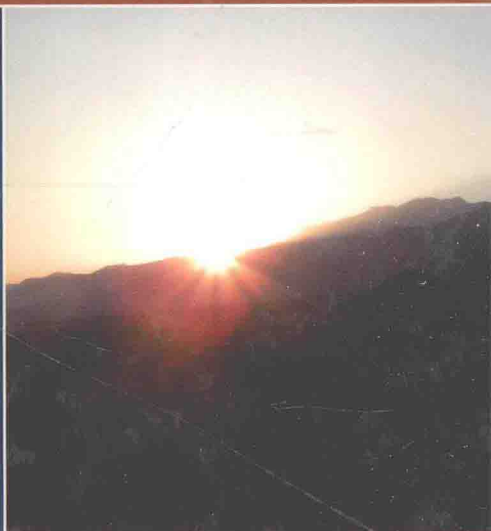
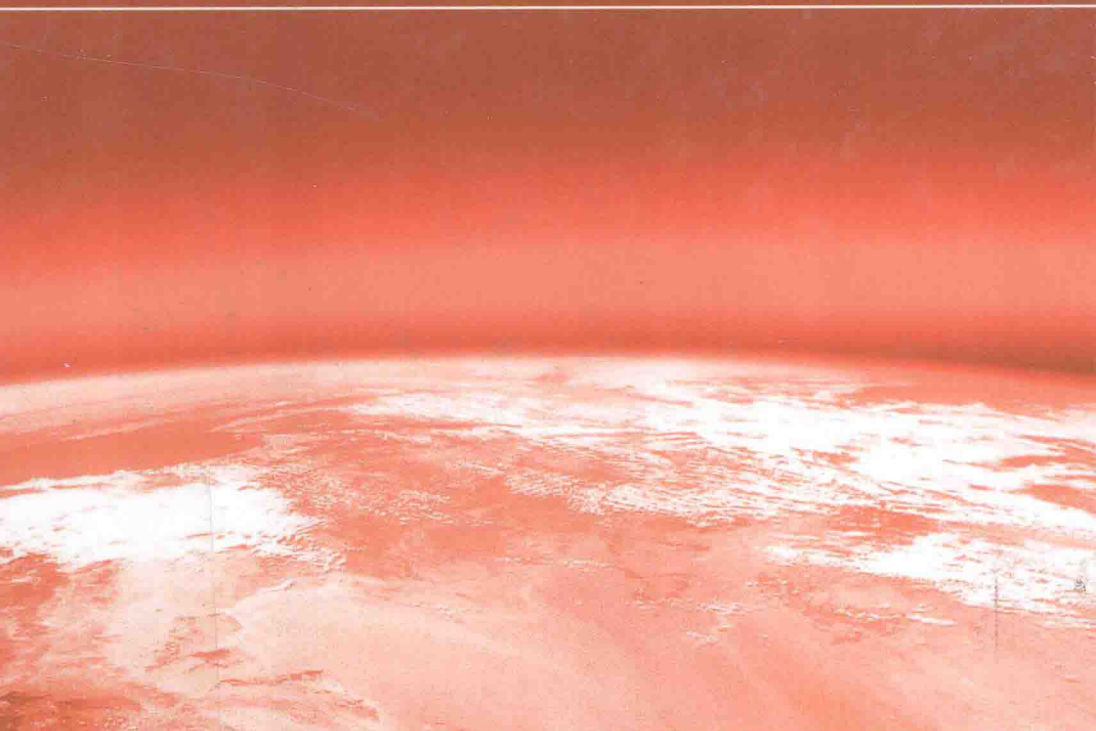


RENEWABLE ENERGY LAW IN THE EU

Legal Perspectives on
Bottom-up Approaches



Edited by Marjan Peeters and Thomas Schomerus



NEW HORIZONS IN ENVIRONMENTAL AND ENERGY LAW

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Legal Perspectives on Bottom-up Approaches

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Renewable Energy Law in the EU

NEW HORIZONS IN ENVIRONMENTAL AND ENERGY LAW

Series Editors: Kurt Deketelaere, *Professor of Law, University of Leuven, Belgium and University of Dundee, Scotland* and Zen Makuch, *Reader in Law, Barrister, Imperial College, London, UK*

Environmental law – including the pressing considerations of energy law and climate change – is an increasingly important area of legal research and practice. Given the growing interdependence of global society and the significant steps being made towards environmental protection and energy efficiency, there are few people untouched by environmental and energy lawmaking processes.

