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WHETHER THE SUPPORT SCHEMES OF THE RENEWABLE ENERGY OF THE EU ARE IN COMPLIANCE WITH THE PRINCIPLE OF THE FREE MOVEMENT OF GOODS?

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SUMMARY

The energy sector faces many legal challenges in its alteration into the internal energy market, especially, the incorporation of renewable energy promotion measures in the internal electricity market. On the national level Member States design their support schemes in accordance to their internal economic and political situation. Interestingly, it seems that any national renewable energy policy that deviates from the compliance with the fundamental freedoms may be justified, since the TFEU grants state an exclusive right to determine the conditions to exploit its energy resources and on the grounds of environment protection.

On the other hand, the EU law establishes objectives for the support schemes that have to be in accordance to the fundamental principles of the EU. Whereas internal electricity market does not exist and policies with regard to the support schemes vary among Member States, it is likely that separate policies in Member States lead to impediments for foreign actors to participate in the national support schemes. Consequently, the collision between different EU objectives of internal electricity market and environment protection appear to exist.

For the purpose of renewable energy, the convergence of support schemes would diminish the possibility to design support scheme in compliance with the principle of free movement of goods as the common legal framework is applied. Though, the view from the policy perspective may enable identification whether convergence of the support schemes is possible so that the principle of the free movement of goods would not be infringed.

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KEY WORDS

Renewable energy, free movement of goods, support schemes, EU law.

BACKGROUND ISSUES OF THE SUPPORT SCHEMES OF RENEWABLE ENERGY

The promotion of renewable energy is not a new area for scientific research, however, its' development and adaptation to the new regulation in pursuance of internal electricity market lack closer examination. Insofar the research made on support schemes of renewable energy was on the functioning of support schemes from the technical point of view. D. Fouquet and T. B. Johansson article *European renewable energy policy at crossroads – focus on electricity support mechanisms* examines support schemes from the national and EU perspectives. A. Campoccia *et.al.* in the article *An analysis on feed-in tariffs for solar PV in six representative countries of the European Union* examine the main support policies for PV with the purpose of highlighting the differences in implementation of the FIT. R. Fagiani *et al.* in the article *Risk-based assessment of the cost-efficiency and the effectivity of renewable energy support schemes: certificate markets versus feed-in tariffs* compare FIT mechanism with the certificate market system. S. Jenner *et al.* in the article *Assessing the strength and effectiveness of renewable electricity feed-in tariffs in European Union countries* conduct econometric analysis of the FIT policies in the EU states.

There were a number of articles by researchers examining the support schemes in order to determine which support schemes work the best. Unfortunately, there is shortage of legal literature regarding support schemes compatibility to the EU law. Though, it may be suggested that due to the novelty of support schemes of renewable energy adaptation to the new market regulation in the EU close examination of new policies on the national and EU level will provide new and important insights.

The energy sector faces many legal challenges in its alteration into the internal energy market. On the national level, Member States design their support schemes in accordance to their internal economic and political situation. Hence national rules determine the structure and conditions for actors to benefit from the support schemes. This stands insecure in the context of EU fundamental freedoms. Interestingly, it seems that any national renewable energy policy that deviate from the compliance with the fundamental freedoms is justified, since the TFEU grants states an exclusive right to determine the conditions to exploit its' energy resources and to protect environment.[2]

On the other hand, the EU law establishes objectives for the support schemes that have to be in accordance to the fundamental principles of the EU. In fact, renewable promotion may fall under the apparent Fifth freedom of energy flows.[3] Due to the fact that currently no internal

[2] The Treaty on the Functioning of the European Union, (Official Journal C 326 , 26/10/2012 P. 0001 – 0390), art. 194, sec. 2.

[3] Energy Union: secure, sustainable, competitive, affordable energy for every European, European Commission, 2015 02 25, http://europa.eu/rapid/press-release_IP-15-4497_en.htm [visited on 25 of March 2015].

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electricity market exists and policies with regard to the support schemes vary between Member States, it is likely that separate policies in Member States lead to impediments for foreign actors to participate in the national support schemes. The EU objective to implement the internal electricity market based on the principle of the free movement of goods may be obstructed. Consequently, the collision between different EU objectives of internal electricity market and environment protection appears to exist.

The energy sector is one of those areas that lack full harmonisation, but as the internal electricity market develops, renewable energy sector is affected as well. Since the frameworks of support schemes lack full harmonisation, national measures should be examined not only in accordance to directives, but also in the light of the primary law.[4] This principle enables to examine whether national support measures are design in conformity with the principle of the free movement of goods.

