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CARBON CAPTURE LEGAL PROGRAMME

The Implementation of the EU CO₂ Storage Directive: Challenges and Opportunities

Background to the EU Case Studies Project

In June 2009, the European Union adopted its 'Climate and Energy Package', which contains a series of measures to drive Member States' legal and policy strategies to achieve the EU's emissions reduction targets. Directive 31/2009/EC on the geological storage of carbon dioxide ('CCS Directive') was adopted as an element of this Package and represents one of the first CCS-dedicated legal frameworks in the world. The Directive requires all EU Member States to adopt domestic measures to implement its provisions within national law ('transposition') by 25 June 2011. The European Commission is responsible for monitoring its correct implementation into Member States' national law.

The EU Case Studies Project

The Carbon Capture Legal Programme launched the 'EU Case Studies Project' in January 2011. The project analyses the implementation process of the CCS Directive in selected European jurisdictions - the United Kingdom, Germany, Poland, Romania, Spain, and Norway. Each jurisdiction, for distinct reasons, provides an example of different approaches to the transposition and to CCS in general.

The objective of the Project is to identify some of the more subtle nuances in different legal cultures and to understand the rationale for national decisions on specific aspects of the implementation of the Directive within national legal regimes. In particular, the focus is on those areas where the Directive leaves room for Member States' discretion or is ambiguous or silent. In conjunction with the more detailed provisions and legal choices, the Project also aims to highlight the national policy and political context within which the legal and regulatory framework for CCS has emerged. The studies are deliberately designed to move beyond formal transposition measures to reveal more of the underlying dynamics and tensions involved in national implementation. Such elements are often crucial in driving domestic legal developments. The way in which EU Directives are implemented often reflects distinct legal and administrative traditions, and the case studies seek to present these in order to provide better insights on the development of CCS regulation.

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The result of the project is a series of reports from the six jurisdictions based on key legal and policy questions, and on a critical reading of the CCS Directive. The CCLP is coordinating the overall research and has carried out the UK case study. Independent experts have been commissioned to carry out research in Germany, Poland, Romania, Spain and Norway.

THE REPORTS IN BRIEF ...

GERMANY

by Prof. Ludwig Krämer

By June 2011, Germany had not yet adopted a legal instrument to transpose the CCS Directive into national law, and therefore failed to comply with the deadline set by the Directive. The German transposition process has encountered an unprecedented level of public opposition to the technology which has influenced the political debate concerning CCS and resulted in delays to the Parliamentary approval.

This report discusses in detail the policy and political context in which the CCS debate has emerged in Germany. It includes a broad account of the reasons for public opposition and of its consequences on the German CCS policy. The report also highlights aspects of the transposition of the CCS Directive which are novel for Germany when it comes to the implementation of other environmental and energy law directives. A detailed description of the provisions of the Bill currently in discussion before the German Parliament is included. In the light of the wider administrative and environmental law framework, the report draws parallels between the issues associated with implementing the CCS Directive in Germany and past experience with other environmental Directives or other technologies and activities.

In the absence of a final Parliamentary decision on this Bill, this report is still subject to amendment and updates, which the author will prepare in due course.

SPAIN

by Prof. Ludwig Krämer

Spain fully transposed the CCS Directive by means of Law ("Ley") 40/2010, in advance of the deadline for transposition. Ley 40/2010 largely mirrors the provisions of the Directive, with some minor differences. The implementation was done by means of new legislation rather than trying to adapt the existing mining, and other

national and regional legislation, to the requirements of the Directive. Regulations are however required to make the provisions of Ley 40/2010 operational and clarify some details, but by the end of June 2011 no such regulations had yet been published.

This report explores the key elements of the early CCS debate in Spain and its role in the country's energy and climate change strategy. It analyses the characteristics of the transposition law and the extent to which it might conflict with the Directive. Extensive discussion is devoted to the role of regional authorities and the tensions with the Central government's approach to CCS. The report also highlights how Ley 40/2010 is largely silent on, or ambiguous about, public participation and access to information concerning CCS.

