

The use of auctioning in phase III of the EU ETS

Seen in light of three general principles of EU law

Candidate number: 680

Submission deadline: 25 November 2013

Number of words: 17,733



Table of contents

1 INTRODUCTION	1
1.1 The EU ETS in brief	1
1.2 The scope of the presentation	3
1.3 Overview of the sources	4
1.4 Structure	5
2 EU CLIMATE POLICY AND EMISSIONS TRADING	7
2.1 Phase I: 2005-2007	7
2.1.1 Cap-setting	7
2.1.2 Method of allocation	8
2.2 Phase II: 2008-2012	9
2.2.1 Cap-setting	9
2.2.2 Method of allocation	10
2.3 Phase III: 2013-2020	10
2.3.1 Cap-setting	12
2.3.2 Method of allocation	12
3 GENERAL PRINCIPLES IN THE EU LEGAL ORDER.....	16
3.1 Notion of legal principle	16
3.2 Types of general principles in EU law	18
3.3 Role of general principles in relation to the EU ETS	22
3.3.1 Preliminary observations	22
3.3.2 In practice	23

4	THE PRINCIPLE OF SUBSIDIARITY.....	28
4.1	Introductory considerations	28
4.1.1	Legal basis	28
4.1.2	Does the principle apply to the ETS?	28
4.1.3	References to the principle in the regulatory documents	29
4.2	Contents of the principle.....	29
4.2.1	Political and legal dimensions	29
4.2.2	The subsidiarity test.....	30
4.2.3	Subsidiarity after Lisbon	32
4.3	Subsidiarity applied to the ETS phase III auctioning	33
4.3.1	Objectives of ETS allocation.....	33
4.3.2	Pre-phase III: NAPs and free allocation	34
4.3.3	Phase III: EU-wide auctioning harmonisation.....	37
4.4	Conclusion	41
5	THE PRINCIPLE OF EQUAL TREATMENT	43
5.1	Introductory considerations	43
5.1.1	Legal basis	43
5.1.2	Demarcation between equal treatment and subsidiarity	43
5.1.3	References to the principle in the regulatory documents	44
5.2	Contents of the principle.....	44
5.2.1	Step I: Identifying a difference in treatment.....	45
5.2.2	Step II: Justification for a difference in treatment.....	45
5.2.3	Role in the field of economic law.....	46
5.3	Equal treatment applied to the ETS phase III auctioning	46
5.3.1	Auction platform	46
5.3.2	Access to the auctions.....	47

5.3.3	Auction process	48
5.3.4	Supervision	49
5.4	Conclusion	50
6	THE PRINCIPLE OF LEGAL CERTAINTY	52
6.1	Introductory considerations	52
6.1.1	Legal basis	52
6.1.2	Demarcation between legal certainty and subsidiarity	52
6.1.3	References to the principle in the regulatory documents	53
6.2	Contents of the principle.....	53
6.2.1	Concept.....	53
6.2.2	Role in the field of economic law.....	54
6.3	Legal certainty applied to the ETS phase III auctioning	55
6.3.1	Long-term framework.....	55
6.3.2	Auction platform	56
6.3.3	Access to the auctions.....	56
6.3.4	Auction process	57
6.3.5	Supervision	58
6.4	Conclusion	59
7	FINAL CONCLUSION.....	60
8	TABLE OF REFERENCE.....	61
8.1	EU primary law.....	61
8.2	EU secondary law	61
8.3	Other EU regulatory documents	62
8.4	Case law	66

8.5	Literature.....	70
8.6	Websites.....	82

1 Introduction

1.1 The EU ETS in brief

Climate change is today perceived as one of the most serious challenges facing mankind in the twenty-first century. Increasing temperatures, changing rainfall, rising sea level and more frequent extreme weather events are some of the consequences of climate change. These pose a threat to human lives, to economic development and to the natural world on which human prosperity depends. The Fourth Assessment Report of the United Nations Intergovernmental Panel on Climate Change, published in 2007, stated that global greenhouse gas emissions due to human activities have seen an increase of 70 % between 1970 and 2004,¹ and that most of the increase in global average temperature since the mid-twentieth century *very likely* is a result of these emissions.²

The European Union has established itself as a frontrunner in the international efforts to tackle these issues. EU leaders are determined to transform Europe into a highly energy-efficient, low-carbon economy. In addition to preventing climate change, the ambitions also involve creating new sources of economic growth and jobs, strengthening the energy security, and saving money by reducing the dependence on oil and gas imports and by mitigating air pollution and its associated costs. For 2020, the Union has committed to cutting its greenhouse gas emissions to 20 % below 1990 levels, sourcing 20 % of its energy from renewable sources and increasing its energy efficiency by 20 %.³ For 2050, a cut of 80 % below 1990 levels is suggested.⁴

¹ IPCC (2007) p. 36.

² *ibid.* p. 39.

³ European Council (2007). These targets form part of the EU's growth strategy for the current decade, *Europe 2020*. The other headline targets concern employment, research and development, education and poverty (European Commission (2010a)).

⁴ European Commission (2011a) p. 4.

The EU Emissions Trading System (EU ETS) has become a key tool in the EU's climate policy. Since its launch in 2005, the system has grown to be the world's largest multi-sector greenhouse gas trading scheme. The objective of the ETS is to promote reductions of such gases in a cost-effective and economically efficient manner.⁵ It works by setting a cap on the total level of emissions that can be emitted in the power sector and energy-intensive industries in the EU and the European Economic Area (EEA) countries. Within the cap, companies can buy and sell emission allowances as needed. They can also buy limited amounts of international credits from emission-saving projects around the world. Over time, the cap is lowered in order to meet the reduction objectives. Furthermore, the cap generates a price on the right to emit greenhouse gases and hereby aspires to stimulate green investment.⁶

During the years of operation, the ETS has found itself suffering from a number of deficiencies. However, it must be recognized that the system was never expected to deliver flawless results from the start. Europe as such had no previous emissions trading experience to build on,⁷ and it was effectively acknowledged that the first phase of operation, lasting from 2005-2007, constituted a "learning by doing" phase.⁸ Nevertheless, phase I succeeded in establishing a transparent and widely accepted price for tradable CO₂ emission allowances as well as the needed infrastructure of market institutions, registries, monitoring, reporting and verification.⁹ However, the number of allowances, based on estimated

⁵ Dir 2003/87/EC Article 1.

⁶ For more on the benefits of emissions trading in the EU, see Egenhofer (2011) p. 2.

⁷ That is not to say that emission trading was a novelty for all European countries. By the time, the United Kingdom, Denmark and Norway had already conducted national experiments within the field. For more on the UK Emissions Trading Scheme, which was the first of its kind on a worldwide scale, see Makuch (2008) p. 261. The case of Norway is thoroughly presented in Sæverud (2006). Furthermore, the concept of tradable allowances was not totally unfamiliar in the EU. The quotas for Ozone Depleting Substances under the Montreal Protocol, the fish catch quotas under the Common Fisheries Policy, and the milk quotas under the Common Agricultural Policy were all examples of allowances with some degree of transferability.

⁸ European Commission (2000) p. 10.

⁹ Ellerman (2008) p. iii.

needs, turned out to be too high, causing the carbon price to fall to zero in 2007.¹⁰ The problem of over-allocation was addressed in phase II, with the European Commission being given powers to better ensure that national allocation plans resulted in real emission reductions. Still, the economic crisis that arose in late 2008 depressed emissions and consequently the demand for allowances, something that led to a large and growing surplus of unused allowances.¹¹ By early 2012, a surplus of 955 million allowances had accumulated.¹² The system thus failed to provide the price signals necessary for its successful functioning.

Phase III, running from 2013 to 2020, sees a substantial overhaul of the ETS. Determined to “[f]ully exploiting the potential of the EU ETS”, the Commission proposed an amendment, intending to make the system more harmonised and predictable.¹³ The new ETS contains a number of fundamental changes. The principal element is a single EU-wide cap, which will decrease annually in a linear way by 1.74 %. Moreover, auctioning is from 2013 the basic principle for allocation. This fundamental change will be the focus in the following presentation.

1.2 The scope of the presentation

The EU ETS is in principle an economic instrument.¹⁴ It can be derived from economic literature that efficiency and effectiveness are aspects that make emissions trading an at-

¹⁰ European Commission (2013) Phase one: 2005-2007.

¹¹ European Commission (2013) Phase two: 2008-2012.

¹² European Commission (2012a) p. 4.

¹³ European Commission (2008a) p. 3.

¹⁴ An economic instrument can be defined as “a means by which decisions or actions of government affect the behaviour of producers and consumers by causing changes in the prices to be paid for these activities” (United Nations (2003) p. 216). This places the ETS in the same category as the Kyoto Protocol, which is linked to the United Nations Framework Convention on Climate Change. For more on the economics of the Kyoto Protocol, see Grubb (2003).

tractive instrument.¹⁵ However, these and many different aspects could and should be analysed from a legal point of view. This thesis aims for an understanding of auctioning, as employed in the EU ETS, from the perspective of three general principles of EU law. These are the principles of subsidiarity, equal treatment and legal certainty. They have been selected because of their conceivable relevance to the auctioning scheme. The principle of subsidiarity regulates, as will be shown, the distribution of powers between the Union level and the Member State level. When phase III introduces a more centralised ETS, with an EU-wide auctioning harmonisation, this is presumably of interest in light of subsidiarity. Furthermore, an auctioning scheme must fulfil several basic requirements in order to operate successfully. Equal treatment and legal certainty are arguably two of these.

The following questions will be asked: Are the principles given consideration in the ETS phase III auctioning? If so, is this done in a sufficient manner? And how are they given consideration? Can any problematic issues be identified?

1.3 Overview of the sources

Directive 2003/87/EC¹⁶ (hereafter “EU ETS Directive”), as amended by Directive 2009/29/EC,¹⁷ established the EU ETS, and is consequently a piece of legislation of great significance for presentation on the topic. The amended version of the directive sets out the auctioning objectives. In accordance with Article 10(4), the Commission has furthermore adopted Regulation No 1031/2010¹⁸ (hereafter “Auctioning Regulation”), which gives rules

¹⁵ See e.g. Tietenberg (1985).

¹⁶ Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC.

¹⁷ Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community.

¹⁸ Commission Regulation (EU) No 1031/2010 of 12 November 2010 on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances pursuant to Directive 2003/87/EC of the Euro-

on the timing, administration and other aspects of auctioning. Likewise, this is an indispensable source here. Other EU regulatory documents accompanying the legislation are also of interest.

The primary sources of EU law, consisting essentially of the Treaty on European Union¹⁹ (hereafter “TEU”) and the Treaty on the Functioning of the European Union²⁰ (hereafter “TFEU”), will also be of importance. Under the principle of conferral in Article 5(2) TEU, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein.

Case law of the Court of Justice of the European Union (hereafter “ECJ”) is an essential source. As will be shown, the ECJ has played an important role in the development of general principles.

Furthermore, the EU ETS is a frequent topic in both legal and economic literature. Such works are clearly of significance.

1.4 Structure

In order to get a better understanding of the current phase of the EU ETS, it is expedient to provide some words about the preceding phases. This will be done in sections 2.1 and 2.2. The aim is not to give a comprehensive presentation, but merely to outline some of the main features and problems, relevant for what follows. The focus will thus be on the cap-setting and the allocation. These two elements of an emissions trading scheme should be seen in conjunction. Thereafter, the same elements of phase III will be presented.

pean Parliament and of the Council establishing a scheme for greenhouse gas emission allowances trading within the Community.

¹⁹ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, incorporating Treaty of Lisbon changes, can be found in Official Journal 30.3.2010 C 83/1.

²⁰ *l.c.*

Section 3 will look at the place of general principles in the EU legal order and particularly the ETS. An aim is to find a classification that permits to put the concerned principles in a suitable theoretical framework. Their role in relation to the ETS will also be examined.

The research questions presented above will be addressed in sections 4, 5 and 6, with one section for each of the three principles. First, the contents of the concerned principle will be set out. Then, the principle will be applied to the ETS phase III auctioning.

A final conclusion is drawn in section 7.

2 EU climate policy and emissions trading

2.1 Phase I: 2005-2007

Both cap-setting and allocation were highly decentralised and negotiated processes in phase I of the EU ETS. In its *Green Paper on greenhouse gas emissions trading within the European Union*,²¹ the Commission had favoured a quite centralised approach, but this was to change when the proposal for the ETS Directive was put forward. The reason for this was a general opposition towards centralisation among the Member States.²² In order to get the final directive adopted, the Commission thus had to settle for a high degree of decentralisation, which implied a system entrusting some decision-making authority to the Commission – but also a system with ample discretion for the Member States.²³ The EU ETS at this stage could be seen as many largely independent trading systems that had agreed to make their allowances commonly tradable and to adhere to certain common criteria and procedures in order to make the system work.²⁴

2.1.1 Cap-setting

The original EU ETS Directive assigned to the Member States to develop a national allocation plan (NAP) that stated the total quantity of allowances that it intended to allocate for that period and how it proposed to allocate them.²⁵ In other words, each state had to decide its allowances *ex-ante*. The NAPs were to be based on 12 criteria, set out in Annex III of the directive, forming the basis upon which the Commission could review and eventually reject them.²⁶ However, the directive did not explicitly prescribe a given number of allow-

²¹ European Commission (2000).

²² Skjærseth (2009) p. 110.

²³ For an in-depth presentation of the making of the directive, see Wettestad (2005).

²⁴ Ellerman (2008) p. 5.

²⁵ Orig. Dir 2003/87/EC Article 9(1).

²⁶ Orig. Dir 2003/87/EC Article 9(3). Guidance for the Member States on the relative importance of the Annex III criteria were published in a Commission Communication (European Commission (2004)).

ances. In absence of a predetermined EU-wide cap, the total cap could thus be established by adding up the allowances allocated by the NAPs.

Characteristic features of the NAPs of phase I were modest ambitions and high dependence on projections.²⁷ Both these features could nevertheless be said to be intrinsic elements of the legislative framework itself, which enabled the Member States to, *inter alia*, set their allowance totals close to “business as usual” levels. But when the 2005 emissions data was released in May 2006, the prices saw a dramatic drop from € 30 per tonne CO₂ to eventually € 0.5 in April 2007.²⁸ The problem of over-allocation²⁹ was consequently put on the agenda.

2.1.2 Method of allocation

The Member States had to allocate at least 95 % of the allowances for phase I free of charge.³⁰ This allocation method has become known under the name of “grandfathering”, since allowances are allocated proportionally to historical emissions. The remaining 5 % could be allocated by means of auctioning. Still, only Denmark, Hungary, Lithuania and Ireland made use of this possibility.³¹ In total, only 0.13 % of all allowances across the EU were auctioned during phase I.³²

The allocation during these first years showed that each Member State developed its own rules, notably for allocation to new entrants and closures, and that these rules varied con-

²⁷ See e.g. Zetterberg (2004) and Grubb (2005).

²⁸ Skjærseth (2009) p. 114.

²⁹ The concept of over-allocation is not well-defined. While the term implies that too many allowances have been allocated, it does not give any precise indication regarding how many excess allowances have been given out (Clò (2009) p. 229).

³⁰ Orig. Dir 2003/87/EC Article 10.

³¹ Ellerman (2008) p. 38.

³² *l.c.*

siderably between the states. This high degree of discretion increased complexity, administrative burdens and transaction costs.³³

2.2 Phase II: 2008-2012

An important event that distinguished phase II from phase I was the entry into force of the First Commitment Period of the Kyoto Protocol.³⁴ The major feature of the Kyoto Protocol was that it established binding targets for 37 industrialised countries and the EU³⁵ for reducing greenhouse gas emissions.³⁶ Member States consequently needed to ensure that their emission strategies, in which allocations under the ETS were an important element, achieved their Kyoto commitments.

