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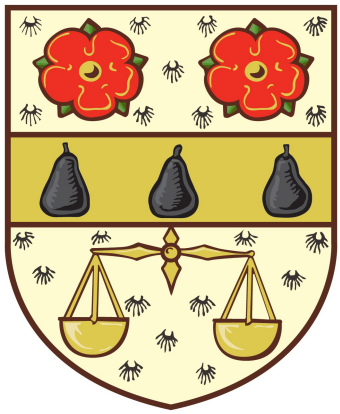

Renewable Energy and the Free Movement of Goods

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January 2015

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To be published in: *Journal of Environmental Law*, Issue 1, 2015.

Abstract

Member States retain the right to decide who can receive renewable energy subsidies, and can exclude green electricity produced abroad from subsidy programs. With its decision in the *Ålands Vindkraft* case, the European Court of Justice assured the continued existence of renewable energy subsidy programs in various EU Member States. While the judgement was welcomed by many political stakeholders, it highlights a number of unresolved legal questions. To date, the CJEU has failed to clarify if and when discrimination against foreign goods is permitted for reasons of environmental protection. The problems that remain in the wake of the Ålands Vindkraft decision argue in favour of abandoning the existing distinction between discriminatory and non-discriminatory subsidy measures. With its decision, the CJEU has granted Member States broad leeway to conduct their own assessment of the proportionality of a measure. All in all, renewable energy providers have reason to celebrate; however, the goal of creating a single European market for electricity has fallen by the wayside.

Keywords: Promotion renewable energies; EU economic freedoms; discrimination; free movement of goods

1. Introduction

The compatibility between European Union (EU) law and national subsidy schemes for renewable energy has become a heated topic of debate in both the political realm and in the legal literature. For a long time this debate focused on EU state aid law, particularly with a view to green energy subsidy systems in Germany[1] and other Member States.[2] However, recently the debate has centred on the compatibility between national renewable energy subsidy schemes and the principle of the free movement of goods. The issue at the heart of this debate was addressed in no uncertain terms by Advocate General Bot in the *Ålands Vindkraft* case when he argued that the disputed Swedish certificate system was incompatible with the free movement of goods, and that, accordingly, it should be declared incompatible with EU law.[3] This assessment of the case gave rise to animated controversy in the legal literature.[4] In its ruling, the Court of Justice of the European Union (CJEU) clearly asserted that the Swedish certificate system is compatible with the free movement of goods.[5] In contradistinction to the arguments advanced by Advocate General Bot, the CJEU recognized the right of Member States to discriminate again foreign energy suppliers when deciding who can qualify for renewable energy subsidies.

This article explores the foundations of the promotion of renewable energy in the context of free movement of goods. In light of the *Ålands Vindkraft* decision, it examines the consistency of the ruling, and discusses its implications for renewable energy subsidy

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1 Thorsten Müller, 'Beihilfe & Grundfreiheiten: Europarechtliche Anforderungen an die EE-Förderung' (2014) ZNER 21, 22; Markus Ludwigs, 'Die Förderung erneuerbarer Energien im doppelten Zangengriff des Unionsrechts' (2014) EuZW 201; Sabine Schulte-Beckhausen, Carsten Schneider and Thorsten Kirch, 'Unionsrechtliche Aspekte eines »EEG 2.0«' (2014) RdE 101. The privileges extended to industry in terms of exemption from bearing the costs of the subsidy scheme have also been controversially discussed, see Jörg Gundel, 'Die Vorgaben der Warenverkehrsfreiheit für die Förderung erneuerbarer Energien – Neue Lösungen für ein altes Problem?' (2014) EnWZ 99.

2 For a discussion of these market-based provisions of the Renewables Directive and their compatibility with the free movement of goods within the EU, see Angus Johnston and others, 'The Proposed new EU Renewables Directive: Interpretation, Problems and Prospects' (2008) 17 EEELR 126; Sirja-Leena Penttinen and Kim Talus, 'Development of the Sustainability Aspects of EU Energy Policy', University of Eastern Finland, Legal Studies Research Papers Paper No16 (2014) 14; see also Ann Goossens and Sam Emmerechts, 'Annotation of Case 379/98' (2001) 38 CMLR 991.

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

4 Among recent contributions, see Angus Johnston, Raphael Heffron and Darren McCauley, 'Rethinking the Scope and Necessity of Energy Subsidies in the United Kingdom' (2014) Energy Research and Social Science 1, 3; Doerte Fouquet and others, 'Report on Legal Requirements and Policy Recommendations for the Adoption and Implementation of a Potential Harmonised RES Support Scheme' (2014) 69, < http://www.res-policy-beyond2020.eu/downloads.html> accessed 21 Nov 2014; Penttinen and Talus (n 2), 14; Gundel (n 1), 101; Schulte-Beckhausen and others (n 1), 101; the questions was at stake already after the judgement of the Court in Preussen-Elektra, see Goossens and Emmerechts (n 2), 991; Ulrich Karpenstein and Christian Schneller, 'Die Stromeinspeisungsgesetze im Energiebinnenmarkt' (2005) RdE 6; Walter Frenz, 'Warenverkehrsfreiheit und umweltbezogene Energiepolitik' (2002) NuR, 204, 205.

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

programs in Europe. The article is organized as follows: Section Two discusses the history of the conflict between the right of Member States to freely design subsidy schemes and the principle that goods must be treated in a non-discriminatory manner. Specifically, this section highlights the origins of the discussion in the Court's line of jurisprudence ranging from *PreussenElektra* case to the *Walloon Waste* case, both of which provide the basis for understanding *Ålands Vindkraft*. Section Two further illuminates contradictions in the interpretations that have been advanced in secondary law. Section Three addresses questions surrounding the violation of the principle of the free movement of goods. Based on the reasoning from *PreussenElektra* and *Walloon Waste* it discusses the matter of dispute in applicable law, as well as the questions raised by the Court's reasoning with a view to the infringement of the free movement of goods. Finally, the proportionality assessment conducted by the CJEU in the *Ålands Vindkraft* case is discussed in light of previous case law.

