Jean Monnet Working Paper Series

-

Environment and Internal Market

Vol. 2015/3

THE PRINCIPLE OF FREE MOVEMENT OF GOODS AND THE PROMOTION OF THE USE OF ENERGY FROM RENEWABLE SOURCES

Case C-573/12, ***Request for a preliminary ruling under Article 267 TFEU from the förvaltningsrätten I Linköping (Sweden)***

by

Manuela Mora-Ruiz

Professor at Huelva University (Spain)

Researcher at the International Centre of Research on Territorial Intelligence-C3it (www.ole.uhu.es)

Published on

desadeleer@fusl.ac.be

TABLE OF CONTENTS

I. INTRODUCTION: THE COMPLEXITY OF THE EU REGIME AIMING AT REDUCING GREENHOUSE GAS EMISSIONS THROUGH THE PROMOTION OF THE USE OF ENERGY FROM RENEWABLE SOURCES

In preventing climate change, promoting energy efficiency and energy saving as well as in developing renewable sources of energy, the European Union (EU) energy policy aims to achieve a number of environmental goals. Pursuant to Article 194 of the Treaty on the Functioning of the European Union (TFEU) in relation to Article 191 (1), the internal market should be established and function "with regard for the need to preserve and improve the environment"[1]. Thus, promoting the production as well as the consumption of energy from renewable sources is contributing to narrow the gap between the EU energy and the environmental policy, within the framework of a very special energy market (mainly electricity).

This paper attempts to analyse the CJEU judgment handed down on the 1st July 2014, C-573/12, in which the Court was requested by the förvaltningsrätten I Linköping

[1] See Article 194 (1), c).

(an administrative court in Sweden) to give preliminary rulings pursuant to Article 267 TFEU on interpretation of the consistency of a Swedish measure promoting energy from renewable sources with the principle of free movement of goods, deemed to be one of the pillars of the internal market[2].

The starting point of this analysis is Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009, on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC[3]. This Directive sets up a compulsory system requesting Member States to develop energy from renewable sources. Generally speaking, pursuant to that directive, Member States are called on to reach a 'national overall target' calculated according to the share of energy from renewable sources in their gross final consumption for 2020.

In doing so, they are likely to reduce their greenhouse gas emissions and to combat climate change.

Besides, as Directive 2009/28/EC focuses on national support schemes as the key instrument for the Member States to achieve the aforementioned objectives, these schemes are likely to qualified as measures of equivalent effect to quantitative restrictions on imports and exports of goods within the meaning of Articles 34 and 35 TFEU (MEEQR).

In this context, this paper attempts, firstly, to analyse the scope of Directive 2009/28/EC, and, secondly, to assess the compatibility of both the Directive and the Swedish legislation with Article 34 TFEU.

My view is that this judgment takes on particular significance with respect to complying with TFEU free movement of goods obligations as well as to the salience of "Green certificates" as instruments for promoting the use of energy produced from renewable sources. In my opinion, differences existing between national regimes (even more, the contrast between Member States such as Sweden and Spain) are likely to hinder the increase of renewable sources of energy. Therefore, particular attention must

[2] See N. DE SADELEER, "Autonomía regulatoria ambiental y libre circulación de bienes", en J.SANZ LARRUGA/ M.GARCÍA PÉREZ/J.J. PERNAS GARCÍA, (Dirs), *Libre Mercado y protección ambiental: intervención y orientación ambiental de las actividades económicas,* INAP, Madrid, 2013, p.54.
[3] *OJ* 2009 L 140.

be given to the opportunity of adopting a new EU act in order to harmonize the national systems supporting this source of energy[4]. I begin my analysis with an examination of the CJEU judgment of 1st July 2014, and the opinion of Advocate General Bot. Then the focus will shift to the Spanish system that is an egregious illustration of the differences existing between Member States. In this respect, I'm taking the view that such significant differences between the legal national frameworks within the EU is hindering both the internal market as well as its environmental objectives. As a consequence, there is a growing awareness of the need of reforming the promotion of these sources of energy[5], with the aim of reconciling the functioning of the internal market with the EU environmental objectives[6].

