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# THE FREE MOVEMENT OF GOODS IN THE EUROPEAN UNION AND THE LIMITATION OF RENEWABLE ENERGIES PROMOTION SCHEMES TO THE MEMBER STATES OWN TERRITORY

## *O PRINCIPIO DA LIVRE CIRCULAÇÃO DE MERCADORIAS NA UNIÃO EUROPEIA E A LIMITAÇÃO DE PROGRAMAS DE SUPORTE A ENERGIAS RENOVÁVEIS AO TERRITÓRIO DOS ESTADOS MEMBROS*

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**ABSTRACT:** This paper sets out to examine whether the legal framework of the European Union allows the Member States to design and apply renewable energies support schemes limited to their own territory, with a direct exclusion of the renewable energies produced in other Member States. The Directive 2009/28/EC will be interpreted in the light of the principle of free movement of goods inserted in the articles 34 and 36 of the Treaty on the Functioning of the European Union.

**KEYWORDS:** European Union. Free Movement of Goods. Territorial Discriminatory Measures. Renewable Energies Support Schemes. Legal Interpretation.

**RESUMO:** O presente artigo analisa se a estrutura normativa da União Europeia autoriza que os Estados Membros desenvolvam e apliquem programas de suporte a energias renováveis com limitação ao seu próprio território, com direta exclusão das energias renováveis produzidas nos demais Estados Membros. A Diretiva 2009/28/EC será interpretada à luz do princípio da livre circulação de mercadorias, o qual se encontra inserido nos artigos 34 e 36 do Tratado sobre o Funcionamento da União Europeia.

**PALAVRAS-CHAVE:** União Europeia. Livre Circulação de Mercadorias. Discriminação Territorial. Programas de Suporte a Energias Renováveis. Interpretação Jurídica.

## INTRODUCTION

To be able to answer whether articles 34 and 36 TFEU allow Member States to limit renewable energies promotion schemes to their own territory, some steps must be taken.

Firstly, it is necessary to assess the European Court of Justice's general interpretation of the Articles 34 and 36 TFEU.

Secondly, the Article 3 (3) of the Directive 2009/28/EC must be interpreted systematically, especially in connection with the recital 25, and in the light of the ECJ's case law.

Thirdly, the interpretation of the Article 3 (3) of the Directive 2009/28/EC must be submitted to a conformity test with the principle of free movement of goods, which is inserted in the primary law. So far as these three steps have been done, it will be able to reach a secure and grounded answer to the question presented.

## 1 ARTICLES 34 AND 36 TFEU: A GENERAL VIEW

In Dassonville[1] the European Court of Justice presents general and too much broad statements about the interpretation of article 34 of the Treaty on the Functioning of the European Union, such as what became famous as the Dassonville formula:

> All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.

A general and broad statement as such transformed 'the free movement of goods' in an overarching principle, limiting too much the Member States legislative powers.

Balancing the application of the article 34, the article 36 provides an exhaustive[2] list of possible justifications to measures with equivalent

1 ECJ Case 8/74, 11.07.1974 - Procureur du Roi v Dassonville.

2 SCHOLZ, Lydia. The dialogue between free movement of goods and the national law of renewable energies. In: T. Solvang. *EU Renewable Energy Law*: legal challenges and new perspectives, Marlus, 2014. p. 98.

effect to quantitative restrictions, which are public morality, public policy, public security, and protection of health, life of humans, animals or plants.

When deciding Cassis de Dijon[3], the ECJ is more cautious than with Dassonville, referring straight to the facts and avoiding establishing general statements.

From the very beginning, the ECJ narrows the broad interpretation conferred in the Dassonville formula, admitting some exemptions to obstacles in free trade. The difference from Dassonville is that the ECJ admits that obstacles must be accepted if they are proven to be "necessary in order to satisfy mandatory requirements"[4], which means that must be a proportionality relation. Therefore, the Dassonville formula is reviewed in order to accept exemptions.

The ECJ then establishes the mutual recognition principle, meaning that:

> [...] there is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State[5].

Finally, the ECJ states that article 34 prohibits discriminatory and non-discriminatory measures, which apply indistinctly to national and foreign goods, but put a greater burden on the latter. According to Craig and De Búrca, "discrimination is therefore a sufficient, but not necessary, condition for invocation of Article 34"[6].

