UNIVERSITY OF GOTHENBURG
SCHOOL OF BUSINESS, ECONOMICS AND LAW

Think Glocally, Discriminate Internally?

State Discretion, Renewable Electricity Schemes, and the Internal Market in the Context of Articles 34-36 TFEU and State Aid Rules

Hunar Aljaderi

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Supervisor: Thomas Erhag

Acronyms and abbreviations

AG	Advocate General
DSO	Distribution system operator
EAG	Guidelines on state aid for environmental protection 2008
ECJ	European Court of Justice
EEAG	Guidelines on state aid for environmental protection and energy 2014-2020
EU	European Union
FIT	Feed-in tariff
FIP	Feed-in premium
GO	Guarantee of origin
RED 2001	Directive 2001/77 on the promotion of renewable electricity
RED 2009	Directive 2009/28 on the promotion of renewable energy
REFIT	Feed-in systems: FIT and FIP
RES	Renewable energy sources
RES-E	Electricity produced from renewable energy sources
TENFIT	Tendering/bidding scheme based on REFIT
TEU	Treaty on European Union
TFEU	Treaty on the functioning of the European Union
TGC	Tradable green certificate
TSO	Transmission system operator

1 Introduction

This essay centres on the relationship between the European Union's (EU) bottom-up approach in respect of national regulatory schemes promoting renewable electricity and core internal market provisions. More specifically, it explores and seeks to delimit the principal scope of state discretion in this regard from the perspectives of how the objectives of the so-called energy trinity – security of supply, sustainability, and competitiveness – are balanced, as well as the interplay between negative and positive integration. Assuming that state discretion cannot be properly conceptualised by way of analysing hard law solely, significant soft law elements that govern – if not strictly regulate – the internal market are methodologically embraced. In the remainder of this chapter, the immediate context and significant concepts are outlined, the problem is stated and the method elaborated.

1.1 Setting the context: energy security

The significance of conventional primary energy sources in the course of history – whether fossil such as oil, gas, and coal or infinite such as nuclear/uranium – can hardly be exaggerated.[1] Energy ultimately satisfies certain human needs. This is perhaps best illustrated by its end usage, following conversion of the primary sources into secondary energy sources such as electricity and petrol, which are generally concentrated to three major sectors of which each roughly accounts for 30 per cent: buildings, manufacturing industry, and transportation.[2] By the same token, energy consumption and energy demand are predicted to grow steadily over the next decades.[3]

Well functioning energy markets ensuring security of supply are thus of fundamental importance for modern societies. Moreover, perceptions of cross-border interdependency and the beneficial case of economic integration necessitate co-ordination at an international level. Nevertheless, the energy sector is highly characterized by governmental intervention.[4] Even the petroleum industry, historically exposed to (more) international competition and accordingly widely considered as a notable exception to the view put forth,[5] is to a large extent characterized by governmental intervention, both by way of the concession systems employed by producing states[6] and the eagerness of the importing states to maintain the advantageous relationships established in previous decades with the former states.[7]

At a general level, the rationale for intervention and state control can be traced back to sovereignty considerations related to the availability, reliability and affordability of energy services of which all ultimately refer to the broader

[1] For a general and brief account, see Smil 1994:chapter 1, 5 and 6 and Zillman et al 2012:3-6
[2] Blok 2007:45. These estimates on end use sector shares are not universal, not least since some 2-3 billion people lack access to secondary energy sources, see for instance Cherp and Jewell 2011:7.
[3] See for instance Davide Farah and Rossi 2011:232f.
[4] See for instance Cameron 2002:5, Lundgren et al 2013:15.
[5] See for instance Cross, Hancher and Slot 2001:295.
[6] Such as exploration and production agreements or licences. See Parra 2004:8f to that effect and Flanagan 2012:278ff on the characteristics and functions of governmental licensing.
[7] Haghigi 2008:478.

and traditional concept of energy security.[8] Although the broadness of the concept also makes it notoriously nebulous and subject to divergent usage,[9] the mainstream definition of the International Energy Agency (IAE) of energy security as the uninterrupted availability of energy sources at an affordable price seems commonly accepted.[10] At the bottom of all these considerations, however, lies the strategic role of energy pertaining to the very notion of a state: military capacity and economic development.[11]

The tension between the desire of functioning energy markets as well as international regulation[12] and state intervention is not least illustrated by the EU. While the very origin of the EU, through the establishment of the European Coal and Steel Community (ECSC)[13] 1951 and to a lesser extent the European Atomic Energy Community (EUROATOM)[14] 1957, explicitly recognized the significance of integrating approaches towards certain energy sources, "the integration process has never developed so far as to lay the foundations for a fully fledged and coherent common energy policy, which has instead become one of the weakest policy areas to date."[15]

On the European level as in most member states, the energy policy nowadays is formulated so as to achieve the "energy trinity"[16] the substance of which is roughly illustrated by the title of the Commission's Green Paper from 2006: *A European Strategy for Sustainable, Competitive and Secure Energy*.[17] With the adoption of the Lisbon Treaty, this policy was formalized and the trinity for the first time elevated to a legal basis for secondary legislation.[18] Apart from promoting the interconnection of energy networks, EU energy policy shall pursuant to article 194(1) TFEU aim to 1) ensure the functioning of the energy market, 2) ensure security of energy supply in the Union, and 3) promote energy efficiency and energy saving and the development of new and renewable forms of energy.

In line with the general observations above, neither the Treaties nor secondary legislation provide for an adequate definition of security of energy

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[8] See for instance Elkind 2010:121-128, Cameron 2001:5ff, Delvaux 2013:3, Buchan 2009:209.
[9] See for instance Cherp and Jewell 2011 and 2014. One may therefore argue, as noted for instance by Larsson 2006:13, that apart from encompassing the narrower concept of security of supply, the actual meaning of energy security depend upon the actor perspective – the producer, importer or consumer – deployed, which corresponds to the example of producing and importing states above. Moreover, as illustrated by Cherp and Jewell 2011, different academic disciplines with appurtenant ontologies that evolved from different empirical events emphasize different threads within the concept, such as sovereignty, robustness and resilience.
[10] At least for introductory and practical reasons, see Haghigi 2008:461 who though replaces uninterrupted availability for adequacy and affordable for reasonable.
[11] This is not a matter a fact but rather a question of perspective and ontology. An emphasis on ultimately sovereignty and resilience, when related to view put forth by Cherp and Jewell 2011, are ontologies pertaining to the fields of political science and economics, respectively.
[12] See for instance Krieger, de Boer and Steeg 2001:98f paras 3.02 and 3.05.
[13] See for instance Krieger, de Boer and Steeg 2001:149f.
[14] See for instance Krämer 2011:381 para 11-23, Krieger, de Boer and Steeg 2001:150f.
[15] Morata and Solorio Sandoval 2012:1. See also Delvaux 2013:44 paras 134-135, 137 and Krieger, de Boer and Steeg 2001:141 para 3.98.
[16] Ringel 2006:4. See also Morata and Solorio Sandoval 2012:2, Van Hende 2011:67.
[17] Commission 2006. See also Delvaux 2012:15ff, 30ff para 86.
[18] Van Hende 2011:56, Morata and Solorio Sandoval 2012:2f. Compare Delvaux 2013:343 para 975 according to which the objectives only partly are inserted into article 194 TFEU.

supply.[19] In the context of electricity, Directive 2005/89 concerning measures to safeguard security of electricity supply and infrastructure investment defines under article 2(b) security of electricity supply as "the ability of an electricity system to supply final customers with electricity". Clearly, this definition lacks guidance on the crucial question of whether supply is sufficient at any price or whether it must be affordable.[20] In this regard, though on a general non-binding European level, the Commission has opted for a broader concept of security of supply aimed to ensure "the uninterrupted physical availability of energy products on the market, at a price which is affordable for all consumers (private and industrial)."[21]

However, under the second subparagraph of article 194(2) TFEU, member states are entitled to three highly interrelated prerogatives, namely the right to "determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c)." The first right comprises national policies regarding the exploitation of primary conventional energy sources that are important for the production of energy in most member states, such as oil, natural gas and uranium,[22] but does not in my view preclude renewable energy sources (RES).[23] The second right refers to the power of a member state to unilaterally determine which kind of energy sources it will use to cover its demand for energy,[24] which reinforces the perception that the responsibility for energy security to a large extent – if not de facto exclusively – remains within the ambit of state discretion.[25] The third right refers to the power of a member state to organise the system of its energy supply and comprises the right to decide both which energy mix or sources it will use and which energy infrastructure it will employ. A further and highly significant example in this context is a member states' option to set a target for renewable energy sources (RES).[26]

The rights enshrined in article 194(2), both in themselves and – as will be illustrated below – together with article 192(2)(c), set potentially far-reaching constraints on EU's ability to exercise legislating competence in the matters concerned.[27] They illustrate at the very least the continuing conflation of energy security into traditional sovereignty concerns, which constitutes the legal point of departure for any explanation of why EU energy policy is destined to be weak.

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[19] Delvaux 2013:337 para 961.
[20] See for instance Delvaux 2013:337.
[21] COM 2000:executive summary. See also Delvaux 2013:338 para 963.
[22] Delvaux 2013:259 and 345, para 739 and 983 respectively.
[23] See for instance AG opinion para 109 in Case C-573/12 *Ålands vindkraft* according to which the provision in article 191(1) TFEU on the "prudent and rational utilisation of natural resources" is relevant for RES.
[24] Delvaux 2013:345 para 984.
[25] This is also illustrated by the current applicable Directives concerning common rules for the internal market in natural gas and electricity which in the face of crisis situations provide the possibility of unilateral withdrawal from the obligations aimed to improve and integrate the energy markets within the Union pursuant to article 42 and 46 respectively. See also Delvaux 2013:335 para 955.
[26] Delvaux 2013:345 para 985.
[27] Johnston and van der Marel 2013:198. See also van Hende 2011:57-59.

1.2 Updating the context: climate change

Emissions of greenhouse gases (GHG), especially carbon dioxide (CO2), are inevitable at both the extraction and consumption phase of fossil energy sources.[28] Increasing concentrations of GHG and particularly of CO2 in the atmosphere due to human-induced activities is by an almost unanimous international community considered as the main cause of global warming and climate changes.[29] Globally, finite energy sources account for more than half of the GHG-emissions.[30] Within EU almost 80 % of the GHG-emissions stem from the energy sector.[31]

Climate change raises several critical questions, inter alia, on intergenerational equity, global justice, international security, and – being described as "the greatest and widest-ranging market failure ever seen"[32] – the legitimacy of free trade.[33] First and foremost, however, climate change targets the energy sector "both as a source of the problem and as a part of solutions for adaption and mitigation".[34] The traditional notion of energy security is thus being redefined, at least academically. States do no longer only have immediate sovereignty interests in the availability, reliability and affordability of energy services, but also in their sustainability, as a mode of both mitigating climate change by decreasing GHG-emissions and adapting to it by protecting energy systems from severe impacts of climate change.[35] Secondly, the international and strategic regulatory approach often needed but seldom agreed upon in the energy sector is a prerequisite for successful climate change mitigation due to its delocalized and long-term effects as well as its character of being a market failure giving rise to the free rider problem.[36]

The international climate change regime – based on the United Nation's Framework Convention on Climate Change (UNFCCC) and the subsequently adopted Kyoto Protocol – respond in a differentiated manner to the demands and questions raised. The aim of the UNFCCC,[37] which the Kyoto Protocol pursues,[38] is to stabilize GHG-concentrations in the atmosphere at a level preventing dangerous anthropogenic interference with the climate system. To this end, the Kyoto Protocol sets legally binding GHG-emission targets.[39]

EU and its member states have acceded to UNFCCC and the Kyoto protocol[40] and are committed to reduce GHG-emissions with 21 % (compared to the base year 1990) during the second commitment period 2013-2020.[41] Externally, EU has indeed repeatedly pursued the role of international leadership

[28] See for instance Redgwell 2007:120 para 1.191, Olsen Lundh 2010:86-88.
[29] See for instance IPCC 2007, Olsen Lundh 2010:91ff, Massai 2012:10f, Sands, Peel, Fabra and Ruth 2012:274f, Hackett 2011:266f.
[30] See for instance European Parliament 2008:1-2.
[31] Commission 2010:2. See also Nielsen and Jeppessen 2003:3.
[32] Kaur 2009:270.
[33] Epps and Green 2010:3ff, 18-26.
[34] Redgwell 2007:120.
[35] Elkind 2012:120-122, 128f
[36] Wiener 2007:1964, 1967, Olsen Lundh 2010:171. See also Lord, Goldberg, Rajamani and Brunnée 2012:26f.
[37] Article 2.
[38] Preamble.
[39] Article 3.
[40] See for instance Krämer 2011:84 para 2-90.
[41] Danish Presidency of the Council of the European Union 2012.

in the context of climate change policies.[42] Internally, several directives related to climate change mitigation have been adopted. The current EU climate and energy package set three key objectives for 2020, known as the 20-20-20 targets, namely 1) a 20% reduction in EU GHG emissions from 1990 levels, 2) raising the share of EU energy consumption from RES to 20%, and 3) a 20% improvement in the EU's energy efficiency.[43] The two instruments related to the second objective, historically as well as currently, are the directives on the promotion of the use of energy from renewable energy sources (RES), setting primarily an indicative and subsequently binding target on the amount of RES in the gross final national consumption of energy and electricity, respectively: Directive 2001/77 (RED 2001) which has been repealed by Directive 2009/28 (RED 2009) currently in force.[44]

Apart from pursuing technological innovation with the associated benefits on economy and employment, both RED directives are underpinned by two policy considerations.[45] Firstly, as established above, renewable energy production displaces fossil based energy and thus contributes directly to the reductions of GHG. Secondly, as the reduced consumption of fossil energy improves the trade balance and diversifies Europe's energy supplies both in terms of the energy developed and the sources used, energy security concerns are pursued, especially when – which is often the case – the RES are domestic.[46] These two policy considerations on a secondary law level are clearly interrelated with the primary legal basis for EU energy legislation under article 194(1)(b-c) TFEU and crucial aspects of the energy trinity contained therein.

The adherence to the UNFCC and the subsequent Kyoto Protocol[47] as well as the adoption of both RED's was, however, based on article 192(1).[48] This provision prescribes the ordinary legislative procedure (OLP) based on qualified majority voting (QMV) under article 294 TFEU when measures are taken to achieve any of the four specific[49] EU environmental policy objectives under article 191 TFEU. Those are 1) preserving, protecting and improving the quality of the environment, 2) protecting human health, 3) prudent and rational utilisation of natural resources, and 4) promoting measures at an international level to deal with regional or worldwide environmental problems, and –

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[42] See for instance Kingston 2013:966f, Jordan and Rainer 2010:77.

[43] For an overview, see http://ec.europa.eu/clima/policies/package/index_en.htm. See also Kulovesi, Morgera and Munoz 2011:832.

[44] Article 1, Directive 2009/28. Compare article 1 to the repealed directive that focuses on RES of "the electricity production". However, since the end use of energy – that is, final consumption in the terms of the new directive – comprises electricity use, the difference, for my purpose, is of small relevance. The significance of the different wording is rather related to the fact that biofuels, under the immediate category of final consumption or end use, are comprised in the new directive and this was not the case in the repealed directive.

[45] See recital 1 RED 2009, Hildingsson, Stripple and Jordan 2010:103, 108. Compare Nielsen and Jeppesen 2003:3 who omit the technology innovation objective.

[46] See for instance Kulovesi, Morgera and Munoz 2011:974, Hildingsson 2009:113.

[47] Krämer 2011:84 para 2-90.

[48] Some of the provisions in the latter RED directive, namely those concerning biofuels under articles 17, 18, and 19, were however based on article 114 as the legal basis for adopting measures pertaining to the field of internal market. See the preamble of RED 2009. See also Peeters 2014:46.