---

[4] For an in-depth review of the future of European Union regarding the fight against climate change, see R. GILES-CARNERO "La acción internacional y europea en materia de cambio climático: construyendo la nueva fase 2013-2020", en Isabel Rodríguez Martínez (Directora*), La negociación de emisiones GEI en los mercados de carbono. Régimen y regulación*, Thomson Reuters Aranzadi, Pamplona, 2014, pp. 39-62.

[5] It should be pointed out the importance of the *Communication from the Commission to the Council and the European Parliament - Renewable energy road map - Renewable energies in the 21st century: building a more sustainable future* (COM (2006), 848, 10 January) as the starting point of the so-called "first package of climate and energy", which led to the adoption of Directive 2009/28/CE. In the aftermath of the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions* "*A policy framework for climate and energy in the period from 2020 to 2030*" (COM (2014), 15final, 22 January), the EU carried out a new strategy regarding energy produced from renewable sources. This document focuses on some topics like the following ones: a) "An ambitious commitment to reduce greenhouse gas emissions in line with the 2050 roadmaps; b) Simplification of the European policy framework while improving complementarity and coherence between objectives and instruments); c) Strengthening regional cooperation between Member States to help them meet common energy and climate challenges more cost-effectively while furthering market integration and preventing market distortion; d) Building on the momentum behind the development of renewables with a policy based on a more cost-efficient approach which reinforces the European dimension and has further integration of the internal energy market and undistorted competition at its core; e) Improving energy security, while delivering a low-carbon and competitive energy system, through common action, integrated markets, import diversification, sustainable development of indigenous energy sources, investment in the necessary infrastructure, end-use energy savings and supporting research and innovation" (see pages 3 and 4).

[6] See M. MORA-RUIZ, "La ordenación jurídico-administrativa de las energías renovables como pieza clave en la lucha contra el cambio climático: ¿un sector en crisis?2, en *Actualidad Jurídica Ambiental*, www.actualidadjuridicaambiental.com, febrero 2014,pp.2,3. And, regarding the said idea of integrating the environmental objectives in the energy policy of European Union, see J.F. ALENZA GARCÍA, "Energías renovables y cambio climático: hacia un marco jurídico común", en J.F. ALENZA GARCÍA (Dir.), *La regulación de las energías renovables ante el cambio climático,* Ed. Aranzadi, Cizur Menor, 2014, pp. 640, 641.

II. THE GRAND CHAMBER CJEU DECISION of 1st JULY 2014

2.1. The proceedings *Alands VindKraft AB v. Energimyndigheten* and the questions referred to the CJEU for a preliminary ruling

The case arose from a challenge brought by Ålands Vindkraft AB against the Energimyndigheten (Swedish Energy Agency) refusal to authorize, for the purposes of the award of electricity certificates, a wind farm in Finland that was operated by the claimant.

On 30 November 2009, Ålands Vindkraft sought approval from the competent Swedish authority for the Oskar wind farm — located in the Åland archipelago in Finland — with a view to being awarded electricity certificates. On 9 June 2010, that application was rejected by Energimyndigheten on the grounds that only green electricity production installations located in Sweden may be approved for the award of electricity certificates.

Ålands Vindkraft brought an action before the förvaltningsrätten i Linköping for annulment of that decision. In particular, it alleged a breach of Article 34 TFEU, "arguing in that regard that, as a result of the electricity certificates quota, set for the period under consideration at 0.179, the effect of the electricity certificate scheme is that approximately 18% of the Swedish electricity consumption market is reserved to green electricity producers located in Sweden, to the detriment of electricity imports from other Member States". Thus, according to the claimant, "a barrier to trade of that nature cannot be justified by considerations relating to protection of the environment, given, in particular, that the consumption of green electricity in Sweden would be promoted just as effectively through the award of electricity certificates for green electricity consumed in Sweden but produced in other Member States"[7].

