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Briefing note Winter 2016/2017

Global Environment Newsletter

4 November 2016 marked a milestone in the transition to a low carbon economy as the Paris Agreement on Climate Change entered into force. The COP22 meeting in Marrakech in November has begun to take the implementation of this agreement forward. The Paris Agreement has not, however, been the only international agreement on emissions reduction making the headlines; three other international agreements have recently been reached to tackle emissions from aviation, hydrofluorocarbons (HFCs) and shipping. We look at these along with a number of European developments on carbon reduction and low carbon markets, and some important developments in Belgium, China, Czech Republic and the UK.

Czech Republic

UK

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.

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International

ICAO Global Market-Based Measure for offsetting emissions from aviation: *CORSIA will introduce two voluntary pilots from 2021, with mandatory offsetting from 2027*

On 6 October 2016 government, industry and civil society representatives agreed a global market-based measure (GMBM)[1] to mitigate international aviation emissions at the 39th Assembly of International Civil Aviation Organisation (ICAO). In 2013, the ICAO agreed a goal of carbon neutral growth from 2020 onwards through a raft of efficiency measures and a GMBM. Under the recently adopted Resolution, ICAO Member States agree to participate in the ICAO's GMBM, the Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA).

Key terms of CORSIA

CORSIA requires that international aviation offsets its emissions through the reduction of emissions outside the sector using a concept of emissions units, with one emissions unit representing one tonne of CO2. CORSIA will be implemented initially through two voluntary phases: a pilot phase from 2021 to 2023, followed by a first phase from 2024 to 2026. A second phase from 2027 to 2035 will apply on a mandatory basis to all States that have either:

- An individual share of international aviation activities in RTKs (a standard industry metric used to quantify the amount of revenue generating payload carried) in the year 2018 above 0.5% of total RTKs; or
- A cumulative share in the list of States from the highest to the lowest amount of RTKs that reaches 90% of total RTKs, except those States defined as least developed countries, small island developing states and landlocked developing countries (unless such countries volunteer to participate).

This will effectively make participation in the scheme mandatory for the vast majority of States, although international flights on routes between a State that is included in CORSIA and a State that is not included as a result of the exceptions will be exempted from offsetting requirements.

The estimated volume of CORSIA units that will be required to offset aviation emissions varies, with one study concluding there will be a demand for around 8 billion tonnes of offsets between 2020 and 2040.

Implementation

The ICAO Council and the Committee on Aviation Environmental Protection (CAEP) have been devising the following implementation measures:

- A monitoring and reporting verification system;
- Recommended emissions unit criteria taking into account developments under the United Nations Framework Convention on Climate Change and the Paris Agreement; and
- Registries under CORSIA as a means of verifying that operators are in compliance with the GMBM.

In relation to each of these elements, the Council will aim to develop the related standards, recommended practices and guidance by 2018, and a consolidated central registry will be put in place no later than January 2021. The effectiveness of CORSIA will in large part be determined by the criteria and mechanisms designed to give effect to each aspect of the scheme.

Two issues that will be particularly important in achieving effectiveness are the quality of offset units and ensuring robust accounting of units. Policy makers generally agree that in order to be effective, emissions units must be real, permanent, additional, measurable, and only counted once towards a mitigation commitment. Although general criteria have recently been recommended by CAEP for the quality of offsets that are broadly along these lines, criteria are likely to require further elaboration to effectively offset emissions. Only once the Council publishes additional details will it therefore be possible to

1 http://www.icao.int/environmental-protection/Documents/Resolution_A39_3.pdf

determine the extent of the compliance burden that will be faced by the aviation industry, and the extent to which the agreement will effectively offset emissions.

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Montreal Protocol on Substances that Deplete the Ozone Layer amended to phase down use of Hydrofluorocarbons: *By the late 2040s, consumption of HFCs should be down to 15-20% of baseline levels*

On 15 October 2016, 197 countries agreed an amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer under which emissions of Hydrofluorcarbons (HFCs) will be phased down.

