The German NAP – bureaucratic, inefficient, unclear and incompatible with the EU directive

On 28 May, the German *Bundestag* passed a law governing the national allocation plan for greenhouse gas emission allowances for the period 2005-07. Two days previously, the governing coalition had introduced more than 50 alterations to its own draft proposal, which in turn had been changed in many places in comparison with the National Allocation Plan for Germany originally agreed on by the Cabinet on 31 March, and of which the EU Commission had been notified.

Following pressure exerted by German industry, not only was the total volume of the emission allowances considerably increased, but an increased number of new exceptions and special provisions were also included in the law, some of which were in themselves inconsistent. This has given rise, not only in the opinion of the parliamentary opposition in the *Bundestag,* to a "bureaucratic monster". Even within the governing coalition, frustration has been expressed about the result, with some wishing they could "start all over again"

The German Emission Trading Association has participated actively in the debate in Germany, presenting detailed commentaries and making its own suggestions at the enquiries held by the Federal Ministry of the Environment and the Bundestag. The Association emphasised the importance of achieving the best possible final result from a macroeconomic point of view. Unfortunately, its efforts were largely in vain. The particular interests of some sectors of industry and of specific companies weighed more that a sense of responsibility for the common good.

It is not possible here to present in full all the bureaucratic provisions, but some of the more fundamental regulations will be considered.

According to the Allocation Act, the emission allowances will be assigned to operators of existing plant in accordance with 2 different methods, grandfathering (on the basis of historical emissions) and allocation according to requirements. But neither method is compatible with the requirements of the EU Directive, and furthermore they are politically "unjust" and economically inefficient.

Plants which have begun operations (or will begin operations) in 2003 and 2004, are issued with emission allowances on the basis of the "announced" average annual CO_2 emissions, with an *ex post* adjustment to allow for the actual level of subsequent activity. In practice, this means that allowances are issued which match actual requirements, so that the operators will play no part in emissions trading, because they have neither surpluses to sell off nor will they need to purchase additional allowances. This is not compatible with the EU Directive, and the EU Commission has repeatedly drawn attention to the unacceptability *ex post* corrections. In fact, however, the wording in the legislation regarding the calculation of the emissions which are to be “announced” and the ex post corrections is not consistent, so that the actual emissions may not necessarily be balanced out by allocated allowances. Indeed, there may under some circumstances be a systematic over-issuing of allowances.

Operators of plant which went into operation before 2003, on the other hand, receive emission allowances corresponding to the annual average CO_2 emissions over a baseline period (usually 2000–02). The allocations to plants which were already in operation in 1994 are reduced by some 3%, as a result of multiplication by a so-called compliance factor. This simple grandfathering method does not take into account the varying potential of activities to reduce emissions, a binding criterion specified in the EU Directive. This deficit cannot be compensated for by a largely ineffective "Early Action" provision.

The allocation in accordance with the grandfathering method will be replaced in three special cases by an allocation based on requirement.

Firstly, the utilisation of capacity provision applies after grandfathering if the actual emissions of an installation are below 60% of average annual emissions during the baseline period, and in this case the allocation will be reduced proportionally to the reduction in utilisation of the plant capacity. Thus, in practice, such installations will receive emissions allowances according to requirements, and will not be affected by emissions trading provisions.

Secondly, an application can be made to have the grandfathering allocations replaced by allocations on the basis of "announced emissions", if, there were special circumstances in the baseline period as a result of which the allocation on the basis of grandfathering would be at least 25 % lower than the level actually required during the allocation period, and that as a result the operator would otherwise experience "considerable economic disadvantages". And thirdly, and finally, such a switch in allocation method is also possible when the grandfathering method would result in "unreasonable hardship" for the operating company as a result of special circumstances. However, the terms "considerable economic disadvantages" and "unreasonable hardship" are legally vague, and their scope here would probably have to be clarified before a court of law.

Further legal uncertainty is presented by the provision covering the termination of operation of a plant in the course of the allocation period, as a result of which the decision would be revoked and annual allocations for subsequent years of the allocation period would not be issued. This too represents an ex post correction. The only exception would be if the production is to be transferred to another existing installation of the same operator or a new installation in Germany.

It is not possible here to discuss the special allocations for 'early action', combined heat-and-power generation, process-related CO_2-emissions, or for the closure of nuclear power stations. The German Emission Trading Association completely rejects all these special allocations, because they are no more than patches which are supposed to make good perceived injustices in the two basic methods of allocation (grandfathering and allocation according to requirements). In fact, however, they introduce new injustices, as well as introducing considerable new bureaucratic hurdles for the implementation.

In contrast, we warmly welcome a reserve fund to provide new installations which are not replacements for existing plant with emission allocations free of charge on the basis of product-related benchmarks. However, the proposed orientation of the benchmarks on the best available technology (BAT) is impractical, as can be seen,

for example, from the fact that it has not yet been possible to agree on a single benchmark. (They are to be specified in later legislation.)

Finally, it should be pointed out that despite having passed through the German parliament, the Allocation Act has not yet come into force, because it requires the approval of the EU Commission. If the Commission rejects at least the provisions made in the legislation for *ex post* corrections, which seems possible given its earlier statements, then it will render invalid a large part of the German legislation on emissions allocations.

The German Emission Trading Association has called on the EU Commission to do precisely that.

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