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Briefing note Spring 2016

Global Environment Newsletter

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

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

The Paris Agreement: Reducing Carbon Emissions whilst Creating Business Opportunities? A Dutch perspective

On 12 December 2015 195 countries (both developed and developing) entered into the Paris Agreement with the aim of limiting the increase in global temperature to 2°C and to pursue efforts to limit temperature increases to 1.5°C in order to avoid the worst effects of climate change. Another aim agreed was to see global greenhouse gas emissions reach a peak "as soon as possible" and to "undertake rapid reductions thereafter". The ultimate ambition is that, in the second half of this century, carbon emissions should only be permitted where these can be taken up by carbon sinks. The focus of the Agreement is on post-2020 action, following the end of the second Kyoto Commitment Period.

The Paris Agreement represents the first real global deal on carbon mitigation action. Although the obligation for the parties to the Agreement to prepare and submit their own individual Nationally Determined Contributions will not be legally enforceable in the same way as the Kyoto targets were for developed countries, the political momentum this creates is likely to be considerable. The Paris Agreement was therefore immediately acclaimed as a great achievement.

National governments will be responsible for the proper execution of the Paris Agreement, but the actual success may well be determined elsewhere. If the global business community picks up the messages included in the Agreement and seizes the commercial opportunities it may offer, the impact may be much bigger than anticipated by the general public, which was lukewarm in its reaction, given the fairly limited substantive obligations placed on the parties by the Agreement.

Entrepreneurial spirits in the Netherlands are already spotting the chances the Paris Agreement may offer to their businesses. These are some inspiring examples:

- ***Renewable Energy Generation and Supply***: Investments in "green energy": Eneco, one of the Netherlands four major power suppliers, expects an increase in demand for electricity by 30% due to the increase in the use of electric cars. Not only does this create a new market e.g. for power charging networks for such cars, but it may also result in demand for increased renewable energy generation capacity, through wind farms and solar parks;
- ***Offshore Industries***: Enterprises active in the offshore industry expect to benefit significantly from the expansion in offshore wind farms. Van Oord, a leading Dutch dredging company, expects to benefit significantly from this new market;
- ***Waste Treatment:*** The waste treatment industry expects the Paris Agreement to have a positive influence on its business. Van Gansewinkel, the Dutch market leader in this field, emphasizes that the Benelux and Germany are frontrunners in recycling of raw materials from waste. Further increases in recycling activity will make an important contribution to achieving the targets of the Paris Agreement, as well as resolving the global shortage for certain raw materials;
- ***Farming:*** Rabobank, the major Dutch bank with a strong market share in agri-business, sees excellent opportunities for Dutch farmers. By applying innovative biotechnology, farmers can provide e.g. molecules for the production of bio-plastics or advanced proteins from plants to replace animal proteins;
- ***Chemicals markets:*** VNCI (the Association of the Dutch Chemical Industry) anticipates large potential benefits from the Paris Agreement. For example, further investments in bio-based raw materials will contribute to a strong reduction in carbon emissions in the production chain for sectors such as car manufacturing, the packaging industry and transportation.

The above are just a few examples of the more broadly shared view, namely that the Paris Agreement is more than a political decision to combat global warming: it is also a platform that can contribute to increased economic activity and industrial creativity. If the industry succeeds in grasping those opportunities, the Paris Agreement may well turn out to be a historical achievement.

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EU

The Medium Combustion Plant Directive

The European Medium Combustion Plant (MCP) Directive came into force on 18 December 2015 following its official publication in the Official Journal (EU/2015/2193). It places controls on combustion plants of between 1MW and 50MW. Transposition of the MCP Directive into national laws is required by 19 December 2017. Larger plants are already regulated by the Large Combustion Plant Directive and the Industrial Emissions Directive. The MCP Directive is a further new instrument aimed at reducing air pollution in the EU from smaller scale emitters which increasingly contribute to poor air quality. In particular the Directive aims to address continued failures to meet World Health Organisation air quality standards. The key requirements of the Directive are set out below.

