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Renewable energy sources and free movement of goods in the European Union

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I hereby declare that the work submitted is mine and that where I have made use of another's work, I have attributed the source(s) according to the Regulations set in the Student's Handbook.

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Abstract

This dissertation was written as part of the LLM in Transnational and European Commercial Law, Mediation, Arbitration and Energy Law at the International Hellenic University.

Energy is an important factor for both the global economy and the everyday life of people, because modern civilization is based mostly on energy. The EU energy policy intends to secure the Union's energy supply, promote energy efficiency, save energy, develop renewable energy sources and promote the interconnection of all energy sources. This thesis aims to explore the foundations of the promotion of renewable energy in the context of free movement of goods and to discuss the matter of dispute in applicable law. The compatibility between EU law and national subsidy schemes for renewable energy has become a fierce topic of controversy. For a long period, this debate concentrated on EU state aid law. However, recently the debate has centralized on the compatibility between national renewable energy subsidy schemes and the fundamental principle of the free movement of goods. This dissertation aims to reveal the contradictions of EU legislation, which is characterized by opposite trends of coherence and divergence. Examples from the CJEU case-law on national energy-related measures that were considered to be in breach of the provisions of the TFEU on the free movement of goods will be illustrated. What are the conditions that a national measure must meet in order not to breach EU law? What is the attitude of the CJEU in relation to environmental protection as a justification for a national measure which, in principle, is contrary to the provisions on the free movement of goods? What is the difference between secondary law and recent CJEU case law and the provisions of the TFEU on the free movement of goods on the prohibition of discrimination based on the origin of goods? The position of the CJEU on national renewable energy systems will be clarified.

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KEYWORDS: Renewable energy sources, internal energy market, free movement of goods, CJEU case law.

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Source: <http://greenenergyscotland.com/renewable> 1

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List of Abbreviations

Art.	Article
CEE	Charges having equivalent effect
CJEU	The Court of Justice of the European Union (the Court)
EU	European Union
MEQR	Measures having equivalent effect
p.	Page
par.	Paragraph
paras.	Paragraphs
RES	Renewable energy sources
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

Introduction

Energy is a precious and expensive good. The energy sector is a rather sensitive one. The energy systems in Europe are interconnected and there is a diversification of the energy sources, which leads to security of supply, a State obligation and target, according to European law in energy. Despite the particular importance of the energy sector and despite the fact that the idea of a European energy policy goes back to the initial stages of the European initiative, to the Treaty of Paris, which established the European Coal and Steel Community (ECSC-1951¹) and the Euratom Treaty establishing the European Atomic Energy Community (Euratom-1957²), the development of a Community Energy Policy was prevented by the lack of a specific reference to energy policy in the Treaty establishing the European Economic Community (EEC-1957³).

In particular, during the period between 1958 and 1972, an absence of the development of an effective common energy policy is noted, despite the increased interest in this area and the legitimate concerns. Although the Member States' response to the oil crisis of 1973 was the protection of their national interests, this crisis moved Member States and the Community towards the realization of the urgent need of a common energy strategy. In the 1980s, environmental issues emerged more acutely in the foreground, with concerns about acid rain and gasses that contribute to the greenhouse effect, which led to the conference of the United Nations on Environment and Development in Rio in 1992⁴.

It has generally been accepted that the present energy system is responsible for many of the problems of climate change and that irreparable damage to the environment can be caused by the enormous consumption of energy. The relevant issues, regarding energy as a good of great significance and also as a marketable commodity, are mainly encountered in provisions relating to the establishment and functioning of the internal market.

Consequently, the adoption of a package of measures promoted the liberalization of the energy market. By the development of these rules it is demonstrated that the fundamental objective of the EU regulatory intervention in the field of energy is to create the appropriate conditions for the smooth functioning of free competition and the limitation of monopoly power, in order to safeguard the competitiveness of the European economy but also the unimpeded supply of energy. Already the liberalization of the internal energy market, by abandoning the former state monopolies and creating conditions of free competition, is in the third stage. The above European Union intervention in the field of energy and the setup of a common policy, is inspired by the principle of sustainable development taking into account the environmental parameter. The Common European Energy Policy therefore aims at both a safe, sustainable and competitive energy market, as well as a protected environment⁵.

Consequently, the first measures adopted to accomplish this approach were based on the legal basis of Art. 174 of the EC Treaty (now 191 etc. TFEU⁶), which gives the EU the possibility of taking legislative action in the field of environmental protection, since this action will be more effective if it is pursued at a Union level. Thus, the legal basis of the EU energy policy is the Art. 194 TFEU. The provision of the new Article 194 TFEU on energy, expresses the key objectives of energy policy, namely: "ensuring the functioning of the energy market,

¹ Treaty establishing the European Coal and Steel Community (no English edition in OJ) see <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:xy0022>> accessed 2 February 2017.

² Treaty establishing the European Atomic Energy Community (no English edition in OJ) see <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:xy0024>> accessed 2 February 2017.

³ Treaty establishing the European Economic Community (no English edition in OJ). See <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3Axy0023>> accessed 2 February 2017.

⁴ United Nations Framework Convention on Climate Change (1992) UNTS No 30822. Ratified by the EC in 1994, Decision 94/69/EC [1994] OJ L33/11.

⁵ Martin Wasmeier, 'The Integration of Environmental Protection as a General Rule for Interpreting Community Law' (2001) 38 CMLR 159, 175.5

⁶ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2016] OJ C202 (TEU and TFEU).

ensuring security of energy supply in the Union, promoting energy efficiency and energy saving and the development of new and renewable forms of energy, and promoting the interconnection of energy networks”.

As far as the renewable forms of energy are concerned, they are milder forms of energy. The European Union as a pioneer in sustainable development issues acknowledges the importance of promoting RES not only for dealing with the phenomenon of climate change but also for a series of economic and social reasons, such as enhancing its security of energy supply and economic and social improvement prospects in rural and isolated areas. RE sources attract a lot of investments, therefore jobs are created, and they make a significant contribution – this being a common admission of the scientific community - to the protection of the environment⁷. So as to achieve the objectives of social and economic development, people and countries must have access to reliable and economical energy sources and energy services. However, the production, distribution and consumption of the current sources of energy (mainly fossil fuels) leads to a significant increase in greenhouse gases.

The finding that the use of RES instead of conventional energy sources contributes to the protection of the environment and in general, to sustainable development, has led, since the 1990s, to taking measures at a Community level, whether legislative or others, by establishing a link between environmental protection and production and distribution through the promotion of Renewable Energy Sources. The first major effort for the promotion of RES was the issuance in 1996 of the Green Paper for a Community Strategy: "Energy for the Future: Renewable Sources of Energy"⁸, with which the EU set the key concerns about RES, trying to target the Member States towards a more systematic use of environmentally friendly energy sources and encouraging cooperation between them on RES. The goal was doubling the use rate of RES by 2010 by around 12% of the European market. Another goal was to establish an acceptable strategy for renewable energy, which would ensure the recognition of the need to promote these energy sources both on new initiatives as well as the implementation of existing policies, along with necessary coordination and consistency in the implementation of these policies at Community, national and local levels. The Green Paper was followed by the Commission White Paper for a Community Strategy and Action Plan: "Energy for the Future: Renewable Sources of Energy" (1997)⁹, highlighting the need for a Community strategy in the field of RES, aiming to achieve increased competitiveness in the European Union, the security of energy supply, and the protection of the environment. In order the Community strategy to be effective, an Action Plan was proposed which should include certain internal market measures regarding RES, access to the electricity market energy, tax relief, financial incentives, etc.

The European Union consumes one fifth of the world's energy but has relatively poor own reserves, a fact with a huge impact on our economy. The EU is the largest energy importer in the world, introducing 53% of its energy at an annual cost of around 400 billion euros. Our dependence on a limited number of countries for our energy supply makes us vulnerable. We have seen this in the past when, for example, some countries were cut off from gas supplies. We need to look at new, renewable and clean energy sources, such as electricity produced by wind, water and sunlight, using wind turbines, dams and solar panels.

The growing importance of the environmental issues within the Union led to new framework directives such as Directive on Electricity Production from Renewable Energy Sources 2001/77/EC¹⁰ and Directive on the promotion of the use of biofuels or other

⁷ A Johnston and G Block, EU Energy Law (1 edn, OUP 2012) 303.

⁸ A non-binding EU act used by the Commission to stimulate discussion and consultation on given topics. See Fräss-Ehrfeld (n 56) Glossary.

⁹ COM (1997) 599 final, Energy for the future: renewable sources of energy.

¹⁰ Directive 2001/77/EC on the promotion of electricity produced from renewable energy sources in the internal electricity market [2001] OJ L283/33.

renewable fuels for transport 2003/30/EC¹¹, which were considering renewable energy, energy efficiency and biofuels. In 2007, the EU adopted its third climate and energy package, Decision No 406/2009/EC¹² of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community’s greenhouse gas emission reduction commitments up to 2020 and Directive 2009/28/EC¹³ of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources (the RES Directive), which amended and subsequently repealed Directives 2001/77/EC and 2003/30/EC¹⁴. The RES Directive was adopted under the Art. 175 (1) EC (now Art. 192 (1) TFEU¹⁵), except for the requirements related to biofuels which were adopted under the Art. 95 EC (now Art. 114 TFEU).

Regarding the nature of competence of the European Union (EU), the Union shares competence with the Member States in the area of energy (Art. 4 (2) TFEU), and according to Art. 2 (2) TFEU¹⁶: “The Member States shall exercise their competence to the extent that the Union has not exercised its competence”.

