

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

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## 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.<sup>2</sup> 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

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<sup>1</sup> 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.

<sup>2</sup> 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).<sup>3</sup> 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

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<sup>3</sup> 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.

sector in particular. However, contrary to the current Directive 2009/28/EC, the policy framework for 2030 is no longer based on binding national renewable energy targets. According to the Commission, fulfilling the greenhouse gas emission targets should be more “market driven” and Member States should enjoy “greater flexibility”.<sup>4</sup> The Commission emphasized that also “strengthening regional cooperation between Member States” is necessary to “meet common energy and climate challenges more cost-effectively while furthering market integration and preventing market distortion”.<sup>5</sup>

Depending on further decision-making by the European Parliament and the Council, and also future choices of Member States regarding the establishment of low carbon energy supply (which does not necessarily mean a full use of renewable energy potential but could also consist of (a mix of) *inter alia* carbon capture and storage, nuclear energy, and shale gas activities), different pressures will continue on regional authorities to deliver towards the overall transition to a low carbon society. Regarding the potential role that renewable energy may play, this book aims to contribute to an understanding of the (already extremely complex) procedural and substantive legal framework, within which the transition to sustainable renewable energy must take place, and looks for potential improvements to the content and application of the law.

## 2. THE DEVELOPMENT OF THIS BOOK: EXPERT COOPERATION

In the EU, the law in the field of climate and energy has become so complex, and the legal frameworks of EU Member States are so different, that a proper understanding of the legal challenges and barriers for energy transition can only be gained through expert cooperation. It is no longer possible for one person, even if this were an expert, to have full knowledge of all related legal aspects. This book is therefore the result of a cooperation between academic experts and practicing lawyers, who have each covered, in depth, a specific legal element of the whole legal “ecosystem” within which the transition to renewable energy must

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<sup>4</sup> *Ibid*, p. 6.

<sup>5</sup> *Ibid*, p. 3.

evolve.<sup>6</sup> The impulse for this book lies in an international expert meeting held at Leuphana University, Lüneburg, Germany on 22–23 November 2012. The meeting titled “European Renewable Energy Regions from a Legal Perspective” brought together more than 20 experts from 13 countries, with the overall aim of providing greater understanding of the current status of renewable energy regions, and possible improvements to the legal framework for regional renewable energy projects in EU Member States. This focus links to a research project from Leuphana University called EnERgioN, that aims at finding solutions for the regional renewable-energy transition, *inter alia* focusing on storage of renewable energy and virtual regional power plants. During the expert meeting, first research observations were discussed intensively. All authors of this book presented papers during the workshop. In the review process of the book, draft chapters have been substantially reviewed, after which, final contributions were submitted. The editors of this book are grateful to all authors for their research efforts and for engaging in fruitful discussions.

### 3. STRUCTURE OF THIS BOOK

This book consists of five parts, of which Part I contains introductory remarks and Part V provides overarching concluding observations. The large substantive Parts II to IV focus on Support measures for renewable energy (Part II), Planning and permitting of renewable energy (part III), and New approaches towards Local (Financial) Engagement (Part IV).

Having introduced this book in Chapter 1, Chapter 2 puts an EU law perspective on the role of regional governments. Here, to start with, the role of the Committee of the Regions is discussed, in its function of formal representation of regional governments in EU decision-making for environment and for energy; then various consequences of the Renewable Energy Directive for such governments are explored. Both chapters have

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<sup>6</sup> Fisher et al. (2009) 141 have used this terminology, stating that too much focus is placed on identifying particular elements and insufficient focus on analysing the interaction of identified elements with the rest of the “legal” ecosystem. This book aims to map legal questions in the overall transition towards renewable energy; a challenge in itself. The editors support the view that additional holistic studies should be undertaken, although the extent to which this remains possible is questionable, given the enormous package of EU environmental law (not to mention its interaction with international environmental law). For a coherent assessment attempt see Peeters and Uylenburg (2014).