[49] The specificity is to be understood in contrast to the general environmental objectives enshrined under article 3 TEU. See Krämer 2011:8 and 13, para 1-10 and 1-15 respectively.

following the Lisbon Treaty[50] – in particular combating climate change. The procedural requirements in the OLP are also applicable in regard of the EU energy policy objectives pursuant to article 194(2) subparagraph 1, provided however that the proposed measure does not interfere with any of the three member state prerogatives previously described.

Given the immediate interrelationship between in particular the third and fourth environmental objective, at the one hand, and at least the sustainability and perhaps also the energy security objective within the energy trinity,[51] at the other hand, it might at first sight seem that the former provides a loophole circumventing the member states immediate sovereignty and energy security interest recognized under article 194(2) second subparagraph.[52] However, as follows from the latter provision, the member state energy prerogatives are "without prejudice to Article 192(2)(c)." This provision prescribes, by way of derogation from the OLP, unanimity under a special legislative procedure (SLP) in respect of legislating "measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply." Conceptually, both of these choices correspond to two of the energy prerogatives under article 194(2). Substantially, a threshold is indicated insofar that unanimity is required only when either choice is significantly affected.

In spite of being highly significant, the interrelationship between article 194(2) and 192(2)(c) TFEU is not settled.[53] In particular, it remains unclear whether all renewable energy matters are now to be governed by article 194 or 192 TFEU.[54] For the purposes of this essay, however, there is no (direct) need to settle the relationship. The point to be made is rather that any attempt on part of the EU to directly regulate energy produced from RES, such as the RED directives, can more (article 194) or less (article 192) be easily obstructed by the member states. The fact that the latter RED directive actually was adopted largely on basis of the then existing – as opposed to the recently inserted article 194 TFEU – article 192(1) TFEU under the OLP does not invalidate the point made, since all Member States voted in favour of the adoption and the Council practically adopted the directive unanimously whereby no formal objection rose as to the choice of OLP instead of SLP.[55]

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[50] See for instance Peeters 2014:42.

[51] It should be noted, again, that albeit being an unclear concept, energy security is increasingly defined so as to include some environmental criteria. Thus, the definition provided by the Commission above, though non-binding, goes on and include the compliance of environmental requirements.

[52] Given the market failure triggered by the energy sector under the traditional state-centred approach the latter of which is partly recognized under article 194(2), one could for instance question whether the traditional notion of sovereignty is practically compatible with the prudent and rational utilisation of natural resources at all.

[53] See for instance Delvaux 2013:346f paras 987-994 and Johnston and van der Marel 2013: 197f.

[54] See for instance Calliess and Hey 2013:95 and Peeters 2014:46. The former argue that instead of holding that article 194 is lex specialis, which most authors are considered to hold, the better view is that article 194 "solely empowers [EU] to promote the technological development of renewable energies, whereby any economically or ecologically motivated support henceforth is governed by environmental regulations" i.e. article 192.

[55] Peeters 2014:43. On the reasons why UNFCC/KP was adopted on the basis of 192(1), see Krämer 2011:84 para 2-90. See also Hannon 2010:7 and Delvaux 2013:275 para 786 who concludes that RED 2009 should have been adopted on the basis of unanimity under the special legislative procedure. It seems that at least Hannon, compare Delvaux 2013:275 para 787,

The concept of *glocalisation*, defined as the oscillation of regulatory forces between the global and local level, [56] is a telling description of the interests involved. Global, at the one hand, due to the delocalised and market failure features of climate change which calls for solutions beyond the realm of national sovereignty. Local, at the other hand, by reason of the locality of the installations giving rise to GHG-emissions the regulation of which to a significant extent are dependent upon states (formal) approval.

1.3 Specifying the context: national RES-E schemes

1.3.1 RES-E

As previously mentioned, RED 2009 primarily establish a mandatory target of 20% in respect of energy from renewable sources in the overall Community gross energy consumption by 2020.[57] Renewable energy sources – RES – are defined as "energy from renewable non-fossil sources, namely wind, solar, aerothermal, geothermal, hydrothermal and ocean energy, hydropower, biomass, landfill gas, sewage treatment plant gas and biogases".[58] Such a definition clearly suggests that RES are indigenous energy resources and potentially available for exploitation in any region, which also have been confirmed by the Commission.[59] However, due to national variations in respect of both renewable energy potential and energy mix, the Community target is translated into individual targets for each Member State.[60] Moreover, the target is subject to a sectorial differentiation where the gross final consumption of energy is calculated as the sum of 1) electricity from RES (RES-E), heating and cooling from RES (RES-H and RES-C, respectively), and 3) energy from RES in transport (RES-T).[61]

In spite of recent policy developments in support of RES-T, member states have so far primarily directed their attention to the development of RES-E.[62] In the context of RES-E, the sectorial breakdown implies that EU need to more than

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presupposes that the material provisions leading to the SLP should be automatically upheld even in the absence of explicit state action to that effect, which in my opinion is somewhat strange given the background of bargaining and compromising that assumingly is inherent in any attempt to adopt secondary legislation and where states submit their interests. For examples of actual conflicts and considerable intergovernmental bargaining surrounding the adoption of RED 2009, see for instance Toke 2008:3006, Calliess and Hey 2013:115. For tensions preceding the adoption of RED 2001, see for instance Lauber 2004:1405f, Jansen and Uyterlinde 2004:97f, and Rowlands 2005.

[56] Neuwirth 2010:3.

[57] Recital 9 and 13 RED 2009. Under article 2(f) gross final consumption of energy is defined as the energy commodities delivered for energy purposes to industry, transport, households, services including public services, agriculture, forestry and fisheries, including the consumption of electricity and heat be the energy branch for electricity and heat production and including losses of electricity and heat in distribution and transmission.

[58] Article 2(a) RED 2009. A few of those are defined in the same article. This definition corresponds largely to the definition of RES under article 2(30) of the Electricity Market Directive 2009.

[59] Commission 2008:13. See also Fouquet 2013:16.

[60] Recital 15 and article 3 RED 2009.

[61] Article 5 RED 2009. It should be noted, however, that pursuant to article 3(4) RES-T is subject to a specific regionally non-differentiated target according to which each member state shall ensure at least 10% of the final consumption of energy by 2020. For the rationale, see recital 16.

[62] van Hende 2011:55. See also Kitzing, Mitchell and Morthorst 2012:193.

double the share of 16% in 2006 to over 30% by 2020 in order to reach its overall target.[63] Indeed, the share of RES-E accounted for 14.1% in 2007, seemingly providing only a marginal increase from 12.8% in 1997. However, this – as well as the gratitude of the overall challenge to increase the share of RES-E – has to take into consideration, firstly, the fact that the electricity consumption has increased and will continue to increase, and, secondly, that climatic conditions change and interfere with RES-E generation, such as the actual decrease of rainfall highly relevant for hydropower based generation.[64] Since many RES technologies are in fact electricity-producing generators, the electricity sector is the prime contributor to the production of renewable energy.[65] For those reasons this essay focuses on RES-E.

1.3.2 The national RES-E schemes

Neither RED 2001 nor RED 2009 prescribe explicitly for directly supportive measures in order to meet the targets. Some kinds of measures are however presupposed by reason of the targets set. According to recital 27 to RED 2009, public support is necessary to reach the objectives with regard to the expansion of RES-E, "in particular for as long as electricity prices in the internal market do not reflect the full environmental and social costs and benefits of energy sources used." In respect of the form and substance of the support rendered, member states are at first sight granted a considerable amount of discretion. This is not least illustrated by the open-ended definition of a support scheme under article 2(2)(k), which comprises:

> [A]ny 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.

The fact that the RED 2009 provides for an open ended definition of support schemes, hence leaving it seemingly open for substantial state discretion, was preceded by fierce conflict over which support schemes are appropriate in the first place with regard to the policy objectives surrounding this area of law.[66] Basically, the conflict centred on the level and substance of harmonisation preferred in respect of RES-E support schemes and where the member states, as illustrated by the outcome, succeeded to safeguard their national support schemes.[67] Significantly, these issues were also highly contentious in the course of adopting RED 2001.[68]

Indeed, even prior to international (i.e. UNFCCC) and also supranational (i.e. EU secondary legislation) to that effect, several European states by own

[63] Jäger-Waldau, Scarlat and Monforti-Ferrario 2011:3705.
[64] Haas et al 2011:1005.
[65] See for instance Fagiani 2014:3.
[66] Calliess and Hey 2013:115.
[67] See for instance Fouquet and Johansson 2008:4079, Lauber 2011:125.
[68] See for instance Dupont 2013:110.

means – unilaterally – adopted support schemes with the aim of promoting RES-E. In general and in line with the two step context previously outlined, the early development of policy support in the 1980s was mainly aimed to improve the secure supply by the substitution of fossil fuels while the 1990s and 2000s saw environmental targets as being equally important.[69] Some of the adopted support policies has subsequently been abandoned in favour of new promoting policies and regulatory designs, while other have been furthered in view of the learning process associated with the multifaceted and complex objectives and technologies underlying these schemes.

The network infrastructure linking electricity producers and consumers together and in which all RES-E support schemes operate, though in a different and more or less industrially embedded manner, is commonly subdivided into at least three sectorial categories or phases: generation, transmission, distribution.[70] At a first stage, often called upstream, the producer/generator connect the electricity generated to the grid. In essence, the grid consists of two infrastructures: the transmission system and the distribution system.[71] The former, managed by the transmission system operator (TSO)[72] and sometimes referred to as midstream by virtue of carrying electricity to the distribution system, consist of transmission lines of extra high-voltage networks designed to transmit over a long distance and to cover the entire territory of a state.[73] As such, they can be described as national energy highways.[74] In contrast, the distribution system managed by the distribution system operator (DSO) and often referred to as downstream, is constituted of high-voltage, medium-voltage and low-voltage lines with a view to local delivery of the electricity to customers.[75] Traditionally, transportation of electricity usually went trough all these systems due to large-scale and centralised generation. However, the characteristics of RES-E such as small-scale generation installations (up to 10 mega watt, MW) make it, to a large extent, suitable for direct connection to the

[69] Haas et al 2011:1014.
[70] See for instance Mendonca, Jacobs and Sovacoval 2010:xxii, 29, Zillman et al 2012:9, Hancher, Ottervanger and Slot 2012:852.
[71] L'Abbate et al 2008:17.
[72] The Electricity Market Directive 2009/72 defines under article 2(4) a TSO as "a natural or legal person responsible for operating, ensuring the maintenance of and, if necessary, developing the transmission system in a given area and, where applicable, its interconnections with other systems, and for ensuring the long-term ability of the system to meet reasonable demands for the transmission of electricity." Under article 2(3) transmission is defined as "the transport of electricity on the extra high-voltage and high-voltage interconnected system with a view to its delivery to final customers or to distributors, but does not include supply."
[73] See for instance Zillman et al 2012:10 and L'Abbate, Fulli, Starr and Peteves 2008:17. It should be noted that this is a somewhat simplified description. Pursuant to the definition of transmission in Electricity Market Directive article 2(3), it comprises delivery to both distributors and final customers the latter of which, according to article 2(9) compared with 2(10), purchases electricity for own commercial use.
[74] Zillman et al 2012:10.
[75] The Electricity Directive 2009 defines under article 2(6) a DSO as "a natural or legal person responsible for operating, ensuring the maintenance of and, if necessary, developing the distribution system in a given area and, where applicable, its interconnections with other systems and for ensuring the long-term ability of the system to meet reasonable demands for the distribution of electricity." Article 2(5) defines distribution as "the transport of electricity on high-voltage, medium-voltage and low-voltage distribution systems with a view to its delivery to customers, but does not include supply."

distribution system, omitting the interconnection to the intermediate transmission midstream system.[76] This decentralised feature of RES-E transportation also makes the economy less vulnerable to the volatility of energy supply.[77]

Currently, four principal regulatory RES-E support schemes are employed in the EU 27 member states: the feed-in system (REFIT) consisting of either a 1) tariff (FIT) or 2) market premium (FIP) mechanism, the 3) tendering/bidding/auction system for long-term contracts (TENFIT) and 4) the tradable green certificate system (TGC).[78] The reason for characterizing these schemes as principal is that every member state employ at least one of them as the main economic incentive provided for RES-E deployment.

In contrast to investment focused schemes that provide awards for the initial investment on the supply side regardless of how much electricity is generated, these four support instruments are largely[79] *generation based* insofar that the awards rendered are proportional to the actual electricity generated.[80] Hence, albeit applying different mechanisms, they directly aim to increase the production of RES-E and encourage market creation (i.e. supply and demand). The main dividing line between these support systems relates to whether the price or the quantity of RES-E is to be set by the regulator or decided by the market.[81]

1.3.2.1 REFIT

The basic elements of REFIT typically comprise 1) guaranteed or prioritized access to the grid in respect of the RES-E generated and 2) long-term framework conditions providing for 3) more or less guaranteed electricity purchase prices.[82] As a result, investment security is sought assured. Taking into account that

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[76] See for instance L'Abbate et al 2008:14, Delgado Piqueras 2012:673, Glachand and Ruester 2014:4. Under article 2(31) of the Electricity Directive 2009 this is described as distributed generation (DG).

[77] Commission 2008b:3.

[78] Kitzing, Mitchell and Morthorst 2012:194, del Rio and Mir-Artigues 2014:288, Rowlands 2005:971, Gunst 2005:102f, Jansen and Uyterlinde 2004:100fand. Compare Reiche and Bechberger 2005:28, Reiche 2003:19, Fouqouet and Johansson 2008:4080, Munoz, Oschmann and Tabara 2007:3105, Ringel 2006:6, Hass et al 2004:834, Couture and Gagnon 2010:956 who often omit to mention TENFIT, perhaps for reasons of similarity with REFIT. It should perhaps also be mentioned that TGC schemes are commonly described as renewable portfolio standards (RPS) in U.S and Japan, see e.g. Haas et al 2011:1011f, Abolhosseini and Heshmati 2014:881, Lauber 2004:1407f.

[79] As illustrated by de Jager et al 2011:224-226 and in particular Thieffry 2014:287, the line between investment and operating costs is a fine one and difficult to maintain from the perspective of business operators whose business plans integrate both variables. Analytically, however, they are easily distinguished.

[80] See for instance Poullikkas, Kourtis and Hadjupaschalis 2012:558, Haas et al 2011:1012, Abolhosseini and Heshmati 2014:877. For an easily accessible overview over renewable schemes in general, see http://www.greenrhinoenergy.com/renewable/context/incentives.php. As will be seen below, the distinction between investment and generation/operation support is highly relevant in the context of state aid regulation. See for instance Kaur 2009:283.

[81] See for instance Menanteau, Finon and Lamy 2003, Hass et al 2004:834, Abolhosseini and Heshmati 2014:881, 884, Haas et al 2011:1011f.

[82] See for instance Hart 2010:57, Kitzing , Mitchell and Morthorst 2012:194, Wilke 2011:1; Mendonca, Jacobs and Sovacool 2010:xxi, Fouquet and Johansson 2008:4080. In respect of prioritized access, see Cameron 2002:148 para 4.14 and Heine 2001:95 on the mandate in the first Electricity Directive.

natural conditions and availability of different RES's differ widely among member states, the national regulator may be inclined to limit the support towards certain eligible RES-E technologies.[83] In spite of some small-scale efforts to incorporate foreign RES-E under the support concerned, REFIT schemes are almost exclusively national to the effect that they support domestic RES-E generation only.[84]

Commonly, the national regulator differentiates the fixed prices according to the generation costs involved in different RES-E technologies (e.g. less mature technologies can be more expensive) as well as the size of a given technology (e.g. larger plants are generally less expensive).[85] In particular, the price is determined according to market-independent tariff mechanisms (feed in tariffs, FIT) and/or market-dependent premium mechanism (feed in premiums; FIP). Under the former design, the RES-E producers are typically exempt from market participation and receive the guaranteed price upon the delivery to the grid-operator who in turn will market the electricity. Legally, this is achieved by imposing a purchase obligation upon the nearest grid operator, either the TSO or DSO,[86] but even other actors can be obliged. Under a FIP in contrast, the RES-E producers compete with other (RES as well as grey/non-RES) producers to meet market demand whereby the remuneration received consists of a guaranteed premium added to the market price.[87] Since the market price fluctuates, FIP mechanisms expose producers to a higher market risk and a lower investment security.[88]

REFIT policies are financed either by governmental resources (through taxes or the general state budget) or, and to a significantly higher and increasingly degree, by way of passing on the additional costs directly to the consumer base.[89] For the latter purpose, the national TSO is typically designated to aggregate all additional costs involved and to divide the sum by the total amount of RES-E produced. Consequently, the additional costs are passed on to final consumers, either depending or not depending on the amount of electricity consumed.[90]

In summary, REFIT schemes are price-driven insofar that the price is regulated but the quantity decided by the market.

