

**The dialogue
between the principle of free movement of goods
and the national law of renewable energies**

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Outline

- The impact of territoriality clauses in national promotion schemes on free movement of goods
- Territoriality clauses in light of conventional forms of justification
- Special treatment of discriminatory promotion schemes by the ECJ
- A reconceptualisation of the principle of free movement of goods?

The impact of territoriality clauses on the principle of free movement of goods

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- States have implemented promotion schemes with territoriality clauses that limit the scope of application to the relevant national territory (and the exclusive economic area)
- Feed-in schemes:
 - ▣ Germany: § 4 EEG (German Renewable Energy Sources Act)
 - ▣ Netherlands: Art. 1 SDE+ in conjunction with Sec. 2 of the Dutch Territoriality Act
- Quota schemes:
 - ▣ Sweden and Norway: Swedish Lag om elcertificat (Limited scope of application follows from preparatory legislative documents)
 - ▣ UK: Sec. 17 ROO (Renewables Obligation Order)

The impact of territoriality clauses on free movement of goods

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- Territoriality clauses are at least capable of hindering indirectly and potentially imports of electricity, especially green electricity, from other Member States
- Feed-in schemes: (*PreussenElektra*)
 - ▣ Preferential treatment for electricity produced within the national territory (*Du Pont de Nemours Italiana, Prantl*)
- Quota schemes: (*Ålands Vindkraft*)
 - ▣ suppliers and certain consumers are required to hold a number of electricity certificates for the purposes of meeting their quota obligation
 - ▣ only certificates awarded under the national scheme to national electricity can be used to meet that obligation => incentive to consume electricity produced in their own territory

Territoriality clauses in light of conventional forms of justification

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- Art. 36 TFEU (-)
 - ▣ justification of measures aimed at the protection of health and life of humans, animals and plants
 - ▣ measures with the objective of environmental protection not included
- Cassis-Formula (-)
 - ▣ justification of measures which apply **without discrimination** to both domestic and imported products may be justified as being necessary in order to satisfy **mandatory requirements** in the interest of environmental protection
 - ▣ territoriality clauses cause discriminatory treatment
- Territoriality clauses may not be justified in the light of conventional forms of justification


Special treatment of discriminatory promotion schemes by the ECJ – *PreussenElektra*

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□ Justification in the judgment:

- Discussion of justification was introduced by the statement that „account must be taken, first, of the aim of the provision in question, and, second, of the particular features of the electricity market”

- Balancing both objectives

Environmental protection  **Free movement of goods**

- Result: Justification of discriminatory national promotion schemes with the aim of environmental protection

□ No application of Cassis-Formula

- Not mentioned in the judgment
- ECJ stated in later judgments that the application of Cassis is (still) limited to non-discriminatory measures

Special treatment of discriminatory promotion schemes by the ECJ – *PreussenElektra*

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- Justification of a discriminatory measure as a result of a suitable compromise between two Treaty objectives of the same value
- Concept familiar from German and French constitutional law (principle of practical concordance)
- Linked to the question whether environmental protection and free movement of goods as a principle of the internal market are of same value: Status of environmental protection: both are objectives and core principles of the EU
- Same applies to fundamental freedoms (*Schmidberger*)

Special treatment of discriminatory promotion schemes by the ECJ – *Ålands Vindkraft*

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- Justification in the judgment:
 - ▣ ECJ stated that measures may be justified on one of the public interest grounds listed in **Art. 36 TFEU** or by **overriding requirements**, in either case in accordance with the principle of proportionality (para. 76)
 - ▣ Analysis of the objective of national support schemes = environmental protection (para. 77-82)
 - ▣ Proportionality test (para. 83 et seq.)

Reconceptualisation of the principle of free movement of goods?

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Two possible interpretations of “overriding requirements”

First: Mandatory requirements in terms of the Cassis-Formula

- ▣ Assumption: ECJ wanted to express that two grounds exist for justification
- ▣ Consequence: Cassis-Formula also applies to discriminatory measures

Second: Overriding requirements as objectives of same value as the principle of free movement of goods

- ▣ Assumption: ECJ wanted to express that two grounds for justification exist for discriminatory measures
- ▣ Consequence 1: Non-exhaustive list of mandatory requirements in Cassis is still limited to non-discriminatory measures
- ▣ Consequence 2: Discriminatory measures can only be justified if they aim to achieve an objective listed in Art. 36 TFEU or an exhaustive list of objectives of the value as the fundamental freedoms

Reconceptualisation of the principle of free movement of goods?

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- Both judgments on the compatibility of discriminatory national promotion schemes show a picture of forms of justification which differs from the currently well-established one
- Legal certainty for national legislators requires a clear conceptualisation of the fundamental freedoms

Thank you for your attention!

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