2. A Brief History of the Conflict Between Renewable Energy Subsidies and the Free Movement of Goods

Two opposing trends – one of convergence and one of divergence – can be observed in EU law as it relates to the energy policies of Member States. On the normative level, a process of convergence has been taking place in recent years. Numerous measures have been implemented to promote the integration of national energy markets as well as remove barriers to the cross-border sale of electricity, including the Third Energy Package, which went into force in the summer of 2009;[6] new rules for cross-border electricity sales;[7] and the TEN-E Directive, which went into force in June 2013[8] and is a component of the Connecting Europe Facility.[9] This process of convergence led the CJEU to acknowledge in the *Ålands Vindkraft* judgement that its decision in the *PreussenElektra*[10] case was informed by an understanding of the EU's internal energy market that is no longer current.[11] Since the *PreussenElektra* decision, the CJEU has observed considerable

6 European Parliament and Council Directive 2009/72/EC concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L211/55.

7 Council Regulation 1228/2003/EC on conditions for access to the network for cross-border exchanges in electricity [2003] OJ L211/15.

8 Council Regulation 347/2013/EU on guidelines for trans-European energy infrastructure as regards the Union list of projects of common interest [2013] OJ L115/39.

9 Council Regulation 1316/2013/EU establishing the Connecting Europe Facility, amending Regulation (EU) No 913/2010 and repealing Regulations (EC) No 680/2007 and (EC) No 67/2010 [2013] OJ L348/129.

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

11 *Ålands Vindkraft* (n 5) [85].

progress – both normative and practical – in the abolition of barriers to electricity trade between states.[12]

However, the process of convergence is being undermined by a countervailing trend toward greater fragmentation. In practical terms, the development of the EU's internal energy market has been lagging, prompting the European Commission to state that a functioning internal market is still a long way off.[13] Observers have repeatedly noted the continued existence of parallel markets as well as national policies that are only focused on domestic considerations.[14] The fractured nature of the EU's internal energy market is clearly apparent when one surveys the heterogeneous subsidy systems for renewable energy that are in place in various Member States. The lack of convergence between subsidy systems for renewable energy will lead to increasing challenges in the market for electricity as the share of power from renewables rises.[15] Beyond the technical problems associated with managing the volatile feed-in of energy from renewables, a key challenge pertains to the privileged feed-in and subsidy of domestic green power, which impairs imports from other Member States.[16]

Against the backdrop of these opposing trends toward convergence and fragmentation, the CJEU decision in the *Ålands Vindkraft* clearly bolsters the movement toward heterogeneity and divergence. The key message of the decision is that the right of Member States to independently formulated national subsidy systems is to be preserved, even if such systems discriminate against foreign energy producers. Member States will retain the right to exclude foreign producers of electricity from qualifying for national subsidy systems. Clearly this decision is at odds with the effort to create a unified internal energy market in which there are no barriers to cross-border trade. Yet this trend toward divergence accords with the explicit wishes of EU legislators, who in Renewable Energy

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12 Renaud Van der Elst, 'Les défis de la nouvelle directive sur les énergies renouvelables et son impact sur le commerce intra- et extracommunautaire", in Dirk Buschle, Simon Hirsbrunner and Kristine Kaddous (eds), *European Energy Law*, (Bruylant 2011), 179; Jörn Gundel and Claas Germelmann, 'Kein Schlussstein für die Liberalisierung der Energiemärkte: Das Dritte Binnenmarktpaket' (2009) EuZW 763; Martin Nettesheim, 'Das Energiekapitel im Vertrag von Lissabon' (2010) JZ 19.

13 European Commission, ''Making the Internal Energy Market Work' COM(2012) 663 final, European Commission, 'Renewable Energy: a Major Player in the European Energy Market' COM(2012) 271 final.

14 European Commission, ''Making the Internal Energy Market Work' (n 13) 3.

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

16 Dazu etwa Ulrich Büdenbender, 'Energiewende 2011 und Wettbewerb in der Elektrizitätswirtschaft – zugleich ein Beitrag zur europarechtlichen Zulässigkeit', in Timo Hebeler, and others, *Jahrbuch des Umwelt- und Technikrechts* (2013) 67, 83.

Directive 2009/28[17] stated in no uncertain terms that "Member States are able to determine if and to what extent their national support schemes apply to energy from renewable sources produced in other Member States."[18]

In addition to rendering a judgment that would address the ongoing (albeit declining) heterogeneity of national subsidy systems, the CJEU was called upon in the present case to review from a normative perspective the discrimination that typically characterizes national subsidy systems in terms of its comparability with the basic freedom of the free movement of goods. Clearly, the cardinal intention of the EU's basic freedoms is to prevent practices applying distinctively based on nationality. Accordingly, practices which are at their core designed to shield domestic markets should not be permitted. The contradiction that exists between, on the one hand, the flexibility that is clearly granted to Members States in secondary law and, on the other hand, the prohibition of discriminatory practices that exists in primary law poses significant problems, as will be illuminated in the following.

An assessment of *Ålands Vindkraft* requires understanding the Court's former decisions in *Walloon Waste*[19] and *PreussenElektra*.[20] *Walloon Waste* was in fact not about subsidy schemes for renewable energies, but rather on a discriminatory ban the region of Wallonia had imposed on imports of waste from outside its borders. However, it was the first case in which – according to the opinion of many scholars, including the Advocate General in that case – the CJ had to decide whether a blatant distinctly applicable act could be justified on environmental grounds. Surprisingly, the CJ allowed the region to justify the ban on environmental grounds. The decision ignited a debate that intensified in cases[21] leading up to *Ålands Vindkraft.* The second milestone was set in 2001 with the *PreussenElektra* decision. In this case, the CJ had to decide whether the so-called *Stromeinspeisungsgesetz*[22], the German law at that time for the promotion of renewable

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17 European Parliament and Council Directive 2009/28/EC on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009] OJ L140/16 (Renewable Energy Directive).