RES Legislation

EU'S Renewable Energy Law

The European institutional framework for RES has been created by a series of Directives and Community measures for the promotion of RES in energy law. The Table below describes the existing European institutional framework for RES.

Table: European institutional framework for RES

Legal framework	Comments	Sources
COM 96/576	Green Paper for a Community Strategy: "Energy for the Future: Renewable Sources of Energy»	http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=L

¹¹ Directive 2003/30/EC on the promotion of the use of biofuels or other renewable fuels for transport [2003] OJ L123/42.

¹² Decision No 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community’s greenhouse gas emission reduction commitments up to 2020, OJ L 140, 5.6.2009, p.136-148.

¹³ Directive 2009/28/EC on the promotion of the use of energy from renewable sources [2009] OJ L140/16 (RE Directive).

¹⁴ Roggenkamp and others (n 1) 319.

¹⁵ Article 192 (1) TFEU (ex Article 175 TEC): “The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191”.

¹⁶ Article 2 (2) TFEU: “When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence”.

		EGISSUM%3A127018
Directive 96/92/EC	Common rules for the internal market in electricity	http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996L0092:EN:HTML
COM 97/599	White Paper for a Community Strategy and Action Plan: "Energy for the Future: Renewable Sources of Energy"	http://europa.eu/documents/comm/white_papers/pdf/com97_599_en.pdf
Directive 2001/77/EC	Promotion of electricity produced from renewable energy sources in the internal electricity market	http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32001L0077
Directive 2003/30/EC	Promotion of the use of biofuels or other renewable fuels for transport	http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32003L0030
Directive 2004/8/EC	Promotion of cogeneration based on a useful heat demand in the internal energy market and amending Directive 92/42/EEC	http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32004L0008
Directive 2006/32/EC	On energy end-use efficiency and energy services and repealing Council Directive 93/76/EEC	http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006L0032&from=EL
Directive 2009/28/EC	Promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC	http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32009L0028

Definition of RES

According to Art. 2 (1) (a) of Directive 2009/28 (the RES Directive¹⁷): “energy from renewable sources means energy from renewable non-fossil sources, namely wind, solar, aerothermal, geothermal, hydrothermal and ocean energy, hydropower, biomass, landfill gas, sewage treatment plant gas and biogases”. Renewable Energy Sources (RES) are of great importance both in legal debates and political developments. They play an important role in

¹⁷ Article 2 (1) (a) Directive 2009/28/EC: “For the purposes of this Directive, the definitions in Directive 2003/54/EC apply. The following definitions also apply: ‘energy from renewable sources’ means energy from renewable non-fossil sources, namely wind, solar, aerothermal, geothermal, hydrothermal and ocean energy, hydropower, biomass, landfill gas, sewage treatment plant gas and biogases;

climate protection, battling against climate change and they contribute to the security of energy supply, because they are available in a limitless supply, due to the fact that they are constantly replenished by environmental forces. As a result, no detrimental effects are delivered on the environment, but on the other hand RES are more expensive than conventional energy sources.

Forms of RES

The main forms of renewable energy sources are the following¹⁸:

Wind Energy. It is the kinetic energy produced by the wind power that transforms into electricity.

Hydropower. It is the energy produced by the waterfalls and hydroelectric stations.

Biomass. It is the result of photosynthetic activity, which is transformed into energy through a series of activities made by plant organisms of terrestrial or aquatic origin.

Geothermal Energy. It is the thermal energy coming from the earth and contained in natural steams, surface or underground hot water and hot dry rocks.

Wave Energy. It is the energy produced by tides, sea flows and oceans.

Solar Energy. It is the energy produced by the technologies that take advantage of heat and electromagnetic waves of the sun.

RES can be used either directly (mainly for heating), or they can be transformed into other forms of energy (mainly electricity or mechanical energy). Renewable energy sources are safe, competitive and attract both individuals and investors.

Some conditions are necessary to be met for a source of energy to be useful:

- i. The energy has to be abundant and access to the energy source has to be easy.
- ii. The energy has to be able to be easily transformed into a form that can be used by modern machinery.
- iii. The energy has to be easy to transport.
- iv. The energy has to be easy to store.

Advantages and disadvantages of RES

The main advantages of renewable energy sources are the following¹⁹:

1. They are inexhaustible sources of energy and help to the reduction of the dependence on conventional energy sources (mainly fossil fuels), which are gradually being exhausted.
2. Because they are scattered geographically, the decentralization of energy system is being achieved and the energy needs are progressively met in a local and Union level thus energy transmission losses are reduced.

¹⁸ Κέντρο ανανεώσιμων πηγών και εξοικονόμησης ενέργειας, <http://www.cres.gr/kape/>

¹⁹ <http://www.allaboutenergy.gr>

3. They have a somewhat low operating cost not being influenced by price fluctuations internationally and by conventional fuel prices.
4. Investing in RES creates new job positions mainly at a regional level.
5. They are environmental friendly.
6. They are indigenous sources of energy and thus contribute to the reinforcement of security of energy supply at regional and national levels.
7. They offer a rational use of energy resources and they cover a wide range of users' energy needs (eg solar energy for low temperature heat, wind energy for power generation).
8. The exploitation facilities of the RES are designed to cover the users' needs, have a short construction time, thus allowing for fast supply response to energy demand.

The main disadvantages of RES are the following²⁰:

1. Their scattered dynamic potential is difficult to assemble in large sizes of power to be transferred and stored.
2. They often show variations in their availability, demanding the back-up of other energy sources.
3. In general, they demand costly storage methods.
4. Their low availability usually leads to a low rate use of their holding facilities.
5. The investment cost per unit of installed capacity compared to the current prices of conventional fuels is still high.

Internal market and free movement of goods - Key Points

The internal market

The term *internal market* consists of two key features²¹:

1. The EU's internal market (Art. 3 (3) TEU)²² builds on the central four fundamental principles of free movement of goods, persons, services and capital (Art. 26 TFEU)²³.
The question is how the internal market is being implemented in the European Union. As far as negative integration is concerned, the EU law forbids Member States to restrict the four fundamental freedoms mentioned above. As far as positive integration is concerned, the EU law removes barriers to cross-border trade and allows Member States to legislate on common rules in a way that encourages the *four freedoms*.

²⁰ *ibid*

²¹ Roggenkamp and others (n 1) 203.

²² Art. 3 (3) TEU: 'The Union shall establish an internal market': "...a common market entails the elimination of all obstacles to intra-Community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market", Case 15/81, *Gaston Schul*, 1982 ...

²³ Art. 26 TFEU: 'An area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties'.

2. The EU rules on competition (Art. 101, 102, 106, 107²⁴ TFEU) and taxation (Art. 110 TFEU²⁵) are also of particular importance for the establishment of an internal market.

The basic internal market principle is the principle of non-discrimination on grounds of nationality, origin for products, meaning the principle of equal treatment. Therefore, the internal market equals: a) the elimination of all barriers to trade between Member States, b) common external policy towards third countries and c) free movement of goods, persons, services and capital (the *four freedoms*²⁶).

The free movement of goods principle

The free movement of goods principle is one of the four fundamental freedoms of European Union law. We could state that it is the cornerstone of the internal market, being the first essential freedom of the internal market, even before that of persons, which is considered a primary political right.

The main TFEU provisions concerning the relative topic of the thesis are:

Art. 28 TFEU²⁷: Customs Union

Art. 30 TFEU²⁸: prohibition of import and export duties and charges having equivalent effect (tariff barriers)

Art. 34 TFEU²⁹: elimination of quantitative restrictions on imports and MEQRs (non-tariff barriers)

Art. 35 TFEU³⁰: elimination of quantitative restrictions on exports and MEQRs (non-tariff barriers)

Art. 36 TFEU³¹: exceptions to Art. 34-35

²⁴ Art 107 (1) TFEU: 'Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.

²⁵ Article 110 TFEU (ex Article 90 TEC): "No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products".

²⁶ Roggenkamp and others (n 1) 203.

²⁷ Art. 28 (1) TFEU: 'The Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries'.

²⁸ Article 30 TFEU (ex Article 25 TEC): "Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature".

²⁹ Art. 34 TFEU: 'Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States'.

³⁰ Art. 35 TFEU: 'Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States'.

³¹ Art. 36 TFEU: 'The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the

Art. 110 TFEU³²: prohibition of tax discrimination

Art. 114-115 TFEU: harmonization measures

a) Customs Union

The main mechanism for the integration of the internal market is the Customs Union (Art. 28, 30 TFEU), according to which the Customs Union is an exclusive competence of the EU. There are two dimensions of the Customs Union a) internal: without internal customs duties and b) external: common external tariff, that classifies the products according to their technical characteristics and their geographical origin.

b) Definition of 'goods'

The EU Treaties do not contain a clear definition of goods with the exception of the notion of agricultural products, in Art. 38 TFEU³³). The term is for this reason widely interpreted in the case law of the CJEU. More specific, “By goods, within the meaning of that provision, there must be understood products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions”³⁴, Case 7/68 Commission v Italy. The ECJ (now CJEU) rejected Italy's claim that art treasures were too sophisticated to fall within the concept of goods, therefore considered that an export tax on art treasures falls within the scope of Article 30 TFEU. Of interest is the element of the marketability of the products, the fact that they could form the basis of a commercial transaction, and not their commercial value (e.g. wastes were considered as goods by the ECJ, Case 2/90 Commission v Belgium³⁵). Along with the Walloon Waste Case, relevant case law, regarding the definition of goods, is: 1) Case 67/97, Bluhme³⁶, where is provided that animals also can be

protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States’.

