RePowerEU and End War by Ending Fossil Fuels

Ewan McGaughey

11.05.2022 doi: 10.17176/20220511-182246-0

Putin's criminal war on Ukraine has forced the Commission to say it will 'RePowerEU', to end Russian fossil fuels. We must also clearly end all fossil fuels, and drive as fast as technology allows to 100% clean energy. To do this we should capitalise upon the vast range of legal options in our European economic constitution: that is the 'law of enterprise'. The geopolitical situation requires us to see our law as an organic, social whole, and for all private and public actors to be on board. If we recognise everyone's universal right 'to share in scientific advancement and its benefits', we can have clean air, a plural economy, a more democratic polity, a more just society, and peace.

The resource curse

The Ukraine war makes us realise that ending coal, oil, and gas is an environmental *and* a geopolitical imperative. First, the 'resource curse' means that the countries whose exports are most fossil fuel intensive and not diversified, are most likely to be dictatorships. Gas, oil and coal extraction have high barriers to entering the market, are easily monopolised, and their wealth is easily captured by political elites. Rarely a blessing, fossil fuels usually curse people with oligarchy, and dictators who launch aggressive wars. By contrast, the materials for solar, wind, and hydro-storage are cheap, dispersed and abundant. Clean energy makes enterprise more plural, and politics more democratic, because nobody can monopolise the sun, wind and rain.

Second, fossil fuels cause apocalyptic climate damage. It's not 'change'. It's 'damage' because fossil fuels are burning and drowning our planet, and corporations like Shell, BP, Total, RWE, Exxon or Gazprom profit from it. These corporations also fill the air with toxic filth, which in the UK costs the NHS £6 billion and kills 40,000 people every year.

Third, how do we stop this? We must change our mindset because we are at war. In World War Two, the US government told its automakers that it needed all factories to retool for planes, and the corporate executives replied that their demands were impossible: only 10-15% of production could be switched a year. But the US government insisted, and then it was done at incredible pace. The most successful, global environmental law is the Montreal Protocol, which banned chlorofluorocarbons and hydroflurorocarbons and healed the hole in the ozone layer. Bans work because they provide moral clarity that galvanises political coalitions, whereas carbon taxes and timid steps to regulate the evil usually fail. Fortunately, the production areas where coal, oil and gas can not be easily and profitably replaced are now largely limited to planes, cargo ships, cement and steel. And all of these have solutions in development. They will come clean with enough research and development investment, and the necessity of technology, as imminent bans will necessarily be the 'mother of invention': *Vorsprung durch Verbote, und Technik*.

Five steps to a clean European economy

Energy

So what are the laws we need to change? First, there is energy. If we are to act with real resolve, a new Electricity Directive 2019/994 article 8a should require Member States to ensure that all electricity undertakings swiftly convert their supply to wind, solar or other clean energy, for instance at a rate of 33% a year. The Gas Directive 2009/73/EC needs a new article 5, with a duty on Member States to phase out all gas as fast as technologically possible and redeploy infrastructure and staff to build hydro-storage facilities for when the sun does not shine or wind does not blow. This world map identifies good hydro-storage locations: you pipe and pump water up a hill or a mine, and let gravity do

the rest. Then a new Hydrocarbons Directive 1994/22/EC article 2 should require Member States to eliminate all fossil fuels as fast as possible. Corporations that fail to convert their business should be wound up.