18 Renewable Energy Directive (n 17) para. 25. For the Court, this reasoning is central for its assessment, see *Ålands Vindkraft* (n 5), [49].

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

20 *PreussenElektra AG* (n 10).

21 Case *C-203/96 Chemische Afvalstoffen Dusseldorp and Others v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* [1998] ECR I-04075, [42]; Case C-389/96, *Aher-Waggon v. Bundesrepublik Deutschland* [1998] ECR I-04473, [18]; Case C-524/07 *Commission v. Austria* [2008] ECR I-00187, [49].

22 Gesetz über die Einspeisung von Strom aus erneuerbaren Energien in das öffentliche Netz vom 7. Dezember

energy sources through a feed-in support scheme, violated EU law. While the plaintiff[23] argued that the law was contrary to provisions of the European Treaty on State Aid (in particular Article 107 TFEU), the German court that referred the case to the CJ also expressed concern about the possible infringement on free movement of goods. In this case, the CJ also ruled that discriminatory practices in the administration of subsidy systems for renewable energy did not violate the free movement of goods.[24] As in the recent *Ålands Vindkraft* case, the Advocate General and CJ adopted opposing viewpoints. For Advocate General Jacobs, it was unclear 'why electricity from renewable sources produced in another Member State would not contribute to the reduction of gas emissions in Germany to the same extent as electricity from renewable sources produced in Germany.'[25] The CJ provided little in the way commentary on the decision; subsequent discussion about the judgment focused predominantly on the issue of whether the clearly discriminating practices of the subsidy system could be justified based on legal grounds found outside of Art 36 TFEU, which does not explicitly refer to environmental protection.[26] The debate turned crucially on the principle advanced by the CJ that grounds not explicitly named in the TFEU should only be accepted in the case of non-discriminatory measures.[27] The compatibility between discrimination and the free movement of goods was an issue of heated controversy following the *PreussenElektra* decision.[28]

While the *PreussenElektra* has been an important – albeit apodictic – point of reference in debate in past years concerning the compatibility of policies with the free movement of goods, since 2001 a constant 'back and forth' has been witnessed in secondary law as regards the discrimination against foreign green electricity providers. The first version of

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1990 (BGBl. 1990 I S. 2633).

23 It is worth mentioning that 65% of the shares of the defendant in this case, the Schleswag AG were owned by the plaintiff, the PreussenElektra AG*, PreussenElektra AG* (n 10), [19]. The fact that PreussenElektr*a* basically sued itself led to the assertion that the company wanted to use this case in order to get rid of an inconvenient law – see Jochen Gebauer, Ulrich Wollenteit and Martin Hack, 'Der EuGH und das Stromeinspeisegesetz: Ein neues Paradigma zum Verhältnis von Grundfreiheiten zum Umweltschutz?' (2001) Zeitschrift für neues Energierecht 12.

24 *PreussenElektra AG* (n 10); Goossens and Emmerechts (n 2), 1007.

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

26 Sybe De Vries, 'Casenote to PreussenElektra' (2001) 10 EELR 193; Julio Cruz and Fernando de la Torre, 'A Note on PreussenElektra' (2001) 26 Eur L.Rev. 489; Gundel (n 1) 101; Jörg Gundel, 'Die Rechtfertigung von faktisch diskriminierenden Eingriffen in die Grundfreiheiten des EGV' (2001) Jura 79, 80; Frenz (n 4) 213.

27 Case C-113/80 *Commission v. Ireland* [1981] ECR I-1626 [7]; see also Claire Vial, *Protection de l'environnement et libre circulation des marchandises* (Bruylant 2006) 116; Case C-120/78 *Rewe v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 1979, 649, [8].

28 De Vries (n 26); Cruz and de la Torre (n 26); Hans-Georg Dederer, 'Anmerkung: EuGH, Urteil vom 13.3.2001, Rs. C -379/98 – PreussenElektra' (2001) BayVBl., 366, 369; Alexander Witthohn and Ulrich Smeddinck, 'Die EuGH-Rechtsprechung zum Stromeinspeisungsgesetz - ein Beitrag zum Umweltschutz?' (2001) ET 466.

the Renewable Energy Directive (2001/77/EC) refrained from placing concrete requirements on national subsidy systems.[29] However, just two years later the Internal Market in Electricity Directive (2003/54/EC) stated that electricity providers in other Member States should receive equal access to domestic markets.[30] Furthermore, the Renewable Energy Directive (2001/77/EC) stated that the increased usage of renewable energy should take place 'within the framework of the internal electricity market'.[31] In line with this intention, the Directive did not contain provisions allowing member states to discriminate against foreign electricity providers in favour of domestic generation facilities.[32] Most recently, the 2009 Internal Market in Electricity Directive more clearly promulgated a prohibition against discrimination, stipulating that one may not discriminate against electricity providers with a view to their rights and duties.[33]

However, the 2009 Renewable Energy Directive, which is now in force, takes a different – and nearly contradictory – position.[34] This Directive was shaped by the desire to preserve broad national sovereignty over subsidy systems. For example, the German position during the negotiations in Brussels consistently focused on avoiding the need to make changes to the German Renewable Energy Act (*Erneuerbare-Energien-Gesetz*).[35] These efforts clearly impacted the final draft of the Renewable Energy Directive that was adopted. The Directive talks of Member States having 'different renewable energy potentials' as well as the need for 'Member States [to] control the effect and costs of their national support schemes according to their different potentials' in order to ensure their 'proper functioning'.[36] Accordingly, it is not surprising that the CJEU concluded in its *Ålands Vindkraft* decision that "'n adopting Directive 2009/28, the EU legislature left open the possibility of such a territorial limitation.'[37]

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29 European Parliament and Council Directive 2001/77/EC on the promotion of electricity from renewable energy sources in the internal electricity market [2001] OJ L 283/33.