INTERNAL ELECTRICITY MARKET

Understanding the context of electricity market where the support schemes operate is of highly importance. What concerns the nature of electricity, its' properties differ from other goods while it is intangible by nature. Furthermore, the creation of internal electricity market aims for objectives[5] which other tools that are applied in the market should be in accordance. In this case, the support schemes are identified as such tools which should be designed to favour internal electricity market development and its' objectives.

The idea of internal electricity market had been proposed in the White Paper that mainly focused the attention on the harmonisation of taxation and standards as well as the liberalization of the equipment procurement.[6] Since the Commission proposal did not oblige states, but highlighted the issues that needed to be addressed, some agreement on EU level had been needed. Though, the Single European Act followed to establish legal background for the internal electricity market.

The legislature regarding the promotion of renewable energy also mentioned the need for the pursuance of internal electricity market. The potential of renewable energy resources could be more efficiently capitalized within the framework of the internal electricity market.[7] The free market principles assist to the promotion of renewable energy. For this reason, it should be significantly beneficial to capitalize the strength of the market forces in the internal market.[8] While Directive 2001/77 set out framework for national support instruments, the Directive 2009/28 is more concerned with cooperation mechanisms among states. For instance, joint

[4] Ålands vindkraft AB v Energimyndigheten, European Court of Justice, (Case C-573/12), para. 57

[5] Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, OJ L 211, 14.8.2009, p. 55–93), para. 1.

[6] Completing the internal market: white paper from the Commission to the European Council, COM/85/0310 FINAL (1985).

[7] 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 L 283, 27.10.2001, p. 33–40), recital 1, No longer in force.

[8] Id., recital 18.

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projects among Member States[9] or joint support schemes[10]. The same practices are used by the EU legislature to set cooperation or coordination mechanisms in the other areas of EU law that later are changed to the binding law.

The development of internal electricity market has a chain of reaction to the renewable energy sector and the design of support schemes. While the emergence of inter-Member States trade may increase production capacity from renewable energy, the occurrence of the economy of scale which enables to have more efficient production of electricity would have positive effect to the price of electricity from renewable energy. The stronger competitiveness of renewable energy would lead to less support in terms of financial aid. Consequently, there should be no need to have different support schemes, because disparities between them had been faded due to the price depletion at competitive level. Furthermore, the economy of scale would stimulate investment in those areas of energy industry whose had been unprofitable due to the small scale. Since renewable energy lacked competitiveness, the framework of internal electricity market would provide a support to new renewable energy technologies leading to increase in efficiency.

When the support schemes are designed, the nature of electricity should be taken into consideration. Electricity is not a material object or a substance as such. Also it is not possible to identify electricity once it is supplied into the grid and it must be used immediately as it may not be stored in financially reasonable terms. These characteristics do not correspond to the ordinary features of `goods`. However, the case-law dealt with this question quite early and it has been determined that electricity is a `good` in the sense of the free movement of goods.[11] While electricity has been defined as a `good`, Member States are obliged to withdraw any possible obstruction to the free trade in electricity. As far as free trade is concerned, the free movement of goods is best achieved in the free market environment,[12] where consumers can freely choose their suppliers and all suppliers freely deliver to their customers.[13] The concept of a 'good' is examined below.

CONVERGENCE OF SUPPORT SCHEMES

The idea of internal electricity market is based on the premise that each Member State regulates national market in accordance to the common principles and objectives of the EU law. Such general application of principles and objectives in the national law inevitably fosters convergence in the rules of separate areas. It may be suggested that internal electricity market and harmonisation of support schemes go together in the way that harmonisation is at the core of the market concept. For the purpose of renewable energy, the convergence of support schemes would diminish the possibility to design support scheme incompliance to the principle of free movement of goods as the common legal framework is applied.

[9] 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, (OJ L 140, 5.6.2009, p. 16–62) art. 7.

[10] Id., art. 11.

[11] Flaminio Costa v E.N.E.L, European Court of Justice, (Case C-6/64).

[12] supra note, Directive 2009/72/EC, recital 3.

[13] Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity, (OJ L 176, 15.7.2003, p. 37–56), recital 4, No longer in force.

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There are two possible ways to pursue convergence of support schemes: top down and bottom up. In the top down approach, a fully harmonised system is created, where the support schemes are decided top-down and implemented alike in all Member States, and as currently exists the bottom up approach where all States have an independent choice of support schemes and the best practise will emerge.[14] This distinction between approaches serves as a guideline for further examination.