The ECJ then establishes the rule of reason (proportionality test)[7] [8] to assess if the mandatory requirements are necessary in order to justify non-discriminatory measures.

The list of mandatory requirements pointed by the ECJ is considered non exhaustive[9]: protection of public health, effectiveness of fiscal

3 ECJ Case 120/1978, 20.02.1979 – Rewe Central AG v Bundesmonopolverwaltung für Branntwein.

4 ECJ Case 120/1978, 20.02.1979 – Rewe Central AG v Bundesmonopolverwaltung für Branntwein, par. 8.

5 ECJ Case 120/1978, 20.02.1979 – Rewe Central AG v Bundesmonopolverwaltung für Branntwein, par. 14.

6 CRAIG, Paul; BÚRCA, Gráinne De. *EU Law*: texts, cases, and materials. Oxford, 2013. p. 665.

7 Ibid, p. 676.

8 ECJ Case 120/1978, 20.02.1979 – Rewe Central AG v Bundesmonopolverwaltung für Branntwein, par. 8.

9 SCHOLZ, op. cit, p. 106.

supervision, fairness of commercial transactions, defence of the consumer, environmental protection, cultural protection, fundamental rights.

In Keck[10], the ECJ establishes a secure guidance for the EU law interpretation, which has to consider the main principles inside the Treaties as an interpretative North. As long as the interpretative North is met – "[...] the appropriate course is to look at the prohibition of resale at a loss from the perspective of the free movement of goods" [11] –, the ECJ provides its application to the facts. To rule then the case in a coherent manner, the ECJ has to repeal the prior interpretation given in Dassonville in order to admit provisions restricting or prohibiting specific selling practices only when applied indistinctly to domestic and imported products[12].

When one analyses the grounding of the decision pronounced by the ECJ in Dassonville, it seems that the formula presented states a lot more than what the ECJ in fact analysed and meant by deciding the case. The effect is that very different situations, which apparently should not be covered by the formula, fit into it.

So, in a matter of fact, such a general statement could not have been validly extracted from Dassonville. The inaccuracy made by the ECJ consisted in transforming into a general rule what should only have been the solution for a unique case and, maximum, a reference for similar situations. Perhaps such a general statement was due to an eagerness of finding a general rule automatically applicable to all similar cases, which is desirable but really difficult to achieve.

In Cassis de Dijon, the ECJ became more cautious, even when setting out a general principle. The mutual recognition principle is linked to the situation analysed in the case, which is very specific and includes the following elements: alcoholic beverages produced and marketed lawfully in one of the Member States may, because of this, be introduced in other Member States. Between Dassonville and Cassis de Dijon, it is already possible to identify an evolution of the ECJ reasoning towards a more technical, meticulous and careful grounding, with a special attention regarding the decision's range.

10 ECJ Cases C-267/91 and C-268/91, 24.11.1993 - Criminal proceedings against Bernard Keck and Daniel Mithouard.

11 ECJ Cases C-267/91 and C-268/91, 24.11.1993 - Criminal proceedings against Bernard Keck and Daniel Mithouard, par. 10.

12 ECJ Cases C-267/91 and C-268/91, 24.11.1993 - Criminal proceedings against Bernard Keck and Daniel Mithouard, par. 16.

In Keck, the reasoning improves at its best, and the Court presents a solid interpretative North – principles in the Treaties – and its consequent application to the facts. However, it must be said that what can be extracted from Keck's decision is not a general principle automatically applicable to other similar cases, but only a secure guidance on interpretation and reasoning.

Considering the three decisions – Dassonville, Cassis de Dijon and Keck –, it is possible to identify a walk towards a systematic and clearer way of interpretation and application of Articles 34 and 36 of the TFEU.

The lesson we have to learn from the evolution of the ECJ legal reasoning is that these decisions are not supposed to be final decisions to other cases, but instruments that can serve only as reference for achieving coherent and correct decisions.

For this paper, what is important to note is that the ECJ accepts that the free movement of goods principle can be weakened when there is a sensitive reason related to the Article 36 or to mandatory requirements, but only when a proportionate measure is used[13].

