

# THE GREEN DEAL GOES SOUR FOR THE CLEAN ENERGY SECTOR IN GREAT BRITAIN

*Joshua G. Gamboa*<sup>†</sup>

## INTRODUCTION

Individual European country taxes have recently been tailored towards a policy that incentivizes clean energy alternatives in order to curb CO<sub>2</sub> and other harmful emissions that contribute to the continent's carbon footprint.<sup>1</sup> Cutting against this established tax policy, the European Court of Justice surprisingly held in *European Commission v. United Kingdom of Great Britain and Northern Ireland*<sup>2</sup> that a national discount on Value-Added Tax ("VAT") for energy-saving materials flouted European Union rules by misapplying two exemptions.<sup>3</sup>

The defendant, the United Kingdom, offered a reduced rate of five percent VAT on solar panels, water turbines, and wind turbines, among other home improvements, to all British homeowners who sought installation to improve their properties.<sup>4</sup> Based on the holding in this case, the British government must comply with European Union law by returning these clean energy alternatives to the full twenty percent VAT or face severe fines for noncompliance.<sup>5</sup>

---

<sup>†</sup> B.M. 2012, Montclair State University; J.D. 2016, Regent University School of Law.

<sup>1</sup> See generally Directive 2009/28/EC, of the European Parliament and of the Council of 23 April 2009 on the Promotion of the Use of Energy from Renewable Sources and Amending and Subsequently Repealing Directives 2001/77/EC and 2003/30/EC, 2009 O.J. (L 140) 16 (requiring European Union member states to submit national renewable energy action plans by June 30, 2010 with a legally binding 2020 target to reduce CO<sub>2</sub> emission and create a major market share of renewable energy consumption). See, e.g., *Wijziging van de Uitvoeringsregeling Energie-Investeringsaftrek 30 december 2014*, *Stert.* 2001, 3 (Neth.) (describing in Bijlage I Artikel 1 tax deductions for investment in energy saving for commercial buildings). The European Union Directive policy emphasizes overcoming economic, technological, and structural hurdles for the development of renewable energy.

<sup>2</sup> See generally Case C-161/14, *Comm'n v. United Kingdom of Great Britain and Northern Ireland*, 2015 [hereinafter *Comm'n v. U.K.*].

<sup>3</sup> *Id.* para. 1.

<sup>4</sup> See Vanessa Houlder, *European Court Rules Against Low VAT for Energy-Saving Equipment*, *FINANCIAL TIMES* (Jun. 4, 2015, 7:56 PM), <http://on.ft.com/1Kd2vH3>; Terry Macalister & Emma Howard, *Anger over Threat of VAT Hike on Renewable Energy*, *THE GUARDIAN* (Dec. 9, 2015, 2:04 PM), <http://www.theguardian.com/business/2015/dec/09/vat-hike-tax-renewable-energy-wind-power-solar-panels-hmrc> (stating that unnamed critics have pointed out that insulation and central heating are unaffected by the holding, but wind and solar energy improvements are singled out for VAT increases).

<sup>5</sup> See Houlder, *supra* note 4 (stating that despite the Queen's Speech of a "tax lock commitment" to legislate against VAT increases, clean-energy equipment VATs will rise from five to twenty percent).

Under external pressure, the United Kingdom has caved to the European Court of Justice's holding and essentially surrendered sovereignty in national legislative interpretation to the European Union, where the European Union has no place to determine interpretation of the law. This Comment argues that the European Union has overstepped its boundaries as a supra-national entity when it sets the definition of "social policy" that is solely in the interpretive domain of a member state at the national level. In Part I, the discrepancies between United Kingdom legislation and European Union law are contrasted and given context. Part II discusses the exemptions analyzed in the European Court of Justice holding and their application to British law. Finally, Part III, exposes the social damage caused by higher costs to clean energy and the encroachment of national sovereignty by the European Union.