2.2.1 Cap-setting

The procedure for developing NAPs for phase II stayed the same.³⁷ However, a Commission Communication, published in December 2005, gave the states less leeway on allocation in order to guarantee the achievement of their Kyoto targets.³⁸ Furthermore, and of greater importance, the Commission made it clear in November 2006 that the 2005 emission data would figure as a central assessment criterion,³⁹ making the NAPs subject to projections based this data. This enabled the Commission to shave off 10 % of proposed allo-

³³ Egenhofer (2011) p. 5.

³⁴ The text of the Kyoto Protocol can be found on the United Nations Framework Convention on Climate Change website at http://unfccc.int/kyoto_protocol/items/2830.php [Visited 15 November 2013].

³⁵ The EU-15 (i.e. the pre-2004 EU) had a single common target to be achieved by the Member States, pursuant to Article 4 of the Protocol. The so-called Burden-Sharing Agreement established the contribution of each individual state towards reaching this common target (Council (2002)). The EU-27 had no common target under the First Commitment Period.

³⁶ For more information on the Kyoto Protocol, see Freestone (2009).

³⁷ Orig. Dir 2003/87/EC Article 9(1).

³⁸ European Commission (2005).

³⁹ European Commission (2006).

cations in the phase II NAPs.⁴⁰ The Commission had hereby “quietly and almost unnoticed at first” introduced quite a different model for the setting of caps than the one described in the directive.⁴¹ The change has also been said to *de facto* impose an EU-wide cap.⁴²

The introduced changes made the price per tonne CO₂ go up to € 20-25 for some time, but it was to tumble again in late 2008 with the occurrence of the economic crisis.⁴³

2.2.2 Method of allocation

The directive set the amount of allowances that had to be allocated free of charge in phase II to 90 %.⁴⁴ The amount that could be auctioned accordingly increased to 10 %. As for auctioning countries, this number doubled to eight in phase II, which resulted in 3 % of all EU allowances being auctioned.⁴⁵ The use of auctioning was thus still far short of what was allowed.

2.3 Phase III: 2013-2020

In March 2007, the European Council made an independent commitment to achieve at least a 20 % reduction of greenhouse gas emissions by 2020 compared to 1990 levels.⁴⁶ An objective of 30 % reduction would be endorsed provided that other developed countries would commit themselves to comparable emission reductions and economically more advanced developing countries would contribute adequately according to their responsibilities and respective capabilities.⁴⁷ Furthermore, the European Council endorsed a binding target

⁴⁰ Egenhofer (2011) p. 6.

⁴¹ Wettestad (2009) p. 316.

⁴² Egenhofer (2011) p. 5.

⁴³ *ibid.* p. 6.

⁴⁴ Orig. Dir 2003/87/EC Article 10.

⁴⁵ Ellerman (2008) p. 38.

⁴⁶ European Council (2007) p. 12.

⁴⁷ *l.c.*

of a 20 % share of renewable energies in overall EU energy consumption by 2020⁴⁸ and stressed the need to increase energy efficiency by 20 % compared to projections for 2020.⁴⁹ Against this background, the European Council invited the Commission to review the EU ETS “with a view to increasing transparency and strengthening and broadening the scope of the scheme [...]”.⁵⁰

In order to reach these 20-20-20 targets, the Commission presented a climate and energy package in January 2008, comprising four legislative proposals,⁵¹ including the proposal for a revised ETS post-2012.⁵² Building on the experiences from the two preceding phases, the proposal contained a number of fundamental changes, entailing what some have called a “revolution” to the system.⁵³ All the main elements in the proposal are preserved in the final text in Directive 2009/29/EC.⁵⁴ The overarching change is increased harmonisation, with decision-making being moved from the Member States to the central EU level.⁵⁵ Phase III can therefore be seen as realising the Commission’s intentions in the *Green Paper on greenhouse gas emissions trading within the European Union*⁵⁶ from 2000 to a far greater extent than any of the previous phases.

⁴⁸ *ibid.* p. 21.

⁴⁹ *ibid.* p. 20.

⁵⁰ *ibid.* p. 13.

⁵¹ European Commission (2008b).

⁵² European Commission (2008a).

⁵³ Carbon Trust (2008) p. 15.

⁵⁴ However, Directive 2009/29/EC is formally an amendment of the original Directive 2003/87/EC. It will in the following presentation be referred only to the consolidated version of the latter directive.

⁵⁵ For comprehensive presentations of the changes, see Skjærseth (2010), Thieffry (2010) and Carbon Trust (2008).

⁵⁶ European Commission (2000).

2.3.1 Cap-setting

The principal element of the revised ETS is a single EU-wide cap, as set out in Article 9 of the amended version of Directive 2003/87/EC. According to the Commission, the previous system based on national cap-setting would not provide sufficient guarantees for achievement of the emission reduction objectives endorsed by the European Council in March 2007.⁵⁷ An EU-wide cap is also said to provide a long-term perspective and increased predictability.⁵⁸ A significant consequence of this change is that NAPs are no longer part of the ETS as from 2013. The new provision stipulates that an EU-wide quantity of allowances will be issued every year, decreasing by a linear factor of 1,74 % compared to the average annual total quantity issued by the Member States in their NAPs for phase II. This will ensure an emission reduction of 21 % below reported 2005 emissions.⁵⁹ Furthermore, the linear reduction continues beyond 2020, as the directive does not provide a sunset clause. The directive states, nevertheless, that the Commission shall review the linear factor by 2025.

2.3.2 Method of allocation

Phase III sees a complete overhaul and harmonisation of the allocation rules. From 2013, auctioning is set to be the basic principle for allocation, as it, in the words of the Commission, “best ensures efficiency of the ETS, transparency and simplicity of the system and avoids undesirable distributional effects”.⁶⁰ As opposed to the two preceding phases, free allocation based on grandfathering has become the exception rather than the rule. The move to auctioning is thus not complete, as certain sectors are still entitled to free alloca-

⁵⁷ European Commission (2008a) p. 7.

⁵⁸ *l.c.*

⁵⁹ *l.c.*

⁶⁰ *l.c.*

tion. The Commission estimates that at least half of the available allowances as of 2013 will be auctioned.⁶¹

First paragraph of Article 10 of Directive 2003/87/EC enshrines auctioning as the basic allocation principle, stating that Member States shall auction *all* allowances which are not allocated free of charge in accordance with the directive. The total quantity of allowances to be auctioned by each Member State is divided into three categories, as determined by the second paragraph: 88 % of the allowances will be divided among the Member States in shares that are identical to the share of verified emissions under the Community scheme for 2005 or the average of the period from 2005 to 2007; 10 % of the allowances will be distributed among certain Member States for the purpose of solidarity and growth within the Community;⁶² and 2 % of the allowances will be distributed amongst Member States whose greenhouse gas emissions in 2005 were at least 20 % below their respective Kyoto levels.⁶³

As for the scope of auctioning, the directive makes an important distinction between the power sector and other sectors. For the power sector, full auctioning is the rule from 2013 onwards.⁶⁴ The stated reason for this is that this sector has the ability to pass on the increased cost of CO₂.⁶⁵ In other words, consideration is given to the aspect of competitiveness. Competitiveness could here be defined as the performance of firms relative to competitor firms in terms of, *inter alia*, production costs and profitability.⁶⁶ Hence, competi-

⁶¹ European Commission (2008c). On the basis of the directive proposal, the Commission had at the outset estimated that at least two thirds of the total quantity of allowances would be auctioned (European Commission (2008a) p. 8), but this estimate had to be lowered with the final wording of the directive. In particular, a group of Eastern European Member States opposed the scope of auctioning in the Commission proposal (European Parliament (2008)).

⁶² This will increase the amount of allowances that these states auction under the first category. Annex IIa to the directive sets out the percentages.

⁶³ The distribution of this percentage among the states concerned can be found in Annex IIb to the directive.

⁶⁴ Dir 2003/87/EC Article 10a(1).

⁶⁵ Dir 2009/29/EC Recital 19.

⁶⁶ European Commission (2008d) p. 107.

tiveness problems are presumed not to arise in the power sector, as firms are confronted with the same carbon price across the EU, and can pass on the increased costs to their customers.⁶⁷

The rule of full auctioning within the power sector also has its exceptions, as certain Member States are allowed an optional and temporary derogation.⁶⁸ In order to help modernise their electricity sector and to prevent a sharp increase in electricity prices for households, ten Central and Eastern European states are given the option of exempting themselves from the rule and continuing to allocate a limited number of emission allowances to power plants for free until 2019.⁶⁹ If the option is applied, the state has to ensure that investments are undertaken in retrofitting and upgrading the infrastructure. The level of free allocation in 2013 must not exceed 70 % of the allowances needed to cover emissions for the supply of electricity to domestic consumers. In each year following 2013, this percentage has to gradually decrease, resulting in no free allocation in 2020.⁷⁰

In other sectors (i.e. power-consuming sectors), free allocation will be phased out progressively, with an auctioning rate set at 20 % in 2013. The rate will increase each year by equal amounts resulting in 70 % in 2020, with a view to reaching 100 % auctioning in 2027.⁷¹

The directive also provides for an exception from this phase-out scheme. Within the group of power-consuming sectors, installations exposed to a significant risk of “carbon leakage”

⁶⁷ If firms can pass on increased costs to their customers, higher price will induce lower demand, which will affect profitability as well. However, this is an *intended* effect of the policy, since the ETS must finally be translated into higher prices for consumers of carbon intensive products (De Bruyn (2008) p. 42).

⁶⁸ Dir 2003/87/EC Article 10c.

⁶⁹ European Commission (2011b). The states are Bulgaria, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland and Romania.

⁷⁰ Dir 2003/87/EC Article 10c(2). The rules on gradual decrease of free allocation are set out in a Communication from the Commission (European Commission (2011c)).

⁷¹ Dir 2003/87/EC Article 10a(11).

(i.e. relocation of greenhouse gas emitting activities from the EU to third countries, entailing an increase in global emissions) will receive 100 % of allowances free of charge up to 2020.⁷² Also, the states have the possibility to compensate the most electro-intensive sectors for increases in electricity costs resulting from the ETS through national state aid schemes.⁷³ The aspect of international competition is thus given due consideration.

Unlike grandfathering, auctioning will generate significant revenues. These will accrue to the Member States. The EU budget is not affected in any way other than the Commission's own administrative costs.⁷⁴ The directive asserts that the Member States shall determine the use of revenues generated from the auctioning of allowances. Still, at least 50 % of the revenues should be used to fund an array of climate change related activities, including emissions reductions, financing research and development in energy efficiency and clean technologies, and assisting developing countries to avoid deforestation and increase reforestation.⁷⁵ The wording of the provision suggests, however, that this is not legally binding for the Member States, as the directive merely states that the revenues *should* be used for these purposes. Nonetheless, the article also sets out that the states "shall be deemed to have fulfilled the provisions of this paragraph if they have in place and implement fiscal or financial support policies". When this is read in conjunction with the Member States' *obligation* to inform the Commission as to the use of revenues and the actions taken pursuant to the paragraph,⁷⁶ it could be asked whether the provision still has binding force.⁷⁷

⁷² Dir 2003/87/EC Article 10a(12). The Commission shall every five years determine a list of the exposed sectors or subsectors on the basis of the criteria referred to in paragraphs 14 to 17 of Article 10a.

⁷³ Dir 2003/87/EC Article 10a(6).

⁷⁴ European Commission (2010b) p. 6.

⁷⁵ Dir 2003/87/EC Article 10(3). The Commission had proposed a minimum of 20 % of the revenues, but the Member States were willing to raise this to 50 % in the subsequent decision-making procedure.

⁷⁶ Dir 2003/87/EC Article 10(3) *in fine*.

⁷⁷ Van Zeben (2009) p. 353.

3 General principles in the EU legal order

3.1 Notion of legal principle

The Oxford Dictionary defines the term “principle” as “a fundamental truth or proposition that serves as the foundation for a system of belief or behaviour or for a chain of reasoning”.⁷⁸ Principles can be found in all sciences. For the purpose of this text, the term must be set against a legal background. Legal thinking is hardly conceivable without the use of principles in one sense or another. In this context, the term can cover a variety of different situations; ranging from a minimum variant where it stands for a synthesis of individual rules or decisions with significant pedagogical function, to a variant where principles are fundamental prerequisites for a democratic state with the ability to override even clear legal provisions.⁷⁹ This can be said to be representative for the case law of the ECJ, which displays a diverse use of the term “principle”. The term is frequently used about something forming an independent source of legal obligation, so that it is appropriate to speak of a principle of *law*. However, the term is sometimes used to emphasise the political importance of a particular treaty norm or set of norms, or as a synthetic description of such content, but without adding any *legal* value.⁸⁰ Given that the role of the ECJ and other courts is to primarily decide concrete cases, the elaboration of a clear principle definition is arguably of lesser importance.

Legal theory has made the notion of legal principle a subject of discussion among many different scholars. A classic contribution comes from the American Dworkin, who primarily emphasises the distinction between principles and rules.⁸¹ This can be said to be an

⁷⁸ Oxford Dictionaries Online (2013), available at <http://www.oxforddictionaries.com> [Visited 15 November 2013].

⁷⁹ Graver (2006) p. 193.

⁸⁰ De Witte (2000) p. 85.

⁸¹ Dworkin (1967) p. 23.

unremarkable distinction – and a logical one, as he remarks.⁸² He states that “[b]oth sets of standards point to particular decisions about legal obligation in particular circumstances, but they differ in the character of the direction they give”.⁸³ As opposed to principles, “[r]ules are applicable in an all-or-nothing fashion”.⁸⁴ But what principles have that rules do not, in Dworkin’s words, is the dimension of weight or importance.⁸⁵ This dimension becomes evident in the case of intersection between several principles, where one must take into account the relative weight of each. In the distinction between principles and rules, Tridimas writes that a principle is a general proposition of law of some importance from which concrete rules derive.⁸⁶ According to this definition, the constituent elements of a principle are two: it must be general and it must carry added weight.⁸⁷ Different opinions between scholars concerning certain aspects of the notion of legal principle can nonetheless be found,⁸⁸ which is unsurprising considering its vagueness and relative character. This can likely be attributed to varying concepts of the origin and functions of those principles and

⁸² His distinction between principles and policies is more striking. He calls a policy a standard that sets out to reach a collective goal, whereas a principle is a standard that is to be observed, because it is a requirement of justice or fairness or some other dimension of morality (ibid. p. 23).

⁸³ ibid. p. 25.

⁸⁴ l.c.

⁸⁵ ibid. p. 27.

⁸⁶ Tridimas (2006) p. 1.

⁸⁷ l.c.

⁸⁸ Raz has challenged Dworkin’s view that only principles have the dimension of weight or importance. He contends that the same may be said of rules, having the ability to interact with one another, and to modify and qualify each other. This necessitates a dimension of weight and importance also for rules. Principles and rules nevertheless behave differently in many instances of conflict, as these “between rules are determined solely by their relative importance; conflicts between principles are determined by assessing their relative importance together with the consequences for their goals of various courses of action” (Raz (1972) p. 830-833). Jareborg argues that a legal principle always is a legal rule, namely a “should” rule, i.e. a legal rule that is not necessarily infringed if it is not followed (Jareborg (2007) p. 361). Furthermore, when Dworkin considers that principles originate not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over time (Dworkin (1977) p. 40), he does not represent, as will be shown, the common view on how principles of EU law emerge.

by the fact that they may be found in different legal orders and in several fields of law.⁸⁹ Yet, it is possible to find a common consensus on the *normative* character of principles, in the sense that they serve as guidelines for policy makers and courts, but do not prescribe particular results.⁹⁰

Nevertheless, such theoretical views are overall of limited value. The importance of general principles must be assessed against the backdrop of practical outcomes. This is also the case here, in relation to the use of auctioning in phase III of the EU ETS.

