

European Climate and Clean Energy Law and Policy

Leonardo Massai



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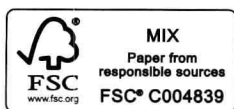
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*European Climate and Clean
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To Giulia and Ernesto

Preface

The origin of this book can be traced back a number of years. It all started with the desire of the author to keep track of the increasing amount of legislation and activities of the European institutions, Member States and international community in the field of climate change and clean energy. As a practitioner and academic directly involved in the field, the need for a constant and frequent update on these matters was the main reason behind this book.

The official sources of information dealing with European Union (EU) climate and clean energy, mainly the website of the EU, soon proved to be too limited in their role and function to respond to the needs of experts working and researching in the field. Furthermore, requests for information from individuals with less experience have also grown substantially in number.

The collection of the material for this book started around 2003 when the author began to assemble legislation, policy and communication papers and official reports. One of the main features of the electronic book is the up-to-date linkages it gives to the original sources, representing a unique product in the panorama of EU and international literature. This work has grown rapidly in terms of volume and the importance of climate change and clean energy issues on the agenda of the international and European community, and it will contribute to further develop the agenda.

The book therefore presents an unprecedented compilation of information on climate and clean energy law and policy in Europe since the early 1990s, in terms of the themes considered and information provided. It aims to show the extent of the EU's commitment towards the development of an advanced environmental policy to fight global warming and to boost clean energy, independently from the developments in international law.

Due to the close relationships and interlinkages between the various issues addressed in this book, the ordering of the chapters, which cover different thematic areas, is solely based on the choice of the author, with a view to providing as much clarity as possible. Inevitably, chronological order is not always maintained and the same information can appear in different chapters.

Special recognition is due to Environmental Data Services (ENDS), Europe's major source of environmental news and information, which has often proved to be an excellent inspiration for the author.

Contents

<i>List of Acronyms and Abbreviations</i>	<i>ix</i>
<i>List of Figures and Tables</i>	<i>xiii</i>
<i>Preface</i>	<i>xv</i>
1 Introduction to European Environmental Law	1
2 The International Climate Regime	10
2.1 The UNFCCC	12
2.2 The Kyoto Protocol	16
2.3 The Kyoto Protocol: Operational measures	26
2.4 Post-2012	30
3 The Foundations of European Climate Policy	49
3.1 Early provisions	49
3.2 The EU in the international climate regime	52
3.3 The EU Burden Sharing Agreement	56
3.4 Internal structure and climate change negotiations	59
4 The Environment Council	68
5 Clean Energy	71
5.1 Energy taxation	77
5.2 SAVE, ALTENER and research	80
6 Energy Efficiency	89
7 Renewable Energy	102

8	Transport Sector and GHG Emissions	113
8.1	Road transport	115
8.2	Aviation	125
9	Greenhouse Gases Emissions Monitoring and Reporting	132
10	European Climate Change Programme	153
10.1	ECCP I (2000–2001)	153
10.2	Second phase of ECCP I (2001–2003)	154
10.3	ECCP II	156
11	Carbon Capture and Storage	159
12	Fluorinated and Other Gases	163
13	Agriculture and Forestry	168
14	European Allowance Trading Directive 2003/87/EC and its Amendments	170
14.1	National Allocation Plans	172
14.2	Second phase National Allocation Plans	175
14.3	EU ETS review	180
14.4	Registries	188
15	Linking Directive	192
16	EU and post-2012	196
16.1	Integrated climate and energy package	206
17	Impacts and Adaptation	217
18	Climate Change Litigation	222
19	Compliance	228
	<i>Bibliography</i>	230
	<i>Index</i>	233

