

EU law and climate change

Nick Flynn explains how EU law is attempting to address anthropogenic climate change.

“We need more Europe, not less” Angela Merkel proclaimed in 2012 to the annoyance of eurosceptics. She was speaking in the context of the global financial crisis, but a parallel climate crisis is unfolding that is likely to have a much greater impact than any austerity measure. The EU has a track record of innovation in the field of environmental law. We might ask then whether Angela Merkel’s prescription for more Europe holds good for the climate also?

Environmental problems have never been respecters of borders or political authority, and today the implications of this feature are profound. Population growth is accelerating. The concentration of greenhouse gases (GHGs) in the atmosphere has risen rapidly from 270 ppm at the start of the industrial age to just over 400 ppm today, a change that would normally have taken many millennia and a level not seen for 3 million years. At the same time, we are witnessing what many believe to be the sixth mass extinction.

Such changes have always occurred, but their scale and pace is now unprecedented. Natural variations in the climate have always produced winners and losers as societies in one location are undermined while those in another thrive. But this pattern has been disrupted environmental, economic and societal pressures have intensified and multiplied. A robust scientific consensus now gives fair warning that avoiding the most serious climate risks requires GHG emissions to peak in 2020 and fall rapidly thereafter. A ‘business-as-usual’ model of significantly rising emissions will simply guarantee that everyone in our highly interdependent and interconnected world loses.

CROSS-BORDER ENVIRONMENTAL ISSUES

The scientific community has been clear about the risks,

but there is a significant gap between the scale of the problem and the international community’s efforts to agree rules that might solve it. We should not be surprised. The strategic importance of cross-border environmental issues only began to be acknowledged properly in the 60s and 70s with the UN Conference on the Environment in Stockholm in 1972, followed by the Bruntland Report in 1987 and then the Rio Conference in 1992, which led to both the UN Framework Convention on Climate Change (UNFCCC) and the Convention on Biological Diversity (CBD) in the same year. The two Conventions are legally binding and undoubtedly important for creating an international framework for action in their areas, but their lack of specific targets or detailed requirements has limited their impact.

The same period did, however, witness momentum at the domestic level with the introduction of meaningful environmental laws and regulators in both the USA and in Europe. Since that time, the two blocs’ behaviour has diverged and other players have emerged with their own agendas. While the USA has typically refused to ratify the most important environmental treaties, the EU has embraced global environmental policy and broken new ground in the pooling of sovereignty. Over the same period, China, India and other countries’ economies have grown enormously but they have been cautious about limiting their increasing power and influence by submitting to binding global rules, particularly regarding commitments that might inhibit their economic development.

FIT FOR PURPOSE?

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▼ EU Parliament



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FIT FOR PURPOSE?

Such differences in approach may be par for the course, but the urgency and scale of climate challenge begs the question of whether the current international legal machinery remains fit for purpose and, if not, how to fix it. As seen in the case of the Conventions discussed above, the typical international treaty commitment is often vague and aspirational. Even when states do take on specific commitments, international law lacks the enforcement machinery that is typically found in domestic systems, and this means that collective action can be very weak if the political will to act is lacking. Sanctions for non-compliance are generally based on the loss of privileges such as voting rights or future increases in commitments in emissions reductions, for example. Sanctions of this kind are apt to be ignored.

These arrangements reflect the habits and norms of sovereign states dealing with each other, at least in principle, as equals subject to no higher authority. The Conference of the Parties (COP) to the UNFCCC is a case in point. It operates by consensus: in principle nothing is agreed until everything is agreed by all 195 parties. Although in the long run everyone has much to lose from exploiting this fact in order to obstruct agreement, in the short term many see tactical advantages in delay. The scientific consensus is therefore politely acknowledged, but in practice, ignored. Over their 20 years, the UNFCCC and its associated Kyoto Protocol have failed to reduce global emissions of GHGs – quite the reverse.