3.2 Types of general principles in EU law

The treaties do not set out any particular classification of the general principles of EU law, nor can this be inferred directly from case law. This has thus been a task for legal theory, wherein many different ways of classifying can be found, typically based on criteria such as the principles' contents, functions and origins.⁹¹ It should be emphasised that there is no particular way that has prominence or which satisfies all schools of thought. As a classification has pedagogical purposes, different scholars have inevitably different opinions on the matter. The aim of this section is not to give any new contribution to this literature. Instead, already existing research will be resorted to, in order to find an appropriate classification that permits to put the concerned principles in a suiting theoretical framework.

⁸⁹ De Sadeleer (2002) p. 236.

⁹⁰ De Larragán (2011) p. 92; Tridimas (2006) p. 2; Graver (2006) p. 195; Sundby (1974) p. 191; Voigt (2008) p. 10.

⁹¹ For a selection, see Schermers (2001) p. 28; Bengoetxea (2001) p. 107; Boulouis (1993) p. 208; Craig (2012) p. 250; De Sadeleer (2002) p. 236; De Witte (2000) p. 83; Foster (2012) p. 109; Fairhurst (2010) p. 71.

Tridimas suggests a distinction between three types of general principles:⁹²

- 1) The first category consists of what he calls principles which derive from the rule of law. These have three distinct features: First, they have been derived by the ECJ from the fundamental premise that the EU legal order is based on the rule of law. Second, given that the EC Treaty did not provide expressly for such principles, they have been derived from the laws of the Member States and used to supplement and refine the treaties. Third, principles which belong to this category can be said to pre-exist written law in that provisions of the Treaty which expressly provide for them are understood to be their specific expressions. These principles are an instrument mainly for the protection of individuals against policies and administrative measures of the European Community and its Member States.
- 2) The second category is made up of systemic principles which underlie the constitutional structure of the Community and define the Community legal edifice. These refer essentially to the relationship between the Community and the Member States, but may also refer to the legal position of the individual, or to relations between the institutions of the Community.
- 3) Principles of substantive Community law form a third category. This can be principles underlying the fundamental freedoms or specific Community policies, e.g. competition or environmental law.

This classification offers several advantages for the understanding of the principles in this thesis. First, it is able to encompass elements of all the three criteria – contents, functions and origins – described above. It is therefore a classification that serves its purpose well, namely to be informative and facilitate the understanding of the principles. Second, the concerned principles are easily placed in their appropriate categories: Equal treatment and legal certainty both fall into the first, while the principle of subsidiarity falls into the second.

⁹² Tridimas (2006) p. 4.

As for their origins, the former two principles share the typical features characterising the principles of the first category, in the sense that they have been developed by the ECJ and derived from various sources, most notably the legal systems of the Member States.⁹³ It should also be mentioned that the treaties themselves have provided some justification for recourse to general principles as a source of law, both through general provisions regulating the competence of the ECJ and more specific treaty articles, concerning e.g. non-discrimination, enabling the Court to read these particular provisions as indicative of more general underlying principles.⁹⁴ It can therefore be said that the Court has made use of a leeway that from the outset has been intrinsic in the treaties. According to Tridimas' classification, the main principles in the second category have in the same manner emerged as a result of creative ECJ rulings. This is, however, *not* the case for the principle of subsidiarity. Even though this principle has also seen a gradual development, the legal framework has rather been constructed within the treaties – and not with the ECJ as a main player.

Yet, for the purpose of this thesis, the classification gives its most beneficial contribution concerning as to between whom they refer. The concerned principles in the first category, namely equal treatment and legal certainty, aim to protect individuals against the public authorities, both at Union and national level. The word “individuals” is here not to be understood in a literal, narrow sense, but also as covering private legal entities, such as business firms.⁹⁵ This should be accentuated, as it is firms that play a practical role in the EU ETS, and consequently firms to whom the legal protection offered by these principles could be of conceivable relevance. On the other hand, the ones in the second category, here represented by the principle of subsidiarity, refer essentially to the relationship between the

⁹³ For more on the influence of national laws, see Tridimas (2006) p. 23 and Akehurst (1981) p. 32.

⁹⁴ Craig (2011a) p. 110.

⁹⁵ De Witte (2000) p. 83. Indeed, much of the early cases establishing these principles were brought on by business firms, see e.g. Case 114/76 *Bela-Mühle* (equal treatment); Case 74/74 *Comptoir National Technique Agricole* (legal certainty).

Union and the Member States.⁹⁶ As will be shown in section 4, the principle sets out that the EU may act only where action of individual Member States is insufficient. Hence, it is appropriate to talk about the principle of subsidiarity as an *institutional* principle, as it concerns the institutional structure of the EU legal order.⁹⁷ From an overall perspective, the biggest change that the transition from phase II to phase III of the EU ETS entailed was the shift of power from the Member States to the central EU level. The main changes, i.e. an EU-wide cap and auctioning as the primary method of allocation, hence also pertained to changes on the institutional level. Such changes are at the core of the principle of subsidiarity. This understanding of which subjects that play a part with respect to the concerned principles is a necessary premise for the following sections.

Notwithstanding the differences between these three principles, their common features should also be noted. By virtue of being general principles of EU law, they all have constitutional status.⁹⁸ This applies irrespective of whether the principle is stated in the constituent treaties or in case law of the ECJ. Moreover, they are binding on both the Union institutions and on the Member States.⁹⁹ The Member States must observe the principles both when the measure at issue implement Union law and when the measure otherwise fall within the scope of Union law, as when rules adopted by the institutions apply to the case or that the subject-matter is otherwise governed by EU law.¹⁰⁰ In the hierarchy of norms in the EU legal order, the treaties and the general principles thus sit at the top. Subordinated to these are legislative, delegated and implementing acts; general principles can be used not

⁹⁶ It can be added that ECJ on one occasion made reference to “the general principles on which the institutional system of the Community is based and which govern the relations between the Community and the Member States” in Joined Cases 205 to 215/82 *Deutsche Milchkontor*, paragraph 17. Nevertheless, it has not developed this into a consistent doctrine of institutional principles (De Witte (2000) p. 83).

⁹⁷ Other principles in the same category include the principle of sincere cooperation and the principles of primacy and direct effect of Community law.

⁹⁸ Case C-101/08 *Audiolux*, paragraph 63; Case C-174/08 *NCC Construction Danmark*, paragraph 42.

⁹⁹ Case C-107/97 *Rombi and Arkopharma*, paragraph 65; Case C-396/98 *Grundstückgemeinschaft Schloßstraße*, paragraph 44.

¹⁰⁰ Prechal (2010) pp. 8-11.

only to interpret such acts, but also as a ground for invalidation in the case of contravention.¹⁰¹ It is therefore clear that ETS acts, notably the EU ETS Directive and the Auctioning Regulation, as legislative acts, are susceptible to judicial review by the ECJ against the concerned principles.

3.3 Role of general principles in relation to the EU ETS

3.3.1 Preliminary observations

A number of arguments can be put forward to suggest that legal principles are of particular importance both for EU law in general and for the ETS in particular. A first argument for the former is the age of the EU legal order. Compared to the legal orders of the Member States, the one of the Union is still relatively young. It should also be added that it is a novel legal order, having no historical precedent or contemporary equivalent.¹⁰² This suggests a greater recourse to general principles for its completion than is the case with the national legal orders.¹⁰³ The same observations can be made for the ETS: The system entered into force in 2005, and is thus reasonable to characterise as a new system. And as noted in the introduction, Europe as such had no previous emissions trading experience. The ETS therefore positively bears many of the same resemblances.

Another argument is the goal-oriented character of the constituent treaties.¹⁰⁴ As becomes apparent when reading the initial provisions of the TEU, a wide range of goals of political, economic and social character is to be achieved by legislation, administration and courts.¹⁰⁵

¹⁰¹ Craig (2011a) p. 109.

¹⁰² Tridimas (2006) p. 18.

¹⁰³ Schermers (2001) p. 28.

¹⁰⁴ Bengoetxea (2001) p. 100.

¹⁰⁵ The embracement of goals is one of the features of what is characterised as the post-modern legal system. Applied to law, post-modernity emphasises the pragmatic, gradual, unstable nature of contemporary law. Other characteristics include dispersion of the law makers, fragmentation of law, decline of state authority

These goals should presumably be reflected in a piece of legislation like the EU ETS. Likewise, the ETS Directive also lays down a main objective, when setting forth to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner.¹⁰⁶

It can also be argued that the dynamics and relative incompleteness of the EU legal order entails a need for general principles to create coherence in the rules,¹⁰⁷ which is arguably a prerequisite for legitimacy and stability. A good example of this dynamic aspect is the entry into force of the Treaty of Lisbon, which saw significant changes in the institutional structure of the EU, most notably the change resulting from the so-called depillarisation of the Union.¹⁰⁸ Again, these characteristics can also be used to describe the ETS, with its different phases and continuous refinement and tuning of the system.

3.3.2 In practice

In relation to an instrument like the ETS, the influence of general principles can in practice assume several forms. A distinction can here be made between the influence they exert on the policy maker, the courts and the administration, respectively.

3.3.2.1 Influence on the policy maker

It should first be clarified what is meant by “policy maker” in this context. The EU ETS Directive was adopted on basis of Article 175(1) EC, which corresponds to current Article 192(1) TFEU. The article made reference to the co-decision procedure in Article 251 EC, which became the ordinary legislative procedure in Article 294 TFEU after the Treaty of

and – of particular significance here – the embodiment of principles (De Sadeleer (2004) pp. 227-231). The Community legal order can be said to possess several of these characteristics. See also Wilhelmsson (2003).

¹⁰⁶ Dir 2003/87/EC Article 1.

¹⁰⁷ Sejersted (2004) p. 65.

¹⁰⁸ For an extensive overview of the main reforms contained in the Treaty of Lisbon, see Dougan (2008).

Lisbon. The ETS was hence adopted according to the normal method for making EU legislation. In short, the procedure consists in the joint adoption by the European Parliament and the Council of a regulation, directive, or decision on a proposal from the Commission.¹⁰⁹ In the case of the ETS, the Economic and Social Committee and the Committee of the Regions were also consulted, as required by Article 192(1) TFEU. In conformity with Article 10(4) of the ETS Directive, the Commission alone adopted the Auctioning Regulation, as the Council had delegated the necessary powers, hereby derogating from the ordinary legislative procedure.¹¹⁰

For the policy maker, the principles can have an enabling function, in the sense that specific implementing law must be adopted in order to breathe life into them.¹¹¹ Principles are never sufficient on their own. Moreover, at this stage, they can also guide the policy maker when elaborating policies to achieve the goals set out in the treaties. The principle of subsidiarity can e.g. give contributions in the legislative process as to how far a further centralisation of the ETS would be within the limits of the EU legal framework. It is also possible that the principles could contribute to the creation of new procedural and even fundamental rights.¹¹² Relating to the ETS, equal treatment and legal certainty are both principles from which such rights have the potential to be inferred. Especially in regard to a piece of legislation as the Auctioning Regulation, where it is stated as an objective that auctions are conducted in an “open, transparent, harmonised and non-discriminatory manner”,¹¹³ could these principles give rise to procedural rights. Finally, and as mentioned above, the principles can work as an instrument for the policy maker to ensure coherency in a complex system like the ETS.

¹⁰⁹ Article 289 TFEU. For a presentation of the ordinary legislative procedure, see Craig (2011a) p. 123.

¹¹⁰ Article 290 TFEU.

¹¹¹ De Sadeleer (2004) p. 232.

¹¹² De Larragán (2011) p. 108.

¹¹³ Dir 2003/87/EC Article 10(4).

It should be emphasised that the principles have the *potential* to exert such influence on the policy maker. However, due to their vagueness, it is often a prerequisite that they beforehand go through a process where policy makers, academics and courts come to an understanding of the meaning and content of each principle.¹¹⁴ Lack of such an understanding is consequently a limiting factor.

3.3.2.2 Influence on the courts

For purposes of clarity, the meaning of “courts” should also be made clear. Here, the term can mean both the Court of Justice of the European Union (ECJ), which pursuant to Article 19(1) TEU includes the Court of Justice, the General Court and specialised courts, and the national courts of the Member States.

In the first place, the general principles serve an interpretative function for the courts.¹¹⁵ The ECJ has ruled that where it is necessary to interpret a provision of secondary Union law, preference should as far as possible be given to the interpretation which renders the provision consistent with the Treaty and the general principles of EU law.¹¹⁶ This has been applied to numerous principles, *inter alia* the principle of equal treatment.¹¹⁷ Second, the general principles are used to fill gaps in the treaties or in acts adopted by the Union institutions.¹¹⁸ Already early in its case law, the ECJ became aware of the situation where there is a lacuna in the primary law, so that the Court is “obliged to solve the problem by reference to the rules acknowledged by the legislation, the learned writing and the case-law of the member countries”.¹¹⁹ In the treaties, a fundamental provision is and has been Article 19(1) TEU (old Article 220 EC and Article 164 EEC), which charges the ECJ with the duty of

¹¹⁴ De Larragán (2011) p. 95.

¹¹⁵ Akehurst (1981) p. 29; Tridimas (2006) p. 29; De Sadeleer (2004) p. 234; De Larragán (2011) p. 111.

¹¹⁶ Case C-314/89 *Siegfried Rauh*, paragraph 17; Case 218/82 *Commission v. Council*, paragraph 15.

¹¹⁷ Joined Cases 201 and 202/85 *Klensch*, paragraph 21.

¹¹⁸ Akehurst (1981) p. 30; Tridimas (2006) p. 17; De Larragán (2011) p. 110.

¹¹⁹ Joined Cases 7/56 and 3-7/57 *Algera*, p. 55.

ensuring that the law is observed in the interpretation and application of the treaties. The word “law” has been interpreted to mean law from outside the treaties rather than some duplicated reference back to these,¹²⁰ being said to *oblige* the ECJ to take general principles into account.¹²¹ This interpretation has enabled the Court to develop a system of legal principles in accordance with which the legality of Union and Member State action must be determined.¹²² Third, the principles serve as grounds for review of Union acts.¹²³ Article 263 TFEU (old Article 230 EC and Article 173 EEC) regulates the grounds on which the Court may annul a Union act. The wording “infringement of the Treaties or of *any rule of law relating to their application*” (my italics) has been used by the Court to work out a doctrine according to which an act may be annulled also for infringement of a general principle.¹²⁴ The same doctrine applies to Article 267 TFEU (old Article 234 EC and Article 177 EEC) as concerns preliminary rulings.

As for the national courts, it should be noted that the general principles may be used also as an aid for the interpretation of national measures which implement Union law and, more generally, which fall within the scope of Union law. A national court must as far as possible interpret a provision of national law which falls within the scope of Union law so as to comply with general principles and, if necessary, make a reference to the ECJ in order to ascertain the requirements of Union law in the case in issue.¹²⁵ Furthermore, it is established case law that an individual may attack the validity of a Union measure before a national court on grounds of infringement of such principles.¹²⁶ However, the national court may not declare a Union act invalid.¹²⁷

¹²⁰ See e.g. Joined Cases C-46 and C-48/93 *Brasserie du Pêcheur* and *Factortame III*, paragraph 27.

¹²¹ Foster (2012) p. 109.

¹²² Tridimas (2006) p. 20.

¹²³ Akehurst (1981) p. 30; Tridimas (2006) p. 31; De Larragán (2011) p. 111.

¹²⁴ See e.g. Case C-70/88 *Chernobyl*.

