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(eds.)

Renewable Energy Law in Europe

Challenges and Perspectives

Introduction

The future framework for the promotion of renewable energies was the main topic for the in-depth legal discussion between the scholars and experts in the field of EU law present at the jointly organised seminar on 12 September 2014. The research seminar in Berlin was organised by the University of Oslo, Scandinavian Institute for Maritime law with UiO Energy and the Institute for Energy and Regulatory Law (Enreg) in Berlin. It provided an overview of the impact on the current developments in EU law within the sphere of renewable energy as well as a platform for discussion. This publication therefore comprises a selection of seminar papers written on the basis of the presentations held.

The triangular aim of European Union energy policy, notably achieving a functioning internal electricity market, promoting electricity generation from renewable energy sources and ensuring a high degree of security of energy supply faces several challenges. The European Commission has emphasised the significance of the aforementioned objectives in two communications which address both the completion of the internal energy market and the promotion of renewable energies.¹ At the heart of these aims figure renewable energy promotion, aimed at addressing all these three objectives at once. Thus, the EU and its Member States have implemented and continue to implement various measures addressing all these aims simultaneously. The objectives have been encapsulated into the energy provision, Article 194 TFEU, as an integral part of EU primary and further substantiated by secondary legislation such as the Electricity Market Directive, the Regulation on Cross-Border Trade for Electricity and the RES Directive. In addition, the Energy Strategy 2020², the Energy Roadmap 2050³ and lastly the 2030 Framework⁴ have been incorporated into the overall legal debate.

More than one decade has passed since the CJEU confirmed the conformity of the national scope of promotion schemes for renewable energies based on private

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- 1 European Commission, Making the internal energy market work, 15.11.2012, COM(2012) 663 final and European Commission, Renewable energy: a major player in the European energy market, 6.6.2012, COM(2012) 271 final.
 - 2 European Commission, An energy policy for Europe, 10.1.2007, COM(2007) 1 final.
 - 3 European Commission, Energy Roadmap 2050, 15.12.2011, COM(2011) 885 final.
 - 4 European Council Conclusions, 24.10.2014, EUCO 169/14.

payments.⁵ Since the rendering of the *PreussenElektra* judgment⁶, promotion and use of renewable energies have increased within a stronger European internal electricity market context. This evolution has indeed strengthened policies and legal measures promoting the use of renewable energies but also their potential conflict with the cardinal principle of free movement of goods as well as State aid rules. In light of this evolution, current developments of European Union case law will be closely examined.

National promotion schemes are still limited to the relevant national territory where the producers of the electricity operate. Member States still use feed-in schemes where renewable energy is promoted by private payments which are subject to control mechanisms governed by the State. Both situations have led to a new series of case law dealing with the compliance of national promotion schemes with the State aid rules and the free movement principles. The recently published Guidelines on State aid for environment and energy (EEAG)⁷ have also fuelled the discussion. These new developments within the European legal and political landscape are deemed to have an impact on the way in which renewable energy in the EU and in the EEA could and should be promoted.

The first topic in this volume raises a general debate regarding the new environmental and energy State aid guidelines as well as the notion of State aid with regards to renewable energy promotion. As the enforcer of EU State aid rules, the European Commission plays an increasingly active role. Although the new guidelines are drafted as soft-law which is not *per se* binding within the *aquis communautaire*, the European Commission's discretion is bound by these guidelines and their nature is argued to be *quasi legislative*.⁸ Further, Article 107(1) TFEU defines State aid as any selective advantage granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition, in so far as it affects trade between Member States. Articles 30 and 110 TFEU include product related provisions that are *legi speciali* to the fundamental freedom in Article 34 TFEU.⁹ They have been neglected for a fairly long time; the

5 In order to facilitate the abbreviation used in the various contributions within this volume, the Court of Justice of the European Union will be referred to as the CJEU.

6 C-379/98 *PreussenElektra* [2001] ECR 2099.

7 European Commission, Guidelines on State aid for environmental protection and energy 2014–2020, 28.6.2014, OJ C 200/01.

8 This argumentation has been put forward by A. Johnston in his contribution to this volume. For detailed analysis, see A. Johnston, section IV 2 a).

9 C-74/76 *Iannelli & Volpi/Meroni* [1977] ECR 557, para. 9.

judgment in *PreussenElektra*¹⁰ and the following legal debate have dwarfed those fiscal provisions. Thus, Articles 30 and 110 TFEU are relevant in the State aid assessment of national schemes to promote renewable energies.

The second topic in this volumes underlines that national legislative freedom in the field of renewable energies is not only limited by the State aid rules but also by the principle of free movement. With regards to the principle of free movement of goods, national promotion schemes have now three times challenged the CJEU to assess their compatibility with Article 34 TFEU and to further clarify the scope of the exemptions. Whereas the CJEU clearly confirmed the compatibility of the promotion schemes despite their discriminatory character in *PreussenElektra*¹¹, *Ålands Vindkraft*¹² and *Essent*¹³, the impact of this series of case-law on the general free movement of goods conceptualisation has not been clarified. The new structure in general and the scope of the non-exhaustive *Cassis-list* of mandatory requirements in particular will therefore be critically discussed. The *Essent* judgment furthermore sheds light on the Court's current approach to Article 345 TFEU and the system of property ownership as well as on restrictions on capital movement and possible justifications. The multiple elements presented in the case mean that it has further implications both for the energy sector and more generally in relation to capital movement.

A third topic in this volume concerns investments and disputes. Investments are crucial to European renewable energy promotion but they also trigger remarkable disputes, litigation at many levels as well as limitations for the implementation of national promotion schemes. Renewable energy disputes are strikingly different from other energy disputes within Europe and internationally due to their scale. Although heavily regulated, it is the scale of renewable energy promotion in Europe that differentiates the investments as they all depend on the national subsidies schemes. These schemes in turn have a direct impact on the investments and regulatory frameworks.

The fourth topic covered in this volume provides a deeper understanding of the EU competences in the field of energy with the introduction of Article 194 TFEU in light of a predominant environmental purpose of renewable energy promotion. The boundary between energy security and environmental protection is certainly not clear from a legal perspective and this may enhance the risks of misinterpretations regarding the purpose and spirit of primary and secondary legislation at

10 C-379/98 *PreussenElektra* [2001] ECR, I-2099.

11 C-379/98 *PreussenElektra* [2001] ECR 2001, I-2099.

12 C-573/12 *Ålands Vindkraft*, not yet reported.

13 C-204/12 – 208/12 *Essent Belgium*, not yet reported.

the national level. The functioning and scope of the competences allocated to the EU as well as measures falling within the energy and environmental domain simultaneously raise several legal questions.

The seminar also addressed the legal questions deriving from the technical impacts of an increasing expansion of renewable energies. Due to the fact that electricity is grid dependent and that the use of volatile intermittent energies such as wind challenges the existing grid infrastructure, an effective congestion management accompanied by incentives to build new infrastructure is required. With respect to the electricity generation in offshore wind-farms, the idea of an integrated offshore grid infrastructure is discussed at European level. Although technical and economic assessments give evidence for the effectiveness for such a long-term and large-scale project, a series of legal questions arises on how to efficiently develop, operate and regulate an integrated grid which is subject to several national legal orders.

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