Transport

Second, there is transport. The total cost of electric vehicle ownership is now cheaper than for fossil fuel vehicles, with clean energy costs declining logarithmically. All tax deductions for non-electric vehicles should be scrapped, because it damages European business to keep driving petrol and diesel, even in the medium term. A new Bus Regulation 2011 (EU) No 181/2011, article 6a should require bus licensing authorities, and companies, to electrify their fleet, for instance at a rate of 33% a year, and Member States to replace all traffic possible with electric bus routes. The Railways Directive 2012/34/EC, article 17(4A) should require electrifying all rail in cooperation with infrastructure owners. Subsidies for rail should be given, and flight-paths of comparable speed de-licensed (eg London to Paris). The Vehicle Emissions Regulation 459/2012/EU needs a new Euro 7 standard with zero emissions, and the Emission Performance Regulation (EC) 443/2009 article 4 should prohibit shareholder dividends and cut executive pay until this is achieved. After 'Dieselgate', the automakers have a moral duty to go electric. They also risk being eclipsed by American and Asian competition. Markets work, but are slow. It took 50 years for cars to replace horses, even though horses were obsolete. Bans – with all suitable exceptions – work faster. So, ban and invest.

Food

Third, there is food. The Common Agricultural Policy of the EU (CAP) should go back to its original social purpose, not enrich agri-businesses that decimate nature. The Direct Payments Regulation (EU) No 1307/2013 article 9 should require all 'active farmers' to plant trees and enhance biodiversity, and articles 45 and 46 should be amended to progressively raise the 'ecological focus area' requirements from 5% to 25%. A new Management and Financing Regulation (EU) No 1306/2013 article 91a should require farmers to eliminate unnecessary machinery, practice no-tilling to revive soil and retain carbon, and use robot weedkillers instead of huge herbicide sprays. To solve rural poverty and boost investment, all employers in receipt of money should be required to pay living wages and recognise independent trade unions (the best defence against fascism), and the Rural Development Regulation (EU) No 1305/2013 article 5 should require installation of electric charging points, and provision of electric public transport, just like the great New Deal programmes in the US Rural Electrification Act of 1936.

Buildings

Fourth, there are buildings. The Energy Performance of Buildings Directive 2010/31/EU articles 2(2) and 7-9 should change from a duty for 'nearly zero-energy buildings' to 'negative energy buildings' following the motto 'every building a power station'. Article 14 on 'inspection of heating systems' should include a ban on all new gas heaters and create a duty to replace existing heaters in public and commercial buildings, then homes, with heat pumps or electric boilers.

Business

Fifth, we must change business in general, at a micro and macro level. The Accounting Directive 2013/34/EU article 6 should require companies to account for the cost of shifting to clean energy, and the Company Law Directive 2017/1132/EU article 45 should require companies to set aside reserves for climate damage liability. In *Urgenda v Netherlands* (2019) and the *Klimaschutz case* (2021) the highest Dutch and German courts have held governments responsible for reducing emissions faster, and in *Milieudefensie v Shell* (2021) a Dutch court held a corporation was liable in tort for failing to reduce emissions. In *Lliuya v RWE AG* (2017) a German Upper State Court is examining whether a big power company could be held liable to pay 0.47% of the cost of flood defences against a melting glacier at a Peruvian village because RWE has contributed to 0.47% of all historic greenhouse gas emissions. However, we should not have to wait for the courts: the principle that "polluters pay" should be codified into EU law, and transposed into every Member State's tort system, for climate damage in full. At a macro level, the European Central Bank Statute, article 1, should clarify that

'price stability' entails reducing inequality and ending climate damage. Inequality of income and wealth concentrates risk and drives depression. The wild inflation now, like in the 1970s, comes from fossil fuels controlled by dictators. This is not controversial: the gas price rises before Putin's criminal invasion happen because we're addicted to gas. So, stop fossil fuels, stop dictators, stop inflation entirely from fossil fuels. Finally, the GNI Regulation 2019/516/EU should replace 'Gross Domestic Product' (GDP) as a measure of economic performance with objective factors that do not count profit, which comes from harm to the environment, human health, and 'loss of our natural wonder', as positive. The inequality-adjusted Human Development Index, with real wages replacing GDP, would be a better measure of welfare for the European social market model, enshrined in the Treaties.