been developed by the book's editors. Part II then turns to questions related to the financial promotion of renewable energy, which is necessary to make this source competitive to fossil fuel and nuclear energy generation. Chapter 3, written by Hartmut Kahl, starts with a trade-law perspective on local support of renewable energy, discussing both WTO and EU trade law. This is followed by Inigo del Guayo's consideration of the case of the Spanish autonomous regions and their prominent role with regard to the promotion of renewable energy sources (Chapter 4). Legal aspects of transforming the German feed-in tariff system are dealt with in Chapter 5, written by Henning Thomas. Leading to high economic costs, the German Renewable Energy Sources Act is currently under political pressure. In Chapter 6, Moritz Meister highlights another part of the German *Energiewende* by discussing the stabilization of the grid with special regard to local virtual power plants. The extension of the national electricity grid plays an important role for the promotion of renewable energy.

Part III concentrates on planning and permitting procedures. It starts with Kars de Graaf and Albert Marseille's discussion in Chapter 7 of Dutch efforts to expedite not only administrative authorization, but also court procedures for renewable energy. This case-based study also includes first experiences with these attempts. Moreover, the authors also shed light on the coordination of procedures and its consequences for regional authorities. Then Chapter 8, delivered by Gabriel Michanek, moves on to discuss a very specific situation: the legal competence for municipalities in Sweden to "veto" renewable energy projects on their territory, particularly in cases where the national government wants to allow the establishment of relatively large renewable-energy projects. After this, a Southern European perspective is provided in Chapter 9 from Stefano Fanetti and Barbara Pozzo, in which the frustrating uncertainty regarding competences of regional governments will be discussed, together with the NIMTOO syndrome ("Not In My Terms Of Office").

Part IV contains new approaches that are aimed at engaging both the financial participation of local communities (local authorities and private citizen organizations) and also individual citizens in renewable energy generation projects. Birgitte Egelund Olsen starts with a discussion from a social-legal perspective of the well known NIMBY effect in Chapter 10. She then turns to a consideration of the potential usefulness of Danish legal experiments on the financial arrangements through which citizens can be awarded compensation or can financially participate in renewable energy projects. Chapter 11, written by Christian Maly, takes a German perspective on aforesaid measures, thereby mapping new approaches

undertaken by municipalities and related dilemmas, particularly the difficulty in getting certain approaches that would enable local financial participation in conformity with law. Since understanding financial participation schemes also requires financial expertise, Chapter 12, developed by Lars Holstenkamp, explains the different forms of financial participation, pointing out the need for more empirical research. To draw a contrast to European experience, the last contribution in Part IV (written by Sanford Gaines) discusses American approaches to renewable energy, which are based on bottom-up, community-focused and market driven instruments more than on control via legal instruments (Chapter 13). Part V concentrates on central and overarching topics and provides concluding observations. The contributing authors reviewed the draft of this final chapter. All substantive research efforts underpinning the chapters were concluded before December 2013.

To our knowledge, this is the first book dealing with regional renewable energy generation in the EU from a legal perspective. This work is far from being conclusive. Many chapters point at new research questions, and we can advocate the need for new solutions, for the storage of renewable energy for instance, or for promoting local community involvement in renewable energy generation. This book does not give the last word, but represents a beginning, and we look forward to the academic discussion both within and outside the EU as it evolves concerning the transition towards renewable energy. Without discussing the legal aspects of *heating and cooling*, which are also included in the Renewable Energy Directive, this book focuses on renewable *electricity* generation. *Energy efficiency* and *energy saving*, which can contribute to the achievement of the national renewable energy targets imposed by the Renewable Energy Directive, have also not been addressed. These topics form challenging subjects for further research projects.

#### 4. WORDS OF THANKS

Without the extremely interesting research work by the contributing authors this book would not have been possible. We sincerely thank all authors for their efforts, and express the hope that this cooperation can be continued in future research activities. We also thank Moritz Meister for his assistance in organizing the expert meeting in November 2012, and Jennifer Stephens for her linguistic support on several chapters. Finally, we thank the publisher, Edward Elgar, for giving us the opportunity to present our research through the format of this book and for providing adequate support for editing the book.

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