential of the installations to reduce emissions.

Most of the allowances will be allocated free of charge, with Member States

having the discretion to auction up to 5% of the allowances for the period 2005 to 2007⁷ and up to 10% of the allowances for the period 2008 to 2012.

In relation to the first phase, Member States will have to decide upon the allocation of allowances to individual operators, in accordance with the approved NAP, at least three months before 1 January 2005.

Member States' proposals for these plans should be carefully monitored as the ETD allows considerable scope for using different allocation methods – each having different cost implications for particular businesses.

Reporting

Each year operators of installations covered by the ETD will have to report the emissions from that installation to the competent authority. Therefore, appropriate systems for monitoring and reporting of emissions will be required.

Options available to operators

Installations that reduce their annual emissions to below their "cap" will be able to trade their surplus allowances on the market or store them for future periods (if the Member State allows it). Installations that require further allowances to cover their emissions will be able to buy them from the market. The reconciliation of allowances and emissions will need to be undertaken by 30 April each year for the preceding year.

The ETD envisages linking the EU ETS to trading schemes in those countries that have ratified the Kyoto Protocol. Further, the European Commission has recently put forward a proposal for a Directive to link the Kyoto Protocol project mechanisms to the EU ETS⁸. The proposal emphasises the contribution which may be made by such credits in helping EU Member States to achieve emissions-reduction targets at lowest cost; but also asserts that recourse to such mechanisms must not be more than "supplemental" to domestic action. The Commission proposal does not set an upper limit to the contribution to targets

which may come from such project credits. Rather, it provides that the Commission shall conduct a review once the number of such project credits reaches 6% of the total number of allowances allocated by Member States. The review would consider whether a limit to such credits should be imposed. By way of example only, a cap of 8% has been mentioned by the Commission.

Penalties

Member States must lay down rules on penalties applicable to infringements of any national legislation adopted pursuant to the ETD and notify such provisions to the European Commission by 31 December 2003. During 2005-2007, the penalty will be €40 per tonne of CO₂ equivalent for which the operator has not surrendered an allowance. From 2008, the excess emission penalty will increase to €100 per tonne. In addition, in the following year the operator will have an obligation to surrender an amount of allowances equal to the excess emissions.

Carbon price

Without an available NAP and the allocations to individual installations, it is only possible to speculate on the price of the emissions allowances. Stringent "caps" are likely to increase the demand for allowances and, therefore, push up the carbon price, whereas large quantities of "hot air" would depress it. The current price of carbon is around €10/tonne of CO₂⁹. More conservative analysts have estimated the price at €6-7/tonne of CO₂ in 2005¹⁰, increasing to about €14/tonne in 2008-2012¹¹. However, there are others who have predicted that the carbon price will increase to €25/tonne by 2008¹².

Comment – UK

The deadline for legal implementation of the ETD is 31 December 2003. The EU ETS will affect a number of existing UK climate policy instruments, in particular, the Climate Change Levy, Climate Change Agreements ("CCA"), the Renewables Obligation and the operation of the UK Emissions Trading Scheme ("UK ETS"). Primary legislation to implement the ETD is not envisaged. On 15 September 2003 DEFRA put out to consultation draft

Greenhouse Gas Emissions Trading Scheme Regulations.

The Government has emphasised that installations covered by the EU ETS should apply to the competent authority¹³ for greenhouse gas emissions permits towards the end of 2003 and have obtained their permits by 31 March 2004 to ensure that they are included in the NAP and are allocated allowances for the first phase. Any unpermitted installations that need allowances after this deadline will be subject to the agreed arrangements for new entrants¹⁴ which may not involve free allocation of allowances. As all affected installations are unlikely to be known to the Government, those covered by the ETD should ensure that the Government has all relevant information.

DEFRA, the DTI and the Devolved Administrations for Scotland, Wales and Northern Ireland published a Consultation Paper in August 2003 on the Implementation of the ETD¹⁵, the main purpose of which is to canvass views on alternative allocation methods for distributing the UK's overall cap of allowances to individual installations. At this stage, it is unclear which of various suggested allocation methods the Government will follow. Options include: allocation based on auction (up to 5% cap); free allocations based on current or historic emissions; and/or free allocations based upon updated information.