30 See Article 3(2) of European Parliament and Council Directive 2003/54/EC concerning common rules for the internal market in electricity and repealing Directive 96/92/EC [2003] OJ L176/37.

31 Para 1 of the preamble of Directive 2001/77/EC (n 29).

32 Karpenstein and Schneller (n 4), 10.

33 Article 3(1) of Directive 2009/72/EC (n 6); see also Schulte-Beckhausen, Schneider and Kirch (n 1), 101.

34 Renewable Energy Directive (n 17).

35 Andreas Klemm, 'Vorgaben aus Brüssel: Das Europarechtsanpassungsgesetz Erneuerbare Energien im Überblick', (2011) REE 61, 67.

36 Para 25 of the preamble of Renewable Energy Directive (n 17).

37 *Ålands Vindkraft* (n 5), [49]

In this way, secondary law on the issue of discrimination has been fickle and contradictory. While the Electricity Directive clearly aims at creating a non-discriminatory and barrier-free internal market for electricity, the Renewable Energy Directive upholds the potential for heterogeneity between subsidy systems in Member States. In the *Ålands Vindkraft* decision, the CJEU adopted the stance on discrimination advanced in the Renewable Energy Directive. As we will see in the next section, the freedom of action granted to Member States by the CJEU concerning justified restrictions to the free movement of goods corresponds to the call for continued national control over subsidy systems promulgated by the Renewable Energy Directive.

3. A Violation of the Free Movement of Goods?

The case at stake was referred to the Court by a Swedish court seeking a preliminary ruling. It concerned the denial to award green electricity to the Finnish firm Ålands Vindkraft, which operated a wind farm located in Finnish waters and feeding into the Swedish grid. The Swedish Energy Agency had justified on the basis that only green electricity production installations located in Sweden would qualify for the award of electricity certificates.

3.1. Applicable law

The free movement of goods, which is a legal principle anchored in primary law, is only applicable as an assessment criterion when the legal situation in question has not been conclusively clarified in secondary law. This can be inferred from *Cassis de Dijon* where the Court – besides its seminal statement on indistinctly applicable measures and mutual recognition – also stated that Member States are allowed to regulate all matters relating to a certain topic 'in the absence of common rules relating to' that topic[38]. A portion of the literature has assumed to date that the situation has been settled in secondary law – accordingly, when assessing the compatibility of national green subsidy legislation, one cannot draw upon primary law, but only upon the Renewable Energy Directive.[39] Article 3(3) of the Renewable Energy Directive is cited as justification for this view: in deciding at least for the time being not to subject national green subsidy rules to EU-wide harmonization, the EU legislature is said to have undertook a legal assessment that is comparable to a conclusive decision.[40] Article 3(3) of the Renewable Energy Directive

38 Case C-120/78 *Rewe v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 1979, 649, [8].

39 Gundel (n 1), 102 with further references.

40 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.

grants Member States the right to decide themselves the extent to which they wish to offer subsidies to renewable energy generated in another Member State.

The Advocate General rejected this view in his opinion, citing the fact that the Renewable Energy Directive had not harmonized the "material content of support schemes."[41] The conclusions of the CJ are similar. In its judgment, the CJ said it could not recognize a desire on the part of EU legislature to complete the harmonization process, and, accordingly, that Art 34 TFEU must still apply.[42] We concur with this view. Neither the Directive's preamble nor its specific provisions demonstrate a desire to complete the harmonization process. In fact, the Renewable Directive explicitly stipulates that '[f]or the proper functioning of national support schemes it is vital that *Member States* can control the effect and costs of their national support schemes according to their different potentials'.[43] Yet in view of an explicit decision against harmonization, one cannot conclude that harmonizing non-harmonization (i.e. an authoritative decision to regard the current state of non-harmonized regimes as ultimate and thus rendering primary law inapplicable) across the EU was sought. On the contrary, insofar as room for manoeuvre was to be explicitly granted to Member States in secondary law, one cannot speak of harmonization at all.

3.2. Intervention in the free movement of goods

The recent CJEU decision[44] as well as the legal literature[45] allow no doubts concerning the fact that the Swedish system for promoting green electricity is a measure having equivalent effect to a quantitative restrictions on exports between Member States within the meaning of Art 34 TFEU. The CJEU recognized the possibility that Swedish green electricity providers have been receiving preferential treatment over electricity importers. After all, Swedish producers can offer electricity as well as green certificates at the same time, thus providing them with a competitive advantage over foreign providers of renewable electricity.[46]

With this justification, the CJEU makes the same argument as Advocate General *Bot* in the

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41 Opinion of Advocate General Bot, *Ålands Vindkraft AB* (n 3), [61].

42 *Ålands Vindkraft* (n 5) [57-63].

43 Renewable Energy Directive (n 17), preamble para. 25. Accentuation by the authors.

44 *Ålands Vindkraft* (n 5), [66, 65].

45 Müller (n 1) 21; Frenz (n 4), 206.

46 *Ålands Vindkraft* (n 5), paras. 71-73.

