EU Climate Law: Largely Uncharted Legal Territory

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Abstract

EU climate law has come to consist of many rules and court decisions. Given its breadth, complexity, and dynamic nature, it is a huge challenge for scholars to acquire a good overview, let alone develop a comprehensive and in-depth analysis of the law. It should not be taboo to concede that hard-working scholars may fall short of having a thorough appreciation of the "state of the art" of EU climate law. Because of this, not only prioritization but also cooperation among scholars is necessary. While legal research can point to problems and shortcomings in EU climate law, it should at the same time delve on the importance of having a body of EU climate law leading to emission reductions that most likely would not have been achieved if the EU member states had had to decide on this objective individually.

Keywords

EU climate law – CJEU case law – legal effectiveness, complexity, dynamism – climate law scholarship

1 The Complex Set of Rules Constituting "EU Climate Law"

Given the numerous rules adopted by the European Union aiming to reduce greenhouse gas emissions and to increase renewable-energy consumption and

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energy efficiency, it is safe to say that EU climate law has emerged as a subdiscipline of EU law. In this field, at least seven important laws were adopted by the European Parliament and the Council of the European Union in 2018, of which some are new (such as a Regulation on the governance of the Energy Union, which introduces a member-state obligation to provide a national climate and energy plan), others introduce a legal framework for a new emission-reduction period (such as Regulation 2018/842 of 30 May 2018 on binding annual greenhouse gas emission reductions by member states from 2021 to 2030), and yet others amend already existing laws (such as an amendment of the EU ETS by means of Directive 2018/410 to enhance cost-effective emission reductions and low-carbon investments).[1] The vast EU package of regulatory approaches is an indication of the effort made by the European Union to take responsibility for combating climate change.[2]

The European Union is in essence a supranational legal organization that facilitates the integration of 28 countries (27 if Brexit gets through) while respecting the principle of subsidiarity.[3] EU climate legislation often specifies important tasks for member states. These include obligations for member states to develop national policies, but also, more specifically, obligations regarding reporting, permitting, monitoring, and enforcement. Core EU climate legislation requires member states to make fundamental decisions on how to structure their national climate policies while leaving them with ample discretion on how to design, for example, renewable-energy or emission-reduction

1 In addition to these three laws, the following four were adopted in 2018 by the European Parliament and the Council: (1) the LULUCF Regulation (Regulation 2018/841 of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework); (2) a revision of the Energy Efficiency Directive (Directive 2018/2002 of 11 December 2018 amending Directive 2012/27/EU on energy efficiency); (3) a revision of the Renewable Energy Directive (Directive 2018/2001 of 11 December 2018 on the promotion of the use of energy from renewable sources); and (4) an amendment of the Energy performance of buildings Directive ((Directive 2018/844 of 30 May 2018 amending Directive 2010/31/EU on the energy performance of buildings and Directive 2012/27/EU on energy efficiency).

2 In 2016, Jordan and Benson observed that "the EU's climate acquis communautaire is undoubtedly one of the most far-reaching and ambitious set of mitigation policies globally": in Daniel A. Farber and Marjan Peeters, *Climate Change Law* (Elgar, 2016), 62.

3 On the aim of integrating national jurisdictions, see Article 1, Treaty on European Union: "the process of creating an ever closer union among the peoples of Europe", which upholds the principle that "decisions are taken as closely as possible to the citizen". The principle of subsidiarity entails that the Union is to act only if, and to the extent, that the objectives of the proposed action cannot be sufficiently achieved by its member states. Article 5 of the Treaty on European Union codifies the principles of subsidiarity.

policies for sources not covered by the EU ETS. This allows for many different regulatory approaches to be employed across the EU member states.[4] At the same time, particular national approaches—such as a decision to allow the construction of wind turbines in an area where a protected bird species lives, or, alternatively, to ban wind turbines in certain nature-conservation areas—must be in conformity with EU law (e.g. renewable-energy or nature-conservation law).[5] Where legal conflicts arise, the Court of Justice of the European Union (CJEU) has the power to clarify EU legislation, including the extent of discretion that is left to a member state to make the relevant choices. Various references for advice on how to interpret EU law in matters relating to measures on greenhouse gas mitigation have been submitted by national courts to the CJEU, not only with respect to renewable energy law but also the EU ETS.[6] The already rich EU climate change case law is proof itself that the implementation of EU climate legislation leads to many different and often complicated legal conflicts.

