

Legal aspects of climate change
Contribution from the European Commission
(Marco Onida – Ludwig Krämer)

1. Legal discussion on the method of burden sharing and its fairness; public discussion on the political agreement of 1997 and its legal fixation of 2002

Issues of burden sharing on questions of climate change are at the table of EC discussions since 1990. Indeed, on 29/30 October 1990 the Environmental Council agreed in Luxembourg that in the area of climate change, economic instruments could contribute to a greater cohesion of Member States at international level and to the implementation of commitments that had been undertaken internationally (SI(90) 842 of 30 October 1990). In particular Spain, Greece, Portugal and Ireland considered that they were currently emitting less than other Member States and should be allowed a margin of CO₂ emissions corresponding to their political target for faster development in the coming decade.

In April 1991, the Commission prepared a draft decision on burden sharing of the objective to stabilise CO₂ emissions by the year 2000. The figures given were in absolute terms, not in percentage. It appears that this draft was never formally adopted by the Commission.

On 11-13 October 1991, an informal Council meeting in Amsterdam discussed climate change; the issue of burden sharing – “target sharing” was discussed.

In the Council conclusions on the meeting of 3 March 1997, it was stated: “The Council recalls that the equitable sharing of the objective within the Community should be discussed and agreed in parallel with the decision on proposals by the Community for quantified reduction objectives and policies and measures for inclusion in the Protocol (Council conclusions December 1995)”. The Council presented a table which “represents the current commitments of Member States” and indicated that “the initial distribution between Member States will be reviewed by the Council, if necessary prior to and in any case after completion of protocol negotiations, on the basis of actual developments”. The figures are given below.

In the Council meeting of 19-20 June 1997 it was stated: “The Council emphasises that arrangements regarding the internal burden sharing among Member States for the target the Community as a whole will have to realise in 2005, will have to be agreed on the basis of the outcome of the Protocol negotiations”.

On 1 October 1997, the Commission submitted a Communication on “Climate Change – the EU approach for Kyoto”, COM(97) 481 of 1 October 1997. That Communication was made public in Bruxelles and put on the internet. It discussed the objective to achieve, in Kyoto, a reduction of 15 percent of three greenhouse gases (CO₂, CH₄-Methan and N₂O), compared to 1990 levels. It referred to Council conclusions of 3 March 1997 which had stated that all industrialised countries, individually and jointly, should reduce its greenhouse gases by 15 percent. For the rest, the Communication discussed the problems linked to such a reduction by industrial sector, but not by Member State. The Commission deliberately did not suggest a burden sharing decision for June 1998, but left it to the Council. It indicated that it would become active, if no progress was reached. It indicated that anyway, a legally binding burden sharing was (only) necessary at the moment of ratification of the Kyoto Protocol.

On 23 March 1998, the Council discussed the outcome of Kyoto and the issue of burden sharing. NL suggested that criteria for the burden sharing should also be fixed, but accepted finally the text without such a clause. A Council resolution stated: “The Council recalls its earlier conclusions on burden sharing and reaffirms that the initial distribution agreed in March 1997 would guide the determination of the final contribution of each Member State towards the reduction to be achieved by the

Community as a whole, subject to re-examination on completion of the Kyoto negotiations, on the basis of an assessment of actual developments, taking account of the principles and approaches referred to in its conclusions of 3 March 1997. It expresses its intention to agree this determination at its next meeting”.

On 15 June 1998, the Environmental Ministers met informally for a dinner. They were presented with a paper by the Presidency which contained an exact percentage for each Member State. There was a lively discussion on these figures

On 17 June 1998, the Council politically agreed a burden sharing among Member States. The text was elaborated by the United Kingdom which held the Presidency of the Council. The final figures slightly deviated from those which had originally been presented by the Presidency (original figures in brackets, beginning with those of 15 June 1998 and followed by those of 3 March 1997):

| | | | |
|---------|------------------|-------------|-----------------|
| Austria | -13(-20.5; -25); | Ireland | +13(+11; +15) |
| Belgium | -7.5(-9;-10) | Italy | - 6.5(-7; -7) |
| Denmark | -21(-22.5; -25) | Luxemburg | -28(-30;-30) |
| Germany | - 21(-22.5; -25) | Netherlands | -6 (-8;-10) |
| Greece | +25(+23;+30) | Portugal | +27(+24;+40) |
| Spain | +15(+15;+17) | Finland | 0(0;0) |
| France | 0(0;0) | Sweden | +4(+5;+5) |
| | | UK | -12.5 (-12;-10) |

The conclusions stated: “The Council has now agreed the determination of the contributions of member States to the 8% reduction and the commitment of each Member State is set out in Appendix 1 to these conclusions. The terms of this agreement will be included in the Council decision on the conclusion of the Protocol by the Community”.

2. Discussion of Directive 2003/87

In February 2000, the Commission published a Green Paper on greenhouse gas emissions trading within the European union, COM(2000)87 of 8 February 2000. The Commission received some hundred answers. Almost no contributions were received from GR, IT, SP, PO, IRL and LUX; opinions from Scandinavian countries were rare. The Council took note of the Green Paper, the European Parliament adopted a resolution(October 2000, OJ 2001, C 197, p.400). Also the Committee of the Regions and the Economic and Social Committee commented.

The Commission made the proposal for a directive on 23 October 2001(OJ 2002, C 75E, p.33). The European Parliament discussed the proposal in two readings and adopted its position on 10 October 2002 and 2 July 2003. Again, both ECOSOC and the Committee of the Regions gave an opinion.

Legal basis

During the Council discussions, Member States were rather evenly divided, whether 175(1) or 175(2) should be the legal basis. The Commission then indicated that it would go to the Court of Justice, should Article 175(2) be chosen. As the Council wanted to appear at the international scene as having concluded the Protocol and adopted the Directive, it accepted 175(1), but made a statement that this should not prejudice future discussions on the legal basis.

3. Allocation plans

(a) According to general EC policy, plans may also be regional, provided that the whole territory of a Member State is covered.

In law, this policy is doubtful, as other EC Member States have an interest in knowing exactly about the national policy of the members.