

# Climate Change Update

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**OLSWANG**



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(see page 5)

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(see page 6)

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(see page 8)

Copenhagen is charged with securing agreement on its successor.  
So what can we expect on the negotiating table?

(see page 9)

# Editorial

We approach a critical few weeks in determining whether the developed world is prepared to work together actively to combat the effects of climate change and greenhouse gas emissions. We all hope that in years to come "Copenhagen" is mentioned in the same breath as "Kyoto" as a milestone or turning point in the fight against global warming. The signs, with a month to go, are mixed. Communications emerging from the various pre-Copenhagen summits and fora suggest on the one hand that there is a degree of community of interest and a desire to reach a solution, but on the other hand, that the difference in approach of many of the interested nations, and the economic drivers that affect much of their policy decisions, may be too great to bridge. We are told that a solution "must" be found, the UN Secretary-General Ban Ki Moon going so far as to say that a "failure to reach broad agreement would be morally inexcusable, economically short sighted and politically unwise" but it remains to be seen whether that is aspirational or genuinely achievable. As we know, Kyoto was not as effective as it might have been because, among other things, of its failure to achieve the buy in of important developed nations. If any meaningful outcome is to emerge from Copenhagen, before anything else, it must first and foremost be one which all the important stakeholders are prepared to adopt and embrace.

We will be monitoring developments at Copenhagen carefully with a view to enabling us to report back and advise on the impact of discussions and any outcome. In the meantime, the world continues to rotate and this edition of our newsletter reports on areas which we see as being of current interest, but perhaps outside the mainstream of climate change and cleantech. Our tax partner, Hartley Foster, has been monitoring developments in relation to the furore over VAT on emissions credits and recent reports on fraudulent activity in that area. We have also recently been active in looking at climate change litigation and consider whether that is an area on which we will all be focussing more in the forthcoming months and years. Finally, and in recognition of recent talk of "green shoots", Dick Newby of the FD group has provided us with some helpful thoughts on corporate responsibility requirements that companies preparing for a full market listing on the London Stock Exchange should have regard to.

As always, we would welcome your feedback on this edition of our newsletter and otherwise look forward to being in touch again in the aftermath of Copenhagen.

# Has the EU's "carbon trading" market gone up in smoke?

## How is carbon trading treated for VAT purposes?

Transfers of EUAs between taxable persons under the European Union's Greenhouse Gas Emission Trading System ("ETS") are treated as a supply of services for VAT purposes. They are taxable where the recipient of those services is established. Given their high value and the fact that they can be easily traded in (lightly regulated) specialised markets, this makes the carbon trade market susceptible to what is known as 'carousel' or 'MTIC fraud'.

## The origins of MTIC fraud

The *fons et origo* of MTIC fraud was the introduction of the EU's internal market in 1993.

Completing the internal market became a political priority in the early 1980s. The EC Commission proposed that the "origin system" be introduced in relation to supplies between Member States. This would involve charging VAT in, and at the rate applicable in, the country of origin of the goods and services. Input tax would be recovered from the tax authorities of the Member States of the customers. For this system to work effectively, rates of VAT would need to be approximated throughout the EC. For this reason (and others), the Commission's proposals were not accepted by the Member States.

The VAT system that was adopted was a compromise and is intended to be transitional. Insofar as business-to-business supplies of goods are concerned, the VAT system remains based on a destination, rather than an origin, system of taxation. There is still no agreement on the origin system and no date for the ending of the "transitional regime" is anticipated soon.

The operation of VAT on supplies of goods between Member States is based on:

- (1) zero-rating by the supplier of intra-EU supplies of goods to a registered business customer in another Member State and the self accounting for VAT by the registered business customer on the acquisition of such goods at the rate applicable in the Member State of destination (e.g. a UK supplier supplies goods to a French VAT registered entity, the UK supplier will zero-rate the supply of goods from the UK to France. The French customer will then self account (under what is termed 'the reverse charge mechanism) for French VAT on the value of the acquisition at the relevant VAT rate applicable in France); and
- (2) the charging of VAT on intra-EU supplies of goods to non-VAT registered persons by the supplier in the country from which they are supplied (e.g. a UK supplier of goods to a French non-registered person will charge UK VAT on the value of the supply). (This is subject to certain exceptions).