Ålands Vindkraft case as well as in the *Essent Belgium* case[47]. The same grounds were also cited by Advocate General Jacobs in the *PreussenElektra* case.[48] At the same time, the approach adopted by the CJEU in the *Ålands Vindkraft* case represents a different approach than that witnessed in the *PreussenElektra* case. In 2001 the CJ established that intervention was taking place by drawing reference to electricity consumers who were prevented from satisfying a portion of their demand with electricity supplied from foreign companies.[49] Thus, while the CJ adopted in its *PreussenElektra* decision the position of a domestic electricity consumer seeking electricity from multiple origins,, in its most recent decision it established that intervention was occurring by referring to the disadvantages suffered by foreign providers of green electricity. This latter perspective accords with the approach that the CJ has taken in comparable cases.[50]

3.3. Justifying intervention in the free movement of goods

3.3.1. Applicable legal framework

For some time a debate has been underway concerning whether the clearly discriminating provisions of existing subsidy systems could be justified on legal grounds not found within Art 36 TFEU, as this article does not specifically cite environmental protection.[51] In *Ålands Vindkraft*, the CJEU continues to tread on thin ice argumentatively, showing little concern for consistency.

For example, CJEU does not address whether distinctly applicable measures could be justified on the basis of public interest grounds listed in Art 36 TFEU, or on the basis of mandatory or overriding requirements, as per the principle established in the *Cassis De Dijon* decision.[52] Instead, the ECJ draws on both possible justifications, declaring on the one hand the renewable energy can serve environmental protection, as its expansion can help to prevent global warming.[53] Referring to the *PreussenElektra* decision, the CJEU

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47 Case C-204/12 *Essent Belgium NVv Vlaamse Reguleringsinstantie voor de Elektriciteits –en Gasmarkt* EU:C:2014:2192.

48 Opinion of Advocate General Bot delivered on 8 May 2013, Joined Cases C-204/12 – C208/12 *Essent Belgium NV v. Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt* EU: C:2013:294 [80]; Opinion of Advocate General Bot, , *Ålands Vindkraft* (n 3), [76]; in this vein, see also Opinion of Advocate General Jacobs, *PreussenElektra* (n 25), [200].

49 *PreussenElektra* (n 10) [70].

50 (n 21).

51 Gundel (n 1) 101; Gundel (n 26) 80; Frenz (n 4) 213; de Vries (n 26); Cruz and de la Torre (n 26); Peter Oliver '*Oliver on Free Movement of Goods in the European Union'* (5th edn, Hart Publishing 2010), 219, 303.

52 Case C-120/78 *Rewe v. Bundesmonopolverwaltung für Branntwein* [1979] ECR I-649.

53 *Ålands* Vindkraft (n 5) [71-73].

then asserts that as renewable energy serves to protect the health of humans, animals, and plants, policy measures to expand its use could be justified based on grounds of public interests, as provided for under Art 36 TFEU.[54] With an additional reference to the general energy policy of the EU, the CJ then concludes that renewable energy subsidies could qualify in principle as a justification for impairments to the free movement of goods.[55]

The CJEU apparently does not wish to openly choose between justifying distinctly applicable measures based on either the grounds provided for under Art 36 TFEU or mandatory requirements in line with the *Cassis De Dijon* principle. The possibility of justifying distinctly applicable measures by citing a reason listed under Art 36 TFEU appears highly questionable, for environmental protection is not expressly named under that article.[56] One could of course argue that climate change, which is to be prevented through the expansion of renewable energy, threatens the health and life of people, animals, and plants – and that, accordingly, the environment can be understood as a reason of general interest.[57] Moreover, requirement to integrate the protection of the environment into EU policies, most prominently stipulated in Article 11 TFEU, Article 191 TFEU and Article 3(3) TEU, accords environmental protection the status of primary law. Scholars draw from the integration requirement different conclusions. Some argue that interpretation of Union law must consider the effect on the environment.[58] Other scholars go even further and demand that environmental protection shall be treated equal or even prior to the freedom of goods[59] However, in the past the CJ has repeatedly ruled that the exceptions under Art 36 TFEU are to be interpreted strictly because they constitute 'a derogation from the basic rule that all obstacles to the free movement of goods between Member States shall be eliminated'.[60] Thus, according to the standards set forth by the CJ in its own judgements, it would appear difficult to justify the protection of the environment

54 ibid [80].

55 ibid [82].

56 See already Opinion of Advocate General Jacobs, *PreussenElektra* (n 25) [216].

57 See also Stefan Tostmann, 'EuGH: Verbot des Ablagerns von Abfall aus einem anderen Mitgliedstaat' (1992) EuZW 577, 579. However, it would be worthwhile to discuss the possible contradictions between environmental protection and possible risks for specific animals, particular considering the ongoing discussions between wind power development and its effects on birds or maritime fauna; Leigh Hancher and Hannah Sevenster, 'Annotation to Case C-2/90, Commission vs. Belgium' (1993) 30 CMLR 351.

58 Martin Wasmeier, 'The Integration of Environmental Protection as a General Rule for Interpreting Community Law' (2001) 38 CMLR 159, 175.

59 Christian Piska, 'Art. 34-37 AEUV' in Heinz Mayer and Karl Stöger (eds), *Kommentar zu EUV und AEUV – unter Berücksichtigung der österreichischen Judikatur und Literatur* (Manzsche Verlags- und Universitätsbuchhandlung 2012), Art. 36 para. 50; further references at Oliver (n 49) 302.