However, it is also important to ascertain whether the situation is such that convergence is possible in renewable energy sector. The Commission thinks that it is currently not the time to follow full harmonization.[15] Firstly, harmonization would have an opposite effect on renewable energy support instruments as there is no model of best working measures. Secondly, difficulties arise to establish common support instrument due to different cost of different installation across the EU. The similar opinion is followed by researchers that suggestes that currently a fully European-wide harmonised scheme cannot be recommended by any means.[16]

It must be acknowledged that a few more obstructions should be mitigated in order to establish the common framework of support scheme. At present, the main hindrances are scarcity of adequate connections between Member States,[17] an access to the network, tarification issues and the different degrees of market opening between Member States. [18] Furthermore, the impediment for convergence lies in the different potential of the source of energy among states. Some countries have more potential in wind energy, while others in solar energy. The difference in potential has effect on the prime price for MWh produced from renewable energy installation. Consequently, an incentive appears for producers with lower prime cost for MWh to participate in higher prime cost possessed states. To mitigate this possible deviation the EU legislature enables states to 'control the effect and costs of their national support schemes according to their different potentials'.[19] Since national support measures are financed from local consumers, states are not ready to back up foreign renewable energy development and affect national renewable energy targets. Legal and economic reasons appear to be at the heart of the debate pursuing convergence.

Currently, bottom up and top down convergence do not reach the threshold of full harmonisation. However, the EU and national policies with respect to support schemes indicate that not far from now common support scheme will be applied across EU. The reason for this suggestion is inherent in the fundamental principle of the free movement of goods. In order to foster free trade convergence of rules and regulations is a must, because otherwise no one can expect faster growth in the number of installations and capacity to produce more and cheaper electricity from renewable energy resources. In addition, other EU objectives such as sustainability, competitiveness and energy security should be ensured. On the other hand, bottom up convergence is obstructed due to economic disparities between Member States. This situation also raises question whether poorer countries would be able from national budgets to finance

[14] L. Kitzing et al, "Renewable energy policies in Europe: Converging or diverging?", Energy policy (2012, vol. 51), p. 193.

[15] A. Johnston, G. Block, EU Energy Law (Oxford University Press, 2012), p. 339.

[16] R. Haas et al., "A historical review of promotion strategies for electricity from renewable energy sources in EU countries", Renewable and Sustainable Energy Reviews (2011, vol. 15), p. 1033.

[17] Report on progress in creating the internal gas and electricity market {SEC(2009) 287}, (COM/2009/0115), p. 3.

[18] supra note, Directive 2003/54, recital 5.

[19] supra note, Case C-573/12, para. 99.

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renewable energy development at the same level as richer countries. One of the ways to address this issue is to finance renewable energy from EU budget or to establish common fond that distributes money in accordance to production efficiency of installations and meeting EU objectives of sustainability and energy security.

There is a close correlation between the concept of territorial limitation and the obligation of the national target that has to be examined in the light of the principle of free movement of goods. While the EU law sets national targets of renewable energy in energy mix for each State, the State's right to determine the design of support scheme is affected by the situation on the ground. One of the examples of different incentives applied in practice is the different tariffs of support schemes. Thus, The Member States are entitled to protect national markets in the form of the territorial limitation of support schemes for the obvious practical reasons. Furthermore, the detachment among States is important as national support schemes are the tools to contribute to national production of RE targets. The issue arises whether the obligation of the national target is such as authorizing Member States to hinder foreign purchase of electricity for the purpose of the fulfilment of its obligation. According to the case-law, the States have a right to protect local market to the detriment of foreign renewable energy.[20] Though, the trend of the bottom up convergence is largely influenced by every states obligation to meet renewable energy targets.

Looking from the broader perspective, the lack of the harmonisation of support schemes leads to the different practice in the promotion tools and policies between states. In the process of the development of support schemes, they has been converging naturally when looking for the best practice available. Even though the EU law does not set an obligation to coordinate support measures among States, but just to follow an established framework,[21] the cooperation is possible. In addition, since the different support schemes creates the different legal environment for market actors in Member States, it has negative impact for the internal electricity market.[22] Overall, the emergence of the bottom up convergence of support schemes due to the practical reasons sheds a light of wider implications with an effect on the development of internal electricity market.

THE PRINCIPLE OF FREE MOVEMENT OF GOODS

The principle of the free movement of goods is one of the fundamental principles of EU. This provision defines general legal framework in terms of trade in goods among Member States.[23] However, very often national legislature establishes legal hindrances obstructing free movement of goods among Member States. In order to mitigate this impediment special provision addresses this issue, namely, quantitative restrictions on imports and all measures having

[20] Essent Belgium NV v. Vlaamse Reguleringsinstantie voor de Elektriciteits – en Gasmarkt, European Court of Justice, (Joined Cases C-204/12 to C-208/12), Para. 68.