The Swedish administrative court notes at the outset that, although the decision was adopted pursuant to the Law of 2003, the dispute before it must, under Swedish law, be settled in accordance with the law applicable at the time of the court's review of that decision, that is to say in accordance with the Law of 2011[8].

In this respect, pursuant to the Law of 2011, approved producers are awarded an electricity certificate for each megawatt-hour (MWh) of green electricity produced. The

[7] Para. 25
[8] Para.26

administrative Court states that "although there is no express mention of any such restriction in the wording of the Law of 2011, it is apparent from the preparatory work for that law and for the Law of 2003 that approval for the award of such certificates is reserved to green electricity production installations located in Sweden. The approval of installations located outside Sweden is, by contrast, impossible". On the other hand, the electricity certificates are tradable on an open competitive market where the price is determined by the interplay of supply and demand. Moreover, certain electricity suppliers and users are called on to hold, and to surrender to the State on 1st of April of each year, a certain number (quota) of certificates corresponding to a proportion of the total quantity of electricity supplied or consumed during the preceding year[9].

As a result, restrictions are placed on trading in green certificates in Sweden whenever the producer's installations are located outside that country and whenever such a trade has not been authorised under an international agreement concluded pursuant to Article 11 of Directive 2009/28/EC. It must be noted that Sweden and Finland did not conclude any such agreement.

In this context, the national court made a request for a preliminary ruling regarding the interpretation of Article 2(2)(k) and Article 3(3) of Directive 2009/28/EC.

These provisions read as follows:

Pursuant to Article 2(2)(k), the notion of 'support scheme' means 'any instrument, scheme or mechanism applied by a Member State or a group of Member States, that promotes the use of energy from renewable sources by reducing the cost of that energy, increasing the price at which it can be sold, or increasing, by means of a renewable energy obligation or otherwise, the volume of such energy purchased. This includes, but is not restricted to, investment aid, tax exemptions or reductions, tax refunds, renewable energy obligation support schemes including those using green certificates, and direct price support schemes including feed-in tariffs and premium payments'.

In accordance with Article 3(3), 'in order to reach the targets set in paragraphs 1 and 2 of this Article Member States may, inter alia, apply the following measures: (a) support schemes ; (b) measures of cooperation between different Member States…'.

[9] See paras 11 to 22.

Without prejudice to Articles (101) and (102) of the Treaty, Member States shall have the right to decide, in accordance with Articles 5 to 11 of this Directive, to which extent they support energy from renewable sources which is produced in a different Member State.'

The national court sought preliminary rulings on the following issues[10]:

"1. The Swedish electricity certificate scheme is a national support scheme which requires electricity suppliers and certain electricity users of that Member State to purchase electricity certificates corresponding, respectively, to a share of their supplies or use, without there being a specific requirement also to purchase electricity from the same source. The electricity certificates are awarded by the Kingdom of Sweden and are proof that a certain volume of electricity has been produced from renewable energy sources. The producers of (green) electricity receive, through the sale of those certificates, income additional to that derived from the sale of electricity. Are point (k) (of the second paragraph) of Article 2 of (Directive 2009/28) and Article 3(3) (thereof) to be interpreted as permitting a Member State to implement a national support scheme, such as that described above, from which only producers established in the territory of that State may benefit, the result of which is that those producers have an economic advantage over producers who are not eligible for electricity certificates?

2. In the light of Article 34 TFEU, can a system such as that described in Question 1 be regarded as constituting a quantitative restriction on imports or a measure having equivalent effect?

3. If the answer to Question 2 is affirmative, can such a scheme be regarded as compatible with Article 34 TFEU in the light of its objective of promoting the production of (green) electricity?

