Multi-level governance in EU climate law

Vedder, Hans

Published in:
Essential EU Climate Law

IMPORTANT NOTE: You are advised to consult the publisher's version (publisher's PDF) if you wish to cite from it. Please check the document version below.

Document Version
Publisher's PDF, also known as Version of record

Publication date:
2021

Link to publication in University of Groningen/UMCG research database

Citation for published version (APA):

Copyright
Other than for strictly personal use, it is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), unless the work is under an open content license (like Creative Commons).

The publication may also be distributed here under the terms of Article 25fa of the Dutch Copyright Act, indicated by the “Taverne” license. More information can be found on the University of Groningen website: https://www.rug.nl/library/open-access/self-archiving-pure/taverne-amendment.

Take-down policy
If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

Downloaded from the University of Groningen/UMCG research database (Pure): http://www.rug.nl/research/portal. For technical reasons the number of authors shown on this cover page is limited to 10 maximum.

Download date: 17-09-2023
10 Multi-level governance in EU climate law

ABSTRACT

- Multi-level governance refers to the following four levels of governance: industry, national, EU and international;
- Implementing a climate change policy requires action primarily at the level of the Member States and industry, given that the EU itself has a very limited carbon footprint;
- As the Member States rely on industry and citizens to actually reduce greenhouse gas emissions, governance within a Member State can be complex as well, particularly with local governments sometimes taking the lead in combating climate change;
- This entails significant problems relating to the resulting multi-level governance scheme that involves the international, EU and national level insofar as public authorities are concerned;
- The resulting multi-level governance complexity is partly shaped by the fact that the industries involved exert influence and experience the effects of EU climate law at all four levels identified above;
- EU climate law addresses the multi-level governance issue only indirectly, and to a large extent general EU law has shaped this system of multi-level governance;
- The resulting governance structure is (overly) complicated as EU Member States resist a clear governance structure in which the Member States are legally bound to individual targets;
- Solidarity and cost-effectiveness are major drivers in shaping this system of multi-level governance;
- Solidarity needs to be enforced because not all Member States and non-EU countries may share the same commitment to curbing climate change;
- Cost-effectiveness explicitly involves regulated competition at lower levels of governance (Member States and industries), and thus presumes a market regulator, because cost-effectiveness is attained by the use of market mechanisms such as the EU ETS and these markets require supervision.

10.1 INTRODUCTION

Talking of ‘EU climate law’ as such may be legally correct, but in a way it is strange: the overwhelming majority of greenhouse gas emissions and (renewable) energy production does
not involve any European Union institution. EU climate law ultimately involves citizens, consumers and companies established in the Member States and needs to take into account the positions of the industry as well as the positions of governments and companies in third countries. A frequently expressed fear is that the competitive position of the industry will be jeopardised when the costs of climate action increase. This situation is complex because of the multitude of actors and the various levels of governance involved.

The relations between these actors that make up the system of multi-level governance are shaped by the (to a lesser or greater extent) shared desire to combat climate change in mutual solidarity as well as by the need to preserve a level playing field. This implies that the forces of solidarity and cost-effectiveness shape EU climate law.

This chapter will analyse this multi-level or ‘polycentric’ system of governance. We will identify the forces that have resulted in the current system of governance and extrapolate it to predict what the system may look like in the future. Multi-level governance refers to the following four levels of governance: international, EU, national\(^1\) and industry. In the preamble to the EU ETS, for instance, compliance with the UNFCCC is reiterated as well as the need to review the EU ETS in the light of international developments.\(^2\) We also read that ‘emission allowance trading should form part of a comprehensive and coherent package of policies and measures implemented at Member State and [Union] level’.\(^3\) In other words: the EU ETS forms a part of a system of multi-level governance that aims to reduce greenhouse gas emissions.\(^4\) The more recent Energy Union and Climate Action Governance Regulation (hereafter the Governance Regulation\(^5\)) further highlights that EU climate action is now an integral part of the Energy Union, so that its governance interacts with the other four dimensions of the Energy Union.\(^6\) This also holds true for the renewable energy and energy efficiency pillars of EU climate law.

Section 10.2 of this chapter sketches the multi-level governance of EU climate law. Section 10.3 focuses on intra-EU multi-level governance, whereas section 10.4 considers its relation with international multi-level governance. Section 10.5 concludes.

---
\(^1\) The sub-national level, e.g. regional and city governments, could be added as well, as these are increasingly active in climate mitigation and adaptation: cf. E. Scanu and G. Cloutier, ‘Why Do Cities Get Involved in Climate Governance? Insights from Canada and Italy’ 2015 Environnement Urbain/Urban Environment 9, available at: http://journals.openedition.org/eue/635. See further recital 62 of the preamble to the 2018 RES directive, Directive 2018/2001, OJ 2018 L 328/82.


\(^3\) Ibid., recital 23 of the preamble.

\(^4\) Ibid., recital 26 of the preamble.


\(^6\) The five dimensions of the Energy Union are: energy security; internal energy market; energy efficiency; decarbonisation; and research, innovation and competitiveness. cf. Article 4 of the Governance Regulation.
10.2 MULTI-LEVEL GOVERNANCE AND EU CLIMATE LAW

Analysis of multi-level governance matters because EU climate law has shown itself to be a rapidly developing area of law. Moreover, it is an area of law that has developed in response to the multi-level nature of the problem involved. Analysing this development from the perspective of multi-level governance intuitively starts with an identification of the levels, and – importantly – the hierarchy between them. In particular in a legal analysis, hierarchy between rules and governance levels is used to overcome inconsistencies between the rules emanating from the various levels. In the EU, for example, the principle of primacy of EU law over national law is used to solve legal problems that arise when there is a discrepancy between EU law and national law.\(^7\) Translating this situation into the terminology of multi-level governance, a clear hierarchy can be identified, placing the EU in a hierarchically superior position compared to its Member States. This reflects the true nature of multi-level governance in the EU only partially.

10.2.1 Multi-level Governance, Integration and Energy Sovereignty in the EU

On the one hand, this application of the principle of primacy simultaneously results in more European integration, in line with the EU’s objective to create ‘an ever closer Union’ (Article 1 TEU). This reinforces the position of the EU as a legitimate source of governance. Connecting this general process of EU integration to climate change, we notice that the EU has defined several aims and values that are very closely connected to combating climate change.\(^8\) Building on this, the EU has set itself a climate change policy and manifests itself as an international negotiator in the talks leading to a new climate accord.