These three cases are not directly related to the renewables promotion scheme, not even to the energy sector, but insofar as energy is considered a good[14] they could present a general guidance to answer the question presented above.

## 2 ARTICLE 3 (3) OF THE DIRECTIVE 2009/28/EC

> The Directive 2009/28/EC intends to harmonize – partially – the promotion of energy from renewable sources and establishes compliance targets to be achieved by Member States.
>
> Nonetheless, its Article 3 (3) establishes that Member States may apply support schemes and that they "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".

13 ECJ Case C-572/2012, 01.07.2014 - Ålands Vindkraft AB v Energimyndigheten, par. 76.

14 SCHOLZ, op. cit., p. 95.

Here it can be found a clear allowance to a direct discriminatory measure – territorial restriction – against renewable energy produced in others Member States, with the potential of hindering the free movement of renewable energy within the European Union.

In the recital (25) of the Directive, it is assumed that "the majority of Member States apply support schemes that grant benefits solely to energy from renewable sources that is produced on their territory" and that this has a sensitive reason, which is that Member States should have the right to "control the effect and costs of their national support schemes according to their different potentials".

It follows that these promotion schemes must be supported in order to "maintain investor confidence", so the Directive is not supposed to affect national schemes.

According to Scholz[15], in Preussen Elektra[16] the ECJ "first considered the issue of the admissibility under European Union law of territoriality clauses within a national promotion system". Indeed, in Preussen Elektra the ECJ states that, "in the current state of the Community law concerning the electricity market", provisions that carry a territorial restriction are not incompatible with the principle of the free movement of goods.

When grounding the decision, the ECJ considers that renewable energy must be supported in order to prevent climate change[17], but it is not clear if the ECJ considers the environmental question inside the article 36 or as a mandatory requirement.

As Johnston[18] points out, the previous case law would require the characterization of the nature of the restriction upon trade, but even so the ECJ did not make it.

Scholz[19] criticizes the reasoning made by the ECJ, arguing that "it posed more questions than it answered in relation to the construct of

15 SCHOLZ, op. cit., p. 99.

16 ECJ Case 379/98, 13.03.2001 – Preussen Electra.

17 ECJ Case 379/98, 13.03.2001 – Preussen Electra, p. 73.

18 JOHNSTON, Angus. The impact of the new EU Commission guidelines. In: T. Solvang. *EU Renewable Energy Law*: legal challenges and new perspectives, Marlus, 2014. p. 33.

19 SCHOLZ, op. cit., p. 99.

the free movement of goods", but it at least made a theoretical balance between the free movement of goods and the environmental protection.

Although establishing a sophisticated theoretical reasoning, the ECJ does not succeed to make an effective proportionality test in the light of the elements involved.

In fact, it must be said that the ECJ even does not assess properly the proportionality of the territorial restriction related to the achievement of its potential goals, which is the core issue of the question.

Lately, the ECJ had two opportunities to assess territorial restrictions in the light of the Article 3 (3) of Directive 2009/28/EC, which were in Ålands Vindkraft[20] and Essent[21]. In both cases, the ECJ admitted renewable promotion scheme with territorial restriction against the energy produced in other Member States.

In Ålands Vindkraft, the ECJ concludes that territorial restriction is capable – "at least indirectly and potentially"[22] – of impeding electricity imports from other Member States, in principle incompatible with Article 34, unless that restriction can be objectively justified. The ECJ considers that the objective of promoting the use of renewable energy is in principle capable of justifying barriers to the free movement of goods[23]. After assessing the facts, the ECJ states that the territorial restriction is not in breach of the principle of proportionality.