HFCs are commonly used in refrigeration and air conditioning, and are one of the most potent greenhouse gases. Emissions from HFCs are currently increasing by around 10% per year.

At the 28th Meeting of the Parties in Kigali, developed countries agreed to phase down their emissions of HFCs in 2019, making a cut of a least 10% against baseline levels in the period to 2023. Certain developing countries (such as China and Latin American countries) will be required to freeze consumption levels in 2024, while others (such as India, Pakistan and the Gulf States) will freeze their use of HFCs in 2028. China, the world's largest producer of HFCs, will only begin to reduce production in 2029. By the late 2040s, all countries will have to reduce consumption of HFCs to no more than 15-20% of their respective baseline levels. The amendment also includes specific exemptions that are available to countries with high ambient temperatures.

Additionally, the parties agreed to adequately finance HFC reductions, with the exact amounts of funding to be agreed at the next Meeting of the Parties in Montreal, in 2017.

Ahead of the Kigali meeting, the Consumer Goods Forum (a group made up of 400 manufacturers, retailers and other bodies accounting for around one quarter of HFC emissions), agreed to phase-out HFCs by switching to natural refrigerants or low global warming potential (low-GWP) alternatives. Currently, a number of potential low-GWP alternatives exist including carbon dioxide, air, water, ammonia and hydrocarbons. The Consumer Goods Forum commitment is effective immediately provided the alternatives are "legally allowed, commercially viable and technically feasible". Where there are barriers to entry, the phase-out must be completed by 2025.

It seems unlikely that the new target imposed by the amendment to the Montreal Protocol will have a significant impact on HFC use by businesses in EU Member States, as the EU has already begun work to phase out HFCs under the 2014 F-Gas Regulation.[2] The F-Gas Regulation aims to reduce HFC emissions by two-thirds by 2030 against a 2014 baseline.

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[2] Regulation (EU) No. 517/2014 Of The European Parliament And Of The Council of 16 April 2014 on fluorinated greenhouse gases and repealing Regulation (EC) No 842/2006

International Maritime Organisation: Sulphur Content of Shipping Fuel Oil to be further Capped in 2020*: A global cap of 0.50% mass/mass of sulphur content of "fuel oil used on board" by ships will be imposed on 1 January 2020*

At its 70th session in London on 28 October 2016, the International Maritime Organisation (IMO) Marine Environment Protection Committee decided a new cap on the sulphur content of "fuel oil used on board" by ships. There had been pressure on the IMO to begin reducing GHG emissions, but delegates at the IMO meeting confirmed they would not to start doing so until at least 2023 and would not put forward an initial GHG strategy until 2018.

Key terms of the new global cap

On 1 January 2020, the IMO will implement a global cap of 0.50% mass/mass by making a further amendment to Annex VI of the International Convention for the Prevention of Air Pollution from Ships (MARPOL). This represents a significant reduction from the current cap of 3.5% m/m that has been in force since 1 January 2012. The new cap will not affect the more restrictive 0.10% m/m cap that came into force on 1 January 2015 in designated Sulphur Oxide Emission Control Areas[3].

The interpretation of "fuel oil used on board" includes use in main and auxiliary engines and boilers, while there are exemptions in certain circumstances involving the safety of the ship and saving lives at sea, or circumstances where a ship is damaged. Ships can meet the requirements either by using low-sulphur compliant fuel oil, or by switching to fuel oil alternatives such as LNG or methanol. A further solution involves using exhaust gas cleaning systems known as scrubbers, provided the system is approved by the ship's flag State.

The IMO will now consider how the new global cap will be implemented and who will regulate it.

Effects of implementing the new cap

Although an IMO study concluded that there will be sufficient quantities of low-sulphur fuel oil available for compliance with the new cap, the shipping industry has expressed concerns that the supply of compliant marine gas oil (MGO) and marine distillate oil will be insufficient to meet demand. In the interim, the shipping industry may therefore have to turn to a blended product created by mixing high-sulphur fuel with diesel. Further, low-sulphur MGO is currently twice the price of high-sulphur residual fuel oil, and a shortage of supply of the former could lead to further price increases when the new cap comes in.

