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The relationship between legislator and judiciary

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Some theoretical and comparative issues from the point of view of the case law of the European Court of Justice

with a special regard to the electricity sector

Thesis of doctoral dissertation

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1. The main topic of the doctoral dissertation and the purpose of the research

The issue of the relationship between legislator and judiciary may seem as purely theoretical question that can only be interesting for some highly dedicated philosophers – rather than for real-life lawyers working on practical matters. Yet, through my researches I have experienced that this issue can serve as a point of view from which one can analyize practically any field of law. In my dissertation I wish to show some of the key points of legislative development within the field of electricity – in the frames of the European Union (EU) legal order. I analyze that changes and trends of changes within the relationship of the European legislative organs and the European interpretative institution, the European Court of Justice (ECJ).

The European Communities (EC) has shaped and re-formed legal systems of its Member States for more than half a century. As a catalizator of the development, the European Court of Justice has and is playing a key role. Along with the development of the EU, the role of the ECJ is also evolving even though the contant of the most important article concerned of the Treaty of Rome has not changed: it was Article 220 on the basis of which the ECJ became a quasi legislator of the EC. The Lisbon Treay[12] re-structured the Treaty, so now the former Article 220 can be found under Article 19 of the Treaty of the European Union. As in my dissertation, I did not wish to analyze the changes brought along with the Treaty of Lisbon, all along my work, I still use the numerotation of the Treaty of the European Communities. The ECJ plays a key role in the development of European law and has become one of the most argued and criticized institution of the EC.

If we want to understand the role of the European Court of Justice, we must go back to the roots and analyze the most important relevant article laying down the duty of the Court. According to Article 220 of the EC Treaty: *"The Court of Justice and the Court of First Instance – each within its jurisdiction – shall ensure that in the interpretation and application of this Treaty the law is observed."* It states clearly that the Court is only entitled to act within the frames of procedures laid down in the Treaty and within the limits of its attributed competences. However, the somewhat still vague formation of Article 220 provided the Court the possibility to interpret it widely and thus extend its competences to fields not explicitly attributed to it. Reasoning of the judicial decisions proves that the Court always takes into account the spirit and the aims of the Treaty and defines its competences in line with that. Nevertheless it is strikingly clear that the Treaty of Rome did not provide the judgments of the Court with the force of precedent.

Rooted in the traditions of the Anglo-Saxon and Continental legal families, a special hybrid has been developed combining the characteristics of both of these legal systems, and yet, not belonging to any of them.[13] This new institution of a new European legal order, the European Court of Justice deployed Europe-wide fundamental changes that exceeded all previous expectations. The judicial activity of the European Court covers several segments of law – one might even say that there is no such a field of law that had not been affected – at least indirectly – by the creative judicial activity of the Court in Europe.

My research focuses on this ever changing and developing institution from the aspect of judicial discretion. One basic point of view of my research was to analyze the leading role of a body that combines the characteristics of two different legal systems. I would like to highlight that I am not willing to deal with the political background issues of the creation and functioning of the European Court of Justice. My only aim was to show briefly the main fundamental theoretical and institutional frames and fundaments that are necessary in order to understand the decision-

[13] See also: K. Zweigert, H. Kötz: *An Introduction to Comparative Law*. Third edition. Clarendon Press Oxford. 1998. pp. 63-256

making process of the Court. "*Only the true combination of comparative law and legal philosophy can lead us to truly understand what law is*."[14] In the light of this motto, I was trying to show several opinions both from the practitioners' side as well as from the academics'.
When examining the role of a newly formed institution, one must not avoid an overview – as brief as it may be – of the origins. On the basis of the comparative method, I chose some major issues – such as the judicial discretion and the relationship of the legislator and the judiciary – and showed briefly the origins rooted in the Anglo-Saxon and/or in the Continental legal system. I must underline however, that my dissertation focuses mainly on the creative interpretative – law-making – activity and on the decision-making of the European Court of Justice. The compendious summary of some of the relevant characteristics of the Anglo-Saxon and the Continental legal system serves only as a tool in order to understand the novelty in the functioning of the European Court.