NORWAY

by Prof. Hans Christian Bugge and André Lamark Ueland

Norway is not a member of the European Union, but is a European Economic Area (EEA) member. The CCS Directive qualifies as 'EEA relevant', which means that, if it is incorporated within the EEA agreement, it must be also implemented by EEA members, including Norway. As of October 2011, no such incorporation has yet been agreed, not least because of legal arguments as to whether the EEA extends to offshore areas beyond the territorial sea. However, in 2009 Norway started a process of developing the necessary rules and regulations to implement the requirements of the Directive within its national legal system in order to provide a more coherent national legal framework for CCS. There is still no dedicated CCS legislation in Norway, though existing oil and gas legislation provides a sufficiently broad legal basis for regulating the technology, and the implementation of many of the provisions of the Directive does not seem to entail any special legal challenge for Norway. This report discusses the key legal and regulatory issues in implementing the Directive under Norwegian law, and indicates the most likely outcome of the ongoing process. The underlying theme is what kind of impact the CCS Directive is likely to have on the Norwegian legislative process and Norwegian law. Some of the key questions are: Is Norway obliged to implement the Directive? If not, will Norway choose to implement the requirements of the Directive in any event? How will the provisions of the Directive be implemented? The legal structure in Norway and the rationale for national decisions in general will be important factors in determining how future CO₂ storage regulations will be formulated.

POLAND

by Prof. Jerzy Jendrośka

By June 2011, Poland had not yet adopted a legal instrument to transpose the CCS Directive into national law, and therefore failed to comply with the deadline set by the Directive. Since even the draft law to transpose the Directive had not yet been finalised or made public by mid-October, the report is based on information available to date. Despite the absence of the text of the draft law itself, the basic policy decisions regarding the way of transposing the Directive have been taken by the Council of Ministers, which approved in February 2011 the Principles for the draft law to transpose the CCS Directive. The decision states, inter alia, that the Directive is to be transposed by way of amendment to existing legislation and that the bulk of its provisions will be included in the Geological and Mining Law.

The report examines the policy context in which the CCS debate has emerged in Poland, discusses the legal process for the implementation of the Directive and indicates policy choices made in relation to some key elements of the envisaged legal and institutional framework for CCS. The report will be revised and/or supplemented as soon as the draft law transposing the Directive is published.

ROMANIA

by Prof. Mónika Józson

The CCS Directive has been transposed into Romanian law by Government Emergency Ordinance (GEO) 64/2011. This is a framework law, but will also govern the implementation of the first demonstration project in Romania. However, issues might yet arise as GEO 64/2011 has still to be confirmed by a law voted on by Parliament. Therefore, Romania complied with the deadline for transposition only in formal terms, as the implementing law has yet to be adopted.

This report describes the policy landscape in which CCS technologies are developing in Romania, together with details of the Romanian CCS demonstration projects. It gives a detailed analysis of the key provisions of GEO 64/2011, putting this instrument into the wider context of existing environmental legislation in Romania. The report concludes that the transposition law is a merely formal "transplant" word-by-word of the provisions of the Directive within the Romanian legal system, with minimal institutional set up and no procedures on authorisation, monitoring and control, financial incentives or the

functioning of the central implementing authority. The report also describes the opportunities for public participation in decision making concerning CCS as weak and unsatisfactory.

UNITED KINGDOM

by Chiara Armeni

Despite its initial advantage, the UK has not been technically able to meet the deadline set by the Directive for its full transposition. The Directive has been implemented by integrating CCS within the existing oil and gas legislation (Energy Act 2008 combined with dedicated regulations and amendment to existing laws), rather than creating an independent new system. Importantly, the UK has also established a sophisticated CCS policy based on: mandatory requirements for CCS; a commitment to fund four commercial-scale CCS demonstration projects; and setting up a range of financial mechanisms to incentivise CCS - which as a whole is unique in Europe. This report describes the developments of CCS law and policy in the UK. It analyses the characteristics of the UK implementation, the CCS governance framework and the details of the legislative provisions. The report argues that, despite implementing issues, delays and a potential shift in government support for CCS, the UK remains a leader in the EU in relation to the design of policy instruments and incentives to support CCS deployment.

Full copies of the reports are available for download at: <http://www.ucl.ac.uk/cclp/ccsresearch-preview.php>

AUTHORS' SHORT BIOGRAPHIES

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Hans Christian Bugge is Professor of Environmental Law, Faculty of Law, University of Oslo. Before becoming an academic lawyer in 1991, he held senior positions in Norway's Ministry of Environment (1972-1982) and was Secretary General of Norway's Save the Children organisation (1982-1991). He served as State Secretary for