On the other hand, at the same time the Treaties show that the Member States are reluctant to completely hand over all powers to the European Union. In relation to EU climate law we see this when the Treaty on the Functioning of the European Union provides for an energy sovereignty clause that dictates a different decision-making procedure that increases the powers of the Member States in EU decision-making whenever the EU adopts ‘measures significantly affecting a Member State’s choice between different energy sources and the general structure of its energy supply’.\(^9\) In terms of multi-level governance, therefore, the EU cannot be seen as a unitary actor that exists independent of the Member States. In certain areas, the EU has ‘a life of its own’ and can act in relative independence of the interests of the Member State(s) involved. We see this notably where the Commission is granted powers to apply the

\(^{7}\) The applicable EU law then sets aside the national law, enabling the (private) actors at the national level to enjoy the benefits given to them by EU law.

\(^{8}\) Notably, Article 3(3) and (5) and 21(2)(f) TEU.

\(^{9}\) Article 192(2)(c) TFEU. This is confirmed in Article 194(2), last sentence, TFEU.
competition provisions.  

We see it to a lesser extent when the normal voting procedure relies on qualified majority voting among the Member States in the Council, whereas measures significantly affecting the choice between energy sources require unanimity in the Council. This reluctance to confer powers on the EU in the energy field can, however, be contrasted with the almost entire transfer of powers in the area of the internal market. Whenever, for example, Member State climate action involves state aids, EU law applies to the effect that all national measures require the Commission’s prior approval. So, governance in the EU as a whole and EU climate law in particular sometimes takes shape more at the EU level, and at other times more at the Member State level.

10.2.2 Governance of Solidarity and Cost-effectiveness

Still, the EU law that emanates from this overwhelmingly needs to be applied at the Member State level in order to have effects at the industry level. Ultimately, producers and consumers need to change their decisions in the market if we are to reduce greenhouse gas emissions. These consumers may do their shopping with a company that falls within the scope of the EU ETS or do business with a competitor from a third country to which the EU ETS does not apply. Obviously, being in or out of the EU ETS and having or not having to pay a carbon price affects the competitive position of these companies. The inclusion of carbon costs in production will affect either prices or profitability and thus impact competition on the market for capital, or the market on which the products are sold. This is one of the reasons why cost-effectiveness is so central to the EU ETS. Only by keeping carbon costs as low as possible is the risk of distorting the level playing field minimised.

At the level of the EU and its Member States, we see that cost-effectiveness and solidarity play an equally prominent role in the Effort Sharing Decision and the Effort Sharing Regulation. Internationally, cost-effectiveness underlies the Kyoto flexible mechanisms and solidarity is embodied in the central principle of the ‘common but differentiated responsibility’.

The centrality of cost-effectiveness and solidarity invariably triggers governance problems. The idea of solidarity inherently requires a higher-level governance framework or compulsion. Solidarity, certainly when the group size increases and becomes more differentiated,

---

10 See e.g., Articles 101, 102, 106 and 107 TFEU. Notably, the latter has been used by the Commission to adopt a competition policy that is solely in the interest of the European Union, as Article 17(1) TEU requires.

11 Article 238 TFEU; this boils down to roughly three quarters of the votes in favour, offering a possibility to outvote a minority of Member States that represent one quarter of the votes.

12 Cf. Article 107 in connection with 108(3) TFEU.

13 Publicly traded companies will see their share value drop when they report lower profitability.

14 European Council Conclusions 23 and 24 October, SN 79/14, pp.1 and 4.


16 In the Paris Agreement Article 6(4) envisages a mechanism similar to that in place until 2020 on the basis of the Kyoto Protocol.

does not come about by itself. This is why states force their citizens to engage in solidarity, for example, by contributing to mandatory mutual insurance schemes. Similarly, solidarity between the Member States is unlikely to be realised in the absence of some form of coercion by a higher level. The judgment in the OPAL case provides a clear example of the enforcement upon Member States of the energy solidarity principle enshrined in Article 194(1) TFEU. Cost-effectiveness, by contrast, involves lower levels of governance in defining the norms as establishing cost-effectiveness invariably requires knowledge of facts that are only known accurately at the lower levels. The fact that cost-effectiveness as well as solidarity shape EU climate law results in, respectively, both bottom-up and top-down influences in governance.

10.2.3 Integration, Solidarity, Cost-effectiveness and the Shaping of Governance

Whereas solidarity and cost-effectiveness have opposing impacts on governance regimes, the integration that is a prominent objective of the EU as a whole also affects the governance structure. Integration exerts an upward effect on governance structures, meaning that decisions are increasingly taken at the higher levels. In the framework of the EU, this means that the role of the Member States as loci of governance decreases while the importance of the EU increases.

Energy market integration, for example, obviously involves more integration in that prices will be aligned in a bigger market that may encompass more than one Member State. It is enabled by having more interconnection, thus necessitating coordination of decisions concerning network investments and development, but also of decisions relating to network management. That in turn requires coordination of the interventions taken by the National Regulatory Authorities in all the Member States. More fundamentally, such market integration enables purchasing and production decisions to be taken in a transboundary manner; for example, enabling consumers to choose between expensive indigenous electricity and cheap imported electricity. Obviously, such purchasing decisions may also ‘significantly affect a Member State’s choice between different energy sources’ within the meaning of Article 194(2) TFEU. This adds a dynamic dimension to the governance, meaning that, for example, even when the law reflects a governance scheme with considerable national influence, the ongoing market integration may actually result in a shift of governance towards the EU level.

---

18 Case T-883/16 Poland v Commission ECLI:EU:T:2019:567, paras 67–85. Note that the Commission, which sanctioned a decision by the German regulatory authority, was found to have failed to comply with the principle of energy solidarity. The result is that from now on the Commission will have to test member states’ plans for their compatibility with the principle of energy solidarity and thus enforce compliance with this principle.

19 A similar issue was at hand in the legal proceeding against a Spanish plan that granted preferential access to indigenous coal for electricity production: see Case T-57/11 Castelnou Energía, SL v Commission ECLI:EU:T:2014:1021.
10.3 EU CLIMATE LAW AND INTRA-EU MULTI-LEVEL GOVERNANCE

The previous chapters have revealed that the bulk of EU climate law requires implementation at the national level. This means that programmes to encourage, for example, consumption of renewable energy or increases in energy efficiency are developed and implemented by the Member States in a way that is intended to have effects in the industry. We have also seen how the role of the Member States in implementing the EU ETS has diminished in particular with the entry into force of the third trading phase. As a result, we can ask to what extent the centralisation and concomitant Europeanisation that has taken place in the EU ETS can also be expected with regard to these other elements that constitute EU climate law. To answer this question, we need to identify the initial multi-level nature of EU climate law governance as well as its development into its current form.20 This requires us to start with an overview of the constitutional framework within which EU climate law is set. On the basis of this framework, the various legal acts that make up EU climate law are analysed with a view to identifying and comparing the role of the EU, the Member States, sub-national authorities and private parties such as industry and environmental NGOs.

