

Global Environment Newsletter

Welcome to the Winter edition of our Global Environment Newsletter. This issue covers the following topics:

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We hope that you find this issue of our Global Environment Newsletter of interest. If you have any topics that you would like to see covered in future editions or if you have any comments on previous issues please let us know.

International

COP21 – the real deal or another cop-out?

From 30 November to 11 December 2015, world leaders are meeting in Paris for the annual Conference of the Parties to the United Nations Framework Convention on Climate Change and the Meeting of the Parties to the Kyoto Protocol. The meeting in Paris is seen as critical because of the perceived failure of previous conferences, best exemplified by the Copenhagen meeting in 2009 and the stalling of negotiations since the end of the first commitment period of the Kyoto Protocol in 2012. The latest reports of the Intergovernmental Panel on Climate Change which reiterate the need to limit global warming to 2°C above pre-industrial levels have also increased the sense of urgency to make real progress on an international deal.

In October this year, a UN climate change working party published the latest version of a draft agreement which is expected to form the basis of negotiations. That draft agreement contemplates national greenhouse gas emission reduction pledges, referred to as "intended nationally determined contributions" or INDCs. More than 170 countries, accounting for 95% of global emissions, have submitted INDCs, although there is a debate about whether these "intended" contributions should in fact be binding.

The UK Government has indicated that it is "cautiously optimistic" that an agreement will be reached in Paris but, as always, one of the key challenges will be the divide between developed and developing countries, and the concept of "common but differentiated responsibilities". In Paris the UK and the EU are arguing for:

- Ambitious mitigation commitments from all parties (both developed and developing countries), and a plan to implement them;
- A mechanism to review mitigation ambitions every five years and to bring parties back to the table to further reduce emissions in line with a long-term goal to keep the world moving towards the below 2°C goal;
- A robust, legally-binding rules framework to ensure transparency and accountability around climate action and to help track progress; and
- Climate finance to support the most vulnerable countries to take mitigation and adaptation action and, to this end, the UK has committed to a multi-million pound funding package of climate change support for the Commonwealth's small island countries.

However, despite positive sounds coming from Beijing (such as the introduction of seven local pilot emissions trading schemes and a commitment to peak emissions by 2030), imposing binding targets on developing countries will be particularly contentious. There are also domestic political issues at play for President Obama, notwithstanding his commitment to reducing power plant emissions in the US.

While the initial indications from Paris are positive, with many leaders publicly expressing the importance of a global accord, it remains to be seen whether this is merely political posturing or whether the parties are willing to make the necessary sacrifices to secure a global agreement.

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International

The New Sustainable Development Goals – Global Action for People and Planet

From 25 to 27 September 2015, the United Nations held its Sustainable Development Summit in New York with the primary objective of adopting 17 new Sustainable Development Goals (SDGs) to form the blueprint for global development to 2030.

In September 2000, the UN adopted eight Millennium Development Goals (MDGs) focussed on the reduction of extreme poverty, improving education and the status of women, and environmental sustainability. It was recognised at the 2012 UN Conference on Sustainable Development (Rio+20) that substantial, albeit uneven, progress has been made towards achieving the MDGs; and that a similar goal-setting process could be useful to pursue focussed action on sustainable development. And so the Sustainable Development Goals (SDGs) were born.

There are 17 SDGs. Each is expressed simply although the ambition in each goal is clearly evident. Separate sub-goals put specific action under each of the main goals. The more environmentally focussed goals and sub-goals are as follows:

Goal 6: Ensure availability and sustainable management of water and sanitation for all.

- By 2020, protect and restore water-related ecosystems, including mountains, forests, wetlands, rivers, aquifers and lakes.

Goal 7: Ensure access to affordable, reliable, sustainable and modern energy for all.

- By 2030, increase substantially the share of renewable energy in the global energy mix.

- By 2030, enhance international cooperation to facilitate access to clean energy research and technology.

Goal 12: Ensure sustainable consumption and production patterns.

- By 2030 achieve the sustainable management and efficient use of natural resources.

Goal 14: Conserve and sustainably use the oceans, seas and marine resources for sustainable development.

- By 2020 conserve at least 10% of coastal and marine areas, consistent with national and international law and based on best available scientific information.

Goal 15: Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss.

- By 2020 integrate ecosystem and biodiversity values into national and local planning, development processes, poverty reduction strategies and accounts.