My research was led by the following questions: 1./ Can we take the European system of norms as a *sui generis* legal order of which the interpretation was assigned to the Court? What source of law serves as a fundament to interpretation? Can this European legal order be viewed as complete as the legal orders of the Member States? 3./ What critics did the Court have to face mostly? How did the Court argue in defending itself? 4./ What are the tools used by the Court in order to fulfill its duties? 5./ In what spirit does the Court fulfill its duties? 6./ Has the so-called „activist" period of the European Court of Justice came really to an end by the signature of the European Single Act? How does the „activism" of the legislator affect the „activism" of the Court? 7./ How does this changing relationship between the Court and the legislator evolve in the European electricity sector?

In order to understand how the relationship of the European legislator and judiciary evolves, one must lay down guidelines with some correlating points. However, I did not intend to write a

[14] E. Örücü: *Quo tendit comparative law?* In: A. Harding, E. Örücü (eds.): Comparative law in the 21st century. Kluwer Academic Publishers. London, Hague, New York. 2002. p. 3

dissertation purely about the theory of the judicial law-making. This has already been done by highly rewarded academics. By the short presentation and analysis of some of the cases related to the liberalization of the European electricity sector, I intend to show the practical side of the main question of my thesis: how the relationship between the legislator and the judiciary develops in the light of their activism. Some might say that the activity of the European Court of Justice can be analyzed more accurately in other fields, such as commercial or public law.

However, one must not forget that the very foundations of the European Community were laid down by the creation of the European Coal and Steel Community and the European Atomic Community. The guiding idea that disposition over energy resources is a key factor in maintaining European economic and political stability has become of high importance again. In the opinion of Judge Timmermans, the development of the Community legal order cannot be analyzed as a whole, but rather with special focus on some separate fields of law, separate sectors.[15] I truly agree with him, and therefore I have decided to narrow the focus of my research to the field of electricity. Within the wider field of energy law, I decided to take electricity mainly because the liberalization process had serious consequences also with regards to the Hungarian electricity sector: former monopolies had to give up their dominant positions and were faced not only by serious difficulties but also with a much stricter auditing body that they were ever used to.

Even though the regulation of the European energy policy lies in the hands of the European Commission, leaving space for the European Court only to step up in case of non-compliance, the judgments and the reasoning contained therein are taken into account both by the EU regulatory bodies and by the Member States. The ever growing importance of the energy sector justifies the analysis of the guiding principles laid down by the Court in this field. I would like to show the important role of the European Court of Justice in the field of energy policy – but

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[15] C.Timmermans: *The European Union's Judicial System*. CMLR. Vol. 41, 2004. Kluwer Academic Publishers, Printed in the Netherlands. p. 395

strictly from the point of view of the development of the relationship between legislator and judiciary. As René David put it: "*The essence of a legal order does not lie in the sum of the momentary legal norms, but rather in the structure of the system*."[16]

The field of energy policy was traditionally viewed as one covering strategically important national interests. In line with the strengthening position of the European Union, the liberalization of the electricity sector – formerly dominated by mostly state-owned monopolies – brought along changes that were of great dismay of the Member States. Throughout the analysis of the cases related to the liberalization of the European electricity sector, my main aim is to show the role of the creative interpretation and quasi law-making activity of the Court. I place this analysis in the frames of a sector that is fairly new within the European legal order – the first relevant piece of EU legislation was issued in 1996: the so-called first electricity directive. The special character and strategic importance of the field of electricity, and the traditionally strong state-dominance characterizing this field offers us a great ground to carry on our research regarding the role of the European Court of Justice. My research covers three periods: the first one without any Community-level legislation (1983-1996), the period after the issue of the first directive (1996-2003) and following the second relevant directive (2003-2007). The European Court of Justice had to follow these important changes that occurred within this field in a short period of time. I would like to underline the expression I used: the Court followed the legislative changes, it did not initiate them.