10.3.1 The Constitutional Framework for EU Climate Law

The current constitutional framework for all EU policies is set in the Treaties.21 Since the entry into force of the Treaty of Lisbon, the framework for EU climate law can be found in Article 194 TFEU. However, this provision to a large extent only codifies a pre-existing policy.22 As a result, a significant part of EU climate law was adopted within the framework of Article 192 and 114 TFEU. Moreover, both Article 192 and 114 TFEU remain relevant today. In appraising this legal framework, it is important to take into account Article 4 TFEU, according to which ‘the environment’ and ‘energy’ as well as the ‘internal market’ are so-called shared competences. Climate change as such is not mentioned in that list of shared competences, but we see it mentioned in the provisions that elaborate the environmental and energy areas.23 As a result, both the EU and the Member States are competent in these fields. In practice this means that as long and insofar as the EU has not enacted legislation in a certain area, regu-
The shared competence means that there is ample room for true multi-level governance, but the results of such governance at the Member State level have to comply with EU law. The concept of true multi-level governance intends to distinguish between those areas where the Member States have no governance powers and essentially only act to give effect to EU measures and situations where the Member States have room for autonomous decisions and can thus ‘govern’ in this area.

The constraints set by EU law to such national initiatives follow from essentially two sets of rules: (a) the internal market rules in the Treaty and (b) the detailed rules laid down in EU secondary law, such as the ETS Directive and the RES Directive. The framework for multi-level governance scheme laid down in EU secondary law is also shaped by the Treaties through the dual principles of:

- subsidiarity, and
- proportionality.25

The exercise of all shared competences must comply with these two principles that essentially seek to curb the EU’s use of its competences.26

**Subsidiarity**

In a nutshell, the principle of subsidiarity constrains the EU’s exercise of its competences to those instances where there is a transnational aspect to the matter that is regulated or where the EU’s action would result in economies of scale or scope compared to Member State action. In practice it means that the EU, and notably the Commission, is under a duty to explain why EU action complies with the subsidiarity principle.27 In relation to EU climate law, both elements of the subsidiarity test would seem to present little difficulty in view of the truly global nature of climate change and the obvious impossibility of dealing with this effectively at the Member State level. Still, we see that the principle of subsidiarity is used by the Member States to challenge proposed EU action. In its proposal for a European Soil Framework Directive, for instance, the Commission argues that EU action is necessary as, for example, drainage of peat soils causes massive emissions of greenhouse gases, which is a problem of a clearly transnational nature.28 The fact of the matter is that the Commission has withdrawn the 2006 proposal, but remains committed to soil protection.29 As a result, there is to this day no

---

24 Article 5(2) TFEU. See further Protocol No. 25 and Declaration No. 18 attached to the Treaty of Lisbon on shared competences. Moreover, when the EU has regulated a certain area, there is a possibility for the EU to ‘withdraw itself from this area and thus hand back the competence to regulate these matters to the Member States.

25 Article 5(3) and (4) TEU.


27 Protocol No. 2 contains more detailed rules.


specific EU-level governance in this field. More fundamentally, there is no clear governance structure that allows for the identification of a clear division of competences and the corresponding assignment of responsibilities. Soil protection is thus a clear example of the failure of multi-level governance, because of the principle of subsidiarity, in the sense that a clearly transboundary problem is not effectively addressed at the EU level, despite the fact that the EU is competent in this field.30

Proportionality
On a similar note, the principle of proportionality seeks to protect national competences. This principle means that in its regulations the EU should leave the Member States as much room as is possible. It thus requires the EU to continuously reflect upon the objectives it seeks to attain with the regulation at hand and to seek to ensure the means chosen do not go beyond what is necessary. In view of the room left for national implementing measures, this results in a preference for a framework directive over a detailed directive and a preference for directives over the use of regulations. Moreover, the substance of such directives and regulations should leave the Member States as much freedom as possible, which could involve freedom to set national standards that go beyond the European standards and thus protect the climate to a greater extent. This invigorates the multi-level governance in these matters.

The proportionality principle raises the question: to what extent has the EU exhaustively and completely harmonised certain areas of climate law in the EU? This is a question of the scope and degree of harmonisation.31

Essentially, the basic reasons underlying harmonisation dictate that the degree of harmonisation will be higher, leading to full or total harmonisation, whenever the impact on the internal market is greater. In terms of EU climate law this means that those measures that are more directed at the environmental side of affairs are likely to be of a minimum harmonising character, whereas the measures that are closely linked to trade between Member States are often of a fully harmonising nature. The fully harmonising nature of these rules negates the room for national rules that are in any way different from those in the EU rules. In terms of multi-level governance, full harmonisation entails a clear shift of governance to the EU level.32

10.3.2 Multi-level Governance of Renewable Energy Sources

We see harmonisation’s impact on the multi-level governance scheme very prominently in the RES Directive.34 While the majority of the rules in this Directive are of a minimum harmo-
nising nature, thus allowing the Member States to impose national targets on the percentage of renewable energy that go beyond those laid down in the Directive, some of the provisions are fully harmonising, such as the rules on the sustainability criteria of biofuels. This is clearly indicated in the text of the Directive. As a result, any multi-level governance concerning these sustainability criteria is completely ruled out. This has resulted in very extensive and all-encompassing rules on the sustainability of biofuels and bioliquids that are only becoming more comprehensive at the EU level with new iterations of the Directive. Multi-level governance concerning the rest of the RES Directive is entirely possible and indeed happening.

This emanates clearly from two recent cases, *Essent Belgium* and *Ålands Vindkraft*, as well as the older *PreussenElektra* case. All three deal with essentially the same question: to what extent can a Member State encourage renewable energy production by means of a measure that restricts the incentive for renewable energy that is produced in that Member State? In this regard the multi-level nature of the governance starts from the general objective set by the EU to ensure that in 2020 at least 20 per cent of energy is renewable. This is then translated into national goals as well as reporting obligations and a duty to draw up National Renewable Energy Plans. Decisions on how the renewable energy targets are to be achieved are thus taken on the national level (and at times sub-national levels). In view of the fact that encouraging and incentivising renewable energy production still involves overcoming market failures, most of the decisions concerning renewables involve subsidisation. Decisions on such subsidies are preferably taken by the Member States in a way that ensures that such funds benefit the national economy so that ‘leakage’ to industries in other Member States and third countries is minimised.