The SDGs do not replace the MDGs. Instead, those aspects of the MDGs that are still to be completed will be brought into the workplan for implementation of the SDGs.

The SDGs become "operational" from 1 January 2016 and will guide the UN's decision making through to 2030.

The focus on implementation of the SDGs and on monitoring and accountability in the formal declaration that adopted the SDGs is a marked difference (and improvement) on the equivalent declaration for the MDGs. The final third of the SDG declaration addresses implementation and maps out the auditing and reporting program to track progress of implementation of the SDGs. Reporting is to be done on a national, regional and global level, with particular support to be given to African countries, least developed countries, small island developing status and low-lying coastal countries to ensure that their national statistical offices and data systems are robust and have sufficient capacity.

The SDG declaration also envisages that a high level political forum will have a "central role" in overseeing the inevitable complicated network of follow-up and review processes that will be required. The forum's work will be informed by an annual SDG Progress Report to be prepared by the UN Secretary-General.

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EU

New EU rules on CO2 emissions from Shipping

A new EU Regulation (2015/757) imposing obligations on ship owners and operators to gather information about the CO2 emissions from their ships came into force on 1 July this year. The Regulation is the first step in a staged approach to include maritime transport emissions in the European Union's greenhouse gas reduction commitment programme.

Overview

The Regulation establishes rules for the monitoring, reporting and verification of CO2 emissions from ships arriving at, departing from or based within ports under the jurisdiction of Member States. Ship owners, or any other organisation or person (such as a bareboat charterer) who has assumed responsibility for the operation of the ship, must determine the annual and per-voyage CO2 emissions for each of their ships and report annually on those emissions.

Scope

As around 90% of shipping emissions come from ships with a gross tonnage of over 5,000, ships with a tonnage under 5000 have been excluded from the scope of the Regulation. Ships transporting cargo or passengers for commercial purposes are also excluded, for example, those undertaking dredging, ice-breaking, pipe laying, fish-catching or offshore installation activities.

Monitoring, reporting and verification obligations

From 1 January 2018, ship owners and operators must monitor (in accordance with an approved monitoring plan) CO2 emissions for each ship on a per-voyage and annual basis. The per-voyage monitoring obligation does not apply if all of the ship's voyages during the reporting year either start from or end at a port under a Member State's jurisdiction or the ship performs more than 300 voyages during the reporting period.

From 2019, ship owners and operators will be required to submit an annual emissions report for each ship under their responsibility to both the Commission and the authorities of relevant flag States. The emissions report must be checked by an independent verifier to confirm that it complies with the requirements of the Regulation.

Each year the Commission will publish a range of information about each ship, including its annual CO2 emissions, the annual total fuel consumption for voyages and the annual average fuel consumption and CO2 emissions per distance travelled on voyages.

Enforcement

If ship owners or operators fail to comply with monitoring and reporting requirements for two or more consecutive reporting periods, the Member State of the ship's port of entry may issue an expulsion order, following which the ship will be refused entry to all European ports until the ship owner or operator fulfils its obligations under the Regulation.

Comment

While the compliance dates may still seem a long way off, companies affected by the Regulation should start thinking about what systems will need to be put in place to satisfy the requirements as it may take some time to implement appropriate processes. Companies should also keep an eye out for related legislative developments as the Commission will produce technical rules by the end of 2016 setting out certain parameters for per-voyage monitoring.

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Germany

New obligations for large distributors from belated implementation of Waste Electrical and Electronic Equipment Directive

On 24 October 2015 the new Law on Electrical and Electronic Equipment "EEE" (*Gesetz über das Inverkehrbringen, die Rücknahme und umweltverträgliche Entsorgung von Elektro- und Elektronikgeräten, Elektro- und Elektronikgerätegesetz*) came into force. It belatedly implements the European waste electrical and electronic equipment "WEEE" Directive (2012/19/EC) into German Law, which should have taken place by 14 February 2014. The new ElektroG strengthens the recovery of rare metals and seeks to better protect the environment against hazardous substances in WEEE. In addition, it aims at preventing the illegal export of WEEE, in particular to developing countries.

