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EUROPEAN ENERGY LAW REPORT VIII

Edited by
Martha M. ROGGENKAMP
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European Energy Law Report VIII

Edited by Martha M. Roggenkamp and Ulf Hammer

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CONTENTS

<i>List of Abbreviations</i>	xiii
<i>List of Authors and Editors</i>	xvii
<i>Foreword</i>	xix
<i>Introduction</i>	xxi

PART I

THE THIRD ENERGY PACKAGE AND THE PROMOTION OF MARKET LIBERALISATION – COMPETITION LAW AND CROSS-BORDER INTEGRATION

Chapter I

Competition in the EU Energy Sector – An Overview of Developments in 2009 and 2010

Hans VEDDER	3
1. Introduction	3
2. Constitutional Changes to EU Competition Law	4
3. Cracking Down on Cartels: Article 101 TFEU and the Energy Sector	5
4. Liberalisation through Antitrust: Article 102 TFEU and the Energy Sector	7
4.1. Introductory Remarks	7
4.2. <i>Swedish Interconnectors</i> : Reducing Interconnection Capacity	8
4.3. ENI Capacity Hoarding	11
4.4. Margin Squeezing as Abuse of Dominance	11
5. Enforcement of Antitrust Law: The Increased Use of Commitment Decisions	13
6. Consolidation and Sophistication: Merger Control and the Energy Sector	15
7. Public Interference in the Energy Sector	16
7.1. Introductory Remarks	16
7.2. Member State Interference in Energy Markets	16
7.3. EU Public Interference in Energy Markets: the Emission Trading Corpus	18
8. Conclusion	19

Chapter II

Cooperation between TSOs: Background, Organisation and Netcodes

Steven DE MOEL and Florence MELCHIOR.....	21
1. Introduction.....	21
2. Cooperation between TSOs – History and Background.....	22
2.1. Early Cooperation.....	22
2.2. Energy Market Liberalisation, Market Integration and Regulatory Cooperation.....	23
2.2.1. The Process of Energy Market Liberalisation.....	23
2.2.2. The Florence and Madrid Forum.....	23
2.2.3. The Third Energy Package.....	24
2.3. Cooperation between Transmission System Operators.....	25
2.3.1. Introduction.....	25
2.3.2. Cooperation between Electricity Transmission System Operators.....	25
2.3.3. Cooperation between Gas Transmission System Operators..	26
2.3.4. The Third Energy Package.....	26
3. Cooperation through ENTSO-G.....	27
3.1. Introduction.....	27
3.2. Legal Aspects of an International Non-Profit Organisation.....	28
3.3. Some Aspects of the ENTSO-G Organisation.....	30
4. Cooperation through ENTSO-E.....	32
4.1. Incorporation of ENTSO-E.....	32
4.2. ENTSO-E and Its Non-EU Members.....	33
4.3. Structure of ENTSO-E.....	34
4.4. Some Functioning Rules.....	35
4.4.1. Voting Power at the Assembly.....	35
4.4.2. Required Majority.....	35
4.4.3. Procedural Documents.....	35
5. Development of Network Codes – The Electricity Sector as an Example..	36
5.1. Introduction.....	36
5.2. Network Code Adoption Process.....	36
5.2.1. Priority List.....	37
5.2.2. Framework Guidelines or FWGL.....	37
5.2.3. ENTSO-E Draft Network Code.....	38
5.2.4. Assessment by ACER.....	39
5.2.5. Binding Character.....	40
5.2.6. Self-Initiated Code.....	40
6. Conclusion.....	41

Chapter III

Agency for the Cooperation of Energy Regulators

Its Particularities and Its Role in Enhancing the Cooperation of National Energy Regulators