It is the zero-rating of cross border transactions that is the weak point in the transitional system of VAT that can be exploited by fraudsters.

## **What is MTIC fraud?**

There are two main forms of MTIC (or missing trader intra-community) fraud: "acquisition" fraud and "carousel" fraud. An acquisition fraud is a commodity based fraud in which (VAT standard rated) goods are purchased zero rated for VAT purposes from a supplier based in another EU member state and sold in the UK for domestic consumption. The trader imports goods from another Member State. No VAT is payable on the import. He then sells on those goods to a domestic buyer and charges VAT. He dishonestly fails to account for the VAT to HMRC and disappears. The trader is labelled a "missing trader" or "defaulter".

The next level of sophistication involves both an import and an export. A trader imports goods from another Member State. No VAT is payable on the import. He then sells on those goods to a domestic buyer and charges VAT. He dishonestly fails to account for the VAT to HMRC and disappears. The domestic buyer sells on to an exporter at a price which includes VAT. The exporter exports the goods to another Member State. The export is zero-rated. Thus, the exporter is entitled to deduct the VAT that he paid from what would otherwise be his liability to account to HMRC for VAT on his turnover. If he has no output tax to offset against his entitlement to deduct, he is entitled to a payment from HMRC. Normally, the exported goods are re-imported and the process begins again. This variant of the fraud is known as a carousel fraud. There are likely to be many intermediaries between the original importer and the ultimate exporter (known as "buffers") to hide the fraud. The ultimate exporter is labelled a "broker". A chain of transactions in which one or more of the transactions is dishonest is labelled a "dirty chain". When HMRC investigate and find a dirty chain, they will refuse to repay the amount reclaimed by the ultimate exporter, and, more importantly, the amounts claimed by (often innocent) buffer companies caught in the dirty chains.

## **Why is this relevant to the emission trading market?**

Through various measures (including the closing of bank accounts, high profile criminal prosecutions, denial of input tax recovery to companies caught in the chains, and the introduction of a reverse charge on mobile phones and computer chips (under the reverse charge mechanism, it is the purchaser of the goods, rather than the seller, who is liable to account for the VAT on the supply), the quantum of fraudulent tax losses in relation to computer chip and mobile phone trading has been reduced significantly.

However, MTIC fraud can be conducted in relation to any goods that are traded cross-border and that are subject to VAT. It seems that one consequence of the measures in respect of mobile phones and computer chips has been to displace the fraud. It seems that carbon credits (being high value, traded internationally and subject to VAT) became one of the next targets of the fraudsters. Between July to September 2009, carbon traders noticed surges in trading volumes on the markets that they considered could be attributed only to fraud. As a result, the Governments in the three countries with the main carbon exchanges acted quickly to try to prevent further fraudulent trading. However, each Government adopted a different measure. The Dutch government introduced the reverse charge mechanism; the French government removed VAT from carbon markets; and the UK government made carbon trading zero-rated (and raided 27 businesses and private addresses in relation to a suspected £38m VAT fraud on carbon credits).

## **The approach by the European Commission**

On 29 September 2009, the Commission produced a proposal on temporary measures for a consistent response to carousel fraud ("the Proposal"). Laszlo Kovacs, Commissioner for Taxation and Customs

noted that it was important that Member States be able to take rapid action against MTIC fraud, but added that, "however, actions taken against this fraud should be taken in a consistent manner across the EU."

The proposal by the Commission is to amend the VAT Directive to enable Member States to introduce the reverse charge mechanism for certain categories of goods and services. These categories are: mobile telephones, computer chips, perfume, precious metals, and EUAs. If the proposal is implemented, it will apply until 31 December 2014.

