

Brexit

Implications of the UK Leaving the EU on Climate Change and Energy Law

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Introductory Comments

This article charts the possible implications of the United Kingdom exiting the European Union on Climate Change and Energy Law. It is of paramount importance to recognise that much of this evaluation is made against a backdrop of uncertainty: the terms, time-scale, and process of 'Brexit' are, as yet, largely unknown. The value of this evaluation comes from setting out the likely affected areas, and in raising awareness of the complexity which Brexit will yield.

Context

It is trite to say that environmental concerns (which are addressed by environmental legislation) are international concerns which generally do not respect national boundaries. For this reason, it has often been recited that environmental concerns need to be addressed at an international level: it is nonsensical to legislate on a national basis when the source or nature of the matter at hand cannot thereby be appropriately or meaningfully managed.

This international characteristic of environmental law is perhaps all the greater in the context of climate change. When we speak of climate change, we are not discussing specific climates or biomes, but rather changes to the *global* climate. The global climate can be understood as a closed system where cause and effect operates on a global scale. Consequently, the EU, as a community of nations, has understandably considered itself competent and justified to legislate on climate change issues.

This global awareness of climate issues can be very clearly seen through the negotiations of COP21 UN Climate Change Conference in Paris, which resulted in the ambition of "[h]olding the increase in global temperatures to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C...recognising that this would significantly reduce the risks and impacts of climate change".¹

Energy law similarly has an international flavour. Bradbrook defines energy law as "the allocation of rights and duties concerning the exploitation of all energy resources between individuals, between individuals and the government, between governments and between states."²

With the benefit of hindsight, it is perhaps somewhat surprising that EU energy policy and regulation has not always engaged with its environmental characteristics. As Bell, McGillivray, and Pedersen suggest, "[h]istorically, EU environmental policy has had little to say about energy, and equally EU energy policy has had little impact on its environmental policy."³ Energy law incorporates issues to do with competition, intellectual property, tax, and free movement more generally. Whilst this article does not suggest that this position is now entirely reversed – certainly these aspects of energy law remain – we believe that there is an increased awareness of the environmental impact of energy use and production. This awareness is shared by producers, distributors, and consumers, and so it is now inevitable that environmental concerns (with all their associated international facets) will influence energy law and policy.

In any event, for the purpose of this article, it is worth highlighting the inherent link between the energy sector and climate change. Indeed, the energy sector is the most significant source of carbon emissions in the EU, amounting to around one-third of total emissions.

Impacted Legislation

Due to the various recognised causes of climate change (which is to say, due to the numerous sources of greenhouse gas emissions) the EU legislative portfolio seeking to address climate change is broad and engages with various different issues. Often, these legislative measures impact on the European energy sector, and so it is useful to deal with these two topics together.

a. EU Climate Legislation

Perhaps the most well-known EU legislative measure addressing climate change is Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community. This Directive endeavoured to facilitate Member States in fulfilling their commitments under the Kyoto Protocol to reduce the aggregate emissions of greenhouse gases. This Directive has been supplemented by Directive 2009/29/EC, which extends the commitment to reduce emissions. The position under the most recent Directive is much in line with the '20-20-20 targets': aiming towards at least a 20 percent reduction in greenhouse gas emissions in the EU by 2020 compared to 1990 levels.

These Directives go on to set out details of how the emission allowance trading market should operate. The 2009 Directive explains that installations which carry out stipulated activities resulting in emissions must hold a permit. Member States are required to submit their proposed allocation plans to the European Commission. The objective of the EU is the efficient but proactive reduction in emissions, and to this end it is stated that the number of allowances shall be decreased year-on-year.

Subsequent legislative measures, such as Regulation 1031/2010, have been enacted to facilitate the effective operation of the emission allowance trading scheme. This Regulation explains how the auctioning process of allowances which are not allocated "free of charge" should be administered and operated. Similarly, Regulation 920/2010 has been implemented to establish a system of standardised registries and electronic databases which oversee and monitor how allowances are issued, held, transferred, and cancelled within the scheme.

In an attempt to highlight the economic basis of the emissions allowance trading scheme, whilst also demonstrating the global concern which climate change poses, Directive 2004/101/EC establishes that joint implementation and clean development mechanisms may be used within the scheme.

In order to work progressively toward these legislated objectives, a number of ancillary measures have been adopted. For example, Decision 280/2004/EC, implemented by Commission Decision 2005/166 establishes a mechanism for monitoring EU greenhouse gas emissions. This mechanism is devised and implemented by national and Community programmes, with Member States then being required to present annual reports to the Commission of their emissions. Much of the rationale behind this Decision was to enable the EU to comply with its commitments under the Kyoto Protocol.