¹²⁵ Tridimas (2006) p. 31.

¹²⁶ Case C-27/95 *Woodspring*, paragraph 17.

¹²⁷ Case 314/85 *Foto-Frost*, paragraph 17.

3.3.2.3 Influence on the administration

The Member States play a fundamental role in the administration of the ETS. In the context of this text, it should be accentuated that the Member States are charged with the administration of the auctions and are responsible for the development of the auctioning infrastructure. Even though the current auctioning scheme is laid down in a regulation,¹²⁸ and hereby expresses the desire to have identical rules in all the Member States, auctioning in the ETS will nonetheless not be an automated process. On the contrary, aspects such as access to the auctions, information disclosure and transparency of rules presuppose an active stance from the Member States. It is likely – and also desirable – that especially the principles of equal treatment and legal certainty can be of influence on the choices made here.

For the administration, the principles can serve both a guiding function and an interpretative function. They form a backdrop against which decisions are taken, so as to enhance the quality of the regular auctioning administration. In the case of vague and open rules, as well as conflicting rules, the administration can use the principles in the process of interpretation, in a similar manner to the courts. Both functions can strengthen the normative power of the statutory rules.

However, as with the policy maker, the principles have similarly for the administration the *potential* to exert the described influence. The reservation made above should be made also here. Knowledge within the administration about the principles and their contents is a prerequisite for their influence in practice.

¹²⁸ Pursuant to Article 288 TFEU, regulations are binding in their entirety and directly applicable in all Member States. Regulations thus constitute the most direct form of Union law.

4 The principle of subsidiarity

4.1 Introductory considerations

4.1.1 Legal basis

The central elements of the principle of subsidiarity are enshrined in Article 5(3) TEU. The article reads as follows:

“Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.”

A broader expression of the principle is found in Article 1 TEU, which sets out that decisions should be taken “as closely as possible to the citizen”. Additionally, various other provisions in the constituent treaties can be seen as expressions of subsidiarity, e.g. the requirement in Article 4(2) TEU to respect the national identities of the Member States and the categorisation of Union competence in Articles 2-6 TFEU.

4.1.2 Does the principle apply to the ETS?

As indicated by the wording of Article 5(3) TEU, it must be determined whether the Union action is based on a non-exclusive competence. The principle of subsidiarity only applies if this condition is satisfied. Pursuant to Article 4(2)(e) TFEU, shared competence (i.e. non-exclusive) between the Union and the Member States applies in the area of environment.¹²⁹

¹²⁹ See also Case C-114/01 *AvestaPolarit*, paragraph 56.

Consequently, the principle applies to a piece of environmental legislation like the ETS, and must be adhered to in the design of an allocation mechanism.

4.1.3 References to the principle in the regulatory documents

It is noteworthy that the regulatory documents contain few direct references to subsidiarity. Recital 30 of the ETS Directive asserts that “[s]ince the objective of the proposed action, the establishment of a Community [greenhouse gas emission trading] scheme, cannot be sufficiently achieved by the Member States acting individually, and can therefore [...] be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity [...]”. This kind of succinct formulation is, however, common in EU legislation and does not necessarily reveal the attention subsidiarity has been given in the legislative process. Yet, neither the Commission’s directive proposal for phase III of the ETS¹³⁰ nor the accompanying Impact Assessment¹³¹ mentions the principle.

Likewise, the Auctioning Regulation¹³² does not give any explicit references to subsidiarity. In its Impact Assessment, the Commission declares early on that the Regulation must respect the principle, as well as the principles of equal treatment and legal certainty.¹³³ Nevertheless, the following assessment does not discuss its implications.

4.2 Contents of the principle

4.2.1 Political and legal dimensions

The principle of subsidiarity seeks to allocate responsibilities for policy formation and implementation to the lowest level of government at which the objectives of that policy can be

¹³⁰ European Commission (2008a).

¹³¹ European Commission (2008d).

¹³² Reg No 1031/2010.

¹³³ European Commission (2010b) p. 6.

successfully achieved,¹³⁴ hereby ensuring that decisions are taken as closely as possible to the citizen of the Union. The focus is on whether a decision should be taken at the level of the Union or of the Member States. Activities should not be regulated at Union level when the Member States are in a better position to handle it themselves.

The distribution of powers between the Union level and the Member State level has throughout the history of the European Union been a contentious matter. Ever since its introduction by the Treaty of Maastricht in 1992,¹³⁵ the principle of subsidiarity has been present both in the political and legal discourse.¹³⁶ While the political dimension is evident, and arguably important for its understanding and placement within the more general framework of the changing EU polity,¹³⁷ it is the legal dimension that interests us here.

4.2.2 The subsidiarity test

The wording of Article 5(3) TEU requires that two cumulative conditions must be fulfilled in order to justify Union action: First, the objectives of the proposed action cannot be sufficiently achieved by the Member States. Second, this action must be better achieved at Union level. The approach is thus one of comparative effectiveness. Clearly, neither of the conditions conveys a clear-cut and precise concept – and several different interpretations can consequently be read into this so-called subsidiarity test. The case law of the ECJ has stated the justiciability of the provision,¹³⁸ but has otherwise refrained from laying down a

¹³⁴ Inman (1998) p. 1.

¹³⁵ Although the Single European Act of 1986 established subsidiarity as an *environmental* principle, it was not until the Treaty of Maastricht that it became a *general* principle (Case T-29/92 *SPO*, paragraph 331). It can be argued that the principle plays a pronounced role in environmental policy, as “[e]nvironmental protection is *par excellence* one area where action often needs to be international to be effective” (Wilkinson (1992) p. 225). See also De Sadeleer (2012a) p. 76.

¹³⁶ A work that has been given considerable attention is Estella (2002).

¹³⁷ De Búrca (1999) p. 7.

¹³⁸ Case C-84/94 *United Kingdom v. Council*, paragraph 55.

clear doctrine.¹³⁹ This might very well be attributed to the sensitive political dimension of the principle. The general picture is that the Court restricts itself to examining only whether the legislature's decision to exercise competence, in accordance with the conditions of Article 5(3) TEU, is supported by the available facts.¹⁴⁰

Protocol on the application of the principles of subsidiarity and proportionality, which was introduced by the Treaty of Amsterdam in 1997,¹⁴¹ laid down some guidelines with the aim of making the concept more tangible. These guidelines are not found in its successor,¹⁴² introduced by the Treaty of Lisbon, which might be due to the development of the Commission's impact assessment process since Amsterdam, defining more specific criteria for applying the principle of subsidiarity.¹⁴³ In the absence of clear guidelines in the case law of the ECJ, it is appropriate to attach significance to the Commission criteria, whose contents both reproduce and further develop the guidelines that were found in the Amsterdam Protocol.

The latest version of the Commission Guidelines asks the following five questions:¹⁴⁴

- 1) Does the issue being addressed have transnational aspects which cannot be dealt with satisfactorily by action by Member States?

¹³⁹ It can also be noted that there have been few ECJ cases based on subsidiarity. According to Craig and De Búrca, just over ten cases have since the Treaty of Maastricht had a real subsidiarity challenge (Craig (2011a) p. 99). What is more, the question of exclusive Union competence, which is discussed in this case law, is of lesser importance after the categorisation of competence in Articles 2-6 TFEU, introduced by the Treaty of Lisbon.

¹⁴⁰ Horsley (2012) p. 269, with reference to Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health*, paragraphs 104-108; Case C-58/08 *Vodafone*, paragraphs 75-79. The ECJ case law is also presented in Ritzer (2006) pp. 740-748.

¹⁴¹ Protocol No 30 (1997).

¹⁴² Protocol No 2 (2010).

¹⁴³ Constantin (2008) p. 169.

¹⁴⁴ European Commission (2009) p. 23.

- 2) Would actions by Member States alone, or the lack of Community action, conflict with the requirements of the Treaty?
- 3) Would actions by Member States alone, or the lack of Community action, significantly damage the interests of Member States?
- 4) Would action at Community level produce clear benefits compared with action at the level of Member States by reason of its scale?
- 5) Would action at Community level produce clear benefits compared with action at the level of Member States by reason of its effectiveness?

4.2.3 Subsidiarity after Lisbon

Notwithstanding the absence of substantial guidelines concerning the application of subsidiarity in the revised Protocol and only minor changes in the wording of the principal provision,¹⁴⁵ the Treaty of Lisbon put a strengthening of the principle on the agenda. The revised Protocol provides for certain new obligations during the drafting of legislation, notably by including national parliaments to a greater extent than before.¹⁴⁶ Following the reform of the Protocol, national parliaments have for the first time the possibility to *directly* influence EU legislation.¹⁴⁷

Even though this reform does not touch upon the substance of the principle of subsidiarity, the developments should be mentioned here, because it shows considerations at Union level as to both the desired significance of the principle and as to when this significance should manifest itself. By means of Commission consulting on national level, it is made clear that

¹⁴⁵ The words “either at central level or at regional and local level” were inserted.

¹⁴⁶ Article 4 obliges the Commission to forward its legislative proposal to the national parliaments at the same time as to the EU legislative institutions. Pursuant to Article 6, each national parliament may within eight weeks, elaborate a reasoned opinion stating why it considers that the legislative proposal does not comply with the principle of subsidiarity (the “yellow card” system). For more on the system, see Dougan (2008) p. 657.

¹⁴⁷ Höreth (2008) p. 9.

compliance with the principle would be more effectively achieved through a system of *ex-ante* political input into the legislative procedure, rather than *ex-post* judicial review of legislation after it has already been adopted.¹⁴⁸ This relates to section 3.3.2 above, which described the practical influences of principles.

4.3 Subsidiarity applied to the ETS phase III auctioning

4.3.1 Objectives of ETS allocation

A necessary step in the present subsidiarity assessment is to determine the allocation objectives. Pursuant to Article 1 of the ETS Directive, the principal objective of the ETS is to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner. More specific aspects of the system, such as allocation, must contribute to fulfilling this objective.

As for allocation per se, a number of objectives can be identified. In the ETS Directive itself, Recital 7 makes clear that preserving the integrity of the internal market and avoiding distortions of competition are two main objectives for the allocation of allowances. This is somewhat more elaborated and clarified in the Commission's Impact Assessment of the phase III directive proposal, which identifies the following allocation ambitions:

- Environmental effectiveness and economic efficiency
- Establishment of a level playing field and elimination of distortions of competition
- Avoidance of unduly negative impact on competitiveness and employment of the EU economy
- Minimisation of the time and administrative burden to authorities and operators
- Avoidance of undue distributional effects

¹⁴⁸ Dougan (2008) p. 659.

It can be said that the objectives in the Directive cover those in the Impact Assessment, but the added precision introduced by the latter is still beneficial in the present context.

4.3.2 Pre-phase III: NAPs and free allocation

4.3.2.1 Distortions of competition

Avoiding distortions of competition is a clear and stated objective of ETS allocation. It is reminded that the internal market of the EU, as set out in Article 3 TEU, includes a system ensuring that competition is not distorted.¹⁴⁹

As presented in sections 2.1 and 2.2 above, phases I and II of the ETS saw ample discretion for the Member States in the elaboration of national allocation plans, with free allocation based on grandfathering. The lack of Union harmonisation led to what has been described as a “race to the bottom” between the states.¹⁵⁰ The term implies that each state will set its own requirements for pollution abatement in light of standards in rival states, in the absence of cooperation with regard to setting common environmental standards. This way, states will be inclined to lower their pollution abatement requirements at least to the level of the standards in the lowest-standard country, if not lower, to avoid a loss of competitiveness either in trade or in attracting foreign investment.¹⁵¹ In the ETS, states proved to allocate emission allowances against the backdrop of allocated allowances in other competing states, so as to avoid a possible loss of competitiveness. Delays in submitting NAPs to the Commission¹⁵² could also be seen as the states’ desire to competitively orient themselves vis-à-vis each other.¹⁵³ The system thus gave the Member States incentives to protect their home industries by means of generous allocations.

¹⁴⁹ Protocol No 27 (2010).

¹⁵⁰ E.g. Carbon Trust (2008) p. 19; Skjærseth (2009) p. 15.

¹⁵¹ Porter (1999) p. 136.

¹⁵² Only five NAPs for phase I were submitted to the Commission on time (Ellerman (2008) p. 38), while only Germany and Estonia were on time for phase II (Rogge (2006) p. 3).

¹⁵³ Skjærseth (2009) p. 115.

As identified by the Impact Assessment, a particular weakness related to allocation has been the treatment of new entrants on the market and closures of existing installations.¹⁵⁴ This was from the outset recognised by the Commission as “one of the important design choices in any emission trading scheme”,¹⁵⁵ but ultimately remained a weak point throughout the two first phases. It turned out that the Member States developed highly divergent rules, leading to distortions of competition.

For new entrants, free allocation – despite its rationale of equal treatment – can be seen as a subsidy to new installations, which may both protect and encourage certain investments. Under phase 1, a new natural gas combined heat and power plant would e.g. in Germany receive allowances corresponding to 130 % of its expected emissions. The corresponding figures were 120 % for Finland, 90 % for Denmark and 60 % for Sweden.¹⁵⁶ Clearly, this was likely to affect investment decisions. Additionally, many NAPs gave more free allowance to more carbon intensive fuels,¹⁵⁷ which was contradicting the system’s objective of environmental effectiveness.

Closure rules can differ by restricting the benefit of keeping allowances after closure to the same operator, site or to investment in the same Member State.¹⁵⁸ Most Member States applied closure rules stating that if an installation is closed or if production is reduced significantly, the amount of allocation corresponding to the reduction of economic activity would be withdrawn.¹⁵⁹ But firms in states who allowed for keeping the allowances in case of closure were put at a disadvantage in terms of competitiveness. Also this conflicted with the objective of environmental effectiveness, as withdrawing allocation upon closure

¹⁵⁴ European Commission (2008d) p. 93.

¹⁵⁵ European Commission (2004) p. 11.

¹⁵⁶ Egenhofer (2006) p. 4.

¹⁵⁷ Carbon Trust (2007) p. 3.

¹⁵⁸ European Commission (2008d) p. 93.

¹⁵⁹ Egenhofer (2006) p. 4.

amounts to introducing an incentive to continue an inefficient installation in order to keep allowances.¹⁶⁰

4.3.2.2 Windfall profits

Another controversial issue resulting from free allocation in the first two ETS phases has been the rise of so-called windfall profits. The term can be defined as “unexpected profit[s] arising from a circumstance not controlled by a firm or an individual”.¹⁶¹ These are thus “accidental profits” that firms are unable to take into account when making business decisions. The criticism has been that those industries that can pass on the additional carbon costs (i.e. the power sector) have had a net gain, since potential losses of revenues may be compensated or even overcompensated by receiving free allocation and earning windfall profits. Hence, the ETS has led to different distributional effects among the covered sectors.¹⁶² Different *ex-post* studies have shown that these profits have been in the range between € 14 billion¹⁶³ and € 19 billion¹⁶⁴ for phase I.

4.3.2.3 Administrative implications

The Impact Assessment asserts that the wide range of allocation methodologies considerably has increased the complexity of the allocation process and thus negatively affected simplicity and transparency.¹⁶⁵ It is not further specified what this complexity consists of, but the finding can be elaborated in light of gathered experience from the first two phases.

Negotiating allocations turned out to be a cumbersome and contentious process, both for the Member States and the Commission. The assessment of all NAPs for phase I took 15

¹⁶⁰ *l.c.*

¹⁶¹ Rutherford (2002).

¹⁶² Egenhofer (2011) p. 14.

¹⁶³ De Bruyn (2010) p. 60.

¹⁶⁴ Ellerman (2010) p. 327.