Each operator of a MCP must be subject to a permit issued by the relevant national authority, or be registered with that authority. Permitting or registration applies immediately to new MCPs. For existing MCPs, the requirements are being phased in:

- Plants over 5MW must be subject to permitting or be registered by 1 January 2024; and
- For smaller plants the deadline is 1 January 2029.

Operators also have various monitoring and reporting duties.

MCPs will have to comply with emission limit values for SO2, NOx and particulates (dust). The strictest limits are placed on new MCPs from 20 December 2018. Existing plants are subject to less strict limits, again on a phased basis:

- Plants over 5 MW are subject to emission limits from 1 January 2025; and
- Smaller plants will have to comply with emission limits (generally the least strict limits of all) from 1 January 2030.

Existing MCPs which operate for less than 500 hours per year (on a rolling average) can be exempted from the emission limits provided that such plants comply with a 200mg/NM3 limit for particulates from solid fuel plants. A similar derogation applies for new plants (with a 100mg/NM3 limit for particulates from solid fuel plant). Additional derogations apply until 1 January 2030 for:

- Plants over 5MW where at least 50% of useful heat produced is provided to district heating systems;
- Solid biomass plant;
- Plant used to drive certain gas compressor stations; and
- Small and micro isolated systems.

Two other derogations apply in the case of low-sulphur fuel and gaseous fuel plants suffering significant interruptions to supply. In areas where Member States are not meeting Air Quality Directive limit values, they will have to consider applying more stringent limits on MCPs. The Directive is not intended to cover plants covered by the Large Combustion Plant (LCP) Directive. The LCP Directive regulates individual plants of 50MW or more (and also other smaller plant, including MCPs, which share a common stack with an LCP).

While various manufacturing and other industrial processes are specifically excluded from the requirements of the Directive, most other forms of stationary combustion plant will be covered. This may impact significantly on energy-from-waste plants and manufacturers who operate combustion plants to power or heat their facilities. The impact will also not be limited to industrial facilities. Building owners with large back-up generation or boiler plants could also be caught by the provisions.

More generally, existing operators will need to keep the deadlines in mind given the need to build in sufficient time for required plant upgrades or replacement.

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Australia

South Australia Considers Global Nuclear Waste Storage Facility

In March 2015, the South Australian State Government commissioned an independent inquiry to investigate the potential for the State to increase its involvement in the global nuclear fuel cycle. South Australia has significant uranium deposits and a number of mines, including BHP Billiton's Olympic Dam copper/uranium mine which is the world's largest uranium orebody.

The inquiry released its tentative findings on 15 February 2016 for a five week consultation period which prompted over 150 submissions. The inquiry's final report was delivered to the South Australian Government on 6 May 2016 and was released to the public by the State Premier, Jay Weatherill on 9 May 2016.

The inquiry made 12 formal recommendations to the South Australian government in connection with the broader development of a nuclear industry in the State with the most significant recommendation being that the State should pursue the development of an integrated storage and disposal facility for high and intermediate level nuclear waste, including used fuel from international sources.

The inquiry noted that there was "international consensus that geological disposal is the best technical solution for the disposal of used fuel" and that South Australia had a "unique" set of attributes that made it attractive for fuel disposal, including low levels of seismic activity, an arid environment and sophisticated frameworks for securing agreement with communities.

The inquiry found that an integrated facility with a lifespan of 120 years from project decision to closure would generate total revenue of AUD5 billion for the first 30 years of operation and could add five percent to South Australia's gross state product by 2029/2030 (AUD6.7 billion).

However, the inquiry also identified a number of (significant) hurdles to commencing development of a storage facility:

- Determining a baseline price for permanent storage of material (no market currently exists);
- Developing acceptable international agreements for the commercial transfer of used fuel for permanent disposal;
- Securing the consent of communities directly affected by the location of the storage facility, particularly the consent of indigenous people;
- Developing an enduring mechanism to share the economic benefits from the storage facility given the intergenerational nature of the project; and
- Making the necessary changes to federal and South Australian laws to allow for the importation and storage of nuclear material.

