



## IN THE SPOTLIGHT

### Climate and energy law: Legal expertise to support ambitious climate policy

At the 2015 Paris Climate Conference, which brought together the parties to the *United Nations Framework Convention on Climate Change (UNFCCC)*, Germany pledged to achieve substantial reductions in its greenhouse gas emissions. Without ambitious efforts to cut carbon emissions, it will be impossible to keep global warming well below 2°C – or, preferably, to 1.5°C – and thus avert climate breakdown.

In November 2016, the German Government adopted the Climate Action Plan 2050, which describes the pathways for progress towards these targets. The medium-term goal is to cut greenhouse gas emissions in Germany by 55% by 2030 compared to 1990 levels. Corresponding mitigation targets are also set for individual sectors – energy, industry, transport, buildings, agriculture and waste.

An intensive debate is currently under way among policy-makers and within wider society about a climate action law and the specific measures that need to be taken in individual sectors to ensure that Germany does not miss its climate targets again in future. Carbon pricing – a cross-sectoral measure – will additionally assist Germany to meet these goals.

#### Preparing the ground for legislation

Climate and energy law is a longstanding focus of attention for the Oeko-Institut's legal researchers, whose work involves analysing, developing and elaborating appropriate measures. In many instances, the first step is to establish that there is a need for legislation; the researchers then explore the political and legislative scope and identify suitable regulatory pathways.

Climate protection measures must be compatible with superior law – primarily European and constitutional law – and must be designed in a way which facilitates their integration into the existing legal framework. The broader economic and social parameters must also be considered.

Ultimately, it is about developing proposals which, besides being legally viable, are fit for purpose, effective, as efficient as possible and do not impose unreasonable burdens on those directly and indirectly affected.

## Advising on the law – from state to EU level

Key topics addressed by the Oeko-Institut have included legal issues relating to the coal phase-out, a climate framework law, effective and equitable carbon pricing, reforms of the *EU Emissions Trading System (EU ETS)*, and measures to reduce the carbon footprint of international shipping and aviation.

The legal researchers at the Oeko-Institut also work on mining law, other legislation applicable to resource extraction, and product-specific regulation (e.g. repair-related aspects of the *Ecodesign Directive 2009/125/EC*). In addition, they are looking at legal and implementation issues relating to the proposed *Buildings Energy Act*, which is intended to merge the *Energy Saving Ordinance* and the *Renewable Energies Heat Act*.

Regular support is also provided to ministries at both federal and state level, particularly the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety (BMU), and the German Environment Agency (UBA). This takes the form of briefings and expert opinions. Our team further devises policy proposals contributing to the development of climate legislation.

## Assessing the legal parameters for a coal phase-out and the scope for carbon pricing

On behalf of the German Environment Agency (UBA), the Oeko-Institut's legal experts, in collaboration with Professor Stefan Klinski, looked at the legal parameters for a coal phase-out and at energy taxation issues. A particular aim was to investigate how energy taxes can be structured so as to support the decarbonisation of the electricity sector.

As the law currently stands, energy products used in electricity generation, such as coal, oil and gas, are not generally subject to taxation. Since 1999, however, energy taxes have applied to the final product, i.e. electricity, even if it is generated from renewables. The project looked at the provisions of European law and the constitutional rules applicable to public finance to determine how taxes can be restructured as a means of promoting the transition to a low-carbon economy.

The experts concluded that concurrent taxation of the fossil fuels used in power generation and the generated electricity itself does not raise any significant issues or concerns under European law or financial regulations.

There is also scope to introduce a graduated system of tax rates in order to take account of climate policy aspects. This type of graduated system, which would be based on a fuel's carbon content, would increasingly squeeze problematical coal-fired electricity generation out of the market. Besides being a legally viable option, this move is essential from a climate policy perspective.

[Endbericht „Klimaschutz im Stromsektor 2030 – Vergleich von Instrumenten zur Emissionsminderung“ im Auftrag des Umweltbundesamtes](#) (Final report for the German Environment Agency (UBA): Climate change mitigation in the electricity sector 2030 – a comparison of emission reduction tools)

## Advice on the framing of climate legislation

A further example of a legal assessment undertaken by the Oeko-Institut is a short study entitled *Erweiterungen des steuer- und abgabenrechtlichen Gestaltungsspielraums für Klimaschutzinstrumente im Grundgesetz* (Expanding the scope for climate protection through taxes and levies under the Basic Law). Based on the case law of the German Federal Constitutional Court

(BVerfG), the study identifies the sometimes very tight constraints on introducing financial tools for climate protection in Germany.