The new cap is therefore likely to benefit those shipping companies who are already investing in modern eco-ships equipped with scrubbers, as retro-fitting older ships with scrubbers is likely to be prohibitively expensive.

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[3] These areas are the Baltic Sea area, the North Sea area, the North American area (covering areas off the coast of the United States and Canada), and the United States Caribbean Sea area (around Puerto Rico and the United States Virgin Islands).

Europe

Major consultation package on EU Energy Union: *Significant reforms proposed to EU electricity market design legislation, and Directives on renewable energy and energy efficiency, and energy efficiency of buildings*

The European Commission has launched a major package of legislative reforms aimed at progressing plans for its Energy Union and implementing the 2030 EU Climate and Energy Framework agreed in 2014[4]. Measures include revisions to the Electricity Regulation and Electricity Directive, the Renewable Energy Directive, and the Energy Efficiency Directive and Energy Performance of Buildings Directive.

There is a wide range of measures covered in the package, with key reforms including:

Renewable energy

- Implementation of the EU-level binding target on renewable energy (at least 27% of total energy by 2030), as agreed in the 2030 Framework.
- New framework for renewables support schemes including a prohibition on retroactive changes to levels of support.
- An aspiration to increase the share of renewable energy supplied for heating and cooling by at least 1% every year.

Energy Efficiency - General

- Implementation of the EU-level binding target on energy efficiency (30% energy savings by 2030), as agreed in the 2030 Framework.
- Extension of the requirements on Member States to establish *energy efficiency obligation schemes* up to 2030, retaining the annual 1.5% per year energy savings target.

Energy Efficiency of buildings

- Smart power and other technology is incorporated into technical building system requirements, with a new requirement for electrical charging points in parking areas from 2025.
- Framework powers included requiring a *Building Smartness* indicator rating to be given to tenants and buyers.
- Relaxation of heating and air-conditioning inspection requirements.
- Strengthening of metering and billing requirements for heating and cooling.
- Building Energy Performance Certificates, energy efficiency standards and *nearly-zero buildings* provisions remain in place.

On Electricity Markets

- Reforms to rules for preferential dispatch by renewable generators.
- New possibilities for Transmission System Operators to own storage, whilst uncertainty over application of unbundling rules to TSOs remains.
- New EU-wide rules for design of, and participation in, capacity mechanisms.

EU Energy Union Governance

- Member State *Integrated National Energy and Climate Plans* and other governance measures are established to place pressure on Member States to meet the EU targets.

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4 http://ec.europa.eu/energy/en/news/commission-proposes-new-rules-consumer-centred-clean-energy-transition

We have produced two detailed briefings discussing key measures in the package:

- EU Energy Union Package - Reforms to Energy Market and Renewable Energy Legislation
- EU Energy Union Package - Reforms to Energy Efficiency of Buildings Legislation

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Carbon Reduction "Effort Sharing" and Land Use Regulations proposed: *Two proposed Regulations establish targets for member states in non-EU ETS sectors and introduce new forms of flexibility between the different emission reduction regimes*

The EU intends to achieve its carbon reduction commitments under the Paris Agreement primarily through implementation of its 2030 Climate and Energy Framework (which requires an EU-wide reduction in emissions of 40% by 2030 compared to 1990 levels). This Framework divides action into the EU Emissions Trading System (ETS) and non EU-ETS sectors.

In July 2016 the European Commission published a proposal for an "Effort Sharing Regulation" (ESR) containing binding annual greenhouse gas emission targets for Member States for the period 2021–2030 for the sectors not regulated under the EU ETS (including buildings, agriculture, waste management, and transport). It also published a separate proposal for a Regulation to bring emissions from land use, land use change and forestry (LULUCF) into the 2030 framework.