The development of EU climate law has emerged from the strategy of the European Union to assume a global leadership position after the conclusion of the Kyoto Protocol negotiations in 1997. The EU demonstrated its readiness to combat climate change by adopting internal laws, culminating in this by now impressive package of norms. In November 2018, the European Commission, in its strategic long-term vision on the EU's climate policy for 2050, referred to Europe's commitment to lead in global climate action and developed scenarios to move to a carbon-neutral European Union by 2050; this is now under discussion by EU institutions, member states, and society at large.[7] Meanwhile,

4 Moreover, Article 194 of the TFEU guarantees a certain autonomy for a member state in respect to determining the conditions for exploiting its energy resources, its choice between different energy sources, and the general structure of its energy supply.

5 See, for instance, case C-164/17, *Edel Grace, Peter Sweetman v. An Bord Pleanála*, ECLI:EU:C:2018:274, decided on 25 July 2018; and case C-2/10, *Azienda Agro-Zootecnica Franchini Sarl v. Regione Puglia*, ECLI:EU:C:2011:502, decided on 21 July 2011.

6 The following decisions related to the EU ETS serve as examples (out of many possible): C-191/14 (joined with other cases), *Borealis Polyolefine GmbH and Others v. Bundesminister für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft and Others,* ECLI:EU:C:2016:311, decided on 28 April 2016; C-460/15, *Schaefer Kalk GmbH v Bundesrepublik Deutschland,* ECLI:EU:C:2017:29, decided on 19 January 2017; C-43/14, *Škoda Energo s.r.o.v Odvolací finanční ředitelství*, ECLI:EU:C:2015:120, decided on 26 February 2015; and C-366/10, *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change*, ECLI:EU:C:2011:864, decided on 21 December 2011.

7 European Commission*, A Clean Planet for all: A European strategic long-term vision for a prosperous, modern, competitive and climate neutral economy*, Brussels, 28.11.2018, COM(2018) 773 final, 3.

the European Union's complex and frequently amended climate legislation has become increasingly difficult to understand. It challenges legal scholars to consider how to study the field of EU climate law. I will address this challenge in the sections below.

2 Mapping and Assessing the Field

Given the fact that the European Union has seen the emergence of many rules and court decisions related to climate change, the first challenge for scholars is to *chart* EU climate law, in the sense of mapping the existing elements of it.[8] This is already quite an endeavour given the sheer amount of material. Yet having only an overview of the landscape of EU climate law is not enough to be able to understand its consequences, particularly its effectiveness. A challenge for legal scholarship is to investigate whether the laws are well designed according to certain benchmarks, such as the following: Are the obligations sufficiently well formulated to avoid interpretation problems, and thus compliance problems, that would negatively impact the environmental effectiveness of the regime? Are the obligations relating to the sources of greenhouse gases complemented with suitable monitoring and enforcement provisions? Are the rules that establish rights of access to information and public participation well implemented? What kinds of legal conflict might emerge when two different legal frameworks (such as laws on nature protection and renewable energy) apply to the same activity? Do the regulatory approaches ensure the desired level of environmental effectiveness while avoiding the imposition of unnecessary costs on businesses and citizens? And how does EU climate law stimulate or require technological innovation (such as carbon storage or electric cars), and what are the provisions for dealing with potential risks from these new technologies?

In addition to these potential research questions there is also an overall issue that emerges from the complexity of the current regulatory regime. When considering all climate-related rules that have been adopted in the EU thus far as a whole, a web of different obligations emerges, addressing many different actors, but it is not woven in a systematic, easy-to-follow, pattern. A simplification, perhaps even reduction, of the legislative provisions of EU climate law is one possible response to the situation. At the same time, calls to strengthen

8 A simple definition of the field of EU climate law would be: all principles, rules, and court decisions adopted within the European Union that deal with climate change.

the European Union's emission-reduction ambition are on the rise.[9] This leads to what is perhaps the most challenging question about the current package of EU climate law for legal scholars to answer: Can the legislation be simpler, yet more ambitious?[10]

3 A Demanding Endeavour

Given the vast and complex package of regulatory instruments in the field of EU climate (and energy) law, it is hardly imaginable that a person could know all of the European Union's rules relating to the mitigation of greenhouse gas emissions, let alone understand how they play out in practice, including in the related case law. This puts scholars, but, even more importantly, the public authorities and emitters that ultimately have to implement and comply with those rules, in a challenging position. It also holds true for civil society, particularly environmental NGOs that try to influence decision-making in a more ambitious direction and monitor the application of the rules. One may wonder to what extent judges themselves struggle with the interpretation of the legal obligations.[11]