³² Art. 110 TFEU: ‘No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products’.

³³ Article 38 (1) TFEU (ex Article 32 TEC): “The Union shall define and implement a common agriculture and fisheries policy. The internal market shall extend to agriculture, fisheries and trade in agricultural products. “Agricultural products” means the products of the soil, of stockfarming and of fisheries and products of first-stage processing directly related to these products. References to the common agricultural policy or to agriculture, and the use of the term “agricultural”, shall be understood as also referring to fisheries, having regard to the specific characteristics of this sector”.

³⁴ Judgment of the Court of 10 December 1968. Commission of the European Communities v Italian Republic. Case 7-68, p. 429, ECLI identifier: ECLI:EU:C:1968:51.

³⁵ Case C-2/90 Commission v. Belgium [1992] ECR I-4431.

³⁶ Reference for a preliminary ruling: Kriminalretten i Frederikshavn - Denmark.

Free movement of goods - Prohibition of quantitative restrictions and measures having equivalent effect between Member States - Derogations - Protection of the health and life of animals - Bees of the subspecies *Apis mellifera mellifera* (Læso brown bee). Case C-67/97, ECLI:EU:C:1998:584.

considered as goods, 2) Case 379/98 Preussen Elektra³⁷, which provided that electricity is considered as a good, 3) Case 221/06, Stadtgemeinde Frohnleiten and Gemeindebetriebe Frohnleiten³⁸, where the Court stated that the long-term deposition of waste from contaminated sites in Austria into landfills in Casother Member States is also considered as being a good. On the opposite, Case 275/92, Schindler³⁹, declared that the lottery tickets are not regarded as a good, because the importation as vouchers of the lottery tickets was not an act independent of the lottery, which was considered as a service activity.

c) Restrictions in the free movement of goods

There are the tariff barriers (Art. 30, 110 TFEU), regarding customs duties on imports and exports, charges having equivalent effect and taxation on the one hand, and the non-tariff barriers (Art. 34, 35 TFEU) having to do with e.g. the origin, quota, license, packaging, prohibition etc., on the other hand. A more precise elaboration is advisable:

A Customs duty (Art. 30 TFEU) is the tax which is levied on the crossing of a State's frontier on the import, export or transit of goods.

A Charge having equivalent effect (CEE, Art. 30 TFEU) is any financial burden imposed by the public authority, which has an effect to Union trade equivalent with that of a customs duty and has three elements: (i) the charge has a monopoly nature, (ii) it is levied after the crossing of the borders of a State and (iii) it only affects products from another Member State, which is the most important element of all.

Discriminative tax measures (Art. 110 TFEU) are considered to be any arrangement which results in the protection of domestic products and puts other Member States' products at a disadvantage either directly or indirectly (Case 142,143 / 80, Essevi & Salengo⁴⁰). This provision includes the arrangements that are applied in the same way to domestic and other Member States' products, but then provide exemptions from which only the domestic products benefit. Art. 110 TFEU par. a mentions discriminatory tax measures and concerns like products. Art. 110 TFEU par. b points out protective tax measures and concerns non-similar products, such as those that are being in competition.

The ECJ has gradually de facto aligned the Art. 110 TFEU with the rules governing the free movement of goods. This was achieved through two cases of judicial activism:

First, although it is not mentioned anywhere in the Treaty, the ECJ has held that the provision of Article 110 TFEU extends also to goods coming from third countries but being in

³⁷ Case C-379/98 PreussenElektra AG v. Schleswag AG [2001] ECR I-2099

³⁸ Stadtgemeinde Frohnleiten and Gemeindebetriebe Frohnleiten GmbH v Bundesminister für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft. Reference for a preliminary ruling: Verwaltungsgerichtshof - Austria. Case C-221/06, ECLI:EU:C:2007:185.

³⁹ Case 275/92, Schindler, ECLI:EU:C:1994:119

⁴⁰ References for a preliminary ruling: Corte d'appello di Milano - Italy. System of taxation applicable to spirits. Joined cases 142 and 143/80, ECLI:EU:C:1981:121.

free circulation in Member States (Case 193/85, *Co-Frutta*⁴¹). Second, the ECJ considered that discrimination against exported products in favor of products that are intended for domestic consumption was also opposed to Art. 110 TFEU (Case 142/77, *Larsen*, paragraphs 24-26⁴²).

As far as the relationship of Art. 110 TFEU with other EU provisions is concerned, according to the ECJ, a tax may not fall within Art. 30 TFEU and Art. 110 TFEU at the same time (Case 90/94, *Haahr Petroleum*, paragraph 19⁴³, Case 28/96, *Fazenda Publica v. Fricarnes*, paragraph 19⁴⁴, Case 383/01, *De Danske Bilimportore*⁴⁵). Between Art. 110 TFEU and Art. 30 TFEU (CEE ban) there is an interrelationship: while both provisions are subject to pecuniary charges, their implementation reason differs a lot. As a matter of fact, CEEs (Art. 30 TFEU) affect only imported products after they cross the border and for that exact reason that they cross the border, therefore they are not imposed on domestic production. Internal taxes (Art. 110 TFEU) are in principle imposed both on domestic and on products of other Member States and affect the circulation within the Member States (Case 109/98, *CTR France International*⁴⁶, Case 441/98 and Case 442/98, *Kapniki Michailidis*⁴⁷).

Concerning the relationship of Art. 110 TFEU with Art. 34 TFEU (MEQRs prohibition, it does not relate to monetary charges, but to measures relating to composition, labeling, packaging, etc.) it is concluded that the application of Art. 110 TFEU excludes the application of Art. 34 TFEU, which is more general (*lex specialis*).

Quantitative restrictions (Articles 34 and 35 TFEU) are: “[Any] measures which amount to a total or partial restraint of, according to the circumstances, imports, exports or goods in transit” (Case 2/73, *Geddo*⁴⁸).

Measures having equivalent effect to quantitative restrictions (MEQRs, Art. 34 and 35 TFEU) are: “All trading rules enacted by Member States which are capable of hindering, directly or

41 Reference for a preliminary ruling: Tribunale civile e penale di Milano - Italy. Tax on the consumption of bananas. Case 193/85, ECLI:EU:C:1987:210.

42 Reference for a preliminary ruling: Københavns Byret - Denmark. Charge for the control of articles of precious metal. Case 142/77, ECLI:EU:C:1978:144.

43 *Haahr Petroleum Ltd v Åbenrå Havn, Ålborg Havn, Horsens Havn, Kastrup Havn NKE A/S, Næstved Havn, Odense Havn, Struer Havn and Vejle Havn, and Trafikministeriet*. - Reference for a preliminary ruling: Østre Landsret - Denmark. - Maritime transport - Goods duty - Import surcharge. Case C-90/94.

44 Reference for a preliminary ruling: Supremo Tribunal Administrativo - Portugal. National charges on the marketing of meat - Charge having equivalent effect - Internal taxation - Turnover tax. Case C-28/96.

45 Reference for a preliminary ruling: Østre Landsret - Denmark.

Free movement of goods - Charge on the registration of new motor vehicles - Internal taxation - Measure having an equivalent effect to a quantitative restriction. Case C-383/01, ECLI:EU:C:2003:352.

46 Reference for a preliminary ruling: Tribunal administratif de Dijon - France.

Tax on the supply of CB sets - Charge having equivalent effect - Internal taxation - Applicability of the prohibition thereof of trade with non-member countries. Case C-109/98, ECLI:EU:C:1999:199.

47 Reference for a preliminary ruling: Dioikitiko Protodikeio Thessalonikis - Greece.

Charges having equivalent effect - Tobacco exports - Levy imposed for the benefit of a social fund. Joined cases C-441/98 and C-442/98, ECLI:EU:C:2000:479.

48 Reference for a preliminary ruling: Pretura di Milano - Italy. Case 2-73, ECLI:EU:C:1973:89.

indirectly, actually or potentially, intra-Community trade..." (C-8/74, Dassonville⁴⁹). Even negligible barriers to imports will fall under the ban of Art. 34 TFEU (no de minimis rule). There are two categories of MEQRs: the distinctly and indistinctly applicable ones (Case 120/78, Cassis de Dijon). Those applied distinctly (Art. 34 and 35 TFEU) are measures exclusively applicable to imports or exclusively applicable to exported products. Those applied indistinctly (Art. 34 TFEU) are measures which apply to both imported and domestic products but which affect imports more, since it is more difficult to be implemented by importers (Case 71/02, Karner and Troostwijk⁵⁰). The difference between distinctly applicable measures and measures applied without distinction is that the measures applied without distinction can be justified if necessary to serve overriding reasons in the public interest, e.g. protection of the environment (Case 120/78, Cassis de Dijon).

Since change is the essential process of all existence, Case 267,268/91, Keck⁵¹ (there is a distinction between a measure concerning the technical characteristics of a product e.g. the size, weight, composition or label of the product, that constitutes an infringement of Union law, and a measure which simply concerns the terms of sale of a product, that is not a breach of Union law) led to an absolute turnaround in the case law. The ECJ stated that the terms of sale refer to the conditions of sale, meaning when, how and where the sale was concluded, and do not constitute an MEQR, if they are applied without distinction and affect, in the same way the marketing of domestic products and products from other Member States.

Exceptions

There are two categories of exceptions:

- 1) First exception is the Art. 36 TFEU. This provision applies to both distinctly and indistinctly applicable measures. The listing of justification grounds is exhaustive: "public policy, public security, the protection of health and life of humans and animals or the protection of plants, the protection of national treasures possessing artistic, historical or archaeological value or the protection of industrial and commercial property". There is a need for a specific justification for the measure that is being taken, which is an exceptional regime that is definitely in favor of Member States.