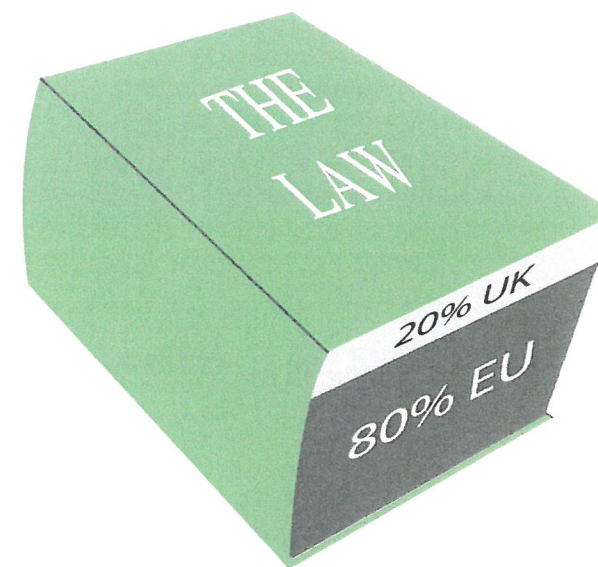
As the IPCC's and other bodies' warnings have increased, a consensus has emerged that a new approach is needed, but with little agreement on how or what it should look like. Trumpeted as a success by some, in Durban in 2011 the COP arguably simply tore up the carefully negotiated road map that it had been following for the previous four years. Delegates restarted the process with the aim, this time, of agreeing a new globally applicable treaty by 2015 which is only to come into force in 2020. We might note that this also happens to be the year in which the science community warns that emissions must peak to avoid the biggest climate risks. The gap between reality and the path we need to travel appears to be getting bigger and starker.

So what is to be done? Imaginative thinking about national sovereignty and international collaboration is required but seems to be lacking. The EU meanwhile has the most ambitious environmental law programme of any regional international body and, even though it faces serious economic and political challenges, its example of sovereign states submitting to the binding rules of a higher authority to deal with cross-border political and economic issues is a useful model for the international community if the political will and ambition existed to follow it.

THE EU'S RECORD

The EU has promulgated more than 200 specific laws covering environmental issues. The majority of these laws have been in the form of directives, leaving the choice of implementation methods up to the member states to reflect the principle of subsidiarity, which encourages the lowest appropriate level of government to make important decisions. It is estimated that 80 per cent of UK environmental law has its origins in EU requirements and, although performance is by no means uniform, such requirements are largely properly implemented and enforced, in contrast to many international commitments.

These laws cover a wide range of environmental subjects, from use of landfill to habitat protection, the handling of waste, the quality of water and air, and the prevention



▲ 80% of the UK environment law has its origins in EU requirements

and clean-up of contamination. They have a significant impact both within and outside the EU.

REACH

To take one example, the 2007 Regulation on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) was a ground-breaking response to the difficulty of ensuring the safety of the many chemicals on sale in the EU market. REACH's innovation was to make participants in the chemical supply chain, rather than public authorities, responsible for evaluating and reporting the relevant associated risks. The US position under the Toxic Substances Control Act has been very different, with regulators hampered by Congress persistently refusing to contemplate reform. The EU model has, by contrast, set the agenda for chemical manufacturers and their customers on a global basis, as they have adapted products to comply with the requirements of the wealthiest consumer market in the world. This includes many US companies who have EU customers. In addition, China has introduced its own version of REACH. The original EU law is one of the most complex pieces of legislation in history and has changed the chemical sector globally. It shows what can be done when the political will exists.

The EU has also demonstrated innovation, impact and leadership in the field of climate legislation. It was the only major power other than Australia at the recent UN climate conference in Doha to commit to emissions reduction obligations under the second Kyoto Protocol commitment period which started in January 2013. There are questions over the effectiveness of EU climate policy

instruments but, again, it offers a model for pooling sovereignty, sharing responsibility and influencing global action that the wider international community might note.