[21] 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, (OJ L 140, 5.6.2009, p. 16–62), art. 1.

[22] S. Milčiuvienė, J. Paškevičius, "The Investment Environment for Renewable Energy Development in Lithuania: The Electricity Sector", Baltic Journal of Law & Politics (2014, vol. 7) p. 29.

[23] The Treaty on the Functioning of the European Union, (Official Journal C 326 , 26/10/2012 P. 0001 – 0390), art. 28.

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equivalent effect (MEQR).[24] Due to its' vagueness the scope of the MEQR have been determined by the Court of Justice (ECJ) in the case-law.

The requirements for MEQR was first introduced in *Dassonville* case where *all trading rules enacted by Member States which a 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*.[25] The definition was quite vague which led to a lot of room for interpretation. The second landmark case in the development of MEQR case-law was *Cassis de Dijon,* which established the principle of mutual recognition.[26] Consequently, rules regulating package, labelling, composition and quality of goods have mutual recognition among Member States. This principle of `mutual recognition` is applied also in the other areas of EU law. The third important case introduced the concept of selling arrangement.[27] The selling arrangement concerns how the products were marketed and does not determine a physical outlook of the product.

In the following case-law ECJ elaborated on the scope of MEQR with clearer distinction. Firstly, national rules are prohibited which actually affect more imported then domestic goods.[28] Secondly, measures shall not be sustained that impose an unreasonable cost on the sale or merely diminish sales[29]. Thirdly, measure to be regarded as the hindrance can be slight or mitigated.[30] Fourthly, it is possible for imported products to be marketed in other ways.[31] Fifth, national measures are assigned as MEQR even though their effect is too *uncertain and indirect*.[32] Sixth, in order for the measure to be MEQR, a person that creates that measure has to carry out a public duty on behalf of the state, or that it is controlled by state.[33] Seventh, private law bodies are subject to Article 34 whenever they restrict free movement *in the same manner as do measures*

[24] Id., art. 34.

[25] Procureur du Roi v Benoît and Gustave Dassonville, European Court of Justice, (European Court Reports 1974 -00837, Case C-8/74), para. 5.

[26] Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein, European Court of Justice, (European Court Reports 1979 -00649, Case C-120/78, Cassis de Dijon), para. 14.

[27] Criminal proceedings against Bernard Keck and Daniel Mithouard, European Court of Justice, (European Court Reports 1993 I-06097, Joined cases C-267/91 and C-268/91), para. 16.

[28] Åklagaren v Percy Mickelsson and Joakim Roos, European Court of Justice, (Reports of Cases 2009 I-04273, Case C-142/05); Commission of the European Communities v Portuguese Republic, European Court of Justice, (Reports of Cases 2002 I-04731, Case C-367/98); Commission of the European Communities v Italian Republic, European Court of Justice (Reports of Cases 2009 I-00519, Case C-110/05).

[29] Alfa Vita Vassilopoulos AE (C-158/04) and Carrefour Marinopoulos AE (C-159/04) v Elliniko Dimosio and Nomarchiaki Aftodioikisi Ioanninon, European Court of Justice, (Reports of Cases 2006 I-08135, Case C-158/04).

[30] Criminal proceedings against Jan van de Haar and Kaveka de Meern BV, European Court of Justice, (European Court Reports 1984 -01797, Joined cases 177/82 and 178/82).

[31] Commission of the European Communities v Italian Republic, European Court of Justice, (European Court Reports 1986 -01759, Case 103/84), para. 2.

[32] D. Chalmers et. al., European Union Law Third Edition (Cambridge University Press, 2014).

[33] Apple and Pear Development Council v Commissioners of Customs and Excise, European Court of Justice, (Reports of Cases 1988 01443, Case C102/86).

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imposed by the state.[34] Lastly, the commission and omission regarded as MEQR, in particular, when the State does not actively support measures, but simply refrains from taking actions against them.[35]

However, the ECJ has provided justified derogations in pursuance of EU objectives. There are two possible justifications to challenge these concepts. It may be either the Treaty derogations which are within Article 36 TFEU or either overriding requirements developed in the case-law. Article 36 TFEU sets out public interest grounds that have a priority against other EU values.[36] A restrictive measure could be regarded as suitable for securing the attainment of the objective pursued only if it genuinely reflected a concern to attain that objective in a consistent and systematic manner.[37]

On the other hand, the concept of overriding requirements enables Member States to deviate from MEQR *insofar as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer*[38]. The list of overriding requirements is open ended, therefore, additional areas may be added to the list that help to achieve EU objectives.