4. Does the fact that there is no express provision in national law requiring the support scheme to be confined to national producers have any bearing on the answers to the above questions?"

2.2. Decision of the Court

Question 1: *Are point (k) (of the second paragraph) of Article 2 of (Directive 2009/28) and Article 3(3) (thereof) to be interpreted as permitting a Member State to implement a*

[10] Para. 32

national support scheme, …, from which only producers established in the territory of that State may benefit, the result of which is that those producers have an economic advantage over producers who are not eligible for electricity certificates?

The Court considers, firstly, that a green electricity support system such as that at issue in the main proceedings constitutes a "support scheme" within the meaning of Article 2(2)(k) and Article 3(3) of Directive 2009/28.

The Court holds that Article 1 of Directive 2009/28 sets out a clear objective: the promotion of energy from renewable sources in establishing a common framework for the use of that kind of energy. Accordingly, the directive defines national support schemes in a very broad sense, thus "requiring producers to 'include' a given proportion of green energy 'in their production' or 'requiring energy suppliers to include a given proportion of energy from renewable sources in their supply, or requiring energy consumers to include a given proportion of energy from renewable sources in their consumption', while stating expressly that that category includes schemes under which such requirements may be fulfilled through the use of green certificates"[11].

The support scheme at issue fulfils the Directive requirements regarding the validity of a national support scheme, on the grounds that it places upon electricity suppliers and certain consumers "an obligation to use green certificates for the purposes of meeting their respective obligations to include a given proportion of green electricity in their supply or to include a given proportion of green electricity in their consumption"[12].

With respect to the territorial scope of the national support scheme, the CJEU takes the view that Directive 2009/28 empowers Member States to limit the scope of their support schemes. In other words, the aim of promoting energy from renewable sources is compatible with the consolidation of national schemes. Accordingly, the Member States are deciding to what extent their support schemes encompass green

[11] Para.45.

[12] Para.46. Account must be made of the fact that the Court distinguishes between the green certificates and the so-called "guarantees of origin issued in the various Member States", as the latter do not confer the right to participate in schemes like the Swedish one, because these guarantees are used as an information mean for the consumers, in order to know how much green energy is in the "energy mix" (see para. 52).

energy produced in other Member States[13]. Indeed, the directive has left open that option to the Member Sates.

Second Question: In the light of Article 34 TFEU, can a system such as that described in Question 1 be regarded as constituting a quantitative restriction on imports or a measure having equivalent effect?

First of all, the Court, points out that Directive 2009/28 cannot be considered as a exhaustive harmonization law at EU level regarding the territorial extent of the national support scheme. In fact, the Directive does not preclude diverse national support schemes[14]. Accordingly, the compatibility of the 2011 Swedish Law had to be reviewed in the light of primary law, and in particular Article 34 TFEU.

Secondly, the Court reminds the scope of ambit of Article 34 TFUE, a provision covering "any national measure capable of hindering, directly or indirectly, actually or potentially, intra-Community trade"[15]. As a consequence, the Court notes that the legislation at issue is capable of hindering, in an indirect and potential way, imports of electricity (especially green electricity) from other Member States.

In the absence of an international agreement recognizing the inclusion in the national share of energy from renewable sources green electricity imported from other Member States, only certificates awarded under the national scheme are taken into consideration in order to control the obligation for suppliers and certain consumers to comply on an annual basis with their quotas. Accordingly, those suppliers and consumers "are as a rule required, on the basis of the electricity that they import, to purchase such certificates…". Thus, these national measures can impede imports from other Member States[16].

---

[13] See paras. 49 and 50.

[14] See paras. 56 to 64. In this respect, the Court affirms the following: "…it cannot be considered that, in covering that aspect of the territorial scope of national support schemes, the harmonization 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 (….para.63)…it is appropriate to proceed with the interpretation of the Treaty provisions relating to free movement of goods …" (para.64 *in fine*).