The Consultation Paper also raises questions on other issues about which the Government will need to make decisions before the end of 2003 including: whether allowances should be withheld if installations close; the proportion of allowances to be allocated in each year; banking between the first and second phases; whether there should be an auction in the first phase; how to take account of early action; and how to treat new entrants.

The Paper does not address whether the Government will reduce the UK's overall cap on allowances from the level of the EU emissions-reduction target to the voluntary and unilaterally adopted target

of 20% reduction in CO₂ emissions by 2010. Fears have been voiced that this may disadvantage UK industry. The overall target will be contained in the draft NAP to be published towards the end of 2003. Operators will then have an eight week consultation period to comment on this as well as the indicative allocations.

The Government will need to confront some difficult issues in implementing the EU ETS arising from a lack of data sources, which data sources to use (e.g. emissions, fuel input, product output or capacity), the difficulties of measuring data sources and demands for confidentiality of certain data.

The existing climate change policies in the UK mean that the Government must also consider whether a case could be made for participants in CCAs and/or Direct Participants in the UK ETS to be excluded from the first phase of the EU ETS. Although the matter is not without doubt the UK Government believes that a strong case can be made in relation to the 'equivalence of effort' precondition. The Waste and Emissions Trading Bill, currently before Parliament, may facilitate such arguments, as it will give statutory effect to the penalty provisions in the UK ETS. In any event, the Government intends to consult on the draft NAP on the basis that any installation covered by the EU ETS will be included in the scheme, thus allowing participants in CCAs and Direct Participants in the UK ETS to make an informed decision as to whether or not they would want the Government to apply for an opt-out on their behalf.

Some analysts forecast an increase in UK wholesale power prices as a result of the ETD. It has been predicted that with a carbon price of €25/tonne, the UK wholesale electricity prices could increase by 80% by 2010¹⁶. On the other hand, if "early action" is recognised (the current UK emissions levels from power generation are already about 23% below 1990 levels) and affected installations are allocated sufficient allowances to cover their emissions, the electricity prices may remain constant (or increase only marginally) in the short term.

Comment – Germany

In a statement to the press on 3 July 2003, the Federal Association of German Industry (*Bundesverband der Deutschen Industrie* – BDI) welcomed the fact that the European Parliament, Council and Commission have arrived at a compromise on the ETD. However, it also expressed its scepticism, saying that the issues that arise in connection with the implementation of the Directive into German law are serious and difficult.

Indeed, the stipulation in Art. 31 of the draft ETD that the Directive be implemented into German law by 31 December 2003 is an ambitious undertaking. The Federal Government had already set up a working group in October 2000 which, in four sub-working groups – to which not only representatives of the governmental authorities and associations, but also representatives of numerous companies belong – has concerned itself with the various aspects of emissions trading. The reports of the working group which have been published to date, however, do not yet display a cohesive concept which would allow the companies affected by the ETD to begin today to prepare for the impending changes.

One central problem which Germany will face will be to establish a fair national allocation plan under which the certificates permitting emissions can be allocated for the three-year period commencing on 1 January 2005. Here, it is of decisive importance to companies in several sectors that their advance investments in the past several years ("early actions") be taken into account. It is no coincidence that Germany has already achieved around 19% of the goal of reducing the six Kyoto greenhouse gas emissions by 21 percent from their 1990 level by the year 2012. Numerous companies have already invested large sums of money to reduce their CO₂ emissions. The "Criteria for the National Allocation Plans" pursuant to Annex III to the ETD provides explicitly (primarily due to pressure exerted by the German Federal Government) that such early actions can be taken into account. However, the difficulty of implementing this rule fairly goes without saying.

Apart from the difficulties involved in setting up a national allocation plan which would withstand legal scrutiny, it is clear that the introduction of emissions trading will mean a systemic change for Germany. While the companies' emissions performance has up to now been primarily guided by statutory regulations such as the Federal Pollution Control Act (*Bundesimmissionsschutzgesetz – BImSchG*) and by such voluntary measures as the "Agreement between the Government of the Federal Republic of Germany and the German Economy on Precautionary Measures for the Climate" (*Vereinbarung zwischen der Regierung der Bundesrepublik Deutschland und der deutschen Wirtschaft zur Klimavorsorge*) of 9 November 2000, the road to an "emission management" will now be taken. Although the latest version of Annex III to the ETD provides that the national allocation plan shall take into account national energy policies and be consistent with national climate change programmes, profound changes in the current laws will be necessary to implement the EDT into German law. These changes as well as the national allocation plan itself will also affect basic constitutional rights (*Grundrechte*) of the affected companies, and thus will be put to the test in this sense also.