49 C-8/74, Dassonville [1974] ECR 837.

50 Reference for a preliminary ruling: Oberster Gerichtshof - Austria.

Free movement of goods - Article 28 EC - Measures having equivalent effect - Advertising restrictions - Reference to the commercial origin of goods products - Goods from an insolvent company - Directive 84/450/EEC - Fundamental rights - Freedom of expression - Principle of proportionality.

Case C-71/02.

51 References for a preliminary ruling: Tribunal de grande instance de Strasbourg - France.

Free movement of goods - Prohibition of resale at a loss. Joined cases C-267/91 and C-268/91.

2) Second, there are the overriding reasons of public interest, which is the second Cassis de Dijon principle, being therefore a principle of judicial origin: the rule of reason (Case 120/78, Cassis de Dijon: 'Overriding reasons of public interest'⁵². These grounds of justification, that were introduced by the Court of Justice, shall be added to those grounds expressly provided for in Art. 36 TFEU. As opposed to Art. 36 TFEU this is an indicative list, not an exhaustive one. The ECJ is responsible to determine whether a trade-restrictive measure can be justified on the grounds of public interest, those being a subsidiary of the first category. The ECJ found the following goods to be considered grounds of public interest:

- * protection of the environment (Case 302/86, Commission v Denmark),
- * protection of fundamental human rights (Case 112/00, Schmidberger),
- * maintenance of national and local socio-political characteristics (Case 145/88, Torfaen),
- * improvement of working conditions (Case 155/80, Oebel),
- * promotion of cultural activities (Case 60 and 61/84, Cinetheque) and
- * polyphony of the type (Case 368/95, Familiapress).

The conditions under which one of the reasons set out above may justify a measure restricting trade among Member States are the following:

First condition, is Art. 36 (b) TFEU, that is applied both distinctly and indistinctly: 'Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States'⁵³. That applies, even if there is really a legitimate purpose for the measure. The way the rule is applied should not benefit only domestic products. The reason for the distinction made must be authentic.

Second condition, is the principle of proportionality. 'National rules or practices adopted in order to achieve one of the objectives referred to in Article 36 of the EEC Treaty are compatible with that Treaty only in so far as they do not exceed the limits of what is appropriate and necessary in order to achieve the desired objective'⁵⁴. (Case 128/89, Commission v Italy).

⁵² C-120/78, Cassis de Dijon [1979] ECR 649.

⁵³ Article 36 TFEU (ex Article 30 TEC): "The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States".

⁵⁴ Commission of the European Communities v Italian Republic.

Actions against Member States for failure to fulfil obligations - Free movement of goods - Plant-health checks on grapefruit - Prohibition of imports through inland border posts. Case C-128/89.

So, even if a measure falls into the Articles 34 or 35 TFEU will be lawful if it proves to be justified. To be more specific, if a) it is justified on the grounds of the Art. 36 TFEU or if overriding reasons of public interest exist and b) it is not a means of discrimination or restriction and c) if it complies with the principle of proportionality, then the measure is legal and does not violate the European Union law. As far as Art. 30 TFEU and Art. 110 TFEU are concerned, they both contain an absolute prohibition. The exceptions of Art. 36 TFEU or overriding reasons of public interest do not apply.

Regarding the principle of mutual recognition, which is the first Cassis de Dijon principle, the general rule is that it applies to non-harmonized sectors. Despite the existence of a national rule in the Member State of destination, products lawfully produced or marketed in another Member State enjoy the fundamental right to free movement of goods that is guaranteed by the TFEU. The exception is that products lawfully manufactured or marketed in another Member State do not enjoy this right under the condition that the Member State of destination demonstrates that it is vital to impose its own national regulation on the products on the grounds set out in Article 36 TFEU or imperative requirements established by the case law of the Court of Justice. That is provided that the principle of proportionality is always respected.

Harmonization

All Member States have the competence to regulate all the issues relating to a specific area of law, but only in the absence of common European rules on this matter⁵⁵. Therefore, where harmonization has been achieved through a Directive, Regulation or Decision, the provisions of the Treaty do not apply, but instead apply the provisions of the Directive, the Regulation or the Decision respectively. Harmonization measures (Directives, Regulations, Decisions) exclude further restrictions from Member States. However, there are certain conditions that have to be met: a) significant restrictions on intra-Community trade, b) the relative control of the State itself. Therefore, the exclusive right to import and then market a product inside the State is not directly subject to the prohibition (see, however, Case 57/94 Commission v Netherlands). The private monopolies of certain professions, e.g. pharmacists and opticians, do not fall within the Art. 37 TFEU. The legal form of the organization is not decisive (the State itself, which acts through the established bodies for this purpose e.g. municipalities, public enterprises etc).

⁵⁵ Art. 2 (2) TFEU: "The Member States shall exercise their competence to the extent that the Union has not exercised its competence".

Internal energy market and free movement of goods

Internal energy market is the objective of the common energy policy. According to Art. 194 (1) TFEU: One of the objectives of the Union's energy policy is "in a spirit of solidarity between Member States to: a) ensure the functioning of the energy market"⁵⁶. A key instrument for the integration of the energy market is the implementation of European internal market law and in particular of the provisions on the free movement of goods. As stated in the case law of the ECJ:

- a) The Treaty rules on free movement apply also in the field of energy. There are however some narrow exceptions. The Member States have to exercise their regulatory powers in a manner consistent with the principles of the Treaty (Case 71/02, *Karner and Troostuijk*, paras 33-34⁵⁷)
- b) This obligation extends also to the state bodies (e.g. municipal authorities) and seems to extend even in cases where such bodies have a private, rather than a public, nature (Proposals of Advocate General M. Poiares Maduro, Case 463/04, *Federconsumatori and Others*, points 21-23⁵⁸).
- c) The interpretation of the fundamental principles of the Treaty by the ECJ sets the limits within which the EU's bodies must act in the establishment of secondary legislation.

Energy as a commodity

Regarding the question whether energy is considered to be a commodity, all forms of energy fall within the definition of *commodity*. Only electricity created doubts and led to the above questioning. The case of electricity is exceptional, due to the fact that it does not carry all features possessed normally by the other goods: a) electricity is not tangible and b) it is difficult to store. It was broadly alleged to have more similarities with

⁵⁶ Article 194 (1) (a) TFEU: "In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to: (a) ensure the functioning of the energy market";

⁵⁷ Reference for a preliminary ruling: Oberster Gerichtshof - Austria. Free movement of goods - Article 28 EC - Measures having equivalent effect - Advertising restrictions - Reference to the commercial origin of goods products - Goods from an insolvent company - Directive 84/450/EEC - Fundamental rights - Freedom of expression - Principle of proportionality. Case C-71/02.

⁵⁸ Reference for a preliminary ruling: Tribunale amministrativo regionale per la Lombardia - Italy. Article 56 EC - Free movement of capital - Restrictions - Privatised undertakings - National provision under which the articles of association of a company limited by shares may confer on the State or a public body holding shares in that company the power to appoint directly one or more directors to the board. Joined cases C-463/04 and C-464/04.

the category of *services* than with *goods*, because both the import and export of electricity are operations falling within the category of *services*.

However, according to the Case 6/64 *Costa v E.N.E.L*⁵⁹, the Court of Justice along with the General Advocate considered that a monopoly of electricity fell within Art. 31 TEC (now Art. 37 TFEU⁶⁰). Since this provision relates exclusively to commercial monopolies, that decision in fact implied that electricity must be regarded as a commodity, although the issue was not addressed neither by the Court nor by the General Advocate.

Also, according to the Case 393/92, *Almelo*⁶¹, in an action before a Netherlands' court between a number of local electricity distribution companies and a regional distributor, the former challenged the compatibility with European Union law of some of the clauses that were included in the agreements regarding the purchasing and selling of electricity that were concluded between the regional distributor and the local distribution companies. The Dutch court sent a preliminary question to the ECJ on the interpretation of the relevant Treaty provisions. The Court of Justice confirmed that electricity is a commodity for three reasons: "a. In Community law, and indeed in the national laws of the Member States, it is accepted that electricity constitutes a good within the meaning of Article 30 of the Treaty, b. electricity is thus regarded as a good under the Community's tariff nomenclature (code CN 27.16) and c. furthermore, in its judgment in Case 6/64 *Costa v ENEL* [1964] ECR 1141 the Court accepted that electricity may fall within the scope of Article 37 of the Treaty" (which concerns State monopolies of a commercial character).

⁵⁹ *Flaminio Costa v E.N.E.L*. Reference for a preliminary ruling: *Giudice conciliatore di Milano - Italy*. Case 6-64.

⁶⁰ Article 37 TFEU (ex Article 31 TEC): "1. Member States shall adjust any State monopolies of a commercial character so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.

The provisions of this Article shall apply to any body through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States. These provisions shall likewise apply to monopolies delegated by the State to others.

2. Member States shall refrain from introducing any new measure which is contrary to the principles laid down in paragraph 1 or which restricts the scope of the articles dealing with the prohibition of customs duties and quantitative restrictions between Member States.

3. If a State monopoly of a commercial character has rules which are designed to make it easier to dispose of agricultural products or obtain for them the best return, steps should be taken in applying the rules contained in this Article to ensure equivalent safeguards for the employment and standard of living of the producers concerned".