### **Will the reverse charge mechanism end fraud in the carbon trading market?**

Reverse charge results in no VAT being charged by the supplier to taxable customers. Customers (who are taxable persons with a full right of deduction) declare and deduct at the same time. Under the reverse charge accounting mechanism, it is the responsibility of the customer, rather than the supplier, to account to HMRC for VAT on supplies of the specified goods. Thus, the opportunity to commit MTIC fraud disappears. If all the Member States introduce the reverse charge mechanism to EUAs, then the potential to commit MTIC fraud ends in this sector.

However, the Proposal is not a panacea.

There are two particular concerns. First, it is voluntary, and it gives a significant discretion to Member States as to how the mechanism is to be implemented. Member States may, but will not be obliged to, introduce the reverse charge mechanism. Even if they do introduce the mechanism, then they may not make more than three out of the five categories of mobile telephones, computer chips, perfume, precious metals, and EUAs subject to the mechanism (although if they make three categories subject, then one of those must be EUAs). Thus, there is the potential for EUAs to be treated differently in different Member States.

Secondly, reverse charge can only ever be a temporary solution. In broad terms, it simply displaces the fraud into trading in other commodities and services. The UK has operated the reverse charge mechanism in respect of mobile phones and computer chips since 1 June 2007; by Council Decision of 5 May 2009, the UK has been permitted to continue with the reverse charge derogation until 30 April 2011. However, no detailed economic analysis of the consequence of the introduction of this measure has been made public. In particular, it is not known whether the measure has primarily only displaced the fraud to other areas, such as EUAs or whether it has increased black market supplies (under reverse charge, the person at the end of a chain of transactions must account for all the VAT). Anecdotal evidence suggests that one of the prime reasons for the recent increase in fraud in the carbon trading market has been the success of the anti-fraud measures that apply in the mobile phone and computer chip market.

### **What should businesses do?**

In March 2006, the UK adopted a risk-based programme of "extended verification" of input VAT claims made by businesses operating in the mobile phone and computer chip wholesale industries. HMRC's approach was to focus on a "means of knowledge" test, which involved lengthy and far-reaching enquiries being conducted into every constituent part of each transaction chain, examining whether frauds have occurred and determining whether other participants in the chain could have known or should have known of fraud before input VAT claims were verified. In short, it was only those businesses who were able to show that they had the best possible due diligence procedures and other risk reduction strategies to guard against fraud that were able to persuade HMRC that their claims should be repaid.

Although there are various ways in which the EU can reduce MTIC fraud (including, for example, enhancing cooperation and exchanges of information between Member States) and it is possible to displace it from sector on a good by good basis (by use of the reverse charge mechanism), it is endemic to the transitional system of VAT that remains in the EU. Thus, unless and until the EU moves to an origin system of VAT (which is not anticipated), businesses need to ensure that they are taking all reasonable steps to protect themselves from the fraudsters.

# Climate change litigation on the increase?

With the increased prominence of climate change issues in the consciousness of the public, it is perhaps no surprise that those issues are now starting to be raised and addressed in and by the Courts. There have been some interesting recent examples of litigation involving climate change issues before the English courts:

- Three campaign groups: PLATFORM, People and Planet & The World Development Movement, brought a judicial review challenge in the Administrative Court in London against Commissioners for HM Treasury, claiming that Government has failed, since investing public funds into the (now 70% state-owned) Royal Bank of Scotland ("RBS"), to assess whether, as part of that investment, to impose minimum environmental and human rights standards on financial investments made by RBS. The campaign groups stated that (amongst other things) the imposition of these types of standards might prevent or restrict RBS from financing new fossil fuel projects in the future.