For example, the EU Emissions Trading Scheme (EU ETS) began operation in 2005 as a key part of achieving the bloc's emission reduction obligations under the Kyoto Protocol, thus creating the first large-scale carbon 'cap and trade' market in the world. It covers more than 40 per cent of the EU's total GHG emissions from 11,000 power stations and manufacturing plants in the 27 EU member states as well as Croatia, Iceland, Liechtenstein and Norway. Flights within and between most of these countries are now also covered.

The EU Effort Sharing Decision of 2009 complements the EU ETS by setting binding GHG emission reduction targets in sectors that are not subject to the main carbon market. These sectors include agriculture, buildings, housing waste and transport, which represent around 60 per cent of total GHG emissions in the EU. The Decision requires that by 2020, total EU GHG emissions from these sectors be cut by 10 per cent compared to 2005 levels. The Effort Sharing Decision and the EU ETS are the key policy instruments for achieving the EU's overall emission reduction target of 20 per cent by 2020.

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Compared to recent efforts by Barack Obama to introduce climate measures while bypassing a reluctant US Congress or China's efforts to reduce its carbon intensity (the level of emissions relative to economic output) while opening two coal-fired power stations every week, this is a record of real leadership in this field.

COMPLEX OUTCOMES

The picture in terms of outcomes is, however, complex. The European Environment Agency records that in 2013 EU GHG emissions are around 18 per cent less than 1990 levels, which puts the EU on track to comply with its own climate commitments. Global emissions, however, have increased by approx 45 per cent by reference to the same criteria, and the EU's performance may have more to do with Angela Merkel's commitment to austerity than the design of its climate laws. The carbon price in the EU ETS, the flagship policy instrument, has collapsed to little more than €4 per tonne. The EU Parliament recently frustrated the EU Commission's effort to remove 900

million carbon allowances from the market and thus drive up the price to the much higher level that might incentivise the transition to a low-carbon economy.

Undoubtedly there are problems with the EU model. Its currency and banks are threatened while its citizens struggle with falling living standards. Its much-vaunted carbon market is moribund and its support for the Kyoto Protocol is almost splendid in its isolation. But its 50-year history proves that states will submit to binding and meaningful limitations to their sovereignty with enormous environmental and social consequences if the political will and vision are there.