Recognising these challenges, Chapter 10 of the final report sets out a number of immediate and longer term steps that the State government should take to start the process. These steps include establishing a dedicated agency to undertake the extensive community engagement process to assess whether a storage and disposal facility would be able to obtain the necessary social licence to operate. The inquiry suggested that the multi-disciplinary agency should be overseen by an independent advisory board comprising trusted South Australian community leaders.

The South Australian government indicated when the final report was released that it would not make a decision on whether to pursue the development of a waste facility until the end of 2016 following more community consultation.

A copy of the inquiry's final report can be accessed here: http://yoursay.sa.gov.au/system/NFCRC_Final_Report_Web.pdf

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China

A National Emissions Trading Scheme

On 25 September 2015, in a US-China Joint Presidential Statement on Climate Change, President Xi Jinping announced that China will roll out a national emissions trading scheme in 2017. This follows the launch of seven pilot schemes in several key cities and provinces throughout China since 2013. The announcement is significant news for the emissions trading market worldwide since the China scheme is likely to be comparable to, if not larger than, the European Union Emissions Trading System ("EU ETS").

On 11 January 2016, the National Development and Reform Commission issued a circular (Fa Gai Ban Qi Hou [2016] No. 57, the "Circular") to lay out the basic principles of the national scheme. According to the Circular, eight key industry sectors (including petro-chemistry, chemicals, building materials, paper-making, non-ferrous metals, iron and steel, power generation and aviation) will be covered in the initial stage of the national scheme. Enterprises in those sectors with annual total energy consumption over 10,000 tonnes of coal equivalent in 2013, 2014 or 2015 will have to participate. Participants are required to submit their third-party verified reports of emissions data in 2013, 2014 and 2015 by 30 June 2016 for the calculation of baseline emissions for the purposes of their participation in the scheme.

It is expected that more details regarding the design mechanism of the national scheme will be released in the near future. The seven pilot schemes currently in operation all have different design features, due in part to the varying economic contexts. For example, Shanghai expanded its ETS coverage to local airlines for their domestic flights, which could potentially be scaled up to a scheme comparable to the EU ETS aviation scheme. Beijing and Shenzhen, both with large service economies, have required major companies in various service industries to join the schemes. Guangdong, the largest scheme in China so far, is the first pilot allocating allowances through auctioning, starting with 3% of total allowances in 2013 and 2014 and increasing to 10% in 2015. Despite that, "grandfathering" based on historical emissions is still the main allocation method in all seven pilot schemes.

The Paris Agreement on Climate Change envisages that there will be an emissions mitigation mechanism to support sustainable development. This mechanism will potentially allow regional emissions trading systems to be linked together and will act as a successor to the Kyoto Protocol's Clean Development Mechanism and Joint Implementation after 2020. It is hoped that China's scheme will be ready to be linked to other regional schemes at that time.

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Germany

Increased Rights for Claimants in Environmental Court Cases

It has long been the rule under German administrative law that pleas in court against decisions of competent authorities in plan-approval procedures must be based on objections which were previously made in the administrative procedure which led to the decision. As a result, no new objections can be made at the court challenge stage. In a recent court case, the Court of Justice of the European Union has decided that this so-called "foreclosure rule" is not in accordance with European Law where the original administrative decisions relate to the Environmental Impact Assessment Directive (2011/92/EU) or the Industrial Emissions Directive (2010/75/EU) [1].

The Federal Republic of Germany had argued that the foreclosure rule is necessary to ensure efficient administrative procedures and legal certainty. If objections already known during the administrative procedure were held back for strategic or tactical reasons, Germany argued that administrative procedures aiming at reconciling the differing interests would become ineffective.

In response, the European Court of Justice pointed out that court proceedings are independent proceedings and must enable the claimant to achieve a full assessment, i.e. substantive and procedural legality of the contested decision. However, the Court noted that appropriate national procedural rules would be allowed to ensure the efficiency of legal proceedings, such as to prevent submission of abusive arguments or actions brought in bad faith.