The Treasury's position in response was that it has undertaken the necessary assessments and that imposing minimum environmental standards or human rights standards on the management of the RBS investments would mean imposing Government strategy on RBS and would cut across the fundamental legal duty of a board to act in the best interests of a company for its members. The claim is interesting in that it raises questions about the extent to which Government can or should impose policy through large publicly-funded commercial holdings such as its stake in RBS.

The High Court refused permission to the campaign groups to move to a substantive hearing of their claim on 20 October 2009. The campaign groups are now appealing that refusal of permission to the Court of Appeal.

- In another interesting case, the Employment Appeal Tribunal recently upheld a ruling of the Employment Tribunal made earlier this year that holding a 'philosophical belief in climate change' attracts the same level of legal protection in the workplace as religious beliefs, under the Employment Equality (Religion or Belief) Regulations 2003.

The Employment Appeal Tribunal held that Tim Nicholson, the former head of sustainability at Newcastle-based Grainger plc, a property investment company, had strongly held views about climate change and lived his life accordingly, and that his dismissal after disagreeing with Grainger's practices amounted to discrimination against him on the basis of those beliefs. Grainger had appealed the ruling on the basis that belief in climate change is a political view, not a religious or philosophical belief within the scope of the Regulations, but was unsuccessful. Mr Nicholson is now to pursue an unfair dismissal claim against Grainger on this basis.

On the international front, the lead-in to Copenhagen has meant the issue of compensation for damage caused by the effects of climate change has again come to the fore. We are presently working with ActionAid on a review of the possible options that a community within a developing country might have in bringing a legal claim against a developed country in an international forum, seeking compensation for damage or loss caused by the effects of climate change.

We have reached some interesting conclusions. While there have been some domestic and regional attempts, particularly in North America, to use courts to hold Government agencies and industry to account for damage caused by the effects of climate change, to date no such cases have been heard in an international forum. This is largely because of (a) the complexities of the science of climate change; and (b) the difficulties, in a legal context, of proving that a specific international entity might owe a duty of care to a developing community in respect of the effects of climate change (whether under a treaty or under a principle of international customary law), that the duty has been breached and that in breaching that duty, that entity's actions have caused the loss which has occurred.

Another practical issue is that in many of the potential international fora, disputes between States cannot be brought before a forum unless both States first consent to that forum's jurisdiction. While some States have agreed to accept the jurisdiction of certain forums in advance (e.g. under a treaty or under a blanket agreement to a particular fora jurisdiction, i.e. the International Court of Justice) these States tend not to be the same States who might make easier targets for a climate change claim by a developing community (i.e. those States who are responsible for substantial levels of emissions and/or who are on track to fail significantly to meet Kyoto Protocol targets).

We rather suspect that the examples that we have given in this summary are, potentially, just the beginning of a large number of claims that we will see over the forthcoming months, as the world is forced to focus on the potential problems that climate change brings and looks to allocate responsibility to and to seek compensation from those perceived as perpetrating the problem.

# Gearing up for a full market listing: meeting Corporate Responsibility requirements

Companies preparing for a full public market listing on the London Stock Exchange have plenty of things to worry about, but one issue which they often ignore is the requirement under Section 417 of the Companies Act 2006 that, once listed, they will have to produce a wide-ranging business review covering information which goes well beyond their financial performance. Business reviews of all quoted companies have to include information about environmental matters (including the impact of the company's business on the environment), the company's employees and social and community issues. For companies other than those which qualify as medium-sized in relation to a financial year, key performance indicators must be set, where appropriate, covering environmental matters and employee matters.

Given that companies will have to report on what their policies are in these areas from the day their listing first takes effect, it obviously makes sense to begin taking action well in advance. This often seems a daunting prospect for CEOs with many other things on their plate, but it needn't be. They do need to adopt formal policies around employment practices, environmental impacts and their community activities – but if these are proportionate and go with the grain of the business, they can help the business develop rather than burden it. To take a couple of obvious examples, best practice employment policies help recruit and retain staff, and environmental policies which minimise carbon footprint also reduce costs.