It is essential to note that the ECJ set out the protection of the environment as essential to the list.[39] On the other hand, it is acknowledged that the support schemes, in particular, the increase of renewable energy production capacity, helps to protect humans, animals and plants that are enlisted in the Article 36 of TFEU as public interest grounds.[40] In terms of support schemes, national measures functioning as support schemes are attributed to the areas of environment protection and public interest of human health.[41] Respectively, dual justification of measures that restrict free movement of goods may be applied.

In either case, the public interest grounds in Article 36 TFEU and the MEQR must be proportionate to the objective pursued. Whether the measures are proportionate the court determines on the case by case basis. The principle of proportionality requires for the measures to *be appropriate for ensuring attainment of the objectives pursued and must not go beyond what*

[34] Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) — Technisch-Wissenschaftlicher Verein, European Court of Justice, (Reports of Cases published in the electronic Reports of Cases, Case C-171/11) para. 25 and 26.

[35] Commission of the European Communities v French Republic, European Court of Justice, (European Court Reports 1997 I-06959, Case C-265/95).

[36] Treaty establishing the European Community (OJ C 325 2002 p. 47), art. 30.

[37] Commission v Austria, European Court of Justice, (Reports of Cases 2011 I-13525, Case C‑28/09), para. 126.

[38] Radlberger Getränkegesellschaft mbH & Co. and S. Spitz KG v Land Baden-Württemberg, European Court of Justice, (Reports of Cases 2004 I-11763, Case C-309/02), para. 75

[39] supra note, Case C‑28/09, para. 120.

[40] PreussenElektra AG v Schhleswag AG, in the presence of Windpark Reußenköge III GmbH and Land Schleswig-Holstein, European Court of Justice, (Reports of Cases 2001 I-02099, C-379/98), para. 75.

[41] D. Fouquet, A. Guarrata, Judgement of 1st of July 2014 in Ålands vindkraft AB v Energimyndigheten, Renewable Energy Law and Policy Review 52, 59 (2014), p. 55.

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is necessary in order to attain that objective.[42] With regard to support schemes the recent case-law suggests that measures are proportionate as long as they are market orientated.[43]

The EU law prohibits not only obstacles to imports, but exports likewise.[44] As a condition for the article to be applicable, the measures should have direct effect. Provided that the measure had not directly imposed quantitative restrictions on exports, it would not be regarded as constituting a MEQR on exports.[45] Up to now, there has been no case-law practice regarding export issues, therefore, the prohibition to obstruct export in terms of renewable energy is more of theoretical and not practical in nature.

RENEWABLE ENERGY SUPPORT SCHEMES

General Findings

It is noteworthy that the support of RE is directed to the production and not the consumption. Respectively, the Member States are assigned to reach quotas obligation in terms of percentage produced from RES in the overall production. In addition, support of RE production is important, because according to the case-law the objective of environment protection to reduce greenhouse gases can be achieved most satisfactory in the production stage.[46] Though, the support schemes have to fulfil later requirement in order for them to be in accordance to the EU law. In the most recent case-law the ECJ stated that support schemes which do not give direct support to producers, but are indirect, uncertain and risky nature, are not justified under EU law.[47]

Due to their application in the installation phase, support schemes can be separated into few groups. One group subsidizes investments and another operation costs. Operational support measures are divided into instruments which fix a quantity of renewable energy to be produced and instruments that fix a price to be paid for renewable energy.[48] This approach for the distinction is the most widely accepted among researchers. However, another approach is to make a distinction between market-based and regulated instruments. Even though they have some similarities, the former approach is more concerned with the framework of support schemes, while the latter is related to the characteristics of the existing energy supply system, structure of

[42] Ålands vindkraft AB v Energimyndigheten, European Court of Justice, (Case C-573/12) para. 76.

[43] Geert Van Calster, Climate Change and Renewable Energy as a Super Trump for EU Trade Law, 2014 Renewable Energy L. & Policy Rev. 60, 66 (2014).

[44] Kakavetsos-Fragkopoulos AE Epexergasias kai Emporias Stafidas v Nomarchiaki Aftodioikisi Korinthias, European Court of Justice, (Reports of Cases 2011 I-00915, Case C‑161/09), para. 22.

[45] Id., para. 26.

[46] Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt, European Court of Justice, (Cases C-204/12), para. 98.