[15] Para. 65, following *Dassonville* 8/74, EU:C:1974/82 (para.5) and *PreussenEleKtra,* EU:C:2001:160, (para. 69). Anyway, deciding whether there is or not a violation of Article 34 TFEU is a permanent opened question, which should be examined case by case: see CJEU decision of 3rd April 2014, C-428/12, *Commission v. Spain* (http://www.tradevenvironment.eu/uploads/2015_1.pdf).

[16] Paras. 68 to 70.

Nevertheless, the possibility for the producers of green electricity to sell the said certificates together with the electricity they produce, *as a package*, given that this is not prohibited under the regulation at issue, is likely to impede imports of electricity. As a result, the Swedish scheme must be regarded as a MEEQR in breach of Article 34, unless it can be objectively justified.[17]

Third Question: If the answer to Question 2 is affirmative, can such a scheme be regarded as compatible with Article 34 TFEU in the light of its objective of promoting the production of (green) electricity?

As it is well known, Article 36 TFEU sets out the public interest grounds that can be invoked by Member States in order to justify their MEEQRs, in accordance with the principle of proportionality. According to that principle, the measure at issue must be appropriate for ensuring attainment of the objective pursued and must not go beyond what is necessary in order to attain the objective[18]. In the annotated case, the Court agrees that the measure pursues a genuine environmental objective covered by an 'overriding requirement relating to protection of the environment' in relation to the protection of the health of humans, animals and plants public interest grounds listed in Article 36 TFEU. On these grounds, the promotion of the use of renewable energy sources, in order to reduce greenhouse gas emissions, as a part of the EU strategy to combat climate change, can be justified[19].

The environmental justification of the measure at issue being endorsed, the CJEU has to verify whether the national support scheme is not in breach of the principle of proportionality. In this connection, the Court was called on to review whether the *Preussen Elektra* judgement was still relevant given that EU secondary law has evolved in various ways. In *Preussen Elektra*, the Court held that the obligation to purchase electricity from renewable energy sources was 'useful for protecting the environment in so far as it contributes to the reduction in emissions of greenhouse gases', noting that this measure 'is also designed to protect the health and life of humans, animals and

[17] Paras. 71 to 75.
[18] For an in-depth review of the meaning of the principle of proportionality under Article 36 TEU, see N. DE SADELEER, *EU Environmental law and the Internal Market,* Oxford University Press, UK, 2014, p.308.
[19] Paras. 77 to 82. The Court also insists on the importance of renewable energy sources to reach the EU energy policy, pursuant Article 194(1)(c) TFEU.

plants'[20]. This was said to justify a German discriminatory rule requesting electricity suppliers to purchase all electricity produced from renewable energy sources from German producers of renewable energy within their respective supply area.

Two separate issues must be distinguished.

Firstly, since that judgment was handed down in 2001, the internal market in electricity has evolved on the account that it must be established without barriers. This is the path followed by the EU lawmaker since the adoption of Directive 2003/54/EC on June 26th 2003, a directive laying down common rules for the internal market in electricity[21].

Secondly, it must be noted that this electricity market is somewhat specific on the account that trading in renewable energy sources must be consistent with the rules underpinning the internal market. In this respect, the Court considers that "a green energy support scheme, whose production costs seem — as the Swedish Government and the Commission, in particular, have maintained — to be still quite high as compared with the costs of electricity produced from non-renewable energy sources, is inherently designed to foster, from a long-term perspective, investment in new installations, by giving producers certain guarantees about the future marketing of their green electricity"[22].

As a consequence, it does not appear that in restricting a support scheme reckoning upon green certificates to green electricity produced on the national territory, Sweden has acted in breach of the principle of proportionality. As EU law currently stands, "Sweden was legitimately able to consider that such a territorial limitation does not go beyond what is necessary in order to attain the objective … of increasing the production and, indirectly, the consumption of green electricity in the European Union"[23]. Therefore, the environmental objective of reducing greenhouse gas emission is reached without infringing the principle of proportionality[24].