List of Acronyms and Abbreviations

AAU	assigned amount unit
AGBM	Ad Hoc Group on the Berlin Mandate
AOSIS	Alliance of Small Island States
APP	Asia-Pacific Partnership
ASEAN	Association of Southeast Asian Nations
AWG-LCA	Ad Hoc Working Group on Long-term Cooperative Action
AWG-KP	Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol
BAP	Bali Action Plan
BAPA	Buenos Aires Plan of Action
BSA	Burden Sharing Agreement
CACAM	Central Asia, Caucasus, Albania and Moldova
CBD	Convention on Biological Diversity
CCS	carbon capture and storage
CCPM	common and coordinated policy and measure
CDM	Clean Development Mechanism
CEEC	Central and Eastern European countries
CER	certified emission reduction
CFC	chlorofluorocarbons
CFI	Court of First Instance
CG11	Central Group 11
CHP	combined heat and power
CITL	Community Independent Transaction Log
CLRTAP	Convention on Long-Range Transboundary Air Pollution
CMP	Conference of the Parties/Meeting of the Parties
CO ₂	carbon dioxide
COP	Conference of the Parties
COREPER	Committee of Permanent Representatives
DNA	Designated National Authority
DOE	Designated Operational Entity
EACI	Executive Agency for Competitiveness and Innovation
EAP	Environment Action Programme
EATD	European Allowance Trading Directive (2003/87/EC)
EC	European Community
ECCP	European Climate Change Programme
ECJ	European Court of Justice
EEA	European Environment Agency
EEC	European Economic Community
EEPR	European Energy Programme for Recovery
EEV	enhanced environmentally friendly vehicle
EEW	Energy Efficiency Watch

EFTA	European Free Trade Area
EIT	economy in transition
ELV	end-of-life vehicle
ENDS	Environmental Data Services
EPER	European Pollutant Emission Register
ERU	emission reduction unit
ET	emissions trading
ETS	emissions trading scheme
EU	European Union
EUA	European Union allowance
FAO	Food and Agriculture Organization
GEF	Global Environment Facility
GHG	greenhouse gas
GO	guarantee of origin
GWP	global warming potential
HFC	hydrofluorocarbon
IASG	Impact and Adaptation Steering Group
ICAO	International Civil Aviation Organization
ICT	information and communication technology
IET	international emissions trading
INC	Intergovernmental Negotiating Committee
IPCC	Intergovernmental Panel on Climate Change
IPPC	integrated pollution prevention and control
ISO	independent system operator
ITL	International Transaction Log
ITO	independent transmission operator
JAMA	Japanese Automobile Manufacturers Association
JI	joint implementation
JISC	Joint Implementation Supervisory Committee
JUSSCANNZ	Coalition of non-EU Annex I Parties, guided by Japan, the United States of America, Switzerland, Canada, Australia, Norway and New Zealand
KAMA	Korean Automobile Manufacturers Association
KP	Kyoto Protocol
LCV	light commercial vehicle
LDC	Least Developed Country
LPG	liquid petroleum gas
LULUCF	land use, land use change and forestry
MEA	multilateral environmental agreement
MEP	Member of European Parliament
MOP	Meeting of the Parties
MRV	monitoring, reporting and verification
NAMA	nationally appropriate mitigation action
NAP	National Allocation Plan
NAS	National Adaptation Strategy
NEEAP	National Energy Efficiency Action Plan

NGO	non-government organization
OECD	Organisation for Economic Co-operation and Development
PAM	policies and measures
PFC	perfluorocarbon
QELRC	quantified emission limitation and reduction commitment
POP	Persistent Organic Pollutants
R&D	research and development
REDD	reduce emissions from deforestation in developing countries
REEES	renewable energy and energy efficiency strategy
REIO	regional economic integration organization
RMU	removal unit
SAR	Second Assessment Report
SBI	Subsidiary Body for Implementation
SBSTA	Subsidiary Body for Scientific and Technological Advice
SCCF	Special Climate Change Fund
SEA	Single European Act
SET-PLAN	European Strategic Energy Technology Plan
SFM	sustainable forest management
SMEs	Small and Medium-sized enterprises
TEC	Treaty of European Community
TEN-T	trans-European transport network
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TWh	Terawatt hour
UN	United Nations
UNCCD	United Nations Convention to Combat Desertification
UNCED	United Nations Conference on Environment and Development
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
VAT	value added tax
WCP	World Climate Programme
WMO	World Meteorological Organization
WSSD	World Summit on Sustainable Development
WTO	World Trade Organization