The German scheme in *PreussenElektra*, for example, required German electricity utilities to buy the renewable electricity that was produced in the area where they were active. This means that this obligation attached only to green electricity produced in Germany. The Swedish scheme at hand in *Ålands Vindkraft* required Swedish electricity supply companies to surrender green certificates at the end of the year corresponding to a certain percentage of the energy they supplied in that year. Here the catch was that such certificates were only provided to renewable electricity generators that are located in Sweden, whereas the Åland archipelago – although interconnected to Sweden – is part of Finland. In both schemes the purchasing obligation, whether this involves the green electricity itself that is to be bought at a premium or the green certificates that have a certain value, ensures a financial incentive for national renewable...
energy production. In ENEA, finally, Polish electricity supply companies were required to buy minimum amounts of renewable energy from Polish generators.\(^{39}\)

Whenever such a decision is taken at the Member State level, it is bound to lead to legal opposition from the private companies being regulated. In PreussenElektra, the (staged) proceedings resulted from the national energy utilities fearing the costs resulting from this feed-in tariff that would have to be borne by them and passed on to the final consumers.\(^ {40}\) In Ålands Vindkraft, the opposition came from a company in a neighbouring Member State that wanted to benefit from the incentive scheme.\(^ {41}\)

The fact that private companies, the subject of regulation, are involved indicates yet another layer in the multi-level governance scheme of EU climate law. Such private involvement in shaping EU climate law follows from the direct effect of the internal market rules. The internal market consists of the free movement of goods, services, people and capital as well as a system ensuring undistorted conditions of competition.\(^ {42}\) In relation to national incentive schemes such as those in the cases mentioned above, the direct effect of the internal market rules results in the inclusion of private actors as well as the EU judiciary in the multi-level decision-making system. The former have a right to challenge the legality of such national schemes in the light of the free movement of goods (Article 34 TFEU) as well as the provisions on state aids (Article 107 and 108 TFEU). This right may be enacted before a national court of the Member States who then may (be obliged to) make a preliminary reference to the Court of Justice of the European Union.\(^ {43}\)

As a result, the internal market rules form an integral part of the constitutional framework for the multi-level governance of EU climate law. All national measures that restrict the free movement of goods\(^ {44}\) or that distort competition must comply with the Treaty rules. In keeping with the basic approach in EU law, the basic provisions are construed broadly, encompassing all measures that may affect trade or competition. This is then connected to a possibility to objectively justify such restrictions. This requires the Member State to put forward an objective in the common interest and to demonstrate that the national measure

\(^ {39}\) Case C-329/15 ENEA S.A. v Prezes Urzędu Regulacji Energetyk ECLI:EU:C:2017:671, notably para 3 where the national law is set out.

\(^ {40}\) This also drove the ENEA case, ibid.

\(^ {41}\) For a more detailed analysis see H. Vedder, ‘Good Neighbourliness in a Sustainable European Internal Electricity Market: A Tale of Communities and Uncommunautaire Thinking’, in E. Basheska and D. Kochenov (eds), The Principle of Good Neighbourliness in EU Law, Martinus Nijhoff 2014, pp. 94–113.

\(^ {42}\) Article 26(2) TFEU in connection with Protocol No. 27 on the Internal Market and Competition.

\(^ {43}\) According to Article 267 TFEU any national court may make a preliminary reference, whereas the highest national court is under an obligation to do so unless there is an acte clair or acte éclaire: case 283/81 CILFIT, ECLI:EU:C:1982:335, paras 13–20. Note that the Court is reluctant to grant the highest national courts too much discretion in this regard. Moreover, the Court has also accepted Francovich Member State liability for highest national courts that fail to make a preliminary reference in Case C-224/01 Köbler, ECLI:EU:C:2003:513.

\(^ {44}\) Perhaps somewhat counterintuitively, the Court has classified electricity as a good within the meaning of Article 34 TFEU.
does not go beyond what is necessary to attain this objective. This proportionality test allows the Court to exercise considerable influence over the national measures, potentially firmly establishing itself as an actor in the multi-level governance system. We see the practical impact of this in the *E.On Biofor* case. This case essentially arose because of Swedish rules that made it impossible for E.On Biofor, a Swedish subsidiary of E.On, to use biogas produced in Germany by another company in the E.On group, in compliance with the Swedish renewables regulations when that biogas is transported through gas pipelines. The Court notes that biogas fed into the Swedish grid could be taken into account, whereas gas fed into an interconnected gas grid in another Member State could not. This inconsistency, the Court held, contributed to the incompatibility of the Swedish rules with Article 34 TFEU. As a result of the appeal by E.On Biofor, Sweden had to amend its rules and to allow imported gas to be taken into account.

The actual impact of this tandem made up of private companies and the EU judiciary in the multi-level system of governance depends on the intrusiveness of the Court’s review. In *PreussenElektra* the Court showed very considerable deference and thus reduced the practical impact of the internal market rules as a framework for the multi-level governance of EU climate law. One of the reasons for this was the fact that electricity market liberalisation was only just underway in the EU. This resulted in a clearly temporally limited acquiescence on the part of the Court.

Expectations were therefore high when the Court had to rule on similar national incentive schemes well over a decade, and two energy market liberalisation packages, later. The two later cases, *Essent Belgium* and in particular *Ålands Vindkraft*, highlight the connection between the governance of climate law and the relevance of governance at the industry level. The applicant in that case, a Finnish company producing renewable energy from the Finish Åland archipelago, in effect could only sell that wind power on the Swedish market, since the only significant power cable connected the islands to Sweden. It was, therefore, in competition with Swedish electricity generators and in that sense ‘governed’ by the local market conditions. However, the regulatory regime resulting from the Swedish rules meant that it could not qualify for the incentive, affecting its position on the market.

---

45 Case C-549/15 *E.ON Biofor Sverige AB v Statens energimyndighet* ECLI:EU:C:2017:490. Actually, the imported gas could be used if it was transported in a (rail)road-based vessel, an utterly economically unattractive means of transportation.

46 Case C-549/15 *E.ON Biofor Sverige AB v Statens energimyndighet* ECLI:EU:C:2017:490, paras 94–99.


48 Case C-379/98 *PreussenElektra* ECLI:EU:C:2001:160, para. 81, where the Court finds the German scheme justified ‘in the current state of Community law concerning the electricity market [emphasis added]’.


50 In effect, it would sell its electricity on the pan-Scandinavian and Baltic Nord Pool spot market.
In much more elaborate and reasoned judgments, the Court found the Swedish and Belgian schemes compatible with the EU law on the free movement of goods. This compatibility had its roots in the way in which the RES Directive barely regulates such national incentive schemes and clearly puts the Member States in the driving seat. We see this when the Court refers extensively to the provisions in the 2009 RES Directive to find that the Member States are free to organise their national incentive schemes, whereas the Directive limits itself to stating that the Member States may conclude cooperation agreements. In this regard, the progress made in market liberalisation since PreussenElektra only resulted in a more elaborate, but not a more intrusive, proportionality test. In terms of multi-level governance, the private companies and EU level clearly matters less than the national level in relation to national incentive schemes. This becomes clear when the relevant provisions in the 2009 RES Directive are analysed and this finding also influences the Court’s findings on compatibility with the internal market rules. In other words: the governance scheme provided for in the 2009 RES Directive is one that envisages a minimal role for the EU and fundamentally chooses sovereign Member States as the drivers for policy and action in this field. The 2018 RES Directive by and large respects this national sovereignty, but adds a provision on the opening of support schemes for imported renewable electricity. This provision is clearly intended to allow Member States to gather experience with such cross-border schemes.