#### I. THE CONTEXT OF EUROPEAN AND UNITED KINGDOM LAW

Prior to litigation in September 2011, the United Kingdom was given formal notice that a reduced VAT on clean-energy goods and services was contrary to European Union law.<sup>6</sup> The United Kingdom agreed in November 2011 only to the reduced rate for goods and services for the charitable purposes exemption, but would apply full VAT rates to energy-saving materials in 2013.<sup>7</sup> The European Commission sent another notice of noncompliance to the United Kingdom in June 2012, but the United Kingdom reiterated in August that it complied with European Union law.<sup>8</sup> The Commission was unsatisfied with the United Kingdom's answer and commenced legal action.<sup>9</sup>

##### A. *The European Union Value-Added Tax Directive*

Binding law cited in this case include five general provisions taken from the Council of the European Union VAT Directive ("Directive").<sup>10</sup> The first relevant European Union VAT Directive section the European Court of Justice cites sets a normalization policy for member states that equalizes VAT taxes on goods and services under the same rate.<sup>11</sup> Second, Article 98 allows the application of a reduced VAT rate on goods and services that are set out in Annex III of the Directive<sup>12</sup> and defined

---

<sup>6</sup> *Comm'n v. U.K.*, *supra* note 2, para. 8.

<sup>7</sup> *Id.* para. 9.

<sup>8</sup> *Id.* para. 10.

<sup>9</sup> *Id.* para. 11.

<sup>10</sup> *See id.* paras. 1–5. *See generally* Council Directive 2006/112, 2006 O.J. (L 347) 1 (EC) (setting forth the standard rates, exemptions, and reduced rates for the supply of goods and services in the European Union).

<sup>11</sup> Council Directive 2006/112, *supra* note 10, at 23–24.

<sup>12</sup> *Id.* at 24.

according to the Combined Nomenclature.<sup>13</sup> Third, Article 99 defines the reduced rate at a specific fixed rate of five percent.<sup>14</sup> The fourth provision, Article 110, which is heavily litigated, states that a member state that sets an exemption applying the five percent reduced VAT rate, according to Article 99, must meet the following requirements: (1) be in accordance with European Union law; (2) have been adopted for “*clearly defined social reasons*,” and (3) be for the benefit of the final consumer.<sup>15</sup> Lastly, Annex III refers to the Article 98 application of reduced rates to goods and services; and for the purposes of this Comment, section 10 is the most relevant.<sup>16</sup>

### B. *The United Kingdom Value-Added Tax Act 1994 and the Green Deal*

Prior to 2011, the United Kingdom applied a reduced VAT rate of five percent to the installation of energy-saving materials in buildings, either for social purposes or for private dwelling improvements in accordance with Section 29A,<sup>17</sup> and Schedule 7A<sup>18</sup> of the Value-Added Tax Act 1994.

In 2011, however, the United Kingdom expanded on the private dwelling exemption when it enacted the Energy Act 2011 (the “Green Deal”) to take advantage of the reduced VATs for energy-efficient home improvement.<sup>19</sup> However, the loans provided in the legislation failed to garner public support,<sup>20</sup> and the Green Deal had to be re-launched in mid-2014 as public grants rather than low-interest loans while still incorporating the lowered VAT rate of five percent.<sup>21</sup>

## II. APPLICATION OF EXEMPTIONS TO BRITISH LEGISLATION

When the European Court of Justice held that the United Kingdom

---

<sup>13</sup> See *Explanatory Notes to the Combined Nomenclature of the European Union*, 2015 O.J. (C 076) 1, 9, 45 (EC) (demonstrating that goods must be designated according to the Combined Nomenclature under the appropriate product classification). This means that any good to be discounted under Article 98 must fall within a defined category in the Combined Nomenclature.

<sup>14</sup> Council Directive 2006/112, *supra* note 10, at 24.

<sup>15</sup> *Id.* at 25 (emphasis added).

<sup>16</sup> *Id.* at 69 (including among the supplies to which the reduced rates apply, the “provision, construction, renovation and alteration of housing”).

<sup>17</sup> Value Added Tax Act 1994, c. 23, § 29A (Eng.).

<sup>18</sup> *Id.* at sch. 7A.

<sup>19</sup> Energy Act 2011, c. 16, § 1 (Eng.) (also known as the Green Deal, which did not actually come into effect until 2013). See ‘Energy Efficiency’ Green Deal Launched by Government, BBC NEWS (Jan. 28, 2013), <http://www.bbc.com/news/uk-21226042>; see also *infra* Part II.B (discussing the private dwelling exemption).