MORE NOT LESS

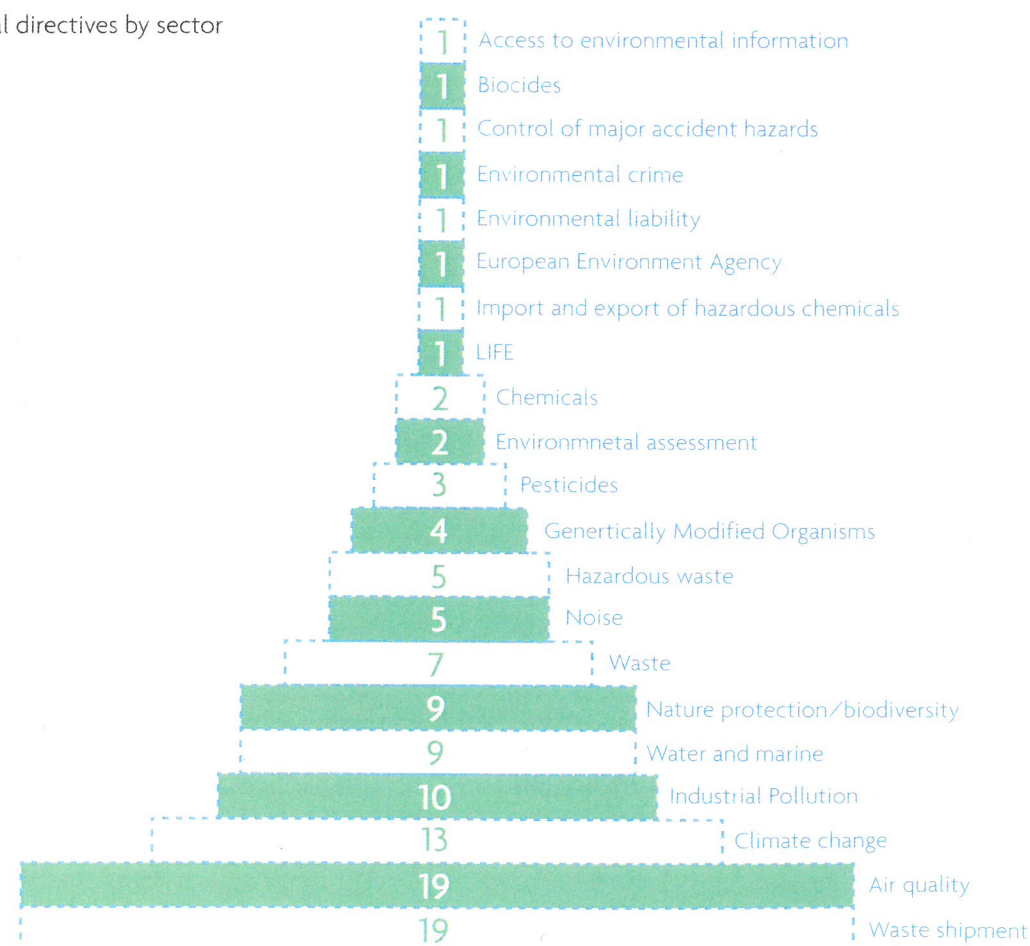
Fifty years ago such will and vision emerged from the ruins of a continent devastated by a global war. Decisions of huge strategic importance were taken to replace conflict with peace and cooperation. They resulted in community of approximately 500 million people benefiting today from levels of freedom, prosperity and environmental protection that, despite recent problems, are among the highest in the world. Yet again, strategic decisions are urgently awaited, upon which the destinies of billions of people depend. Whether those decisions

will be robust from the point of view of scientific rigour and in terms of legal justice and fairness is the critical question. As the international climate talks stall for lack of political will and vision, it may indeed be a time not for less Europe, but more. **ES**

The views expressed in this article are solely those of the author.

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► EU environmental directives by sector



The consequences of not implementing EU law

Colin Reid uses the Environmental Impact Assessment Directive to explain the ways in which the European Commission and Court enforce EU law.

Legal systems are constructed on the basis that most of the time most people will obey the rules, while recognising that inevitably on occasion some people will not. The same applies to the European Union. Not every member state fulfils its obligations on every occasion, to give full effect to the laws that have been agreed in Brussels after the prolonged legislative process. There can be a variety of reasons, ranging from a deliberate attempt to avoid a rule to a genuine but mistaken belief that everything has been done to comply with the law.

Various mechanisms have been developed to respond to such failures. The Environmental Impact Assessment Directive provides a good example of the ways in which these mechanisms operate and the ways in which cases come before the courts.

ENVIRONMENTAL IMPACT ASSESSMENT DIRECTIVE

The Directive on Environmental Impact Assessment (EIA) was adopted in order to ensure that the environmental consequences of major developments were taken into account before deciding whether or not they should go ahead¹. The way in which Directives work is that they do not change the law in the member states, but rather specify what the end result should be. This is the mechanism used for most EU environmental law. The result to be achieved in this case was that an EIA fulfilling the requirements set out in the Directive should be carried out as part of the approval process for any developments in the categories listed therein. It was then up to the member states to effect this in their own legal system by a set date (in this case three years after the Directive was made) in the way that they thought most appropriate.

In the UK, most of the categories of development that were covered already required planning permission, so the assessment was simply added as a stage in the

procedure of obtaining such permission. For other categories, either it was added to the existing statutory approval processes (as for highways and pipe-lines) or a new approval procedure, incorporating an EIA, had to be introduced (as for some forestry developments).

However, in a number of ways the initial response did not fully meet the requirements of the Directive, and this has given rise to two forms of litigation that have reached the Court of Justice of the European Union, which sits in Luxembourg. The first route is direct enforcement action (often called 'infraction proceedings') taken by the European Commission to carry out its role of ensuring that member states do in fact comply with EU law. The second arises when an individual party argues that EU law has not been properly implemented and goes to court to claim that the position in the UK is in breach of EU law.

