

Emissions Trading and the Rule of Law:

Any Place for Soft Law?

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Problem definition

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- Market-based instruments need clear and enforceable obligations
- also in order to prevent companies from finding loopholes for avoiding costs

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- Soft law – in itself already a contested term – in essence entails non-binding norms

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- Using soft law can endanger the robustness of the legal framework (compliance). Consequently, one would not expect soft law in an emissions trading scheme. Literature thus far is (almost) silent about it.

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- Nonetheless, in EU ETS case law references to soft law – in the sense of guidance notes from the Commission – are made. This made us wonder why soft law exists in the context of the EU ETS, whether it has any legal relevance (is soft law tested and applied by the courts?) and how its use can be valued from a legal perspective

Enforcement of the EU ETS

- Thus far, no major indication for problems with compliance to the EU ETS
- However, what is really known with respect to the level of compliance?
 - > *Non-compliance is, by nature, difficult to examine.*
 - > *Some case law gives signs of compliance problems*
- Monitoring and enforcement of the EU ETS takes place at national level
 - > *What is the quality of national enforcement policies?*
- Moreover, emission reports from EU ETS industries are checked by verifiers contracted by the industries themselves
 - > *any collusion?*

Corruption – to what extent does it exist in the EU – and within the EU ETS?

The Guardian, 19 January 2018

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Romania

Romania braced for huge protests over 'big step backwards' on rule of law

Critics say changes to judicial system and proposed decriminalisation of some corruption offences mean separation of powers is 'finished'

Jennifer Rankin in Brussels
Fri 19 Jan 2018 05:00 GMT

9,080

This article is over 6 months old



▲ People hold placards reading: 'All for justice' during a protest against the Romanian government and corruption in Bucharest. Photograph: Daniel Mihaliescu/AFP/Getty Images

Romania is taking the biggest step backwards on the rule of law since it joined the **European Union**, a former justice minister has warned before what could be the biggest street protests in a year this weekend in Bucharest.

Monica Macovei, who was an architect of Romania's anti-corruption policy

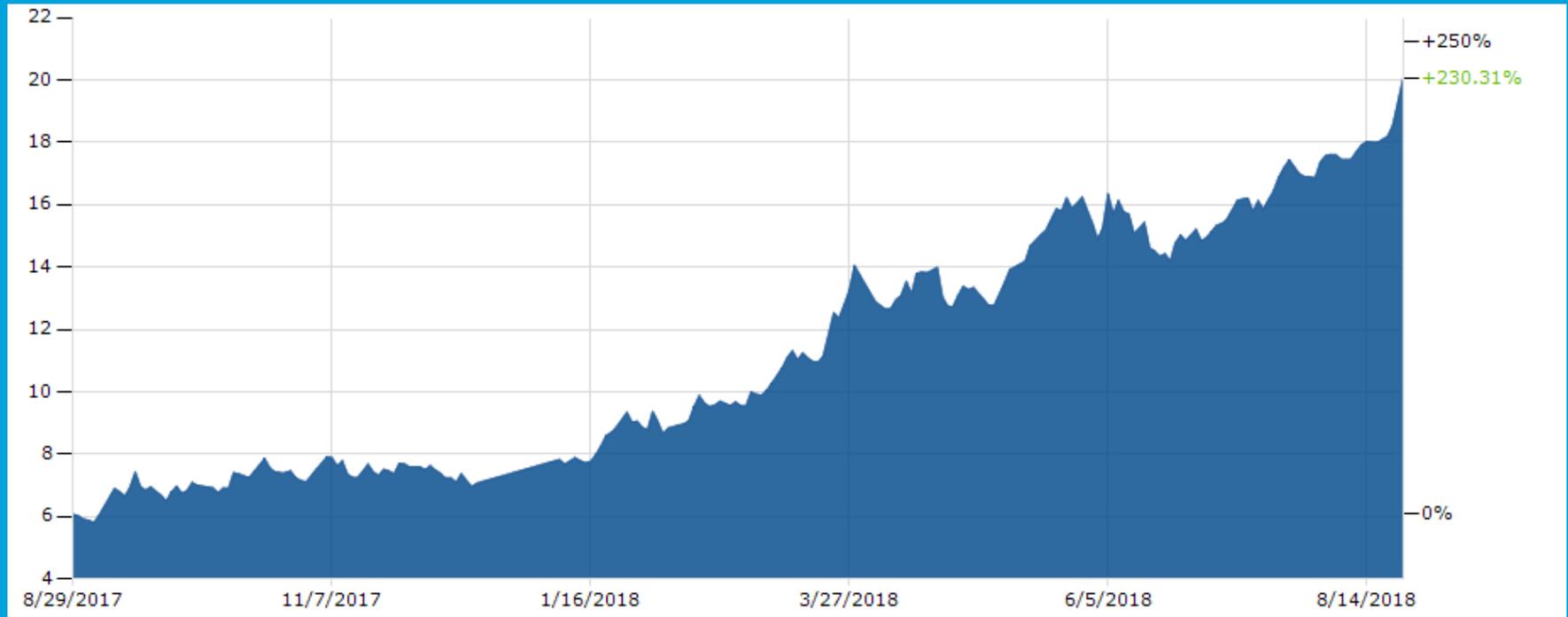
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Increasing prices → more pressure on compliance