60 Case C- 46/76 *Bauhuis* [1977] ECR 5, [12]; Case C-113/80 *Commission v. Ireland* [1981] ECR I-1626, [7].

on the grounds of general interest. Due to its abstract nature, the environment is negatively impacted at a much earlier point in time than the tangible life of people, animals, and plants.[61] If this argument were accepted, the determination of grounds for deviation would become much more imprecise, and the provisions concerning specific interests that are to enjoy legal protection under Art 36 TFEU would become nugatory.[62] Accordingly, we cannot accept the view adopted by the CJEU that the protection of the environment could potentially serve as justification for intervention in the free movement of goods under the framework of Art 36 TFEU. In this way, the protection of the environment can only be cited as justification by appealing to mandatory requirements in accordance with the *Cassis De Dijon* principle. Indeed, when the CJEU acknowledged the protection of the environment as a possible ground for justifying measures of having equivalent effect it explicitly labelled the protection of the environment as a mandatory requirement.[63]

The CJEU has consistently coupled more stringent requirements to interventions based on mandatory requirements than those foreseen under Art 36 TFEU. Originally, only national rules that were indistinctly applicable and did not discriminate between imported and domestic goods could be justified as mandatory requirements.[64] If the CJEU had applied this standard of strict interpretation to the *Ålands Vindkraft* case, it would have been forced to reject justifying the Swedish quota system on the basis of the *Cassis De Dijon* principle due to the clear disadvantage suffered by foreign providers of green electricity.

In the past, however, the CJEU has repeatedly assessed whether the environmental grounds put forth to justify interventions in the free movement of goods have merit, even though these measures were distinctly applicable. The court's discomfort with the question has been apparent to everyone. In some cases it undertook an explicit assessment and grounded the justification in the specific nature of the environmental protection provided.[65] In most cases, though, it avoided this question[66] or rejected the justification of the measure for other reasons.[67] This approach has elicited varied reactions in the legal literature. Some scholars believe that the ban on distinctly applicable measures ought to be

61 Case C-524/07 *Commission v. Austria* (n 21), [56].

62 In conclusion see also the Opinion of Advocate General Bot, *Essent Belgium* (n 46), [87].

63 Case C-302/86 *Commission v Denmark* [1988] ECR 1988, 4607.

64 Case C- 788/79 *Gilli* [1980] ECR 1980, p. 2071; Gundel (n 1) 101 with further references.

65 *Commission v. Belgium* (n 19).

66 *PreussenElektra G* (n 10).

67 *Chemische Afvalstoffen Dusseldorp* (n 21) and *Aher-Waggon* (n 21).

preserved and thus regard the court's position as breaking a taboo.[68] Some see these rulings of the CJ as an attempt to increase the value of environmental protection as legitimate grounds for action for which other conditions ought to apply.[69] By contrast, others take the view that the problem lies not in the inconsistency of the CJ but in the ban on distinctly applicable measures. These scholars suggest giving up this categorical ban and including instead the discriminatory character of a measure in the proportionality assessment.[70]

This opinion has found resonance especially among the Advocates General of the CJ. Both Advocate General Jacobs, who delivered the opinion in *Walloon Waste*, *Dusseldorp*, and *PreussenElektra*, and Advocate General Bot, in *Essent Belgium* and *Ålands Vindkraft*, have encouraged a more flexible approach to handling distinctly applicable measures.[71] Such a clear position of an institutional organ of the court may be surprising, considering that the clear wording of Art 36 TFEU speaks against it, and that this Article has not been changed in any of the many reforms of the Treaty. However, this can also be understood as an argument for changing legal dogma. Since the first formulation of Art 36 TFEU, the circle of legally protected interests has not been expanded,[72] even when after CJ rulings such as *PreussenElektra* and *Walloon Waste* dissolved the separation between written and unwritten legal grounds that has gained increasing importance over the past 50 years. This eloquent silence on the part of the signatories can be understood as tacit acceptance of the Court's position.[73]

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68 Gundel (n 1), 101 with further references; Oliver (n 49).

69 Franz Mayer, 'Die Warenverkehrsfreiheit im Europarecht - eine Rekonstruktion' (2003) Europarecht 793, 800; a similar but more cautious tendency is found in Jan Jans and Hans Vedder, *European Environmental Law*, (3rd edn., Europa Law Publishing 2008) 244.

70 Catherin Barnard, *The Substantive Law of the EU – The Four Freedoms* (4th ed., OUP 2013), 87; Cruz and de la Torre (n 26) 499; de Vries (n 26); Astrid Epiney and Thomas Möllers, *Freier Warenverkehr und nationaler Umweltschutz: zu dem den EG-Mitgliedstaaten verbleibenden Handlungsspielraum im Europäischen Umweltschutzrecht unter besonderer Berücksichtigung der Verhältnismäßigkeitsprüfung* (Heymanns 1992); Peter-Christian Müller-Graff, in Groeben and Schwarze, *Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft (*6th edn., Beck 2003), Art. 28, para. 197; Peter Wilmowsky, 'Abfall und freier Warenverkehr: Bestandsaufnahme nach dem EuGH-Urteil zum wallonischen Einfuhrverbot' (1992) ER, 414, 416; ambiguous Tilman Kuhn, 'Implications of the 'PreussenElektra' Judgement of the European Court of Justice on the Community Rules on State Aid and the Free Movement of Goods' (2001) 28 Legal Issues of Economic Integration, 361, 374; Sandrine Rosseaux, 'L'emprise de la logique marchande sur la promotion des énergies renouvelables au niveau communitaire', (2005) Revue internationale de droit économique 231, 241.

71 Opinion of Advocate General Jacobs, *PreussenElektra* (n 25), [230]; Opinion of Advocate General Bot, *Essent Belgium* (n 46), [92]; Opinion of Advocate General Bot,„*Ålands Vindkraft* (n 3), [79].