The most important change from former ElektroG is the extension of take-back obligations for WEEE to so-called large distributors¹. Large distributors are entities which offer or provide EEE on the market with a sales area for EEE of at least 400 sqm or, in the case of online distributors, with a sales and storage area for EEE of at least 400 sqm. The principal obligations on Large Distributors are as follows:

- Large Distributors have a continuing obligation to take back from consumers waste EEE (WEEE) which is shorter than 25 cm on each side;
- For larger WEEE, Large Distributors only have to take back such equipment if a consumer buys an equivalent new product; and
- Large Distributors must either provide their own take-back points or use the existing infrastructure provided by manufacturers (rather than using take-back points of public waste disposal authorities). They may only charge fees if they collect the WEEE at the consumer's home.

Previously, only manufacturers and public waste disposal authorities were legally obliged to take back WEEE, while many distributors took back WEEE on a voluntary basis. The new take-back obligation comes into effect nine months after the ElektroG came into force. Large distributors can either recycle, treat or dispose of the WEEE themselves or provide it to manufacturers or public waste disposal authorities. Large Distributors must register with the competent authority within three or nine months (depending on whether or not they took back WEEE in the past on a voluntary basis).

Notwithstanding the extension of the take-back obligation to Large Distributors, manufacturers or importers must still bear WEEE disposal costs.

The ElektroG also introduces new recycling and recovery thresholds and introduces new rules requiring better information to be provided to consumers in relation to available take-back points.

In addition, the new ElektroG sets out minimum requirements for export of old EEE. In future, only tested and functioning EEE which has been properly packaged may be exported. Furthermore, the exporter must prove that the EEE are products and not waste.

The new ElektroG is only one tool to increase levels of recycling. On 21 October 2015 a draft bill was published regarding *inter alia* the introduction of a Yellow Bin in private households for the collection of separate recyclable metals. The bill will aim to increase the proportion of recyclable waste and is being widely debated. It will most likely enter into force after further amendments in the course of 2017.

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The Netherlands

Reducing CO2 emissions: National Energy Agreement – a good start, but more efforts required

The National Energy Review 2015 ("Nationale Energieverkenning 2015") was published in October 2015. This review contains important conclusions about the impact of the National Energy Agreement ("NAT") which resulted from extensive consultations in 2013 between over forty Dutch organisations including Ministries, energy organisations, employers organisations, unions, NGO's and others. Driven by European climate change targets, the declining availability of fossil

fuels, and the dependence on international energy suppliers, the NAT seeks to facilitate the transition to a sustainable, reliable and affordable energy supply for everyone. Its objectives are to achieve:

- An average energy efficiency saving of 1.5% per year;
- A share of renewable energy in the Netherlands' total consumption of energy of:
 - 14% by 2020;
 - 16% by 2023; and
- Creation of at least 15,000 additional jobs in the low carbon sector by 2020.

The Agreement focuses on twelve key focus areas ("Pillars"). Each Pillar has its own objectives and approach (See box inset).

The National Energy Review 2015 concludes that the NAT has had a number of positive effects on the transition to a more renewable energy supply system in the Netherlands. Nevertheless, increased efforts will be necessary to meet the NAT's objectives.

The main conclusions from the National Energy Review 2015 are the following:

- Energy supplies in the Netherlands have reached a tipping point. The share of renewable energies will be increasing more rapidly up to 2023, due in part to joint efforts by the parties involved in the NAT.
- Energy efficiency savings will also increase up to 2020.
- Energy consumption will continue its decline, but at a slower pace.
- However, based on current NAT actions, after 2020, the decline in emissions of greenhouse gases and air pollutants would be expected to slow down as well.
- In order to achieve a cleaner and more reliable energy system in the longer term, stricter long-term climate change policies will need to be defined; and these policies will require implementation through stronger incentives for carbon reduction and energy efficiency.

Following publication of the review, the Dutch Cabinet is now considering future policy / incentives in this area. It appears that increased efforts in energy saving, enhanced development for wind and solar initiatives and further investments in renewable heat will be strong areas of focus for the Dutch Cabinet. In any case it is clear that the renewable energy sector in the Netherlands will show extensive activity in the next decade, with significant investment being required to meet the NAT's targets.

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Romania

Current state of the Green Certificates market

In Romania, the Renewable energy sources ("RES") incentive system is based on a system of Green Certificates (GC) awarded to renewable energy generators combined with an obligation upon energy suppliers to obtain a quota of certificates (see box inset).

The Romanian Government has recently been taking action to control the impact of scheme on consumers as described below.

