

Black Holes & Illegal Acts

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Emissions Trading in Disarray cried the headlines – followed by claims that the European Court’s decision that the Commission unlawfully rejected Poland and Estonia’s National Allocation Plans would undermine the carbon market.

Were they right - or did the instant press overplay its hand?

In 2006 all Member States produced their NAPs to the Commission – which promptly rejected almost every one, imposing its own cap on the number of carbon allowances (EUAs) that could be allocated by each country.

Those who objected the most - Poland, Estonia, Bulgaria, Romania, Hungary, Czech Republic, Lithuania and Latvia – appealed the rejection.

The Court, having heard the first two appeals, has found resoundingly against the Commission. Decisions on the other cases will go the same way.

The main elements of the decisions were:

- ◆ Only Member States can draw up a NAP or decide the total quantity of EUAs to be allocated and only they can decide how EUAs are to be distributed.
- ◆ The Commission has no power to substitute its own figures and its own cap. In doing so it unlawfully behaves as if it has power to “uniformise” and has a central role in the drafting of NAPs.
- ◆ The Commission must give ‘reasoned decisions’ for rejections. In these cases, it rejected the NAPs “on the basis of reasoning which consists only in the evocation of doubts as to the reliability of the data”.

Unsurprisingly, immediately the Court’s decision was published the Commission announced that it would appeal. Any appeal must be on the ground that the Court has erred in law. The chance of a plausible appeal seems slim.

Meantime, the Court decision is in effect. That is to say, the Commission’s rejection of the NAPs no longer stands.

What, then, is the outcome?

Some believe it is now open to Poland and Estonia to re-submit their NAPs with their original EUA figures and that when they do so the market will be “flooded” with EUAs and prices will fall, or even “collapse”.

But if the Commission’s rejection of the NAPs was illegal, they are still theoretically before the Commission for consideration. So no re-submission of NAPs is needed and, contrary to what some have suggested, no re-drafting of NAPs is possible.

However, the emissions data have changed. If *current* emissions data are used, the NAPs will have to be changed (by Poland and Estonia – not by the Commission) and the outcome will be pretty much in line with what the Commission illegally decided.

There is a legal black hole here. If Member States’ NAPs were assessed using data available in 2006, it is arguable that it is not open to the Commission now to assess the NAPs it unlawfully rejected using newer, tougher, data.

And yet, the Directive which determines what the Commission can and cannot do, does not envisage an illegality of the kind found by the Court and it makes no provision for old figures to be used.

Thus the Commission cannot, without injustice, use newer data nor can it, without bending the rules, use old data (inviting legal action by other Member States).

What should it do? It has no options for decisions that are immune from legal challenge except a negotiated ‘fix’ or, if that fails to work, absolutely anything that spins out time and maintains the lower level of EUAs on the market. And that, probably in that order, is what it will do and I predict it will be successful – the Commission is a dab hand at dealing with legal black holes.