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[83] See for instance Reiche and Bechberger 2004:844, Mendonca, Jacobs and Sovacool 2010:16f.
[84] See for instance Mendonca, Jacobs and Sovacool 2010:17f and Jansen and Uyterlinde 2004:100.
[85] Mendonca, Jacobs and Sovacool 2010:26f.
[86] Kitzing 2012:194. See also Mendonca, Jacobs and Sovacool 2010:26f and Couture and and Gagnon 2010:956. It should be noted that this is just one, though original, pricing design and several other exists under the FIT classification.
[87] See for instance Couture and Gagnon 2010:956, Kitzing, Mitchell and Morthorst 2012:194f, Fouquet and Johansson 2008:4080, Ringel 2006:6, Munoz, Oschmann and Tabara 2007:3105. As in particular Couture and Gagnon points out, there are several different implementations of FIP designs.
[88] See for instance Mendonca, Jacobs and Sovacool 2010:40.
[89] See for instance Held et al 2013:12f, Mendonca, Jacobs and Sovacool 2010:28f, 61 and Ringel 2006:6. Financing through government resources can however be seen as passing on the costs indirectly, e.g. through taxes.
[90] Mendonca, Jacobs and Sovacool 2010:29, van der Linden 2004:26, Jansen and Uyterlinde 2004:100.

1.3.2.2 TGC

The basic elements of TGC systems are 1) that RES-E producers receive tradable certificates corresponding to the amount of eligible RES-E supplied to the grid (e.g. 1 certificate for 1 MVH of the eligible RES-E technology), and 2) an obligation upon certain actor categories within the electricity supply chain – typically the suppliers, occasionally the producers and/or large consumers (e.g. electro-intensive industries) – to regularly surrender a certain quantity of certificates i.e. quota obligation corresponding to their total consumption/supply.[91] TGC schemes almost exclusively impose non-compliance penalties upon those not holding the correct amount of certificates at the date of disposal.[92]

Under the first step the national regulator defines the amount of RES-E generation that must be developed at a certain date (e.g. 20 TWH in 10 years), which is then broken down to periodical (e.g. annual) compliance targets for the obliged parties to fulfil corresponding to their consumption.[93] Once the target is defined, a distinct parallel market for environmental value is created on which the certificates become tradable financial assets.[94] As a result, RES-E producers will have two different sources of income: one consisting of the standard market price accruing from the pre-existing market where RES-E producers compete with producers of non-RES-E/grey electricity and therefore are likely to incur losses due to cost disadvantage, the other accruing from the eco-service market at which the certificates are traded at a price (possibly) recovering the loss.[95]

TGC schemes are financed off-budget i.e. by the obliged parties passing on the additional costs to the consumers.[96] TGC schemes are almost without exception national i.e. the promotion aim to increase the RES-E generation within the national territory concerned whereby the certificates are issued for domestic, not foreign, RES-E generation and only domestic certificates can met the quota obligation. A notable exception consists of the joint Swedish and Norwegian TGC scheme where certificates issued in one country can be used to fulfil the quota obligation in the other country.[97]

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[91] See for instance Jacobsson et al 2009:2144, Poullikkas, Kourtis and Hadjupaschalis 2012:564, Verhaegen, Meeus and Belmans 2009:209, Amundsen and Nese 2009:904, 917f, Lind and Rosenberg 2014:10, Fouquet and Johansson 2008:4080, Nielsen and Jeppessen 2003:4, Ringel 2006:8, Haas et al 2011:1012 and 1022 Kitzing, Mitchell and Morthorst 2012: 195. Rarely, see for instance Jansen and Uyterlinde 2004:101 and 106, the quota obligation is set upon electricity generators.

[92] Haas et al 2011:1021, Kitzing, Mitchell and Morthorst 2012:195.

[93] See for instance Haas et al 2011:1014, Munoz, Oschmann and Tabara 2007:3105, and Swedish Ministry of Sustainable Development 2006.

[94] Haas et al 2011:1014, Verhaegen, Meeus and Belmans 2009:209, Nielsen and Jeppesen 2003:4.

[95] Ringel 2006:8.

[96] Held et al 2013:12f, though pointing out that Belgium, a TGC deploying country at both the federal and the regional level, partly use state budget resources for bearing the additional costs of RES-E support. However, as follows from the account in respect of Belgium by Verhaegen, Meeus and Belmans 2009:214, the federal state budget provides funding under certain circumstances only and it has to be decided on a case by case basis whether it is triggered at all.

[97] See for instance Norwegian Ministry of Petroleum and Energy 2010 and SÖ 2012:5 which is the Treaty between Sweden and Norway in this regard. A similar TGC structure was also enabled in Italy until 2013 when a double system of REFIT and auction mechanisms was established. It is however uncertain to what extent foreign RES-E under the new system is counted of towards the target under RED 2009, see for instance Ragwitz et al 2012:53f.

TGC schemes are capacity-driven insofar that the quantity is regulated but the price largely decided by the market. However, since the quota obligation only guarantees an increase of the RES-E share in relation to total electricity consumption and thus can be fulfilled by way of decreasing non-RES-E consumption, it is not a very precise capacity controlling policy measure. Other support schemes, such as TENFIT, may work better in this regard.[98]

1.3.2.3 TENFIT

The third major[99] support scheme – TENFIT – is characterised by an initial competitive bidding procedure, often called either auctioning or tendering.[100] The designated authority, firstly, defines an amount of RES-E to be generated nationally during a specific period, and, secondly, organises a competitive bidding process in order to find the least costly and most attractive offer from RES-E producers.[101] The most attractive bid, determined by a low requested support level (i.e. the lowest kWh ask price) and other favourable predefined specifications (e.g. specific timing, grid positioning, impact on local R&D and industry, environmental impacts), wins the tender and is awarded a favourable long-term contract.[102] This contract, provided through regulation, is basically a tailored REFIT scheme with its internal differentiations in respect of both how the prices are set and how the overall support scheme is financed. Accordingly, as outlined above, the price is set according to either a FIT or a FIP mechanism.[103] Although the politically predetermined RES-E amount sought generated can be neutrally defined with regard to RES-E technology and capacity[104], tenders are typically used for large-scale projects and most commonly offshore wind.[105] Thus, TENFIT schemes can be seen as initial procedures for the competitive determination of support levels in respect of REFIT pricing mechanisms, which otherwise are set administratively.[106]

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[98] Amundsen and Nese 2009:917.

[99] For accounts that does not classify tender schemes as a distinct and/or primary support mechanism, see Klessman et al 2011:7642, Haas et al 2011:1016, Held et al 2013:34. Taking these considerations as well as the intimate relationship with REFIT pricing, a description of TENFIT could alternatively be made under the REFIT heading i.e. as a third subcategory.

[100] From a public procurement perspective auction typically refers to price as the sole award criterion whereas tender may include other criteria. However, for the purpose of this essay and in line with Held et al 2013:44, I will not uphold this distinction at a conceptual level. Rather, the substantial difference is treated as subcategories under the overall auction/tender/bidding procedure.

[101] See for instance Batlle, Perez-Arriaga and Zambrano-Barragan 2011:7, Menanteau, Finon and Lamy 2003:800, 802, Haas et al 2011:1011, 115f, Rowlands 2005:971.

[102] Kitzing, Mitchell and Morthorst 2012:195, Mendonca, Jacobs and Sovacool 2010:174, Haas et al 2011:1011, Batlle, Perez-Arriaga and Zambrano-Barragan 2011:7, Held et al 2013:44.

[103] Kitzing, Mitchell and Morthorst 2012:195, 198. In their account the two main implementations of TENFIT end up in two subcategories of FIT, not FIP, albeit they also point out that one of these implementations in other studies are described as FIP. See also See for instance Mendonca, Jacobs and Sovacool 2010:174, Brick and Wisser 2009:3, Resch et al 2014:10f, Menanteau, Finon and Lamy 2003:804 and 808, del Rio and Mir-Artigues 2014:295.

[104] Resch et al 2014:10, Brick and Wisser 2009:3.

[105] De Jager et al 2011:32, See also del Rio and Mir-Artigues 2014:293.

[106] Held et al 2013:3, 25, 44f. Latvia provides an exception as tenders are employed in FIT schemes to allocate procurement rights rather than setting the support levels, see del Rio and Mir Artigues 2014:289. The latter also suggest that TENFIT only sometimes are used to determine support levels, though not clarifying what the function of generations based TENFIT schemes

Accordingly, albeit TENFIT schemes are highly quantity driven support schemes where indeed the output is more controllable than in TGC schemes,[107] they also enable the national regulator to maintain indirect price control and to anticipate the level of subsidies.[108]

1.3.3 Sovereignty revisited once again

As indicated, the geographical conditions for exploiting RES as well as the starting points in respect of energy policy differ widely among the EU member states.[109] A case in point of the former is the fact that solar energy is most successfully utilised in southern Europe. Different state priorities in respect of energy policy may for instance depend on the financial situation, the availability of indigenous fossil resources, long-term decisions to phase out nuclear power or the influence of domestic energy intensive industries.[110] As a result the energy mix of each member state varies. This is also recognised in recital 15 of RED 2009 according to which "[t]he starting point, the renewable energy potential and the energy mix of each Member State vary".

Given that the various RES-E schemes outlined above are perceived to be more or less suitable depending on the kind of RES-E technologies considered eligible the latter of which in turn will be affected by the geographical conditions, more or less strategic decisions etc., member states can arguably defend their principal scope of discretion by two further constitutional arguments.

Firstly, since both energy and environment are shared competences pursuant to TFEU article 4(2) letter e and i respectively, the possibility to invoke the principle of subsidiarity is evoked. According to this principle, contained in TEU article 5(3), "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 a regional and local level, but can rather, by reason of the scale of effects of the proposed action, be better achieved at Union level." The test to be conducted is highly elastic and the application needs to be determined on a case-by-case basis.[111] Nevertheless, in the immediate context of the bottom up approach discussed, one can pursue the argument that subsidiarity is complied with by way of retaining wide state discretion in respect of RES-E support schemes in a way that suits the state specific renewable potential and circumstances best. This is indeed one of the arguments put forth by the Commission in the proposal of RED 2009 for the fulfilment of the subsidiarity principle.[112] Furthermore, one could add that the concept of minimum harmonization – as established by RED 2009 in respect of RES-E schemes – fits

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otherwise would be. Assumingly, they conflate investment based and generation based tendering schemes.

[107] Amundsen and Nese 2009:917.

[108] Menanteau, Finon and Lamy 2003:804.

[109] See for instance Reiche and Bechberger 2004:844.

[110] See for instance Reiche and Bechberger 2004:844, Delgado Piqueras 2012:670.

[111] Delvaux 2013:123 para 369.

[112] Commission 2008b:9. See also Delvaux 2010:122 para 365. Oschmann 2008:26 concludes that the Union is essentially restricted by the subsidiarity principle to prescribe binding targets, to monitor the achievement and to impose sanctions upon failure to do so. See also Calliess and Hey 2013:117f and Ringel 2006:13.

well with the principle of subsidiarity, generally as well as in the context of renewable energy deployment.[113]

Secondly, the principle of proportionality may be submitted. According to this principle contained in TEU article 5(4), "the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties." According to the jurisprudence of the ECJ, the principle contains at least a test of the suitability (i.e. whether suitable or appropriate in order to achieve the aim) and the necessity (i.e. whether necessary to achieve it) of the measure in question, but occasionally also a test sensu strictu i.e. whether the aim could have been attained by a less onerous method.[114] Given the objective of RED 2009 to increase the share of RES in energy consumption, it is hard to envisage how the absence of state discretion in respect of support schemes would be suitable and necessary to that effect.[115]

Of course, the application of both principles must take account of the specific legislation context in which potential attempts to eliminate the principal state discretion in respect of RES-E are raised. However, these principles together with the sovereignty caveat enshrined in the legal bases for secondary energy and environmental legislation described above, provide the member states with a significant arsenal of constitutional arguments in favour of state discretion in this regard. As a consequence, state discretion in respect of RES-E support schemes is likely be to the prevailing starting point for a considerable time ahead, at least from the perspective of constitutional competence norms.[116]

1.4 A two folded problem in the internal market

The wide discretion provided as to the principal RES-E support scheme design is a function of states exercising their sovereignty interests in competence matters at the level of primary law. However, the actual exercise of state discretion will inevitably have to take into account the fundamental obligation resting upon the EU pursuant to article 3(3) TEU to establish an internal market.

According to article 26(2) TFEU "[t]he internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties." The creation of an internal market lay at the heart of the EU project[117] and constitutes, according to some commentators, its principal economic rationale[118] – albeit the Union, as illustrated by the very same article 3(3) TEU,

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[113] See for instance Craig 2006:423, Fouquet and Johansson 2008:4091, Jansen and Uyterlinde 2004:106. Compare Ringel 2006:13 who suggests radically that due to the subsidiary principle, the Commission has no competence for energy policy on its own. The subsidiarity principle was also invoked in the negotiations preceding RED 2001, see Jansen and Uyterlinde 2004:97.

[114] Craig 2006:656f.

[115] As exemplified by Delvaux 2013:129 para. 386 the sensu strictu requirement would not be met if it, for the purpose of fulfilling a legally binding RES target for each member state, prescribed the utilization of certain kind of RES technologies. Oschmann 2008:26 concludes that given the objectives of the current framework, the only form of Community regulation that would be conceivable from the point of view of the principle of proportionality would be a European regulation on prices.

[116] See also Hildingsson, Striple and Jordan 2010:111 who, albeit from a non-legal perspective though taking into account the contentious negotiations preceding RED 2009, concludes that "the possibility of a fully harmonised support scheme seems as remote as ever."

[117] Barnard 2010:10.

[118] Craig and de Burca 2008:604.

also shall work for values traditionally considered as non-economic such as "sustainable development … and a high level of protection and improvement of the quality of the environment".[119] The legal instruments aiming to attain an internal market operate at the level of both primary and secondary law, which in terms of how the integration process is formulated largely corresponds to the notions of negative or judiciary-driven and positive or legislature driven integration respectively.[120] Several secondary legislative acts have been adopted with the view of attaining an internal energy market, notably within the third energy package currently in force,[121] taking into account the characteristics of the gas and the electricity sector.[122] The Electricity Directive 2009/72 complements RED 2009 in several regards, for instance providing for the possibility of prioritized grid access common for REFIT.[123]

In the case of minimum harmonisation, the directive provides the floor whilst the EU treaties provides the substantial upper ceiling with which national legislation must comply.[124] As a consequence, trade barriers and distortions arising from the various national RES-E support schemes are assessed under the substantive treaty rules.[125] Illustratively, while the early unilateral state efforts to accelerate RES have been motivated by energy security and environmental concerns of which both are elements within the trinity, the efforts favouring "a common policy framework at EU level has to be seen against the backdrop of the EU's longer-term ambition to integrate European energy markets and promote competition within them."[126]

Thus, in the case of RES-E, one can assume a principal tension in respect of both the form and substance between a bottom-up approach underpinned by sustainability as well as energy security concerns and a top-down approach underpinned by internal market concerns. Additionally, one can assume a tension between sustainability in terms of its delocalised feature and energy security concerns. Accordingly, even if RES-E may be framed as a seamless synthesis that represent a triple-win solution at a policy level,[127] the application of substantial internal market provisions may very well prove otherwise/involve trade offs.