⁶¹ *Municipality of Almelo and others v NV Energiebedrijf Ijsselmij*. - Reference for a preliminary ruling: *Gerechthof Arnhem - Netherlands*. - Competition - Agreement restricting the importation of electricity - Service of general interest. - Case C-393/92.

In Case 206/06, *Essent Netwerk Noord*, 43⁶²: “In the case in the main proceedings, the price surcharge is imposed on transmitted electricity. In that regard, it must be borne in mind that electricity constitutes a product for the purposes of the provisions of the Treaty (Case C-393/92 *Almelo* [1994] ECR I-1477, paragraph 28, and Case C-158/94 *Commission v Italy* [1997] ECR I-5789, paragraph 17)”.

In Case 158/94 *Commission v Italy* (monopoly on electricity), 17⁶³: “It must be remembered, however, that in its judgment in Case C-393/92 *Almelo and Others v Energiebedrijf IJsselmij* [1994] ECR I-1477, paragraph 28, the Court noted that it is accepted in Community law, and indeed in the national laws of the Member States, that electricity constitutes a good within the meaning of Article 30 of the Treaty. It noted in particular that electricity is regarded as a good under the Community's tariff nomenclature (Code CN 27.16) and that it had already been accepted, in Case 6/64 *Costa v ENEL* [1964] ECR 585, that electricity may fall within the scope of Article 37 of the Treaty”.

Lastly, Advocate General Fennely in Case 97/98, *Jagerskiold v Gustafsson*⁶⁴ acknowledged that it may seem somewhat surprising that the CJEU has faced electricity, despite its intangible character, as a good. After reiterating the rationale of the Advocate General in the *Almelo* Case, he added that electricity must be regarded as an exceptional case, which may be justified due to its function as an energy source being in competition with gas and oil. As far as other forms of energy are concerned, e.g. heat was treated by the Commission as a product that affects trade in energy, given its nature as a source of energy competing with other energy products (Commission Decision 2006/598), natural gas (Case 159/94 *Commission v France*). Electricity, natural gas and heat are considered as goods under EU law. Therefore, restrictions on the movement and circulation of all forms of energy fall under the provisions of the Treaty on goods (Art. 28-37) and not under those for services.

62 Case C-206/06: Judgment of the Court (Third Chamber) of 17 July 2008 (reference for a preliminary ruling from the *Rechtbank Groningen* — Netherlands) — *Essent Netwerk Noord BV, Nederlands Elektriciteit Administratiekantoor BV, Aluminium Delfzijl BV v Aluminium Delfzijl BV, Staat der Nederlanden, Nederlands Elektriciteit Administratiekantoor BV, Saranne BV* (Internal market in electricity — National legislation permitting the levy of a surcharge on the price for electricity transmission in favour of a statutorily-designated company which is required to pay stranded costs — Charges having equivalent effect to customs duties — Discriminatory internal taxation — Aid granted by the Member States)

63 *Commission of the European Communities v Italian Republic*.

Failure of a Member State to fulfil its obligations - Exclusive rights to import and export electricity. Case C-158/94.

64 Reference for a preliminary ruling: *Pargas tingsrätt* - Finland. Free movement of goods - Definition of "goods" - Angling rights - Freedom to provide services. Case C-97/98.

Restrictions regarding energy

First, there is a prohibition of customs duties on imports and exports and charges having equivalent effect (CEEs): Art. 30 TFEU.

Specifically, in Case 206/06, *Essent Netwerk Noord and Others*⁶⁵, according to the material facts, the Netherlands, in order to adapt Directive 96/92 and achieve the liberalization of the Dutch electricity sector introduced a relevant law (1998), which provided that:

“1. Any purchaser who is not a protected buyer shall, in addition to a contractual obligation to the network operator of the region in which he is established, pay NLG 0.107 per kWh to that network operator, calculated on the total quantity of the electricity transferred by the grid operator to the grid during the period from 1 August 2000 to 31 December 2000.

2. Every protected purchaser shall, in addition to a contract due to the licensee of the region in which he is established, pay to that licensee an amount of NLG 0 010 per kWh, calculated on the total quantity of electricity delivered to him the holder of the authorization during the period from 1 August 2000 to 31 December 2000”.

This case concerned the preliminary question whether that national provision is compatible with Articles 25, 87 and 90 TEC. It should be noted that a charge applied under the same conditions to both domestic and imported products, that is used for the benefit of domestic products alone, so that the burden borne by the domestic products is balanced, may constitute, having regard to the use of the charge, State aid that is incompatible with the internal market, under the conditions of Article 87 EC (Case C-17/91 *Lornoy and Others* [1992] ECR I-6523, paragraph 32⁶⁶, and Case C-72/92 *Scharbatke*[1993] ECR I-5509, paragraph 18⁶⁷). On the other hand, when only

⁶⁵ Case C-206/06: Judgment of the Court (Third Chamber) of 17 July 2008 (reference for a preliminary ruling from the Rechtbank Groningen — Netherlands) — *Essent Netwerk Noord BV, Nederlands Elektriciteit Administratiekantoor BV, Aluminium Delfzijl BV v Aluminium Delfzijl BV, Staat der Nederlanden, Nederlands Elektriciteit Administratiekantoor BV, Saranne BV* (Internal market in electricity — National legislation permitting the levy of a surcharge on the price for electricity transmission in favour of a statutorily-designated company which is required to pay stranded costs — Charges having equivalent effect to customs duties — Discriminatory internal taxation — Aid granted by the Member States)

⁶⁶ *Georges Lornoy en Zonen NV and others v Belgian State*. Reference for a preliminary ruling: *Rechtbank van eerste aanleg Turnhout - Belgium*. Parafiscal charges - Compulsory contributions to a Fund for Animal Health and Livestock Production. Case C-17/91.

⁶⁷ *Firma Herbert Scharbatke GmbH v Federal Republic of Germany*. Reference for a preliminary ruling: *Verwaltungsgericht Frankfurt am Main - Germany*. Parafiscal charges - Compulsory contributions to a fund for the marketing of agricultural, forestry and food products. Case C-72/92.

part of the proceeds is paid to domestic electricity producers, then Art. 110 TFEU is violated. We could take into consideration a hypothetical example: Russia is imposing a charge on electricity exports to Finland during peak hours. This is due to the fact that electricity is crossing a border. Indeed, the charge would seem to be bearing all the features of a charge having equivalent effect (CEE), except one: Russia is not a Member State. The charge imposed by Russia on exports to Finland would be a breach of the Art. 30 TFEU, if Russia was a Member State. It could not be justified, particularly on the basis of Art. 36 TFEU (Case 7/68 Commission v Italy, works of art⁶⁸).

Second, there is also a prohibition of discriminatory internal taxation: Art. 110 TFEU.

Regarding energy, in Case 213/96 – Outokumpu⁶⁹ (restriction of discriminatory internal taxation, Art. 110 TFEU), the fact that was taken into consideration was a Finnish legislation that imposed duties on electricity. The duty levied on the electricity produced in Finland was calculated according to the method that it was produced. In the reference for a preliminary ruling, the national court stated that the purpose of the scheme was to protect the environment. Consequently, electricity produced from water power was subject to a lower rate than the electricity produced from different sources. On the other hand, the imported electricity was subject to a rate of tax, which was higher than the lowest tax rate applied to domestically produced electricity but less than the corresponding higher rate. The result of this legislation was that domestic clean energy was subject to a lower tax than the imported one, but it was on a more favorable scale than the so called dirty energy. The ECJ was asked to judge whether the abovementioned treatment of electricity complied with the prohibition of customs duties on imports and CEEs (Art.30 TFEU) or the prohibition of discriminatory or unfavorable internal taxation (Article 110 TFEU). The Court pointed out that, according to settled case-law, that the Art. 110 TFEU is infringed when the tax levied on the imported product and that charged on the like domestic product are calculated in a dissimilar way and according to different methods and procedures, which results sometimes in a greater charge of the imported product. So, there was a violation of Art. 110 TFEU.

Case 72/83, Campus Oil⁷⁰, (quantitative restrictions and MEQRs, Art. 34 TFEU), concerned the requirement imposed by Ireland on importers of petroleum products to buy 35% of their needs, at a higher price than that produced from the Whitegate state

68 Commission of the European Communities v Italian Republic. Case 7-68, ECLI:EU:C:1968:51.

69 Case C-213/96, Outokumpu Oy [1998] ECR I-1777.

70 Campus Oil Limited and others v Minister for Industry and Energy and others. Reference for a preliminary ruling: High Court - Ireland. Free movements of goods - Supply of petroleum products. Case 72/83, ECLI:EU:C:1984:256.

refinery. The aim was to ensure the survival of the State refinery and the energy autonomy of the country in the event of a crisis. This was the first big judicial decision on energy. It considered that the Irish measure constituted an MEQR under the provision of Art. 34 TFEU. It was therefore prohibited by European Union law.

In Case 379/98, *PreussenElektra*⁷¹, the facts were: on the basis of a German law, each electricity supplier was obliged to buy a certain percentage of electricity from RES that were produced in the domestic market in Germany. Like *Campus Oil*, it has never been denied that it was an MEQR, while the real issue was that of how a justification could be made. The Court confirmed its decision in *Campus Oil*. The German requirement on suppliers to obtain a certain percentage of their electricity supplies from RES from the domestic market constituted an MEQR under the provision of Art. 34 TFEU. It was therefore prohibited by European Union law.

