Browne Jacobson

The pressure on western universities to divest in fossil fuels: Navigating legal complexities and environmental responsibilities

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In recent years, a growing movement has emerged, urging Western universities to divest their endowments and pension funds from fossil fuel companies. This movement is driven by the urgent need to address climate change and the significant role that divestment can play in this global effort. However, the path to divestment is fraught with legal, financial and ethical complexities.

Where universities fit into tackling the climate crisis

It is internationally agreed that the amount of carbon dioxide released into the atmosphere needs to be significantly reduced if we are to avoid a catastrophic change in our climate. In 2015, at the UN Climate Change Conference (COP21) in Paris, 196 parties agreed to reduce their carbon emissions to keep global temperature rises below 1.5 °C. This has become known as the Paris Agreement.

Governments across the world have been introducing legislation and targets to reduce carbon emissions. In the UK, the Climate Act 2008, as amended in 2019, legally binds the UK to being net zero on carbon emissions by 2050. However, reaching net zero is not an easy task. Our decisions, as individuals and organisations, impact on the volume of carbon emitted. Whether it is using an internal combustion engine-powered car to commute to work or deciding on the most appropriate supplier, our actions are important.

“Decisions are rarely clear cut.”

The sheer scale of the actions that can be taken to reach net zero presents its own challenges, as decisions are rarely clear cut. For example, if you require employees to work from an office, this is likely to be more energy efficient than employees individually heating their homes all day. But you then need to take into account the emissions from people’s commutes, which vary dramatically from person to person.

Some actions are best undertaken at a government level. For example, the UK turned off its last coal-fired power plant on 30 September 2024 (in 2012, coal still generated about 39% of the UK’s electricity). This has led to a dramatic reduction in emissions from electricity generation, although the next challenge is to move away from the use of natural gas.

Other actions need to be taken by individuals, whether it is choosing active travel on their commute, digesting a less carbon-intensive diet or improving the energy efficiency of their homes. There is also pressure on businesses to play their part. This includes reducing carbon emissions in supply chains, improving the energy performance of commercial buildings, and facilitating their staff and customers to make more environmentally friendly decisions.

These choices raise a range of questions. For example, what is the role of the state, including the legal system, in compelling people to make changes in regard to things that are normally considered private, such as the choice of diet and which products to purchase?

Reaching net zero

Reaching net zero has, in relation to some choices, become highly political. The expansion of the London Ultra Low Emission Zone, although not a net zero policy, is an example of how an environmental policy is credited with helping to change the outcome of an election. This led to the previous Conservative government pledging to slow down the transition to net zero.

All this means that there are lots of views on how net zero should be reached and what compromises, if any, individuals and organisations should be prepared to make.

This is a particular challenge for universities. Their customer base, or student population, typically comprises young people, who attribute significant weight to the green credentials of their chosen institution. Universities desire to be at the forefront of research needed to reach net zero; see, for example, important R&D demonstrators at the likes of Keele University and the University of Nottingham to power homes, businesses and vehicles with hydrogen, solar and thermal ground-source energy.

Energy efficient estates

Higher education institutions also often have large, energy-inefficient estates, which risk becoming liabilities if the government increases energy efficiency requirements on buildings, and various investment funds in relation to pensions, endowment funds and research, for example.

During a period in which they also face mounting financial and structural obstacles, the pressure on universities to divest their investment funds from companies that extract fossil fuels presents another significant challenge.

What is fossil fuel divestment?

Fossil fuel divestment is when an organisation, such as a university, specifically sells investments in companies that extract fossil fuels and ensures that future investments in these fossil fuel companies does not occur. The aim of this is to allow institutions to state that they are not funding highly polluting industries.

Student network People and Planet reports that 109 UK universities and two Irish universities have committed to divest from fossil fuels in some form, as of May 2024. These commitments cover endowment wealth exceeding £17.6bn. The advantage of taking this path for universities is the ability to make them more attractive to students by taking a moral position in relation to the funding of fossil fuels.

It can also be considered a sound financial move because to reach the globally agreed carbon emission targets, there needs to be a very significant reduction in the extraction of fossil fuels. It makes sense to divest from those assets while they still have value.

However, the divestment movement is not without its critics. Some argue it is better to continue to engage with companies to change their behaviour, for example, by only investing in companies that have set realistic and binding carbon reduction commitments, which comply with the targets in the Paris Agreement.