In the following, two internal market regimes will be presented as well as motivated and the problem under each stated. In this essay, the chosen regimes serve as a delimitation and operationalization of the competitiveness objective within the trinity. It is submitted that these two substantial primary law regimes are the most likely to interfere with state discretion in respect of RES-E support

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[119] These are the general environmental objectives of EU, as opposed to the specific environmental objectives under article 191 discussed above. See Krämer 2011:8 and 13, para. 1-10 and 1-15 respectively.
[120] Syrpis 2012:5. See also e.g. de Sadeeler 2013:212, Craig and de Burca 2008:606.
[121] See for instance Delvaux 2012:50-60. For an overview of the legislation, see http://ec.europa.eu/energy/gas_electricity/legislation/legislation_en.htm
[122] See for instance Cameron 2002:5-7, 29f and 363f, Padrós and Cocciolo 2010:34. See also Van Hende 2011:65 on the origin of the notion of an internal energy market in EU primary law.
[123] See for instance Gunst 2005:99, who though compares the previous – now repealed – directives.
[124] See for instance Barnard 2010:632f, Snell 2014:322.
[125] See for instance Cross et al 2001:269 para 5.148.
[126] Hildingsson, Stripple and Jordan 2010:112.
[127] Ringel 2006:5, Buchanan 2009:14.

scheme design. Thus, an analysis of state discretion in this regard enables considerable generality as to the principal scope of discretion under EU law in general.

1.4.1 The first problem: Articles 34-36 TFEU

Considered by the Commission as "one of the success stories of the European project and remains a major catalyst for growth in the European Union,"[128] the treaty provisions on the free movement of goods lie at the core of the EU integration process and the efforts to attain an internal market. These provisions basically aims to remove trade barriers, to guarantee the opening up of national market but do not encourage a general deregulation of national economies i.e. negative integration.[129] According to settled case law electricity constitutes goods.[130] The provisions are commonly grouped according to whether they target fiscal measures, such as custom duties, charges having equivalent effect, taxes and para-fiscal charges, or non-fiscal measures, such as quantitative measures (QRs) and all measures having equivalent effect (MEEs).[131] None of the four main RES-E support schemes outlined among EU's 27 member states rely on fiscal measures.[132] Rather, they are prima facie much more likely to be classified as non-fiscal measures, which are specifically regulated depending on whether they impede exports or imports. Assumingly, all member states have an interest in exporting RES-E[133] and this is indeed encouraged by RED 2009 which additionally recognizes states "right to decide … to which extent they support energy from renewable energy sources which is produced in a different Member State."[134] Together with the fact that all of the four main RES-E support schemes at the outset are national i.e. supporting domestic RES-E generation only, their legality will most likely be questioned on the basis of hindering the importation of electricity. For this reason this essay explores article 34 TFEU which governs non-fiscal measures in the context of imports as well as article 36 TFEU which provides exceptions in the context of imports and exports, but excludes article 35 TFEU that solely regulates exports.

To which extent, then, are the main RES-E support schemes compatible with article 34 and 36 TFEU? According to the wording of the former article "[q]uantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States." Basically, QRs are measures which amount to a total or partial restraint of imports.[135] Since none of the main RES-E support schemes directly restraints imports, the question is whether they nevertheless constitute MEEs. Several examples of MEEs are given in the now

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[128] Commission 2010:3.
[129] AG opinion in Cases C-158/04 and C-159/04 *Alfa Vita* para 37, Craig 2014:19.
[130] See for instance Barnard 2010:34 and the case law cited.
[131] See for instance Barnard 2010:42f, 66f, 70.
[132] Until early 2011, Finland was indeed the only country employing a RES-E support scheme primarily relying on taxation. An early version of this RES-E scheme was assessed in Case C-213/96 *Outokumpu Oy*. Today Finland employs a REFIT scheme, see for instance Kitzing, Mitchell and Morthorst 2012:196.
[133] This is indeed an explanation put forth by Barnard 2010:71 for the extensive amount of case law regarding import in comparison with export, articles 34 and 35 respectively.
[134] RED 2009, article 3(3).
[135] And can according to the circumstances restraint exports or goods in transit, see e.g. Barnard 2010:71 and the case law cited.

expired Directive 70/50[136] of which in particular the classic example of "measures which … encourage, require or give preference to the purchase of domestic products only" at first sight are relevant.[137] Furthermore, in the famous *Dassonville* case MEEs was defined as "[a]ll trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-[Union] trade"[138] – prompting suggestions that article 34 serve as the basis for an EU economic constitution.[139]

Applying the Dassonville formula on regulatory RES-E support schemes, which beyond doubt constitute rules enacted by states, the first question would arguably be whether these rules are to be classified as trading rules. In this regard suggestions have been made that RES-E support schemes possibly can be conceptualised as "policy instruments in form of market-enhancing tools" rather than trading rules.[140] To be sure, such an approach yields considerable potential to exempt RES-E support schemes, but the suggestion is poorly qualified and cannot be identified in case law.[141] Indeed, the fact that ECJ in nearly every subsequent case has repeated the *Dassonville* formula but recently frequently omitted the "trading" element and sometimes referred to "any measure", clearly suggests that the ECJ does not confine its overall assessment of MEEs to this particular issue.[142] Rather, the significance of the *Dassonville* formula is that it exclusively refers to the effects of a measure, not taking into account its purpose(s), and authorizes an examination of its actual or potential, direct or indirect effects without regard to either statistical analysis or a de minimis threshold.[143]

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[136] This directive was effective during the transational period of the original Treaty of Rome until what is now article 34 became full effective. See Oliver 2010:85.
[137] Article 2, letter k. See also Oliver2010:93 para 93.
[138] Case 8/74 *Dassonville* para 5.
[139] Barnard 2010:73.
[140] Fouquet and Johansson 2008:4089, who unfortunately do not elaborate this issue further. Moreover, since the *Dassonville* case itself concerned measures at the marketing stage, Barnard 2010:74 suggests that the formula does not comprise measures at "the production stage, of the economic process". If such an approach were applied, it cannot be excluded that under certain circumstances a specific mechanism considered isolated of a specific scheme would fall outside the formula. However, although several arguments was put forth in favour of such a distinction by the parties involved in Dassonville, the ECJ – in my view – does not explicitly authorize such a distinction. One could possibly submit Case 3/76 *Kramer* paras 55-59 where ECJ differentiated between the marketing and production stage but ECJ's reasoning seems to be based on the highly specific facts of the case rather than a principal guidance on the application of article 34.
[141] The only but far-fetched possibility would be where the effects of non-trading rules are too uncertain and indirect i.e. the remoteness test/doctrine. One thread of these rules are those where the restrictive effects on imports is inherent in proportional legislation pursuing goals permitted by the treaty. The applicability of the remoteness test is however highly questionable in the context of RES-E support schemes, since the effects at the outset are neither too uncertain nor too indirect. An additional obstacle is that the ECJ in several cases solely applied this test to rules that was applied without distinction or did not discriminate, see for instance Spaventa 2009:250-253. This is, as further explained below, hardly the case in respect of legislation prescribing RES-E support schemes.
[142] See for instance Oliver 2010:93 para 6.20, Gormley 2009:404 para 11.06, Barnard 2010:74 and the case law cited. See also Commission 2010b:13.
[143] Oliver 2010:94. As regard the potential application of a de minimis rule, it has been suggested that the remoteness test sometimes applied in effect is a de minimis rule in disguise, see Oliver 2010:96 para 6.25.

Having regard to the expired Directive 70/50, the ECJ has acknowledged two types of MEEs that are of a significant importance in the context discussed: distinctly and indistinctly applicable measures. Basically, the latter category consist of measures "which are equally applicable to domestic and imported products" but in fact have a particular burden on the imported goods.[144] In contrast, distinctly applicable measures are "measures, other than those applicable equally to domestic or imported goods, which hinder imports which could otherwise take place."[145] Basically, these measures are overtly or directly discriminatory and impose a different burden in law and in fact on the domestic and imported goods.[146] Having this as well as the *Dassonville* formula in mind, it seems at first sight safe to assume that the RES-E support schemes are directly discriminatory since the support at the outset only applies to domestic RES-E generation the effects of which actually or potentially, indirectly or directly impedes the import of the electricity (green or grey) that otherwise could have taken place.

The main rule is however not absolute and derogations may be justified on two grounds, provided that the measure comply with the principle of proportionality. Firstly, an exemption is provided by way of fulfilling article 36 TFEU. The specific grounds contained therein – such as public security, public policy, protection of health and life of humans, animals or plants – are however interpreted strictly by the ECJ and cannot be employed to serve economic objectives.[147] The second exemption basis is the so-called mandatory requirements or case law based derogations developed by ECJ. Although its contours are notoriously vague the traditional view hold that a mandatory requirement can serve as a justification only when the measure at hand is indistinctly applicable measure i.e. applicable to domestic and imported products alike.[148] Several diverse requirements may fall within its scope, such as environmental protection, protection of public health and protection of cinema as a form of cultural expression.

Regarding energy security measures infringing article 34, the *Campus oil* case[149] makes it clear that they may be justified on the basis of public security under article 36, *even* when economic objectives are pursued.[150] If nothing else this case reinforces and acknowledge the perception of energy security as a state prerogative under EU law (as it stood at the time of the verdict, at least[151]). However, since the case concerned petroleum products by ECJ considered of "exceptional importance as an energy source in the modern economy [and] of fundamental importance for a country's existence",[152] it may be questioned whether the current deployment of RES-E amount to such fundamental importance. With regard to climate change mitigating measures, they may at the

[144] Directive 70/50 article 3, Barnard 2010:90.
[145] Directive 70/50 article 2.
[146] Oliver 2010:105 para 6.43, Barnard 2010:80.
[147] Barnard 2010:15, Oliver 2010:239 para 8.54, Gormley 2009:455 para 11.62.
[148] Gormley 2009:507, Barnard 2010:166f.
[149] Case 72/83 *Campus Oil*.
[150] Daniel Cross, Eugene, Hancher, Leigh and Jan Slot, Piet 2001:225f paras 5.29. Compare Barnard 2010:156.
[151] The extent to which such an approach would be upheld today is doubted by several commentators, see for instance Delvaux 2013:203 paras 589-590.
[152] Case 72/83 *Campus Oil* para 34.

outset be classified under the heading of environmental protection pertaining to the mandatory requirements doctrine. However, since this doctrine under the traditional view is applicable solely to indistinctly applicable measures, any reconciliation with the distinctly applicable RES-E support schemes seems doomed.

How, then, does RES-E support schemes stand in this regard? The answer is not evident. Until 2014, the leading case on these issues was *PreussenElektra* concerning a German FIT scheme from 1998. Symptomatically, it yielded considerable criticism and ECJ's reasoning was described as "tortous", "baffling … [and] idiosyncratic, to say the least", "quite ambiguous, ignoring a number of key questions."[153] Moreover, the multifaceted legal area in question is under development and subject to several potentially colliding objectives, and this was indeed recognized by ECJ in *PreussenElektra*, basing its judgement on "the current state of Community law concerning the electricity market". In fact, the Commission has subsequently suggested that FIT schemes may be challenged under internal market principles related to free trade while being quiet on the compatibility of TENFIT and TGC with these principles.[154] Since all these aspects may affect state discretion, the first problem that this essay seeks to explore is whether states under this internal market regime are in a position to freely choose between the principal RES-E support schemes.

1.4.2 The second problem: State aid rules

Article 3(3) RED 2009 envisages the application of state aid provisions on the RES-E support schemes employed. Systematically, these provisions are positioned among the treaty rules on competition under title VII TFEU. As a competition policy, the EU has pursuant to article 3(1)(b) TFEU exclusive competence on matters related to the state aid regime.[155] In contrast to cartel and merger control regulating the conduct of enterprises, state aid law basically regulates states budgetary policies.[156] The plain conceptualisation of internal market rules typically refers to the four freedoms, excluding state aid.[157] Nonetheless, the suggestion that "State Aid DNA shares more chromosomes with free movement than with antitrust rules" seems profound.[158] Firstly, the fact that the rules on both state aid and free movement of goods (in particular article 34) may be applicable to the same material facts[159] indicates a functional overlap. Additionally, the fact that no national correlatives exists of either EU state aid or free movement can be explained on the grounds that both regimes complement each other in securing free and undistorted cross-border trade and thus finds its paramount rationale in the internal market.[160] However, a significant difference – of cardinal importance in this essay – is that apart from policing negative

[153] Delvaux 2013:216 para 621, Oliver 2010:304f para 8.194, Fernandez Armenteros and Lefevere 2001:347, respectively.
[154] Commission 2005:4f, 8.
[155] See also Rusche 2013.
[156] Blauberger 2008:7.
[157] See for instance Snell 2014:301.
[158] The qoute originates from JL Buendia Sierra and others in *Liber Amircorum Francisco Santaollalla Gadea* (The Hague, Kluwer, 2008, p. 9) but is reproduced in de Cecco 2013:38, Hancher, Ottervanger and Jan Slot 2012:27.
[159] See for instance Craig and de Burca 2008:1107f and the case law cited.
[160] de Cecco 2013:38.

integration, the state aid regime is accompanied by a distinct dimension of positive integration promoting the emergence of new regulatory realities.[161]

The importance of the Commission in the state aid regime cannot be overstated. Firstly, as the initial decision-maker in respect of both existing aid and newly/altered aid pursuant to article 108(1) and (3) TFEU, it is entrusted the functions of law enforcer, watchdog and policy maker in this area.[162] Secondly, the Commission enjoys discretion regarding the general approach to be taken to state aids. It may for instance develop its policy in general, either by formal legislation (i.e. certain regulations) or informal rule making, or through individual decisions.[163] The informal rule making or soft law, such as guidelines, communications and frameworks, is not binding in the sense of article 288 TFEU. Guidelines nevertheless bind the Commission once published and also the states if they have agreed on the content, even though the latter condition does not seem to be given much weight by the courts.[164] Subject to the threat of formal investigations of all its existing aid measures, member states are typically induced by the Commission to explicitly approve its soft law.[165] The legal basis for adopting guidelines in this regard is derived from article 108(1) TFEU that obliges the Commission to propose appropriate measures.[166] The soft law can also be enforced indirectly via individual decisions concerning the approval/disapproval of notified aid.[167] These decisions are subject to judicial review, but the Union courts have entitled the Commission "a broader discretion" in two significant situations.[168] First of all, in respect of the Commission's decision on whether the aid is compatible with the internal market pursuant to article 107(3) TFEU, the judicial review is confined to determining whether the decision is vitiated by manifest error or misuse of powers. Additionally, the Commission enjoys broad discretion in relation to the very existence of aid pursuant to article 107(1) whenever it is based on a complex, technical or economic assessment. Here, apart from ensuring no manifest error or misuse of power, the review is generally confined to verifying that the Commission has complied with relevant procedural rules as well as stated the reasons and the facts on which it has based its decision.

To which extent, then, are the main RES-E support schemes compatible with the state aid rules? Article 107(1) TFEU provide the starting point:

> Save as otherwise provided in the Treaties, any aid granted by a Members State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

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[161] de Cecco 2013:38f.
[162] Craig and de Burca 2008:1084, Johnston, Heffron and McCauley 2014:2, Heidenhain 2010:575.
[163] Craig and de Burca 2008:1084f.
[164] See Hancher, Ottervanger and Slot 2012:24f, Heidenhain 2010:9 and the case law cited.
[165] Blauberger 2008:18.
[166] EEAG 2014 point 250, EAG 2008 section 7.4. See also Blauberger 2008:13.
[167] Blauberger 2008:17.
[168] See Hancher, Ottervanger and Slot 2012:59f and the case law cited. See also Craig and de Burca 2008:1084.

