

ENERGY LAW WORKSHOP

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Case C-105/12 Essent and others [2013] – an increasingly active role of the states?



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FACTS OF THE CASE

- The dispute in the proceedings concerned Dutch national legislation transposing the obligations provided in the 2003 electricity and gas directives.
- The Court of Justice of the European Union examined the compatibility of the EU law on three prohibitions provided under the Dutch law:
 - 1) The prohibition on the sale of the shares of electricity and gas distribution system operators to private investors (the prohibition of privatisation)
 - 2) The prohibition of distribution system operators from becoming members of a vertically integrated energy undertakings (the group prohibition)
 - 3) The prohibition of distribution system operators from engaging other activities which may affect system operation, such as engaging in transactions or other activities which may conflict with the interests of system operator (the prohibition of other activities)

FACTS OF THE CASE

- The applicant undertakings, Essent NV, Essent Nederland BV, Eneco Holding and Delta NV were the major vertically integrated energy companies acting on the Dutch market.
- The companies brought three separate actions before the national courts claiming that the group prohibitions and the prohibition of unrelated activities run counter to the fundamental freedoms of freedom of establishment and free movement of capital as provided in Articles 49 TFEU and 63 TFEU and are therefore of no effect.

FACTS OF THE CASE

- The State of Netherlands pleaded against those actions by stating that the prohibition of privatisation constitutes a body of rules governing the system of property ownership within the meaning of Article 345 TFEU. Following from the prohibition, the shares held in a system operator cannot be the subject of private investment and
 - 1) the Treaty provisions on free movement of capital and freedom of establishment are not applicable or
 - 2) at least the possible restriction is justified on the grounds of overriding reasons in the public interest.

THE JUDGMENT OF THE COURT

- According to the Court, Article 345 TFEU is an expression of the principle of neutrality of the Treaties in relation to the rules in Member States governing the system of property ownership.
 - Member States may, in principle, legitimately pursue an objective of establishing or maintaining their national provisions regulating public ownership of certain undertakings.
- Even though Article 345 TFEU entitles Member States to limit the exercise of certain activities in respect of publicly owned undertakings, such measures are not exempt from the general provisions of the Treaty and their compatibility with EU law must be assessed on the basis of the free movement law provisions.
- Building upon its settled case law on Article 63 TFEU, the Court held that the prohibitions constitute restrictions on free movement of capital.
 - As a result of the prohibitions, no private investor can acquire shares of an electricity or gas distributions system operator active in the Netherlands.

THE JUDGMENT OF THE COURT

- The third question referred for a preliminary ruling enquired whether the objectives behind the national legislation – combating cross-subsidisation, achieving transparency in the electricity and gas markets and preventing distortions of competition – are *purely economic* interests or could they be considered to fall under the notion of overriding public interest and therefore capable of justifying restrictions on trade.
- The Court emphasised that, as it has repeatedly held, grounds of a purely economic nature cannot, however, constitute overriding reasons in the public interests. Nevertheless, the Court has accepted that controversial national legislation may be justified if it is dictated by reasons of an economic nature in the pursuit of an objective in the public interest.

THE JUDGMENT OF THE COURT

- Hereby the Court refers to the preamble of the TFEU, where it is stated that in order to achieve, inter alia, fair competition for the **protection of consumers** – a legitimate key interest recognized by the Court – there is a need for concerted action. Similarly, the objective of **guaranteeing adequate investment** in the electricity and gas distribution systems is designed to ensure before anything **security of energy supply**, as well legitimate interests as well as one of the triple objectives of the common European energy policy.
- As a conclusion, the Court held that “[...] the objectives referred to by the referring court may, in principle, as overriding reasons in the public interest, justify the identified restrictions on fundamental freedoms.” However, it is left for the referring national court to determine whether the national measures pass the traditional proportionality test.

IT FOLLOWS FROM THE JUDGMENT...

- 1) Provides guidance on the Court's current approach to Article 345 TFEU and the role of the public sector in the energy market
- 2) Questions the traditional approach to justifying trade restrictions if the objectives sought are to be considered purely economic
- 3) Raises interesting questions in relation to the increasing role of the state in the EU energy market and the application of free movement law.

The Court's approach to Article 345 TFEU and system of property ownership

- Article 345 TFEU governs the rules on the *system* of property ownership, not the rules of property ownership itself
 - Hereby, the Treaties do not affect to the choices of the system of property ownership – this remains under the competence of the Member States.
 - However, the Article does not confer an absolute immunity upon the right of property from the application of the Treaty rules – certain degree of unification is needed in order to achieve economic integration.

Purely economic aims as a justification for trade restrictions

- The Court has often refused to accept any justification grounds for national measures that aim to achieve objectives that are of an economic nature.
- Nevertheless, even though the Court has generally condemned economic aims, it has in practice allowed them in certain circumstances, either
 - by interpreting the concept of restriction narrowly to avoid the issue of justification altogether,
 - by linking the economic aims to other public interests considerations
or
 - by denying or ignoring the economic nature of the objectives sought.

Purely economic aims as a justification for trade restrictions

- In its line of argumentation the Court refers to consumer protection which constitutes an overriding reason of public interest and therefore measures to avoid undistorted competition constitute overriding public interests as well.
- However, in this particular case the economic objectives sought by adopting the contested national measures do not seem to be adopted in order to achieve solely protectionist objectives which are the main reason why economic aims are not in general accepted as grounds for justification.
- Instead, the objectives and their protection should be seen through the EU lens instead of assessing the nature of the objectives purely from the viewpoint of one single Member State.

The increasing role of the state and free movement law in the EU energy sector

- Recently, there has been many cases brought before the Court where the emphasis has been in the internal market law.
- These cases have dealt with the question on whether the provisions of the secondary law are in conformity with the primary – namely free movement – law. This, on the other hand, raises the question whether the secondary energy market regulation has been ‘successful’ and whether the regulation can, in actual fact, keep up with the fast evolving energy market influenced by several factors not only within but also outside the EU borders.

The increasing role of the state and free movement law in the EU energy sector

- In the current state of the EU energy law it could be fair to argue that questions related to the 'good old' free movement law will be standing out increasingly together with questions that relate to the relationships between different market players.
- The increasing role of the state does not, however, mean the return to the old pre-liberalisation state of play but instead presents a sort of halfway house situation. This could mean re-emergence also for the free movement law in the energy sector.