As mentioned above, the link between the environment and energy policy has become more pronounced in the minds of the EU legislature, and this can be seen through another aspect of the 20-20-20 package: a 20% share for renewables in EU energy production, and a 20% improvement in energy efficiency from 2007 levels.

b. EU Energy Legislation

The link between energy and climate change is most clearly demonstrated through Directive 2009/28/EC which seeks to promote the use of energy from renewable sources. Across the EU, it requires that 20% of energy consumed must be derived from renewable sources. Obviously, the basis for this Directive is not simply to reduce the emissions of greenhouse gases: there are "many benefits, including the utilisation of

local energy sources, increased local security of energy supply, shorter transport distances, and reduced energy transmission losses. Such decentralisation also fosters community development and cohesion by providing income sources and creating jobs locally."⁴

For the purposes of this article, this 2009 Directive is particularly interesting because it advocates establishing mandatory national targets for the contributions of energy from renewable sources. In the case of the UK, the national overall target for the share of energy from renewable sources by 2020 is 15% (as compared with the 1.3% share which existed in 2005). A point of contention amongst environmental lawyers is that this target, whilst it is characterised as 'binding', does not attract sanctions or infringement proceedings should the Member State fail to reach it. Therefore, an interesting question may be raised by Brexit: would the UK nevertheless be bound to fulfil its quasi-contractual obligations, and if so, how 'binding' is that target in any event.

The EU has recognised that another significant source of emissions which may be regulated on a pan-European level is transportation. Regulation (EC) No 443/2009 sets out emission performance standards for new passenger cars as part of the Community's broader approach to reduce CO₂ emissions from vehicles. Directive 2009/30/EC seeks to monitor and reduce greenhouse gas emissions through establishing environmental standards for fuel.

This theme of the EU legislating and thus impacting on individual consumers is also evident in various Directives relating to energy usage. Directive 2012/27/EU – the Energy Efficiency Directive – for example, establishes a framework for labelling and consumer information regarding energy consumption for energy-related (including household) products. This Directive also requests that energy companies make reductions in their sales to customers by 1.5% every year. Directive 2010/31/EU seeks to improve the energy performance and efficiency of buildings.

c. EU Air Quality Legislation

It makes sense, as part of this note, to mention the central pieces of European legislation concerned with air quality: CO₂ is not the only emission which has an environmental impact.

Directive 2001/81/EC sets the upper limits for Member States' emissions of certain atmospheric pollutants (including sulphur dioxide, nitrogen oxides, and volatile organic compounds). This Directive is supplemented by Directive 2010/75/EU which seeks to control and reduce the emissions from large combustion plants. This Industrial Emissions Directive, in much the same way as Directive 2009/29/EC (the emission reduction Directive outlined above), requires various installations undertaking specified industrial

activities to operate in accordance with a permit which is issued by the Member State authorities.

The general health impacts, as well as the environmental impacts, of improved air quality are clearly considered in Directive 2008/50/EC on ambient air quality and clear air for Europe. This 2008 Directive imposes limits for Member States for various pollutants and particulates in outdoor air. This Directive has self-evident implications on the UK, and it is well-publicised – for example in the ClientEarth judgment of the Supreme Court⁵ – that in many urban areas these targets are not being met.

Implications of the UK's Exit from the EU

Turning now to the implications for the UK of leaving the EU, it is again necessary to restate that much of what follows is unavoidably generalised. It is perhaps also prudent to bear in mind that we are likely to be equally unclear as to what the UK remaining in the EU would look like if David Cameron is able to successfully negotiate a new relationship with the EU.

There is the very obvious detriment to the UK that if it were to leave the EU, then it would equally be unable to negotiate and seek to influence the EU's approach to environmental regulation. This disadvantage is magnified when one considers that the UK will (perhaps) nevertheless remain obliged to meet certain targets established by the EU or by international treaties, such as the Kyoto Protocol. It would be a regrettable situation for the UK to be bound to meet various objectives but have no influence in the process determining how those targets should be achieved. It is also the case that the UK may be less inclined to adopt stringent and taxing targets for itself if there were not European pressures to do so.