72 Opinion of Advocate General Jacobs, *PreussenElektra AG* (n 25), [232].

73 Cruz and de la Torre (n 26) 500.

In addition, it is difficult to comprehend why an interest such as the environment, which is crucial to the health of our entire ecological system, should enjoy a weaker standard of protection than 'interests recognized in trade treaties concluded many decades ago and taken over into the text of Article 36 of the EC Treaty, itself unchanged since it was adopted in 1957'.[74]This is all the more true in light of the fact that interests subject to protection – whether explicitly named in the TFEU or not – have an identical function in relation to the free movement of goods.[75] In the end, the other arguments against loosening the ban on discriminatory measures are not persuasive. In addition to the wording argument, proponents stress the risk that Member States will exploit their discretionary power to introduce protectionist measures.[76] Yet if we take a closer look, this risk loses its shock value: every measure must also be proportional, which is likely not to be the case for most distinctly applicable measures.[77] For these reasons, it seems legally defensible and justified to examine the distinctly or indistinctly applicability of a measure on the level of the proportionality assessment. Ultimately this is exactly what the CJEU has done – without explaining its line of reasoning. For the purposes of predicting future legal decisions, it would be desirable to receive a clearer statement from the court.[78]

3.3.2. Proportionality

Proportionality is recognized as the central principle for balancing different legally protected interests and a crucial component of the Union Treaties. As a rule, the CJEU only decides what is appropriate and necessary.[79] But here too legal dogma is inconsistent. For instance, the CJEU explained the two-step assessment by citing its earlier decision *Commission/Republic of Austria*[80] in which it held that the disputed regulation was appropriate and necessary to reach its legitimate objective.[81] Yet in that decision the Court also demands that the measure should stand in proper relation to the goal it pursues, which suggests more a three-part proportionality assessment.[82]

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74 Opinion of Advocate General Jacobs, *PreussenElektra AG* (n 25) [232].

75 Already Peter Oliver, 'Some Further Reflections on the Scope of Articles 28-30 (Ex 30-36) EC' (1999) 36 CMLR 783, 804; Werner Schröder in *Streinz, EUV, AEUV: Vertrag über die Europäische Union und Vertrag über die Arbeitsweise der Europäischen Union*, (2nd edn., Beck 2012), Art. 36 para. 33.

76 Gundel (n 26) 82.

77 Barnard (n 68) 87; Oliver (n 73) 805; Frenz (n 4) 213; Cruz and de la Torre (n 26).

78 A statement that was very clearly made in the Opinion of Advocate General Jacobs, *PreussenElektra* (n 25), [229]; see also Barnard (n 68), 87; Jans and Vedder (n 67), 249.

79 *Commission v. Austria* (n 21), [83].

80 ibid [57].

81 *Ålands Vindkraft* (n 5) [76].

82 *Commission v. Austria* (n 21), [57].

Advocate General Bot did try to achieve clarity in his opinions on *Essent Belgium*[83] and on the ruling in question,[84] contending that distinctly applicable or discriminatory measures should 'undergo a particularly rigorous or reinforced proportionality test'.[85] Yet the Advocate General refrained from explaining in more detail what exactly he thinks should constitute this rigorous or reinforced demand. It goes without saying that the CJEU already exercises extreme care when assessing the proportionality of a measure. One option is to demand a stricter assessment when striking a balance between legally protected interests and the principle of the free movement of goods. When considering legally protected interests, environmental protection must clearly outweigh the violation of the free movement of goods for the measure to be justified. Such an approach would also resolve the disputed question whether distinctly applicable measures can be justified on the grounds of unwritten mandatory requirements. A strict assessment of proportionality could counteract the risk of abuse on the part of state institutions.[86]

Questions as to the proportionality of interventions into the free movement of goods are thus also inherently questions related to the stage of development of the EU's internal market. In its *PreussenElektra* judgment, the Court of Justice included an 'expiration date' of sorts. At the end of its review, it stated that the once disputed German Electricity Feed-In Act did not violate the principle of the free movement of goods 'given the current state of Community law'.[87] In line with its "evolutionary approach" set out in *PreussenElektra,* in the present Ålands Vindkraft case the Courtwas called upon to answer the question of where Community law stands today and how Community law has evolved since its initial assessment in *PreussenElektra*.

Understandably, in *Ålands Vindkraft* the Court considers that the depiction in *PreussenElektra* of the EU's internal electricity market as unfinished and flawed, with barriers for the electricity trade between the Member States, is now outdated. In justifying its view, it cites the individual legal acts passed for creating Europe's internal electricity

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83 Opinion of Advocate General Bot, *Essent Belgium* (n 46), [94].

84 Opinion of Advocate General Bot, *Ålands Vindkraft* (n 3), [79].

85 ibid.

86 Mayer (n 67) 800.

87 *PreussenElektra* (n 10) [81].

market.[88] These acts, however, exhibit countervailing trends. On the one hand, the new energy market acts aim to make energy law more coherent. On the other hand, the Renewable Energy Directive expressly permits the divergent development of national subsidy systems. Moreover, the sole focus on the state of Community law is insufficient, as it neglects the actual development of the EU market.[89] For instance, all relevant Communications of the European Commission on this topic indicates that the creation of a single EU electricity market remains incomplete.[90] Even the Advocate General noted the technical obstacles for cross-border electricity trade that still exist, especially difficulties with grid access and the absence of alliances.[91]

In this conflict between contradictory assessments of EU secondary law, the CJ in *Ålands Vindkraft* has decided in favour of allowing Member States the freedom set down in the considerations for the Renewable Energy Directive. It gives them the right to solely subsidize power production taking place in its sovereign territory for three reasons: subsidy regulations have yet to be harmonized throughout the EU,[92] EU lawmakers grant Member States discretion to choose their own subsidy instruments, and Member States should be able to control the effects and costs of national subsidy regulations based on their domestic potentials and thus maintain the trust of investors.[93]

In the subsequent question concerning whether the territorial restriction of Sweden's quota agreement was necessary to promote the legitimate goal of increased green energy use, the court takes a clear position: It affirms and substantiates the necessity[94] of such a restriction. In doing so, the CJEU disagrees with the objections of the Advocate General and those of legal scholars who do not regard a regional restriction as appropriate for promoting environmental protection, as from their perspective it is immaterial in which Member State generation facilities are installed.[95] Advocate General Bot provided a

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88 ibid [85]-[86]; compare also the description above on the legal acts concerning the Single Electricity Market (nn 6-9).