This provision does not contain a clear-cut definition of state aid.[169] Similarly to article 34, the effect of a measure – neither purpose nor form – is decisive.[170] Basically, four cumulative conditions must be fulfilled in order to constitute state aid.[171] Firstly, an economic advantage has to be gratuitously conferred in the sense that the benefit received would not normally have been enjoyed by virtue of own commercial endeavours i.e. private investor test, favouring either certain undertakings or the production of certain goods i.e. selectivity criterion.[172] Both REFIT and TGC schemes certainly provide such an advantage, but TENFIT schemes – due to its initial competitive bidding process – may possibly be assessed differently. Since all RES-E schemes exclusively promote RES-E generation to the detriment of competitors producing grey electricity, the selectivity criterion will most likely be met.[173]

Secondly, related to both the selectivity criterion and the third condition, the advantage must distort or threaten to distort competition.[174] This condition is usually met with ease and this is also most likely to be the case in respect of RES-E support schemes since they at least threatens to distort the competition on the electricity market.[175]

Thirdly, the measure must have an effect on trade between member states. Even this condition is usually met with ease since it neither depends on the locality of the goods/services nor the scale of the activity in question, but rather infer the outcome out of the preferential treatment under the selectivity and second condition without regard to whether the favoured undertaking(s) participate in such trade.[176] Thus, it is most likely that the RES-E schemes meet this condition.

Fourthly, the advantage must be granted by a member state or through state resources. This condition requires that the advantage stems from state resources and additionally – though not always distinguished – are transferred directly or indirectly to the favoured undertaking(s).[177] State resources include not only the resources of public undertakings and authorities, but also – the

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[169] Commentators actually diverge as to whether state aid is defined at all in the treaty or only in an imprecise manner whose substance must be deduced from the elements set forth. See for instance Hancher, Otteranger and Slot 2012:51 and Heidenhain 2010:14, respectively.
[170] See for instance Delvaux 2003:104, Kaur 2009:268f, Krieglstein 2001:54.
[171] For an easily accessible overview, see http://ec.europa.eu/competition/state_aid/overview/index_en.html.
[172] Craig and de Burca 2008:1087ff, Heidenhain 2010:23ff, 43ff, Hancher, Ottervanger and Jan Slot 2012:53ff, 76ff.
[173] There is however a possibility to exempt measures viewed as integral components of the general treatment of the subject area and therefore not specific/selective measures. RES-E schemes can assumingly be construed so as to fall within this exemption, but the Courts have so far only relied on this in a few cases, notably in tax and social security law. See Hancner, Ottervanger and Slot 2012:61, 84, Heidenhain 2010:48 and the case law cited.
[174] Hancher, Ottervanger and Slot 2012:59, 103f, Craig and de Burca 2008:1092, Heidenhain 2010:50ff.
[175] See also Krieglstein 2001:54f.
[176] Hancher, Ottervanger and Slot 2012:100f, Craig and de Burca 2008:1092, Heidenhain 2010:54ff and the case law cited. It should perhaps be mentioned that there is a de minimis regulation applicable to aid of very low level given to an undertaking but it is clearly not relevant here. See also Kaur 2009:277.
[177] Heidenhain 2010:33, 40, Hanchner et al 2010:63f. Compare Jaeger 2012:536 and cited case law according to which the two criteria are, firstly, granting directly or indirectly through state resources, and secondly, the advantage being imputable to the state.

traditional view goes – resources of private entities upon which the state or public authorities can exercise decisive influence as regard the allocation, even where these are the outcome of private economic activity. Similarly, the traditional view goes, resources of private undertakings by virtue of legislation subject to state disposal also constitute state resources.[178] As to the transferral of state resources the means are manifold. Subsides are obviously included and the transfer does not necessarily have to charge the public budget. To the extent, then, the allocation of resources received by virtue of TGC schemes are subject solely to the interplay of and through market forces, these would assumingly not constitute state resources.[179] In contrast, financing schemes established through legislation aimed to distribute and compensate TSOs for being obligated to purchase RES-E at minimum prices contained in some FITs and TENFITs, are at first sight likely to constitute state resources. The fourth condition is arguably the most difficult to evaluate in respect of RES-E support schemes. Until late 2013, *PreussenElektra* was the only ECJ case dealing with these issues. Seemingly shifting from an effect-based approach towards a formalistic one, the ECJ found that the purchase obligation on minimum prices did not amount to a transfer of resources and omitted the question of whether they constituted state resources in the first place. According to one commentator *PreussenElektra* is one of the main reasons that case law on state aid "is considered by many to be … catastrophic, or at least fanciful … [and] showing signs of mental fatique" – indeed triggering arguments against the very existence of state aid control.[180]

Furthermore, even if certain RES-E schemes are considered to constitute state aid, they may nevertheless be exempted by virtue of article 107(3) TFEU according to which:[181]

> The following may be considered to be compatible with the internal market:
> (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and in the regions referred to in article 349, in view if their structural, economical and social situation;
> (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
> (c) aid to facilitate the development of certain economic activities or of a certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interests;
> (d) aid to promote culture and heritage conservation …

[178] Heidenhain 2010:36ff.

[179] Compare Hancher, Ottervanger and Slot 2012:860 according to which "[t]he obligation to purchase a specific amount of green certificates appears comparable to the obligation to purchase electricity produced from renewable energy sources at fixed minimum prices." However, in the case discussed the state exercised a decisive influence over a fund that further compensated RES-E producers. This feature is hardly present in TGC schemes, but rather refers to certificates under a totally different and now abandoned scheme.

[180] Biondi 2013:1718, and p 1727 where an overruling of *PreussenElektra* in the name of legal certainity is suggested. See e.g. also Jaeger 2012:537 asking "whether it is not time to admit that the *PreussenElektra* judgment was, in spite of its good intentions, a mistake. […] and to abandon the ill-fitted *PreussenElektra* criterion?"

[181] The second subparagraph of article 107 providing automatic exemption – "shall be compatible" – is not relevant here.

(e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.

The first four categories of aid are subject to Commission approval whose discretion – as indicated by "may" – is considerable and only subject to marginal review by EU courts. The Commission commonly issues guidelines on how it intends to apply its discretion in a particular area. The existence and application of such guidelines potentially provide the dimension of positive integration mentioned above. In the context of environmental protection aid to which RES-E schemes subsequently was pertained, the first guidelines were issued 1974 and qualified for an exemption under letter B. The subsequently adopted guidelines 1994, 2001 and 2008 gradually moved to mainly provide exemption on the basis of letter C.[182] RED 2009 underlines, though in a footnote to Annex 1, "that the [2008] State aid guidelines for environmental protection recognize the continued need for national mechanisms of support for the promotion of energy from renewable sources." However, the 2008 guidelines was replaced 1 July 2014 by the guidelines for environment protection and energy (EEAG) which will be applicable until 31 December 2020,[183] coinciding with the expiry of the target set forth by RED 2009.

The outcome of *PreussenElektra* as well as the subsequent case law developments, the new EEAG as well as the Commission's decisional practice, may very well affect state discretion. Against this background, the second problem that this essay seeks to explore is whether states under the state aid regime are in a position to freely choose between the principal RES-E support schemes.

1.5 Problem statement and purpose

Having established that states in legislative matters easily can defend their wide discretion as to the principal RES-E support scheme design, the problem to be explored is whether this discretion is upheld or curtailed in the context of the two internal market regimes.

Accordingly, the prime purpose of this essay is to delimit the principal scope of state discretion as to the RES-E support scheme design in the context of the internal market regimes specified. Assuming that the outcome under the two internal market regimes may involve trade-offs in respect of how the trinity is balanced and potentially intervene in states energy rights, a subsidiary purpose is to assess whether the outcome may be considered legitimate.

1.6 Method and material

In order to fulfil the primary purpose, the following main types of legal sources will be analysed: 1) primary law provisions and their substance as elaborated by the ECJ and, more rarely, the General Court; 2) AG's opinion when deemed necessary in order to illustrate contentious aspects of relevance for state discretion; 3) the Commission's decisional practice and the guidelines establishing the compatibility criteria.

The material will be analysed through the so-called argumentativist legal dogmatics method. This means that apart from describing the content of positive

[182] Delvaux 2003:105, Maca 2009:19.
[183] EEAG point 246.

law as elaborated primarily by ECJ, I will also propose possible applications on hard cases to which the law seemingly does not provide clear and single answers.[184] Since two or three of the principal RES-E support schemes – depending on the internal market regime discussed – has not been reviewed by ECJ, this method enable the primary purpose to be met.

More specifically, in the context of article 34-36 TFEU, the argumentative framework will be based in particular on ECJ's intensity of review and how it approaches discretional elements, such as proportionality and possible justifications. Additionally, I will seek to approach ECJ's reasoning through a trinity perspective, assuming that energy security considerations may induce a wider and steadier scope of state discretion while the glocal feature of environmental matters may tip in either direction. All ECJ cases concerning RES-E support schemes under articles 34-36 TFEU will be analysed, and these are: *PreussenElektra,*[185] *Ålands vindkraft,*[186] and *Essent Belgium.*[187]

Under the state aid regime, the argumentative framework will centre on whether, and on what basis, RES-E support schemes are considered as aid by the ECJ and the Commission and whether the conditions laid down for considering a measure compatible with the internal market prompts a higher or lower level of scrutiny. The ECJ cases dealing with support schemes under the state aid regime are *PreussenElektra* and *Vent De Colère*.[188] Four decisions taken by the Commission are also analysed and specifically chosen in order to cover all principal RES-E support schemes, but other decisions will be invoked in order to illustrate consistency or inconsistency in its decisional practise. In order to understand the gratitude of the shift provided by the recently issued EEAG, an approach enabling a comparison with the previous guidelines will be adopted and further described below. Several of the specific substantive elements deemed necessary to assess in order to identify the principal scope of state discretion under both regimes will be presented and analysed in due course as the analysis proceeds.

All ECJ cases analysed are preliminary rulings i.e. initiated by article 267 references. Under such judgements the ECJ formulate the judgement in an abstract manner whilst enabling the national court to apply the judgement to the facts. The referring national court and all other courts dealing with the same matter are bound by the operative part of the judgment. Additionally, the judgement constitutes a precedent that the ECJ will follow in similar cases.[189] Accordingly, the analysed cases enables considerable generalisation. This is hardly the case in the Commission's decisional practice, at least not formally. Nevertheless, given the particular features of the state aid regime and the considerable discretion enjoyed by the Commission, the decisions analysed illustrates its general approach which in turn serves as an answer to the question of whether states can freely choose between the support schemes in question.

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[184] Vaquero 2013:66f, 80. For the sake of clarity it should perhaps be mentioned that Vaqueuro distinguish this method from legal dogmatics by 1) not specifically addressing judges with the solutions proposed, 2) to a larger degree focusing on problematic hard cases, and 3) always engage in describing the content of law.

[185] Case C-379/98, *PreussenElektra*.

[186] Case C-573-12, *Ålands vindkraft.*

[187] Cases C-204/12 to C-208/12 *Essent Belgium*.

[188] Case C-216/12 *Vent De Colère.*

[189] See for instance Lenz 1993:398, 403.

This is not to say that the ECJ's possible approach will be substituted by Commission's approach, since I will raise and assess the question as to whether the approach by the latter is reasonable and can be substantiated in case law. Generalisation is in particular enabled by the Guidelines, since its very purpose is to communicate how the Commission will assess the compatibility criteria.

The legitimacy of the outcome will be analysed concisely along the lines of input and output legitimacy.[190] Under an input criterion, legitimacy basically depend on whether the outcome reflect the preferences of the members of a given community and favours to this end decision-making procedures that enable participation and/or consensus. Under an output criterion, in contrast, legitimacy is derived from the ability to effectively solve problems requiring collective solutions and relies to this end on indirect participation. Naturally, both concepts are important and in practice often indistinguishable, but they can and should be analytically separated in order to assess assertions concerning (il)legitimacy. Although both concepts may sound superficial, especially in a legal context, it will be argued and sought illustrated that they are highly relevant in a legal context. The purpose will not be to reach a definite conclusion on whether the outcome is either legitimate or illegitimate, but rather to assesses whether the outcome *may* be considered more or less (il)legitimate.

1.6.1 Research questions

In order to fulfil the purpose, the following general research questions will guide me:

- In the context of article 34 and 36;
  - Does the schemes amount to QRs/MMEs? If so, on what basis?
  - How is the justification approach constituted in terms of scope, basis and proportionality?
  - Is it possible to discern a preference in respect of certain RES-E supporting measures?

- In the context of state aid;
  - Does the measures amount to state aid? If so, on what basis?
  - How are the compatibility criteria framed in terms of (im)precision and what level of review do they indicate?
  - Is it possible to discern a preference in respect of certain RES-E supporting measures?

- In the context of assessing the legitimacy of the outcome;
  - Does it meet basic input criteria?
  - Does it meet basic procedural output criteria?
  - Does it enable an effective fulfilment of the trinity?

[190] Scharpf 1999: 616f, 11-13 elaborated this concept. For a distinct application, see Craig 2012:25-34.

1.7 Outline

Chapter 2 discusses RES-E support schemes under articles 34-36 TFEU and concludes definitely on the scope of state discretion in this regard. Chapter 3 discusses RES-E support schemes under the state aid regime, comprising the ECJ cases and the Commission's decisional practice as well as its preconditions in terms of relevant guidelines. This chapter will also conclude definitely on the scope of state discretion under this regime. Finally, chapter 4 briefly analyses and concludes on whether the outcome under the previously assessed regimes may be considered legitimate.

2 RES-E support schemes and articles 34-36 TFEU

In the following I will present and discuss the three cases relevant to the subject matter. The discussion is largely structured around the two key issues enabling state discretion: firstly, the classification of the measure, dealing with how potential infringement is conceptualised, and secondly, the justification assessment comprising both the establishment of justification bases and a review in light of the proportionality principle. I will pursue the argument that the approach employed by the ECJ is highly favourable towards the RES-E schemes assessed, yet take into account certain contradicting aspects.
Having presented these cases isolated I will proceed to an overall assessment of the scope of state discretion in this regard, discussing the key doctrinal issue of justification bases, intensity of review, how the trinity is balanced and whether the approach may be generalised to other principal RES-E support schemes.

2.1 PreussenElektra: FIT scheme

2.1.1 Background and measure

The case concerns a German FIT law whose scope comprised RES-E produced in Germany. It obliged distribution undertakings to purchase at minimum prices RES-E produced in their area of supply and provided a certain compensation mechanism to that effect.[191] PreussenElektra is a conventional electricity producer (and a TSO) whilst Schleswag is the DSO subject to the purchase obligation. Although the dispute between these parties primarily concerned the compatibility of the purchase obligation and the compensation mechanism with state aid law, the referring national court in the alternative also raised the question of the compatibility with article 34 TFEU. According to the AG, however, the issues pertaining to article 34 were not fully discussed by the parties and the ECJ was not fully informed of the facts. In his view it remained unclear how and to what extent intra-Union trade was affected by the German legislation and in particular whether such trade was technically feasible in respect of RES-E at all and whether such electricity could be distinguished from conventional

[191] Case C-379/98 *PreussenElektra* para 6-7, 9, AG opinion para 3, 5-6. Compare Heinen 2001:94 according to which "the obligation to purchase is not explicitly mentioned in the German law, but it is the logical consequence of the obligation to pay certain prices for electricity originating from renewable energy sources." However, both the Swedish and English translations of the case are clear on this issue.

electricity.[192] This is important since it may explain the brief and ambiguous reasoning by the ECJ.

For the purpose of analysing the compatibility with articles 34 and 36, the measure at stake is the purchase obligation upon DSOs in respect of RES-E produced in their area of supply.