<sup>20</sup> Jessica Shankleman, *Up to 600 Jobs at Risk at Leading Insulation Company*, BUSINESSGREEN (July 4, 2014), <http://www.businessgreen.com/bg/analysis/2353736/up-to-600-jobs-at-risk-at-leading-insulation-company>.

<sup>21</sup> See *New Green Deal is Very Generous, Says Energy Secretary*, BBC NEWS (June 9, 2014), <http://www.bbc.com/news/business-27759217>.

violated European Union law by applying a five percent VAT to energy-saving materials, they examined how the United Kingdom executed the two exemptions at the individual level.<sup>22</sup> The first exemption involved a lowered VAT rate for energy-saving goods for a social or charitable purpose, and the second exemption involved home improvements for private British subjects.

#### A. *The Charitable Purpose Exemption*

According to the Commission, the meaning of “energy-saving materials” within Schedule 7A of the British VAT Act<sup>23</sup> does not conform to the EU meaning of “social policy” in Category 10 of Annex III<sup>24</sup> because the term should be construed narrowly in its interpretation.<sup>25</sup> Based on paragraph 13 in the decision, the European Court of Justice only considers a social policy in governmental intervention for people on low income and those who need equitable access to social housing.<sup>26</sup> However, the United Kingdom adopted the reduced rate for the social policy purpose involving environmental and energy policy objectives for society as a whole.<sup>27</sup> Under a two prong analysis of the United Kingdom housing sector, the European Court of Justice notes that “social policy” is only used in light of two problems in (1) general housing problems for the entire population, and (2) specific initiatives for specific segments or groups in society.<sup>28</sup> Under general housing problems, the United Kingdom claimed that the reduced rate addressed an obvious social need.<sup>29</sup> The question remains on how to interpret “social policy.”

European scholars have stated that the meaning of social policy should be interpreted in three ways: (1) systematically; (2) teleologically; and (3) with a “good sense” of interpretation.<sup>30</sup> According to prior case law, the European Court of Justice has held that where a provision of European Union law is open to several interpretations, preference must be given to an interpretation that ensures a provision retains its

---

<sup>22</sup> *Comm'n v. U.K.*, *supra* note 2, paras. 1, 4–5, 7.

<sup>23</sup> Value Added Tax Act 1994, c. 23, sch. 7A (Eng.) (describing energy-saving materials).

<sup>24</sup> Council Directive 2006/112, *supra* note 10, at 69.

<sup>25</sup> *See Comm'n v. U.K.*, *supra* note 2, paras. 13, 25.

<sup>26</sup> *Id.* para. 13.

<sup>27</sup> *Id.* para. 14.

<sup>28</sup> *Id.* para. 17.

<sup>29</sup> *Id.*

<sup>30</sup> Case C-451/08, *Helmut Müller GmbH v Bundesanstalt für Immobilienaufgaben*, 2009 E.C.R. I-2678 (“The existence of these textual problems is a strong incentive for not attempting to find the ‘correct’ interpretation of provisions through a strictly literal analysis of the provisions in question, especially if that analysis is confined to a single language version.”).

effectiveness.<sup>31</sup> Further, when there is divergence between various language versions of European Union law, the provision must be interpreted by “reference to the purpose and general scheme of the rules of which it forms a part.”<sup>32</sup> However, the concept of “clearly defined social reasons” for a law is a determination to be made by the member state, and the European Union can only intervene when there is severe distortion of the concept.<sup>33</sup>

In this case, the European Court of Justice came to the conclusion that the social objectives of the VAT provision were distorted because the United Kingdom applied the reduced VAT to all residential accommodations without distinction regarding household income.<sup>34</sup> Although the British VAT Act does not specifically list what defines the social policy behind the reduced rate,<sup>35</sup> a systematic and teleological analysis of the legislation would shed light on the purpose behind the reduced rate. The British purpose behind the legislation was a broad social policy regarding general housing problems in the United Kingdom, such as heating and energy costs,<sup>36</sup> within Green Deal legislation,<sup>37</sup> and must be understood together with the British VAT Act provisions in order to interpret the “general scheme of the rules of which it forms a part.”<sup>38</sup> It was not the place of the European Union to scrutinize the political choices of the British legislature under this exemption because the social policy choice was clearly based on the connection between the British VAT Act and the Green Deal.<sup>39</sup> However, the British government caved in too easily

---

<sup>31</sup> See Case C-437/97, *Evangelischer Krankenhausverein Wien v. Abgabenberufungskommission Wien*, 2000 E.C.R. I-1189; see also Case 187/87, *Saarland and Others v. Minister for Indus., Post and Telecomm. and Tourism and Others*, 1988 E.C.R. I-5037.

