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COMPETITION IN ENERGY MARKETS

Law and Regulation in the European Union

SECOND EDITION

PETER DUNCANSON CAMERON

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FOREWORD

My Foreword to the first edition of this book suggested that there was broad agreement that European energy markets should be liberalized and also that they need some degree of regulation. The question was how this should be achieved. Today the question remains, but is there still broad agreement about the need to liberalize and the need to regulate?

The problems of energy markets have evolved in an alarming way. The issue is no longer simply one of the availability of energy at competitive prices. It is now wider and more fundamental. For how long, from what sources, at what price, and at what cost to the environment and the future of the planet, will energy continue to be available to sustain the way of life to which we have become accustomed?

These questions cannot be detached from wider questions about 'security', using that phrase in a broad sense to cover the preoccupations of the Second Pillar (Foreign and Security Policy) including relations with Russia, China and the Middle East, and those of the Third Pillar (Freedom, Security and Justice), including terrorism, illegal immigration, people trafficking, international gangsterism, and money-laundering.

It seems clear that no European nation is in a position adequately to respond to these challenges by itself. Indeed, the attempts by some nations to secure their own energy supplies, apparently without regard to the interests of others, have led to protests that there must be a 'European' response. But the availability of a European response depends on there being a system of European government that is capable, not simply of taking decisions and enforcing them, but of the prior task of objective analysis and rational determination of priorities and methods.

On what basis of evidence and analysis should political choices about obtaining and sharing energy supplies be made? How should they be translated into legislative texts? Who should be responsible for their administration and enforcement? What should be the respective responsibilities of legislators, administrators and judges?

These questions have hardly been posed, far less answered, in the recent discussion of the European Constitution, its shipwreck on the shoals of French and Dutch

public opinion, and the possibilities of refloating it with or without major repairs. Most of the discussion has been conducted in highly simplistic terms, centring either on rather woolly questions of governance ('overcoming the democratic deficit' and 'bringing Europe closer to the people') or on a false antithesis between a 'European social model' and an 'Anglo-Saxon free market model', both of which, in reality, form part of the programme of the EEC Treaty and the Single European Act.

It is even more remarkable that the urgent need to act together in response to common threats, and consequently to put in place institutional arrangements to enable this to be done effectively, has hardly, if at all, been prayed in aid as a reason for supporting a new constitutional dispensation. Part of the reason may be that little attention was given by the Constitutional Convention to the adequacy of the legal framework of the EC Treaties which reappears in truncated form in Part Three. There are even some enthusiasts who propose that we press ahead with Parts One and Two, leaving aside Part Three as deserving less attention from the European citizen and capable of being left to negotiation between the experts of the Member States. The potentially enormous significance of bringing the Inter-Governmental Third Pillar within the Community system has been downplayed.

The question needs to be faced whether the underlying economic assumptions of the EEC Treaty of 1957 are still valid at the beginning of the 21st century, and whether they are likely to remain so for the lifetime of the projected Constitution (50 years, according to the President of the Constitutional Convention). If the economic assumptions are no longer sound, then the method—the four freedoms strengthened by energetic enforcement of the competition rules—may prove to be inadequate, if not inappropriate and ultimately damaging.

It is worth remembering that the EEC Treaty was born, not in an atmosphere of Euro-enthusiasm, but against the background of Euro-scepticism following the failure of the European Defence and Political Communities. The supranational aims and methods of the ECSC were not to be reproduced in the Treaties of 1957. The aim was more limited and, in a sense, more precise—how to create an economy capable of competing effectively with that of the United States. The method was the creation of an internal market subject to the discipline of non-discrimination and open access binding on States and competition rules binding on undertakings.

The attraction of the Treaty system is that enforcement of the four freedoms and the competition rules is largely (though not wholly) assigned to the Commission, the Court of Justice, and the national courts and competition authorities. To that extent, the processes of enforcement are relatively immune to the vagaries of political opinion or the need to satisfy particularly clamant interest groups.

The Maastricht Treaty introduced a degree of uncertainty as to whether the four freedoms are still to be regarded as the 'foundations of the Community', so that they take precedence over other policies, especially in the energy sector, environmental protection and security of supply. Attempts by the Commission to use the courts to enforce its view of what the rules of the Treaty require have been met with only partial success.

To some extent this may be attributable to unwillingness on the part of judges to become involved in what they see as political choices, but such unwillingness reflects a deeper sense of the proper separation of powers, as does the tension as to aims and methods between the Commission, the Council and the Parliament.

Faced with today's problems, do we need to rethink the aims and methods of 1957? Are they still workable, particularly in a Community of 25 Member States (soon to be 27) of very different degrees of economic development? Has the 'heaviness' of the decision-making process, with its constant need to reconcile competing claims for relatively short-term political reasons, led to a situation in which it would be more honest, and in the long run more effective, to allow Member States to pursue their own policies, including energy policy, while facilitating but not enforcing co-operation?

These are 'hard' questions of governance that are not going to be solved by throwing *bonnes bouches* to the citizens. In order to assess whether the 'Community method' remains valid in a world that has changed out of all recognition, we need some points of reference.

Europe's energy industries, whose vigour and competitiveness are crucial to a successful economy, have to carry on their business according to the body of energy and competition laws as they are now. Quite independently of the policy debates and the latest legislative initiatives, people have to live day by day according to the current directives and regulations on liberalization and have to grapple with their various shortcomings and occasional lack of clarity. They need to be sure where they stand now.

Professor Cameron's book will be valuable as a guide to the existing system for those who work in the energy sector, whether as producers, administrators or enforcers. He explains the methods enjoined by the existing Treaties and how they have been deployed—on the one hand, through sectoral legislation and regulation and, on the other, through the administrative and judicial enforcement of competition law. He offers a fresh map of the landscape of EU energy law that will guide the reader through the lanes and the minor roads as well as the major routes and highways. Although the emphasis is mainly on the electricity and gas industries—the principal targets of liberalization so far—there is a new analysis of the emerging issues of competition and security of supply in the nuclear and 'renewables' sectors, as well as the problems of competing objectives.

The book has a wider purpose. It illustrates the successes and inadequacies of the system we have and suggests a possible way of resolving the inadequacies without sacrificing the successes. The problems of the energy sector deserve to be studied for the insights they can offer to those who seek a wider view of where Europe is heading.

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