

COMPETITION IN
ENERGY MARKETS:
LAW AND
REGULATION IN THE
EUROPEAN UNION

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FOREWORD

There is broad agreement that European energy markets should be liberalized and also that they need some degree of regulation. The question of how this should be achieved raises a problem that is both exceptionally important and exceptionally difficult.

It is important because the availability of energy at competitive prices affects us all, directly and indirectly. It is difficult because there are so many competing interests at stake, yet there is no consensus as to what those interests are, far less how they should be reconciled.

This book is probably the first in any language that seeks not only to assess the nature of the problem and the steps that have been taken so far in the European Union to resolve it, but also to point up the positive interaction and potential conflicts between primary and secondary legislation, judicial decisions, and political action.

The basic rules of the EC Treaty are designed to ensure free movement of goods and services and to promote competition for the benefit of the economy—and ultimately of the consumer. In this context, the various forms of energy are ‘goods’ and their supply is a form of ‘services’. The primacy of the Treaty rules has been invoked in a series of judgments of the European Court of Justice removing some of the political roadblocks to deregulation of sectors and markets formerly subject to state ownership and control, including the energy sector.¹

At the same time, the Court has recognized the importance in the energy sector of security and continuity of supply and—since the policy emphasis of the Treaties was changed by the Treaties of Maastricht and Amsterdam—protection of the environment and promotion of renewable energy sources. The conflict between all these competing objectives has recently been illustrated by the Court’s judgment in *PreussenElektra*; while the earlier judgment in *Commission v France* emphasized that there are limits to the extent to which the Court can be expected to make social and economic choices and to compensate for political and legislative inaction.²

¹ eg, Case C-393/92, *Almelo* [1994] ECR I-1477.

² See Case C-379/98, *PreussenElektra* AG and Schlesweg AG [2001] ECR I-2099, and Case 159/94, *Commission v France* [1997] ECR I-5815.

Foreword

It should be recognized that the energy sector is not unique in these respects. The achievement of a fully functioning internal market in other sectors, such as telecommunications, transport, and finance, has thrown up comparable problems. Detailed legislation to supplement the basic Treaty rules is needed to give effect to political choices and to define more precisely the legal obligations of the Institutions of the Union, the Member States, and economic operators. Legislation that has been promoted by the European Commission in all these sectors has served to fill some of the gaps. But it has also drawn attention to the complex problems and deep political differences that remain.

Despite the success of the 1992 programme, a free competitive internal market is not yet a reality. It is important that policymakers, legislators, and commentators should be fully aware of what remains to be done and how difficult it will be to achieve it. They will find this book a valuable guide to the problems of the energy sector and the possible solutions.

But I hope the book will also serve as a case study of problems of governance in the twenty-first century. What kind of legislation is needed to achieve economic and social goals in complex markets? How should political choices be translated into legislative texts? What should be the respective responsibilities of legislators, administrators, and judges? In particular, how far can judges be expected to decide which of a number of conflicting objectives, defined in Treaties, Conventions and Legislation, should take precedence in any particular case?

These are questions that need to be discussed, not only by lawyers and constitutional experts, but also by citizens, since the answers affect everyone, albeit indirectly, almost as much as the availability of energy in everyday life. This book will help to stimulate the debate.

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