¹⁶⁵ European Commission (2008d) p. 93.

months in total,¹⁶⁶ which was certainly not in line with the three months foreseen in the ETS Directive. There were various reasons for this: First, the allocation methodologies gave rise to political challenges in the form of industry pressure and lobbying.¹⁶⁷ Considering the distributional impact of the system, the affected firms also had an incentive to protect their interests by means of putting pressure on their respective governments. Second, the development of the NAPs was also demanding from a technical point of view. The wide discretion for the Member States resulted in complex allocation rules, which made the final outcome of the NAP process uncertain. The more special provisions applied by the Member States, the lower the transparency on the allocation outcome was.¹⁶⁸

As for phase II in particular, the states resorted to the concepts and methodologies developed in phase I, making the progress towards more efficient and more harmonised allocation rules generally small.¹⁶⁹ Moreover, phase II also saw a number of Eastern European states bringing the Commission's NAP decisions before the ECJ, which added further complications. These decisions were largely an affirmation of the Member States' discretionary powers in relation to the NAPs. Recalling the significance of the principle of subsidiarity, the Court emphasised that the Commission merely enjoys a power of review – and not a power to substitute or to harmonise.¹⁷⁰

4.3.3 Phase III: EU-wide auctioning harmonisation

4.3.3.1 Increased environmental effectiveness and economic efficiency

By making auctioning the default method of allocation, the issue of over-allocation will no longer arise. Whereas the Member States before stated in the NAPs the total quantity of

¹⁶⁶ Delbeke (2006) p. 203.

¹⁶⁷ See e.g. Wettestad (2009) p. 319.

¹⁶⁸ Matthes (2005) p. 7.

¹⁶⁹ Rogge (2006) p. 37.

¹⁷⁰ Case C-504/09 P *Commission v. Poland*, paragraphs 80-81; Case C-505/09 P *Commission v. Estonia*, paragraphs 82-83.

allowances that they intended to allocate and how they proposed to allocate them, it is now for the firms to get hold of the needed allowances through auctions. The auctions will yield significant revenues, which will give the allowances a monetary value *also* for the states. This was not the case in phases I and II. The distributional aspects of these revenues will be treated in the following section, but it should here be emphasised that the change will have an influence on the allocation behaviour of the Member States. Before, the consequence of over-allocation consisted of imposing an additional burden on non-ETS sectors (as these sectors had to pay for the emission reductions of the ETS sectors if the state was to comply with its emission target) and indirectly other states' industries and consumers; now, the Member State would now be harming itself in failing to obtain the optimal auctioning revenues.¹⁷¹

As for the treatment of new entrants and closures of existing installations, the revised ETS Directive harmonises the national regimes: For new entrants, it introduces an EU-wide reserve.¹⁷² Installations that have closed will no longer receive any allowances for free. In relation to closures, it should be added that auctioning strengthens the environmental effectiveness of this harmonisation, as it gives incentives to replace an inefficient installation with a more a more efficient one. When an incumbent does not replace an inefficient technology in a timely manner a newcomer will do so and push the obsolete installation out of the market.¹⁷³ Also for new entrants that are not entitled to free allocation from the aforementioned reserve (i.e. the power sector), auctioning gives strong incentives to invest in low-carbon technology.

It is understood that windfall profits will by and large disappear with auctioning, since the industries that can pass on the additional carbon costs (i.e. the power sector) can no longer

¹⁷¹ Van Zeben (2009) p. 353.

¹⁷² Dir 2003/87/EC Article 10a(7).

¹⁷³ Egenhofer (2007) p. 9.

profit from free allowances.¹⁷⁴ For industries that do not have this possibility, the recycling of auction revenues can alleviate this disadvantage.

Moreover, the Commission has stated that auctioning best complies with the polluter-pays principle.¹⁷⁵ There seems to be a general agreement in legal theory about the validity of the view.¹⁷⁶ The polluter-pays principle is set out in Article 191(2) TFEU, along with the other principles on which EU environmental policy is based. Its main function is to internalise the social costs borne by the public authorities for pollution prevention and control.¹⁷⁷ By having to buy allowances through auctions, such costs are effectively internalised by the polluting firms.

4.3.3.2 Distributional aspects

The auctioning will generate significant revenues for the states.¹⁷⁸ With the progressive phasing out of free allocation, these revenues are also going to increase in the coming years. As presented in section 2.3.2, the rules in the current ETS Directive assert that the Member States shall determine the use of revenues. Still, at least 50 % of the revenues should be used to fund different climate change related activities. The novelty of being able to dispose such financial means is arguably an important element in a subsidiarity discussion, as it shows that the major revision of the ETS did not *only* entail a shift of power from the Member States to the central EU level.

¹⁷⁴ See, however, Weishaar (2010) p. 5.

¹⁷⁵ European Commission (2008a) p. 7.

¹⁷⁶ See e.g. Egenhofer (2007) p. 9; Rogge (2006) p. 3; Carbon Trust (2008) p. 2; Woerdman (2008) p. 143.

¹⁷⁷ De Sadeleer (2012b) p. 405.

¹⁷⁸ The Commission has estimated that if all sectors in the ETS would have to acquire allowances via auctioning at a carbon value of around € 40 per allowance in 2020, revenues would amount to € 75 billion, or 0.5 % of GDP (European Commission (2008e) p. 10). For more calculations of possible auction revenues, see Behrens (2008) pp. 36-37.

The revenues not specifically earmarked by the ETS Directive could be used for a wide range of distributional purposes. Two main categories can here be distinguished, namely recycling to the industry for mitigation of competition and recycling to households for social purposes. It can be argued that both these two categories have legitimate reasons to benefit from the revenues. Recycling to the industry can be in the form of e.g. a decrease in income tax and corporate taxes,¹⁷⁹ which offers what has been called a “double dividend”, as both the environment improves and costs of the tax system are reduced.¹⁸⁰ Recycling to households can be done by means of e.g. improvement of social security systems. This would mitigate the overall impacts of the increase in the cost of living resulting from internalised carbon costs.¹⁸¹ Also, the states are free to use *more* than 50 % of the revenues on the climate change related activities listed in Article 10(3) of the ETS Directive.

4.3.3.3 Transparency and simplicity

The Commission states that auctioning is transparent and simple.¹⁸² When auctioning is compared to the grandfathering in phases I and II, the statement is very likely to hold true. If seen from an overall European level, it is clearly easier to have an overview over one set of harmonised auctioning rules than 31 different national allocation procedures and an equal number of Commission approvals. Also if seen from a national level, auctioning is advantageous: First, challenging NAP negotiations are no longer necessary. Second, auctioning can offer several benefits from a point of view of transparency and simplicity. It must, however, be emphasised that this does not apply unconditionally. As has been noted in economic theory, good auction design is not “one size fits all”, but rather something that must be sensitive to the details of the context.¹⁸³

¹⁷⁹ Neuhoff (2008) p. 69. See also De Bruyn (2008) pp. 92-93.

¹⁸⁰ The standard work on the topic is Goulder (1994).

¹⁸¹ Neuhoff (2008) p. 69.

¹⁸² European Commission (2008d) p. 116.

¹⁸³ Klemperer (2002) p. 184.

With regard to auction format, the Auctioning Regulation opts for a “single round, sealed-bid uniform-price auction”.¹⁸⁴ The Member States are not free to choose another format. Furthermore, the Auctioning Regulation harmonises several other aspects that can be related to transparency and simplicity, such as market access,¹⁸⁵ submissions and withdrawal,¹⁸⁶ and timing of the auctions.¹⁸⁷ It also regulates the publication of different auction documents¹⁸⁸ and the announcement and notification of the auction results.¹⁸⁹

4.4 Conclusion

Although the principle of subsidiarity was seemingly not given great attention in the legislative process, it should on the basis of the preceding analysis be concluded that EU-wide auctioning harmonisation seems to be sufficiently and well justified. The stated main objectives of ETS allocation, namely preserving the integrity of the internal market and avoiding distortions of competition, will be better achieved by the current harmonisation. What supports this conclusion is not only legal and economic considerations on a theoretical level, but also strong evidence from the two first ETS phases. Phases I and II positively demonstrated that allocation largely at the discretion of the Member States failed to yield the desired results. It can moreover be added that the ECJ did not approve of the Commission’s increasingly pro-active approach in relation to the assessment of the NAPs. The Court thus made clear that this sort of quasi-harmonisation was not a viable solution either.

When it comes to the specific auction design, the Auctioning Regulation imposes a high degree of harmonisation. The principle of subsidiarity could perhaps suggest more national

¹⁸⁴ Reg No 1031/2010 Article 5. The term is not used in the provision itself, but can be found in Recital 17. For more on the auction format, see section 5.3.3.

¹⁸⁵ Reg No 1031/2010 Chapter IV.

¹⁸⁶ Reg No 1031/2010 Article 5.

¹⁸⁷ Reg No 1031/2010 Article 8.

¹⁸⁸ Reg No 1031/2010 Article 60.

¹⁸⁹ Reg No 1031/2010 Article 61.

discretion in the design, but several arguments can be made against this: First, the experience with different national approaches to allocation proved unsuccessful. Another negative experience could be the outcome if the Member States were to introduce different auction designs. Second, considering the lack European experience with auctioning of emission allowances, the different states were unlikely to have a preference for a specific national design at the outset. There were therefore few expectations to take into account with respect to this. Third, the lack of experience also suggested *early* Union action, as any future national preference could impede harmonisation at a later stage. A downside of the present harmonisation is, however, that there is little room for a healthy competition between different national policies. Such competition can result in valuable experiences that can be benefited from at EU level. But again, this approach was not successful as regards allocation in phases I and II.

5 The principle of equal treatment

5.1 Introductory considerations

5.1.1 Legal basis

The constituent treaties have always contained some references to the principle of equal treatment, most notably the provisions on nationality discrimination and equal pay. These provisions sought to establish equal treatment between the factors of production within the internal market. However, it is due to the endeavours of the ECJ that the principle evolved into a principle of *general* application, whose scope goes beyond what is required by an internal market rationale.¹⁹⁰ As concerns the ETS auctioning, it is the substantive concept of equality as developed by the ECJ that is of interest. In the words of the Court, the concept implies that “comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified”.¹⁹¹

Moreover, a broad expression of the principle is articulated in Article 2 TEU, which lists equality as one of the values on which the Union is founded.

5.1.2 Demarcation between equal treatment and subsidiarity

It can be argued that equal treatment is one of the elements that should be considered in a subsidiarity assessment. If regulation at Union level of a given activity entails more equality for the concerned parties, then this is an argument in favour of regulation at this level and not regulation at national level. Of the aspects discussed in the previous subsidiarity section, equal treatment can be said to be an underlying premise, especially with regard to competitiveness. When the ETS is better served by auctioning than free allocation based on grandfathering, it is, *inter alia*, because the former treats the stakeholders more equally.

¹⁹⁰ For the developments of the principle, see Craig (2011b) p. 611 et seq. and Tridimas (2006) p. 59 et seq.

¹⁹¹ E.g. Case 106/83 *Sermide*, paragraph 28.

With the aim of avoiding duplication of the arguments presented above, the present section will assess the principle of equality against the current auctioning scheme *in itself*. The approach will thus not be to compare the phase III auctioning with what has been, which has already been done under the principle of subsidiarity, but rather try to identify some equality issues that might arise in relation to the current scheme, as primarily laid down in the Auctioning Regulation.

5.1.3 References to the principle in the regulatory documents

It is recalled that the ETS auctioning scheme was finalised with the adoption of the Auctioning Regulation. The Regulation and the accompanying Impact Assessment would hence be documents of great interest when looking for references to the principle of equal treatment. References in earlier documents to equality aspects of auctioning *as such*, or in relation to other allocation methods, are of less relevance here, as they do not take the current scheme into account. However, in the determination of the main objectives to be achieved in the design of the scheme, Article 10(4) of the ETS Directive sets out non-discrimination as a main priority. When it comes to the more specific features, the article states that auctions shall be designed to ensure that operators have full, fair and equitable access, as well as access to the same information at the same time. These objectives clearly aim to safeguard the principle of equal treatment and show that it was given consideration in the legislative process.

The auctioning objectives in the ETS Directive are expressed and transformed into concrete provisions in the Auctioning Regulation. Even though the Regulation does not directly mention the principle, the main objectives on which it is based make clear that this should not be interpreted as indicative for the attention given in the auctioning rules.

5.2 Contents of the principle

It can be derived from the case law of the ECJ that an equal treatment assessment is a two-step process: First, it must be determined whether there is a difference in treatment between

two firms. Second, it must then be determined whether any eventual difference in treatment can be objectively justified.

5.2.1 Step I: Identifying a difference in treatment

A breach of the principle of equal treatment as a result of different treatment presumes that the situations concerned are comparable, having regard to all the elements which characterise them. It is settled case law the criterion of competition is decisive in the field of economic law.¹⁹² Here, the characteristics of both the products in question and the implied firms can be or relevance. In the case of ETS auctioning, the focus should be on the latter. Case law shows that the Court might have regard to the firms' production¹⁹³ or to their legal structure.¹⁹⁴

An essential condition is also the difference in treatment itself, which consists in treating like cases differently, involving a disadvantage for some firms in relation to others.¹⁹⁵

5.2.2 Step II: Justification for a difference in treatment

The principle of equal treatment will not, however, be infringed if the different treatment is justified. Although difficult to define in the abstract,¹⁹⁶ the ECJ has indicated that the decisive criterion is that the difference in treatment must not be arbitrary,¹⁹⁷ i.e. it must be adequately justified and based on objective criteria.¹⁹⁸

¹⁹² Joined Cases 103/77 and 145/77 *Royal Scholten-Honig*, paragraph 28.

¹⁹³ Case 14/59 *Pont-à-Mousson*, p. 232.

¹⁹⁴ Joined Cases 17/61 and 20/61 *Klöckner*, p. 345.

¹⁹⁵ l.c.; Case C-462/99 *Connect Austria*, paragraph 115.

¹⁹⁶ *Tridimas* (2006) p. 83.

¹⁹⁷ Case 139/77 *Denkavit*, paragraph 15.

¹⁹⁸ Case 106/81 *Kind*, paragraph 22.

5.2.3 Role in the field of economic law

It could be claimed that the principle of equal treatment acquires a particular role in economic law, due to the association with the internal market. Advocate General Tesauro has convincingly argued that “if, in this field, different rules are laid down for similar situations, the result is not merely inequality before the law, but also, and inevitably, distortions of competition which are absolutely irreconcilable with the fundamental philosophy of the common market”.¹⁹⁹ Nevertheless, the Court has made clear that the scope of the principle also here has its limitations, as it is practically impossible to consider every difference that may exist among economic operators.²⁰⁰

5.3 Equal treatment applied to the ETS phase III auctioning

5.3.1 Auction platform

The term “auction platform” refers to the IT system used by an auctioneer to run an auction.²⁰¹ In theory, it could be left to the Member States to develop their own auctioning infrastructure, hereby allowing for different national solutions. The Auctioning Regulation, however, foresees the establishment of a common infrastructure where a common auction platform conducts the auctions.²⁰² According to the legislature, this harmonisation entails a number of advantages, including non-discriminatory access to the auctions.²⁰³ Particularly emphasised is the situation for small and medium-sized enterprises (SMEs), which would be faced with burdensome costs in the process of becoming familiar and registering with, as well as participating in, more than one auction platform.

¹⁹⁹ Case C-63/89 *Assurances du Crédit*, p. 1829.

²⁰⁰ Joined Cases 17/61 and 20/61 *Klöckner*, p. 340.

²⁰¹ European Commission (2010b) p. 33.

²⁰² Reg No 1031/2010 Article 26.

²⁰³ Reg No 1031/2010 Recital 7.