Proposed Effort Sharing Regulation

Similarly to the EU 2020 targets, each Member State is given a reduction target for 2030 compared to 2005 levels. The proposed reductions range between 0% for Bulgaria, to 40% for Sweden, and represent a 30% reduction target in these sectors across the EU as a whole. Targets are also set for each year within the 10 year period based on a decreasing linear trajectory.

Existing flexibility on banking, borrowing, buying and selling allocations from other Member States is retained.

The Commission notes that the EU is expected to achieve a 16 % reduction in emissions by 2020 (against its 10% reduction target) in the non-ETS sectors as set out in the current Effort Sharing Decision.

Proposed LULUCF Regulation

For the 2021 to 2030 period, each Member state will have to compensate any CO2 emissions from land use from equivalent CO2 removals from the same sector (i.e a no-debit target). Two compliance periods are set: 2021-2025 and 2026-2030 to align with the Paris Agreement.

Where Member States fail to meet their commitments, any shortfall will increase the target required under the ESR. The proposal allows Member States to bank over-performance in the first period into the second compliance period, and to trade over- or under-performance with other Member States.

Additional Flexibility under the ESR and LULUCF Regulations

The proposals give a number of new flexibilities:

- 9 Member States will be allowed to use a small percentage of their EU ETS allowances to satisfy their new ESR target (i.e. rather than auctioning them).

- If a Member State has net emissions from LULUCF, it will be able to use allocations from its ESR target to reach its LULUCF no-debit target.
- Member States will be able to use a percentage of any over-performance on their no- LULUCF target against their ESR target. Greater flexibility is given to countries which are more reliant on agriculture.

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Belgium

New Flemish Permitting Regime broadly survives challenge in the National Constitutional Court: *The regime will be implemented as enacted except in respect of certain habitats assessment provisions*

In Belgium's Flemish Region, currently, the development of an industrial project requires both an urban planning permit (*stedenbouwkundige vergunning*) governing plant construction works and an environmental permit (*milieuvergunning*), governing ongoing operation of the project after its construction. Urban planning permits are granted for an indefinite period of time, whereas environmental permits are to be renewed every 20 years.

The permitting scheme will change substantially as from 23 February 2017 when the single permit Statute comes into force (*Decreet betreffende de omgevingsvergunning* dated 25 April 2014). The Statute will integrate both permit regimes into one single permit covering the development and operation of a project. A single permit will normally be granted for an indefinite period of time.

As a transitional measure, the Statute allows the conversion of an environmental permit granted for a 20 year term into a 'single permit' of indefinite duration. Provided that certain conditions are met (such as for example the absence of *environmental impact assessment* or *appropriate assessment* requirements and the relevant environmental permit having been granted after 10 September 2002), this conversion can be done by means of a simple notification to the permit granting authority. If these conditions are not met, then a fully fledged permit application procedure will be required to effect the conversion.

Several NGOs are opposed to the Statute and have challenged it by means of annulment petitions before the Constitutional Court. During these proceedings it was argued, among other things, that the indefinite duration of the single permit and the conversion procedure for existing permits violates the Habitats Directive.

In a ruling dated 6 October 2016, the Constitutional Court dismissed the objections that were raised against the Statute. Only one provision, allowing the use of the notification procedure in certain circumstances for environmental permits covering operations in European protected sites, was considered in breach of the Habitats Directive. The Court therefore annulled this provision.

A limited number of proceedings against the Statute remain outstanding although the vast majority of the Statute's provisions have now successfully passed the Constitutional Court's test. As a result, the Statute will enter into force on 23 February 2017. Permit-granting authorities, project developers and operators of industrial activities should therefore prepare to implement this new regime. Operators should, in particular, check if their current permit may be converted by means of the notification procedure into a single permit and make sure that the notification is filed within the relevant period, i.e. between 48 and 36 months before the expiry of their current permit.