Nadia HORSTMANN	43
1. Introduction.....	43
2. An Agency for the Cooperation of the National Regulatory Authorities with Particular Organs and Decision Powers	45
2.1. The Governance Arrangements of ACER.....	46
2.1.1. The Role of the Board of Regulators.....	46
2.1.2. The Role of the Commission within ACER	48
2.2. The Tasks and Powers of ACER.....	50
2.2.1. Introduction	50
2.2.2. A General Advisory Role.....	50
2.2.3. A Regulatory Oversight of the Energy Markets	51
2.2.4. An Individual Decision Power.....	51
2.3. What about Enforcement Power for ACER	54
2.4. The Judicial Accountability of ACER.....	55
3. Conclusion	58

PART II

PROMOTING SECURITY OF ENERGY SUPPLY AND THE PRODUCTION OF RENEWABLE ENERGY SOURCES IN A LIBERALISED MARKET

Chapter IV

Regulation 994/2010: A Measure to Improve the Security of Gas Supply in the EU?

Silke MUTER GOLDBERG.....	61
1. Introduction.....	61
2. Background	62
2.1. Legal Background	62
2.1.1. EU Competencies in Energy Supply Security	62
2.1.2. EU Security of Supply Legislation.....	64
2.2. Rationale	65
2.2.1. Long Term Rationale: Upward Trend in Foreign Gas Imports	65
2.2.2. Short Term Rationale: The 2009 Gas Crisis as a Trigger for the Regulation?.....	67
3. Summary of Regulation no. 994/2010.....	69
3.1. Policy Considerations.....	69
3.1.1. Policy Objectives	69
3.1.2. Policy Options	70

3.2. Summary of the Regulation	71
3.2.1. A Market-First Approach	71
3.2.2. Preventive and Emergency Action Plans	72
3.2.3. Union or Regional Emergency	75
3.2.4. Harmonized Security of Supply Standards	76
3.2.5. Centralised Coordination	78
4. Assessment of the Regulation	79
4.1. Introduction	79
4.2. Wider Assessment: The Europeanisation of Security of Gas Supply Policy	79
4.2.1. Background of EU Security of Supply Policy	79
4.2.2. Choice of Legislative Instrument	80
4.2.3. A Set of Harmonised Security of Supply Standards	81
4.2.4. The Principle of Solidarity	83
4.2.5. Commission Oversight	85
4.3. Specific Assessment: Security of Supply Standards	85
4.3.1. Identification of Standards	85
4.3.2. A Relaxation of the Standards	86
4.3.3. The N-1 Formula	88
4.3.4. The Supply Standard	89
5. Conclusion	91

Chapter V

The Framework for Supporting Renewable Energy in Europe: Implementing Directive 2009/28/EC

Nicole AHNER	93
1. Introduction	93
2. A Brief Historical Background	95
3. Legal Basis	96
4. Instruments to Promote the Production and Use of Renewable Energy Sources	98
4.1. Introduction	98
4.2. Mandatory National Targets	98
4.2.1. Introduction	98
4.2.2. Legally Binding Targets	99
4.2.3. Compliance	99
4.3. Cooperation between Member States	100
4.3.1. Introduction	100
4.3.2. Statistical (Virtual) Transfers between Member States	101
4.3.3. Joint Projects in the EU	102
4.3.4. Joint Projects with Third Countries	103
4.3.5. Joint Support Schemes	105

4.3.6. Assessment	106
4.4. National Renewable Energy Action Plans	106
4.5. Reduction of Administrative and Regulatory Barriers.....	108
4.5.1. Introduction	108
4.5.2. Authorisation, Certification and Licensing of Renewable Energy Technologies.....	108
4.5.3. Information and Training.....	110
4.6. Grid Access Barriers.....	111
4.7. The Role of Guarantees of Origin.....	112
4.8. A Pan-European Sustainability Regime for Biofuels.....	113
5. Implementation of the 2009 Directive	115
6. Conclusion	116