As a result of my research I found that the European Court of Justice had not overstep its limits of competence, but it had fulfilled its duties that had not been by no means easy ones. It is of course possible – even useful – to discuss certain decisions and their reasoning. As most of these basic discussions are formed around the idea or criteria of legitimacy, that analyzes the relationship between the judiciary and legislators, the guiding line in this dissertation is the

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[16] R. David: *Major legal systems of the world today*. Stevens. London, 1978. p. 333

changing relationship and the boundaries between the legislator and the judiciary. The different topics are bound by one question: How does the activity of the European Court of Justice change in relation to the changing activity of the European legislature? When talking about legislator in my dissertation, I mean all European legislative bodies: the European Parliament, the Council and the European Commission as well. From the point of view of my research, it is irrelevant which body takes part (and to which extent they take part) in the legislative process. As I do not analyze the actual law-making procedure of the European Union, I use the term "legislator" covering all and any of the EU legislative institutions.

Energy policy, as a relatively new field of EU competences, serves as a very good example to follow the development path of the European Court in the field of the liberalization of the electricity market: as long as no Community-level legislation exists, the Court does not want to initiate any major changes in such a strategically important field of law. It only sends messages to the legislative bodies calling their attention on some points worth mentioning in its decisions. Nevertheless, from the very moment of the creation of EU secondary legislation, the Court is a strict guard of making sure that the law is observed.

2. The main issues of the dissertation and the method applied during research

When writing my dissertation, my method was to start from the general aspects and narrow down my scope of analysis step by step to the field of electricity – illustrating what was previously stated in the theoretical part of the thesis. First, I examine the definition of legal order, as it serves as media for interpretation and some related theories. The definition of the legal order and the criteria is inevitable in my view as no activity can be analyzed without knowing the environment in which it takes place. Based on the notion of legal order, I turn my focus on the notion of European legal order, as the more precise environment of the interpretative activity of the European Court of Justice. It is also important to highlight that it was on the basis of a decision of the Court that the European legal order became recognized as a *sui generis* legal order. What are the characteristics of this special, relatively young legal order? Can one indeed take it as a complete legal order or rather as a still forming and changing initiative of a future-

legal order? If we do accept it as a legitimate legal order: how does it relate to the legal order of the Member States? After having briefly reviewed these questions, I further narrow my focus on the two major powers within this field: the legislative and the judiciary, laying down the basic rules characterizing their relationship. Just like before, I go back to the roots here as well – so that the well-known models can serve as fix points, related to which I can take a closer look on the functioning of the European Court of Justice.

After the short introduction to the European legal order and the institutional background, I turn to the introduction of the European Court of Justice. What was the main idea behind the creation of the Court? What is it entitled to do on the basis of the Treaty? Can it be compared to any institution already existing in the Member States? Can it be considered as the European constitutional court? It is important to clarify these questions on the basis of the norms of the Treaty. Based on these norms, the Court is the only legitimate interpretator of the Treaty. Its duty is to ensure that the law is observed.

The question of legitimacy is most interesting when evaluating and analyzing the decision-making of the European Court. Indeed, it is one of the most important questions touching upon the role of the Court and the limits of its discretion right. In order to understand these arguments, we must understand some relevant key statements concerning legitimacy. Certainly, it is by no means my aim to show a complete picture of the notion of legitimacy. I do not even make any attempt. My only goal is to give a guideline to the Reader by laying down some important principles. The main question of legitimacy of the Court is this: Up to what point is the discretion of the Court can be considered legitimate? What is this legitimacy is based on? Are these foundations strong enough? Do the relevant norms ensure legitimate basics to the wide interpretation activities of the Court? Legitimacy is one of the key questions concerning the role of the Court.