2.1.2 Classification of the measure

In the course of assessing the compatibility with article 34, the ECJ initially reminded of two threads of case law. Firstly, the *Dassonville* formula was recalled, though omitting its original "trading rules" element. Secondly, referring to *Campus Oil* and *Du Pont de Nemours Italiana*, it stated "that an obligation placed on traders in a Member State to obtain a certain percentage of their supplies of a given product from a national supplier limits to that extent the possibility of importing the same product by preventing those traders from obtaining supplies in respect of part of their needs from traders situated in other Member states."[193] The statuary purchase obligation, the ECJ shortly concluded, was "therefore capable, at least potentially, of hindering intra-Community trade."[194]

Neither the parties nor the AG questioned whether the FIT law constituted "trading rules". Together with the ECJ's omission of this issue in a more or less straightforward application of the *Dassonville* formula, it seems clear that this issue was not really contested. There are however certain aspects of this application that signify a favourable approach towards the measure at hand, namely that it is considered "capable, at least potentially", of hindering inter state trade. Certainly, the insertion of "at least potentially" can for instance be indicative of the concerns raised by the AG as to whether RES-E was possible to import at all.[195] At the same time, however, the obliged party claimed that it declined an offer of RES-E from Sweden at a relatively low price due to the purchase obligation. In particular, it is noteworthy that the ECJ – unlike AG[196] – neither categorized the measure as being discriminatory, distinct applicable or the like, nor examined whether it is of a discriminatory character. In my opinion the German FIT scheme is outright discriminatory and a distinctly applicable measure since it not only favours – which is sufficient[197] – but also explicitly prescribes the demand of domestic and regionally produced RES-E. Since the sole function of establishing a discriminatory feature is to determine the amount and type of justification bases available,[198] the conscious avoidance in this regard

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[192] AG Opinion para 195-196 Case C-379/98 *PreussenElektra*.
[193] Case C-379/98 *PreussenElektra* para 69-70.
[194] Case C-379/98 *PreussenElektra* para 71.
[195] Compare Delvaux 2013:214 para 615 according to which the courts conclusion on what the measure is potentially capable of is remarkable, since it undoubtedly favours the marketing of the RES-E in question to the detriment of imported electricity. In my opinion he mixes up the question of potential/real effect with the question of distinctly/non-distinctly measures.
[196] AG's Opinion paras 103, 201-205 of the Case C-379/98 *PreussenElektra.*
[197] See for instance Barnard 2010:166f and the case law cited on "buy national"-campaigns.
[198] Jacobs 2006:192 who argue that this is the sole function of the indistinct/distinct classification and therefore a necessary first step. Compare Delvaux 2013:216 para 621 according to which an approach that do not distinguish between distinct/indistinct cannot take into account whether the measure at stake is appropriate or desirable for policy reasons. Compare also Krämer 2011:113 para 3-40 according to which the discriminatory character of the measure in question "could not really be put in doubt. The only explanation of this is that the

seem to serve ECJ's preoccupation with finding the measure compatible with primary law. A preliminary conclusion, therefore, is that the measure amounts to a MEE but its discriminatory features are not taken into account.

2.1.3 Justification

However, in order to determine whether the measure nevertheless was compatible with article 34, ECJ held that "account must be taken, first, of the aim of the provisions in question, and, second, of the particular features of the electricity market."[199] Although it is anything but clear, the ECJ have in a subsequent case[200] made it clear that the review of "particular features" is in fact a proportionality assessment.

Having assessed these aspects the ECJ concluded that, "in the current state of Community Law concerning the electricity market", the German FIT law was not incompatible with article 34 TFEU. In the following the path toward this conclusion will be presented and discussed.

2.1.3.1 Justification bases

Assessing the aim of the FIT law, the ECJ considered the use of RES-E as "useful" for protecting the environment since it reduces GHG which the EU and its member states have pledged to combat. Reference is here made to both the international climate change regime (UNFCC and the Kyoto Protocol) and the multiannual programme for the promotion of renewable energy sources in the Union (ALTENER) whose implementation amongst its priority objectives identify the growth of renewable energy use. Given the absence of any explicit basis for environmental protection under article 36 TFEU, this thread of justification is technically based on the mandatory requirements doctrine. According to the general principle,[201] only non-distinctly measures can be justified under this heading. Since there is little doubt that the measure in question is discriminatory, though not classified so by the ECJ, this thread of justification suggest that the court either will modify or abandon its previous case law to which it in the judgement also authoritatively refers.[202]

However, the ECJ went further and added that "[i]t should be noted that that policy [UNFCC, Kyoto Protocol, ALTENER] is *also* designed to protect the health and life of humans, animals and plants."[203] This brief and indirect reference to article 36 TFEU is interesting in several regards. Firstly, as indicated above and the effects of which will be elaborated below, the parties did not explicitly invoke this ground. Neither did the AG. Secondly, the reference to the protection of health and life of humans, animals and plants may be interpreted to

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Court considered the legislation to be a discrimination, but not an arbitrary discrimination." Whilst the argument of the former seems to be a prolongation of the basic point made i.e. the availability of justification bases whose amount and type in effect consider the merits of policy reasons, Krämer seems to conflate the prohibition of arbitrary discrimination under article 36 TFEU with the initial classification.

[199] Case C-379/98 *PreussenElektra* para 72.

[200] Case C-573/12 *Ålands vindkraft* para 84. Compare Jacobs 2006:191, who was the AG in *PreussenElektra*, according to which the ECJ did not conduct any proportionality assessment.

[201] Compare Kuhn 2001:373f. See AG opinion para 220, 228 in Case C-379/98 *PreussenElektra.*

[202] Case C-21/88 *Du Pont de Nemours Italiana* para 14 in which ECJ states that a discriminatory measure cannot be justified by way of the mandatory requirements doctrine. In the instant case, however, the reference is made in the context of assessing the issue of infringement.

[203] Case C-379/98 *PreussenElektra* para 75, my emphasis.

the effect that environmental protection is actually subsumed under article 36 TFEU. The starting point for such an interpretation would arguably seek to identify what the very concept of environment refers to. This, in turn, will depend on the ontology or perspective deployed – eco-centric or anthropocentric. Basically, the former seeks to protect the biosphere per se whilst the latter aim at improving the quality of human life. Although there is no established definition within EU law on the precise meaning of environment,[204] one can nevertheless conclude that ECJ's reference in the instant case at least comprises core anthropocentric elements. Assuming then that ECJ construes the reference to humans, animals and plants broadly and conjunctively as opposed to disjunctively,[205] this thread of justification can be interpreted as subsuming environmental protection under article 36. Furthermore, as the reference to this basis is situated between ECJ's previous consideration of environmental protection and the subsequent reference to the environmental integration obligation, the internal structure of the judgment may also serve as authority for such a conclusion. If so, this may explain why ECJ invoked this basis in spite of not being invoked by the parties nor AG; that is to say, this basis was already inherent by virtue of the arguments put forth in substantiating environmental protection as a mandatory requirement. However, such a reading represents a radical[206] reorientation of the law of article 34 and is highly unlikely to be established in the absence of a formal clarification by ECJ. Thirdly, the features of climate change, especially its long-term effects, may very well raise doubts on the approximate causation towards endangering health and life. ECJs' silent stance could certainly be explained by the possible application of the precautionary principle in article 192(2) TFEU. This principle were interpreted in *United Kingdom v Commission* as allowing action to be taken "[w]here there is uncertainty as to the existence or extent of the risks to human health … without having to wait until the reality and seriousness of those risks become fully apparent."[207] This and several other cases nevertheless concerns measures related to assumingly more immediate harm, in contrast to long-term effects of climate change, arising for instance from BSE transmission (the so-called mad cow disease),[208] foodstuffs containing unlawful nutrients[209], cosmetic protects.[210]

The significance of the first and the latter aspects are evident, fourthly, in both the burden of proof[211] resting on the party alleging this justification basis to be applicable and the rigorous proportionality assessment to be undertaken by the court.[212] However, the fact that the parties did not invoke this basis and

[204] de Sadeleer 2014:7. See also Langlet and Mahmoudi 2011:53.
[205] See Gormley 2009:465 para 11.69 and the case law cited which suggest that this is likely to be the case, even though the health and life of humans is ranked first among the interests considered protected by the treaties. See also the suggestion by Johnston et al 2008:135 on the conjunctive approach ECJ explicitly may pursue in order to include environmental protection under article 36.
[206] Barnard 2010:162.
[207] C-180/96 *United Kingdom v Commission* 99.
[208] C-180/96 *United Kingdom v Commission*.
[209] C-192/01 *Commission v Denmark*.
[210] T-199/96 *Labaratoires pharmaceutiques Bergaderm.*
[211] Oliver 2010:221.
[212] Oliver 2010:226, 259.

accordingly had no burden of proof in this regard did apparently neither prevent ECJ from considering the basis to be applicable nor subject it to any explicit proportionality review.

Having established the two justification bases, the ECJ mentioned the obligation to integrate environmental protection requirements into the definition and implementation of Community policies and activities. ECJ notes that at the time of the initiation of the proceedings this obligation was contained in article 130r(2) of the Maastricht Treaty but at the time of the judgement included in article 6 of the Treaty of Amsterdam and there elevated to its "principles".[213] Given ECJ's vague reasoning it is difficult to grasp what it wanted to communicate by mentioning the environmental integration requirement and its elevation to principle.[214] According to the AG the requirement "is not merely programmatic; it imposes legal obligations." However, in the AG's opinion this requirement is submitted in the context of justifying directly discriminatory measures.[215] Additionally, the integration requirement as such seems to impose obligations on the Union legislator, not on the adjudication of the treaty rules concerning free movement of goods in the absence of exhaustive harmonisation.[216] In this respect the opinion by the AG provide the opposite angle. Since the ECJ neither classifies the measure as being discriminatory nor explains the relevance of the integration requirement, its relevance in the instant case remains obscure. The fact that the environmental integration obligation is mentioned but not other cross-sectorial integration provisions on health and animal welfare[217] may however suggest a hierarchy in which environmental protection rank higher than the simultaneously applicable article 36 for the purpose of justifying the measure. Again, this can also serve as an argument for the subsumtion of environmental protection under article 36.

ECJ then make two references to the Electricity directive[218]. Firstly, it mentions articles 8(3) and 11(3) according to which a member state for environmental reasons may require TSOs and/or DSOs, "when dispatching generating installations, to give priority to generating installations using RES". These provisions basically enable a prioritized access to the electricity grid.[219] The priority dismantling mechanism was indeed utilized by most member states prior to the Directive.[220] Several commentators have taken the view that the mechanism as such, namely without any provisions on financing, would not significantly affect the promotion of RES-E.[221] These provisions were also submitted by several of the governmental and intervening parties in order to justify the measure. It is not entirely clear how their arguments were constructed. What is clear however is that the validity of these arguments were dismantled by AG. According to him these provisions, first, "must be interpreted

[213]Case C-379/98 *PreussenElektra* para 76.
[214] See also Dhondt 2003:163.
[215] AG opinion para 230-233 in Case C-379/98 *PreussenElektra*, Jacobs 2006:191.
[216] Johnston 2008:134. See also Dhondt 2003:183.
[217] See protocol on protection and welfare of animals and art. 129 of Treaty of Amsterdam Amending the Treaty on the European Union, the Treaties Establishing the European Communities and Certain Related Acts.
[218] Directive 96/92/EC.
[219] Compare Heinen 2001:95.
[220] Cameron 2002:149, para. 414
[221] Cross, Hancher and Slot 2001:316 para 5.307 and Cameron 2002:149, para 414.

narrowly as exceptions to the general non-discrimination rule in Articles 8(2) and 11(2)", and second, "allow only distinctions between different modes of production of electricity." Since the measure favoured domestic electricity over imported electricity of the same type the AG concluded that they could not be justified on the basis of these provisions.[222] Apparently, the ECJ must have come to another conclusion on the relevance of these provisions. In the absence of any amplification the potential relevance remains ambiguous. However, it cannot be excluded that the reference is merely part of the wider strategy to establish environmental protection as the main thread of justification, which leads me to the second reference to the Electricity directive and the proportionality assessment.

2.1.3.2 Proportionality

As previously mentioned, the consideration of the "particular features of the electricity market" is in effect a proportionality assessment i.e. whether the means are appropriate for achieving the legitimate objective pursued and necessary for those purposes.

In this regard the ECJ noted that according to the 39th recital of the then applicable Electricity directive, it constituted only a further phase in the liberalisation of the electricity market and left some obstacles to Inter-state trade at place. Considered de jure, the statement simply seems to legitimize other distortions than those arising from the monopolistic market structures of the electricity sector which the directive primarily targets. However, if considered de facto, the effects of such a stance would imply that to the extent the electricity market is not fully liberalised, further distortions on environmental grounds would be permissible. This is a self-defeating and circulatory reasoning since it would justify distortions to trade by reference to the very same distortions.

Secondly, the ECJ found that "the nature of electricity is such that, once it has been allowed into the transmission or distribution system, it is difficult to determine its origin and in particular the source of energy from which it was produced."[223] In this regard reference is made to the view taken by the Commission in its proposal for RED 2001 where a system of guarantees of origin for renewable electricity, capable of being subject of mutual recognition among member states, is essential in order to make trade in that type of electricity reliable as well as practically possible. In the absence of such a system, one must assume, the purported "nature of electricity" will inevitably justify the obstacles to intra-Union trade provided by the measure.

2.1.3.3 Energy security? AG's opinion

According to inter alia the Commission and the German government the measure should be justified on basis of security of supply concerns by virtue of public security under article 36 and the former applicable Electricity directive.[224] Whilst the ECJ in principle acknowledges the possibility of justifying the measure by reference to environmental protection, it disregarded the justification basis advanced in respect of security of supply concerns. The neglect of a legal basis

[222] AG opinion para 214 in Case C-379/98 *PreussenElektra.*
[223] Case C-379/98 *PreussenElektra* para 79.
[224] AG Opinion para 207 in Case C-379/98 *PreussenElektra.*

actually raised by the parties implies that the basis under no circumstances could be applicable under the present conditions. The dismissive opinion of AG must under these conditions[225] be considered as highly indicative as to the principal possibility to invoke security of supply concerns.

Two specific legal grounds were invoked in order to substantiate the justification on security of supply concerns. Firstly, it was contended that security of electricity supply concerns as such were included in the concept of public security under article 36 TFEU. Secondly, article 8(4) of the former applicable Electricity Directive was invoked, providing:

> A Member State may, for reasons of security of supply, direct that priority be given to the dispatch of generating installations using indigenous primary energy fuel sources to an extent not exceeding in any calendar year 15% of the overall primary energy necessary to produce the electricity consumed in the Member State concerned.

This provision remains unchanged in article 15(4) of the Electricity directive currently in force. Essentially, the provision enables a prioritized access to the grid of the production installations concerned and targets the TSO.[226] AG dismissed the relevance of this provision on two grounds. Firstly, the article was deemed to be interpreted strictly since it constituted an exception to the main rule in article 8(2) providing objective, transparent and non-discriminatory criteria. More precisely, wind in AG's opinion constituted neither a "fuel source" nor an "indigenous" commodity in the sense of the article's wording. Secondly, in his view this article allowed "differential treatment only on the basis of the origin of the primary energy fuel sources used and not on the basis of the location of the generation installation."[227] Although the outcome of the reasoning is correct in my view, the validity of not classifying wind as an indigenous source could be questioned, at least in light of the subsequent policy developments and considering the Commission's stance in this regard.

Furthermore, the AG rejected the possibility to invoke energy security concerns pertaining to public security under article 36. While acknowledging the possibility of recourse to article 36 provided by *Campus oil*, the AG nevertheless found it doubtful whether this was still possible in light of the measures allowed under the aforementioned Directive in order to ensure security of supply.[228] Additionally, wind as an energy source was considered to be of less importance than petroleum products for the modern economy, which was a decisive factor in the ECJ's "rather exceptional judgement in *Campus Oil*." What is more, the FIT law in question "pursues essentially environmental objectives and the admittedly positive consequences for security of energy supply are only side-effects of the Law in issue."[229] In any event, AG continued, the measure might be found incompatible with the principle of proportionality and the second

[225] See Hettne and Otken Eriksson 2011:116f on when the opinion of AG may be considered as a source of law.
[226] See also Hancher and Salerno 2012:390.
[227] AG opinon para 208 in Case C-379/98 *PreussenElektra.*
[228] The backdrop is Case 72/83 *Campus oil* para 27 according to which "[r]ecourse to article 36 is no longer justified if Community rules provide for the necessary measures to ensure protection of the interests set out in that article."
[229] AG Opinion para 209 in Case C-379/98 *PreussenElektra.*

sentence of article 36. More specifically, it was considered unclear whether the exclusion of renewable energy produced in other member states contributed to the realization of security of supply whereby it might be liable of arbitrary discrimination against RES-E from other member states.