The Oeko-Institut's legal experts pinpoint areas where amendments to the German constitution, the Basic Law, may be useful in order to expand the range of available legal and policy instruments. The aim is to give law-makers more scope to impose charges on climate-damaging activities (especially carbon emissions) and to introduce incentive schemes – based, for example, on the credit/penalty principle – as is customary in many other countries.

[Assessment for the German Environment Ministry BMU: Erweiterungen des steuer- und abgabenrechtlichen Gestaltungsspielraums für Klimaschutzinstrumente im Grundgesetz](#) (Expanding the scope for climate protection through taxes and levies under the Basic Law)

## Protecting the climate or tenants' rights?

A short study for the BMU on landlord-to-tenant electricity and heating looks at ways of promoting renewables use in shared-occupancy buildings. The current regulations raise a number of fundamental issues relating to the legislation governing tenants' rights and operating costs in rental properties. For example, the 2017 Act on the Promotion of Tenants' Electricity allows solar power generated on rental properties to be sold directly to the tenants, enabling them to benefit from the energy transition.

The main issue addressed in the study is whether it is permissible under tenancy law for this electricity to be billed as part of a building's operating costs instead of being charged for separately under a power supply contract. The researchers conclude that the law does not permit this billing method, as revenue from supplying landlord-to-tenant electricity is unconnected to operating costs under tenancy law. A legal declaration seeking to establish such a connection would conflict with the definition of operating costs under the existing system.

Furthermore, under European law, tenants are free to choose their electricity supplier, a right which cannot be restricted by declaring electricity output as operating costs. It may also be assumed that the complexity of billing for operating costs would substantially increase. For these reasons, this method of charging for electricity is not recommended.

## The landlord/tenant dilemma

The second part of the study looks at how tenants are billed for renewables-generated heating (landlord-to-tenant heating). The upgrading of heating systems to renewables often involves substantial investment costs, whereas running costs are relatively low as these systems use very little fuel. The landlord/tenant dilemma concerns the question of who should cover specific costs and how these costs are to be passed on.

Investment costs can be passed on to tenants via the modernisation surcharge. However, tenants do not always benefit from a decrease in heating costs; indeed, rents that include heating costs may increase after upgrading. The study aims to clarify whether it is possible to charge for some elements of the investment in renewable energy installations as part of the running costs.

The experts look at the current situation, eligible technologies, the scope of the law, the need to avoid a double financial burden for tenants, and price regulation options. They conclude that it is possible to modify the concept of operating costs at a legislative level. However, in order to avoid

additional burdens for tenants that would put acceptance of the energy transition at risk, a cautious approach is called for when introducing new rules. There are various other issues to be clarified as well.

[Assessment for the German Environment Ministry BMU: Abrechnung von Mieterstrom und Mieterwärme](#) (Billing for landlord-to-tenant electricity and heating)

## Further information

[Gutachten: „Realisierbarkeit von Klimaschutzklassen für Gebäude als Element einer integralen und langfristigen Sanierungsstrategie“ im Auftrag des BMU](#)

(Assessment for the German Environment Ministry BMU: Viability of climate protection categories for buildings as an element of an integrated long-term upgrading strategy)

[„Harmonisierungsbedarf im Rahmen der Administration des EU-Emissionshandels als System der Mehrebenenverwaltung“ im Auftrag des UBA](#)

(Need for harmonisation in the administration of the EU Emissions Trading System as a multi-tier governance system, on behalf of the Federal Environment Agency UBA)

[Stellungnahme „Weiterentwicklung des Erneuerbare-Energien-Wärmegesetz“ zur Anhörung des Ausschusses für Wirtschaft und Energie des 18. Deutschen Bundestages am 17. Februar 2016](#)

(The further development of the Renewable Energies Heat Act: Expert opinion for the hearing conducted by the German Bundestag's *Committee on Economic Affairs and Energy*, 17 February 2016)

[Research report: Informative and Transparent Heating Bills as a Contribution to Climate Protection](#)

[Studie: „Konzepte für die Beseitigung rechtlicher Hemmnisse des Klimaschutzes im Gebäudebereich“](#)

(Study: Concepts for the removal of legal barriers to climate protection in the buildings sector)

[Study: Instruments for environmentally sustainable regulation of raw materials extraction \(INSTRO\), Teil 1: Recht der Rohstoffgewinnung – Reformbausteine für eine Stärkung des Umwelt- und Ressourcenschutzes im Berg-, Abgrabungs- und Raumordnungsrecht](#) (Part 1: Resource extraction law – Reform elements for improved consideration of resource protection and conservation in mining, extraction and spatial planning law)

[Study for the UBA: Underground spatial planning and sustainable resource management using the example of selected regions](#)

[Study for the UBA: An Aviation Carbon Offset Scheme \(ACOS\) \(in English\)](#)

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