Chapter VI

New Incentives for Promoting More Wind Power in Denmark

Jens BENGTTSSON	117
1. Introduction.....	117
2. Wind Energy Producers in Denmark.....	118
3. New Incentives to Promote Wind Energy.....	119
3.1. The Policy and Legal Framework	119
3.2. Legally Binding Obligations for Municipalities to Reserve Areas for Turbines in Their Physical Planning	120
3.3. The Loss-of-Value Scheme	120
3.4. The Option-to-Purchase Scheme	122
3.5. The Green Scheme.....	123
3.6. The Guarantee Scheme	124
3.7. The Scrapping Scheme.....	125
3.8. Subsidies for Producing Green Energy	125
3.9. National Test-Center for MEGA Turbines.....	126
4. Incorporating Wind Power into the Electricity System.....	126
4.1. Introduction	126
4.2. Balancing Cross-Border Supply and Demand.....	127
4.3. Regulating Electricity Demand.....	128
5. Conclusion	128

PART III
INVESTMENTS IN THE ENERGY AND CLIMATE CHANGE SECTOR

Chapter VII

EU Rules concerning Energy and Investment after the Lisbon Treaty

Wim VANDENBERGHE	133
1. Introduction	133
2. Background: The Lisbon Treaty and Decision-Making Reform	133
2.1. Content and Structure	133
2.2. Competences	135
2.3. Categories of Competences	137
2.3.1. Introduction	137
2.3.2. Exclusive Competence	137
2.3.3. Shared Competence	138
2.3.4. Supporting Competence	138
2.4. Legislative Process	139
2.4.1. Changes following the Lisbon Treaty	139
2.4.2. Ordinary Legislative Procedure	139
2.4.3. Consent Procedure	140
2.4.4. Consultation Procedure	140
2.5. Voting	141
2.5.1. Voting Regime	141
2.5.2. Special Regimes	141
3. Energy	143
3.1. History and Background	143
3.2. The Treaties and the Energy Sector	144
3.2.1. The EC Treaty	144
3.2.2. The Lisbon Treaty	144
3.3. Article 194 TFEU	146
3.3.1. Scope	146
3.3.2. Shared Competence versus National Sovereignty	148
3.3.3. Procedural Aspects	151
3.4. Other Post-Lisbon Energy Treaty Provisions	153
4. Investment	155
4.1. Pre-Lisbon Investment Regime	155
4.2. Investment Regime in the Lisbon Treaty	156
4.3. Investment Agreements	160
4.4. Procedural Aspects	162
5. Conclusion	163

Chapter VIII

Access to International Arbitration by Foreign Energy Investors in Russia

The Impact of the *Yukos* Decision on Jurisdiction

Anatole BOUTE	165
1. Introduction.....	165
2. Access to International Arbitration under the Russian Law on Foreign Investment	168
3. Access to International Arbitration on the basis of the Russian Bilateral Investment Treaties.....	170
3.1. Access to Arbitration on the Basis of the Dispute Resolution Clauses of Russian BITs.....	170
3.2. Access to Arbitration on the Basis of the Most Favoured Nation Clauses of Russian BITs.....	173
4. Access to Arbitration on the Basis of the Energy Charter Treaty	175
4.1. The Dispute Resolution Clause of the ECT	175
4.2. The Provisional Application of the ECT	175
5. Conclusion	179

Chapter IX

The Role of Foreign Direct Investment in Combating Climate Change

Elisabeth TUERK and Moritz VON UNGER	183
1. Introduction.....	183
2. Foreign Direct Investment (FDI) in Climate Technology: Trends and Salient Features.....	187
2.1. Facts and Figures.....	187
2.2. Low Carbon Business Developments.....	188
2.2.1. Areas of Low-Carbon Investment.....	188
2.2.2. Potential for Investment	190
2.3. Attracting Low Carbon FDI: Challenges and Strategies.....	192
2.3.1. Geographical Distribution of Investment Flows.....	192
2.3.2. Country Strategies.....	192
2.3.3. International Investment Agreements (IIAs)	193
2.3.4. Focus and Comprehensiveness of Initiatives.....	195
3. The International Climate Change Regime and the Cancun Agreements.....	196
3.1. Origins of the International Climate Change Regime	196
3.2. Kyoto Protocol	196
3.3. Cancun Agreements.....	198
3.3.1. From Copenhagen to Cancun	198
3.3.2. Financing.....	198
3.3.3. Technology Transfer.....	199