<sup>32</sup> See Case C-372/88, *Milk Mktg. Board of Eng. and Wales v. Cricket St. Thomas Estate*, 1990 E.C.R. I-1370 [hereinafter *Milk Mktg. Board v. Cricket*]. But see Case C-41/09, *Comm’n v. Kingdom of Neth.*, 2011 E.C.R. I-00831, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=84215&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1213998> (holding that wording used in one language version of a provision of EU law cannot serve as the sole basis for interpretation because it is incompatible with a uniform application of EU law).

<sup>33</sup> Case 416/85, *Comm’n of the European Cmty. v. United Kingdom of Great Britain and Northern Ireland*, 1988 E.C.R. I-3148 (stating that to identify social reasons is a matter of political choice at the national level unless the meaning is distorted and outside the scope of the law’s true objectives).

<sup>34</sup> See *Comm’n v. U.K.*, *supra* note 2, paras. 23, 25.

<sup>35</sup> See *id.* para. 26.

<sup>36</sup> See Macalister & Howard, *supra* note 4.

<sup>37</sup> Energy Act 2011, c. 16, § 1 (Eng.).

<sup>38</sup> *Milk Mktg. Board v. Cricket*, *supra* note 32, at 1376.

<sup>39</sup> See Arla Fytrou-Moschopoulou, *The UK’s Green Deal VAT Reductions Ruled Illegal by EU Judges*, BUILD UP (June 5, 2015), <http://www.buildup.eu/news/44493> (stating that the Commission was aware that the reduced VAT was directly tied to the Green Deal).

prior to the decision of this case by withdrawing the reduced rate for this exemption from the 2013 budget.<sup>40</sup> The result was the European Court of Justice legislating from the bench instead of giving deference to the British legislature's definition of a clean energy social policy.

### *B. The Private Dwelling Improvement Exemption*

Under the second exemption, the United Kingdom argued that by adopting the reduced VAT, the quality of housing for private British subjects would be improved by incentivizing the renovation or repair of homes with energy-saving materials.<sup>41</sup> The European Court of Justice cited Directive 2009/47<sup>42</sup> as its main rationale for rejecting an extension on the scope of the reduced VAT rates to *all* renovation of common stock housing under Annex III, Category 10a.<sup>43</sup> Also, the European Court of Justice provided that the reduced rate must exclude energy-saving materials when they account for more than the value of the service supplied, such as installation and repair<sup>44</sup> and be evaluated under the two-prong test of Article 110 of the Directive.<sup>45</sup>

In this case, the European Court of Justice erroneously narrowed the scope of Article 110 for two reasons. First, the clearly defined social reasons for home improvement are similar to the social policy exemption which affects all society,<sup>46</sup> and this exemption also adds comprehensive social policy rationale of public health.<sup>47</sup> Further, in contrast to the holding in this case, the reduced rates are for the cost benefit of the final consumer because of the structure of Green Deal subsidies.<sup>48</sup> Contrary to the analysis here, the holding specifically targeted clean-energy home improvements because the European Court of Justice misapplied the Article 110 analysis by narrowly reading the VAT Act without taking into account Green Deal legislation.<sup>49</sup> Thus, installation or improvements on private dwellings with clean-energy materials were unable to be classified

---

<sup>40</sup> See *Comm'n v. U.K.*, *supra* note 2, para. 9. See generally HM TREASURY, BUDGET 2013, 2013, HC 1033 (UK) (illustrating that the absence of the reduced rate scheme in the United Kingdom's treasury budget for 2013 is an indication that the British government has caved to the European Court of Justice's ruling).