There are two most important legitimating factors concerning the activity of the European Court of Justice. First, the cooperation with the national courts assure that the decisions of the Court are enforced. As the Court does not dispose of any enforcement tools, it is indeed dependent on the measures of the national courts. Cooperation with the national courts, however, is based on

another – the second - legitimating factor: that is the coherence, the logic and well-funded reasoning of the decision. That is why it is of high importance to analyze the interpretative method of the Court, as these methods – and only these widely accepted methods – can lead the Court to the final result. Examining each method, one must also ask whether there is anything unique about the application of these methods by the European Court of Justice, and whether there is a special style of decision-making of its own.

This unique characteristic can be found in the discretion which is present at all stages of decision-making and in all levels of interpretation. By taking a closer look on the notion of discretion, we arrive to a most important and truly exciting topic concerning the role of the European Court of Justice. When talking about the limits of this discretion right, the question arises: until what point can discretion be legitimate? Are there any limits at all or is discretion to be considered as something totally subjective and elusive?

When talking about judicial discretion within the legal order of the European Union, one finds that legal principles play a key role by limiting and encouraging discretion at the same time. From the very beginning, legal principles served as a basis applying to which the Court made some decisions that resulted in fundamental changes in Europe. These decisions laid down the main direction lines for the future development of the European Union and the method of theological interpretation was applied in most cases. These were the cases upon which the heavy critics of exceeded "judicial activism" were based. These critics stated that the Court did overstep its limits of competences and it acted as a legislative body instead of respecting the boundaries set for a court. Therefore the Court was often accused of taking illegitimate steps as a disguised legislator. Most of these critics can be summarized by the term of "judicial activism" which has thus turned into a negative notion *vis-á-vis* the European Court of Justice.

As this notion almost became a constant attribute of the Court, one must not avoid taking a closer look on it. What was exactly the reason for attacking the Court of Justice so heavily? After having presented the critics, we must also summarize the positive side of the so-called judicial activism. As the Court was created under special circumstances, its duties were also very special and unique. The European Court of Justice could not possibly function as a traditional judicial

forum within non-traditional legal, political and social circumstances. One cannot expect the Court to form a stable and never-changing judicial style within an ever-changing, ever-evolving environment where new demands are being formed each and every day.

Despite the critics, the Court held on. In the midst of the constant changes, it took effort to create, to stabilize and to strengthen the coherence within the European legal order. When talking about strengthening predictability, the Court had to balance carefully between the idea of a system of precedents and the freedom to change its previous decisions if it was considered necessary. It is indeed needed that the decisions of the Court have certain binding power, nevertheless, it is just as important to have the possibility to overwrite previous decisions if it is justified by the changing social-economical circumstances. Certainly, deriving from previous decisions must be well-founded: in the form of a coherent and logical reasoning. When can the Court change its mind? This is entirely up to the Court itself: a question exclusively belonging to the right of discretion. By analyzing the binding power of the decisions of the Court, we get back to the essential criteria of a legal order: coherence. This coherence must be applied and respected by the Court.

The judicial style of the European Court of Justice is not uniform, nor unvaried. One might find a rich variation when analyzing as to what extent are the different methods applied and how their importance varies from case to case. I would like to highlight, however, that no matter how great extent of variety we may find, there is one clear tendency that remains unchanged: the Court's respect of its own boundaries *vis-á-vis* the legislative institutions of the European Union. It did not want to declare itself a legislator. One must not object however that within the limits of its competences, the European Court of Justice does make use of its discretionary powers in order to fulfill its duties.

This dynamic of the judicial decision-making is what I am examining within the sector of European electricity. The *Campus Oil* case[17] serves as a good example illustrating the time when the Community had no competence at all. Back then energy matters were recognized as most important strategic fields concerning solely the Member States. This field was out of the Community's competences up to a limit that even the obvious restraint of the free movement of goods was justified on the grounds of national security interests. At these times when no Community legislation existed concerning the energy sector, the Court did not come up with new ideas or did not go against the interests of the Member States. It respected the dispositions of the Treaty and defended the interests of the Member States.