For the moment, these sovereign Member States engage in a limited amount of solidarity. We see this when we find that the incentive schemes are essentially restricted to national production of renewable energy only. This limited amount of solidarity comes at the cost of employing the market mechanism and all the potential offered by the comparative advantages that the market harnesses. Indeed, the reduced amount of ‘EU enforced’ solidarity limits the role of markets to the situation within a Member State, if a market-based instrument is chosen. The companies’, Commission’s and Courts’ roles in this multi-level governance scheme are very limited. E.On Biofor, however, shows that the Court will test the proportionality of national measures that limit the importation of renewable energy increasingly strictly. The proportionality of national measures is also reviewed by the Commission, subject to Court review, as part of the state aid rules. By and large, this means that national measures to subsidise renewable energy generation will be reviewed by the Commission for their compatibility with the internal market. Increasing market integration has resulted in increasingly tight review by the Commission. This is also clearly visible in relation to the state aid supervision

---

51 C-573/12 Ålands Vindkraft ECLI: EU:C:2014:2037, paras 84–119 and notably paras 97–100.
52 The Court explicitly noted this in paras 84 and 85 of the judgment in case C-573/12 Ålands Vindkraft, ECLI: EU:C:2014:2037.
of national (renewable) energy policies,\textsuperscript{54} as well as ancillary schemes such as capacity and generation adequacy schemes.\textsuperscript{55}

The same holds \textit{a fortiori} for the rules on energy efficiency. From Chapter 6 of this book we know that the rules on energy efficiency lack binding targets at the Member State level and do not provide for any market-based mechanism whatsoever. Where a market is envisaged, the EED confines itself to reiterating the applicability of the general EU rules on competition law.\textsuperscript{56} This centrality of the Member States comes with an overwhelming focus on cost-effectiveness and reduces the potential for solidarity as well as (market) integration, negating the European Union’s role.\textsuperscript{57}

This is different when the market-based rules are more central to the EU regulation in place, as is the case in the EU ETS, to be discussed hereafter.

\subsection*{10.3.3 Multi-level Governance of the EU ETS}

The EU ETS has experienced a marked evolution at an astonishing pace. In little more than 15 years the EU ETS has developed from a scheme that fundamentally put the Member States in the driving seat to one that acknowledges the need to have effective market supervision for markets to really work.\textsuperscript{58} Discussions on so-called windfall profits accrued by companies due to free allowances triggered a major overhaul of the scheme, with a greater emphasis on auctioning as the main mechanism for allocating allowances. This firmly establishes markets as a main driver for change in greenhouse gas emissions, in addition to the trading that takes place once allowances have been distributed. More fundamentally, the 2009 overhaul of the ETS Directive has recognised that there is obvious regulatory competition between the Member States. Whereas regulatory competition could result in regulatory experimentation and thus sustain efficiencies in the EU ETS, in reality it has resulted in a classic ‘race to the bottom’. Over-allocation of allowances by the Member States is the foremost reason for the absolute lack of scarcity on the allowance market and the resulting absence of a serious incentive for companies to invest in low-carbon technology and innovation.

The solution has been to put the Commission, as a supervisor of the market for regulatory competition, in a central position from the third trading phase onwards. To be clear, as of

\begin{itemize}
  \item \textsuperscript{54} Cf. A. Haak and M. Bruggemann, ‘Compatibility of Germany’s Renewable Energy Support Scheme with European State Aid Law – Recent Developments and Political Background’ 2016 \textit{Eur. St. Aid L.Q.} 91, at 100.
  \item \textsuperscript{55} The increased uptake of intermittent renewable energy in the grid can jeopardize grid stability and generation adequacy: see Chapter 5 in this book and e.g. Case T-793/14 \textit{Tempus Energy Ltd and Tempus Energy Technology Ltd v Commission} ECLI:EU:T:2018:790, on the UK capacity and generation adequacy scheme and the state aid supervision of that.
  \item \textsuperscript{56} Directive 2012/27, OJ 2012 L 315/1, Article 18(3).
  \item \textsuperscript{57} See further European Council Conclusions 23/24 October, SN 79/14, p. 6, where an EU target of 27 per cent for improving energy efficiency is set, which will not be translated into nationally binding targets and even omits the ‘need to deliver collectively the EU target’ that guides the Member States for the EU renewables target.
  \item \textsuperscript{58} For a fuller overview of this evolution see Chapter 3 in this book.
\end{itemize}
2013 the EU ETS remained a system of multi-level governance, but had shifted the bulk of competences to the EU level.59

Part of this shift also came from the private company level, as is evidenced by the Arcelor case.60 This case was started by a producer of ferrous metals that was subject to the EU ETS as part of the implementation in France. It considered that this implementation, and the ETS Directive that underlies it, was illegal as it deteriorated its competitive position compared to that of the aluminium and plastics industry. The latter industries were outside the scope of the ETS Directive and French legislation, but they were in competition with Arcelor, for example where packaging is concerned. Under the heading of the general principles of equality and proportionality, the ECJ investigated whether the choice by the EU legislator to include the ferrous metal industry but to leave out the aluminium and chemicals industries could be objectively justified. In what is again a deferential judgment that acknowledges the discretionary room for the EU legislature, the Court ultimately accepted the different treatment of the steel industry and the aluminium and plastics industry for reasons of administration and enforcement costs.61 At the basis of this analysis, however, is the observation that from a climate change perspective, all greenhouse gas emissions are comparable.62 In this regard, the fact that the industries involved are (potential) competitors is not a decisive criterion, according to the Court.63 This shows that the Court is primarily thinking in terms of markets, but works from an assumption of equality of polluters when analysing the EU ETS.

The implications of the Court’s vision of the EU ETS for the governance of the EU ETS are significant, as it implies that all sectors that contribute to climate change and have a potential for greenhouse gas abatement are included. As a result, it becomes an issue for the EU legislature to explain why – as an exception – a sector is not included. The reasoning accepted in this regard is one based on enforcement and administration costs in the light of the novelty and complexity of the scheme. Based on this there would be an expectation for the scope of the EU ETS to expand over the years, as the novelty wears off, experience is gained and administration and enforcement costs decrease. This is indeed what has happened, as recital 10 in the preamble to Directive 2009/29 clearly shows in its statement that other industries have been included in the EU ETS. The steps taken towards the inclusion of aviation and maritime shipping – albeit in an imperfect manner – in the EU ETS are further evidence of this expansion to include all sectors of the economy.64

Interestingly – and this is also alluded to in Arcelor65 – the wider scope of the EU ETS including the allowance market as an exchange mechanism allows for comparative advantages to be
reaped. Indeed, allowances can be traded freely in the EU and possibly even, in the future, with third countries (so-called linking of emissions trading markets).66 This inherent expansion of the scope of emissions trading brings an ever greater group of companies as well as states into the multi-level governance scheme.