Others point out that universities withdrawing investment from fossil fuels is not going to have a meaningful impact on the capital available to these companies.

Environmental vs financial investments

There is also the concern that by choosing investments on environmental rather than financial grounds, those responsible for investments are failing in their fiduciary duty to maximise financial returns. Given that recent reports by PwC and the Office for Students have forecast that 40% of England’s universities will run budget deficits this year, this is an important consideration.

It should be noted that divestment in certain industries is not new. Universities have previously chosen not to invest in other areas, withdrawing from investing in tobacco companies and armament companies, for example. These investment decisions are often set out in ethical investment policies.

What is the legal position?

There is very little case law in the UK about divestment in fossil fuels. Fundamentally, the choice of where funds are invested is one for individual institutions, based on their internal policies and procedures. However, an investing case last year before the Court of Appeal looked at whether a failure to divest in fossil fuels was a breach of a fiduciary duty for trustees of the Universities Superannuation Scheme (USS), the principal pension scheme for UK higher education institutions.

In *McGaughey v Universities Superannuation Scheme Ltd* [2023] EWCA Civ 873, two members of the USS brought a claim against the directors and former directors of the scheme's corporate trustee in respect of alleged breaches of fiduciary and/or statutory duty. Among other points, the claimants argued there was a breach because the directors had continued to invest in fossil fuels without an immediate plan for divestment, and that this was contrary to the long-term interests of the beneficiaries of the scheme.

The claim was dismissed for a number of technical reasons connected to derivative claims, but it highlights both the interest in divestment and the fact that the existing statutory framework generally does not describe what trustees of schemes should and shouldn't be investing in.

"Woefully inadequate"

Cases like *McGaughey* may just the beginning. Around the world, activists and concerned stakeholders are increasingly turning to the courts to challenge institutions they believe are not doing enough to address climate change. For example, the European Court of Human Rights earlier this year ruled in favour of a group of elderly Swiss women that Switzerland's efforts to meet its emission reduction targets had been woefully inadequate.

The women, mostly in their 70s, argued that the increase in heatwaves, during which they couldn't leave their homes and suffered a detrimental impact on the health, violated their right to respect for private and family life. While subsequent action by the Swiss government has not been significant, it demonstrates a growing trend.

This trajectory underscores the growing legal and social pressures on universities and other institutions to justify their investment choices in the context of global climate goals. It is also possible the statutory framework may change, however. Governments across the world are seeking ways to promote their net zero goals.

In the UK, Labour's 2024 general election manifesto contained a commitment to require the 100 largest UK public companies and all UK regulated financial services to disclose credible transition plans. As the pressure mounts on the need to move away from fossil fuels, investment in fossil fuels is likely to look increasingly less attractive.

So, what does all this mean for universities?

If the UK is to meet its legally binding climate change obligations, it needs to take action. There is still uncertainty as to what this should look like, but there is a growing trend for organisations to take action voluntarily.

Universities face two key commercial pressures aligned to their leadership role in relation to climate change: to increase their appeal to students, who are typically demanding that their institutions take action, and to develop research into climate change mitigation strategies that will drive collaboration opportunities with governments and businesses.

Ethical investing

However, ethical investing – a phrase that captures divestment in fossil fuels – is not without its detractors. We have seen backlash in the United States against Bud Light for its ethical stance. There are also those that argue simply divesting isn't going to make a meaningful impact.

From a legal perspective, it is important for universities to remember to follow their internal governance requirements and statutory responsibilities when updating investment and other policies. The financial impact of decisions must be carefully considered, so that a number of competing demands are adequately addressed. Decisions need to be made, for example, not just on the investment policy for direct investments, but on receiving monies for research and who the university partners with.

This has the potential to raise some interesting ethical dilemmas. For example, should universities work with fossil fuel companies on renewable energy technological research? Should universities set strict requirements, such as the need for credible carbon reduction plans, if they do work with fossil fuel companies?

Unfortunately, there is very little guidance on what UK universities should do in relation to the climate crisis. But when it comes to divestment in fossil fuels, it's clear this is something they can't simply ignore. What is important is that it is dealt with in a structured, clear and transparent way, which takes into account the fiduciary duties of those investing.

Universities have a significant amount of discretion about how they manage their investments, the key challenge is how to use this power to their own advantage, while encouraging action in the fight to reach net zero.

Key contact

Ben Standing

Partner

ben.standing@brownejacobson.com

+44 0330 045 2400