Comment – The Netherlands

Reducing CO₂ emissions has been high on the political agenda in the Netherlands since 1996¹⁷. The Dutch government created a CO₂ emissions Reduction Fund with NLG 1,000 million for investments that has significantly helped to reduce CO₂ emissions. The goal of the Reduction Fund is to reduce the CO₂ emissions in 2010 by 4 to 5 Mega tonnes.

After signing the Kyoto Protocol, the Minister of Economical Affairs decided to conclude a Covenant with the industry to reduce emissions, instead of developing an emissions trading scheme – "Covenant Benchmarking"¹⁸. The Dutch government is an advocate of emissions trading, provided allocation of emissions allowances takes place via the method of benchmarking, hence in line with the Covenant¹⁹. Moreover, the Dutch government advocates the 50/50

criterion: 50% CO₂ emissions reduction may be achieved via the Kyoto Protocol, the other 50% has to be achieved by actual reductions in the Netherlands²⁰.

In addition to the reduction of greenhouse gases according to the Kyoto Protocol, the Dutch government has drafted an emissions trading scheme for NO_x, aimed at reducing the emissions of NO_x, particularly in the chemicals sector. The Minister of Environmental Affairs has published a draft Act for emissions trading that was based on NO_x trading²¹. However, the explanatory notes to the draft Act state that the draft is also meant to implement the ETD. The ETD has to be implemented into Dutch law ultimately by 31 December 2003.

The draft Act aims to make a national emissions trading scheme possible for NO_x and an international emissions scheme for CO₂. However, as the national emissions trading scheme differs from the international emissions trading scheme, the draft Act cannot be specific enough to govern both schemes. Therefore, the draft Act provides for the legal basis for two Decrees, one for NO_x and one for CO₂. The draft Decrees have not yet been made public. Recently, the Ministry announced that the differences between the CO₂ emissions trading and NO_x emissions trading lead to the conclusion that two separate Acts are necessary. No new drafts have yet been published.

The draft Act provides for the creation of an Emissions Authority. The Emissions Authority has the authority to approve an annual emissions report, to approve an emissions monitoring protocol, to register the transfer of emissions rights and to fine companies that emit more CO₂ and NO_x than they are allowed to on the basis of their emissions rights. The maximum fine is €450,000.

The draft Act does not provide clear rules on the relationship between the competent authorities on the basis of the Environmental Management Act, which is the Act that implemented the IPPC-Directive and the Emissions Authority.

Currently, the Dutch government is drafting a NAP that has to be approved by the

European Commission ultimately at 31 March 2004. The Dutch government is aiming to allocate allowances via the method as described in the Covenant Benchmarking, i.e. via the method of a performance standard rate, instead of a "cap and trade" system. However, there is some doubt whether the European Commission will approve such a method of allocation. No draft NAP has been made public yet. However, it is known that the Dutch government is drafting the NAP in consultation with the representatives of the various sectors of the industry.

Comment – France

Although the deadline for the transposition of the ETD into French law is 31 December 2003, the French Government has indicated that a law transposing the directive will be presented to the French Parliament at the beginning of 2004. It is not currently clear how the French Government will implement the ETD. Important outstanding issues include the link, if any, between emissions trading and tax, and the scope of the French emissions trading system. On the latter point, the French Government has expressed its disappointment that the EU ETS does not cover the chemical and aluminium sectors in its first phase of implementation. Several existing French climate policy instruments will be affected by this transposition, such as the "Programme national de lutte contre le changement climatique" ("Plan climat"), which, at this stage, only deals with emissions reduction. For the moment, there is no relevant legislation in France in relation to emissions trading.

The Ecology and Durable Development Ministry ("Ministère de l'écologie et du développement durable") is developing a draft NAP in consultation with relevant companies and environmental protection bodies. The intention is currently for quotas to be defined by voluntary negotiated agreements ("VNAs") between the French authorities and individual industrial emitters. The French NAP is likely to provide for VNAs to be entered into in respect of around 1500 industrial installations in France.