This judgement was vigorously criticized by the commentators. Steinbach[24] summarizes it by saying that "renewable energy providers have reason to celebrate", but "the goal of creating a single European market for electricity has fallen by the wayside". He points out that two "opposing trends – one of convergence and one of divergence" can be identified relating to energy policies at the EU level. On the normative level, he identifies a "process of convergence" as "numerous measures have

20 ECJ Case 573/12,14.07.2014 - Ålands Vindkraft AB v Energimyndigheten.

21 ECJ Cases 204/12 and 208/12, 11.9.2014 – Essent Belgium.

22 ECJ Case 573/12,14.07.2014 - Ålands Vindkraft AB v Energimyndigheten, par. 67.

23 ECJ Case 573/12,14.07.2014 - Ålands Vindkraft AB v Energimyndigheten, par. 82.

24 STEINBACH, Armin. Renewable Energy and the Free Movement of Goods. To be published in: *Journal of Environmental Law, Issue 1, 2015.* <http://www.nuffield.ox.ac.uk/Research/Politics%20Group/Working%20papers/Documents/Renewable%20Energy%20and%20the%20Free%20Movement%20of%20Goods.pdf>. Access: 21 nov. 2015, 10.58.

been implemented to promote the integration of national energy markets". Nonetheless, he also identifies a "countervailing trend toward greater fragmentation" and, in his view, "Ålands Vindkraft clearly bolsters the movement toward heterogeneity and divergence".

Ankersmit, quoted by Jiménez-Blanco[25], points out that the Court failed to explain why the territorial limitation was in line with the rule of reason. In his view, to make the proportionality test appear more convincing, the ECJ should have pointed economic evidence of the indispensability of the territorial restriction. He concludes that the ECJ "is and probably will remain deferential towards the protection of public interests which are important for the UE itself, in particular as regards combating climate change" even it fails to pass the proportionality test.

Also quoted by Jiménez-Blanco[26], Albert Sánchez Graells states that Ålands Vindkraft deserves criticism from three perspectives: "a strict legal perspective (due to the muddled situation in which it keeps environmental protection justifications to restrictions of free movements on goods)"; "economic perspective (due to partial and biased assessment of economic charges and incentives)"; "a functional/political (international) perspective (as it diminishes the possibilities for the EU as a whole to comply with the Kyoto Protocol)".

In Essent, Advocate General Bot plays an important role trying to convince the ECJ to admit expressly that "environmental protection goals are capable of justifying even directly discriminatory national trade-restricting measures, on the basis that EU law requires the EU to integrate (Article 11 TFEU) environmental protection objectives into its definition and implementation of EU policies"[27]. Nonetheless, he is not followed by the ECJ, who keeps the same reasoning already presented in Ålands Vindkraft.

Talus[28] points out that the ECJ's approach was less technical and more political, not addressing the "core issues of free movement and

25 JIMÉNEZ-BLANCO, Antonio. Energías renovables y Tribunal Europeo: la sentencia de la Gran Sala de 1 de julio de 2014, Ålands Vindkraft. *Revista Vasca de Administración Pública*, núm. especial 99-100. Mayo-Diciembre 2014, p. 1775-1794.

26 Ibidem.

27 JOHNSTON, op. cit. p. 37.

28 TALUS, Kim. *EU Energy Law and Policy:* a critical account. Oxford, 2013. p. 171/172.

environment"[29]. He even states that the ECJ, when the environment protection is at stake, "is prepared to adopt a more relaxed approach to measures taken by Member States than it would in other situations" [30], even if it means to "trump the strict application of law" [31].

The critics addressed to both recent judgements seem to be irreproachable to the extent as the ECJ does not manage to make a link of its argumentation to enough economic and factual evidence, which reveals extremely necessary to relativize coherently the free movement of goods principle, according to previous ECJ's case law.

Indeed, the ECJ should have assessed the positive impact of the territorial restriction on the promotion schemes, as well as the potential impacts of the removal of the territorial restriction.

As pointed out by Johnston[32], in Essent[33] AG Bolt stressed the "need to take into account the advantages that may arise from trade in green electricity within the European Union", what, unfortunately, was not made by the ECJ. Perhaps the greatest achievement of these two judgments in Ålands Vindkraft and Essent is solely legal certainty[34].

## 3 PRINCIPLE OF CONFORMING INTERPRETATION

Scholz[35] assesses the cases Ålands Vindkraft and Essent by using the principle of "praktische Konkordanz", pointing out the necessity to weigh up two different principles inside primary law (free movement of goods - environmental protection) against each other so that both may achieve their maximum efficacy.

Actually, the use of "praktische Konkordanz" principle is not even needed, as it doesn't seem to be a real collision between free

29 TALUS, Kim.Renewable energy disputes in the European Union, In: T. Solvang. *EU Renewable Energy Law:* legal challenges and new perspectives, Marlus, 2014, p. 151.