The reduced role for the Member States also can be seen in the EU legislature’s reasoning in curbing the Member States’ freedom to enact more stringent protection legislation. The replacement of the Directive on Integrated Pollution Prevention and Control (IPPC) with the 2010 Directive on Emissions from Industrial Installations (IED) came with the introduction of a clause that banned the Member States from introducing emissions limit values in the permits on the basis of this Directive.67 The idea underlying this provision was to ensure the undistorted functioning of the EU ETS by means of largely ruling out the possibility of national environmental regulation. This seems to be at odds with Article 193 TFEU that allows for such more stringent protection measures,68 but such measures must be compatible with the Treaties. Above, we have already seen how climate law at both the EU and the Member State level interacts with the constitutional framework of the EU that is laid down in the Treaties. In relation to more stringent measures, however, the catch is that the Treaties do not stand in the way of a Member State putting its own industry at a competitive disadvantage. Essentially, therefore, the self-restraint of the Member States, which will undoubtedly be lobbied by the national industry, results in the absence of such more stringent national climate policies.

Interestingly, European cooperation may also influence climate governance within a Member State. A good example of this is the fate that befell the Netherlands Energy Accord. This agreement between major energy producers and consumers as well as environmental NGOs envisaged, inter alia, the coordinated closure of a number of ageing and thus relatively dirty coal-fired power plants. Such a coordinated closure resulted in concerns raised on the basis of competition law and the agreement was thus notified to the Netherlands competition authority, which issued an opinion on the agreement’s compatibility with the cartel prohibition.69 In assessing the Accord the competition authority balanced the negative welfare effects of the reduction of generation capacity with the positive effects of reduced emissions. In that regard, it stated that the Accord would not reduce emissions of carbon dioxide because the EU ETS would result in an increase of these emissions elsewhere.70 The multi-level nature of EU climate law thus results in effects for the appraisal of national initiatives under national law. These effects follow from the (in)famous waterbed effect whereby allowances not used by one participant in the scheme can be used by another participant. One solution would be

---

66 For an analysis in general and applied to the EU-Chinese context see Y. Zeng, Obstacles to Linking Emissions Trading Systems in the EU and China – A Comparative Law and Economics Perspective, PhD Groningen 2018.
67 Directive 2010/75 (IED), OJ 2010 L 334/17. Recital 9 of the preamble in connection with Article 9(1) of the IED. See further recital 10 of the preamble to the IED.
to cancel the allowances held by the operators of the coal-fired power plants to the amount that corresponds to the avoided emissions, to counteract this waterbed effect. This, however, would simultaneously result in a reduction of income for these operators, and thus affect their competitive position. Obviously, these companies are likely to show self-restraint in view of the need to preserve their competitive position. At the same time, the ETS Directive now allows the Member State to cancel allowances that are freed up due to more stringent national measures.\textsuperscript{71} This allows for more Member State involvement in EU climate governance, insofar as this governance is beneficial to climate protection.

The above refers overwhelmingly to the central state. In terms of governance, it is also relevant to mention that EU climate governance also increasingly involves sub-national levels of governance. The Covenant of Mayors for Climate & Energy is a prominent example of how the European Commission has encouraged sub-national governments to become involved in climate governance.\textsuperscript{72} This also makes sense given that the bulk of the impact of climate change will have most impact in the urban environment and thus affect cities primarily. At the same time, the bottom-up policies that emanate from cooperation such as the Covenant of Mayors are likely to shape the national policies of the Member States,\textsuperscript{73} potentially reducing the role of central governments in climate governance.

In short, a Member State’s core position in the governance of phase one has been replaced largely by a central role for the Commission. Where there is room for national governance, this is strictly circumscribed. Further evidence for this can be seen in the provisions on the Modernisation Fund set up pursuant to Article 10d of the ETS Directive. Again, we see Member State involvement in the governance of this fund, yet we also see that in the absence of consensus, decisions can be taken by simple majority.\textsuperscript{74} It is clear that for climate governance the EU no longer wants to be hostage to the lowest common denominator between the Member States.

When we cast the climate law net a bit wider, one final example of the effect of a central role for the market in shaping the rules can be seen in the Hinkley Point C saga.\textsuperscript{75} This case concerns a Commission decision that authorised UK state aid for the construction and operation of the Hinkley Point C nuclear power plant, required to ensure generation adequacy in light of expected RES uptake and electrification. In a nutshell, Austria objected against this decision because it considered that the environmental integration principle enshrined in Article 11 TFEU had not been complied with. In the framework of EU state aid supervision, the integration principle is, according to the Court, binding in the sense that the Commission cannot

\textsuperscript{71} This is made possible by Directive 2018/410, OJ 2018 L 76/3, that changed Article 12(4) of the ETS Directive, allowing for such cancellation of allowances.

\textsuperscript{72} It was created in 2008 by means of a Commission initiative: https://www.eumayors.eu/about/covenant-initiative/origins-and-development.html last accessed 16 June 2021.

\textsuperscript{73} For an analysis of this effect see M. Fraundorfer, ‘The Role of Cities in Shaping Transnational Law in Climate Governance’ 2017 Global Policy, pp.23–31, doi:10.1111/1758-5899.12365.

\textsuperscript{74} ETS directive, Article 10d(7).

\textsuperscript{75} Case C-594/18 P Austria v Commission ECLI:EU:C:2020:742.
allow state aid for an activity that violates EU environmental law.\textsuperscript{76} Again, it is only through the market-based state aid rules that the EU plays its decisive role in steering the Member States.

