



EU ETS and national ELVs?

Is the EU restricting member states to act against climate change?

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Reduction of
GHG-emissions
in Europe and/or in
the Netherlands?



1600 MW coal-fired power plant



EU Environment → shared competence

> Article 191 & 192 TFEU

- 191 (objectives): 'in particular combating climate change'
- 192 (powers of the EU): the European Parliament and the Council (...) shall decide what legislative action is to be taken by the Union in order to achieve the objectives

+ EU → subsidiarity & proportionality

> Article 193 TFEU (remaining powers of MS)

- 'The protective measures adopted pursuant to Article 192 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. They shall be notified to the Commission.'

+ Member States and EU → sincere cooperation



Under what circumstances can MS successfully rely on Article 193 TFEU?

- › Member States may adopt more stringent protective measures that...
 - a) fall within the scope of application of a EU measure pursuant to Article 192 TFEU
 - b) follow the same environmental objective as the EU Act
 - c) respect the secondary objectives of the EU Act
 - d) achieve a higher level of environmental protection
 - e) respect other EU law
 - f) be notified
- › Introducing more stringent protective measures is often referred to as 'Gold Plating' and some Member States have explicit policies against 'Gold Plating'



ETS Directive (2003/87 and 2009/29)

- › Meant to fulfill the obligations under the Kyoto-Protocol in Europe in a cost-effective and economic efficient way
- › Cap-and-trade (total amount of tolerated emissions is set to a cap and allowances are distributed under participants)
- › Applies to emissions resulting of activities listed in Annex I
- › 'Marked-based'

IPPC Directive (2008/1, now IE Directive)

- › Permit requirement for activities listed in Annex I
- › Permit shall take into account the whole environmental performance of the installation
- › Permit conditions include emission limit values (ELVs) and must be based on the Best Available Techniques (BAT)
- › Command-and-control



Article 9(1) IE Directive (2010/75)

- › Article 26 ETS Directive introduced Article 9(3) of the IPPC Directive → Article 9(1) IE Directive
 - ‘Where emissions of a greenhouse gas from an installation are specified in Annex I to Directive 2003/87/EC in relation to an activity carried out in that installation, the permit shall not include an emission limit value for direct emissions of that gas, unless necessary to ensure that no significant local pollution is caused.’
- › First impression: no national ELVs (or EPS?) allowed
- › Second thought: Article 193 TFEU would allow EPS/ELV



Reasons for the strict division

- › European Commission:
 - Prohibition for MS to include emission standards in IPPC-permit for ETS-covered greenhouse gases is necessary to
 - avoid duplication of regulation (Recital 9 IE Directive)
 - guarantee smooth interplay between ETS and IPPC
 - protect the cost-effectiveness and efficiency of ETS

- › And at the same time:
 - 'the quantities [of allowances] should ensure that the overall emissions of all of the participating installations would not be higher than if emissions were to be regulated under the IPPC Directive'



Are MS contemplating national measures?

- › Netherlands Coalition Agreement → we strive to implement an EPS (preferably by the EU)
 - Failed initiative: taxes on coal related to CO₂ emissions

- › UK Coalition Agreement → No new coal-fired plants without Carbon Capture and Storage
 - Climate Law Act 2008 → legally binding target of at least an 80% cut in GHG emissions by 2050. Also a reduction in emissions of at least 34% by 2020. Both targets are against a 1990 baseline
 - Draft Energy Bill 2012 → possibly introduces
 - A 'floor price' for Carbon
 - An EPS of 450g CO₂/Kwh for new fossil-fuel-fired plants





What is happening at the EU level?

- › Proposed by the European Parliament:
 - Delete Article 9(3) IPPC Directive for it is no longer appropriate to meet the increasing urgency to cut emissions
 - Any original permit issued after 1 January 2015 for a Large Combustion Plan (>300 MW) must include an emission performance standard (EPS) of 500g CO₂/kWh
- › Recital 10 for IE Directive:
 - In accordance with Article 193 TFEU, nothing in this Directive prevents MS from introducing more stringent protective measures, for example greenhouse gas emission requirements *for installations that are covered by Annex I of Directive 2003/87/EC* , provided that such measures are compatible with the Treaties and the Commission has been notified.'



ETS and national ELVs/EPs?

- › It is unclear whether and to what extent the EU is restricting MS to act against climate change
 - Is a national ELV a more stringent protective measure? Is a national EPs? And a carbon tax?
 - What about legislation other than that implementing the IE Directive?

- › Would such national regulation achieve a higher level of environmental protection? Would it frustrate the proper functioning of ETS?
 - Would it influence the capacity to deliver the secondary objective of the ETS?



Academics?

- › Wyatt & Macrory (legal advice, 2010)
 - 'Article 9(1) does not preclude MS from imposing, under national rules other than those implementing the Directives, ELVs for CO2 on emissions from installations covered by the ETS Directive
- › A. Epiney (*JEEPL*, 2012)
 - 'MS may set their own emission limit values for both Directives were enacted on the basis of Article 192 TFEU and Article 193 TFEU allows for more stringent protective measures.'
- › J. Scott (*Carbon and Climate Law Review*, 2011)
 - 'Fierce debate on appropriateness and legality' → (re-) introduction of a comparative effectiveness reporting requirement for the European Commission as a first step



Environmental Law in Europe and its Member States at a Crossroads?

- › From the perspective of a MS
 - Either respect 9(1) IE Directive or invoke Article 193 TFEU and see what happens
 - UK → national EPS. Outcome somewhat unclear
- › From the perspective of the EU
 - Choice made in 2003 → ETS (more effective in future)
 - ETS and national emission requirements will *probably* not function together in a cost-effective manner
- › Introduce a requirement to check the performance of ETS compared with IPPC/IE
 - Introduce a mandatory EU emission standard?



Thank you for your attention

Also see:

Lorenzo Squintani, Marijn Holwerda & Kars de Graaf, *Regulating Greenhouse Gas Emissions from EU-ETS Installations: which room is left for Member States?*, in M. Peeters, M. Stallworthy & J. de Cendra de Larragan (eds.), *Climate Law in EU Member States. Towards national legislation for climate protection*, Edward Elgar