On the other side of the coin, if the UK were to leave the EU, then there is an argument that the EU's climate change and energy policies would suffer. The UK has had a recognised positive impact in steering EU policy in a more demanding, conscientious and sustainable direction. There is a worry that if the UK were to leave the negotiating table, then Member States for whom environmental concerns are subordinate to economic prosperity may come to the fore. This point is likely to be borne out in the context of UNFCCC negotiations: without the UK, the EU may be inclined to adopt a weakened stance, and similarly, the UK's position is likely to be diminished. One of the defining justifications for the EU is that it is greater than the sum of its parts, and that argument is particularly prevalent on the global stage. This position may be questioned, however, in light of the disappointing lack of commitment the Conservative government has shown to progressing environmental sustainability (particularly when environmental 'red tape' may stand in the way of business development).

It is submitted here that the UK is likely to want to continue being able to trade within the EU emissions trading scheme so as to attain its obligations imposed by international treaties and agreements. For example, if the Paris Agreement is ratified, then the ambitious global targets will require exactly such an international response.

There is a suggestion that if the UK were to leave the EU, it could nevertheless opt-in to the emissions trading scheme. Iceland, Norway and Lichtenstein have each signed up to the scheme, and the suggestion is that the UK could do the same, thus preserving the commercial impetus underpinning continued climate change action in industry. This said, there is still the potential concern relating to how influential the UK would be in formulating EU ETS policy if it were no longer an EU Member State.

Much the same argument can be raised with regard to the 2009 Directive promoting the use of renewable energy sources. This Directive envisages joint projects, with the common objective of increasing proportional energy production from renewable sources. These projects may be between Member States or entered into with third countries. Obviously, this latter point is worth noting because it could mitigate any disruptive effects arising from Brexit on long-term international projects. So long as the conditions for third party joint projects would be met, the Member States of the EU may not be deterred from entering into joint projects with the UK.

There are a number of arguments which suggest that Brexit might not be as damaging to the UK's climate change and energy policies as is feared. The Climate Change Act 2008 is the flagship piece of national legislation on this issue, most significantly setting out a duty "to ensure that the net UK carbon account for the year 2050 is at least 80% lower than the 1990 baseline."⁶ This legislated target is remarkably ambitious, and indicates that the UK's national (and, therefore, individual) commitment to sustainable development is genuine and proactive.

Further, Simon Moore raises the interesting argument that the UK, through being compelled to meet EU targets on investment in renewable energy sources, may in fact struggle to meet the decarbonisation target.⁷ Meeting the renewable energy target *may* have a deleterious effect on the UK's prospects to reduce its carbon account because it commits the bulk of the UK's efforts and resources in one specific way, at the expense of encouraging broader innovation and investment in low-carbon alternatives.

Concluding Remarks

It is important to be wary of making suggestions about the implications of Brexit when the actual terms and general outcomes are unknown. The overwhelming

majority (between 80-90%) of the UK's environmental legislation is derived from EU legislation, and so the potential impact of Brexit on climate change and energy policy in the UK is huge. If the UK were to leave the EU there would be a resulting legislative lacuna, and at present we do not know how that would be filled: we could repeal all EU measures, or keep them, or adopt an awkward hybrid legislative regime, each option carrying with it obvious problems.

This article has mapped the major pieces of EU legislation which concern specifically climate change and energy, and suggested potential (if chiefly generalised) impacts should a no-vote be delivered in the referendum. The main impact of Brexit will be confusion, and whilst it will be possible to resolve much of this uncertainty over the course of time through a combination of legislating and negotiating, this article questions whether any potential outcomes would be worth that confusion from a sustainability perspective. When considering climate change policy and energy policy, it seems that there are far more advantages to remaining within the EU.

One cannot escape the fact that climate change and the finite nature of non-renewable energy sources are (at least) a pan-European problem. Further, it is true that acting on climate change, and the move toward sustainable energy sourcing, demand a holistic and collaborative approach, and for this reason the arguments for the UK staying in the EU are very strong. Indeed, in the context of the environment as a whole, the disbenefits of Brexit are writ large.

Endnotes

- 1 Article 2(1)(a), Paris Agreement (2015, COP21 UNFCCC).
- 2 AJ Bradbrook, 'Energy Law as an Academic Discipline' (1996) 14: 2 JERL 194.
- 3 S Bell, D McGillivray, and O Pedersen, *Environmental Law* (8th ed, OUP 2013) 554.
- 4 Directive 2009/28/EC of 23 April 2009 on the promotion of the use of energy from renewable sources [2009] OJ L140/16, para (6).
- 5 *R (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28.
- 6 Section 1, Climate Change Act 2008.
- 7 S Moore, '2020 Hindsight: Does the renewable energy target help the UK decarbonise?' *Policy Exchange* (2011, London).