Source (accessed 26 August 2018)

<https://markets.businessinsider.com/commodities/co2-emissionsrechte>

The EU ETS Directive

EU ETS
Directive

Monitoring, reporting, accreditation
and verification
(Commission Regulations)

Guidance
documents

- EU-wide emissions cap
- Companies buy, receive and trade emissions

- Companies must surrender emission allowances
- Preparation of emission report
- Verification by independent and impartial verifier

EU ETS: Regulation and Guidance documents (for ensuring compliance)

- Rules related to compliance are set out in two Commission regulations:
- [Monitoring and Reporting Regulation](#) (MRR - 601/2012 of 21 June 2012 – 75 pages)
- [Accreditation and Verification Regulation](#) (AVR - nr 600/2012 of 21 June 2012 – 29 pages)
- These two regulations are very detailed, and very complicated in an administrative-technical sense.
- Next to this: a large number of guidance documents, including templates, exemplars and further tools. They are published on the Commission website:
https://ec.europa.eu/clima/policies/ets/monitoring_en#tab-0-1

Monitoring and Reporting Regulation (MRR): Guidance and templates

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EC website
dd 27 August 2018

- 27/11/2017 - Guidance document No. 1 - [The Monitoring and Reporting Regulation – General guidance for installations](#) (...)
 - [Template No. 1: Monitoring plan for the emissions of stationary installations](#) (...)
 - [User Manual for the AER template](#) (...)
 - [Template No. 4: Annual emissions report of stationary source installations](#) (...)
 - [Template No. 7: Improvement report for stationary installations](#) (...)
 - [User Manual for the IR template](#) (...)
 - [Unreasonable costs determination tool](#) (...)
 - [Exemplar checklist for assessing installation MPs](#) (...)
 - [Exemplar monitoring plan](#) (...)
 - [Exemplar MRR Article 13 Simplified Monitoring Plan](#) (...)
 - [Exemplar improvement report](#) (...)
 - [Exemplar monitoring plan update](#) (...)
- 11/01/2018 - Guidance document No. 2 - [The Monitoring and Reporting Regulation – General guidance for aircraft operators](#) (...)
 - [Template No. 2: Monitoring plan for the emissions of aircraft operators](#) (...)
 - [Template No. 3: Monitoring plan for the tonne-kilometre data of aircraft operators](#) (...)
 - [Template No. 5: Annual emissions report of aircraft operators](#) (...)
 - [Template No. 6: Tonne-kilometre data report of aircraft operators](#) (...)
 - [Template No. 8: Improvement report for aircraft operators](#) (...)
- 27/11/2017 - Guidance document No. 3 - [Biomass issues](#) (...)
- 27/11/2017 - Guidance document No. 4 - [Uncertainty Assessment](#) (...)
 - [GD No. 4a - Exemplar Uncertainty Assessment \(for an installation with low emissions\)](#) (...)
- 27/11/2017 - Guidance document No. 5 - [Sampling and Analysis](#) (...)
 - [Frequency of Analysis Tool](#) (...)
 - [GD No. 5a – Exemplar Sampling Plan](#) (...)
- 17/10/2012 - Guidance document No. 6 - [Data flow activities and control system](#) (...)
 - [GD No. 6a – Risk assessment and control activities - examples](#) (...)
 - [Tool for operator risk assessment](#) (...)
- 11/01/2018 - Guidance document No. 8 - [EU ETS Inspections](#) (...)

