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Preface

As the introduction to this volume explains, a better understanding of the variety of low-carbon transitions is the primary motivation behind this Handbook. Authors from nineteen countries discuss the legal underpinnings of climate policies in six continents – testifying to this volume’s ambitious goals. It aims at identifying similarities, differences and connections across regional, national, and local experience. Importantly, it develops the concept of legal pathways of decarbonization ‘to systematically present the components of the institutional contexts directly affecting the pace and direction of the low-carbon transition’.

Undoubtedly, this approach to legal knowledge can improve the interdisciplinary understanding of different decarbonization scenarios. Several chapters expand and develop the concept of legal pathways, inter alia to identify the institutional factors able to influence the low-carbon transition in different jurisdictions. A comparative assessment of this nature allows for a broader assessment of the multiple linkages between energy law, climate law, and the specific institutional contexts in which they are designed and implemented. This is not only of great practical importance, but it will help new scholars tailor a methodology for further research.

The institutional context is rightly understood as both a source of opportunities and constraints for technological, economic, and social changes – and hence as a means to explore legal feasibility of different options towards decarbonisation. This Handbook is an invaluable mapping exercise. It provides the information on which the links between legal feasibility and legal pathways can be identified in most continents, including Europe. Indeed, European energy law and policy features in all five parts of the handbook. This is hardly a surprising result. As Penttinen rightly observes in her chapter, for decades the European Union (EU) has been considered one of the forerunners in deploying a toolbox of various successful policies to stimulate the transition towards a low-carbon energy future and achieve reductions in greenhouse gas emissions, including the launch of the world’s first emissions trading scheme (under Directive 2003/87/EC, the ‘ETS Directive 2003’).

To meet concerns over the pace of climate change and in the light of its commitments under the Paris Agreement, the EU has more recently committed to the adoption of more ambitious goals, culminating in the agreement on the European Green Deal in late 2019, the launch of the ‘Fit for 55’ exercise in July 2021, and subsequently, a Decarbonisation Package in December 2021. The adoption of Regulation (EU) 2021/1119 (the ‘Climate Law’) incorporates the goal of climate neutrality in binding EU

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legislation at the latest by 2050, thus reducing emissions to net zero by that date. These various initiatives include extensive legislative provisions – mostly in the form of regulations, but also secondary legislation, as well as a variety of soft law instruments. Importantly, the Commission updated its guidelines on state aid for climate, energy, and environmental support in January 2022 (the CEEAG).

With the outbreak of the tragic war in the Ukraine and the enormous if unanticipated impact that this is having on the EU’s security of gas supply, it remains to be seen whether these ambitions are likely to be realized by 2050. Following the reduction of Russian natural gas flows, massive investments are now being made in securing alternative gas supply – threatening to crowd out available funds for renewable energy projects and even to prolong the EU’s dependence on fossil fuels. Even in the absence of these latest events, the achievement of the increasingly ambitious targets adopted during the past few decades has been and still is hampered by limited competences at EU level. Article 194 of the Treaty on the Functioning of the European Union (TFEU) sets out the EU’s competences on energy matters. These are shared competences. The common EU energy policy objectives defined at Treaty level include the establishment of an EU wide energy market, security of supply, promotion of energy efficiency and renewable energy as well as interconnection of energy networks in the EU. However, Member States retain competence to determine their own ‘energy mix’ and to determine the make-up of their own national energy portfolio. How to reconcile the need for common action with individual energy and climate policy goals?

This theme resonates throughout the book’s chapters on all matters European. First, the chapters on governance models, policy instruments, and implementation and enforcement mechanisms identify the major legal dimensions of climate policies in the EU and other continents. Second, as the chapter by Wu explains, renewable energy integration into the market is one of the most obvious aspects of energy transition in response to climate change. But decarbonising the electricity sector to achieve carbon emission goals cannot afford to lose robust legal support. Wholesale electricity markets themselves are not sufficient for incentivising renewable energy integration, which necessitates the adoption of legal and regulatory instruments to achieve the goal of decarbonising the electricity sector. The interaction between legal and regulatory instruments promoting renewable energy integration and the wholesale electricity market reform measures pursuing fair prices cannot be ignored because their effectiveness depends on this interdependency.