INFRACTION PROCEEDINGS

Action to ensure that member states are complying with EU law is primarily in the hands of the Commission². The Treaties also enable any member state to start legal proceedings against another in the European Court, but this very rarely happens since it is a politically provocative act and each state knows that if it does so it is vulnerable to retaliatory action in areas where it in turn is not fully complying with the law. There is no right for individuals or companies to take a state to the Court in this way.

The Commission does not have an inspectorate or police force to seek out cases of non-compliance but learns about these from the reports that member states may have to provide to show what they have done to implement a Directive, from its own limited desk-based studies of national law and, more importantly, from complaints received from individuals and companies.

When a potential breach of EU law is discovered, there are several stages to the procedure, with opportunities for cases to be settled or dropped at each stage:

- **Administrative stage:** there is an exchange of correspondence between the Commission and the member state about the alleged breach, giving both sides the chance to explain why they think that there is or is not a breach, and giving the state a warning that infraction proceedings are being contemplated. Many cases where states have been slow to implement Directives are resolved at this stage;
- **Reasoned opinion:** the Commission formally sets out the grounds on which it alleges that the law is being breached and its decision to take things further. This defines the issues that may be heard by the Court and also sets the date at which a member state's law is to be judged. Any changes in the national law after the date set in the reasoned opinion will be disregarded by the Court in judging whether or not a state has complied with the law;
- **Court hearing:** the Court hears argument from the Commission and the state, and determines whether or not the state is in fact in breach of EU law. If it is, the Court's decision does not actually change anything, but the member state is under a specific obligation to ensure that it obeys the judgment and makes the necessary changes to its law to give full effect to the Directive; and
- **Second Court hearing:** if a member state does not respond fully to the Court's decision, the Commission can refer the case back to the Court, this time asking for sanctions to be imposed on the member state. These can take the form of a lump-sum penalty or a periodic penalty (annual, monthly or daily) until compliance is reached, or both. The penalties can be substantial: France had to pay a lump sum of €20 million for breaches of fishing rules, plus over €57 million for every further six months that the breach persisted³, and in December 2012 Ireland lost two environmental cases (one on EIA), leading to penalties of €3.5 million plus €12,000 per day until the breach still outstanding was cured⁴.

An example of this process came in 2005 when the Commission took the UK to the Court on the basis that the EIA Directive was not properly implemented, since at that date development undertaken by the Crown could go ahead without being subject to an EIA⁵. When taken to Court the UK admitted its failure, and did change the law soon afterwards. This case also shows that it can be a long time after the due date for implementing a Directive before infraction proceedings are initiated and a case comes to Court.

In this case the reasoned opinion was made in 2003, and it was early 2006 before the Court gave its judgment, seven years after the date for implementing the specific amended Directive on which the case was formally based and almost 18 years after the date when the law should first have been changed to comply with EU measures on this point.

PRELIMINARY RULINGS

The second way for litigation to reach the Court of Justice is as a request for a preliminary ruling from a national court after a case has been raised there⁶. Individuals cannot themselves go to the Luxembourg Court to argue that a member state has failed to implement a Directive, but they can go to the national courts to challenge the legality of what the state is doing on the grounds that it is not in compliance with EU law. The national court can determine this itself, but if the national court considers that there is a question about the interpretation or application of the EU law that needs to be resolved to decide the case, then it may, and in some cases must, refer the case to Luxembourg. Additionally, any argument that an EU measure itself is invalid must be referred in this way.

The individual cannot force the national court to make a reference and it is also the court that frames the question to be asked. This takes the form of a legal question phrased in terms of general application, for example asking how a provision should be interpreted, not asking about the outcome of the specific case. The Luxembourg Court responds to the question and the case then goes back to the national court which has to apply the ruling to the specific circumstances of the case before it can reach its conclusion.