Nevertheless, to mitigate risk of reduced competition in the carbon market, the Regulation provides for the possibility for Member States to opt-out of the common auction platform.²⁰⁴

The European Energy Exchange (EEX) in Leipzig is the common platform for the large majority of countries participating in the EU ETS.²⁰⁵ Germany,²⁰⁶ United Kingdom²⁰⁷ and Poland²⁰⁸ have made use of the opt-out possibility.

5.3.2 Access to the auctions

Equal access to the auctions is a clear prerequisite for non-discriminatory auctioning. Even if the subsequent auction process is fair, this will be to little avail for firms who have to overcome insurmountable obstacles in order to participate. Such obstacles could be of both formal character (firm size, capital structure, etc.) and practical character (inaccessible information about participation, language barriers, etc.). Yet, as pointed out in Auctioning Regulation's Impact Assessment, there is a trade-off between openness and the cost of know-your-customer checks, given the need to protect the integrity of the market and avoid abuse of auctions for the purpose of money laundering and terrorist financing.²⁰⁹

Article 16 of the Auctioning Regulation declares that an auction platform shall provide for the means to access its auctions on a non-discriminatory basis. The Regulation distinguishes between eligibility and requirements for admission to bid. Article 18(1)-(2) lists the different categories of participants eligible to bid, which include, *inter alia*, ETS operators,

²⁰⁴ Reg No 1031/2010 Article 30.

²⁰⁵ Reg No 784/2012.

²⁰⁶ *l.c.*

²⁰⁷ Reg No 1042/2012.

²⁰⁸ Poland intends to appoint an opt-out auction platform but will use the common auction platform in the meantime (European Commission (2013) p. 5).

²⁰⁹ European Commission (2010b) p. 11.

investment firms and credit institutions authorised and regulated under EU law, and public bodies or state-owned entities that control ETS operators. What should be specifically noted here is the possibility to use intermediaries, which facilitates access for notably SMEs. Potential bidders must also fulfill the admission requirements in Article 19(2), where a number of formalities are specified, such as establishment in the EU, account information and appointment of at least one bidder's representative. Furthermore, it is also required that the bidders comply with the exchange rules of the auction platform. For the time being, this means the rules of the EEX for the large majority of the Member States.²¹⁰

Of relevance to equality is also the requirement in Article 17, with address to the auction platform, of making available a helpline service accessible by telephone, facsimile and electronic mail.²¹¹ Easily available information about e.g. access to the auctions can remedy some of the inequalities that may exist at the outset in the level of knowledge between the firms.

5.3.3 Auction process

Article 5 of the Auctioning Regulation states that the auctions shall be carried out through an auction format whereby bidders submit their bids during one given bidding window without seeing bids submitted by other bidders. Furthermore, each successful bidder pays the same auction clearing price, regardless of the price specified in the bid. The Regulation thus makes the single round, sealed-bid uniform-price auction the mandatory auction format.²¹² This is in principle a simple design that enables all bidders to bid on equal footing,

²¹⁰ These requirements can be found on the EEX website at http://www.eex.com/en/EEX/Products%20%26%20Fees/Emission_Allowances/Phase_3_Auctions/Rules_Regulation [Visited 15 November 2013].

²¹¹ An "auction hotline", open from Monday to Friday, has been established by the EEX. For more information, see <http://www.eex.com/en/Auction> [Visited 15 November 2013].

²¹² See presentations of the different formats in Cramton (2002) pp. 336-338, Klemperer (1999) pp. 229-230 and Frontier Economics (2008) pp. 5-9.

irrespective of size, level of information or experience. In economic literature, the possibilities the sealed-bid auction gives smaller bidders have been especially highlighted. Since an advantaged bidder must make its single final offer in the face of uncertainty about its rivals' bids, and because it wants to get a bargain, its sealed-bid will not be the maximum it could be pushed to in an ascending auction (which would be the main alternative format to the sealed-bid auction).²¹³ Consequently, smaller bidders have a greater chance of winning the auction. This may lead to a less efficient outcome than in the case in an ascending auction,²¹⁴ but the Regulation can be said to let equality outweigh efficiency in this respect. Moreover, by giving smaller bidders greater chance, participation also becomes more attractive, something which may improve efficiency in this way instead.

As regards information, Article 17 obliges the auction platform to offer a practical web-based training module on the auction process it is conducting, including guidance on how to complete and submit any forms and a simulation of how to bid in an auction.²¹⁵ Questions concerning the auction process could also be addressed to the mandatory helpline service mentioned in the previous section.²¹⁶

5.3.4 Supervision

The Member States shall appoint one independent auction monitor for all auction processes, in accordance with Article 24, whose functions consist of monitoring and reporting on compliance of the auction process with the objectives of Article 10(4) of the ETS Directive, on the compliance with the provisions of the Regulation, and on any evidence of anti-competitive behaviour, or market abuse. As seen above, Article 10(4) enshrines non-discrimination as a main objective.

²¹³ Klemperer (2002) p. 180.

²¹⁴ I.c. For more on this inefficiency, see Ausubel (2002).

²¹⁵ The EEX Auction Tutorial can be found at http://streaming.eex.com/pws-june/EUA_Auction_v1.htm [Visited 15 November 2013].

²¹⁶ See supra note 211.

Additionally, the Member State in which an auction platform is located must, pursuant to Article 35(4) of the Regulation, ensure that the competent authorities of that Member State are able to authorise and supervise the auction platform in accordance with the national measures transposing Title IV of Directive 2004/39/EC (the Markets in Financial Instruments Directive) to the extent relevant. This requires the state to, *inter alia*, provide for a right to appeal a decision to the courts.

5.4 Conclusion

The preceding sections have made it evident that the principle of equal treatment occupies a distinct place in the ETS phase III auctioning. First, the principle has a strong manifestation in the main objectives for the auctioning, as Article 10(4) of the ETS Directive positively states that the auctions must be conducted in a non-discriminatory manner. Particular attention is also given to SMEs, which is category of firms that is especially susceptible in market-based mechanisms such as the EU ETS. Second, as regards auction platform, auction access and process, as well as supervision, the principle of equal treatment is given clear consideration. The mandatory auction format – the single round, sealed-bid uniform-price auction – seems particularly suitable for safeguarding the principle.

Experience from the months following the entry into force of phase III does not seem to have revealed any particular issues in relation to equality. The observation is based on the Commission's regular auction reports,²¹⁷ which again are based on the reports submitted by the EEX, on discussions between the Commission, its advisors and the EEX and on any further relevant information available to the Commission. Furthermore, no case concerning the matter has yet been brought before the ECJ.

²¹⁷ These reports are available at the Commission's website at http://ec.europa.eu/clima/policies/ets/cap/auctioning/documentation_en.htm [Visited 15 November 2013].

It must nevertheless be reminded that the current auctioning scheme is still young and that challenges may arise at a later time. Any eventual claim of breach of the principle must then be assessed against the two-step process presented above. Fortunately, the current situation does seemingly not necessitate this as of now.

6 The principle of legal certainty

6.1 Introductory considerations

6.1.1 Legal basis

The principle of legal certainty forms an integral part of unwritten Union law. No provision in the constituent treaties makes explicit reference to this concept. Case law, on the other hand, shows that legal certainty has a wide scope that appears axiomatic to democratic societies and, consequently, common to the legal orders of the Member States.²¹⁸ However, in its basic form, the ECJ has constantly held that Union legislation must be clear and predictable for those who are subject to it.²¹⁹ A more precise concept, of relevance to the ETS auctioning, will be elaborated in section 6.2.

6.1.2 Demarcation between legal certainty and subsidiarity

What was observed in the corresponding section under the principle of equal treatment can be reiterated in the case of legal certainty. Also here, it can be argued that legal certainty is one of the elements that should be considered in a subsidiarity assessment. If Union regulation increases clarity and predictability of the activity at issue, then this is an argument against retaining national regulation. E.g. both the Member State discretion in the elaboration of NAPs, and the subsequent Commission review, as well as the issue of windfall profits, implied significant uncertainty for stakeholders and states in phases I and II. These situations will not arise in phase III, hereby presumably making for a more clear and predictable system.

²¹⁸ Groussot (2006) p. 189.

²¹⁹ See e.g. Joined Cases 212 to 217/80 *Salumi*, paragraph 10; Case 257/86 *Commission v. Italy*, paragraph 12; Case C-325/91 *France v. Commission*, paragraph 26; Case C-63/93 *Duff*, paragraph 20; Case C-343/09 *Afton Chemical*, paragraph 79.

As with the principle of equal treatment, the present section will assess the principle of legal certainty against the current auctioning scheme *in itself*, as primarily laid down in the Auctioning Regulation.

6.1.3 References to the principle in the regulatory documents

Article 10(4) of the ETS Directive lays down openness and transparency as main objectives of the auctioning. Furthermore, the paragraph states that the process has to be predictable, in particular as regards the timing and sequencing of auctions and the estimated volumes of allowances to be made available. These objectives can be regarded as explicit references to the principle of legal certainty.

The requirement of full, fair and equitable access for operators and access to the same information at the same time should likewise be mentioned. This was also done under the principle of equal treatment, but as these objectives could contribute to more clarity and predictability as well, they should not be overlooked in the present section.

The Auctioning Regulation asserts that the provisions on submission and processing of applications for admission to bid, as well as a wide range of practical aspects of the auction process (e.g. possibility to withdraw or modify submitted bids and protection of confidential information), are necessary due to legal certainty.²²⁰

6.2 Contents of the principle

6.2.1 Concept

According to settled case law of the ECJ, the principle of legal certainty requires that rules should be clear and precise, so that individuals may be able to ascertain unequivocally what

²²⁰ Reg No 1031/2010 Recitals 26 and 54.

their rights and obligations are and may take steps accordingly.²²¹ In case of ambiguities, the case is resolved in favour of the individual.²²² Yet, beyond these basic features, the case law reveals a broad concept whose content is difficult to concretise.²²³ Its character of “umbrella principle”, being composed of specific sub-concepts (e.g. non-retroactivity, acquired rights and legitimate expectations), further adds to the complexity.²²⁴

Notwithstanding the diffuse nature of the principle, the starting point is well-defined: EU legislation must be clear and predictable. Moreover, the ECJ has used legal certainty to reinforce the binding character of the legislation and the obligations which ensue for the Member States.²²⁵ In areas covered by Union law, national rules should be worded unequivocally so as to give the persons concerned a clear and precise understanding of their rights and obligations and enable national courts to ensure that those rights and obligations are observed.²²⁶ Furthermore, the ECJ has used the principle to safeguard the integrity of the EU legal order.²²⁷

6.2.2 Role in the field of economic law

Also the principle of legal certainty plays a particular role in economic law. This has been explicitly acknowledged by the ECJ, which has ruled that “certainty and foreseeability are requirements which must be observed all the more strictly in the case of rules liable to en-

²²¹ *Afton Chemical*, supra note 219, paragraph 79.

²²² Case 169/80 *Gondrand Frères*, paragraphs 17-18.

²²³ Tridimas (2006) p. 243; Groussot (2006) p. 190; Puissechet (2001) p. 7.

²²⁴ Groussot, l.c.

²²⁵ Tridimas (2006) p. 246.

²²⁶ Case 143/83 *Commission v. Denmark*, paragraph 10; Case 365/85 *Commission v. Italy*, paragraph 7; Case C-119/92 *Commission v. Italy*, paragraph 17.

²²⁷ Tridimas (2006) p. 248 and Puissechet (2001) p. 6, with reference to Case 314/85 *Foto-Frost*, paragraph 15.

tail financial consequences”.²²⁸ Still, this has an important limitation, as the Court has pointed out that economic agents cannot legitimately expect that they will not be subject to restrictions arising out of future rules of market or structural policy.²²⁹

In addition to the regulatory risk that firms must accept, there are also a great variety of other risks inherent to economic life, such as commercial risks, strategic risks and environmental risks.²³⁰ To state the obvious, the principle of legal certainty cannot protect against such risks.

6.3 Legal certainty applied to the ETS phase III auctioning

6.3.1 Long-term framework

The EU is determined to transform Europe into a highly energy-efficient, low-carbon economy. In section 1.1, it was noted that the Union has committed to cutting its greenhouse gas emissions to 20 % below 1990 levels for the short term (i.e. 2020).²³¹ For the long term (i.e. 2050), a cut of 80 % is suggested. The ETS is given a key role in these reductions – and auctioning is set to be the basic principle for allocation. It is recalled that the auctioning rate will increase each year by equal amounts resulting in 70 % in 2020, with a view to reaching 100 % auctioning in 2027.²³² The Auctioning Regulations contains detailed rules on the annual volumes.²³³

²²⁸ Case C-30/89 *Commission v. France*, paragraph 23. Also Case 326/85 *Netherlands v. Commission*, paragraph 24.

²²⁹ *Duff*, supra note 219, paragraph 20. An example of this could be postponement of the auctioning of allowances (“backloading”), as proposed by the Commission (European Commission (2012b)). The proposal was, however, voted down by the European Parliament (European Parliament (2013)).

²³⁰ Peeters (2009) p. 89, with further references.

²³¹ Recent data from the European Environment Agency show that it is well on track to reach this target (EEA (2013)).

²³² Dir 2003/87/EC Article 10a(11).

²³³ Reg No 1031/2010 Articles 10 and 12.

The legislature has thus made auctioning part of a long-term framework. Stakeholders know not only that the ETS will continue until 2020 and beyond, but also that the use of auctioning will increase and effectively become the default method of allocation. This assurance should add to the legal certainty of the auctioning, notwithstanding the more specific features of the scheme.

6.3.2 Auction platform

As presented under the principle of equal treatment, the Auctioning Regulation favours a common infrastructure where a common auction platform conducts the auctions.²³⁴ It is claimed that this also leads to more openness and transparency,²³⁵ which according to case law are two components of legal certainty. The common platform is also said to ensure the predictability of the auction calendar and best strengthens the clarity of the carbon price signal.²³⁶

Germany, United Kingdom and Poland have, as noted under equal treatment, made use of the possibility to opt-out of the common auction platform. Time will show whether more states will follow. From a point of view of legal certainty, it should be asked how any eventual national platform takes the principle into account. Clearly, the advantages of the common platform will not be actualised in the case of national platforms.

6.3.3 Access to the auctions

The Auctioning Regulation contains detailed provisions on the access to the auction. First, it sets out the eligibility²³⁷ and requirements²³⁸ for admission to bid. These were above pre-

²³⁴ Reg No 1031/2010 Article 26.

²³⁵ Reg No 1031/2010 Recital 7.

²³⁶ I.c.

²³⁷ Reg No 1031/2010 Article 18.

sented from the perspective of equal treatment. In the present section, the provisions should be scrutinised from the perspective of clarity. Although difficult to do in the abstract, they do seem to set out the two respective categories in a clear and predictable manner, leaving no apparent doubt as to who can access the auctions. Still, practice will show whether this observation holds up.

Also provisions on the submission and processing of applications for admission to bid,²³⁹ as well as any refusal, revocation or suspension of admission²⁴⁰ are laid down in the Regulation. The provisions are detailed, yet easily comprehensible through an ordinary understanding of the wording. Again, their functioning in practice will be decisive.

The helpline service of the auctioning platform will also be of avail to bidders in need of clarification of the rules.²⁴¹

6.3.4 Auction process

As previously mentioned, Article 5 of the Auctioning Regulation adopts the single round, sealed-bid uniform-price auction. The format has been chosen owing to, inter alia, its simplicity.²⁴² A single round, as opposed to multiple rounds, and the fact that bidders are unable to see bids submitted by other bidders, are both factors that should simplify the auction process. Having limited opportunity to follow the process by which the price is set also implies, however, less transparency.²⁴³ Yet, this aspect also makes the sealed-bid auction less susceptible to manipulation, which is clearly beneficial from a legal certainty point of view. As bidders do not know each other's bids, they cannot act together to avoid bidding

²³⁸ Reg No 1031/2010 Article 19.

