

The impact of the EU green policies on the energy transition - UNIVERSITA' DEGLI STUDI "SAPIENZA" DOTTORATO DI RICERCA IN DIRITTO PUBBLICO, COMPARATO E INTERNAZIONALE - Curriculum Diritto Amministrativo Europeo dell'Ambiente - Resoconto del seminario dell'8 luglio 2022: Prof. Kars de Graaf

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Mauro Beraldi

On July 8, 2022, within the context of the meetings organized by the curriculum of European administrative environmental law of the doctorate in Public, Comparative and International Law, prof. Kars de Graaf from the University of Groningen gave a seminar on the impact of the EU green policies on the energy transition.

At the beginning, the speaker provided an overview of the Dutch approach to environmental and energy matters and how the current legislation has been influenced by the policies of the European Union. In particular, the participation model used in order to identify the targets to reduce emissions or accelerate a renewable energy project was described.

To this end, negotiations are conducted with all relevant societal partners, with the aim of reaching an agreement. The positive side is related to the effort to involve the entire society within this process so that everybody should be able to accept what they are called to agree upon. However, not all relevant stakeholders are involved in these processes.

For instance, in the energy agreement^[1], the government agreed with most of the stakeholders, by stating how many renewable energy projects, like wind farms or solar farms, should be placed per province in Netherlands; how many solar parks or wind farms there should be in a region and so on. This created a sort of a situation that the government acts as if there's a binding agreement and local citizens have not been involved in it, but do need to accept the implications of that agreement. So at the moment there is a lot of resistance against those projects and the thought of a renewable energy project.

Professor de Graaf then mentioned the importance of two cases of climate litigation, the Urgenda Foundation^[2] and Shell cases^[3], by underlining the innovativeness of this instrument for the environmental issue.

The fact that these cases based on tort law are relevant factors in environmental action by Dutch society could be attributed to the fact that current environmental law is unable to deliver the task of achieving the (international and EU) targets set for both reduction of greenhouse gas emissions and energy transition. To better align environmental law instruments with the need to achieve environmental (EU) targets the Dutch legislator is explicitly looking at a legal regime implementing a programmatic approach related to environmental matters: when a target for the environment is set, then there should be a program to achieve it, and accountability for those

government bodies that set-up the program and also an obligation to monitor the progress in achieving the target. If progress is not sufficient, the program should be adapted in order to achieve the target anyway, but also people would need to be able to speak up and to participate in the program making.

Above all, once it is clear that the program is not up to the task to achieve the target, then you have the obligation to change the program in order to still achieve the target. Essentially, the idea is that people are stakeholders and they might hold government responsible for not doing enough and for being accountable for its efforts to achieve any goal in the environmental policy realm.

Subsequently, the focus shifted to European policies in relation to energy transition.

The main topic of the recent developments on green policies in the EU is certainly the Green Deal, which was presented in 2019. Everything that comes afterwards is an expression of the goals that they have been set out in it, considering also that there has been a much higher effort since then.

This leads to an enormous legislative agenda in the European Union, because the Green Deal sets out a target that is very ambitious and unachievable until a few years ago, but people are tending to feel that it could be done if things move along quickly enough.

Undoubtedly, there is an important relation between the Green Deal and the Paris Agreement: member states are bound by both Paris Agreement and European Union to set-up a plan, which is named National Energy and Climate plan in the European Union, but a nationally determined contribution in the Paris Agreement called Climate plan.

Furthermore, since December 2021 there is also the Fit for 55 package, which basically is a more detailed version of how to reach the target set in the European Green Deal, but the proposals in Green Deal and in Fit for 55 policy document is significantly broader than only energy. In fact, they concern biodiversity, innovation, change of agriculture, transport in the European Union. It's a new way of life and of course after the Russia invaded Ukraine we also have the incentive to accelerate the green transition because of gas availability in the European Union, which might diminish because of Russia.

The main question is to understand how the EU is trying to achieve these targets and, basically, the answer is: by introducing new legislation and amending existing legislation.