The third part of the book focusses on regional experiences and includes chapters on cross-border initiatives in the EU. The goal of the contributions to this part three is to assess strengths and weaknesses of regional governance for the low-carbon transition. The EU’s approach to decarbonization policies had traditionally focused on sector-specific measures. The so-called ‘20-20-20’ targets might have even contributed to the ‘silos’ thinking that has dominated the implementation of the vari-
ous EU legislative tools each designed to further the realization of its sector-specific target by the deadline of 2020.

The fourth part devotes several chapters to national experiences, including three developed countries facing serious implementation problems for their domestic climate policies, including one of the largest Member States, Poland, as well as countries striving to reconcile sustainable development and investment-friendly regulatory frameworks.

The fifth and final part turns to local experiences, the institutional level where expectations for change and fossil fuel use reduction are high, but where many legal barriers to project feasibility remain. This is especially so with reference to energy communities and peer-to-peer energy trading in the EU, concepts which have become more prominent following the adoption of the consumer-focused Clean Energy Package of 2019. As explained, the mainstreaming of community energy requires significant structural adjustment to governance and regulatory systems built around large-scale energy production and distribution.

EU energy law, EU climate law, and the EU energy market and energy policy governance are therefore prominent themes throughout this highly useful Handbook. The various chapters in the five different parts allow for comparative evaluation of the legal and policy instruments as well as for a deeper understanding of the very real legal and political tensions between the national, regional, and wider European levels.

This raises an important question: has the EU (and its member states) performed better in realizing their climate ambitions than other countries? Equally, have recent reforms introduced at EU level galvanized performance within the Union compared to the past? It is interesting to reflect on the results of research into the 2012 EU Energy Efficiency Directive (EED). Differentiated implementation will usually occur when member states makes use of the discretion given to them by EU legislation. The EED indeed offers broad discretion to member states in choosing and specifying targets and measures related to energy efficiency. If differentiated implementation does indeed occur, what does this mean for the effectiveness and legitimacy of the directive in question?

Earlier research has confirmed the importance of path dependency in this respect too. Member states have invariably used the discretion to retain domestic measures that were already in place. This pattern is driven by a combination of inertia and the wish not to disrupt well-working approaches. Overall, the pattern of differentiated implementation that resulted has arguably had a positive effect on goal-achievement as well as domestic acceptance of the EED. At the same time, the EED’s impact on domestic policies and approaches has been limited.¹ The EED is now subject to further revision as art of the ‘Fit for 55’ package mentioned above and as initiated by

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the adoption of the new EU Climate Law. It will be recalled that Article 2(1) of the new European Climate Law of 2021 establishes a binding objective of climate neutrality in the EU by 2050, and its Article 4(1) sets a binding EU target of a net domestic reduction in GHG emissions of at least 55% compared to 1990 levels by 2030.

To meet these objectives and targets, the Climate Law requires Member States and EU institutions (including the Commission) to ‘prioritise swift and predictable emission reductions’ (Art. 4(1)) and to ‘take the necessary measures ... taking into account the importance of promoting both fairness and solidarity among Member States and cost-effectiveness in achieving this objective.’ (Art. 2(2)). Does this new measure introduce an important step-change to path dependency? Importantly the Commission must now assess the consistency of any draft measure or legislative proposal with the EU’s climate targets and objectives before adoption and include that assessment in any impact assessment accompanying these measures or proposals and make the result of that assessment publicly available at the time of adoption (Art. 6(4)). The Commission must also ‘endeavour to align’ its draft measures and legislative proposals ‘with the objectives’ of the Climate Law and ‘provide the reasons’ for any non-alignment. This should eliminate the risk of a ‘silo-based’ approach.

The new Climate Law only entered into force in July 2021, and at a time when the EU’s economy was just beginning to emerge from the national lock downs imposed in response to the COVID pandemic. If economic life was showing signs of returning to normality, that has proved to be a shorted lived intermission. By October 2021 gas and electricity prices were at all-time highs and by February 2022 a full-blown energy security crisis had caused the European Council, the Commission, and the EU member states to turn their attention to dealing with energy shortages over the coming winters.

To borrow from the title of Swora’s chapter on the ‘Polish Pathway to Just Transition’, EU energy law may risk being trapped ‘Between Sustainability and Security of Supply’. It is therefore of key importance to all actors concerned, public and private, producers and consumers, traders and network operators, local energy communities, and multinational investors, that there is a clear route to avoid that trap – or at very least – to find a legally feasible way out of it.

This Handbook offers timely guidance – and not just for the EU – but for every jurisdiction that must urgently confront similar challenges.