For those wishing to experience the complexity I am alluding to, I recommend reading the CJEU's judgment of 28 April 2016, which declared invalid a decision of the European Commission determining the so-called "uniform cross-sectoral correction factor" for the free allocation of greenhouse gas allowances.[12] Apart from illustrating the administrative/technical complexity

9 See the interview with Jean-Pascal van Upersele: Euractiv (by Frédéric Simon), Ex-IPCC Vice-chair: EU contribution to Paris goals is 'unambitious and outdated', 10 July 2018, <www.euractiv.com/section/climate-environment/interview/ex-ipcc-vice-chair-eu-contribution-to-paris-goals-is-unambitious-and-outdated/1255283/>, but, even more importantly, case T-330/18, *Carvalho and Others v. Parliament and Council*, lodged on 23 May 2018, claiming that there should be a more ambitious emission-reduction target under EU legislation.

10 I have elaborated on the complexity and possible simplification of EU climate law in Marjan Peeters, 'Instrument Mix or Instrument Mess? The Administrative Complexity of the EU Legislative Package for Climate Change', in Marjan Peeters and Rosa Uylenburg, *EU Environmental Legislation: Legal Perspectives on Regulatory Strategies* (Cheltenham UK: Edward Elgar, 2014), 173–192.

11 One may also question, and hence investigate, whether the legislative institutions, including the individuals who are part of those institutions, have sufficient knowledge of the matters they decide on, such as on the allocation regime for tradable allowances or on the feasibility and impact of regulations for road transport, including their impact on situations outside the European Union.

12 *Borealis Polyolefine GmbH and Others v. Bundesminister für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft and Others*, Joined Cases C-191/14, C-192/14, C-295/14, C-389/14,

of EU climate law, the case shows how a core but technically complex decision of the European Commission on the functioning of the EU ETS was found to be unlawful. The court did not refrain from delving into the legal complexity and assessing the validity of the decision. Thus the legal system seems to function in the sense that recourse to the judicial system in the European Union can result in a thorough judicial review of the administration's actions, even those of the very highest administrative organ—the European Commission.[13] Nevertheless, it falls to scholars to examine whether the court's reasoning is convincing and whether alternative arguments on the interpretation of the legal framework could have been developed. It is a standard scholarly task to debate how, in view of the complex legislation, the courts—and in particular the CJEU—construct their argumentation. It has already been observed that climate-related adjudication, as well as the study of it, are difficult exercises. For instance, Fisher and colleagues point to the normative challenge facing courts to resolve climate disputes correctly.[14] For insights into whether courts decide disputes in the best way, legal scholarship can scrutinize the quality of the judicial argumentation, thereby highlighting not only whether other solutions could have been taken but also whether, and what kind of, normative choices are embedded in actual judicial considerations.

Anyone dedicated to achieving a thorough understanding of EU climate law must also update her or his knowledge almost continuously (as is no doubt the case in other disciplines of law, although at a different level of intensity).[15] The package of EU climate rules is characterized by frequent and multiple amendments. This is a good thing, as long as change is motivated by improving and strengthening the regulatory approaches.[16] At the same time, legislative changes often lead to new legal questions for which answers are unpredictable,

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and C-391/14 to C-393/14, ECLI:EU:C:2016:311. The effects of the declaration of invalidity were limited to a certain period of time; see the verdict.

13 The peculiarity of this case is that industries went to court essentially arguing for more generous free allocation of tradable greenhouse gas allowances, while the outcome of the case points in the opposite direction of more stringent free allocation.

14 Elisabeth Fisher, Eloise Scotford, and Emily Barritt, 'The Legally Disruptive Nature of Climate Change', 80(2) *The Modern Law Review* 173 (2017), 180 and 197.

15 In this respect, it would be interesting to investigate which fields of EU environmental law generate the most legislative developments and case law. I have the impression that EU climate legislation stands out for its changing nature, but this could be further examined.