On all aspects that are relevant for the energy transition, there are already directives in place, such as an energy efficiency directive, a directive on renewable energy, a directive on the emission trading system, a directive related to the Industrial Emissions Directive. Therefore, there is a lot already going on to achieve the energy transition, but still more can be done. If EU increases the target or put a more ambitious target in place, then it will be necessary to change those directives as well.

During the presentation, two different examples of new legislation or amended directives for the energy transition have been provided and described by professor de Graaf.

The first example is about the Carbon border adjustment mechanism (CBAM), which is a climate measure that should prevent the risk of carbon leakage and support the EU's increased ambition on climate mitigation, while

ensuring WTO compatibility. As EU raises our own climate ambition and less stringent environmental and climate policies prevail in non-EU countries, there is a strong risk of so-called 'carbon leakage' – i.e. companies based in the EU could move carbon-intensive production abroad to take advantage of lax standards, or EU products could be replaced by more carbon-intensive imports. Such carbon leakage can shift emissions outside of Europe and therefore seriously undermine EU and global climate efforts. The CBAM will equalise the price of carbon between domestic products and imports and ensure that the EU's climate objectives are not undermined by production relocating to countries with less ambitious policies.

The other example concerns the acceleration of renewable projects. The idea is that authorization for those projects are not fast enough and they need to be accelerated if we want to achieve the target for renewable energy. Of course, in the existing Renewable Energy directive there is a paragraph on authorization procedures, which basically says that the authorization procedures should be proportionate and necessary, streamlined and expedited at the appropriate administrative level, but this is just an incentive to expedite and streamline those procedures.

According to the European Commission there is a proposal to amend the existing Renewable Energy directive, in the sense that it is necessary to map the areas where are required to achieve the renewable energy sources goals and indicate where certain renewable energy sources should be allocated. On this way, the last Renewable Energy Directive amendment proposal^[4] provides for some important modification, by basically providing two new articles 15b and 15c respectively (i) on the obligation for Member States to identify the land and sea areas necessary for the installation of plants for the production of energy from renewable sources in order to meet their national contributions towards the 2030 renewable energy target; (ii) on the obligation for Member States to adopt a plan or plans designating 'renewables go-to areas', which are particularly suitable areas for the installation of energy production from renewable sources. Furthermore, a replacement of article 16 of the existing directive is also proposed, with the aim of extending the scope of the permit-granting process, clarifying the start of the permit-granting process and asking for the most expeditious administrative and judicial procedures available for appeals in the context of an application for a renewable energy project.

In the concluding remarks of the meeting, the speaker returned to the importance of a programmatic approach in the environmental policy realm.

It is really important to have regulations in place that demand, regulate and facilitate programs as an instrument to achieve environmental goals. There needs to be accountability of the public authority that sets up the program, there needs to be participation of stakeholders in setting up them and if it is not sufficient to achieve the target, there should be measures in place – potentially court procedures – in order to rectify the insufficiency and then the obligation of the public authority to adapt the program. There are some experiences with this and there is of course all sort of programs in European directives, but there is a possible improvement with regards to the accountability aspects of those programs.

A relevant consideration concerned the role of private property and its changed meaning. Probably, we are going into an era in which private property will be something less. There will be less emphasis on the legal certainty of

existing rights because of the need to transition towards a new era of sustainability, that sometimes clashes with the ideas of private property and individual freedom.

Today it is possible to individuate a smart instruments mix in the green policies of the European Union, such as the ETS, the industrial Emissions Directive and the Energy Efficiency Directive. All sorts of instruments in place are command and control or market-based instruments, but also, of course, financial instruments.

All of them should be well balanced to achieve the goals of the Green Deal, because this is the only way through which the goal achievement will be possible, but this will be a long process.

[1] The energy agreement is an agreement between large energy producers which details how they will produce energy and how they will reduce carbon dioxide emissions.

[2] The Urgenda Climate Case against the Dutch Government was the first in the world in which citizens established that their government has a legal duty to prevent dangerous climate change.

[3] On 26 May 2021, the District Court of the Hague held Shell liable for causing dangerous climate change. As a result of legal action brought by Friends of the Earth Netherlands (Milieudefensie) together with 17,000 co-plaintiffs and six other organisations, the court ruled that Shell must reduce its CO2 emissions by 45% within 10 years.

[4] European Commission, COM(2022) 222 final