[47] Essent Belgium NV v Vlaams Gewest and Others, European Court of Justice, (Case C-492/14), para. 116.

[48] A. Johnston, G. Block, EU Energy Law, (Oxford University Press, 2012), p. 332.

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the political system and the EU membership.[49] This type of approach for analyses will not be used owing to the lack of acceptance in the legal literature.

Tradable Green Certificate

The support scheme Tradable Green Certificate (TGC) is a quantity based instrument. It is structured that free market powers would be unleashed, and the benefit of free market would be shared among the significant number of people. The producers of RE participate in the support schemes of TGC and receive a certificate for electricity they produce and later sell them to the suppliers of electricity - on the market or bilateral contracts - or to the Distribution System Operator at a pre-determined price. The suppliers of electricity are obliged to buy the specific number of certificates every year and at the end of the year present to National Regulatory Authority (NRA). The number is determined by taking into account the percentage of the total amount of electricity supplied to consumers. Failing to do that, suppliers are penalized for every certificate which is absent. This system makes a distinction between electricity which is sold on the electricity market and certificates that are sold on a TDS's market. Since electricity produced from renewable energy resources is tradable separately from certificates themselves, the certificate could be defined as a security which is traded on the special market in accordance to supply and demand interaction. On the other hand, electricity and certificates can be sold together on the contract bases.

However, few issues were raised in the application of TGC that must be addressed. Firstly, the concepts of the TGC and the guarantees of origin (GO) use a word *certificates* to identify the document received as a proof of electricity produced from renewable energy installations. Even though they are used in a similar context to identify electricity produced from renewable energy resources, the content of the term *certificate* is different in both concepts and the GO is not a *good* for the purpose of Article 28EC.[50] The GO is used to demonstrate that electricity sold is produced from renewable energy resources,[51] while the TGC is set as a source of financial award for the produced electricity of RE. The issue has been addressed by the ECJ and made the conclusion that the GO issued in the various Member States in accordance with the directive must be distinguished from green certificates used in the context of national support schemes and that they do not, of themselves, confer the right to participate in such schemes.[52] The differences of the main features of the concepts such as objectives and granted rights to the owners of *certificates* establishes clear distinction between the *certificates*.

Initially, the TGC compatibility to the free movement of goods should be examined. On the condition that foreign producers do not receive the TGC or count the TGC towards foreign

[49] L. M. Schaffer, T. Bernauer, "Explaining government choices for promoting renewable energy", Energy policy (2014, vol. 68), p. 25.

[50] Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt, European Court of Justice, (Cases C‑204/12), para. 73.

[51] 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 L 283, 27.10.2001, p. 33–40), art. 5, sec. 2 No longer in force.

[52] Ålands vindkraft AB v Energimyndigheten, European Court of Justice, (Case C-573/12), para. 52.

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quota obligation, it is possible to name the TGC as an obstruction to inter-state trade in electricity. Consequently, strictly national application may be regarded as MEQR. Since electricity is a *good* and the TGC possibly hinders trade in electricity, therefore, a national legislation establishing the TGC must be objectively justified in order to succeed.[53] Some doubts exist whether this support scheme is about trade in electricity or obtainment and trade in the *certificates* of the TGC.

If the design of TGC impeded the principle of free movement of goods, every possible justification should be examined. Though the TGC may be justified on the grounds of public interest or overriding requirements. In the context of the production of RE, the design of support schemes that aim to protect environment, in particular, to reduce greenhouse gases, or to protect health and life of humans, animals and plants may be justified on either of the former grounds.[54]

Lastly, the promotion schemes should be in accordance with the principle of proportionality. In other words, there should be no encumbrance to obtain and trade in the TGC. The requirement for suppliers to obtain the TGC under free market conditions that would not be detrimental to any of them is essential part of this principle, on the other hand, the penalties for the failure to fulfil quota obligation due to possible market imperfections should not be in an excessive manner.[55] The right to obtain should be granted irrespective of nationality, but taking into account the place of the production of renewable energy. Different approach should be taken in terms of trade. Since the TGC can be identified as a security, the trade in them should not be impeded. Any person can trade them and use for any legal purpose, except for foreign quota obligation.

Overall, the principle of proportionality should be examined on case-by-case bases and solely the elaboration of some of the attributes may be distinguished. In the light of EU law, the general framework of TGC seems to be adequate measure as proportionality principal concerns.