16 There is at least one example of a softening of EU climate rules. This happened with regard to the scope of the EU ETS by first including, and then excluding, flights to and from third countries. This exclusion took place even while the CJEU could not find a reason for the inclusion being unlawful; see case CJEU C-366/10 (*Air Transport Association of*

leading to court appeals. To embark on a study of EU climate change case law entails that, to understand just a single case—by reading the CJEU decision along with the prior opinion of the Advocate General—can easily take half a day. Understanding the content as well as tracking the development of EU climate law is thus a very demanding endeavour.

4 Delving Into Complexity Implies Prioritization and Cooperation...

As discussed above, the EU regulatory package is vast, dynamic, and complex. Nonetheless, behind the complex law (such as that establishing the verification of emission reports under the EU ETS),[17] important decisions can, and need to be, identified.[18] The discussion of the many important legal elements in the EU climate law package thus calls for specialization. For example, Regulation 2018/841 of the European Parliament and the Council of 30 May 2018 established a regime for the inclusion of greenhouse gas emissions and removals from LULUCF in the EU climate and energy framework. It aims for a reduction in emissions of at least 40 per cent by 2030 compared with 1990. It obliges member states to ensure that LULUCF emissions do not exceed removals, and it provides an extensive body of accounting rules for afforested land, cropland, and managed wetlands, among other types of activity, as well as for natural disturbances. It also provides "flexibilities" for member states, including the possibility to transfer a surplus of removals to another member state (article 12(2)). Legal scholarship could embark on a study of how the credibility of this approach (e.g. the compliance of member states with the application of the accounting obligations) can be ensured, and also what kind of transparency surrounds how member states act. Another example concerns legislative approaches enabling carbon capture and storage. The EU Directive on CCS provides a permit regime (with an advisory competence for the European Commission in cases of permit decisions by national authorities, which is unique in EU law) and a monitoring-and-liability regime, including a provision

America and others v. Secretary of State for Energy and Climate Change), 21 December 2011, ECLI:EU:C:2011:864.

17 See, for instance, Commission regulation (EU) No 600/2012 of 21 June 2012 on the verification of greenhouse gas emission reports and tonne-kilometre reports and the accreditation of verifiers pursuant to Directive 2003/87/EC of the European Parliament and of the Council (together with relevant articles of the EU ETS directive).

18 An example is the attribution of important monitoring tasks to private actors. However, does this function well, and, more specifically, how is trustworthiness (and so ultimately effectiveness) ensured?

on corrective measures in case of leakage.[19] Here the application of public-participation provisions is relevant, particularly where the activity would take place on land (near human settlements) or threaten other environmental values. The possible clash between CCS law and nature-conservation law would be another subject for legal analysis.

Furthermore, a whole book could be written on each of the two core elements of the EU climate law package—the EU ETS and the effort-sharing approach.[20] Books are more useful than articles in achieving a comprehensive and sufficiently in-depth analysis. Through such books, or special editions of journal issues, intense and fruitful cooperation can take place among scholars. Multi-author publications also present an opportunity to develop a multidisciplinary approach. For instance, for the functioning of the EU ETS to be understood, what is required is not only the knowledge of lawyers (of different disciplines, such as civil law, administrative law, and tax law) but also of economists. Moreover, the extraterritorial effects of EU climate law are an important issue. If we wish to understand the effects of EU climate law, we need to investigate, for instance, how the internal legislation creates a demand for biofuels, or for (substances to be used in) batteries, and how this in turn has an impact on third countries, including developing countries.

5 ...While Keeping Track of Important General Legal Developments

Furthermore, the analysis of regulatory instruments in the field of EU climate law cannot be conducted without taking account of the (unique) internal institutional and other fundamental legal provisions (such as legal principles) of the EU itself, which may be relevant where legal conflicts arise. The case law shows that judges are called upon to clarify to what extent the European Council, which according to Article 15 of the Treaty on European Union consists of the political leaders of the member states, may direct the decision-making of the EU legislature. The European Council has adopted detailed observations on how EU climate legislation should develop.[21] However, in adopting EU

19 Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006.

20 This approach distributes binding emission targets among the EU member states for emissions not covered by the EU ETS.

21 European Council conclusions adopted during the meeting of 23 and 24 October 2014, <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/145397.pdf>.

legislation, detailed views on the desired content of the legislation may be introduced by the European Parliament (where the citizens of the European Union are directly represented at the EU level) and the *Council*—different from the *European* Council.[22] The Council consists of representatives of the national governments (such as environment ministers). Ultimately, it has become clear in the case law that the European Council cannot order the EU legislature to adopt a decision.[23]

In sum, legal scholars are confronted with the task of, on the one hand, studying the specific (and complex) body of EU climate law, and, on the other hand, interpreting the specific legal issues in the broader context of institutional, constitutional, administrative, private, criminal, and tax law, as relevant.