This is a significant decision in the German context and it has been widely discussed in the German legal press. While the verdict is only expressly applicable to decisions involving the two Directives mentioned above, its impact may be much wider as similar restrictions apply in other fields of public environmental law. It is anticipated that if and to the extent other European directives grant a similarly wide right of access to courts e.g. Article 15 of the Seveso III Directive (2012/18/EU) or Article 13 of the Directive on Environmental Liability (2004/35/EC), the German foreclosure rule must not be applied. Experts fear that court procedures will take longer in the future due to the fact that many claimants, particularly acknowledged environmental protection associations, might decide strategically to keep some objections in reserve for the court procedure rather than submitting them in the course of the original administrative procedure.

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[1] European Commission v Federal Republic of Germany - Case C 137/14, decision dated 15 October 2015.

Poland

Renewables at a Crossroads?

2015 was a memorable year for the development of the renewable energy sector in Poland. After almost four years of legislative works and hot public debate, the Polish parliament adopted a new act solely dedicated to renewable energy sources that has shaped the regulatory framework for the development of the renewable sector in Poland for the coming years. Yet, one year later, the uncertainty as to the direction in which Poland will go with respect to renewables remains, but hopefully not for long.

The Renewable Energy Sources Act of 20 February 2015 (the "RES Act") abolished the green certificates-based support scheme for all future renewable energy installations replacing it with an auction based Contract for Difference "CfD" based support scheme (with support available only to auction winners). At the same time the RES Act removed support for larger hydro generation installations over 5 MW and significantly limited support for biomass co-fired units. In order to protect investments in projects already being constructed, a transitional period was established, allowing any new project which commenced generation by the end of 2015 to benefit from the green certificates scheme on the same terms as all other pre-existing projects.

However, the new government which took power after parliamentary elections in Autumn 2015 has been taking forward some new ideas on renewable energy. As a first step, the entry into force of the auction scheme has been delayed by six months, until 1 July 2016, in order to give the Government sufficient time to adjust the legal framework to address new priorities. Now, with less than two months to the deadline, the informal disclosure of a draft of a bill to amend the RES Act has finally begun to give some clarity to what form of support will be available for renewables in the coming years and where the Government's priorities appear to lie:

- The auction scheme remains, but technological baskets defined by reference to efficiency or CO_2 emissions (rather than by reference to the type of energy source) are being introduced;
- Although volume allocation between baskets will take place annually based on secondary legislation, it is apparent that preference will be given to "stable" renewable energy sources such as biomass and biogas over "unstable" wind and solar;
- The first auction is still to be announced in 2016, but no minimum volumes are guaranteed;
- Support for co-firing installations is being strengthened: dedicated co-firing plants will now be allowed to participate in the CfD auctions and some other pre-existing limitations for "dedicated" co-firing plants in the Green Certificate Scheme will be removed; and
- Biomass plants will have to source minimum thresholds of biomass from the local area (to be defined) in order to qualify for support.

The most significant impact of these changes is likely to be felt by the wind farm sector, which flourished under the green certificates scheme. While this sector should have been an obvious leader in any open auction, the introduction of efficiency-based technological basket is likely to marginalise wind technologies. In addition, a draft act limiting the possibility of locating new wind farms in Poland and introducing new levies on wind farms has been recently proposed by the governing party, although its fate is yet to be decided.

More generally, if the Government hopes to see any increase in the installed capacity of RES installations (regardless of the technology), the regulatory instability which has plagued the Polish renewables sector must end once and for all and the support for existing projects must be maintained in order to regain the investors' confidence in this area. At long last, it seems likely that by 1 July 2016 the shape of the legal framework for the coming years will finally have been set.