The first electricity directive issued in 1996 brought along fundamental changes not only in the European electricity market, but at the same time in the judicial activity of the European Court. From the point of view of my research, in fact, it cannot truly be regarded as a revolutionary twist, as the Court followed again the dispositions set by the legislator. The first electricity directive left a wide margin of discretion in the hands of the Member States as to the realization of its goals. Therefore the Court enforced the Community norms upon the Member States only up to a possible limit - in compliance with the directive. It did not in any case start to attack the Member States for not wholly complying with the dispositions of the directive. The second electricity directive issued in 2003 however, brought along more changes. The conditions became stricter, and Member States no longer had such wide right of discretion as before. These strict norms also resulted in new and growing number of cases before the European Court. And the Court again held on.

One might rightly ask: if – as I stated above - the Court always respected its limits of competences, and it always complied with the legislative norms, then what can be interesting about the activity of the Court at all? Where is the creativity? Where is the discretion? Why

[17] Case 72/83. Campus Oil Ltd. v. Minister for Industry and Energy. [1984] ECR 2727

would it be interesting to analyze cases from this sector if the Court never oversteps its boundaries? Cases brought before the Court are mostly very complex and can be analyzed from several different point of view. Each point of analysis offers different possible conclusions. The Court respects of course its limits of competences, nevertheless it is not only the major outcome worth looking at: also with tiny details, the Court can change the outcome of future cases. For example by defining some notions can be decisive later on. By such relatively small steps, the Court is still forming and shaping the legal order of the European Union.

When looking for cases in the field of energy law today, one might find several of them. Before 1996, one could not find this category: energy was only mentioned in cases concerning free movement of goods. In these cases, decisions were taken on the basis of general Treaty norms – as there was no other specific norm for the energy sector. Following the market liberalization in 1996, cases related to the newly faced difficulties and questions concerning the opening of the European electricity market occurred in front of the Court.

The energy-related cases can be grouped in different ways. The first and the most manifest is to examine these cases in chronological order. From this point of view, cases would be analyzed by highlighting the changes that occurred along with the changing legislation. (i) From this aspect, the first group would be formed of cases that were judged before the issue of any secondary legislation in the field of energy law. In this dissertation, this group would only serve for the purpose of demonstrating the high importance of national interests concerning energy policy. (ii) The second group would be composed by cases that were brought before the Court after the first electricity directive came into force in 1996. These cases can be considered as somewhat transitory cases in the sense that this is the period when from the well-protected field of exclusive Member States competences, energy law becomes shared competence where Community legislation enters and changes the legal frames. Nevertheless, Member States still have wide scope of discretion concerning the effectuating of the goals. (iii) And finally the third group would be those that were brought in front of the Court after the second electricity directive form 2003 and on. Here, Community legislation became much more strict, thus left less margin of discretion for the Member States. Member States were brought in front of the Court for non-compliance with these strict norms.

Beside chronological order, cases can also be grouped on the basis of the main issues therein. One of the most exciting field of the liberalization of the electricity sector is the future situation of former monopolies. It is fairly common that these companies tried to take over their dominant positions into the frames of the open market – often with the assistance of the Member States. The European Commission, however, was acting as a watch dog and examined all relevant agreements that it considered as disguised state aid – in breach of the Community norms. The strict investigations were mostly followed by bringing the case before the European Court of Justice. These cases were of high interest for all Member States. They often intervened and thus supported each other against the Commission. This is an exciting field where the borderline between public and private interests is not always clear, and therefore the Court has had a specific duty and specific responsibility in observing that European law is applied.
Another group of cases could be formed around the issue of the restriction of third party access to the network. This right was laid down in the first electricity directive. As electricity is a network industry, former monopolies were often simply based on the ownership of the network. Thus, in the course of liberalization it was essential to ensure that beside the owner and the system operator, third parties – as potential competitors – would be entitled to access the network. True competition could only be assured this way. Access, however, was possible to be restricted upon certain requirements created and set by national law. This way, former monopolies could re-enforce their dominant position, and maintaining a practically closed market.

