



UiO : Nordisk institutt for sjørett

Det juridiske fakultet

The free movement of goods and the promotion of
renewable electricity production

Energy law workshop 12 September 2014, Institut für Energie und
Regulierungsrecht Berlin

Henrik Bjørnebye

Associate Professor

Henrik.bjornebye@jus.uio.no



Introduction (1)

- Background
 - National subsidy schemes for the promotion of electricity generation from renewables
 - Subject to scrutiny under (inter alia)
 - EU Electricity market legislation
 - State aid rules
 - Free movement of goods provision

Introduction (2)

- Context
 - The establishment of a sustainable internal electricity market
 - National subsidy schemes to attain broader EU goals – a (necessary) paradox?

Background (1)

- The RES Directive 2009/28/EC
 - national targets
 - Subsidy schemes
- A brief look at current RES subsidy schemes in EU Member States
 - CEER, Status Review of Renewable and Energy Efficiency Support Schemes in Europe (25 June 2013)

Background (2): Norwegian/Swedish subsidy scheme

- 2020 targets
 - Sweden: 49 % (from 39.8 % in 2005)
 - Norway: 67.5 % (from 60.1 % in 2005)
- Electricity certificate market in Sweden from 2003
- Joint Swedish/Norwegian market from 1 January 2012
 - Joint support scheme under Article 11 of the RES Directive

The law of the free movement of goods

- Electricity as goods
- Article 34 TFEU
 - Prohibition on national measures having equivalent effect to quantitative import restrictions
 - Case law
- Derogations
 - Article 36 TFEU and mandatory requirements
 - Proportionality

Case C-379/98, *PreussenElektra* (1)

- Background
 - German feed-in scheme
 - Questions concerning State aid and the free movement of goods
- The Court's reasoning under (now) Article 34 TFEU
 - Starting point: *Dassonville*, *Campus Oil*
 - Purchase obligation “[...] capable, at least potentially, of hindering intra-Community trade” (para 71)

PreussenElektra (2)

- ...but then:
 - *“However, in order to determine whether such a purchase obligation is nevertheless compatible with [now Article 34 TFEU], account must be taken, first, of the aim of the provision in question, and, second, of the particular features of the electricity market”* (para 72)
 - Environmental protection, EU priority objectives, the principle of environmental integration, RES priority, obstacles to trade and nature of electricity, etc.

PreussenElektra (3)

- Conclusion
 - The right result – difficult to follow the reasoning

Case C-573/12, *Åland Vindkraft*

- Background
 - Electricity certificates under the former Swedish certificates scheme denied for wind power produced on Åland
- Key questions
 - Interpretation (and validity) of Article 3(3) in the RES Directive 2009/28/EC
 - Article 34 TFEU and derogations

Åland Vindkraft (2)

- Article 34 TFEU
 - No exhaustive harmonisation
 - *Dassonville*
 - “[...] the legislation at issue is capable, in various ways, of hindering – at least indirectly and potentially – imports of electricity [...]” (para 67)
- Justification
 - The objective of promoting the use of renewable energy sources for the production of electricity

Åland Vindkraft (3)

- Proportionality
 - The Advocate General: *«whilst it is easy to accept that green certificate schemes contribute to environmental protection by stimulating the production of green energy, it would, on the other hand, appear somewhat paradoxical to assert that the importation of green energy from other Member States might undermine environmental protection» (para 93)*
 - The Court: A territorial limitation not beyond what is necessary to attain the objective
 - Relationship to *PreussenElektra*
 - The nature of electricity
 - The nature of support schemes

Joined cases C-204/12-208/12, *Essent Belgium* (1)

- Belgian certificate scheme (Flanders)
- Supplier submitted electricity certificates from producers in Flanders, Wallonia and Brussels, and Guarantees of origin (GoO) from producers in the Netherlands, Denmark and Norway to fulfil quota obligation
- Only electricity certificates from producers established in Flanders accepted
- Scheme considered under RES Directive 2001/77 and Electricity Directive 2003/54/EC

Essent Belgium (2)

- (Now) Article 34 TFEU
 - The legislation *“is capable, in various ways, of hindering — at least indirectly and potentially — imports of electricity [...]”* (para 83)
- Justification
 - See *Åland Vindkraft*
- Proportionality
 - Territorial restriction may be necessary, see *Åland Vindkraft*