4.	Toward a Common Framework: Combining Investment and Climate Change Regulation.....	200
4.1.	Opposite Policies.....	200
4.2.	FDI and NAMAs.....	200
4.3.	Synergizing IIAs and Climate Policies.....	202
4.4.	Engaging the Private Sector.....	203
4.5.	Low-Carbon Technical Assistance Center (L-TAC).....	204
5.	Conclusion.....	204

Chapter X

New Auction Rules under the EU Climate Change Regime: Optimal Prevention of Market Abuse?

	Stefan E. WEISHAAR and Edwin WOERDMAN.....	207
1.	Introduction.....	207
2.	Auction Design and Market Abuse.....	209
3.	Economic Theory on Optimal Enforcement.....	213
3.1.	Some Economics of Optimal Deterrence and Enforcement.....	213
3.2.	Criminal versus Administrative Enforcement.....	216
3.3.	Private versus Public Enforcement.....	216
4.	Assessing the Auction Regulation.....	217
4.1.	Concurring Competences.....	218
4.2.	Efficient Enforcement Schedules.....	220
4.3.	Public and Private Enforcement.....	221
5.	Conclusion.....	222

LIST OF ABBREVIATIONS

AB	Administrative Board
ACER	Agency for the Cooperation of Energy Regulators
ADEME	Agence de l'Environnement et de la Maîtrise de l'Energie
AGF	Advisory Group on Climate Change Financing
AHW LCA	Ad Hoc Working Group on Long-Term Cooperative Action
AISBL	Association Internationale Sans But Lucratif
AoA	Articles of Association
ATSOI	Association of the Transmission System Operators of Ireland
BALTSO	Baltic States (Estonia, Latvia and Lithuania) Transmission System Operators
BAU	Business-as-usual
BIT	Bilateral Investment Treaty
BoR	Board of Regulators
BOT	Build-operate-transfer
CCAP	Center for Clean Air Policy
CCP	Common Commercial Policy
CDM	Clean Development Mechanism
CEER	Council of European Energy Regulators
CEPS	Centre for European Policy Studies
CFI	Court of First Instance
CFSP	Common Foreign and Security Policy
CHP	Combined Heat and Power
CIF	Court of First Instance
CJEU	Court of Justice of the European Union
CMP	Conference of the parties serving as a Meeting of the Parties to the Kyoto Protocol
CO ₂	Carbon Dioxide
COP	Conference of the Parties
CPMP	Committee for Proprietary Medicinal Products
CPVO	Community Plant Variety Office
DC	Developing Countries
DDT	Double Taxation Treaty
DG Trade	Directorate General of Trade

DKK	Danish Krone
DSO	Distribution System Operator
EAU	EU Allowance Unit
EASA	European Aviation Safety Agency
EC	European Commission
ECHA	European Chemicals Agency
ECJ	European Court Of Justice
ECN	Energieonderzoek Centrum Nederland (<i>Energy Research Centre Netherlands</i>)
ECR	European Court Report
ECSC	European Coal and Steel Community
ECT	Energy Charter Treaty
EEA	European Economic Area
EEC	European Economic Community
EFSA	European Food Safety Authority
EMA	European Medicines Agency
ENI	Ente Nazionale Idrocarburi
ENTSO-G	European Network of Transmission System Operators for Gas
ENTSO-E	European Network of Transmission System Operators for Electricity
EP	European Parliament
EREGG	European Regulators Group for Electricity and Gas
ETSO	European (network of) Transmission System Operators
EUI	European University Institute
EU	European Union
EU ETS	European Union Emissions Trading Scheme
FCC	Federal Communication Commission
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FTA	Free Trade Agreement
FWGL	Framework Guidelines
FYROM	Former Yugoslav Republic of Macedonia
GDF	Gaz de France
GDP	Gross Domestic Product
GIE	Gas Infrastructure Europe
GHG	Greenhouse Gas
GTE	Gas Transmission Europe