²³⁹ Reg No 1031/2010 Article 20.

²⁴⁰ Reg No 1031/2010 Article 21.

²⁴¹ See supra note 211.

²⁴² Reg No 1031/2010 Recital 17.

²⁴³ Frontier Economics (2008) p. 14.

up the allowance price ("collusion"), neither explicitly nor tacitly.²⁴⁴ Consequently, lower probability for such behaviour potentially offsets the downside of less transparency in the bidding.

Despite the sealed bidding, tied bids are still possible. The Regulation's solution is to sort these bids through a random selection according to an algorithm determined by the platform before the auction.²⁴⁵ This adds predictability to the auctioning.

The auctioning platform's helpline service could also in relation to the auction process assist in clarification of the rules.²⁴⁶

6.3.5 Supervision

Legal certainty can be said to be the rationale behind a system of supervision in *any* economic instrument. The Auctioning Regulation puts in place two separate bodies for supervision of the auctions: First, there is the monitor for all auctions on all auction platforms, appointed by the Member States,²⁴⁷ who reports on compliance with, *inter alia*, the objectives of Article 10(4) of the ETS Directive.²⁴⁸ Second, the competent national authority for financial markets of the Member State in which an auction platform is located is responsible for supervising that auction platform.²⁴⁹ The Regulation consequently places a high importance on supervision.

²⁴⁴ Klemperer (2002) p. 179.

²⁴⁵ Reg No 1031/2010 Article 7(2).

²⁴⁶ See supra note 211.

²⁴⁷ Reg No 1031/2010 Article 24.

²⁴⁸ Reg No 1031/2010 Article 25.

²⁴⁹ Reg No 1031/2010 Article 35(4).

6.4 Conclusion

The principle of legal certainty has a solid foundation in the ETS phase III auctioning. First, elements of the principle, namely openness and transparency, are expressed in the main objectives for the auctioning in Article 10(4) of the ETS Directive. Second, the principle seems to have been duly taken into account in the Auctioning Regulation. A third point of relevance is that auctioning is made the basic principle for allocation in a system that is intended to run for a long period of time. All these elements should make for certainty and foreseeability, which are requirements that the ECJ has stated that must be strictly observed when it comes to rules liable to entail financial consequences. Nevertheless, it should be stressed that it must be left to practice to determine the accuracy of this conclusion. So far, however, no issues seem to have arisen – at least not according to the Commission’s regular auction reports.²⁵⁰ Also, the ECJ has not yet had to deal with the matter.

Yet, it should be recalled that the current scheme has been in force only since 2013 and is therefore still in its infancy. As was the case with NAPs and free allocation in phases I and II, it is also likely that the auctioning becomes subject to some refinement and tuning as experience with its functioning is gathered. Despite the findings here, it is more than conceivable that the scheme is not perfect from the perspective of legal certainty – and that this will underlie future improvements.

²⁵⁰ These reports are available at the Commission’s website at http://ec.europa.eu/clima/policies/ets/cap/auctioning/documentation_en.htm [Visited 15 November 2013].

7 Final conclusion

Phase III of the EU ETS has seen a major revision of the system. The revised ETS contains a number of fundamental changes. This thesis has focused on one of these, namely auctioning, which has become the basic principle for allocation of emission allowances. The preceding sections have seen the current auctioning scheme in light of the EU law principles of subsidiarity, equal treatment and legal certainty. Under each principle, the conclusion has been that the scheme sufficiently considers that particular principle.

The principle of subsidiarity is an institutional principle that regulates the distribution of powers between the Union level and the Member State level. It has been shown that EU-wide harmonisation of auctioning is well justified from a point of view of subsidiarity, despite the apparent lack of attention the principle was given in the legislative process. When it comes to the principles of equal treatment and legal certainty, which in the present context aim to protect participating firms, several references to these can be found in the main auctioning objectives in the ETS Directive and they are well reflected in the concrete provisions of the Auctioning Regulation.

The EU ETS establishes a market that does not emerge naturally by means of regular supply and demand, but rather develops as a result of a specific political objective. Consequently, the ETS market relies extensively on its institutional setting, which must determine how emission allowances are established, treated and traded. General legal principles can arguably play an important role in this setting, as this thesis has evidenced in relation to auctioning. The coming years will see further development of the ETS. It is likely that legal principles will exert their influence also here.

8 Table of reference

8.1 EU primary law

TEU	Consolidated version of the Treaty on European Union
TFEU	Consolidated version of the Treaty on the Functioning of the European Union
Protocol No 30 (1997)	Protocol on the application of the principles of subsidiarity and proportionality to the Treaty of Amsterdam
Protocol No 2 (2010)	Protocol on the application of the principles of subsidiarity and proportionality to the Treaty of Lisbon
Protocol No 27 (2010)	Protocol on the internal market and competition to the Treaty of Lisbon

8.2 EU secondary law

Dir 2003/87/EC	Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC
Dir 2009/29/EC	Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the green-

house gas emission allowance trading scheme of the Community

Reg No 1031/2010

Commission Regulation (EU) No 1031/2010 of 12 November 2010 on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances pursuant to Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowances trading within the Community

Reg No 784/2012

Commission Regulation (EU) No 784/2012 of 30 August 2012 amending Regulation (EU) No 1031/2010 to list an auction platform to be appointed by Germany and correcting Article 59(7) thereof

Reg No 1042/2012

Commission Regulation (EU) No 1042/2012 of 7 November 2012 amending Regulation (EU) No 1031/2010 to list an auction platform to be appointed by the United Kingdom

8.3 Other EU regulatory documents

Council (2002)

Council Decision concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder. Luxembourg, 25.4.2002 2002/358/CE.

- European Commission (2000) *Green Paper on greenhouse gas emissions trading within the European Union*. Brussels, 8.3.2000 COM(2000) 87 final.
- European Commission (2003) *Communication from the Commission on guidance to assist Member States in the implementation of the criteria listed in Annex III to Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, and on the circumstances under which force majeure is demonstrated*. Brussels, 7.1.2004 COM(2003) 830 final.
- European Commission (2005) *Communication from the Commission: Further guidance on allocation plans for the 2008 to 2012 trading period of the EU Emission Trading Scheme*. Brussels, 22.12.2005 COM(2005) 703 final.
- European Commission (2006) *Emissions trading: Commission decides on first set of national allocation plans for the 2008-2012 trading period*. Brussels, 29.11.2006 IP/06/1650.
- European Commission (2008a) *Proposal for a directive of the European Parliament and of the Council amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading system of the Community*. Brussels, 23.1.2008 COM(2008) 16 final.
- European Commission (2008b) *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of*

the Regions: 20 20 by 2020 - Europe's climate change opportunity. Brussels, 23.1.2008 COM(2008) 30 final.

European Commission (2008c) *Questions and Answers on the revised EU Emissions Trading System.* Brussels, 17.12.2008 MEMO/08/796.

European Commission (2008d) *Commission staff working document: Accompanying document to the Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/87/EC so as to improve and extend the EU greenhouse gas emission allowance trading system. Impact Assessment.* Brussels, 23.1.2008 SEC(2008) 52.

European Commission (2008e) *Commission staff working document: Document accompanying the Package of Implementation measures for the EU's objectives on climate change and renewable energy for 2020. Impact Assessment.* Brussels, 23.1.2008 SEC(2008) 85/3.

European Commission (2009) *Impact assessment guidelines.* Brussels, 15.1.2009 SEC(2009) 92.

European Commission (2010a) *Europe 2020: A strategy for smart, sustainable and inclusive growth.* Brussels, 3.3.2010 COM(2010) 2020 final.

European Commission (2010b) *Commission staff working document: Impact Assessment. Accompanying document to the Commission*

- Regulation on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances pursuant to Article 10(4) of Directive 2003/87/EC. Brussels, 8.2.2010 SEC(2010).*
- European Commission (2011a) *A Roadmap for moving to a competitive low carbon economy in 2050. Brussels, 8.3.2011 COM(2011) 112 final.*
- European Commission (2011b) *Emissions trading: Questions and Answers on rules and guidance on allocation of free allowances to the power sector. Brussels, 29.3.2011 MEMO/11/201.*
- European Commission (2011c) *Communication from the Commission. Guidance document on the optional application of Article 10c of Directive 2003/87/EC. Brussels, 31.3.2011 2011/C 99/03.*
- European Commission (2012a) *The state of the European carbon market in 2012. Brussels, 14.11.2012 COM(2012) 652 final.*
- European Commission (2012b) *Proposal for a decision of the European Parliament and of the Council amending Directive 2003/87/EC clarifying provisions on the timing of auctions of greenhouse gas allowances. Brussels, 25.7.2012 COM(2012) 416 final.*
- European Commission (2013) *Auctions by the transitional common auction platform – 5th report. Brussels, July 2013.*

European Council (2007)	<i>Presidency Conclusions 8/9 March 2007</i> . Brussels, 2.5.2007 7224/1/07 REV 1.
European Parliament (2008)	<i>Position of the European Parliament adopted at first reading on 17 December 2008 with a view to the adoption of Directive 2009/.../EC of the European Parliament and of the Council amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading system of the Community</i> . Strasbourg, 17.12.2008 EP-PE_TC1-COD(2008)0013.
European Parliament (2013)	<i>Decision by Parliament, 1st reading/single reading</i> . Strasbourg, 16.4.2013 2012/0202(COD).

8.4 Case law

Joined Cases 7/56 and 3-7/57	<i>Dineke Algera and others v. Common Assembly of the European Coal and Steel Community</i> [1957-1958] ECR 39.
Case 14/59	<i>Société des Fonderies de Pont-à-Mousson v. High Authority of the European Coal and Steel Community</i> [1959] ECR 215.
Joined Cases 17/61 and 20/61	<i>Klöckner-Werke AG and Hoesch AG v. High Authority of the European Coal and Steel Community</i> [1962] ECR 325.
Case 74/74	<i>Comptoir National Technique Agricole (CNTA) SA v. Commission</i> [1975] ECR 533.

Case 114/76	Bela-Mühle Josef Bergmann KG v. Grows-Farm GmbH & Co. KG [1977] ECR 1211.
Joined Cases 103/77 and 145/77	Royal Scholten-Honig (Holdings) Limited v. Intervention Board for Agricultural Produce; Tunnel Refineries Limited v. Intervention Board for Agricultural Produce [1978] ECR 2037.
Case 139/77	Denkavit Futtermittel GmbH v. Finanzamt Warendorf [1978] ECR 1317.
Case 169/80	Administration des douanes v. Société anonyme Gondrand Frères and Société anonyme Garancini [1981] ECR 1931.
Joined Cases 212 to 217/80	Amministrazione delle Finanze dello Stato v. Srl Meridionale Industria Salumi and others; Ditta Italo Orlandi & Figlio and Ditta Vincenzo Divella v. Amministrazione delle Finanze dello Stato [1981] ECR 2735.
Case 106/81	Julius Kind KG v. European Economic Community [1982] ECR 2885.
Joined Cases 205 to 215/82	Deutsche Milchkontor GmbH and others v. Federal Republic of Germany [1983] ECR 2633.
Case 218/82	Commission v. Council [1983] ECR 4063.
Case 106/83	Sermide SpA v. Cassa Conguaglio Zucchero and others [1984] ECR 4209.

Case 143/83	Commission v. Kingdom of Denmark [1985] ECR 427.
Joined Cases 201 and 202/85	Marthe Klensch and others v. Secrétaire d'État à l'Agriculture et à la Viticulture [1986] ECR 3477.
Case 314/85	Foto-Frost v. Hauptzollamt Lübeck-Ost [1987] ECR 4199.
Case 326/85	Kingdom of the Netherlands v. Commission [1987] ECR 5091.
Case 365/85	Commission v. Italian Republic [1987] ECR 259.
Case 257/86	Commission v. Italian Republic [1988] ECR 3249.
Case C-70/88	European Parliament v. Council (Chernobyl) [1990] ECR I-2041.
Case C-30/89	Commission v. French Republic. [1990] ECR I-691
Case C-63/89	Les Assurances du Crédit SA and Compagnie Belge d'Assurance Crédit SA v. Council and Commission [1991] ECR I-1799.
Case C-314/89	Siegfried Rauh v. Hauptzollamt Nürnberg-Fürth [1991] ECR I-1647.
Case C-325/91	French Republic v. Commission [1993] ECR I-3283.

Case T-29/92	SPO and others v. Commission [1995] ECR II-289.
Case C-119/92	Commission v. Italian Republic [1994] ECR I-393.
Joined Cases C-46 and C-48/93	Brasserie du Pêcheur SA v. Federal Republic of Germany and The Queen v. Secretary of State for Transport, ex parte Factortame Ltd and others [1996] ECR I-1029.
Case C-63/93	Fintan Duff and others v. Minister for Agriculture and Food, Ireland, and the Attorney General [1996] ECR I-569.
Case C-84/94	United Kingdom of Great Britain and Northern Ireland v. Council [1996] ECR I-5755.
Case C-27/95	Woodspring District Council v. Bakers of Nailsea Ltd [1997] ECR I-1847.
Case C-107/97	Rombi and Arkopharma [2000] ECR I-3367.
Case C-396/98	Grundstückgemeinschaft Schloßstraße GbR v. Finanzamt Paderborn [2000] ECR I-4279.
Case C-462/99	Connect Austria Gesellschaft für Telekommunikation GmbH v. Telekom-Control-Kommission, and Mobilkom Austria AG [2003] ECR I-5197.
Case C-114/01	AvestaPolarit Chrome Oy [2003] ECR I-8725.

Joined Cases C-154/04 and C-155/04	The Queen, on the application of Alliance for Natural Health and others v. Secretary of State for Health and National Assembly for Wales [2005] ECR I-6451.
Case C-58/08	The Queen, on the application of Vodafone Ltd and others v. Secretary of State for Business, Enterprise and Regulatory Reform [2010] ECR I-4999.
Case C-101/08	Audiolux SA and others v. Groupe Bruxelles Lambert SA (GBL) and others, Bertelsmann AG and others [2009] ECR I-9823.
Case C-174/08	NCC Construction Danmark A/S v. Skatteministeriet [2009] ECR I-10567.
Case C-343/09	Afton Chemical Limited v. Secretary of State for Transport [2010] ECR I-7027.
Case C-504/09 P	Commission v. Poland [2012] OJ C 151/2.
Case C-505/09 P	Commission v. Estonia [2012] OJ C 151/3.

8.5 Literature

Akehurst (1981)	Michael Akehurst. <i>The application of general principles of law by the Court of Justice of the European Communities</i> . In: British Yearbook of International Law, Vol. 52, Iss. 1 (1981), pp. 29-51.
Ausubel (2002)	Lawrence M. Ausubel and Peter Cramton. <i>Demand reduction and inefficiency in multi-unit auctions</i> .

Working Paper. University of Maryland. Maryland, 2002.