89 Grabmayr, Kahles and Pause (n 38) 12 with further references.

90 European Commission, ''Making the Internal Energy Market Work' (n 13) 2; European Commission, '2009-2010 Report on Progress in Creating Internal Gas and Electricity Market' (Commission Staff Working Document 2011) 3.

91 Opinion of Advocate General Bot, *Ålands Vindkraft* (n 3) [98].

92 *Ålands Vindkraft* (n 5),[94]-[97].

93 ibid [99], [103].

94 ibid [92].

95 Opinion of Advocate General Bot, *Essent Belgium* (n 46) [104]; Opinion of Advocate General Bot, *Ålands*

comprehensive argument for this position in *Essent Belgium* and *Ålands Vindkraft*. A number of economic approaches[96] even suggest that an EU-wide subsidy system would lower the costs for the expansion of renewable energies by allowing a more rational choice of generation sites.[97]

The broad discretion that the CJEU granted Member States lends the necessity test a prognosis-like character, outside the scrutiny of the courts. Here the CJEU has shown considerably more restraint than in other proportionality tests in the area of environmental law. In previous decisions, the ECJ has assessed whether disputed measures were taken for the purposes of environmental protection, thus truly serving an environmental objective, with the burden of proof resting on the Member State.[98] For instance, in the case of its nation-wide tax on heavy vehicles Germany had to prove to the CJEU that the controversial levy actually served the purpose of environmental protection.[99]

Such an assessment is not discernible here, nor are there indications that corresponding evidence was provided, although multiple links between the discriminatory exclusion of foreign renewable energy and environmental protection are conceivable. For instance, one could argue that the CJEU itself acknowledged that renewable energy sources – even those abroad – serve the purpose of environmental protection[100] and that the exclusion of foreign green power from subsidies would logically lead to a reduction in environmental protection. The situation changes if one assumes that an expansion of subsidies for foreign facilities would collapse the national subsidy system on political grounds and as a result adversely affect environmental protection. Pro and contra arguments can be found for whether discriminatory measures promote environmental protection. But the discretion granted to the Member States appears to have freed the CJEU from demanding stricter evidence, as would be required based on its previous decisions.

Vindkraft (n 3) [92]; Opinion of Advocate General Jacobs, 8 *PreussenElektra* (n 25) [236]; Gundel (n 1), 99.

96 For proposals for a harmonized feed-in law see Miquel Munoz, Volker Oschmann and David Tabara, Harmonization of renewable electricity feed-in laws in the European Union, Energy Policy 35 (2007) 3104; Jaap Jansen and Martine Uyterlinde, 'A Fragmented Market on the Way to Harmonisation? EU policy-making on Renewable Energy Promotion' (2004) 8 Energy for Sustainable Development,93.

97 Opinion of Advocate General Bot, *Essent Belgium* (n 46) [110].

98 See the case analysis of Epiney and Möllers (n 68) 84.

99 Case C–195/90 *Commission v. Germany* [1992] ECR I-3141,[45]; further examples for the Court's lack of consistency in this question is provided by Kuhn (n 68) 374

100 *Ålands Vindkraft* (n 5), [71-[73], [93].

All in all, the Court of Justice has come out in favour of those who believe that the closed national subsidy system offers a higher degree of planning reliability, with regard both to the expectations of project managers and investors in green energy facilities. Wind and solar farms, in particular, have high capital expenditures and require high start-up investments: since they run without fuel, the construction of the plants constitutes the main costs. As a result, they depend on long-term planning reliability. Unreliable subsidy regulations stand in the way of such investments.[101] Pronouncements about whether and to what extent a national subsidy system expanded to include foreign facilities adversely affects the ability to plan cannot be dismissed out of hand per se; still, cannot be explored further here.

4. Conclusion

The relationship between the subsidy of renewable energy and the principle of the free movement of goods has an unmistakable political character. This is understandable: billions of Euros in subsidy schemes are at stake. The most recent ruling of the CJEU should come as a relief for the affected stakeholders, and that includes the Member States. Using unambiguous language, the ruling gives EU countries permission to keep resources raised for the subsidy 'within the country'.[102]

However, the ruling raises several questions regarding legal dogma. In particular, the long overdue question about the relationship between Article 36 TFEU and the *Cassis de Dijon* decision with regard to discriminatory measures remains open. In relation to environmental protection, there is an argument to be made for abandoning the distinction between distinctly and indistinctly applicable measures. Furthermore, the ruling seems to place the proportionality assessment entirely at the discretion of the Member State, granting them broad decision leeway.

The ruling also reveals the contradictions of EU legislation, which is characterized by countervailing trends of coherence and divergence. While efforts to create a single EU

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101 Jan-Benjamin Spitzley and others, Keep-on-Track! Project – Analysis of Deviations and Barriers, (2014) <www.keepontrack.eu> 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.

102 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.

electricity market have focused on eliminating barriers and discrimination, national borders continue to persist when it comes to the expansion of renewable energy. This may be necessary for reliable planning, but it breeds a number of challenges that clearly affect the EU electricity market. These include consequences for cross-border grid load due to national feed-in for renewables and the increasingly sharp tone of discussions about capacity markets for conventional energy sources – a reflex-like response from renewable subsidies that seems to stop at national borders.[103] In sum, the goal of creating a uniform and barrier-free electricity market in the EU will remain for now just that – a goal, but not a reality.

[103] In this regard, the Commission's recent publication of its Energy and Environmental Guidelines (EEAG) has relevance for both national capacity markets and feed-in tariffs, see European Commission, Communication from the Commission, Guidelines on State aid for environmental protection and energy 2014-2020 (2014/C 200/01), < http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52014XC0628%2801%29> accessed 22 Nov 2014.