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China

Work Plan for Controlling GHG Emissions during 2016-2020 published: *The 13th Five-Year plan will establish greenhouse gas and renewable energy targets and launch a carbon trading scheme*

On 4 November 2016, the same date as the Paris Agreement came into force, the State Council of China announced its Work Plan for Controlling Greenhouse Gas (GHG) Emissions during the 13th Five-Year Plan Period (the "Work Plan"). The Work Plan sets out concrete steps to implement and illustrate the GHG emissions targets put forward in the 13th Five-Year Plan for 2016-2020 released in March this year.

The major targets set out in the 13th Five-Year Plan and the Work Plan include reducing energy intensity and carbon intensity by 15% and 18% respectively by 2020, from their respective levels recorded in 2015. Total energy consumption is targeted to be capped at 5 billion tonnes of coal equivalent and total coal consumption at 4.2 billion tonnes. It is also aimed at increasing the share of non-fossil fuel energy (including hydro, nuclear, wind, solar, geothermal, biomass and marine power) to 15% of total energy consumption. Consumption of fossil fuel energy will be optimised and by 2020 natural gas will take up about 10% of the total energy consumption.

One of the major initiatives highlighted in the Work Plan is the launch of a national carbon trading market in 2017. This echoes China's previous announcement, which predicted that the market will cover nearly 10,000 enterprises in 31 provinces at the time of its launch, involving 4 billion tonnes of carbon emissions amounting to almost half of China's total carbon emissions. It is expected to develop into the world's largest emissions trading scheme (details of which were discussed in the Spring 2016 edition of the Global Environment Newsletter). The Work Plan stipulates that a dual-level management system will be established. This will provide for:

- The central authority to set the total national carbon emissions cap and the emissions allowance allocation rules; and
- The relevant local governments to implement such rules by allocating the allowances and monitoring compliance within their respective jurisdictions.

At the moment, local governments are verifying historical emissions data of the covered entities and examining third-party verifiers. It is anticipated that the key rules and documents governing the carbon emissions trading scheme will be released soon.

Other major initiatives in the Work Plan include:

- Developing low carbon industries and agriculture;
- Encouraging low carbon technology innovation;
- Creating more carbon sinks mainly through forestation and controlling desertification; and
- Building low carbon cities and towns through low carbon transportation and waste management.

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Czech Republic

Supreme Administrative Court clarifies IPPC Permit Rules: *New clarity on the extent to which a change to a facility constitutes a "substantial change" enabling the public and NGOs to be involved in the decision-making process*

The Supreme Administrative Court has issued a judgment clarifying the meaning of a "substantial change" to an industrial facility under the Integrated Pollution Prevention and Control (IPPC) regime. Under Czech law, all changes to a facility need to be reflected in the permits through issuance of an administrative decision. However, only if such a change is regarded as a substantial change will the public and NGOs have the right to be involved in the decision-making process. Until now, Czech case law has taken an inconsistent approach in determining the nature of such changes. This first decision by a Czech court of higher authority is likely to set a precedent that will enhance legal certainty for industrial operators.

The dispute was between Frank Bold Society, an environmental NGO, and company Sev.en EC, an operator of a large combustion plant, who was represented by Clifford Chance Prague. In the legal proceedings, the NGO contended that several proposed changes, including a change in calorific value of the coal being burned at the plant and setting of emission limits should have been treated by the administrative authority as a substantial change in the facility. On this basis, the NGO sought to be a participant in the administrative decision-making process.

Primarily, a change is substantial if it may have significant adverse effects on human health or the environment. In relation to this criterion, the Court held as follows: [5]

- A simple change of fuel does not necessarily amount to a substantial change (even though such a change would need to be reflected in the IPPC permit); it depends on the potential impact of the new fuel;
- In relation to whether increases in emissions amount to a substantial change, the determining factor is whether the maximum levels specified in the IPPC permit are exceeded; actual increases in emissions (e.g. to maximise performance) are irrelevant for these purposes; and
- If legislation changes in a way that it must be reflected in the IPPC permit, e.g. there is a new wording required or other formalities, these changes do not amount to a substantial change as long as there is no change in the functioning of the power plant as a result.