By contrast failure to address these issues can lead to weak morale, unnecessary costs and adverse reports by organisations such as EIRIS (Ethical Investment Research Services), who are now increasingly being employed by investors to guide their investment decisions.

So what should aspirant FTSE companies do to get their corporate responsibility house in order?

1. Identify the key people. Someone at board level - ideally CEO or CFO - needs to be formally in charge of CR. And by trawling all staff it will usually be possible to identify people who have a passion for the environment or community activity to help drive action in these areas forward,
2. Formalise existing policies. Companies are often doing positive things, but doing so in an informal way. As a quoted company, this has to change.
3. Identify gaps. Typically, whilst companies are doing some things well, there are other areas where they haven't really thought through what they're doing.
4. Set forward-looking targets. To make the process manageable, a small number of targets should be set to drive up performance on a year by year basis.
5. Prepare to report what you're doing clearly. Companies can easily suffer critical external reviews by not having set out in an accessible way what they are doing across the CR agenda.

And of course, where management are unsure how to do all this in a professional manner, use an external adviser.

***Dick Newby is Head of Corporate Responsibility at FD Group. A member of the House of Lords, he is Treasurer of the All Party Associate Parliamentary Corporate Responsibility Group.***

# Copenhagen – a matter of days away: what can we expect?

It is now less than a month before Copenhagen plays host to the fifteenth Conference of the Parties under the United Nations' Climate Change Convention, known as COP15. The first phase of the Kyoto Protocol expires in 2012 and Copenhagen is charged with securing agreement on its successor. So what can we expect on the negotiating table?

Debate at Copenhagen will centre on two subjects in particular: mitigation and adaptation. Mitigation refers to actions employed to reduce emissions, such as renewable energy projects; adaptation to the measures required to help countries adjust to the effects of climate change now inevitable, such as building flood defences.

Both mitigation and adaptation require funding, for which the developing world looks to the industrialised nations, and it is the issue of finance which will likely prove the most testing at Copenhagen. The developing world has for some months insisted that 0.5%-1% of GDP (\$200bn-\$400bn) per annum is required from developed countries, many of which are reluctant to monetise the extent of their commitment to tackling climate change. The EU's estimate is €22bn-€50bn (about \$32bn-72bn) and that figure assumes that the richer developing nations (like India and China, themselves recipients of the fund) will make their own contributions. The chasm separating the expectations of the opposing sides is glaring and further widened by the developing world's expectation that this funding be in addition to existing aid flows.

Even if agreement on the above issues is reached, the legal framework within which it will be recorded is uncertain. Any agreement extending the Kyoto Protocol will not bind the US and so a parallel negotiating track is required to accommodate its involvement, potentially resulting in a new treaty or set of decisions. The US, backed by Australia and Canada, is frank about its desire to move away from a legally binding agreement in favour of allowing individual countries to pledge their own reductions. However, the possibility of a deal outside the Kyoto Protocol led China during the Bangkok talks to accuse the US and other developed countries of attempting to "sabotage" the Protocol.

Concern about US involvement in the negotiations has not been helped by official statements that the Senate will not attempt to vote through climate change legislation before Copenhagen and is instead aiming for a deal late next year. Even Ban Ki Moon, the UN Secretary-General, has conceded that a legally binding agreement on cutting emissions is no longer likely to result this year. "Political agreement" and voluntary reductions targets are now the aim, much to the frustration of some developing nations.

This frustration manifested itself at last week's Barcelona talks when over 50 African nations staged a walkout in protest at the low emissions reductions targets developed countries are pledging to meet by 2020. The African nations are pushing for cuts at the top end of the 25-40% bracket of reductions against 1990 levels suggested by the Intergovernmental Panel on Climate Change and ten times higher than the US offer. The walkout was followed at the end of the talks by threats of further boycotts at Copenhagen by the G77 plus China group of 130 nations.