[continued on the back page ►](#)

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◀ continued from page 4

The French Government is also working to organise the emissions trading system on a practical level. The “Caisse des dépôts et consignations” (CDC), a major French public sector financial institution, will keep a register of emissions.

A number of large French companies, headed up by an association called Aeres (*Association des entreprises pour la réduction de l'effet de serre*, created in 2002 between 18 major companies operating in France), have entered into voluntary agreements with each other undertaking to reduce their emissions of greenhouse gases. Today, 33 big industrial companies and 4 federations, representing

56% of the emissions of the sector are involved. Aeres examines, approves, registers and controls the implementation of the participating companies' commitments. In case of non-compliance, participating companies will have to pay penalties to Aeres with effect from the end of 2004. A potential emission trading scheme has been in discussion for some time in the context of Aeres and it is hoped that an experimental emissions trading scheme will be implemented in the near future between these companies. It remains to be seen to what extent these voluntary agreements within Aeres will influence the French Government in the future, as, even though the Government has approved these proposals, Aeres is an entirely private initiative.

1 An unofficial text of the Emissions trading Directive is available at the European Commission's website <http://europa.eu.int/comm/environment/climat/emission.htm>

2 The Kyoto Protocol requires 55 countries accounting for at least 55% of the world's 1990 carbon dioxide emissions to ratify the Protocol for it to come into force. So far it has been ratified by 111 countries (including Japan, China and EU). If Russia ratifies the Protocol, which it has indicated it intends to do, the requirement will be met.

3 "Installation" is defined as a stationary technical unit where one or more activities covered by the EU ETS are carried out and any other directly associated activities which have a technical connection with the activities carried out on that site and which could have an effect on emissions and pollution.

4 From 2005 Member States may apply emissions allowance trading to installations below the capacity limits referred to in the ETD.

5 Methane (CH₄), Nitrous Oxide (N₂O), Hydrofluorocarbons (HFCs), Perfluorocarbons (PFCs) and Sulphur Hexafluoride (SF₆).

6 E.g. UK 12.5%; France 0%; Germany 11%; Netherlands 6% – EU Council Decision 2002/358/EC of 25 April 2002.

7 This differs from the Commission's original proposal that all allowances for the period 2005-2007 should be allocated free of charge.

8 See COM (2003) 403 final, 23 July 2003.

9 Bid price reported by Point Carbon on 8 August 2003: €8.25 (mid price €9.75).

10 Point Carbon, Carbon Market Europe, 8 August 2003.

11 European Commission's Extended Impact Assessment, 23 July 2003, COM (2003) 403 final.

12 UBS Warburg, The greening of UK electricity, May 2003

13 The authorities likely to be responsible for issuing greenhouse gas emissions permits will be the Environment Agency (England and Wales), the Scottish Environment Protection Agency (Scotland), the Department of the Environment, Northern Ireland and the Department for Trade and Industry (all offshore installations).

14 The Government is currently consulting on whether allowances to new entrants should be allocated free of charge from a set-aside or whether new entrants should be required to purchase them from the market.

15 The First Consultation Paper on the Implementation of the EU Emissions Trading Directive published on 12 August 2003, available at <http://www.defra.gov.uk/corporate/consult/eu-emissions/index.htm>

16 UBS Warburg, op. cit.

17 The start of the government's interest in reducing CO₂ emissions was the Letter of 17 September 1996 of the Ministers of Economical Affairs, the Environment, Agriculture and Transport. (Kamerstukken II 1996/1997, 25 026, nr. 1). The budget has later been increased with NLG 250 million (Kamerstukken II 1997/1998, 25 026, nr. 6).

18 Kamerstukken II 1998/1999, 25 026, nr. 9, p. 5.

19 Kamerstukken II 2001/2002, 26 603, nr. 38, p. 9.

20 Kamerstukken II, 2001/2002, 26603, nr. 38, p. 11. This 50/50 criterium is still valid under the new government Kamerstukken II 2002/2003, 21501-08, nr. 168, p. 5.

21 Voorontwerp emissiehandel, to be downloaded at www.vrom.nl/docs/milieuv/voorontwerpemissiehandel.pdf. The explanatory notes can be downloaded at www.vrom.nl/docs/milieuv/MVtemissiehandel.pdf.

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