At the same time, environmental and energy law is at a crossroads. The command and control methodology that evolved in the 1960s and 1970s for air, land and water protection may have reached the limit of its environmental protection achievements. New life needs to be injected into our environmental protection regimes – perhaps through the concept of sustainability in its environmental, economic and social forms. The same goes for energy policy and law, where liberalisation, environmental protection and security of supply are at the centre of attention. This important series seeks to press forward the boundaries of environmental and energy law through innovative research into environmental and energy law, doctrine and case law. Adopting a wide interpretation of environmental and energy law, it includes contributions from both leading and emerging international scholars.

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Renewable Energy Law in the EU
Legal Perspectives on Bottom-up Approaches
Edited by Marjan Peeters and Thomas Schomerus

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Abbreviations

| | |
|------------|---|
| ABRvS | Administrative Jurisdiction Division of the Council of State (<i>Afdeling bestuursrechtspraak van de Raad van State</i>) |
| AC | Aarhus Convention |
| ACCC | Aarhus Convention Compliance Committee |
| AG | German stock company (<i>Aktiengesellschaft</i>) |
| AIFM | Alternative Investment Fund Manager |
| AIFMD | Alternative Investment Fund Manager Directive |
| AöR | German public-law institution (<i>Anstalt des öffentlichen Rechts</i>) |
| Art | Article |
| BaFin | German Federal Financial Supervisory Authority (<i>Bundesanstalt für Finanzdienstleistungsaufsicht</i>) |
| BGBI. | Bundesgesetzblatt (<i>Federal Law Gazette</i>) |
| BGH | German Federal Court of Justice (<i>Bundesgerichtshof</i>) |
| BMU | Federal Ministry for the Environment, Nature Conservation and Nuclear Safety (<i>Bundesministerium für Umwelt, Naturschutz und Reaktorsicherheit</i>) |
| BMWi | Federal Ministry of Economics and Technology (<i>Bundesministerium für Wirtschaft und Technologie</i>) |
| BT-Drucks. | Bundestagsdrucksache (<i>Document of the German Federal Parliament</i>) |
| CDU | Christian Democratic Union (<i>Christlich Demokratische Union</i>) |
| Ch | Chapter |
| CJEU | Court of Justice of the European Union |
| COM | European Commission |
| CoR | Committee of the Regions |
| CRA | Crisis and Recovery Act (<i>Crisis- en herstelwet</i>) |
| CSU | Christian Social Union (<i>Christlich-Soziale Union</i>) |
| dena | Deutsche Energie-Agentur |