Accreditation and Verification Regulation (AVR): Guidance and templates

- 27/11/2017 - The Accreditation and Verification Regulation - [Explanatory Guidance Document No.1](#) (...)
 - [Quick guide on the role of the verifier and the CA](#) (...)
 - [Quick guide on verification for operators and aircraft operators](#) (...)
- 27/11/2017 - Guidance document - [Key guidance note II.1 on the scope of verification](#) (...)
- 27/11/2017 - Guidance document - [Key guidance note II.2 on risk analysis](#) (...)
 - [Risk analysis example No. 1](#) (...)
 - [Risk analysis example No. 2](#) (...)
- 17/10/2012 - Guidance document - [Key guidance note II.3 on process analysis](#) (...)
- 15/11/2012 - Guidance document - [Key guidance note II.4 on sampling](#) (...)
 - [Risk analysis with verification sampling plan example](#) (...)
- 06/2016 - Guidance document - [Key guidance note II.5 on site visits concerning installations](#) (...)
 - [Site visit waiver risk assessment exemplar](#) (...)
- 27/11/2017 - Guidance document - [Key guidance note II.6 on the verification report](#) (...)
 - [Verification report template](#) (...)
 - [Exemplar verification report for an installation](#) (...)
 - [Exemplar verification report for an aircraft operator](#) (...)
 - [Classification of outstanding items in the verification report](#) (...)
- 11/10/2012 - Guidance document - [Key guidance note II.7 on competence of verifiers](#) (...)
- 11/10/2012 - Guidance document - [Key guidance note II.8 on the relation between EN ISO 14065 and AVR](#) (...)
 - [Good practice on application of EN ISO 14065: Management system](#) (...)
 - [Good practice on application of EN ISO 14065: Impartiality and independence](#) (...)
- 11/10/2012 - Guidance document - [Key guidance note II.9 on the relation between EN ISO/IEC 17011 and AVR](#) (...)

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Soft law (Guidance from the Commission) :

(first) exploration of pros and cons



Soft law necessary in technically complex and fast moving fields ?

- Guidance helps harmonization – and thus promote equal treatment of EU ETS industries?

- Guidance beneficial because it provides some clarity to member states and industries?



- Sound procedure?
No guarantee !

- No full certainty (or do courts give `legal relevance' to guidance documents? But, if so, do courts then also test the guidance?)

Moreover, guidance can be quickly amended

- Circumvention of European Parliament and Council?

Legal research: attention to the procedural dimension

“This document is part of a series of documents provided by the Commission services for supporting the implementation of Commission Regulation [MVR or AVR].”

The guidance represents the views of the Commission services at the time of publication. It is not legally binding.

This guidance document takes into account the discussions within meetings of the informal Technical Working Group on the [MRR or AVR] under the WGIII of the Climate Change Committee (CCC), as well as written comments received from stakeholders and experts from Member States. This guidance document was unanimously endorsed [or re-endorsed] by the representatives of the Member States at the meeting of the Climate Change Committee on [date].”

The procedural dimension : questions

- What is this 'informal Technical Working Group'?
- Which stakeholders have been invited, and has any opportunity be given to ENGO's / watchdogs?
- What does it mean that the Climate Change Committee 'endorsed' the Guidance Document?
- Can the 'discussions' be traced?
- Who are the experts and stakeholders who submitted 'written comments'?
- Access to information procedures?

Reflection and conclusion

- Apparently, in practice, the legal binding framework for the EU ETS is complemented with a **`wealth' of (non-binding) guidance documents**
- This is the case for the norms governing **compliance**
- But: even more guidance documents exist (for instance for determining the **scope of allocation rules**)

How to value this?

- *-> **Guidance is preferable to gaps in the regulatory framework, and to different treatment of EU ETS industries, particularly with regard to compliance***
- (Regulating everything by means of binding norms is perhaps impossible: soft law can be necessary to fill gaps left by the legislature - and by the Commission when regulating the compliance framework.)
- Nonetheless, procedural and other legal concerns can be raised
*-> **How to avoid a `black box' of norms?***

Comments, questions, remarks and suggestions are welcome at

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