The Government's renewable policy strategy, is to ensure that electricity produced from RES that benefits from the RES incentive system meets a gradually increasing percentage of total annual electricity consumption in Romania:

- 8.3% in 2010.
- 10% in 2011.
- 12% in 2012.
- 14% in 2013.

The supplier certificate quotas are based upon the national targets from time to time. Although initially the law provided for fixed incremental targets until 2020, recent changes provide for the Government to set a new target for each year going forward to 2020 based on analysis by ANRE (the Roman Energy Regulatory Authority).

Accordingly to RES industry Associations, in the last two years, the targets / quotas set by the government have

been lower than the total electricity produced from renewable sources. This has led to a surplus of GCs on the market compared with demand from suppliers. As a result, the price of GCs has now reduced to the minimum EUR 27 threshold (plus annual indexation). It is noteworthy that GCs are valid for only 12 months since their issuance and, according to the RES industry association figures, a significant number of GCs remain unsold.

As from 1 July 2013, the Government also deferred the ability to trade a proportion of wind, solar and hydro generators' GCs until 1 April 2017 or 1 January 2018, depending on technology. The deferral is only applicable to projects that have been accredited by ANRE as at 31 December 2013 to receive Green Certificates. As such, RES generators will still receive the same number of GCs, but a portion of these cannot be traded (and cashed-in) until the respective dates. After such date, it will be possible to trade the deferred GCs until 31 December 2020 on a basis that has yet to be decided. While this reduces the current oversupply of GCs on the market to a certain extent, generators are concerned that this is likely to lead to additional oversupply post-April 2017.

RES industry Associations are seeking to encourage the Government to increase national targets and quotas but no official position has yet been taken by the Government.

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How the Romanian Green Certificate System Works

- Each electricity supplier has an obligation to purchase a quota of GCs, calculated as a percentage of its electricity sales to consumers. Suppliers purchase certificates from generators and the costs are passed on to final consumers. The parties may freely negotiate the price for GCs, taking into consideration the minimum and maximum prices established by law. If a supplier does not meet its quota, it has to pay a penalty to the national grid operator amounting to EUR 110 for each missing GC. For the period 2008-2025, the value of a GC is established by law between EUR 27 and EUR 55, subject to annual indexation.
- The system requires the Romanian authorities to monitor energy investment and production costs, as well as generator income. Support levels for new beneficiaries have to be adjusted if overcompensation is identified (e.g., by reducing the number of GCs granted to new entrants in the support scheme).

UK

New Tough sentencing guidelines for health & safety and corporate manslaughter offences

The UK Sentencing Council has published a new set of guidelines (the H&S Guidelines) establishing harsher penalties for a number of types of offence including breaches of health & safety regulations and corporate manslaughter. For many years, there has been criticism that sentences imposed for environmental, and health & safety offences are often too low and inconsistently applied. Following its publication of new guidelines for environmental offences (see further below), the Council has now turned its attention to the related matters of health & safety and corporate manslaughter and food hygiene.

The H&S Guidelines require the Courts to take a step-by-step approach to determining a level of fine commensurate with the harm caused, the conduct of the defendant and the nature of the organisation involved. It establishes ranges of appropriate fines (and prison sentences for individuals) and a starting point for consideration. The ranges vary depending on the size of organisation.

Significantly, for large companies, the H&S Guidelines make it clear that fines should aim to remove any economic gain caused by the offence and be sufficiently large to ensure that management and shareholders realise the need to achieve safe conditions for workers and the public. Examples in the H&S Guidelines of sentencing ranges for companies with over £50m turnover include:

- Corporate manslaughter: A range of fines of between £3m and £20m. Starting points for consideration:
 - £7.5m for higher culpability;
 - £5m for lower culpability; and
- Breaches of Health & Safety regulations: for the highest level of culpability and highest level of actual, or risk of, harm: A range of fines between £2.6m and £10m. Starting point for consideration: £4m.

The H&S Guidelines note that the Courts should consider increasing these levels where turnover "very greatly exceeds" £50m. In June 2015, the Court of Appeal imposed the first sentence under the analogous new guidelines on environmental offences (see our [client briefing](#)) upon the utility Thames Water for a pollution offence. The Court noted that fines up to 100% of pre-tax net profit might be reasonable; and that this could lead to fines over £100m in appropriate cases, similar to those found in financial services cases. It seems likely that the Courts will adopt a similar approach under the H&S Guidelines.

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This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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69697-5-1579

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