ICSID	International Centre for Settlement of Investment Disputes
ICT	Information Technology
IEA	International Energy Agency
IIA	International Investment Agreement
IPA	Investment Programme Association
ISDS	Investor State Dispute Settlement
JI	Joint Implementation
Km	Kilometre
KP	Kyoto Protocol
kW	Kilowatt
kWh	Kilowatt hour
LDC	Least Developed Country
LGDK	Local Government Denmark
LNG	Liquefied Natural Gas
L-TAC	Low Carbon Technical Assistance Center
LULUCF	Land Use, Land Use Change and Forestry Change
MEP	Member of the European Parliament
MFN	Most Favoured Nation
MS	Member States
MRV	Measuring, Reporting and Verification
MW	Megawatt
M&A	Mergers and Acquisition
NAMA	Nationally Appropriate Mitigation Action
NC	Network Code
NEFCO	Nordic Environment Finance Corporation
NEWGOV	New modes of Government Project
NOAK	Nordic Ad Hoc Group on Climate Change
NORDEL	Association of Nordic Electricity Companies
NRA	National Regulatory Authority
NREAP	National Renewable Energy Action Plan
OGEL	Oil, Gas and Energy Law Intelligence
OHIM	Office for Harmonization in the Internal Market
OJ	Official Journal
PCA	Permanent Court of Arbitration

Q&A	Questions and Answers
QMV	Quality Majority Voting
QUELRO	Quantified Emission Limitation and Reduction Obligations
RES	Renewable Energy Source
RWE	Rheinisch-Westfälisches Elektrizitätswerk
R&D	Research and Development
S.A.	Sociedad Anónima
SEZ	Special Economic Zone
S&D	Scope and Definition
TEC	Treaty establishing the European Community
TEP	Third Energy Package
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TNC	Transnational Corporation
TSO	Transmission System Operator
TREC	Tradable Renewable Energy Certificate
UCPTE/UCTE	Union for the Coordination of the Transmission of Electricity
UK	United Kingdom
UKTSOA	United Kingdom Transmission System Operators Association
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNFCCC	United Nations Framework Convention on Climate Change
UNCITRAL	United Nations Commission on International Trade Law
UNECE	United Nations Economic Commissions for Europe
UNEP	United Nations Environment Programme
UNMIK	Interim Administration Mission in Kosovo
USD	United States Dollar
WIR	World Investment Report

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FOREWORD

The editors are very pleased to present the *European Energy Law Report VIII*. The *European Energy Law Report* is an initiative by the organisers of the European Energy Law Seminar, which has been organised on an annual basis since 1989 at Noordwijk aan Zee in The Netherlands. The aim of this seminar is to present an overview of the most important legal developments in the fields of energy law and climate law at international, EU and national level. Whereas the first seminars concentrated on the developments at EC level, which were the results of the establishment of an Internal Energy Market, the focus has now gradually switched to the developments at the national level following the implementation of the EC Directives with regard to the internal electricity and gas markets.

Similar to the *European Energy Law Reports I – VII*, which were presented the next year, this Report is also the result of the papers presented at the seminar which was held on 12 and 13 April 2010. The current report contains three sections representing the following legal topics: ‘The Third Energy Package and the Promotion of Market Liberalisation – Competition Law and Cross-border Integration’, ‘Promoting Security of Energy Supply and the Production of Renewable Energy Sources in a Liberalised Market’, and ‘Investment in the Energy and Climate Change Sector’.