<sup>41</sup> See *id.* para. 17.

<sup>42</sup> Council Directive 2009/112, 2006 O.J. (L 116) 18 (EC).

<sup>43</sup> *Comm'n v. U.K.*, *supra* note 2, paras. 14, 40–41.

<sup>44</sup> See *id.* para. 15.

<sup>45</sup> See *id.* para. 4. The test called for the exemptions and reduced rates to be adopted (1) according to clearly defined social reasons; and (2) for the benefit of the final consumer. *Id.*

<sup>46</sup> See *id.* para. 26.

<sup>47</sup> See *id.* para. 29 (discussing the U.K.'s argument that the reduced VAT rate will improve housing quality).

<sup>48</sup> See Energy Act 2011, c. 16, § 1(2) (Eng.).

<sup>49</sup> See *Comm'n v. U.K.*, *supra* note 2, para. 27.

as “housing improvements”<sup>50</sup> because the scope of the reduced VAT to *all* residential property were not defined as “essentially social.”<sup>51</sup>

### III. THE QUESTION OF SOVEREIGNTY AND SOCIAL CONSEQUENCES AFFECTING THE BRITISH ENERGY CONSUMER

In the wake of this holding, British subjects face consequences on three fronts. First, most will incur higher bills due to increased energy consumption. Second, the catastrophic collapse of the British solar industry is a real possibility. Lastly, on the national level, the United Kingdom may not be able to meet the 2020 clean energy deadlines set by the European Union.<sup>52</sup>

The brunt of the damage from this holding will be felt by the British subject at the individual level.<sup>53</sup> Estimated additional costs for wall insulation are expected to rise per project by about £2,500,<sup>54</sup> and about £900 to the average cost of domestic solar projects.<sup>55</sup> United Kingdom European Parliament representatives have said that the ruling “defies common sense” because of the double standard with carbon reduction policies on one hand and case law such as in this case.<sup>56</sup>

A second consequence of the holding has been the collapse of the

---

<sup>50</sup> *Id.* para. 30.

<sup>51</sup> *Id.*

<sup>52</sup> See generally Directive 2009/28, of the European Parliament and of the Council of 23 April 2009 on the Promotion of the Use of Energy from Renewable Sources and Amending and Subsequently Repealing Directives 2001/77 and 2003/30, 2009 O.J. (L 140) (establishing a variety of deadlines for biofuels, renewables, information training, compliance, capacity increases, joint projects, administrative procedures, regulations and codes, verification, and reporting).

<sup>53</sup> See Penny Sukhraj, *Uncertainty over UK's Reduced VAT for Domestic Energy Saving After ECJ Ruling*, ACCOUNTACYLIVE (June 5, 2015), <https://www.accountancylive.com/uncertainty-over-uks-reduced-vat-domestic-energy-saving-after-ecj-ruling> (asserting that the decision will likely impact consumers, charities, housing associations, and non-profits that cannot recover VAT costs).

<sup>54</sup> Nick Gutteridge, *Britons' Insulation Bills to SOAR as EU Outlaws Tax Relief on Greener Homes*, EXPRESS (June 5, 2015), <http://www.express.co.uk/news/uk/582401/Insulation-bills-to-go-through-the-roof-after-barmy-EU-outlaws-tax-relief-on-green-tech> (arguing that the UK now will charge the full twenty percent VAT rate on all energy saving measures).

<sup>55</sup> Madeleine Cuff, *Government Proposes Major VAT Hike for Domestic Solar Installations*, BUSINESSGREEN (Dec. 10, 2015), <http://www.businessgreen.com/bg/analysis/2438603/government-proposes-major-vat-hike-for-domestic-solar-installations> (noting that insulation and draught stripping are eligible for the lower VAT, but not domestic solar installations and other saving products).

<sup>56</sup> Emily Gosden, *Households Must Pay Higher VAT on Insulation and Solar Panels, EU Rules*, THE TELEGRAPH (June 4, 2015, 9:00 PM), <http://www.telegraph.co.uk/news/earth/energy/11652827/Households-must-pay-higher-VAT-on-insulation-and-solar-panels-EU-rules.html> (quoting Ashley Fox, leader of UK Conservatives in the European Parliament).