List of Figures and Tables

Figures

2.1	Sources of GHG emissions in the EU	11
3.1	The distribution of the responsibilities and tasks of European climate policy (pre-Lisbon Treaty)	62
5.1	The evolution of the structure of environmental taxes in the period 2000–2008 (percentage of gross domestic product)	80
9.1	EU27 GHG emissions 1990–2007	139
9.2	EU15 GHG emissions 1990–2007 (excluding LULUCF) compared with the target for 2008–2012	139
9.3	Projected emission scenarios in the EU15	140
9.4	Projected emission scenarios in the EU15	141
9.5	EU27 GHG emissions 1990–2008 (excluding LULUCF)	141
9.6	EU15 GHG emissions, base year 2008 compared with target for 2008–2012 (excluding LULUCF)	142
14.1	Distribution of the effort among sectors to achieve the 20 per cent GHG emission reduction target of the EU	184

Tables

2.1	Annex I parties to the UNFCCC	14
2.2	Status of ratification of the Kyoto Protocol	18
2.3	Annex A of the Kyoto Protocol	24
2.4	Annex B of the Kyoto Protocol	25
2.5	COP13 and COP/MOP3 decisions	34
2.6	COP14 and COP/MOP4 decisions	37
2.7	COP15 and COP/MOP5 decisions	42
3.1	Quantified emission limitation and reduction commitments for the purpose of determining the respective emission levels allocated to the European Community and its Member States in accordance with Article 4 of the Kyoto Protocol	60
7.1	Reference values for Member States' national indicative targets for the quantity of electricity produced from renewable energy sources to gross electricity consumption by 2010	103
7.2	National overall targets for the share of energy from renewable sources in final energy consumption in 2020	108
9.1	GHG emissions scenario of the EU in respect of the Kyoto Protocol's first commitment period	143
14.1	Members States' EUAs based on NAPs approved by the European Commission, 2005–2007	174
14.2	27 NAP II assessed by the European Commission in December 2007	178

16.1 EU and Member States commitment under Appendix 1
of the Copenhagen Accord204

16.2 20 20 targets by 2020 updated to 2005207

16.3 Member States limits by 2020 for non-EU ETS sectors
(proposed by the Commission)209

CHAPTER I

Introduction to European Environmental Law

The protection of the environment is one of the key pillars of EU law and policy with the European institutions fully engaged in the matter since the late 1970s, when the first regulations were adopted.¹ A specific title on environmental protection was first introduced in the system of European Community (EC) treaties by the Single European Act (SEA) of 1986 (Articles 130r to 130t) and further refined with the Treaty of Maastricht in 1992 (Articles 174 to 176) and the Treaty of Amsterdam of 1997. At the moment of writing, the Treaty of Lisbon is the last step of European integration and introduced several important reforms of EU institutions and law.² The changes initiated by the Treaty of Lisbon have a very limited impact on environmental protection, in particular as far as the decision-making procedures and the distribution of competences are concerned. They only provide for more clarity. In particular, the Treaty of Lisbon does not modify the requirement of unanimity in the Council for the adoption of legislation on environmental taxation and energy sources.

EU environmental policy is based on the principles of sustainable development and integration of environmental concerns in all other areas. Sustainable development is mentioned within the objectives of the EU (Article 3(3) Treaty on European Union (TEU)) after the incorporation of the objectives of the EC. The principle is mentioned in the same weak manner as in the previous treaties, namely along with the principles of economic growth and price stability, although with Lisbon reference is made to the sustainable development of Europe. Furthermore, Article 3(5) TEU refers to the role of the EU in the world and to the 'sustainable development of the Earth', and sustainable development is contained in the title on General Provisions on the Union's External Action (Article 21(2)d and f TEU). In this way, sustainable development is included in the list of objectives that guide the external action and the common foreign and security policy of the EU.