Third possibility of classification can be based on cases concerning tax issues. Tax law is still a field of exclusive national competences. This is exactly the reason why it seemed to be a perfect path through which direct or more indirect rules could be adopted in order to prefer a group of companies, or just the opposite: to disadvantage some others.

Cases can also be classified on the basis of which article of the Treaty served as a legal basis for the Court case: (a) on the basis of Article 226, the Court examines whether the Member State in question fulfilled its duties under the Treaty; (b) on the basis of Article 230, the legality of

Community acts are being examined; (c) and finally, on the basis of Article 234, the Court gives preliminary ruling to a Member States concerning the interpretation of certain Treaty articles.
The main goal of this dissertation is not the exhaustive analysis of the cases related to the field of energy law. These cases only serve as illustrative tools in showing the changing development line of the relationship between the legislator and the judiciary, therefore I chose the chronological order, as it seems to be best suited for this purpose. I would like to highlight that even though very important substantial issues are mentioned in these cases – especially with regard to the field of state aid – my aim is not to go deeply in these matters, but to show how the Court of Justice fulfills its duties in such a field that used to belong to the exclusive competences of the Member States, but which became – in a very short period of time – one of the most important sectors of European law. The liberalization of the electricity market is also of high interest for me because the Hungarian market became also heavily affected by these new regulations.

3. Importance of the topic and conclusions

There are quite few academic works so far in the field I chose. One reason for this is certainly due to the simple fact that European energy policy is one of the newest policies. Nonetheless, we might find a fairly nice amount of articles concerning energy law and European energy issues: these articles, however, do not touch upon the role of the European Court of Justice within this field. Thus, even though there are numerous articles and books on the judicial activity of the Court and also several articles on the liberalization of the electricity market, to my best knowledge, these two topics have not yet been brought together in a deeper academic research.
All along my research I quoted many sources underpinning my main basic statements concerning the role of the judiciary. I tied these issues to the concrete case of the liberalization of the electricity market in such a way that the exciting topic of the relationship between the legislator and the judiciary could be analyzed within this very concrete field of law. My aim was to prove

that the widely accepted theory according to which the so called "activist" period of the Court came to an end by the signature of the European Single Act[18], is simply not true. I also wanted to confute those critics trying to present judicial activism as an evil phenomena that it could only came into being due to the attitude of the European Court of Justice. In my opinion, however, activism of the Court can only flourish if and when the legislator was unable or unwilling to fulfill its legislative duties. The Court is often criticized for disregarding the requirement of legal security. Nonetheless, it is exactly the opposite: legal security requires the Court to make decisions in cases that are brought before it, no matter how detailed or ambiguous the applicable law might be.

Energy law as a fairly young field of European policy serves as a good example for my statement: the important creative interpretative or "activist" period of the Court has not come to and end, it has only changed. Judicial activity is applied in fields where it is simply needed: those new fields and sectors that have just recently became EU competences, and thus have not yet been regulated. The approximately 10 years I examined show a clear example that the Court did follow the beaten path of the legislator, and its activity – as ever – serves the enforcement of European law. The cases clearly prove that activism of the Court did not come to an end. Activism of the Court is not a phenomena standing on its own: it can only be understood in connection with the "activism" of the legislator, namely of the willingness and/or capacity of the legislative body to resolve the social demands. Interestingly, even though the electricity sector was regulated in directives, the Court still had a role to play. Making use of judicial discretion right in this field also served the application of European law.