We are grateful for the support extended by the speakers at the seminar and their co-operation in rewriting their papers for the purpose of this book. We further wish to thank the authors and co-authors who were not speakers at the seminar, yet were willing participants in this project, enabling us to provide you with a ‘complete’ picture of all topics discussed. Finally, we would like to acknowledge the help and support of the publisher in publishing this book. We are confident that these reports will be part of a good and long-term tradition.

Martha Roggenkamp and Ulf Hammer
Leiden/Oslo, 1 June 2011

INTRODUCTION

Martha ROGGENKAMP and Ulf HAMMER

The European Energy Law Report VIII presents an overview of the most important developments in the fields of energy law and climate law at international, EU and national level, as discussed at the 23rd European Energy Law Seminar. This seminar was held on 12 and 13 April 2010 in Noordwijk aan Zee in The Netherlands. Each of the three parts of this book deals with a different development in the energy and climate change sector. The order and content of these sections are not necessarily identical to the papers presented at the seminar.

THE THIRD ENERGY PACKAGE AND THE PROMOTION OF MARKET LIBERALISATION – COMPETITION LAW AND CROSS-BORDER INTEGRATION

The Third Energy Package has been discussed in several previous editions of the European Energy Law Report and will probably continue to be discussed over the coming years. This is evident as Member States are now in the process of implementing the Directives at national level and new organizational structures are finally emerging. The first part of this book will therefore discuss some of the most important developments in the EU affecting the establishment of an Internal Energy Market.

Chapter 1 concentrates on the relevance of recent developments in EU competition law to the energy sector in 2009 and 2010. Since the 1988 EU working document *Towards an Internal Energy Market* it is clear that the establishment of such an internal market relies on *ex ante* provisions included in Directives and Regulations and the *ex post* competition law provisions in the (now) Treaty on the Functioning of the European Union (TFEU). The latter has been illustrated again in the Energy Sector Inquiry of 2007. Hans Vedder re-iterates the importance of competition law for the energy sector in this chapter. He first analyses the impact of constitutional law reform following the Lisbon Treaty on competition law in general and then continues to examine the effects of these changes on the energy sector. He discusses the case law affecting possible energy cartels such as the ‘E.On/GdF Market-

Sharing Cartel'. Thereafter he turns to antitrust law and how it affects the energy liberalisation process. Examples of important cases are *Swedish Interconnectors* and *ENI Capacity Hoarding*. Finally he addresses the issue of market dominance and how it relates to regulated markets. Although the case *Deutsche Telekom* is not energy-related it involves a similar network-bound sector and therefore the outcome is of direct relevance to vertically integrated energy companies. The final section of the chapter focuses on the interference of public authorities, Member States in particular, in the energy sector. The rules of State Aid are discussed here, especially, the exemptions in the field of national environmental and climate measures.

The next chapter written by Steven de Moel and Florence Melchior concentrates on an important new set of rules resulting from the Third Energy Package, i.e. the cross-border cooperation between Transmission System Operators (TSOs). One of the main outcomes of earlier liberalisation packages and market assessments has been the focus on national liberalisation processes and lack of harmonisation and cross-border market integration. The Third Energy Package is addressing these issues by requiring, amongst others, cross-border cooperation between national TSOs. This chapter first describes the history and background of earlier cooperation between vertically integrated national energy companies via Nordel and UCPTE and attempts for further cooperation between TSOs since the 1990s, via the Florence and Madrid Fora, CEER, ERGEG, etc. Thereafter the chapter focuses on Regulation (EC) 714/2009 and Regulation (EC) 715/2009 establishing ENTSO-E and ENTSO-G. It introduces both organisations and discusses their establishment, legal structure, functioning rules and the Network Code Adoption Process, which can be considered as one of the key instruments to achieve further cross-border cooperation between TSOs.