Case 204/12 to 208/12, *Essent Belgium*⁷², concerns if measures taken by the Flemish Region were in accordance with Directive 2001/77 on RES and Directive 2003/54 on Electricity. The Flemish Region has issued a decree according to which, in order to meet the green energy quota that each electricity producer was required to meet under that legislation, the producers could only rely on the green certificates produced for green energy in the Flanders. The Flemish authorities were empowered to not take into consideration the above condition in some cases but did not do so in relation to the green electricity produced in other Member States and Norway and then imported into Flanders by *Essent Belgium*. As regards imports from other Member States, *Essent* argued that the scheme was contrary to the provision of Art. 34 TFEU⁷³. Norway is not in the EU but one of the three countries which are parties to the EEA Agreement with the EU. Art. 11 EEA⁷⁴ in fact reproduces the provision of Art. 34 TFEU. In relation to the imports from Norway, it stated that the regime violated Art. 11 EEA. The court considered that the limitation of aid to Renewable Energy produced in Flanders

⁷¹ Case C-379/98 *PreussenElektra AG and Schleswag AG* [2001].

⁷² Cases C-204/12 to C-208/12 joined, *Essent Belgium v Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt* [2014].

⁷³ Cases C-204/12 to C-208/12 joined, *Essent Belgium v Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt* [2014] paras 33 and 37.

⁷⁴ Agreement on the European Economic Area - Final Act - Joint Declarations - Declarations by the Governments of the Member States of the Community and the EFTA States - Arrangements - Agreed Minutes - Declarations by one or several of the Contracting Parties of the Agreement on the European Economic Area, *Official Journal L 001*, 03/01/1994 P. 0003 – 0036, Article 11: “Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between the Contracting Parties”.

constituted an MEQR under the provision of Art. 34 TFEU (see par. 77 and 83-88⁷⁵). With regard to imports from Norway, the Court also considered that the measure was in breach of Art. 11 EEA. It also held that the rule that green certificates were only granted to green energy produced in Flanders constituted a restriction on imports in two respects. The most obvious was that it prevented electricity producers from meeting their quotas by importing Renewable energy. In addition, it prevented them from marketing green certificates that they would otherwise have acquired by introducing renewable electricity.

Case 573/12, *Ålands vindkraft*⁷⁶, concerned the 2009/28 RES Directive. According to its provisions, it allows the Member States to support green energy production and also it does not obligate the Member States to support the use of green energy produced in another Member State. In compliance with the above Directive, the Swedish law provided green certificates only to green electricity plants located in the Swedish territory. *Ålands vindkraft*, a Finnish company that was operating a wind park located in Finnish waters and was supplying the Swedish grid, asked the Swedish Authorities to issue electricity certificates. The request of the company was however rejected. The Swedish Energy Authority refused to issue the certificates on the grounds that only operators who operate facilities located in Sweden can obtain such certificates. *Ålands vindkraft* appealed to a Swedish court, which sent a preliminary ruling to the CJEU. The company asked whether the Swedish framework constitutes an MEQR under the provision of Art. 34 TFEU and, if so, whether it can be justified on the grounds of promoting the production of electricity from RES. The governments of Germany and Sweden and the Swedish Energy Authority have argued that the CJEU did not even need to look at this provision (Art. 34 TFEU) because the 2009 RES Directive exhaustively harmonized the rules of national support systems for green energy production. According to established case law (Case 309/02, para. 53⁷⁷) where a matter has been exhaustively harmonized by EU legislation, the CJEU will examine the legality of national measures in the light of this legislation, not under Art. 34 TFEU. The CJEU rejected this on the grounds that the RES Directive did not harmonize these issues exhaustively, but on the contrary, it gave to Member States a considerable independence to act with freedom in this regard. Particularly it offered them the right to

⁷⁵ Cases C-204/12 to C-208/12 joined, *Essent Belgium v Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt* [2014] paras 77 and 83-88.

⁷⁶ Case C-573/12 *Ålands Vindkraft v. AB Energimyndigheten* EU:C:2014:2037.

⁷⁷ *Radlberger Getränkegesellschaft mbH & Co. and S. Spitz KG v Land Baden-Württemberg*. Reference for a preliminary ruling: *Verwaltungsgericht Stuttgart - Germany*. Environment - Free movement of goods - Packaging and packaging waste - Directive 94/62/EC - Deposit and return obligations for non-reusable packaging that depend on the overall percentage of reusable packaging. Case C-309/02.

decide to what extent they would support the green energy produced by other Member States (paras 56-63). In addition, the CJEU considered that such a support system constituted an MEQR under Art. 34 TFEU, for the same reasons as *Essent Belgium* (paragraphs 67-75⁷⁸).

Application of Articles 34-35 TFEU

In Case 231/83 *Cullet v Leclerc*⁷⁹, the CJEU considered that the French law that was setting a minimum retail price for oil falls under the Art. 34 TFEU, because this price was set at a level which operated in such a way that imported products were noticeably at a disadvantage vis-à-vis domestic products. In that case, the minimum prices were determined on the basis of national products, thereby depriving in this way the imported products of any potential competitive advantage.

Under the provision of Art. 35 TFEU (concerning exports), the measure must distinguish between imported and domestic products. In Case 174/84 *Bulk Oil AG v Sun International*⁸⁰, the CJEU considered that the UK Government's policy, despite the fact that it was unofficial, to limit oil exports to Israel through the use of destination related clauses constituted an MEQR in exports being in line with the purpose of Art. 35 TFEU but it was not contrary to this provision, as the case concerned exports to a non-EU country.

In Case 302/88 *Hennen Olie*⁸¹, the CJEU has examined national measures which have the object or effect of specifically restricting export flows and thus create a difference in treatment between the domestic trade of a Member State and its export trade, in order to ensure a particular advantage for the national production or the domestic market of the State concerned. The difference between distinctly applicable measures and measures applied without distinction is that the measures applied without distinction

78 C-204/12 to C-208/12, *Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteitsen Gasmarkt* ECLI:EU:C:2014:2192.

79 *Henri Cullet and Chambre syndicale des réparateurs automobiles et détaillants de produits pétroliers v Centre Leclerc à Toulouse and Centre Leclerc à Saint-Orens-de-Gameville*. Reference for a preliminary ruling: Tribunal de commerce de Toulouse - France. National rules on fuel prices. Case 231/83.

80 *Bulk Oil (Zug) AG v Sun International Limited and Sun Oil Trading Company*. Reference for a preliminary ruling: High Court of Justice, Queen's Bench Division - United Kingdom. Quantitative restrictions imposed by the United Kingdom on exports of crude oil to non-member countries (Israel) - Validity under the common commercial policy - Validity under EEC-Israel Agreement. Case 174/84.

81 Reference for a preliminary ruling: *Gerechthof 's-Gravenhage* - Netherlands. - Interpretation for Article 34 of the EEC Treaty - Non-reimbursement or partial reimbursement of contributions in the case of export of petroleum products. Case C-302/88.

can be justified if necessary to serve overriding reasons in the public interest, e.g. the protection of the environment (Case 120/78, Cassis de Dijon).

Justification

Grounds of justification: public order and security

As already mentioned above, Case 72/83 Campus Oil concerned the requirement imposed by Ireland on importers of petroleum products to buy 35% of their needs, at a higher price than that from the Whitegate state refinery. The aim was to ensure the survival of the State refinery and the energy autonomy of the country in the event of an economic crisis. In fact, this requirement simply kept the refinery in operation and therefore financially benefited Ireland. The Court held that the uninterrupted supply of petroleum products was so important that it was above purely economic thoughts and could thus be justified in this way. In view of the seriousness of the consequences of an interruption in the supply of petroleum products for the existence of a country, the objective of ensuring a minimum supply of petroleum products at all times may be an objective covered by the concept of public security. According to par. 34: "It should be stated in this connection that petroleum products, because of their exceptional importance as an energy source in the modern economy, are of fundamental importance for a country's existence since not only its economy but above all its institutions, its essential public services and even the survival of its inhabitants depend upon them. An interruption of supplies of petroleum products, with the resultant dangers for the country's existence, could therefore seriously affect the public security that Article 36 allows States to protect".

The exception for reasons of "public security" under the provision of Art. 36 TFEU was further defined in Case 347/88 Commission v Greece (supplying Greece with petroleum I), paras 41-44⁸². Under the relevant Greek legislation, distributors were required to submit annual supply schedules for government approval and to comply with a quota regime. The ECJ rejected the Greek government's allegations that these subsequent restrictions were necessary to maintain public safety and to ensure an adequate supply of petroleum products at all times. The Court stated that the Greek government had not demonstrated that without these rights the refineries would not be able to sell their products at competitive prices (see par. 49). Although the ECJ acknowledged that the contested measure ensured that Greece was equipped with oil products at any given

⁸² Case C-347/88. Commission of the European Communities v. Hellenic Republic. (Importation, exportation and marketing of crude oil and petroleum products — State monopoly — Prices).

time, the government failed to persuade the ECJ that the measure was necessary to achieve these objectives, particularly since the production capacity of the two Greek refineries exceeded the country's minimum needs in times of crisis. As stated in par. 58 of the Court judgement: "In that regard it must first be borne in mind that, as the Court stated in its judgment in *Campus Oil Ltd*, cited above (paragraph 35), the aim of ensuring a minimum supply of petroleum products at all times is capable of constituting an objective covered by the concept of public security within the meaning of Article 36 of the EEC Treaty. However, measures adopted on the basis of Article 36 cannot be justified unless they are necessary for the attainment of the objective pursued by that article and that objective is not capable of being achieved by measures which are less restrictive of intra-Community trade (see the judgment in *Case C-196/89 Nespoli and Crippa* [1990] ECR I-3647, paragraph 15)".