---

[20] Case C-379/98 *Preussen Elektra* [2001] ECR I-2099, paras. 73 and 75.
[21] Para. 86.
[22] Para. 103.
[23] Para. 104. As it is established in para. 110, "..a Member State does not exceed the bounds of the discretion to which it remains entitled in the pursuit of the legitimate objective of increasing the production of green electricity"
[24] In fact, the Court says the following: "it should be noted that, provided that there is a market for green certificates which meets the conditions set out in paragraphs 113 and 114 above and on which traders who have imported electricity from other Member States are genuinely able to

Fourth Question: Does the fact that there is no express provision in national law requiring the support scheme to be confined to national producers have any bearing on the answers to the above questions?

The national court finds that, under the legislation at issue, the electricity certificate scheme is not open to green electricity production installations located outside Sweden. However, that restriction is not expressly laid down in that legislation. The CJEU considers that the legislation at issue must be construed to that effect, particularly in view of the related *travaux préparatoires*[25]. According to the CJEU, this question is a matter of interpretation of the Swedish law and, as a result, falls under the exclusive jurisdiction of the national courts.

2.3. Opinion of Advocate General Bot

One has to do justice to the opinion of Advocate General Bot, who reached different conclusions than the ones the Court.

According to Advocate General Bot, the main question arose as to whether the territorial restrictions on access to support schemes for green energy were consistent with the requirements of the principle of the free movement of goods or, in other words, whether Directive 2009/28 is consistent with Article 34 TFEU. He argued that Article 3(3) of Directive 2009/28 is invalid to the extent that it confers upon Member States the power to prohibit, or to restrict, access to their support schemes on the part of producers whose green electricity production sites are located in another Member State[26].

He acknowledged that green certificates were amounting to a national support scheme within the meaning of Article 2(k) of Directive 2009/28. Moreover, he also agreed that Member States are endowed with room for discretion in establishing their schemes; even more, it seems that a Member State may refuse access to its support scheme to a green electricity producer located abroad, "even if the fact that the

---

obtain certificates under fair terms, the fact that the national legislation at issue in the main proceedings does not prohibit producers of green electricity from selling to traders under the quota obligation both the electricity and the certificates does not mean that the legislation goes beyond what is necessary to attain the objective of increasing the production of green electricity. The fact that such a possibility remains open appears to be an additional incentive for producers to increase their production of green electricity" (para.110).

[25] Para. 121.

[26] Nevertheless, the Advocate General proposes," for reasons of legal certainty, that the temporal effects of a declaration of invalidity in that regard be limited" (see para.8).

electricity that it produces is green is affirmed by a guarantee of origin that meets the requirements of Directive 2009/28", on the grounds that the guarantee of origin is only an instrument of proof[27].

On the other hand, Advocate general Bot also took the view that the Swedish scheme was in breach of Article 34 TFEU: "although the Swedish green certificate scheme does not prohibit the importation of electricity, it indisputably confers an economic advantage which may favour producers of green electricity located in Sweden as compared with producers located in other Member States, since, whereas the former benefit from additional income from the sale of green certificates, which is in effect a production premium, the income of the latter is derived solely from the sale of green electricity". Accordingly, the fact that it is impossible for electricity producers located in other Member States to have access to the Swedish green certificate scheme amounted to a discriminatory restriction on the free movement of goods, and as a result was in breach of Article 34 TFEU[28].

By contrast with the Court's reasoning, Advocate General Bot held that the measure at issue could not be justified under Article 36 TFEU: it makes no sense that the green electricity produced in another Member State cannot contribute to achieving the environmental objectives of the national support scheme. Besides, the Swedish authorities did not convinced him of the risk that national green certificate schemes would become ineffective if they were made accessible to producers located in other Member States[29].