Feed-in tariff

In comparison to other support schemes, the Feed-in Tariff (FIT) has an attribute that some researchers distinguish as a separate support scheme that is a Tendering. The Tendering is a competition where investors offer a price per MWh that they can produce from a specific renewable energy resource. Some countries make strict detachment between support schemes that participating in one hinders to take part in other and this trend mostly seen in the context of FIT and Tendering.[56] Furthermore the Tendering may be more advantages in terms of the price reduction of production from RES in comparison to the FIT.[57] However, the most accepted view is that the Tendering is not operating as an independent support scheme, but just as a tool for a price determination.

[53] Ålands vindkraft AB v Energimyndigheten, European Court of Justice, (Case C-573/12), para. 88.

[54] Essent Belgium NV v Vlaams Gewest and Others, European Court of Justice, (Case C-492/14), para. 101.

[55] Ålands vindkraft AB v Energimyndigheten, European Court of Justice, (Case C-573/12), para. 116.

[56] S. Jenner, F. Groba, J. Indvik, "Assessing the strength and effectiveness of renewable electricity feed-in tariffs in European Union countries", Energy policy (2013, vol. 52) p. 386.

[57] P. del Rio, P. Linares, "Back to the future? Rethinking auctions for renewable electricity support", Renewable and Sustainable Energy Reviews (2014, vol. 35), p. 54.

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Member States use different design of the support schemes of RE, but the FIT is the most widely used instrument.[58] It is argued that a well-designed FIT system can be deployed in the shortest time and at the lowest cost for society.[59] The few properties that can be indicated in the design of FIT among all Member States that is priority dispatch to eligible generation, long-term perspective, guaranteed prices for a specific period or for a pre-determined amount of production.[60] The price is established prior to the construction of installation and will vary according to the type of installation. This instrument enables investors better to foresee the return on their investment and to secure the stable income for a defined period.

The FIT possible obstruction to the free movement of goods may exist when producers of RE attempt to receive the FIT for the electricity produced in neighbouring Member State. In this case, the produced electricity and an *award* are so interconnected that possession of one without the other is not possible. The national DSO is not obliged to buy electricity from foreign producers of renewable energy even though interconnection between Member States enables to do so. However, the failure to be eligible to obtain predetermined price by foreign producers may possibly obstruct the supply of foreign electricity to the grid not only from RES, but electricity in general. Provided that foreign producers of RE did not derive any benefit from national FIT, the barriers would be unacceptable for the free trade. Though, territorial limitation following the ECJ logic could be a MQER as far as the support schemes of RE concerns.

With regard to justification, the FIT, following the same logic as in the TGC, may be justified by one of the overriding requirements. They aim the same objective to reduce green gas emissions and consequently to protect environment. Since all support schemes are designed for the same objectives, the environment protection as the ground for justification should be reiterated in all cases.

Lastly, the FIT design should be in accordance to the principle of proportionality. Although all support schemes share the same justification, the question whether they are proportionate should be examined on the case by case bases. It may be assumed that some features can be taken from the TGC framework. Firstly, despite of nationality all producers of RE located in national territory should be eligible to participate in the FIT. Furthermore, the amount awarded to the producers of the renewable energy should be proportionate, otherwise new installations will not be built and fair participation for all actors is obstructed. On the condition that too low tariffs for FIT support schemes were established, participation for smaller actors would have been difficult to adapt to such small threshold. Consequently, some actors could gain benefits while others do not.

The FIT stands quite unfirmly in the face of the principal of proportionality while it leads to suggestion that the FIT design leaves no room for price adaptation to the market based on fluctuation of supply and demand except in case of Tendering.

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[58] D. Fouquet, T. B. Johansson, "European renewable energy policy at crossroads – focus on electricity support mechanisms", Energy Policy (2008, vol. 36) p. 4086.

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[60] L. Kitzing, C. Mitchell, P. E . Morthorst, "Renewable energy policies in Europe: Converging or diverging?", Energy policy (2012, vol. 51) p. 194.