Case 398/98 *Commission v Greece*⁸³ (supplying Greece with oil II) concerned Greek legislation implementing Directive 68/414⁸⁴ on the obligation to maintain minimum stocks of crude oil and/or petroleum products. Greek law required trading companies either to maintain such stocks themselves or to transfer this obligation to the refineries established in Greece, with which they cooperated, by purchasing a substantial part of their supplies from these refineries. The Greek Government argued that this system was justified under Art. 36 TFEU, so as to ensure the security of supply of petroleum products. The fundamental right to freedom of the refineries would be too restrictive, arguing if they were required to store the minimum stocks of petroleum products and thus to assume an obligation on the marketing companies, unless they were required by the latter in their turn to buy their supplies from these refineries. The Greek Government has argued that refiners could not have expected to undertake the storage obligation without consideration. The Greek Government has argued that without the contested measure it would be impossible to supply the armed forces with the specific fuels they use and that the marketing companies would not be able to sell them. Greece's argument was directly linked to its claim, which was based on the need to ensure security of supply. The CJEU retreated from *Campus Oil* decision. The CJEU has rejected the Greek Government's argument that it is purely economic. The CJEU has confirmed that the maintenance on the national territory of a stock of petroleum

⁸³ *Commission of the European Communities v Hellenic Republic*. - Failure by a Member State to fulfil its obligations - Article 30 of the EC Treaty (now, after amendment, Article 28 EC) - Obligation to maintain minimum stocks of petroleum products. - Case C-398/98.

⁸⁴ Council Directive 68/414/EEC of 20 December 1968 imposing an obligation on Member States of the EEC to maintain minimum stocks of crude oil and/or petroleum products. Official Journal L 308 , 23/12/1968 P. 0014 – 0016.

products to ensure the continuity of supply constitutes a legitimate public safety objective under the Treaty (see par. 29). However, the Court rejected aspects of Greek legislation on oil reserves, which the Greek government tried to defend based on the Campus Oil theory. Because of the Greek framework, there was a result that discriminated against petroleum products from refineries located in other grids, which faced more difficult market conditions. Although companies could be exempted from the obligation to store petroleum products at their premises if they obtained supplies from refineries located in Greece they could not do so if they bought their petroleum products from refineries located in other Member States. Thus, the CJEU ruled that the Greek measure was not necessary, as these fuels did not necessarily have to be produced or refined by national refineries.

Grounds of justification: protection of the environment

Case 379/98, PreussenElektra, as briefly mentioned above, concerned a German law on the promotion of RES through a feed-in support system, according to which, each private electricity company was obliged to buy electricity from RES, which was within its scope of supply in Germany. 65% of the shares of the defendant subsidiary Schleswig AG belonged to the applicant, PreussenElektra AG. The fact that PreussenElektra was actually instigating itself led to the claim that the company wanted to use this case to get rid of a law that did not interest her. The ECJ considered that, as current Community law on the electricity market is concerned, legislation such as the one at issue is not incompatible with Article 34 TFEU (par.79-81). That conclusion was based on the finding that the nature of the electricity is such that, once it is accepted in the transmission or distribution system, it is difficult to determine the origin and, in particular, the source of energy from which it was produced. According to the ECJ, this justified the distinctive rule. It is difficult to reconcile with the principle of mutual recognition. Although this judgement was a step in the right direction, the strength of the arguments used in the ruling of the Court can be questioned.

There is a different attitude of the ECJ in Outokumpu (where the ECJ did not even give the importer the opportunity to prove that the electricity he imported had been produced by a specific method). General Advocate Jacobs was opposite: 'I do not understand why electricity produced from renewable energy sources in another Member State

would not contribute to reducing gas emissions in Germany to the same extent as electricity produced from renewable energy sources in Germany', note 236⁸⁵.

Both Case 573/12, Ålands vindkraft and Case 204/12 to 208/12, Essent Belgium related to RES. The CJEU following its decision in PreussenElektra accepted the justification for environmental protection reasons, contrary to Advocate General Bot⁸⁶ in both cases. The internal market in RES has not been completed. Member States are establishing barriers and the CJEU justifies them under two conditions: 1) not to make an arbitrary discrimination or a disguised restriction (no specific issues raised) and 2) principle of proportionality (Case 72/83, Campus Oil). According to the CJEU's Conclusion in Campus Oil, par. 31, although this legislation provided for "specific guarantees" that deliveries from other Member States would be maintained in the event of a serious supply shortage, the Member States still had no "conditions of supply" that supplies would be maintained at a sufficient level in each case. If the same issue arose today, it is by no means certain that the CJEU decision would be the same. There are differences between the EU legislation that was in force at that time and the legislation currently in force (see Directive 2009/119, which imposes a duty on stocks to keep crude oil and / or petroleum products). It is not surprising that the CJEU itself has retreated from it.

Conflict between national RES support systems and free movement of goods

Two opposing trends exist in EU law with regard to the energy policies of the Member States. The first trend is convergence, meaning that the primary legislation and the secondary legislation (Directive 2009/72 on the Internal Market in Electricity) proclaim the prohibition of discriminatory practices on the basis of origin and the removal of barriers to trade in energy between the commodities. The second trend is divergence, meaning that the RES Directive 2009/28 provides flexibility to Member States. It acknowledges them the right to form national support systems independently, even if they discriminate against foreign energy producers. However, there is a contradiction. While Directive 2009/72 on the Internal Electricity Market is aimed at creating a non-discriminatory internal market for electricity, Directive 2009/29 on RES supports the heterogeneity between the Member States support systems.

⁸⁵ Opinion of Advocate General Jacobs delivered on 26 October 2000, PreussenElektra (n 10) [236].

⁸⁶ Opinion of Advocate General Bot delivered on 28 January 2014, Case C-573/12 Ålands Vindkraft AB v. Energimyndigheten EU:C:2014:37.AI.

The first issue is whether national discriminatory measures can be justified to protect the environment. According to the Case 2/90 Commission v Belgium⁸⁷ (the Walloon Waste Case), the Commission brought an action against Belgium seeking a declaration that, by prohibiting the storage, dumping or disposal in the Walloon Region of hazardous waste from another Member State or from another region of Belgium, the Commission has failed to fulfill its obligations under Directives and the Treaty. The basic Belgian legislative text was the Decree of the Walloon Regional Council of 1985 on waste, the purpose of which was, among other things, to avoid waste. This Decree gave the Walloon Government the power to lay down specific rules on the use of controlled sites of disposal. It was the first case in which the Court had to decide whether an act that was being applied causing discrimination could be justified on environmental grounds. The Court has laid down the rule that only national rules which apply without distinction and make no distinction between imported and domestic products could be justified as mandatory requirements. It did not actually concern subsidy schemes for renewable sources of energy but rather a discrimination ban imposed by the Walloon Region on imports of waste originating outside its borders. Paradoxically, the Court has allowed Walloon to justify the ban on environmental grounds. In Case 379/98, PreussenElektra, the CJEU has ruled that discriminatory practices in the management of subsidy schemes for renewable energy do not violate the free movement of goods. As in the Ålands Vindkraft case, the Advocate General disagreed with the CJEU. The debate focused on the principle expressed in previous judgments by the CJEU that reasons not explicitly mentioned in the TFEU should be accepted only if they do not introduce discriminatory measures. He avoided giving a clear answer. In Case 573/12, Ålands vindkraft, the CJEU endorsed the position on discrimination of Directive 2009/28 on Renewable Energy Sources. If it had applied the Case 2/90 rule, Commission v Belgium, it would have to reject the justification of the Swedish quota system under the Cassis de Dijon principle because of the clear disadvantage faced by foreign suppliers of green electricity. In previous judgments, the Court examined whether the contested measures were adopted for the purpose of protecting the environment, thus effectively serving an environmental objective, with the burden of proof being borne by the Member State. In Ålands Vindkraft, the CJEU itself acknowledged that renewable energy sources - even those abroad - serve the purpose of environmental protection (par. 71-73 and 93) and that foreclosing foreign green energy from subsidies would reasonably lead to a reduction in protection of the environment. Overall, the Court has advocated those who believe that the closed

⁸⁷ Case C-2/90 Commission v. Belgium [1992] ECR I-4431.

national support system offers a higher degree of credibility with regard to the expectations of both project managers and investors in green power plants. Wind and solar parks, in particular, have high capital costs and require large investments. Because of the fact that they are operating without fuel, the construction of factories is the main expense. Therefore, they depend on the reliability of long-term planning. Unreliable subsidy arrangements prevent this type of investment. There is a new point of view: flexibility with regard to the measures applied "by distinction" and "indistinctly". The problem is not the inconsistency of the CJEU jurisprudence, but the prohibition of discriminatory measures. It is recommended to abandon this absolute ban and instead to include the distinctive character of a measure in the proportionality assessment. This proposal has been widely popular, notably between the Advocate Generals of the CJEU. Jacobs, in *Walloon Waste*, *Dusseldorp*, and *PreussenElektra* Cases, as well as Bot in *Essent Belgium* (point 46⁸⁸) and *Ålands Vindkraft* (point 79⁸⁹), have encouraged a more flexible approach to tackling discriminatory measures. An argument in favor of this position is the fact that it is difficult to understand why an interest, such as the environment, which is vital for the health of the whole ecological system, should enjoy a weaker level of protection than the interests recognized in trade agreements, which are included in Article 36 TFEU, while this has remained unchanged since it has been introduced in 1957. Finally, for these reasons, it would seem legally well-founded and justified to consider whether a measure is distinctly or indistinctly applicable in the assessment of proportionality. This is exactly what the CJEU did without explaining its reasoning.