On top of all this, legislative provisions of EU environmental law that are not specifically about climate change are relevant to an understanding of EU climate law. They include legal provisions implementing the Aarhus Convention on access to information, public participation in decision-making, and access to justice in environmental matters. To give an example of the relevance of the Aarhus Convention to EU climate law: To what extent is it possible for environmental NGOs to gain access to information concerning the assessment of whether biofuels comply with the sustainability requirements as regulated in the Renewable Energy Directive, and how should public participation be arranged in case of (fierce) citizen protest against the establishment of windturbines or CCS projects?

6 Beyond the Taboo: Sketching Necessary Choices for EU Climate Law Scholarship

All in all, given the breadth, complexity, and dynamic nature of EU climate law, it is a huge challenge for EU climate scholars to map and understand it well. It should not be taboo to concede that even scholars who devote all their available time to analysing EU climate law may fall short of having a thorough appreciation of the "state of the art" of EU climate law—for it is nearly impossible for anyone to have it. Instead, scholars must decide how to further

22 See Article 16 of the Treaty on European Union.

23 See CJEU C-5/16, decided on 21 June 2018, ECLI:EU:C:2018:483, *Republic of Poland v. European Parliament, and the Council of the European Union*, paras 76–91, considering that a legislative strengthening of the EU ETS by means of an earlier entry into force than indicated by the European Council of the so-called market stability reserve mechanism is allowed.

develop their research agenda and prioritize the most important topics. Cooperation among scholars specializing on different topics may be advantageous, as it can be more efficient to join forces than to try to examine EU climate law on one's own. But what is the priority? Is it to focus on how the development of new technologies, which we urgently need for reducing and capturing emissions, can be stimulated and managed by legal regimes?[24] Or should we prioritize the investigation of the extent to which governments could, by using the law, change citizen behaviour (e.g. to eat less meat, use less energy, take fewer flights)? Or should we prioritize the impact of the EU climate legislation on other countries in order to understand the dramatic environmental social and economic effects that EU climate law may cause externally, such as on the mining of cobalt in Africa for use in batteries for electric vehicles in Europe[25] or the cultivation of biofuels in developing countries for European use?[26]

Alternatively still, is it better to focus on adaptation (including on how the EU could help developing counties) and question to what extent EU law facilitates or perhaps even frustrates adaptation activities (e.g., in the Netherlands, dykes may cause negative effects for the water ecosystem), or should we focus on the possibility that member states legally have to take more stringent action than is so far provided for by the EU legislature, considering the potential negative effects that more stringent national measures may have on the free movement of goods and even the unity of the European Union? Perhaps the core focus has to be the courts—examining, for example, whether and how judges can fill gaps in climate legislation. Above all, whatever choices are made, the scholarly work on whether and how the EU succeeds in its endeavour to deal with the climate change problem should be critically, but also, in my view, constructively debated. At a time when EU institutions face much criticism and the European Union itself is questioned by many across EU member states, scholars face the task of finding a balance between, on the one hand, being

24 See the keynote lecture of Geert van Calster at the 17th IUCN Academy of Environmental Law Colloquium, Glasgow, 4–6 July 2018, <www.strath.ac.uk/research/strathclydecentreenvironmentallawgovernance/events/conferences/2018thetransformationofenvironmentallawandgovernanceinnovationriskandresilience/keynotespeakers/geertvancalster/>.

25 See the discussion of this issue by Amnesty International, 'Time to Recharge', 2017, <www.es.amnesty.org/uploads/media/Time_to_recharge_online_1411.pdf>.

26 On the "global" environmental footprint of the EU, see the keynote lecture of Joanne Scott at the 17th IUCN Academy of Environmental Law Colloquium, Glasgow, 4–6 July 2018, <www.strath.ac.uk/research/strathclydecentreenvironmentallawgovernance/events/conferences/2018thetransformationofenvironmentallawandgovernanceinnovationriskandresilience/keynotespeakers/joannescott/>.

frank about EU climate measures that could be improved, and, on the other hand, recognizing the fact that, thus far, the EU has managed to move forward with important binding laws regulating emission reductions that most likely would not have been achieved if the member states had had to decide such matters on their own.