The AG's reasoning is straightforward and in my view correct but it might nevertheless be questioned whether the limitation to wind and not RES-E in general is the appropriate point of reference. Although the specific area in which Schleswag operated presented ideal conditions for RES-E based on wind, the scope of the law in question is wider and comprises RES-E produced from at least water, wind, sun and biomass.[230] This would hardly have altered AG's assessment but nevertheless constitutes an unduly limitation in my opinion.

2.1.4 Preliminary assessment

The approach employed by the ECJ is highly favourable towards the measure assessed. The prima facie discriminatory character of the FIT law is not examined and it is furthermore justified by an exceptional two-tier justification approach, largely based on environmental protection concerns considering the other subordinated but seldom elaborated references. Energy security concerns are disregarded. The invoking of article 36 TFEU without explicitly taking into account at least some of the above mentioned aspects can be seen as an expression of its creative and lam making role.[231] The seemingly common perception that "the ECJ closely scrutinizes such claims [...and] will also closely examine the arguments concerning public health to determine whether they make sense on the facts"[232] is thus not an accurate description of ECJ's approach in this particular case. Nevertheless, considering that the measure in question is prima facie discriminatory, invoking article 36 may have been considered necessary in order to justify the measure under the traditional approach – albeit the approach employed is anything but traditional. However, by confining the conclusion to how the "Community law currently stands", assumingly comprising the particular features of the electricity market, the ECJ suggests that it will reconsider its approach in light of changes in the regulatory landscape.

2.2 Ålands vindkraft: TGC scheme

2.2.1 Background and measure

In contrast to the legal environment in *PreussenElektra*, the judgement *in Ålands Vindkraft* was rendered in the immediate context of Union legislation in the field of RES-E promotion, namely RED 2009. The Swedish legislator adopted a TGC scheme intended inter alia to transpose the Directive into Swedish law. Under the law, approved RES-E producers located in Sweden are awarded a certificate per MWh RES-E produced. These certificates are tradable on an open and competitive market where price is determined by the interplay of supply and demand. Demand for certificates stems from a quota obligation placed upon electricity suppliers, and certain electricity users corresponding to a proportion of the total volume electricity supplied or used respectively. A specific fee was

[230] AG opinion para 25 and 48 in Case C-379/98 *PreussenElektra.*
[231] For a general account, see for instance Hettne and Otken Eriksson 2012:49.
[232] Craig and de Burca 2011:673.

imposed in the event of non-compliance with the quota obligation. In the absence of an international agreement coordinating the Swedish TGC scheme with a TGC scheme of another state (such as the one between Norway and Sweden), the quota obligation was possible to fulfil only by certificates issued under the Swedish TGC law. The purchase price for certificate is passed on to the consumers.

Ålands Vindkraft, a RES-E producer located in the Åland archipelago in Finland, sought approval by the Swedish Energy Agency with the aim of being granted tradable certificates. The application was however refused on the basis that only RES-E production installations located in Sweden were eligible for certificates, whereby Ålands Vindkraft took action for annulment of that decision and approval of its application.

Even though the territorial restraint of the TGC scheme at first sight seems to be of prime concern for the purpose of analysing the compatibility with articles 34 and 36 TFEU, the question formulated by the referring court was basically whether the whole scheme as constituted by the elements outlined above, was compatible with article 34.[233] Thus, the TGC scheme in general is the measure subject to ECJ's review.

2.2.2 Classification of the measure

ECJ quite briefly identified the starting point, recalling the *Dassonville* formula while also referring to *PreussenElektra* employing it. Applying this formula ECJ, again omitting the "trading rules" element, found at the outset that "the legislation at issue is capable, in various ways, of hindering – at least indirectly and potentially – imports of electricity, especially green electricity, from other Member States."[234] Unlike "various ways" may suggest, the infringement is ascertained in two distinct but seemingly interrelated means.

Firstly, in the absence of inter alia an international agreement to that effect, only certificates issued under the national scheme can meet the quota obligation. The suppliers and consumers subject to the quota obligation would therefore as a rule have to purchase such national certificates on the basis of the electricity imported, failing which they would have to pay a specific fee. Such a construction was considered capable of impeding electricity imports.

Secondly, although RES-E producers may trade their certificates on an open and competitive market, the TGC scheme does not preclude producers from selling the certificates together with the electricity they produce – as a package. The mere existence of such a possibility, ECJ continues, "seems capable in practice of facilitating the opening of negotiations and the establishment of contractual relationships" whereby suppliers and users are able to obtain a package of both the electricity and the certificates needed.[235] Also in this regard,

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[233] The referring court also asked, firstly, whether the Swedish TGC scheme was allowed by the RED 2009, and secondly, on the assumption that article 34 did not preclude the scheme at hand, whether the fact that the territorial restraint did not follow explicitly from the law itself but from its preparatory work and previous law affected the assessment. Whilst the affirmative answer to the first question is the very starting point of this essay and hence not subject to doubt in the authors view, the second question does not raise substantial concerns regarding the scope of state discretion in respect of RES-E design. For those reasons, none of these questions and corresponding answers will be further analysed here.

[234] Case C-573/12 *Ålands vindkraft* para 67.

[235] Case C-573/12 *Ålands vindkraft* paras 71-72.

ECJ reasoned, the effect of the Swedish support scheme at least potentially restrained electricity imports. This finding was accompanied by a reference to previous case law on "Buy national"-campaigns supported by the Irish Government. Additionally, referring to the Angry Farmer-case, ECJ in particular noted "that a failure by a Member State to adopt adequate measures to prevent barriers to the free movement of goods that have been created, in particular, through the actions of traders but made possible by specific legislation that that State has introduced, is just likely to obstruct intra-Community trade as is a positive act."[236] Against this background ECJ concluded that the TGC scheme constituted an MEE and was in principle incompatible with the obligations under article 34, unless objectively justified.

In contrast to *PreussenElektra*, the measure at hand does not explicitly prescribe the purchase of domestic RES-E. It is therefore perfectly reasonable for ECJ to elaborate on the means in which article 34 prima facie are breached. In contrast to ECJ's stance, the AG, having found that the certificates "indisputably confers an economic advantage," concluded that the fact that it was impossible for RES-E producers located in other member states to have access to such a scheme when they exported RES-E constituted "a discriminatory restriction" as such prohibited by article 34 TFEU.[237] It is noteworthy that the ECJ, unlike the AG, does not characterize the measure as being discriminatory. Although the effects by the TGC scheme on intra-Union trade may be framed differently, as displayed by the different conceptualisation by ECJ and AG, the scheme is in my opinion clearly discriminatory since it in law and in fact has a different burden for domestic and imported RES-E. This may, in line with the infringement assessment in *PreussenElektra*, be read so as to suggest that the ECJ is preoccupied with justifying the measure.

2.2.3 Justification

In contrast to the ambiguous reasoning in *PreussenElektra*, the ECJ clarify in the instant case that it has "consistently held" that MEEs/QRs may be justified on one of the public interest grounds listed in article 36 TFEU or by mandatory/overriding requirements.[238] In either case, ECJ continues in even sharper contrast to the approach in *PreussenElektra*, the measure must comply with the principle of proportionality i.e. be appropriate for achieving the objective pursued and not go beyond what is necessary to attain that objective. While the former part amounts to 6 paragraphs in the judgement, the latter amounts to 37 – signalling thereby a shift in the jurisprudential devices employed.

Having established the justification bases and undertaken the proportionality assessment, the ECJ concluded that the TGC scheme was not precluded by article 34 TFEU. In the following the path toward this conclusion will be presented and discussed.

2.2.3.1 Justification bases

The Swedish Energy Agency, as well as all governments which had submitted observations, argued that the justifications established in *PreussenElektra*

[236] Case C-573/12 *Ålands vindkraft* para 74.
[237] AG opinion para 76 in Case C-573/12 *Ålands vindkraft*.
[238] Case C-573/12 *Ålands vindkraft* para 76.

applied equally to the measure in question. The AG did not share this view since the developments in the regulatory framework, in his view, necessitated a review of the terms of the debate.[239] However, the ECJ basically adhered to the governmental view.

Both the establishment and the reasoning in respect of principal justification bases nearly duplicate the ones employed in *PreussenElektra* to which the ECJ in the instant case also refers. Accordingly, the ECJ notes, the use of RES-E is useful for environmental protection and the increase of that usage is, "as is explained, in particular, in recital 1" to RED 2009, one of the important components to comply with obligations pertaining to the international climate change regime and other external as well as internal commitments.[240] The fact that energy from RES according to the very same recital also have an important role in promoting security of energy supply is clearly not considered. Secondly, the increased usage is also considered designed to protect the health and life of humans, animals and plants under article 36 TFEU. However, ECJ also invokes the new energy provision in article 194(1)(c) TFEU which in its interpretation makes it clear "that the development of renewable energy is one of the objectives that must guide EU energy policy."[241] In light of these considerations, ECJ concluded that the objective of promoting the use of renewable energy sources is in principle capable of justifying barriers to the free movement of goods.

2.2.3.2 Proportionality

In the context of proportionality the ECJ found it appropriate initially to review certain features of the electricity market that it took into consideration in *PreussenElektra*. In this regard, the court seemingly follows the approach recommended by AG but depart on how the substantial issues are assessed. In the AG's view *discriminatory* national measures should be possible to justify on environmental protection grounds "provided, however, that it undergoes a particularly rigorous proportionality test", one described as reinforced.[242] The development of two new factors underlie AG's scepticism of the continued relevance of the *PreussenElektra* judgement and those are also assessed by ECJ.

Firstly, in line with AG's opinion, the legal context in which the first Electricity directive operated and constituted a further liberalisation that nevertheless left some obstacles to trade in place was considered no longer true. This was so due to the various legislative instruments that have been adopted since *PreussenElektra* in order to gradually dismantle the barriers so as to enable a fully operational internal electricity market.[243]

Secondly, the dictum in *PreussenElektra* to the effect that the nature of electricity is such that once it has been allowed into the transmission/distribution system it is difficult to determine its origin and in particular the source of energy from which it was produced, was considered to be of continuing validity. The fact that GO's had been established, the absence of which was decisive for the outcome in *PreussenElektra* according to AG,[244] was

[239] AG opinion paras 81-82 in Case C-573/12 *Ålands vindkraft*.
[240] Case C-573/12 *Ålands vindkraft* para 79.
[241] Case C-573/12 *Ålands vindkraft* para 81.
[242] AG opinion para 79 in Case C-573/12 *Ålands vindkraft*.
[243] Compare Kröger 2013:389 on the actual developments of the internal market for electricity.
[244] AG opinion para 90 in Case C-573/12 *Ålands vindkraft*.

not in the courts view capable of calling that finding into question. The ECJ submitted two arguments in this regard – one of legal, the other of factual/empirical character. Firstly, pursuant to the RED 2009, the sole purpose of GO's is to indicate to final customers the proportion of RES in the suppliers energy mix. Secondly, the systematic identification of RES-E at the distribution and transmission level remained difficult to put into practice due to the fungible nature of electricity and the inability of GO's to confirm that a certain electricity volume in the grid is produced from RES.

Although the legal argument on the function of GO's as such is correct in my view, it is nevertheless used – as predicted by AG – to justify infringement of primary law by reference to the wording of a lower-ranking source of law. In particular, the absence of GO's seemed decisive in the *PreussenElektra* judgement which took into account the discussions held at Union level aiming to introduce GO's and explicitly confined the outcome to how the EU law "currently stood". Thus, in my opinion, it would have been much more frank by the ECJ to state that it in *PreussenElektra* misunderstood the potential function of GO's (after all, their introduction and substance was merely discussed) and/or to clarify that the justification of the measure(s) at hand cannot in itself depend upon the possibility to distinguish RES-E from grey electricity. In the absence of such a clarification and on the assumption that ECJ's empirical argument is correct and indeed will remain correct for a considerable time ahead, the principal scope of state discretion regarding RES-E support scheme design will as a starting point be significant.

However, having taken account to these "preliminary considerations" since *PreussenElektra*, ECJ went on and assessed core features of the TGC scheme at hand, namely the territorial limitation and the quota obligation. The territorial limitation, in my view outright discriminatory, was the very basis for the proceedings initiated. Several general and interrelated arguments were pursued in order to justify the territorial restriction of the TGC scheme concerned and all were underpinned by a general reference to environmental protection.[245] The first argument was based on the need to ensure the proper functioning of the support scheme and not to comprise the ability of the member states to meet their national target. The second argument held that cross-border trade in electricity requires the prior conclusion of a international cooperation agreement between the member states concerned. Thirdly, it was contented that any prohibition on territorial restrictions would cause the member states to lose control over their energy mix. The fourth argument was that electricity producers located in other member states would be free to select the support scheme that was most favourable to them and that this would pave the way for 'à la carte' support and even make it possible to obtain support from two national schemes. Finally, it was stated that making support schemes accessible to foreign electricity production would have the consequence of forcing national consumers to finance green energy production installations located in other Member States. The AG dismissed all of the arguments put forward and concluded that none of the arguments relied on is capable of demonstrating that the territorial restriction are appropriate for the attainment of environmental protection. As a result, the measure at stake was considered inconsistent with

[245] AG opinion paras 95-96, 99, 103, 105 in Case C-573/12 *Ålands vindkraft*.

the principle of the free movement of goods. What is more, since RED 2009 authorized the alleged inconsistency it was also considered invalid in this regard. The main argument pursued by the AG is interesting since it illustrates the deterritorialised feature of environmental protection and the difficulties informing state discretion in this respect. Basing it on one of the four specific EU environmental objectives contained in article 191(1) TFEU, namely the prudent and rational utilisation of natural resources, the AG argued that:

> [T]he 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 State according to their respective potentials.[246]

This statement bears close resemblances with the theory of comparative advantage underpinning the case for free international trade.[247] The ECJ was however not convinced by the AG's opinion, holding that "as EU law currently stands, such a [territorial] limitation may in itself be regarded necessary" in order to attain the objective of increased RES-E usage.[248] Admitting that the underlying objectives of environmental protection and the protection of human etc. at first sight may seem possible to pursue within the EU regardless of specific locality, the absence of in particular harmonisation in this regard enabled in principle member states to limit their schemes territorially. This is noteworthy since it may be read so as to suggest that the ECJ is attracted by the deterritorialised component of environmental protection whose legal force, however, is precluded by secondary legislation. Two main arguments were advanced to this end.

Firstly, the ECJ pointed out that it is primarily at the production stage that the reduction of GHG-gases can be pursued, explaining why a national support scheme favour directly the production rather than the consumption of RES-E solely. This finding is based on the perceived nature of electricity and the accompanying practical difficulties to systematically identify RES-E at the grid, and accordingly the consumption, level. This empirical statement is followed by several references to RED 2009 interpreted by the ECJ to the effect that "the EU legislature has assigned the various Member States mandatory national targets formulated in terms of quotas for the production of green electricity."[249] With those two seemingly elusive statements the ECJ, in my view, underline the importance of territorial constraints insofar that the national RES targets are calculated on the basis of production and not consumption. If the target(s) was based on consumption, one must assume, the case for territorial limitation would have been weaker, irrespective of the difficulties to systematically identify different types of electricity.