\section*{10.4 EU CLIMATE LAW AND INTERNATIONAL MULTI-LEVEL GOVERNANCE}

Companies' self-restraint in response to the need to remain competitive is an obvious trait of EU climate law when it is analysed from the perspective of international multi-level governance. The part of the climate acquis that deals with carbon leakage is an example of precisely that: the EU and the Member States showing self-restraint in the light of the international competition that faces certain industries located in the European Union. In terms of multi-level governance, the method of adopting the carbon leakage list under the EU ETS clearly involves the national and industry levels, with the latter submitting the economic data and the former drafting the list that is to be adopted by the Commission. The involvement of all three levels is eminently sensible in view of the fact that industry has a unique insight into its competitive position, the Member States can relate the data and findings of their industry to those of the other Member States and the Commission has oversight of the entire internal market and can function as an arbiter. More fundamentally, the Commission also plays a central role in the international relations between the EU and third countries and international organisations in the field of climate change. In this regard, the close connection between the EU’s internal climate change goals and the international negotiations has always featured prominently on the Commission’s agenda.\textsuperscript{77} Interestingly, the Commission not only sees an ambitious climate change policy as a political goal, but increasingly presents it as a competitiveness issue, directly involving the industry involved.\textsuperscript{78} This pivotal position for the Commission is even clearer in relation to the EU’s external trade policy.

\subsection*{10.4.1 EU Climate Law and International Trade Law}

We see this in the myriad cases concerning the EU common commercial policy. This policy is set out as an exclusive competence for the EU, which rules out Member State involvement unless this is envisaged in the EU acts in place.\textsuperscript{79} The Commission’s central position has meant

\textsuperscript{76} Case C-594/18 \textit{P Austria v Commission} ECLI:EU:C:2020:742, para. 100.


\textsuperscript{78} Commission, ‘Policy Framework for climate and energy policy in the period from 2020 to 2030’, COM (2014) 15, pp.17, 18, where the EU presents itself as a ‘global leader for low carbon technologies’ that should seek ‘to maintain its first mover advantage’. See further and more recently, the Commission’s communication ‘A Clean Planet for All’, COM(2018) 773 final, pp. 3, 4.

\textsuperscript{79} Joined cases C-70/94 and C-83/94 \textit{Criminal Proceedings against Leifer and Werner} ECLI:EU:C:1995:328.
that it has sought to protect its mandate to negotiate exclusively on behalf of the European Union in relation to, for example, energy efficiency labelling of office equipment in accordance with the US Energy Star scheme.\textsuperscript{80}

It has also put the Union institutions in the driving seat in terms of the possible illegality of the EU’s external climate change policies in the light of international trade law. As regards the concept of international trade law, this certainly encompasses the WTO/GATT-\textit{acquis}.\textsuperscript{81} For the purposes of this chapter, however, it is also assumed to involve the rules on the provision of international transport services. It is this body of law that has created most tensions with EU climate law, resulting in a judgment by the Court of Justice of the European Union.

The most prominent example of such tensions arises from the inclusion of international aviation in the EU ETS.\textsuperscript{82} This inclusion has been controversial from the outset as a potentially extraterritorial measure that would be at odds with international aviation law. Viewed from the perspective of non-EU states, the EU appears to be using its market power as an economic powerhouse and air travel destination to force compliance with the EU climate rules. From the EU’s perspective, the inclusion of aviation in the EU ETS is second-best to adopting an international multilateral agreement on this matter.\textsuperscript{83} The illegal extraterritoriality is what essentially underlies the \textit{Air Transport Association of America} case.\textsuperscript{84} Ultimately, the Court found the application of the EU ETS to international air traffic departing from and landing at European airports compatible with international law, without ruling explicitly on the extraterritoriality of the regulation at hand.\textsuperscript{85}

Whatever may be made of the claim of extraterritoriality or the qualification of the EU’s approach as multilateral or unilateral, in terms of multi-level governance the EU’s inclusion of aviation has been – for the moment at least – successful in putting climate change firmly on the international political agenda. The practical implementation of this is that the International Civil Aviation Organization (ICAO) has committed to negotiations with a view to coming to a global market-based mechanism that should be finalised in 2016 and enter into force in 2020. The contrast between extraterritoriality and the result of the EU’s actions is interesting:

\begin{itemize}
  \item \textsuperscript{80} Case C-281/01 Commission v Council (Energy Star) ECLI:EU:C:2002:761.
  \item \textsuperscript{82} This is the result of Directive 2008/101, OJ 2009 L 8/3.
  \item \textsuperscript{83} Directive 2008/101, notably recitals 8–10 of the preamble and Regulation 2017/2392, OJ 2017 L 350/7, recitals 5–8 of the preamble.
  \item \textsuperscript{84} Case C-366/10 Air Transport Association of America and Others v Secretary of State for Energy and Climate Change ECLI:EU:C:2011:864.
  \item \textsuperscript{85} Ibid, para. 129. For an analysis see J. Scott and L. Rajamani, ‘EU Climate Change Unilateralism’, 2012 European Journal of International Law 23/2, pp.469–94. Similar debates can be expected in the light of the contemplated inclusion of international maritime shipping in the EU ETS: see COM (2013) 480, holding a proposal for the monitoring, reporting and verification of emissions from shipping Regulation that is seen as the first of three steps leading to the inclusion of shipping in the EU ETS.
\end{itemize}
extraterritoriality is traditionally seen as a threat to the international legal order, whereas the EU’s actions have been framed in the light of the absence of an international legal order and geared towards the creation of such a legal order. This is evident from both the ‘Stop the Clock’ Decision and the Amending Regulation. In the ‘Stop the Clock’ Decision the European Union temporarily suspended the application of the EU ETS in order to facilitate the progress made at ICAO level.86 On a similar note, the Amending Regulation that amends the ETS Directive so that – in a nutshell – international flights are assumed to comply with the obligations under the EU ETS is set firmly within an agenda that intends to reward and encourage international progress at ICAO level.87 Seen from this perspective, the greening of the international trade acquis can be attributed in part to the EU.

10.4.2 EU Climate Law and International Climate Law

A similar phenomenon occurs, though with more limited effects, in relation to international climate law. There, the essential drivers within the EU are industry and Member States in a combined effort in order to protect the competitiveness of the European industry. It is well known that such competitiveness concerns have triggered the inclusion of carbon leakage provisions. In this regard it is worthy of mention that the carbon leakage mechanisms envisage a central role for the European Commission. Whether in relation to the adoption of the carbon leakage list or the approval of state aid to offset indirect carbon leakage risks, EU climate law puts the Commission in the driving seat.88

This centrality of the Commission can also be seen more generally in the Commission’s position internally, that is, in relation to the negotiations leading to the 2009 and later amendment of the EU ETS, as well as externally in representing the EU.89 To a certain extent this more central role for the Commission is a logical consequence of the changed constitutional arrangements after the entry into force of the Lisbon Treaty.90 It is also, however, inextricably

---

86 Decision 377/2013, OJ 2013 L 113/1, notably recitals 5 and 6 of the preamble.
87 Regulation 421/2014, OJ 2014 L 129/1, notably recitals 2 and 3 of the preamble. This Regulation introduces Article 28a in the ETS Directive. This can also be seen in Regulation 2017/2392, OJ 2017 L 350/7, notably recitals 8–11, and Article 28b that is inserted into the ETS Directive, in particular paragraph 1 insofar as this requires the Commission to take into account the implementation of an ICAO market-based scheme in third countries. See further Article 25a of the ETS Directive.
88 See Chapter 9.
90 Articles 17(1) and 27(2) TEU for the first time explicitly mention this task for the Commission and the High Representative. It may be noted that the EU’s external policy envisages a major role for the rule of law (Article 21(1) TEU) which entails a policy preference for multilateral law based on EU legalism, as opposed to other states that do not postulate legalism quite so much, see K. Kulovesi, ‘Climate Change in EU External Relations: Please Follow My Example (Or I Might Force You To)’, in E. Morgera (ed), The External Environmental Policy of the European Union, Cambridge University Press 2012, at p. 116.
linked to the substance of the matter: the centrality of competitiveness concerns. Apart from the central position of the Commission, the explicit connection between the EU’s internal climate change policies and the international climate change mitigation effort must be noted here.