Last, the Advocate General considered "that territorial restrictions … are inconsistent with the principle of the free movement of goods"[30] and, given that

[27] Para. 48.
[28] See paras. 76 and 77.
[29] Para. 97 related to para. 96.
[30] In fact, Advocate General Bot takes the view that it would be possible to combine environmental goals and energy needs in making national support schemes accessible to foreign electricity producers. Advocates Bot stresses that "one of the four elements of the European Union's environmental policy, set out in Article 191(1) TFEU, is 'prudent and rational utilisation of natural resources'. The development of cross-border trade in green electricity which would result from making national support schemes accessible to foreign electricity producers would contribute to the attainment of that objective by facilitating the optimal distribution of production between the Member States according to their respective potentials" (para.109).

Directive 2009/28 can only — in his view — be construed as permitting such restrictions, it must be regarded as invalid in that regard"[31].

III. FINAL COMMENTS ON THE COURT'S DECISION: HOW TO FLESH OUT THE PROMOTION OF THE USE OF ENERGY FROM RENEWABLE RESOURCES?

The annotated judgment highlights the importance of Directive 2009/28 and the EU policy of promoting renewable energy sources. In the first place, it seems to uphold the *Preussen Elektra* judgement. In addition, the CJEU endorses the same reasoning in the recent CJEU of 11 September 2014, C-204/12, *Essent-Belgium,* a case in which the CJEU held that Article 34 TFEU is not precluding a regional scheme under which guarantees of foreign origin could not be accepted as substitutes of Flemish green certificates. Accordingly, national support schemes are the cornerstones of the promotion of green energy.

In my opinion, the concept of the support scheme as it is laid down under Directive 2009/28 must be approved, given the differences between Member States in achieving the objectives of green electricity production. In other words, Member States should be endowed with room for discretion in tailoring their schemes with a view to achieving the environmental objectives laid down by the Directive. On the contrary, this room for manoeuvre does not allow unfettered discretion in tailoring the scheme[32] irrespective of the functioning of the internal market (of electricity), on the grounds that there is a potential conflict with Article 34 TFEU as discussed above.

Some authors have questioned whether national support schemes, to be regarded as MEEQRs, can be consistent with the single market, on the grounds that it is unclear whether the environmental approach is deemed to be the prevalent objective[33]. From my

---

[31] Paras. 110 and 111.

[32] As the authors has stressed, "differentiation is allowed, but discrimination is not": See J.H. JANS/H.H.B VEDDER, *European Environmental Law,* 3rd Edition, European Law Publishing, Brussels, 2008, p. 247.

[33] See J-C PIELOW, "Energías renovables en Alemania: La Eneigierwende y el Derecho", en J.F. ALENZA GARCÍA (Dir.), *La regulación de las energías renovables ante el cambio climático,* Ed. Aranzadi, Cizur Menor, 2014, p. 547. See CJUE Judgement 21 july 2011, C-2/10, request for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per la Puglia (Italy), made by decision of 23 September 2009: the request has been made in proceedings between Azienda Agro-Zootecnica Franchini Sarl ('Azienda Agro-

point of view, the EU should set out key requirements with respect to the national support schemes in order to avoid significant differences between Member States and to achieve full harmonization in the energy-climate realm. Otherwise, the promotion of renewable energy sources will still be considered as an obstacle to the internal market of electricity. Of particular salience in this respect is to stress that there is a constitutional obligation pursuant Article 3(3) TEU to promote sustainability at EU level. Against this background, it is of paramount concern to determine at EU level the level of renewable energy sources necessary to achieve the environmental goals of the climate change policy[34].

Anyway, the case merits consideration on the account that it highlights the different strategies endorsed by Member States regarding the promotion of renewable energy sources. In my opinion, this is a key point in order to stress the importance of a new harmonisation at EU level.