Chapter III concentrates on another important instrument of cooperation and that involves the establishment of an Agency for the Cooperation of Energy Regulators ('ACER' or 'Agency'). Regulation (EC) 713/2009 provides for the establishment of ACER as a means of cooperation between the national energy regulators. The establishment of ACER is a direct result of the Third Energy Package and its background and legal form has already been discussed in the European Energy Law Reports VI and VII. Nadia Horstman discusses in this chapter in greater detail, the governance arrangements of ACER and the tasks and powers assigned to it. ACER plays a direct role in the establishment of network codes as discussed in chapter II above.

PROMOTING SECURITY OF ENERGY SUPPLY AND THE PRODUCTION OF RENEWABLE ENERGY SOURCES IN A LIBERALISED MARKET

Part II concentrates on the flip side of the energy market liberalisation process, and this involves the legal instruments which could secure long time energy supply and the production of renewable energy sources in a liberalised market. The increased production of renewable energy sources is necessary as fossil fuels are gradually decreasing. Apart from the decided need therefore to avoid import dependency from non-EU states like Russia (see also EELR VII), also for reasons of climate change as the EU has set itself the so-called 20-20-20 goals, i.e. 20 per cent less CO₂ emissions and 20 per cent renewable energy in 2020. These goals may not always fit well with the focus on competition and market liberalisation of the Third Energy Package.

Chapter IV of this book discusses Regulation (EC) 994/2010 replacing Directive 2004/67/EC and the presentation of measures to safeguard security of gas supply. Silke Goldberg analyses this new Regulation, which provides the European Commission with centralised legal instruments. The primary responsibility for a secure gas supply in the European Community now appears to lie with the European Commission rather than with the individual Member States. This chapter analyses the background for this Regulation as well as its main provisions. Whereas the Internal Energy Market relies on principles of competition and a 'market first' approach, this Regulation relies on a 'solidarity' approach. How does the EU legislator balance these two approaches? By contrast to the 2004 Directive, the Regulation focuses on the importance of reliable infrastructure. It introduces infrastructure and supply standards. Although these standards may improve energy supply security it remains to be seen whether the solidarity mechanisms will prove sufficient in a crisis.

Another factor that secures European energy supply is the increased production and use of renewable energy sources. In addition, these renewable energy sources are an important tool to combat climate change and reduce CO₂ emissions. Following the Third Energy Package, Directive 2001/77/EC has now been replaced by Directive 2009/28/EC. Nicole Ahner discusses this new Directive in more detail in Chapter V. After a brief presentation of its background and main goals, she analyses the new instruments provided by the Directive to promote the production and use of renewable energy sources such as the new mechanisms for cross-border cooperation like the statistical (virtual) transfer of specific amounts of renewable energy production and the establishment of joint projects in the EU. Thereafter she discusses the need for national renewable action plans, the role of guarantees of origin and the need to reduce national, administrative and regulatory barriers.

Chapter VI presents a clear example of national attempts to reduce administrative and regulatory barriers. Jens Bengtsson analyses the new incentives for promoting more wind power in Denmark. Since 1990 the share of wind in the Danish energy mix increased from 1.9 per cent to 19.3 per cent in 2009. According to the Renewables Directive (discussed in Chapter V), Denmark should cover 30 per cent of its energy consumption with renewable energy in 2020. The main challenges for achieving this increase are found in growing local resistance, local planning procedures, the lack of proper sites, more attractive subsidy schemes in other countries and the problems local consumers face when interested in developing new and large (as well as expensive) wind turbines. In order to overcome these barriers, Denmark has introduced new legislation. These new rules include legally binding obligations for municipalities to reserve areas for wind energy, a scheme to compensate private persons for a loss in property value, an option that private parties can get a share in a nearby wind energy project and several subsidy regimes. The author analyses these options and explains where and why some of them have been successful and others, not.

INVESTMENT IN THE ENERGY AND CLIMATE CHANGE SECTOR

The third and final part of this book involves an analysis of the EU investment regime and how it relates to investments in the energy and climate change sector. The aim to liberalise the energy sector creates a difficult balancing act with the need to secure a regular energy supply and is further complicated with the need to protect the environment and combat climate change. More supply security and climate mitigation measures require serious investments.