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CONCLUSION

1. The nature of internal electricity market has implications on the renewable energy policies regarding support schemes. Firstly, internal electricity market and renewable energy support schemes have substantial links with regard to objectives and object. Therefore, the developing internal electricity market affects how the frameworks of support schemes have to be designed. Against this background it may be suggested that while they share the same object – electricity – and the same objectives – environment protection – the support schemes will be more and more incorporated into the internal electricity market abandoning current free market imperfections. Secondly, in terms of economical background the development of internal electricity market has a chain of reaction to the renewable energy sector and the design of support schemes. While the emergence of inter-Member States trade may increase production capacity from renewable energy, the occurrence of the economy of scale which enables to have more efficient production of electricity possibly will influence the price of electricity from renewable energy. Consequently, there will be no need to have different support schemes, because disparities between them will fade due to price depletion to the near competitive level.
2. Harmonisation of support schemes on the EU level contributes to the free movement of goods. Support schemes convergence possibly removes any possible obstructions for every person to participate in any support scheme and consequently to the free movement of goods. There are two ways to achieve this convergence - top down and bottom up. Currently, no new proposals were made by legislature to foster top down convergence. However, bottom up convergence despite obstructions due to economic disparities between Member States develops quite substantially. One of the ways to address this issue is to finance renewable energy from EU budget or to establish common fond that distributes money in accordance to production efficiency of installations.
3. The examined support schemes are in conformity with the principle of free movement of goods. The general legal pattern of support schemes laid by ECJ is based on the notion that TGC and FIT have to be designed without disproportionate restrictive measures. These support schemes were chosen for examinations since they are most widely used by Member States. For the purpose of the future of support schemes development it may be suggested that a number of restrictive measures should deplete affected by more joint support schemes or other mechanisms leading to common support in the EU and free trade.

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SANTRAUKA

AR ES ATSINAUJINANČIOS ENERGIJOS PARAMOS SISTEMOS ATITINKA LAISVO PREKIŲ JUDĖJIMO PRINCIPĄ?

Šiuo metu energetikos sektorius susiduria su dideliais iššūkiais siekiant Europos Sąjungoje sukurti vidaus energetikos rinką. Viena iš šios kompleksinės problemos dalių yra atsinaujinančios energetikos skatinimo priemonių integravimas į vidaus elektros rinką. Kadangi atsinaujinančios energetikos skatinimo priemonių suvienodinimas ES kontekste tampa vis aktualesnis, todėl šiame straipsnyje autorius siekia nustatyti, ar atsinaujinančios energijos skatinimo priemonių modeliai ES atitinka laisvo prekių judėjimo principą. Pažymėtina, kad šalys narės nustato skatinimo priemones atsižvelgdamos išskirtinai į nacionalinius interesus, o tai neigiamai veikia tarpvalstybinę prekybą ES atsinaujinančia energija. Atitinkamai, valstybių narių nacionalinis protekcionizmas galimai prieštarauja laisvo prekių judėjimo principui ES. Vis dėlto esama nuostatų ir principų, išimtinais atvejais leidžiančių nukrypti nuo ES pamatinių

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principų. Atsižvelgdamas į atsinaujinančios energetikos reikšmę aplinkosaugai, straipsnio autorius, remdamasis ETT jurisprudencija, daro išvadą, kad tirti atsinaujinančios energetikos skatinimo priemonių modeliai, ribojantys tarpvalstybinę prekybą, yra leidžiami ES.

Energetikos sektoriuje egzistuojančios praktikos, lemiančios skatinimo priemonių konvergenciją, vyksta dviem kryptimis: iš viršaus ir iš apačios. Iš apačios konvergencija vyksta natūraliai ieškant geriausių valstybių narių praktikų kuriant, administruojant ir įgyvendinant užsibrėžtus tikslus. Kita kryptimi vykstančią konvergenciją apibrėžia ES teisėje nustatyti bendro pobūdžio reikalavimai, kurie privalomi visoms valstybėms narėms. Straipsnio autorius manymu, šiuo metu vykstanti dviejų krypčių konvergencija sudaro sąlygas taikyti suvienodintą atsinaujinančios energijos skatinimo priemonės modelį, kuris neprieštarautų laisvo prekių judėjimo principui ES.

Nepaisant to, kad šalys narės turi teisę apsaugoti nacionalinę rinką nuo kitų valstybių narių atsinaujinančios energijos, atsinaujinančios energijos skatinimo priemonių harmonizavimas ES lygiu leidžia užtikrinti tinkamą laisvo prekių judėjimo principo įgyvendinimą. Šiuo metu pastebima vis aiškesnė atsinaujinančios energijos skatinimo priemonių konvergencija iš apačios, ji yra nulemta dalijimosi geriausia praktika tarp valstybių narių. Taigi, tirti dažniausiai naudojami atsinaujinančios energijos skatinimo priemonių modeliai ES – fiksuotas tarifas ir žalieji sertifikatai – neprieštarauja laisvo prekių judėjimo principui. Vienas iš svarbiausių elementų nustatant, ar atsinaujinančios energijos skatinimo priemonės atitinka laisvo prekių judėjimo principą ES, yra šių priemonių proporcingumas.

REIKŠMINIAI ŽODŽIAI

Energetika, Europos Sąjungos teisė, atsinaujinanti energetika, laisvas prekių judėjimas, skatinimo priemonės.