Comparison to the Sustainability and Due Diligence Directive proposal

How does this compare to the SDDD proposal, released a day before Putin's criminal invasion? This Directive would require companies with turnover in excess of €150 million, or just €40 million in 'critical sectors', to prevent 'potential adverse impacts' on human and environmental rights (arts 2-3, 7 and Annex). If 'the adverse impact', says article 8(2), 'cannot be brought to an end, Member States shall ensure that companies minimise the extent of such an impact.' Article 15 says large companies should have a 'business model and strategy[…] compatible with the transition to a sustainable economy' (not defined), 'limiting of global warming to 1.5 degrees', and they should report. Article 25 says directors have a duty to 'take into account the consequences of their decisions for […] human rights, climate change', etc. This is like the UK Companies Act 2006 section 172, without a good faith defence.

In a nutshell, the proposed Directive is 'blah, blah, blah'. Article 8(2) gives companies a licence to pollute, violate labour and human rights, and argue over it in court if the wrongs ostensibly 'cannot be brought to an end'. Presumably Gazprom lawyers in London or Munich would have argued that NordStream2 just could 'not be brought to an end' but that they could plant some trees to 'minimise the impact'. But is this better than nothing? Arguably it is worse, because it made everyone feel like they were doing something when they were not, and the dictator fuelled his next criminal invasion.

So, with a dozen other changes, article 25 should require every director to shift their company to clean energy as fast as technology allows, divest fossil fuels, and make products of lasting quality to minimise material throughput. Every director should comply with human rights duties, without qualification. This should be enforceable by investors, employees and other groups with a sufficient interest in the company, through a harmonised derivative claim procedure.

Act now, and ditch distant targets

If this war makes us realise anything, it's that lies and inaction must end. In 1977, Exxon Corp's internal research said 'mankind is influencing the global climate through carbon dioxide release from the burning of fossil fuels'. Then its executives lied and denied global warming. In 1997, Putin wrote a master thesis on how Russia could be great again if it exploited its resources. He turned his country into a petro-state, and became the world's biggest climate denier. After the first Ukraine invasion, his US president appointed Exxon's CEO as Secretary of State, and Putin funded climate deniers and sceptics across Europe. Every puff of smoke, every slick of oil, every lump of coal is doing us damage, and the geopolitical cost can no longer be ignored. Ukrainians are being tortured, mass raped and massacred by war criminals. Similarly, Saudi Arabia is run by another sadistic war criminal who chops up journalists and starves Yemeni children. And the list goes on. So, distant targets of 2050 or 2030 are no good. They function as licences for fossil fuellers and dictators to keep going.

Perhaps the best advice, from Immanuel Kant, writing in 1792 in Königsberg, today's Kaliningrad, was that if we could dispose the materials for war, end international debt, and ensure that states are free, we may come *Zum Ewigen Frieden*, and win *Perpetual Peace*. We followed most of Kant's advice at the end of

World War Two, enshrined in the United Nations Charter ban on aggressive war, in the Universal Declaration of Human Rights, and in a host of other international law norms. But we have not yet tackled the key problems in changing our economic constitution, particularly fossil fuels and relations of debt and dependence, that a coherent legal strategy for clean energy will go so far to solve.

A previous version of this article contained an error regarding the Lliuya v. RWE case which has been corrected, the ed.

ABOUT THE AUTHOR

Ewan McGaughey

Dr Ewan McGaughey (@ewanmcg) is a Reader in Law at King's College, London, and a Research Associate at the Centre for Business Research, University of Cambridge. His new book, Principles of Enterprise Law: the Economic Constitution and Human Rights (Cambridge UP 2022) is available for pre-order.Dr Ewan McGaughey (@ewanmcg) is a Reader in Law at King's College, London, and a Research Associate at the Centre for Business Research, University of Cambridge. His new book, Principles of Enterprise Law: the Economic Constitution and Human Rights (Cambridge UP 2022) is available for pre-order.

SUGGESTED CITATION

McGaughey, Ewan: RePowerEU and End War by Ending Fossil Fuels, Verfassungsblog, 11.05.2022, doi: 10.17176/20220511-182246-0.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20220511-182246-0.