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Spain

New Possibilities for Redeveloping Previously Forested Land Cleared by Fires

Historically, Spanish forests were often set ablaze on purpose with the aim of seeking approval for urban development on forested areas. In 2003, in order to stop this practice, the Forests Act introduced a 30-year prohibition on changing the use of forest land affected by fire ("Burnt Land") regardless of whether the fire started by accident or was lit intentionally.

Under the prohibition, Burnt Land must remain as land that is used for forest-related activities (excluding urban development) for three decades following the fire.

However, considering the need for economic development, the Spanish Parliament passed a bill on 20 July 2015 (which entered into force on 21 October 2015), that amends the Forests Act 2003 and provides for an exception to such prohibition.

This exception provides that the prohibition can be lifted on an exceptional basis by a regional act of the relevant regional government which is competent for the regulation and management of the forests situated within their territory. In order to pass such an act:

- Urgent reasons of the utmost public interest must be involved; and
- Compensatory measures allowing for the provision or restoration of forest of surface area equivalent to the Burnt Land must be implemented.

So far no regional government nor legislature has taken advantage of this possibility. As a result, it remains to be seen how such "urgent measures of the utmost public interest" are construed by regional legislatures and by environmental authorities, and how demanding those "compensatory measures" are going to be.

Nevertheless, it seems likely that some regions (especially those most affected by forest fires) will seek to use this exception to enable dormant real estate or industrial projects to finally be implemented in areas where, for example, there are high unemployment rates. It seems unlikely that the exception will lead to a new rise in intentional forest fires, given the strict criteria for application of the exception.

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UK

Reform of Groundwater Abstraction Regime

Following a long period of consultation, the UK Government has now proposed reforms of the current regime regulating abstraction of water for surface or groundwater resources in England. These reforms are aimed at making the abstraction regime more flexible in protecting the environment (particularly in dealing with short term changes in water flow), whilst ensuring the public water supply and making the system fairer between abstractors.

Under the proposals, all abstraction permits will be subject to annual and daily abstraction limits. There will no longer be any "seasonal" licences which, for example, only allowed abstraction in Winter. For surface water abstractors in "enhanced catchments" (water scarce resources), rights to abstract will be linked to proportions (or shares) of water which are available for abstraction. Groundwater abstractions will continue to be regulated through annual allocations although these may change in response to environmental conditions in the longer term.

There will be flow-based conditions on all surface water permits which could restrict abstraction in cases of low water availability in the resource. Most of these restrictions will simply be copied over from current licences. However, the new conditions will be applied gradually on a basis proportionate to the level of scarcity.

The Government believes that the greatest benefit of flexibility will be seen in enhanced catchments, where abstractors will be allowed to take additional water for storage when flows are high without this being counted towards their maximum usage. Additional opportunities will be provided for water trading in enhanced catchments using pre-approved trading rules. However, only those with an interest in water or a justified need to abstract water, or land on which there is such a need, will be able to trade in water rights.

Water catchment management will take on increased importance in the new abstraction regime. For example, rules specific to each water catchment will determine when low flow controls can be applied and how a new risk-based approach to reviewing abstraction permits will operate. Reviews will be used to remove current time limits on permits and could be instigated at any time, e.g. in case of environmental concerns or environmental legislation changing. The review process would take up to 6 years for each permit and 3 year's notice of any changes to the permit would be given. Significantly, changes to permits would no longer entitle the abstractor to compensation.

Outside of the review process, the Environment Agency would be able to remove permitted, but unused, abstraction volumes from permits in circumstances where there is a risk of environmental deterioration of the resource.

Water abstraction permitting will be brought into the single Environmental Permitting regime for the first time as part of the reform. A new system of charging for water abstractions will be considered but not one based on applying a value to the water abstracted. It will aim to cover the Environment Agency's costs.

A separate consultation has been published which contains proposals to bring all currently exempt abstractors within the licensing system. This would be done on a "light-touch" basis with a view to ensuring that all harmful abstractions can be managed whatever their size.

The Government wants to implement these reforms "by the early 2020s". The Welsh Government will publish its own proposals for reform in due course.

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