| | |
|-------------|---|
| Doc | Document |
| e.V. | German registered society (<i>eingetragener Verein</i>) |
| EC | European Commission |
| ECHR | European Convention for the Protection of Human Rights and Fundamental Freedoms |
| ECJ | European Court of Justice |
| ECR | European Court Reports |
| ECtHR | European Court of Human Rights |
| EEG | Renewable Energy Sources Act (<i>Erneuerbare-Energien-Gesetz</i>) |
| EEM | European Energy Market |
| eG & Co. KG | German limited partnership with registered cooperative as general partner (<i>eingetragene Genossenschaft und Compagnie Kommanditgesellschaft</i>) |
| eG | German registered cooperative (<i>eingetragene Genossenschaft</i>) |
| EIA | Environmental Impact Assessment |
| EnERgioN | Generation, Storage, and Marketing of Renewable Energy in Northern Germany; title of a research project (<i>Erzeugung, Speicherung und Vermarktung von Erneuerbarer Energie in der Region Nord</i>) |
| EnWG | German Act on Electricity and Natural Gas Supply (<i>Gesetz über die Elektrizitäts- und Gasversorgung</i>) |
| ER | <i>EnergieRecht</i> (Energy Law, German Journal) |
| ERDF | European Regional Development Fund |
| ESA | Electricity Sector Act 1997 |
| ESMA | European Securities and Markets Authority |
| ET | <i>Energiewirtschaftliche Tagesfragen</i> |
| EU | European Union |
| EU ETS | European Union Emissions Trading Scheme |
| EXX | European Energy Exchange |
| FDP | Free Democratic Party (<i>Freie Demokratische Partei</i>) |
| FIT | Feed-in Tariff |
| GALA | General Administrative Law Act (<i>Algemene wet bestuursrecht</i>) |
| GATS | Agreement on Trade in Services |

| | |
|-----------------|---|
| GATT | General Agreement on Tariffs and Trade |
| GbR | German civil law association (<i>Gesellschaft bürgerlichen Rechts</i>) |
| GmbH & Co. KG | German limited partnership with limited liability company as general partner (<i>Gesellschaft mit beschränkter Haftung und Compagnie Kommanditgesellschaft</i>) |
| GmbH | German limited liability company (<i>Gesellschaft mit beschränkter Haftung</i>) |
| GO NRW | Municipal Code of the State of North Rhine-Westphalia (<i>Gemeindeordnung für das Land Nordrhein-Westfalen</i>) |
| GPA | Agreement on Government Procurement |
| GSE | Electrical Service Manager (<i>Gestore del Servizio Elettrico</i>) |
| GW | Gigawatt |
| HGB | German Commercial Code (<i>Handelsgesetzbuch</i>) |
| HNWI | High Net Worth Individual |
| IEA | International Energy Agency |
| IEEE | Institute of Electrical and Electronics Engineers |
| JEEPL | Journal for European Environmental & Planning Law |
| KAGB | German Investment Code (<i>Kapitalanlagegesetzbuch</i>) |
| KG | German limited partnership (<i>Kommanditgesellschaft</i>) |
| Km ² | Square kilometer |
| MW | Megawatt |
| NGO | Non-governmental organization |
| NIMBY | Not In My Backyard |
| NIMTOO | Not In My Term Of Office |
| No | Numero |
| NREAP | National Renewable Energy Action Plans |
| OECD | Organisation for Economic Co-operation and Development |
| OJ | Official Journal of the European Union |
| Prop | Governmental Bill (<i>Proposition</i>) |
| PV | Photovoltaics |
| RDL | Royal Decree-law |
| RE | Renewable Energy |

| | |
|----------|---|
| RED | Renewable Energy Directive |
| REE | Spanish Transmission Operator (<i>Red Eléctrica de España</i>) |
| RES | Renewable Energy Sources SCM Agreement on Subsidies and Countervailing Measures |
| SCR | Secondary Control Reserve (<i>Sekundärregelleistung</i>) |
| SEA | Strategic Environmental Assessment |
| Sec | Section |
| Secs | Sections |
| SEN | National Energy Strategy of Italy (<i>Strategia Energetica Nazionale</i>) |
| SFS | Swedish Collection of Parliamentary Acts and Governmental Regulations (<i>Svensk författningssamling</i>) |
| SPA | Spatial Planning Act (<i>Wet ruimtelijke ordening</i>) |
| SPD | Social Democratic Party of Germany (<i>Sozialdemokratische Partei Deutschlands</i>) |
| SPV | Special Purpose Vehicle |
| SRL | Sekundärregelleistung (see SCR) |
| StromNZV | Federal Ordinance of Electricity Network Access (<i>Stromnetzzugangsverordnung</i>) |
| TEC | Treaty Establishing the European Community |
| TEU | Treaty on European Union |
| TFEU | Treaty on the Functioning of the European Union |
| TRIMS | Agreement on Trade Related Investment Measures |
| TSO | Transmission System Operator |
| TWh | Terawatt hours |
| ÜNB | Übertragungsnetzbetreiber (see TSO) |
| WpHG | German Securities Investment Act (<i>Wertpapierhandelsgesetz</i>) |
| WTO | World Trade Organization |
| WWF | World Wildlife Foundation |
| ZNER | Zeitschrift für Neues Energierecht |
| ZUR | Zeitschrift für Umweltrecht |