The second issue is whether the Directive 2009/28 on RES led to harmonization. The profound answer is that there is no harmonization. In Case 573/12, *Ålands Vindkraft*,

88 Opinion of Advocate General Bot delivered on 8 May 2013. *Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt*. Requests for a preliminary ruling from the rechtbank van eerste aanleg te Brussel. References for a preliminary ruling — Regional support scheme providing for the issuance of tradable green certificates for facilities situated in the region concerned producing electricity from renewable energy sources — Obligation for electricity suppliers to surrender annually to the competent authority a certain quota of certificates — Refusal to take account of guarantees of origin originating from other Member States of the European Union and from States which are parties to the EEA Agreement — Administrative fine in the event of failure to surrender certificates — Directive 2001/77/EC — Article 5 — Free movement of goods — Article 28 EC — Articles 11 and 13 of the EEA Agreement — Directive 2003/54/EC — Article 3. Joined Cases C- 204/12 to C- 208/12.

89 Opinion of Mr Advocate General Bot delivered on 28 January 2014. *Ålands vindkraft AB v Energimyndigheten*. Reference for a preliminary ruling: Förvaltningsrätten i Linköping - Sweden. Reference for a preliminary ruling - National support scheme providing for the award of tradable green certificates for installations producing electricity from renewable energy sources - Obligation for electricity suppliers and certain users to surrender annually to the competent authority a certain number of green certificates - Refusal to award green certificates for electricity production installations located outside the Member State in question - Directive 2009/28/EC - Article 2, second paragraph, point (k), and Article 3(3) - Free movement of goods - Article 34 TFEU. Case C-573/12.

the Advocate General rejected this view, citing the fact that: “While it is clear from case-law that any national measure in a sphere which has been the subject of exhaustive harmonisation at EU level must be assessed in the light of that harmonisation measure and not in the light of primary law, that case-law does not apply here since it is established that Directive 2009/28 did not harmonise the material content of support schemes designed to promote the use of green energy. ”, note 61⁹⁰. The CJEU stated that it could not acknowledge a desire on the part of the EU legislator to complete the harmonization process and consequently that Article 34 TFEU still needs to be applied (points 57-63)⁹¹. According to the Preamble of the RES Directive, for the proper functioning of these national support schemes, it is essential that Member States be able to control the impact and cost of their respective national support schemes according to their respective capacities, para. 25.

90 *ibid*, note 61.

91 Case 573/12, *Ålands vindkraft*, point 57: “In that regard, it should be noted that the Court has consistently held that, where a matter has been the subject of exhaustive harmonisation at EU level, any national measure relating thereto must be assessed in the light of the provisions of that harmonising measure and not in the light of primary law (see, *inter alia*, *Radlberger Getränkegesellschaft and S. Spitz*, C-309/02, EU:C:2004:799, paragraph 53 and the case-law cited)”.

Case 573/12, *Ålands vindkraft*, point 58: “In the circumstances of the present case, it is therefore necessary to determine whether the harmonisation brought about by Directive 2009/28 ought to be regarded as being of such a kind as to preclude an examination of whether legislation such as that at issue is compatible with Article 34 TFEU”.

Case 573/12, *Ålands vindkraft*, point 59: “In that regard, it should be noted at the outset that, far from seeking to bring about exhaustive harmonisation of national support schemes for green energy production, the EU legislature — as is apparent, *inter alia*, from recital 25 to Directive 2009/28 — based its approach on the finding that Member States apply different support schemes and on the principle that it is important to ensure the proper functioning of those schemes in order to maintain investor confidence and to enable those States to define effective national measures in order to achieve their mandatory national overall targets under the directive”.

Case 573/12, *Ålands vindkraft*, point 60: “The definition of ‘support scheme’, for the purposes of Directive 2009/28, as laid down in point (k) of the second paragraph of Article 2 thereof, also highlights the fact that the instruments, schemes or support mechanisms are essentially measures adopted by the State, while confining itself to referring, in quite broad terms, to the existing types of national incentive designed to promote the use of energy from renewable sources”.

Case 573/12, *Ålands vindkraft*, point 61: “In Article 1 of Directive 2009/28, which describes the subject-matter of that directive, there is nothing else to suggest that the directive is intended to bring about harmonisation of characteristics specific to the various national support schemes”.

Case 573/12, *Ålands vindkraft*, point 62: “Nor does Article 3(3) of Directive 2009/28, which in substance simply authorises and encourages national support schemes for green energy production, contain any guidance on such characteristics, apart from the clarification that Member States have the right to decide, in accordance with Articles 5 to 11 of that directive, to what extent they support green energy produced in another Member State”.

Case 573/12, *Ålands vindkraft*, point 63: “Against that background, it cannot be considered that, in covering that aspect of the territorial scope of national support schemes, the harmonisation brought about by Directive 2009/28 in the field of support schemes was of such a kind as to preclude an examination of their compatibility with Article 34 TFEU (see, by analogy, *Radlberger Getränkegesellschaft and S. Spitz*, EU:C:2004:799, paragraphs 54 to 57)”.

Conclusions

All in all, the EU has set some energy and climate targets for 2020⁹², 2030⁹³ and 2050⁹⁴. The goals for 2020 are: to reduce greenhouse gas emissions by at least 20% compared to 1990 levels, to obtain 20% of the energy from renewable sources and to improve energy efficiency by 20%. The goals for 2030 are: to reduce greenhouse gas emissions by 40%, to obtain at least 27% of energy from renewable sources in the EU, to increase energy efficiency by 27-30% and lastly, to achieve electricity interconnection of 15% (ie 15% of energy produced in the EU must be able to be transported to other EU countries). Last but not least, the goal for 2050 is to reduce the greenhouse gas emissions by 80-95% compared to 1990 levels. The 2050 Energy Roadmap shows how this can be achieved. Europe also wants to remain competitive in global energy markets while moving to cleaner energy sources. The EU does not just want to adapt to the transition to cleaner energy but in fact wants to be a leader in this transition. According to the progress made so far, the EU is well on track to meet the renewable energy target by 2020.

The European Union has definitely noticed the benefits and the advantages of renewable energy sources, by making their promotion a key priority, bearing in mind also its international commitments to cope with the effects of climate change. Within the Union, the already developed environmental and energy policies have provided the appropriate means for shaping the relevant policy and regulatory framework. With the goal of a high level of protection and improvement of the quality of the environment, but also the objective of addressing climate change, the European Union is trying to achieve the goal of a competitive, secure and environmentally sustainable internal energy market.

The case-law of the Court of Justice of the European Union has been particularly important for the promotion and implementation of a European energy policy, in which RES will play a leading role. Alongside, it is worth noting that the CJEU with its pioneering jurisprudence in some cases, also had a significant impact on the subsequent production of the Community legislation on energy issues. It is clear from the aforesaid CJEU case-law that the promotion of RES is one of the main priorities of the European energy policy. Considering the compatibility of RES with the principle

⁹² COM (2008) 30, 20 20 by 2020: Europe's Climate Change Opportunity.

⁹³ COM (2014) 15, A Policy Framework for Climate and Energy in the period from 2020 to 2030.

⁹⁴ COM (2011) 112, A Roadmap for moving to a competitive low carbon economy in 2050.

of free movement of goods, an increasing number of cases were brought before the CJEU. We could declare that the devil lies in the details. There is still a legal and compliance deficit. Therefore, the regulatory environment needs to be more balanced and reliable. The matter certainly needs more specific clarification⁹⁵. Regarding the question on what grounds can the intervention on free movement of goods be justified, as opposed to the past, nowadays the emphasis of the cases received by the CJEU for a preliminary ruling is on internal market law instead of competition law. As far as the outcome of the many cases presented above, the CJEU upholds many support schemes for Renewable Energy, limited to the national territory⁹⁶, because the RES Directive (national mandatory targets) may require so⁹⁷. The Court's approach for Renewable Energy is more realistic, (e.g. in Case 573/12, Ålands vindkraft, an awaited judgement at the national energy sector, according to which the national support schemes may stay national, for the Renewable Energy industry it was a good judgement, otherwise the investors' actions⁹⁸ in the Renewable Energy sector would have been affected, along with the development of the Renewable Energy sector) but not so satisfactory, its arguments are often unfinished and inadequate and the sources of law which are used are often left open. As far as the environmental protection is concerned, no clear distinction between the two justification categories is made.

95 Napaporn Phuangpornpitak, 'Opportunities and Challenges of Integrating Renewable Energy in Smart Grid System' (2013) 34 Energy Procedia 282.

96 Gundel (n 1), 102 with reference to European Commission, 'Guidance on the Use of Renewable Energy Cooperation Mechanisms' (2013)SWD 440 final, according to which the limitation to national beneficiaries is easier to communicate to voters.

97 Nora Grabmayr, Markus Kahles and Fabian Pause, 'Warenverkehrsfreiheit in der Europäischen Union und nationale Förderung erneuerbarer Energien', Würzburger Berichte zum Umweltenergierecht Nr. 4 (2014), 9.

98 Jan-Benjamin Spitzley and others, Keep-on-Track! Project – Analysis of Deviations and Barriers, (2014) accessed 22 Nov 2014), 69; Maria Blanco and Gloria Rodrigues, 'Can the Future EU ETS Support Wind Energy Investments?' (2008) 36 Energy Policy, 1509, 1514; Riccardo Fagiani and Rudi Hakvoort, 'The Role of Regulatory Uncertainty in Certificate Markets: A Case Study of the Swedish/ Norwegian market' (2014) 74 Energy Policy, 608.

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