This procedure ensures consistency across the EU rather than each state's courts coming up with their own, potentially conflicting, decisions on what EU law means or requires. At the same time it allows the national courts to act as a filter, preventing the European Court from being swamped by ensuring that only those cases where there is a genuine issue to be resolved are passed on to it.

BARKER VS BROMLEY

To illustrate this process we can look at the case of Diane Barker, who in 2000 sought judicial review of the decision by Bromley Council to approve a major development in Crystal Palace Park⁷. The development was considered under a two-stage procedure whereby outline permission was given to the general principle of the development and then the final details were to be approved as "reserved matters". In accordance with the relevant statutory provisions (which were meant to implement the EIA Directive), the Council considered the need for an impact assessment at the first stage (it was agreed that none was necessary) but when it came to consider the reserved matters it did not address the

question of whether an assessment might be required. Mrs Barker claimed that the terms of the Directive meant that the need for an EIA should be considered at each stage and that the council's action, and the UK regulations it was applying, were in breach of EU law. If so, the council was acting unlawfully and the English courts should say so.

She lost her case before the Queen's Bench Division and then the Court of Appeal, both of which were clear that the English rules did adequately implement the Directive and that therefore there was no illegality. Moreover they thought the issue clear enough for there to be no need to refer it to the European Court. When the case reached the House of Lords, though, the judges there considered that there was enough doubt to require a ruling from Luxembourg on the application of the Directive to multi-stage procedures.

The European Court held that where there is a two-stage process, the need for an EIA had to be considered at both stages. When the case returned to the House of Lords, their task was to apply this ruling to the facts, which meant that the procedure followed by Bromley Council had to be declared unlawful, so Mrs Barker won her case. Moreover, to avoid the risk of subsequent infraction proceedings for having national rules that did not properly implement EU law, the planning regulations had to be, and were, changed, to reflect the interpretation of the law given by the European Court.

A key point to note is the time that the case took. It was first heard in an English court in April 2000, was referred to Luxembourg by the House of Lords in June 2003, was decided there in May 2006 and the final decision in the House of Lords was given in December 2006. It is clear that enforcement of EU law is not a rapid process, whether through infraction proceedings by the Commission or through a preliminary ruling sought by the national courts.

OTHER REMEDIES

This account has been phrased in terms of implementing a Directive, but the same processes apply for any alleged breaches of EU law. In addition, the European Court has held that in certain limited circumstances the provisions of the Treaties or a Directive can be given "direct effect", in other words they can be regarded as creating enforceable legal rights and obligations within a member state even though no national implementing measures have been adopted. Also, if a member state's failure to comply with EU law reveals a "manifest and grave" error, then in some circumstances a party who has suffered a loss as a direct result of this failing may be able to recover compensation.

CONCLUSION

The EU legal system provides ways of trying to ensure that member states do properly obey EU law. Nevertheless the process is slow and therefore member states can get away with non-compliance for years, even if the Commission identifies the failing and decides to take action. Individuals have no right to go directly to the European Court and cases that start in the national courts may lead to a request for a ruling from Luxembourg, a process that adds further to the cost and delay of seeking judgment. The imposition of penalties for continued non-compliance does give the EU some sanctions against member states that are not doing what they should be, but at times all states appreciate the 'wriggle room' given by the inefficiencies of the enforcement mechanisms. **ES**

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SOURCES

1. Directive 85/337 EEC, amended most notably by Directive 97/11/EC and now replaced by Directive 2011/92/EU
2. Arts 258-260, Treaty on the Functioning of the European Union (TFEU)
3. Commission v France (C-304/02)
4. Commission v Ireland (C-279/11); Commission v Ireland (C-374/11)
5. Commission v UK (C-37/05)
6. Art 267, TFEU
7. R (Barker) v Bromley London Borough Council 2000 WL 544117, [2001] EWCA Civ 1766, 2003 WL 21491809; [C-290/03]; [2006] UKHL 52