Chapter VII analyses the new provisions on energy and investments following the entry into force of the Lisbon Treaty in 2009. Following a general introduction on the Lisbon Treaty and the impact it has on decision-making in the EU, Wim Vandenberghe examines the new provisions governing the energy sector and investments from a substantive and procedural perspective. As regards the energy sector it seems that the new provisions rather confirm areas of competences then presenting something new. Member States retain sovereignty over their natural resources as they did before, and may thus decide about their energy mix and the way in which they organise their energy supply. However, changes in the decision-making procedures may have a more significant impact, especially as regards the entry into force of legislation on energy, security and climate change. Nevertheless, real changes can be found in the area of trade policy as the Treaty establishes more competences for the EU on foreign direct investments. The chapter further discusses the fragmentation of competences between the European Union and its

Member States. The author concludes that some improvement has been made but that there still is room for confusion.

The relevance of rules of investment is highlighted in the next chapter. Anatole Boute focuses in Chapter VIII on foreign investments in Russia and the potential of foreign investors to access the remedy of international arbitration. The *Yukos* case is used as an example. After discussing the possibility to access international arbitration under the Russian Law on Foreign Investments, the author continues to examine several Russian bilateral investment treaties and the extent to which they may provide foreign investors with access to international arbitration. Thereafter the relevant provisions of the Energy Charter Treaty (ECT) is discussed, as despite its announcement that Russia does not intend to become a contracting party to the ECT, it is generally recognised that the ECT applies provisionally until 2029. The *Yukos* tribunal confirmed this interpretation of the ECT. The author concludes that jurisdictional barriers to international arbitration are vital to foreign investors in the Russian energy sector. The Russian authorities recognise this need in a draft Convention on Ensuring International Energy Security. The end result remains to be seen and depends on the outcome of the negotiation on the establishment of a new EU-Russian energy regime.

Chapter IX also deals with the issue of foreign direct investments but concentrates on a specific sector, i.e. instruments necessary to combat climate change. The authors, Elisabeth Tuerk and Moritz von Unger, commence by presenting the need for climate change reductions and the role of developing countries in achieving this goal. There is international consensus that developed countries should take a lead in this process. The chapter therefore discusses the role of international investment law and the large number of bilateral investment treaties in achieving the goal of sufficient investment in low-carbon business areas in developing countries. First, the chapter analyses the role of foreign direct investment in climate technology. It describes the areas where such low-carbon investments can be made, the potential for investments and (legal) instruments that can be applied. Second, an examination of the International climate change regime follows, in particular, the impact of the Kyoto protocol and the more recent Cancun Agreements. Subsequently, the authors assess the possibility of combining investment and climate change regulation in order to create a common framework. Although it means the integration of two quite different policies and regimes, the authors note that these differences lie less in objectives and purpose, than in perspective. The chapter concludes by recognising the need for such integration and the already existing opportunities for private investments.

The last Chapter of this book concentrates on a different factor: climate change mitigation instruments. It involves the EU emissions trading regime (EU ETS)

and the new auction rules. Stephan Weishaar and Edwin Woerdman discuss in Chapter X the evolution from a cap-and-trade system for greenhouse gas emission allowances to a system of auctioning these allowances. They discuss the development of the EU ETS and experiences gained in the individual trading phases. Directive 2009/29/EC introduced the possibility to auction (part of) the emission allowances. It is envisaged that 20 per cent emission allowances will be auctioned in 2013 and full auctioning will take place in 2027. The authors then focus on Regulation (EC) 1031/2010 as this EU law provides the legal basis for auctioning. They assess the auction regulations from a law and economics perspective and address, in particular, the possibility that such a regime will lead to a situation of market power and/or market manipulation. Such a situation may arise if there are insufficient monitoring and enforcement mechanisms in place.