2 • European Climate and Clean Energy Law and Policy

The Treaty of Lisbon introduces three references to the environmental integration principle, namely:

- Article 11 Treaty on the Functioning of the EU (TFEU) (ex Article 6 Treaty of EC (TEC));
- Article 13 TFEU: integration in the field of animal welfare;
- Article 194(2) TFEU: integration in the field of energy policy.

With the TFEU, the unique position occupied by the environmental integration principle in the TEC loses some relevance due to the fact that more references to the integration principle have been promoted to the section of provisions having general application, such as sex equality, employment and social policies, non-discrimination, etc. (Articles 7–13 TFEU).

Furthermore, objectives and principles of EU environmental protection are indicated under Article 191(1) and (2) of the TFEU. They are:

- Objectives:
 - preservation, protection and improvement of the quality of the environment;
 - protection of human health;
 - prudent and rational utilization of natural resources;
 - promotion of international measures to deal with environmental problems, in particular combating climate change;
- Principles:
 - high level of protection;
 - precautionary principle;
 - principle of prevention;
 - polluter pays principle.

The only change introduced by the TFEU in this section is the introduction of a specific reference to the fight against climate change among the objectives of European environmental policy.

Article 192 TFEU refers to the decision-making procedure in the field of environmental protection and mirrors ex Article 175 TEC, namely, ordinary legislative procedure under paragraph 1 (co-decision and qualified majority voting in the Council) and unanimity in the Council required for provisions of a fiscal nature, measures affecting town and country planning, management of water resources and land use, and national choices between different energy sources and the general structure of energy supply.

A new title on energy policy is introduced by the Treaty of Lisbon (Title XXI, Article 194 TFEU), which basically codifies the practice of the EU institutions and Member States on this matter. Article 194(1) indicates the objectives of EU energy policy:

- (a) ensure the functioning of the energy market;
- (b) ensure security of energy supply in the Union;

- (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy;
- (d) promote the interconnection of energy networks.

The ordinary legislative procedure should be applied to achieve the objectives of paragraph 1 (Article 194(2)) without breaching the limits set under Article 192(2)(c) ('Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply'). Measures of a fiscal nature shall be adopted in accordance with a special legislative procedure (unanimity in the Council) as prescribed under Article 194(3).

EU environmental protection and clean energy policy and law are nowadays areas where the action of the EU and its Member States is most significant and advanced. The result of EU environmental policy is around 300 legal acts covering horizontal legislation, water and air pollution, climate change, management of waste and chemicals, biotechnology, nature protection, industrial pollution and risk management, noise and radiation protection. In terms of the status of environmental protection in the EU as of 2010, the 2009 Environmental Policy Reviews (Annual report on EU environment policy) released by the European Commission on 10 August 2010 shows that positive trends are observed in areas such as renewable energy, organic farming, the recycling of packaging waste and compliance with the Kyoto Protocol. On the contrary, negative trends were reported on energy use in the transport sector, nature protection, air pollution and waste generation.

One of the issues to be considered when addressing EU environmental law and policy, especially in relation with international law and multilateral environmental agreements (MEAs) is the division of internal and external competences between the EC and the Member States. Furthermore, with the reform of the EU treaties introduced by the Treaty of Lisbon, the EU has acquired an international legal personality and therefore replaced the EC.

The legislative competence of the EC and the Member States to act in a specific area of Community law was defined by the TEC and now by the TFEU. The competences in the different areas of Community law can be either shared between the EC and the Member States – in the majority of cases – or exclusively assigned to either of them. Before Lisbon, although in most cases the TEC explicitly identified the boundaries of the different Community policies and specified whether the competence was shared or exclusive, this distinction was sometimes open to different interpretations.

In this respect, the opinion of the European Court of Justice (ECJ) was necessary to clarify uncertainties generated by the lack of a clear demarcation between exclusive and shared competences in the EU. This is why, for instance, on several occasions, the European legislator considered Article 352 TFEU (ex Article 308 TEC, originally Article 235 TEC) as the legal basis for acting, particularly where the Treaty failed to give the Community specific and express legislative power in a certain area.³ This was the case with early adopted European environmental legislation and policy until a specific title on environmental