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PART I

Introduction

1. Regional renewable energy approaches: An introduction to exploring legal barriers and opportunities

Marjan Peeters and Thomas Schomerus¹

1. AIM OF THIS BOOK

This book focuses on legal frameworks within which regional authorities in EU Member States must act in the course of the necessary transition towards a sustainable energy system. *Regional authorities* or *regional governments* are broadly understood here as sub-national bodies that either hold a regional or local authority electoral mandate, or are politically accountable to an elected assembly.² The book explores the role played by these regional authorities in this vital transition to renewable energy, and, more specifically, it maps several legal questions that might emerge along the path to renewable energy. Neither the possibilities for the financial promotion of renewable energy, nor the planning and permitting of renewable energy projects and the management of the grid can be understood outside the context of international, EU and national law. This multi-level legal framework has become increasingly complex with renewable energy laws at EU and national levels particularly, having faced frequent amendments complicating an understanding of the applicable law. Alongside specific renewable energy laws, a vast number of other laws are important elements for the

¹ Thomas Schomerus and Marjan Peeters were at the time of writing of this chapter members of the research team in the projekt Innovation Incubator, Act. 1.1/CT EnERgioN, sponsored by the European Union with funds from the European Regional Development Fund (ERDF) and by the state of Lower Saxony.

² This connects to the definition used in Article 300(3) TFEU.

transition to renewable energy, since for instance, nature conservation and air quality legislation must be taken into account when deciding on renewable energy activities, such as hydro-power generation and biomass combustion. At the same time, compliance with the Aarhus Convention on access to environmental information, public participation in decision-making and access to justice is required for all EU Member States and the EU itself – all of which are party to this Convention. WTO and EU public procurement and financial law also play a role when regional governments try to establish incentives for regional renewable-energy production. Moreover, new policy concepts arise, particularly concerning the idea of allowing citizens financial participation in local renewable energy projects, but also in view of overcoming the “Not In My Backyard” (NIMBY) effect. One can appreciate how this range of legal frameworks requires an enormous legal knowledge on the part of regional governments wishing to stimulate renewable energy production and consumption within their territory. The same applies to regional governments which, for one reason or another, do not welcome specific renewable energy activities within their territory. Since EU law has imposed legally binding targets upon its Member States through Directive 2009/28, it might indeed be the case that pressure on regional governments to open up their territories to renewable energy generation will continue to increase until 2020.

The EU energy and climate objectives for the years following 2020 were proposed by the Commission on 22 January 2014. The Commission continues to uphold the ambitious targets for cutting 80–95 per cent of greenhouse-gas emissions by 2050, and it proposes setting a greenhouse-gas emission target of 40 per cent by 2030, relative to emissions in 1990, without the opportunity of using international credits. This means that the reduction in emissions required to reach the 40 per cent target in 2030 would have to be achieved within EU boundaries. In order to achieve these targets, the EU-Emissions Trading Scheme (ETS), currently governed by Directive 2003/87, should be strengthened. While the ETS sector is supposed to deliver a reduction of 43 per cent in greenhouse gases by 2030, the non-ETS sector would have to contribute a reduction of 30 per cent (both compared to 2005).³ The Commission also proposed binding EU-level targets of 27 per cent renewable energy in general, and of at least a 45 per cent share of renewable energy in the electricity

³ EU Commission, *A policy framework for climate and energy in the period from 2020 to 2030*, COM(2014) 15 final of 22 January 2014, p. 5.