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5 Decision of Supreme Administrative Court of 16 September 2016, reference number 2 As 92/2016 – 76

Furthermore, there are certain circumstances under which the change is always considered to be substantial under Czech law:

- Where the change causes emission levels that are not in accordance with the concept of "Best Available Techniques" (BAT). Here, although no applicable EU BAT reference document existed at the time the emission limits were set in the plant's permit, the Court deemed that the authorities should have taken into account the values contained in a previous, non-binding reference document as a "supporting guideline". This applied regardless of the fact that the plant has been operated under a more lenient transitional regime implemented under Czech law (as permitted by EU law) until its full implementation of EU BAT requirements planned for 2020. This precedent means that any further emission levels or other changes deviating from the BAT listed in the non-binding reference document must be treated as substantial change. This precedent, however, will only be applicable until the new legally binding reference document is published (presumably in late 2017).
- Where the 50MW threshold for application of IPPC rules to a combustion installation are exceeded, the change is automatically regarded as substantial. If, however, an installation's capacity was already above 50MW, any increase to that capacity will not necessarily constitute a substantial change; its impact must be assessed to determine whether it is a substantial change.

Following the Court's decision, the administrative authority will have to repeat the decision-making process taking into account the Court's guidance on what constitutes a substantial change. Litigation by NGOs is becoming more frequent in the Czech Republic and landmark decisions of this nature are like to be more common in the future.

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UK

BREXIT and the Environment – Moving on beyond the Referendum: *The UK Government announces a Great Repeal Bill. The resulting transposition of all EU law into UK law leads to a number of questions in relation to environmental legislation*

Since the Referendum in June when the UK voted to leave the EU, there has been a great deal of discussion over how environmental and climate change law might change in the future (see our recent briefings included below this article). Of course much of this depends on the relationship we continue to have with the EU going forward. However, statements by senior government figures have confirmed that there will be no immediate cull of environmental law once the UK leaves the EU. This would in any event be unlikely given the amount of international law in place governing the UK's environmental responsibilities, the role that the UK has often taken as driving force for stronger EU policy in some areas, and the adverse reaction of many stakeholders to such a course of action.

At the Conservative Party Conference in October, the Prime Minister Theresa May confirmed that a Great Repeal Bill will be presented to Parliament to repeal the European Communities Act 1972 (the Act that makes UK law subject to EU law). David Davis, Secretary of State for Exiting the EU, confirmed that on the day the UK leaves the EU, all EU law at that time will "where practical" be transposed into domestic law. This is a practical solution since it will give the UK time to consider which laws can and should be amended and in what way. However, even with this approach, there are a number of likely complications and decisions to make:

- How will we deal with references in EU legislation to bodies and regimes that operate at a European level. In many instances it will be workable for the Environment Agency or Secretary of State to be the relevant body in substitution for the European Commission (e.g. in relation to Environmental Impact Assessment). However, this will be much more difficult for regimes like REACH which establishes complex registration and authorisation processes which involve for example, use of EU databases and collaboration between Member States.
- What approach will we take to European case law? EU Court of Justice interpretations have featured heavily to interpret European legislation in a number of areas of environmental law – e.g. in relation to environmental impact assessment and waste.

Finally of course, the UK will need to decide how closely to mirror the development of EU legislation and case law moving forward. So while this is possibly the most straightforward approach, the Government needs to focus on how to make this work in practice. Of course this process might be overtaken somewhat by events if the UK decides to remain more formally within the Single Market and certain EU legislation has to remain in place as a result. Even if this does not happen, EU law has had a tendency to become increasingly *extra-territorial* in its application and the UK may find itself having to comply with EU law in practice to retain access to EU markets in due course.

For commentary on some of the potential implications of Brexit for environmental law see our previous briefings: Brexit - What next for Environmental & Climate Change Law?; and Brexit and the Energy Sector: UK Climate Change and Renewables Policy and Targets

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