To analyze the relationship between two institutions – in this case between the European legislative and judicial body – is always a complex task, and can be viewed from different aspects. In my dissertation, the center issue is the judicial discretion which serves as a starting

[18] 28th February, 1986

point throughout the research. In order to narrow this wide topic of relationship between the legislator and the judiciary, I found it necessary to show the line of steps through which I arrived to the main questions of my work and then to the cases serving as illustrative examples. I thought it is inevitable because when analyzing a course of development, one must not skip any stair: they are all built upon each other. Therefore I examined some of the most important questions related to the notion and the criteria of legal order, as it provides the frames in which the judiciary can fulfill its interpretative duties, and also the frame in which one can understand the relationship of the legislator and the judiciary. Examining the legal order of the European Union is of especially high importance as the European Court of Justice has formed and re-shaped this system to a great extent.

As the specialties of the European Union are not only manifested in the legal order, but also in the institutions themselves, it was very important to look into the differences that might appear between the already known traditional judicial models of the Member States and the characteristics of the European Court of Justice. Both when analyzing the legal order and the role of the judiciary, it was necessary to refer to some reference points: the traditional models of the Member States. The specialties of the legal order of the European Union and of the decision-making of the European Court of Justice are not of any interest by themselves. They are interesting by comparing them with other models: that of the Member States'. Therefore at each issue I briefly showed the roots and points of origins serving as reference for us. Thus, all along the thesis I apply the comparative method.

The comparative method is therefore very useful as it protects the researcher from making too simplified statements concerning the object of the research. One can of course highlight that already the existence of some models could be viewed as simplification. This is certainly true, however, it should be viewed as a technical necessity. Nevertheless, one must be careful with generalization. The main goal of my thesis is exactly to query and to disaffirm two of those generalized statements concerning the judicial activity of the European Court. One of these is the idea that the activist period of the Court did come to an end. The other statement – or rather critics – concerns the assumed overstepping of the limits of competences by the Court. Duties of the Court and the fulfillments of these obligations must be analyzed within the frames of

legislative activity of the European Union. When focusing purely on the case law of the Court reforming and fundamentally re-shaping the legal order of the Union, we fall in the trap of only looking at one side of the coin. On the other side lies the legislative activity. It is my personal conviction that legislative and judicial activity cannot and must not be analyzed separately: they form an integral unity.

Looking at the legislative path of the European Union forming its legal order, one might state that the basic underlying work is practically done. Nonetheless, it would be a delusion to believe that changes that occurred within one field of law are taken for granted for another field of European law, as well. European law is an ever growing field, and more and more issues of former exclusive Member State competences become now shared or exclusive European Union competences. Thus the activism of the Court – following this tendency – appears and is applied in new fields. The Court cannot set its agenda. In other words, it cannot have a say in what sort of cases are brought before it. Evident it may seem, this basic fact is often overlooked by critics of judicial activism. The electricity sector, as a newly conquered field offers us a great chance to analyze whether the Court is really less activist than before and to see if its creative interpretative role overpasses its limits of competences.

The chronological analysis of cases gives us a chance to draw this development line. In the cases I chose, and in other cases relevant to the electricity sector, many questions of high importance and interest arise which nevertheless overpass the limits of this dissertation. I would like to underline that the analysis carried out in the frames of the present dissertation does not aim to take a closer look on all these most interesting issues. Cases presented in this thesis serve only as an illustration to the development line of the relationship between the European legislator and judiciary – as it were a bird's eye view.

The role of the European Court of Justice is of high interest to me because by way of its active pertinence from the background from the "Ivory tower of Luxembourg" the Court acted as a "grey eminence" of the European Union and has built up something long-lasting. Having gone through this research I have come to the conclusion that the role of the European Court is of high importance in the field of energy law and in the liberalization process as well, and that it fulfilled

its duties within the frames of its competences and not attempting to take over the role and responsibilities of the legislative body. The intensity of the activism and creative interpretative decision-making of the European Court of Justice mirrors trustworthily the activity or passivity of the European legislator, and it follows the path of the latter, just as the rhythm of the low-tide and flood-tide follows precisely the changing phases of the Moon.