We see this in the ETS Directive’s inclusion of what can be called sticks and carrots for international multilateral cooperation. The carrot exists in the form of the EU’s pledge to reduce greenhouse gas emissions by 20 per cent and top that up (by an additional 10 per cent) to 30 per cent when there is an international accord on this matter.91 The clearest stick for both developing and developed countries can be found in Article 11a(7) of the EU ETS Directive. This holds that, following the conclusion of an international agreement, only credits for project activities from countries that have ratified that agreement can be taken into account for the purpose of the EU ETS. In view of the EU’s position as the world’s biggest carbon market, this constitutes a significant incentive and integrates the international layer into the multi-level governance scheme laid down in the ETS Directive. The same holds true for Article 28 of the ETS Directive.92 This provision requires the Commission to forward a report to the Council and European Parliament on the possibly more ambitious EU greenhouse gas abatement target. This report should essentially contain an appraisal of the international agreement as well as an assessment of the impact on national and EU policies and competitiveness.

As regards international governance as well as governance in third countries, the RES Directive also acknowledges a multi-level governance scheme. In particular where such renewables involve raw materials coming from primary forests, nature reserves, highly biodiverse grassland and land with high carbon stock, the EU keenly eyes the way in which these raw materials are grown and harvested in in third countries as well as the way in which this regulated in those countries.93 Similarly, raw materials grown on peatlands will only be taken into account if there is evidence that their production does not involve drainage of land that was undrained before January 2008.94 As a result, the biofuels resulting from these raw materials will not count towards the renewables targets of the Members State and will not command a price premium. The 2018 RES Directive continues along these lines and includes an incentive for third countries that seek to export biomass to the EU to be party to the Paris Agreement.95

In addition to incentivising biomass production through the Member States, the RES Directive envisages reporting by the EU itself of compliance by Member States,96 as well as

---

91 See e.g., Article 30 of the ETS directive.
92 Another carrot can be found in Article 10(3)(c) ETS Directive, according to which the proceeds of the allowance auctions may be used to fund forestry projects, but only in third countries that have ratified the international agreement.
93 Article 17 (3)(a), (b), (c) and (4) RES Directive.
94 Article 17(5) RES Directive.
96 This applies to third countries as well as Member States. Concerning the latter this has the awkward consequence that the Commission will have to report on the application of the CITES Regulation in order to control
third countries with certain international conventions and development standards. This is a weaker instrument that appears to rely primarily on political declarations. It requires the Commission to report to the European Parliament and Council on the impact of the Union’s biofuel policy upon food availability and affordability in developing countries. Insufficient environmental governance in third countries may thus also trigger the applicability of this reporting procedure. In view of the requirements imposed on the EU by the GATT/WTO rules, these corrective measures would most probably only involve political action or a further extension or reformulation of the list of items taken into account for the incentivisation effect.

All in all, EU climate law clearly has an international governance element to it. This international governance element is, however, less successful. For one, the Paris Agreement, though hailed as the first legally binding and universal climate agreement, still does not include several significant greenhouse gas emitters. In addition, the EU has been less than effective in setting the agenda for the recent round of international climate change negotiations. Despite these setbacks, the EU still sets much of its energy and climate agenda in accordance with international negotiations.

10.5 CONCLUSION

Cost-effectiveness and solidarity between the Member States are major driving forces in shaping the multi-level framework for EU climate governance. In particular, cost-effectiveness, using market mechanisms to bring about greenhouse gas abatement at the lowest possible costs, can be seen as an important driver. The incentive schemes trigger a reduced mutual interdependence or solidarity between the Member States, which in turn reduces the role of the EU in multi-level governance. As soon as public funding is involved (such as subsidies to reduce the costs of renewable energy), the Member States take out the cross-border element and thus remove the EU from the governance framework that drives decisions on how this funding is distributed. We see this tension when reviewing the process resulting in the 2030 Climate and Energy Framework, where the European Council conclusions are succinct and gnomic on the governance of this framework, whereas the Commission envisaged a true review process for the national policies involved.

whether or not the Convention on International Trade in Endangered Species of Wild Fauna and Flora has been implemented: cf. Article 17(7), tenth indent, RES Directive.

97 The list of ILO Conventions and environmental treaties (the Cartagena Protocol on Biosafety and the Convention on International Trade in Endangered Species of Wild Fauna and Flora) appears to be exhaustive. It is not clear why other international treaties, such as the Ramsar Convention (on the protection of wetlands), were not included.

98 Article 17(7) Renewables Directive.

The market mechanism that drives (market) integration in general in the EU also underlies the creation of an Energy Union. In this Energy Union ever more market integration is also seen as creating more solidarity between the Member States, ultimately resulting in opening up incentive schemes to companies across the EU instead of limiting the efficiencies that markets can bring to the national territory. This potential for cost-effectiveness has already resulted in (the evolution of) the EU ETS. Interestingly, it is exactly this involvement of the industry level, as well as the need to take into account the international level, that reinforces the role of the EU in the multi-level governance scheme.

The need for efficiency in EU climate law is expected to result in more solidarity between the Member States. This is also why, notably, the Commission presents an ambitious climate policy as an instrument to maintain or even increase competitiveness. This will increase the importance of the EU as the locus for decision-making that not only concerns myriad companies within the EU, but also reflects the fact that the EU is far from the only emitter of greenhouse gases. Ultimately, climate change is a truly global problem that can only be tackled collectively, which needs to go hand in hand with solidarity.

**CLASSROOM QUESTIONS**

1. Why is EU climate governance so complicated? Explain in your own words.
2. In which areas of EU climate law does governance take place mostly at Member State level and in which areas does this occur more at EU level?
3. Design and defend an easier scheme for climate governance in the EU.

**SUGGESTED READING**

**Books**


**Articles and chapters**


**Policy documents**

No specific policy documents available (to our knowledge).