- Behrens (2008) Arno Behrens, Jorge Núñez Ferrer and Christian Egenhofer. *Financial impacts of climate change: Implications for the EU budget*. CEPS Working Document No. 300. Centre for European Policy Studies. Brussels, 2008.
- Bengoetxea (2001) Joxerramon Bengoetxea. *Principles in the European constitutionalising process*. In: King's College Law Journal, Vol. 12, Iss. 1 (2001), pp. 100-110.
- Boulouis (1993) Jean Boulouis. *Droit institutionnel des Communautés européennes*. 4th edition. Paris, (Montchrestien) 1993.
- Carbon Trust (2007) Carbon Trust. *EU ETS phase II allocation: Implications and lessons*. London, 2007.
- Carbon Trust (2008) Carbon Trust. *Cutting carbon in Europe: The 2020 plans and the future of the EU ETS*. London, 2008.
- Clò (2009) Stefano Clò. *The effectiveness of the EU Emissions Trading Scheme*. In: Climate Policy, Vol. 9, No. 3 (2009), pp. 227-241.
- Constantin (2008) Simona Constantin. *Rethinking subsidiarity and the balance of powers in the EU in light of the Lisbon Treaty and beyond*. In: Croatian Yearbook of European Law and Policy, Vol. 4 (2008), pp. 151-177.

- Craig (2011a) Paul Craig and Gráinne de Búrca. *EU law: Text, cases, and materials*. 5th edition. Oxford, (Oxford University Press) 2011.
- Craig (2011b) Paul Craig and Gráinne de Búrca. *The evolution of EU law*. 2nd edition. Oxford, (Oxford University Press) 2011.
- Craig (2012) Paul Craig. *EU administrative law*. 2nd edition. Oxford, (Oxford University Press) 2012.
- Cramton (2002) Peter Cramton and Suzi Kerr. *Tradeable carbon permit auctions: How and why to auction not grandfather*. In: *Energy Policy*, Vol. 30, Iss. 4 (2002), pp. 333-345.
- De Bruyn (2008) Sander de Bruyn ... [et al.]. *Impacts on competitiveness from EU ETS: An analysis of the Dutch industry*. CE Delft. Delft, 2008.
- De Bruyn (2010) Sander de Bruyn ... [et al.]. *Does the energy intensive industry obtain windfall profits through the EU ETS? An econometric analysis for products from the refineries, iron and steel and chemical sectors*. CE Delft. Delft, 2010.
- De Búrca (1999) Gráinne de Búrca. *Reappraising subsidiarity's significance after Amsterdam*. Harvard Jean Monnet Working Paper 7/99. Harvard Law School. Cambridge, 1999.

- De Larragán (2011) Javier de Cendra de Larragán. *Distributional choices in EU climate change law and policy: Towards a principled approach?* Alphen aan den Rijn, (Kluwer Law International) 2011.
- Delbeke (2006) Jos Delbeke ... [et al.]. *EU environmental law: The EU greenhouse gas emissions trading scheme.* Deventer, (Claeys & Casteels) 2006.
- De Sadeleer (2002) Nicolas de Sadeleer. *Environmental principles: From political slogans to legal rules.* Oxford, (Oxford University Press) 2002.
- De Sadeleer (2004) Nicolas de Sadeleer. *Environmental principles, modern and post-modern law.* In: Principles of European environmental law. Groningen, (Europa Law Publishing) 2004, pp. 225-236.
- De Sadeleer (2012a) Nicolas de Sadeleer. *Particularités de la subsidiarité dans le domaine de l'environnement.* In: Droit et Société, No. 80, Iss. 1 (2012), pp. 73-90.
- De Sadeleer (2012b) Nicolas de Sadeleer. *The polluter-pays principle in EU law - bold case law and poor harmonisation.* In: Pro natura: Festschrift til Hans Christian Bugge. Oslo, (Universitetsforlaget) 2012, pp. 405-419.
- De Witte (2000) Bruno de Witte. *The role of institutional principles in the judicial development of the European Union legal order.* In: The Europeanisation of law: The legal ef-

fects of European integration. Oxford/Portland, (Hart Publishing) 2000, pp. 83-100.

- Dougan (2008) Michael Dougan. *The Treaty of Lisbon: Winning minds, not hearts*. In: Common Market Law Review, Vol. 45, Iss. 3 (2008), pp. 617-703.
- Dworkin (1967) Ronald Dworkin. *The model of rules*. In: University of Chicago Law Review, Vol. 35, Iss. 1 (1967), pp. 14-46.
- Dworkin (1977) Ronald Dworkin. *Taking rights seriously*. Cambridge, (Harvard University Press) 1977.
- EEA (2013) European Environment Agency. *Trends and projections in Europe 2013: Tracking progress towards Europe's climate and energy targets until 2020*. Luxembourg, (Publications Office of the European Union) 2013.
- Egenhofer (2006) Christian Egenhofer ... [et al.]. *The EU Emissions Trading System: Taking stock and looking ahead*. Centre for European Policy Studies. Brussels, 2006.
- Egenhofer (2007) Christian Egenhofer and Noriko Fujiwara. *Shaping the global arena: Preparing the EU Emissions Trading Scheme for the post-2012 period*. CEPS Task Force Report No. 61. Centre for European Policy Studies. Brussels, 2007.

- Egenhofer (2011) Christian Egenhofer ... [et al.]. *The EU Emissions Trading System and Climate Policy towards 2050: Real incentives to reduce emissions and drive innovation?* Centre for European Policy Studies. Brussels, 2011.
- Ellerman (2008) A. Denny Ellerman and Paul L. Joskow. *The European Union's Emissions Trading System in perspective*. Pew Center on Global Climate Change. Arlington, 2008.
- Ellerman (2010) A. Denny Ellerman, Frank Convery and Christian de Perthuis. *Pricing carbon: The European Union Emissions Trading Scheme*. Cambridge, (Cambridge University Press) 2010.
- Estella (2002) Antonio Estella. *The EU principle of subsidiarity and its critique*. Oxford, (Oxford University Press) 2002.
- Fairhurst (2010) John Fairhurst. *Law of the European union*. 8th edition. Essex, (Pearson Education Limited) 2010.
- Foster (2012) Nigel Foster. *EU law directions*. 3rd edition. Oxford, (Oxford University Press) 2012.
- Freestone (2009) David Freestone and Charlotte Streck. *Legal aspects of carbon trading: Kyoto, Copenhagen and beyond*. Oxford, (Oxford University Press) 2012.

- Frontier Economics (2008) Frontier Economics. *Review of the proposed ETS permit auction design*. Frontier Economics Pty Ltd. Melbourne, 2008.
- Goulder (1994) Lawrence H. Goulder. *Environmental taxation and the "double dividend:" A reader's guide*. NBER Working Paper No. 4896. National Bureau of Economic Research. Cambridge, 1994.
- Graver (2006) Hans Petter Graver. *I prinsippet prinsipiell – om rettsprinsipper*. In: Tidsskrift for Rettsvitenskap, No. 2-3 (2006), pp. 189-221.
- Groussot (2006) Xavier Groussot. *General principles of Community law*. Groningen, (Europa Law Publishing) 2006.
- Grubb (2003) Michael Grubb. *The economics of the Kyoto Protocol*. In: World Economics, Vol. 4, No. 3 (2003), pp. 143-189.
- Grubb (2005) Michael Grubb, Christian Azar and U. Martin Persson. *Allowance allocation in the European emissions trading system: a commentary*. In: Climate Policy, Vol. 5, No. 1 (2005), pp. 127-136.
- Horsley (2012) Thomas Horsley. *Subsidiarity and the European Court of Justice: Missing pieces in the subsidiarity jigsaw?* In: Journal of Common Market Studies, Vol. 50, No. 2 (2012), pp. 267-282.

- Höreth (2008) Marcus Höreth and Jared Sonnicksen. *Making and breaking promises: The European Union under the Treaty of Lisbon*. Discussion Paper C181. Zentrum für Europäische Integrationsforschung. Bonn, 2008.
- Inman (1998) Robert P. Inman and Daniel L. Rubinfeld. *Subsidiarity and the European Union*. Working Paper 6556. National Bureau of Economic Research. Cambridge, 1998.
- IPCC (2007) Intergovernmental Panel on Climate Change. *Climate Change 2007: Synthesis Report*. Edited by the Core Writing Team, Rajendra K. Pachauri and Andy Reisinger. Geneva, 2008.
- Jareborg (2007) Nils Jareborg. *A lecture on principles*. In: Festschrift für Heike Jung. Baden-Baden, (Nomos Verlagsgesellschaft) 2007, pp. 361-366.
- Klemperer (1999) Paul Klemperer. *Auction theory: A guide to the literature*. In: Journal of Economic Surveys, Vol. 13, Iss. 3 (1999), pp. 227-286.
- Klemperer (2002) Paul Klemperer. *What really matters in auction design*. In: Journal of Economic Perspectives, Vol. 16, No. 1 (2002), pp. 169-189.
- Makuch (2008) Karen E. Makuch and Zen Makuch. *Domestic initiatives in the UK*. In: Climate change and European emissions trading: Lessons for theory and practice. Cheltenham, 2008, pp. 257-297.

- Matthes (2005) Felix Matthes, Verena Graichen and Julia Repenning. *The environmental effectiveness and economic efficiency of the European Union Emissions Trading Scheme: Structural aspects of allocation*. Öko-Institut e.V. Berlin, 2005.
- Peeters (2009) Marian Peeters and Stefan Weishaar. *Exploring uncertainties in the EU ETS: "Learning by doing" continues beyond 2012*. In: Carbon & Climate Law Review, Iss. 1 (2009), pp. 88-101.
- Porter (1999) Gareth Porter. *Trade competition and pollution standards: "Race to the bottom" or "stuck at the bottom"?* In: The Journal of Environment & Development, Vol. 8, No. 2 (1999), pp. 133-151.
- Puissochet (2001) Jean-Pierre Puissochet and Hubert Legal. *Le principe de sécurité juridique dans la jurisprudence de la Cour de justice des Communautés européennes*. In: Cahiers du Conseil constitutionnel, No. 11 (2001), pp. 1-10.
- Prechal (2010) Sacha Prechal. *Competence creep and general principles of law*. In: Review of European Administrative Law, Vol. 3, No. 1 (2010), pp. 5-22.
- Raz (1972) Joseph Raz. *Legal principles and the limits of law*. In: Yale Law Journal, Vol. 81, Iss. 5 (1972), pp. 823-854.

- Ritzer (2006) Christoph Ritzer, Marc Ruttloff and Karin Linhart. *How to sharpen a dull sword – the principle of subsidiarity and its control*. In: German Law Journal, Vol. 7, No. 9 (2006), pp. 733-760.
- Rogge (2006) Karoline Rogge, Joachim Schleich and Regina Betz. *An early assessment of national allocation plans for phase 2 of EU Emission Trading*. Working Paper Sustainability and Innovation Nr. S 1/2006. Fraunhofer Institute for Systems and Innovation Research. Karlsruhe, 2006.
- Rutherford (2002) Donald Rutherford. *Routledge Dictionary of Economics*. 2nd edition. London/New York, (Routledge) 2002.
- Schermers (2001) Henry G. Schermers and Denis F. Waelbroeck. *Judicial protection in the European Union*. 6th edition. The Hague, (Kluwer Law International) 2001.
- Sejersted (2004) Fredrik Sejersted ... [et al.]. *EØS-rett*. 2nd edition. Oslo, (Universitetsforlaget) 2004.
- Skjærseth (2009) Jon Birger Skjærseth and Jørgen Wettestad. *The origin, evolution and consequences of the EU Emissions Trading System*. In: Global Environmental Politics, Vol. 9, No. 2 (2009), pp. 101-122.
- Skjærseth (2010) Jon Birger Skjærseth and Jørgen Wettestad. *Fixing the EU Emissions Trading System? Understanding the post-2012 changes*. In: Global Environmental Politics, Vol. 10, No. 4 (2010), pp. 101-123.

- Sundby (1974) Nils Kristian Sundby. *Om normer*. Oslo, (Universitetsforlaget) 1974.
- Sæverud (2006) Ingvild Andreassen Sæverud and Jørgen Wettestad. *Norway and emissions trading: From global front-runner to EU follower*. In: *International Environmental Agreements*, Vol. 6, No. 1 (2006), pp. 91-108.
- Neuhoff (2008) Karsten Neuhoff ... [et al.]. *The role of auctions for emissions trading*. *Climate Strategies*. Cambridge, 2008.
- Thieffry (2010) Patrick Thieffry. *Renforcement du système d'échange de quotas d'émission de gaz à effet de serre : l'Union européenne prête pour l'après-Kyoto*. In: *L'Actualité Juridique. Droit Administratif*, No. 5 (2010), pp. 259-265.
- Tietenberg (1985) Thomas Tietenberg. *Emissions trading: An exercise in reforming pollution policy*. Washington D.C., (Resources for the Future) 1985.
- Tridimas (2006) Takis Tridimas. *The general principles of EC law*. 2nd edition. Oxford, (Oxford University Press) 2006.
- United Nations (2003) United Nations ... [et al.]. *Handbook of national accounting: Integrated environmental and economic accounting 2003*. 2003.

- Van Zeben (2009) Josephine A.W. van Zeben. *(De)Centralized law-making in the revised EU ETS*. In: Carbon & Climate Law Review, Iss. 3 (2009), pp. 340-356.
- Voigt (2008) Christina Voigt. *The role of general principles in international law and their relationship to treaty law*. In: Retfærd, Vol. 31, No. 2 (2008), pp. 3-25.
- Weishaar (2010) Stefan Weishaar. *Auctions - the solution to windfall profits and end of all state aid problems?* In: Amsterdam Law Forum, Vol. 2, No. 2 (2010), pp. 3-7.
- Wettestad (2005) Jørgen Wettestad. *The making of the 2003 EU Emissions Trading Directive: An ultra-quick process due to entrepreneurial proficiency?* In: Global Environmental Politics, Vol. 5, No. 1 (2005), pp. 1-23.
- Wettestad (2009) Jørgen Wettestad. *European Climate Policy: Toward Centralized Governance?* In: Review of Policy Research, Vol. 26, No. 3 (2009), pp. 311-328.
- Wilhelmsson (2003) Thomas Wilhelmsson. *De allmänna lärorna under trycket från rättens fragmentering och avnationalisering*. In: Retfærd, Vol. 26, No. 1 (2003), pp. 32-49.
- Wilkinson (1992) David Wilkinson. *Maastricht and the environment: The implications for the EC's environment policy of the Treaty on European Union*. In: Journal of Environmental Law, Vol. 4, No. 2 (1992), pp. 221-239.

Woerdman (2008) Edwin Woerdman, Stefano Clò and Alessandra Arcuri. *European emissions trading and the polluter-pays principle: Assessing grandfathering and over-allocation*. In: *Climate change and European emissions trading: Lessons for theory and practice*. Cheltenham, 2008, pp. 128-150.

Zetterberg (2004) Lars Zetterberg ... [et al.]. *Analysis of national allocation plans for the EU ETS*. IVL Swedish Environmental Research Institute Ltd. Stockholm, 2004.

8.6 Websites

European Commission (2013) *EU ETS 2005-2012*. 2013. URL: http://ec.europa.eu/clima/policies/ets/pre2013/index_en.htm [Visited 15 November 2013].

European Commission *Auctioning: Documentation*. 2013. URL: http://ec.europa.eu/clima/policies/ets/cap/auctioning/documentation_en.htm [Visited 15 November 2013].

European Energy Exchange *Rules & regulation*. URL: http://www.eex.com/en/EEX/Products%20%26%20Fees/Emission_Allowances/Phase_3_Auctions/Rules_Regulation [Visited 15 November 2013].

European Energy Exchange *Overview [of emissions auctions]*. URL: <http://www.eex.com/en/Auction> [Visited 15 November 2013].

- European Energy Exchange *EEX Auction Tutorial.* URL:
http://streaming.eex.com/pws-
june/EUA_Auction_v1.htm [Visited 15 November
2013].
- Oxford Dictionaries Online (2013) URL: <http://www.oxforddictionaries.com> [Visited 15
November 2013].
- United Nations Kyoto Protocol website. URL:
http://unfccc.int/kyoto_protocol/items/2830.php
[Visited 15 November 2013].