30 Ibidem.

31 Ibidem, p. 155.

32 JOHNSTON, op. cit., p. 37.

33 ECJ Cases 204/12 and 208/12, 11.9.2014 – Essent Belgium.

34 SCHOLZ, op. cit., p. 91.

35 Ibidem, p. 101.

movement of goods and environmental protection principles, as Scholz[36] eventually concluded.

An alternative approach to the question could be a conforming interpretation of the renewable promotion schemes with the article 34 TFEU. Although "it is settled case law that a national provision is not to be assessed in light of the Treaties if it falls into an area already exhaustively harmonised at Union level"[37] [38], it is undisputed that the promotion of renewable energy is not still completely harmonized[39].

So, it follows that the national renewables promotion schemes can be assessed by the ECJ in the light of the article 34 TFEU. Another option would be to examine directly the validity of the article 3 (3).

By doing so, the ECJ should stress the possible justifications and in the light of not having 28 different energy markets. Indeed, as Talus[40] points out, "the main difference between an EU internal energy market and 27 [28, at the moment] liberalized national energy markets is their integration through unhindered cross-border trade in energy".

By doing this, the article 3 (3) should be read in the light of the commitment among Member States to achieve the internal market through the strengthening of the free movement of goods and weakening off all forms of protectionism, as precisely highlighted by Scholz[41].

At this point, the debate should be focused on the economic reasons to maintain or not the trade barrier, and especially the economic and environmental consequences of its removal.

Indeed, to assess the justifiability of article 3, (3), of the Directive 2009/28/EC, the ECJ should analyse the arguments presented in recital 25, in order to verify if the removal of the territorial barrier would affect, and in what extent, investor's confidence, or if it would hinder the efficacy of the promotion schemes.

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36 SCHOLZ, op. cit., p. 101.

37 Ibidem, p. 96.

38 ECJ Case 573/12,14.07.2014 - Ålands Vindkraft AB v Energimyndigheten, par. 57.

39 ECJ Case 573/12,14.07.2014 - Ålands Vindkraft AB v Energimyndigheten, par. 58/64.

40 TALUS, Kim. *EU Energy Law and Policy:* a critical account, Oxford, 2013. p. 158.

41 SCHOLZ, op. cit., p. 95.

In debates as such, it is important to keep the focus on the central issues. Talus[42] says that arguments such as "environment protection" and "security of supply" sometimes have "less to do with objective factors and more to do with the appeal this line of argumentation has to an energy non-expert". He warns that "the stronger weight now given to environmental objectives means both that protectionism will increasingly seek environmental camouflage and that advocacy of environmental purposes will urge that the environmental failure of markets requires correction by means of public subsidies"[43].

According to Johnston, by analysing the restriction in the light of the hierarchically superior position of the Treaty rules on free movement of goods, Advocate General Bot "went on to find that the relevant provisions in that Directive were themselves an unjustifiable trade restriction and thus contrary to Article 34 TFEU"[44].

## 4 CONCLUSION

The answer one can achieve so far is that nowadays the ECJ admits, with crooked lines, that Member States, due to environmental protection, are allowed to limit their renewable promotion schemes to their own territory.

It is not clear although if the ECJ, in order to relativize the article 34 TFEU, considers environmental protection inside the article 36 or as a mandatory requirement[45].

However, the truth is that this definition doesn't seem to have any importance, as the ECJ decides to make a pragmatic and embracing approach in order to maintain untouched, no matter what, the national renewable promotion schemes.

One question still unanswered is that presented by Advocate General Jacobs in Preussen Electra[46]: "it is unclear why electricity from renewable sources produced in another Member State would not contribute to the

42 TALUS, op. cit, p. 160.

43 Ibidem, p. 161.

44 JOHNSTON, op. cit., p. 35

45 SCHOLZ, op. cit., p. 108.

46 STEINBACH, op. cit.

reduction of gas emissions in Germany to the same extent as electricity from renewable sources produced in Germany".

By not giving an answer to this question, the ECJ clearly chooses to privilege the legal certainty of these schemes over a more technical analysis, which would conduct to a completely different conclusion.

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