Tensions are running high, but opinion at least seems to be united on two points: an agreement, whether binding or political, needs to be reached and the time within which to do it is running out.

# Recent developments

## Intellectual property offices go green too!

There have been a number of recent developments in the field of intellectual property driven by green/climate change issues.

In May 2009 the **UK Intellectual Property Office** introduced a scheme to allow those applying for UK patent protection for an invention relating to "Green or environmentally friendly" technology to fast track their patent application. Very recently the **Australian Patent Office** has followed suit and indicated that climate change mitigation technology can be fast tracked through the Australian patent office. This will be good news for any applicants in the green technology space, who will be able to more rapidly protect and commercialise their inventions. It is likely that other patent offices will follow suit.

In September the **European Patent Office**, together with the United Nations Environment Programme (UNEP) and the International Centre for Trade and Sustainable Development (ICTSD), is conducting a survey on licensing practices in the area of environmentally sound technologies (ESTs). The survey is part of a joint project on patents and ESTs which aims at enhancing the understanding of the role of patents in relation to the transfer of, access to and deployment of ESTs, starting with the energy generation sector. The results of the survey and the findings of the study should provide inputs and recommendations for the United Nations Framework Convention on Climate Change (UNFCCC) Conference in Copenhagen next December. Around 1800 companies and institutions have been specifically invited to fill out the questionnaire, but the survey is open to other organisations working in the field.

Further information on any of the above is available from Robert Stephen, a patent attorney and partner in Olswang's Intellectual property team, and member of the firm's climate change group.

## And finally

We are sorry to have to say farewell to Adam Fenner, a founder member of our Climate Change and Cleantech practice. We wish him all the best in his new life in California and assure him that his successors, Stephen Rosen and Duncan McDonald, will do all they can to carry on his good work!

***The information contained in this summary is intended as a general review of the subjects featured and detailed specialist advice should always be taken before taking or refraining from taking any action.***

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# About Olswang

Olswang is a leading business law firm with a distinctive approach. Our pioneering and problem-solving ethos has established a commanding reputation in the technology, media and real estate sectors, as well as a wide range of other industries.

Founded in 1981, our Firm has grown to a team of over 650, including more than 100 partners, across four European offices. In addition, Olswang has a long-established best friends' network of leading independent law firms throughout the world.

Our Firm continues to be acknowledged as a leading practice in many of our core areas: Olswang was voted TMT Team of the Year 2009 for the second year running at the annual Legal Business Awards; Olswang's Corporate Group won M&A Law Firm of the Year at the M&A Awards 2008 in conjunction with M&A Magazine, and was named Corporate Team of the Year – Mid markets at The Lawyer Awards 2008.

Resourceful drive and a climate of shared knowledge and empowerment are the hallmarks of our meritocratic, unstuffy culture. For the last five years Olswang has been ranked in The Sunday Times 100 Best Companies to Work For and our strong management team is dedicated to the personal and professional development of our people.

We are committed to encouraging every member of staff to engage in lasting and meaningful pro bono and volunteering activities, both legal and non legal. The time invested by our people through the Firm's HELP Programme to assist those in need is a positive contribution to the community which is reflected in the values and culture of Olswang.

We recruit personalities with a genuine fascination and notable reputation in the sectors they focus on, which is reflected in the quality of our advice. We also understand the importance of achieving our clients' goals and ensure that our advice is, above all else, practical.

From world-class businesses to entrepreneurial startups, the rich diversity of our client base ensures a broader perspective and, as a result, deeper commercial insight. Transactional work is the most obvious feature of the role we perform. However, ongoing non-transactional support is an integral part of our business, and we focus on creating long-term relationships with our clients. We employ a range of proactive initiatives such as client care programmes, secondments, client training and feedback sessions to ensure our client relationships are strong.

At Olswang the passion of our lawyers, the confidence of our approach and the commercial edge to our advice provide a unique and compelling service.

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