In this respect, I'm taking the view that it is necessary to strike a balance between the promotion of the said sources of energy and the traditional producers of electricity energy, because of the environmental objectives associated to the energy

---

Zootecnica Franchini') and Eolica di Altamura Srl ('Eolica di Altamura'), on the one hand, and the Regione Puglia (Apulia Region), on the other, concerning the refusal to authorise the location of wind turbines not intended for self-consumption on land situated within the confines of the Alta Murgia national park, a protected area classified as a site of Community importance ('SCI') and special protection area ('SPA') forming part of the Natura 2000 European Ecological Network ('the Natura 2000 network'), even though no prior assessment had been carried out as to the environmental impact of the project on the particular site concerned. The request concerns the interpretation of Directive 2009/28 /EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ 2009 L 140, p. 16), Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market (OJ 2001 L 283, p. 33), Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) and Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1). About the position of the Court regarding the prevalent environmental interest in that case, see M. MORA-RUIZ, "La competencia estatal para la aprobación de normas adicionales de protección ambiental en ámbitos armonizados en el nivel comunitario: studio jurisprudencial de los artículos 114 y 193 TFUE", en J.SANZ LARRUGA/ M.GARCÍA PÉREZ/J.J. PERNAS GARCÍA, (Dirs), *Libre Mercado y protección ambiental: intervención y orientación ambiental de las actividades económicas,* INAP, Madrid, 2013,pp.94,95.

[34] With regard to this idea, one has to take into consideration the principle of subsidiarity. Article 5(3) TEU reads as follows: "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level".

from renewable sources. The point is, therefore, how to regulate this market, once the EU policy of energy is based on the concepts of security on energy supply in the Union, efficiency and sustainability, as pursuant to Article 194(1) TFUE.

In this context, on December 26th 2013, Spain adopted the Law 24/2013 on the Electricity Sector[35], that modified the previous national support scheme. Perhaps, it was necessary to review the former scheme, which was reckoning upon the granting of public aids by the State and the autonomous regions alike. However, the new law stops short of meeting the standards of a model scheme (as the Swedish one or the German model[36]). In truth, the new legislation maintains public aids, though they are granted in accordance with economic criteria exclusively (environmental considerations are excluded)[37]. Accordingly, investors have to adapt their installation to the new requirements, despite all the money they have already invested[38].

From my point of view, the former legislation of 1997[39] lacked some key elements to enhance a policy of promotion as it has been pointed out above. Moreover, given the absence of State regulation regarding the energy from renewable sources, every autonomous region has enacted its own regulations. As a result, there was no comprehensive regulatory framework in order to boost investors' confidence.

Besides, there were different instruments that could be qualified as support schemes within the meaning of Directive 2009/28. As a result, it was unclear which instrument was deemed to amount to such a scheme. Nevertheless, the 24/2013 Law still falls short of resolving these pitfalls. Its objective is not environmental, but economic, given that it is aiming at reducing the granting of State aids.

To conclude with, there are significant differences between Member States regarding their support schemes. Even worse, there are different policies regarding renewable energy sources within Europe (as exemplified by the Spain regulation). Without doubts, the EU should review its climate and energy policy with the aim to

[35] *BOE* num. 310, 27 December 2013.
[36] See J-C PIELOW (2014): 522-531.

[37] See Article 14(4) and (7) of the 24/2013 Law. Article 14(4) reads as follows: 'the parameters of retribution of the transport, distribution and production activities from renewable energy …. have to be set out taking into consideration cyclic economic growth, the demand for electricity, and the profitability of these activities, at regular intervals not exceeding 6 years'.

[38] For a critic review of the actual legal framework in Spain, and the possible solutions, see M. MORA-RUIZ (2014): 21,22; and J.F. ALENZA GARCÍA (2014): 657-659.
[39] The 54/1997, 27 November, on the Electricity Sector (*BOE* num.285, 28 november 1997).

harmonising Member States regulations and to ensuring the internal market in accordance with Articles 34 and 36 TFUE. If it were not the case, it won't be possible to fight climate change through energy produced from renewable sources.