British solar industry at the local level.<sup>57</sup> Examples include the 1,000 layoffs at the Mark Group due to financial losses, and almost twenty–five percent of the staff of the solar panel installation company Climate Energy due to the new tax policies.<sup>58</sup>

Lastly, this holding creates misplaced criticism against the United Kingdom government at the national level.<sup>59</sup> This case undermines the United Kingdom’s position on tackling climate change, cutting against political public statements and an ambitious climate agreement at the Paris Summit in December.<sup>60</sup> Further, without the British government standing behind the solar industry, there is a serious risk for the United Kingdom to miss renewable energy targets<sup>61</sup> that may lead to serious fines.<sup>62</sup>

### CONCLUSION

Considering the broad meaning behind the wording contained in British legislation, this case cuts against British sovereignty and has serious implications for the interpretation of future laws that incentivize social policies. This Comment has aimed to question the European Court of Justice’s legal restrictions on the Value-Added Tax Act 1994 and the Green Deal—restrictions that perhaps directly are associated with recent policy discussions to remedy climate change at the 2015 Paris conference. The European Court of Justice’s decision to legislate from the bench favors a legal direction towards a policy of tax normalization at the unreasonable cost of direct adversity to the social policy and utility of reduced VAT rates that member states have applied to local industries. At the end of the day, it is British homeowners who are harmed, and the burden falls

---

<sup>57</sup> See Terry Macalister, *Second Solar Firm in Two Days Goes Bust, Blaming UK Government Policy*, THE GUARDIAN (Oct. 8, 2015, 1:48 PM), <http://www.theguardian.com/environment/2015/oct/08/second-solar-firm-in-two-days-goes-bust-blaming-tory-policy> (stating that government policy threatens over 20,000 UK solar energy jobs).

<sup>58</sup> See *id.* (noting that the Mark Group was owned by US group SunEdison before it was declared insolvent).

<sup>59</sup> See *Solar Panel Bills to Rise by £900 After EU Court Ruling*, THE WEEK (Dec. 10, 2015), <http://www.theweek.co.uk/64049/solar-panel-bills-to-rise-by-900-after-eu-court-ruling> (stating that the tax policy change is not a result of policy within the UK’s energy department, but rather due to the decision in *Comm’n v. U.K.*).

<sup>60</sup> See Gosden, *supra* note 55.

<sup>61</sup> Oliver Tickell, *Deep Cuts and VAT Bring Ruin to UK Solar Industry*, THE ECOLOGIST (Dec. 17, 2015), [http://www.theecologist.org/news/news\\_round\\_up/2986703/deep\\_cuts\\_and\\_vat\\_bring\\_ruin\\_to\\_uk\\_solar\\_industry.html](http://www.theecologist.org/news/news_round_up/2986703/deep_cuts_and_vat_bring_ruin_to_uk_solar_industry.html) (contending that the UK will cut its annual subsidies to the solar power industry by sixty-four percent).

<sup>62</sup> European Parliament Press Release 20081006IPR38800, *Fine Member States That Fail to Meet National Emission Reduction Targets, Says Environment Committee* (July 10, 2008) (although the “excess emissions penalty” is stipulated by European Union parliamentarians serving on the Environment Committee, there is no mechanism to enforce compliance).

indiscriminately upon them to make up for the difference in cost due to a higher VAT.

The case of *European Commission v. United Kingdom* has left the Green Deal out to dry in the harsh sun to rot and mold like the dream of a strong and sustainable British solar industry. There is one simple solution available: the European Union must amend its laws to incorporate a favorable policy for green energy subsidies and tax deductions in order to incentivize Europeans to adopt clean energy, which will support sustainability and social responsibility.<sup>63</sup>

---

<sup>63</sup> See *Threat of Major VAT Hike for Residential Solar Needs Urgent Action from London and Brussels*, BLUE AND GREEN TOMORROW (Dec. 9, 2015), <http://blueandgreentomorrow.com/2015/12/09/threat-of-major-vat-hike-for-residential-solar-needs-urgent-action-from-london-and-brussels/> (acknowledging that the EU possess few incentivizing tools to promote renewables, but that VAT is one of them).