Secondly, the ECJ took account of the considerations informing the EU legislature in 15th and 25th recital RED 2009. Both recitals take their point of departure in the national variations regarding renewable energy potential and

[246] AG opinion para 109 in Case C-573/12 *Ålands vindkraft*.
[247] See for instance Barnard 2010:4f.
[248] Case C-573/12 *Ålands vindkraft* para 92.
[249] Case C-573/12 *Ålands vindkraft* para 97.

energy mix. However, while the former moved the EU legislature to consider it appropriate to allocate among the states a differentiated share of EUs overall 20 % target, the latter stressed the importance of states' ability to control the effect and costs of their in schemes in order to ensure its proper functioning and maintaining investor confidence. In this connection the ECJ also refuted the argument put forward by Ålands Vindkraft that Sweden's share of RES-E production enabled it to meet its mandatory target. Even if this was the case, the ECJ held, it could not support the inference that the territorial limitation was no longer necessary since the effectiveness of a RES-E support scheme, due to its higher productions costs "requires by definition a measure of continuity sufficient, in particular, to ensure the fulfilment of the legitimate expectations of investors who have committed themselves to such projects."[250]

Having taken into account these aspects, ECJ found that a territorial limitation appeared to not breach the proportionality principle. More precisely, in light of how "EU law currently stands", the territorial limitation was considered to not go beyond what is necessary to attain the objective, pursued by both RED 2009 and the Swedish TGC scheme, of increasing the production and indirectly the consumption of RES-E in EU. Two things should be noted here. Firstly, ECJ consider the territorial limitation of RES-E support schemes as such, not confining itself to the particularities of the Swedish TGC scheme. I submit that such a principal reasoning enables considerable generality and thus can be extended, by analogy, to other similar RES-E support schemes. Secondly, it is noteworthy that legitimate expectations of investors are raised in the context of relatively higher RES-E production costs when it is alleged that RES-E support scheme in question already enables the fulfilment the target set. Although RED 2009 is full of references to the importance of investor confidence, the ECJ's angle in the case at hand may be read so as to suggest that it is the cost deficiency on part of RES-E that ultimately justify support schemes, not the long-term objective to decarbonize the energy sector. Both objectives are certainly highly interrelated but by emphasizing the assumingly shifting expectations of investors than the more easily and objectively captured RES targets, the basis for state discretion is likely to be unstable.

Having found that the territorial limitation comply with the proportionality requirement, ECJ went on to examine whether the other features of the legislation at issue, viewed as a whole, meets the requirement. This examination centres on the effects of the annual quota obligation and associated aspects such as the specific fee in case of non-compliance, the subjection of certificates to a competitive market, and the possibility of package sales.
The court initially stated that a member state, in choosing a TGC scheme with the intermediary quota obligation whereby the costs are borne by the market, did not exceed the bounds of discretion to which it remained entitled in the pursuit of the legitimate objective. Secondly, the ECJ noted that, unlike for instance investment aid, the purpose of the scheme at hand is to support the operation of production installations once they become active. The quota obligation functions in this regard in particular to guarantee the RES-E producers a demand of the certificates awarded, thereby facilitating the sale at a price higher than the market price for conventionally produced energy. The effect of such a scheme in

[250] Case C-573/12 *Ålands vindkraft* para 103.

terms of providing an incentive for electricity producers to increase their production did not appear to be open to doubt, nor its ability to attain the legitimate objective. Thirdly, however, a proper functioning of such a scheme requires in the ECJ's view market mechanisms through which suppliers/users subject to the quota obligation actually can obtain certificates under fair terms. Fourthly, provided that these market mechanisms are established which seems to be assumed by the reference to the affirmative finding of the referring court, the fact that the TGC scheme at issue did not prohibit package sales did not mean that it went beyond what was necessary to attain the legitimate objective. Actually, "[t]he fact that such a possibility remains open appears to be an additional incentive for producers to increase their production of green electricity."[251] Finally, as regards the imposition of a specific fee in case of non-compliance with the quota obligation, the ECJ considered it necessary as an incentive on both producers and traders subject to the quota obligation provided, however, that the fee did not go beyond what was necessary for the purpose of providing such an incentive.

2.2.4 Preliminary assessment

The fact that the ECJ in the instant case adhere to the justification bases in *PreussenElektra* reinforces the perception that it is highly favourable towards RES-E support schemes. In spite of the poor and ambiguous reasoning in *PreussenElektra*, the judgement seems to have set an important precedent in the context of RES-E support scheme design. By not tying the justification possibilities to an examination of whether the measure is discriminatory, the court validate a rather original approach where two set of justification regimes are seemingly equally applicable but no guidance is provided as to the specific base on which the measure is exempted. Thus, several of the arguments that were made in the context of *PreussenElektra* may be reinvented. There are however two important differences. Firstly, the ECJ's reasoning in the instant case is not structured so as to suggest that environmental protection is subsumed under article 36. Although this may technically still be the case, the earlier reference to environmental provisions at the level of primary and secondary law is replaced by the new energy provision in respect of promoting RES. Secondly, a quite detailed proportionality review has entered the justification assessment. Although this in principle may restrict state discretion, its function in the instant case seems rather be to validate the territorial limitation in light of the justification bases.

2.3 Essent Belgium: GO's and TGC scheme

2.3.1 Background and measure

The predecessor to RED 2009 – RED 2001 – established GO's in order to facilitate trade in RES-E and to increase transparency for the consumer's choice between RES-E and grey electricity. Member states are obliged to ensure that the origin of electricity produced from RES can be guaranteed as such. To this end, a GO shall 1) specify the energy source, date and place of production, and 2) serve to enable RES-E producers to demonstrate that the marketed electricity is produced from

[251] Case C-573/12 *Ålands vindkraft* para 116.

RES. Additionally, states are obliged to mutually recognize the issuance of GO's, exclusively as proof of the elements mentioned, and any refusal in this regard must be based on objective, transparent and non-discriminatory criteria. Under RED 2001, as in RED 2009, GO's do not in themselves imply a right to benefit from RES-E support schemes established in different member states. Under the RED regime it is important to clearly distinguish GO's from tradable green certificates. Thus, in contrast to the leeway in respect of RES-E support scheme design, the establishment of GO's are compulsory.

In order to implement inter alia RED 2001, the Flemish region in Belgium instituted a TGC scheme. Under this regime RES-E producers are awarded a green certificate for each 1000 kWH RES-E generated. Suppliers are obliged to annually surrender a number of certificates corresponding basically to the total amount of electricity supplied multiplied with a certain coefficient set for each year. An administrative fee was imposed in case of non-compliance. Under this regime a GO was defined as proof confirming that a quantity of electricity supplied to final consumers originated from renewable energy sources, which roughly corresponded to the definition and usage of a green certificate in the context of sales to final consumers. However, in the absence of express approval by the Flemish government, only certificates for RES-E produced in the Flemish region was able to met the quota obligation.

The supplier Essent Belgium surrendered inter alia GO's attached to RES-E produced in Norway, Netherlands, Denmark and/or Sweden in order to meet the quota obligation arising from the Flemish TGC scheme. Since only green certificates for RES-E produced in the Flemish Region could meet the quota obligation, the Flemish Regulatory Authority for the Electricity and Gas Market (VREG) imposed on Essent Belgium an administrative fee per each green certificate not surrendered.

The system of mutual recognition and establishment of GO's does not constitute a RES-E support scheme. However, as displayed by Commission's criticized proposal for RED 2009, GO's are nevertheless easy to combine with RES-E support schemes, in particular TGC schemes. In effect, by not allowing a state to require the fulfilment of a quota obligation by certificates issued for domestic RES-E, the very basis for state discretion – minimum harmonisation – would be erased.

Additionally, even though the territorial restraint of the TGC scheme and the usage of GO's at first sight seems to be of prime concern for the purpose of analysing the compatibility with articles 34-36, the question formulated by the referring court is basically whether the whole scheme as constituted by the elements outlined above is compatible with article 34.[252] Thus, the TGC scheme in general and its interrelation with GO's is the measure subject to ECJ's review.

[252] The national court in fact asked whether the provisions were compatible with articles 11 and 13 of the EEA agreement. According to settled case law, however, the provisions of TFEU and EEA agreements must be interpreted in a similar fashion. The ECJ assessed the TFEU provisions and stated that the considerations in this regard must be construed as applying mutatis mutandis to the said provisions in the EEA agreements. Moreover, similar to *Ålands vindkraft*, it was asked whether the RED 2001 allowed a support scheme such as that in the instant case, which is the very starting point of this essay. See Cases C-204/12 to C-208/12 *Essent Belgium* paras 42, 69, 72.

2.3.2 Classification of the measure

Several objectives were raised against the classification of GO's as "goods" within the meaning – ultimately the applicability – of article 34 TFEU. In my view, it is not necessary to handle this particular issue since the question is whether GO's can serve the same function as certificates under the TGC scheme the latter of which arguably must be assumed to affect the trade of electricity which is a good.[253] However, after designating the *Dassonville* formula as the point of departure while also referring to *PreussenElektra*, the ECJ sought to handle this objection and also the question of whether the movement of GO's was affected by the scheme. In this regard, ECJ observed that the "very existence, content, scope and functions" of GO's is regulated by RED 2001.[254] Having analysed the characteristics of GO's which basically have been outlined above, ECJ found, firstly, that GO's are designed to be incidental to both the RES-E generated by a producer and the electricity sold by a supplier to consumers. Secondly, it found that the free movement of GO's, at least for the purposes attached to them under RED 2001, is not restricted by the fact that they are not taken into account by a national TGC scheme. However, the ECJ did not find it necessary to rule definitely on these questions, because even if GO's were deemed to constitute goods whose movement was restricted by the TGC scheme at hand, they would nevertheless – "in any event" – be subject to the justification considerations set out in the judgement.[255] The properness of not ruling definitely on the character of a certain legal construction by reference to the justification assessment of a system promoting a good to which the construction "in any event" belong but only in an seemingly "incidental" manner may certainly be discussed. In particular, it may be discussed whether GO's which are exhaustively regulated by secondary legislation are in a position to be affected by primary law considerations. At the same time, however, ECJ's approach indicates a principal reasoning where components incidental to the overall support scheme, or at least the good traded thereunder, are to be assessed under the justification considerations applicable to its main components.

Referring exclusively and extensively to *Ålands vindkraft* case, the ECJ found that this legislation is capable in various ways of hindering – at least indirectly and potentially – the imports of electricity, particularly RES-E, from other member states. Unlike "various ways" may suggest, the restriction is conceptualised by two distinct means. Firstly, since only green certificates awarded under the domestic legislation could fulfil the quota obligation, imports of electricity would as a rule necessitate the purchase of those certificates, failing which an administrative fee would have to be paid. Secondly, the fact that the legislation did not prohibit package sales (i.e. selling the RES-E together with the certificates), appeared capable in practice to establish contractual relationships, sometimes on a long-term basis, through which suppliers obtained both the electricity and the certificates required. In both cases the import of electricity was considered potentially restricted. In light of these considerations the ECJ

[253] For a similiar view, see AG opinion para 76 in Cases C-204/12 to C-208/12 *Essent Belgium.* AG, however, seem to misconceive the issue by also raising the question of whether certificates constitutes goods. Ultimately, he falls back on a broad definition of goods.
[254] Cases C-204/12 to C-208/12 *Essent Belgium* para 78.
[255] Cases C-204/12 to C-208/12 *Essent Belgium* para 81.

concluded that the scheme at issue constituted an MEE in principle incompatible with article 34, unless objectively justified.

It is hardly surprising that the ECJ nearly duplicates the dicta in *Ålands Vindkraft*. The Flemish TGC scheme is after all quite similar to the Swedish TGC scheme. This is also one reason for disregarding the question of whether GO's constitute goods. It should nevertheless be mentioned that ECJ, unlike AG, does not expressly classify the MEE as discriminatory.

2.3.3 Justification

In accordance with the justification approach in *Ålands vindkraft* to which it also referred, ECJ considered, first, whether the TGC scheme may be justified by any of the public interest grounds listed in article 36 TFEU or by overriding requirements, and, second, whether it complied the principle of proportionality.

Having established the justification bases and undertaken the proportionality assessment, the ECJ concluded that the TGC scheme was not precluded by article 34 TFEU, provided however that two aspects related to the scheme were considered proportional the interpretation of which was leaved to the national court. In the following the path toward this conclusion will be presented and discussed.

2.3.3.1 Justification bases

According to AG who favoured the possibility to justify discriminatory measures on grounds of environmental protection as a mandatory requirement, the arguments presented for such a justification was nevertheless weak. Firstly, as noted elsewhere, the dicta in *PreussenElektra* on the further liberalisation of the electricity market that nevertheless left some obstacles to inter-state trade at place and the perceived nature of electricity, could in his view not longer be accepted due to changes in the regulatory framework. Secondly, the argument that the TGC scheme contributed to a reduction of GHG was dismissed, because RES-E produced in other member states contributed to the reduction of GHG in the Flemish region to the same extent as RES-E produced in that region. In this connection AG also refuted the principle that environmental damage should be remedied at source, which justifies local treatment of waste and was successfully invoked in *Wallonian Waste* case, assumingly due to the different conceptualisation of territorialised waste and deterritorialised GHG. This thread of argument highlight the deterritorialised feature of climate change mitigation and underline the shaky foundation for the purposes of establishing state discretion. Thirdly, the argument that the targets set by RED 2001 would be jeopardized if national support schemes were made available to foreign RES-E producers was dismissed by reference to the fact that the consumption target was defined as national production plus imports minus exports, and that imports of RES-E accordingly could be counted of towards the national target.

The rationale pursued by AG, similar to the main argument pursued in *Ålands vindkraft* though not referring to a specific legal basis, is that environmental protection is "not understood in purely national terms, but is part of a European momentum" and subject to a EU common policy, amongst other in the field of climate change mitigation. In AG's view, therefore, it is necessary to *also* take into account the benefits that may arise from intra-Union RES-E trade, such as "reducing the cost of renewable energy by permitting a more rational

location of production."[256] It is noteworthy that although these aspects can be underpinned by internal market and cost based energy security concerns, contingent on angle, they are pursued by AG under the banner of deterritorialised environmental protection. AG finally[257] concluded that article 34 TFEU precluded national support schemes that did not take into account GO's issued for RES-E production in other member states.

However, in the course of establishing environmental protection as a mandatory requirement, the ECJ duplicated the general dictum in *Ålands vindkraft* according to which the use of RES-E, which the measure seeks to promote, contributes to the reduction of GHG which are amongst the main causes of climate change that the EU have pledged to combat. Referring to the first three recitals of RED 2001 and also the judgment *IBV & Cie* which referred to the first two, ECJ then stated that the increased use of RES-E is a high priority for EU and an important part of the measures to comply with the Kyoto Protocol and achieve this more quickly. The fact that the first two recitals of RED 2001 also mention the contribution of RES to security of energy supply is clearly not considered. Secondly, the increased usage of RES-E was also found to protect the health and life of humans, animals and plants under article 36 TFEU. These principal findings duplicate the reasoning in *Ålands vindkraft*. However, in contrast to *Ålands vindkraft*, the ECJ then added that the national RES support mechanisms are capable of contributing to attain the objectives in articles 6 and 174(1) EC, now contained in articles 11 and 191(1): the environmental integration principle and the four specific EU environmental objectives. The fact that the case-by-case balancing of these objectives very well may result in a deterritorialised approach to environmental protection, as illustrated by the AG's reference to "prudent and rational utilisation of national resources" in *Ålands vindkraft*, is not considered. In light of these considerations the ECJ concluded that the legislation at issue was in principle capable of justifying barriers to the free movement of goods.

2.3.3.2 Proportionality

As regards the compatibility with the principle of proportionality – namely whether the legislation is suitable for attaining the legitimate objective pursued and necessary to that end – the ECJ basically assessed the two components of the TGC scheme reviewed in *Ålands vindkraft*: the territorial restraint and the quota obligation. ECJ, however, omitted the initial "preliminary considerations" in respect of the electricity market raised in *PreussenElektra*. At the one hand, this is hardly surprising given that ECJ in its *Ålands Vindkraft* judgement dealt with these issues and basically formulated the justification approach applied on the TGC scheme at hand. At the other hand, however, the nature of electricity as understood in the two previous judgements is highly related to how ECJ conceptualise the function and usage of GO's the question of which is far more important in the instant case than in the previous case.

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[256] AG opinion para 110 in Cases C-204/12 to C-208/12 *Essent Belgium*.

[257] AG also submitted two more specific arguments related to the distinction between GO's and green certificates as well as VREGs practice in this regard. However, since AG does not definitely characterise GO's as goods and ECJ's envisaged justification assessment in any event are applicable on GO's, I will not comment this issue further.

In the absence of inter alia EU law harmonisation of national support schemes, the fact that only certificates issued for the regional (Flemish) RES-E production could fulfil the quota obligation may, in ECJ's view, in itself be considered necessary for the promotion of RES-E production. Two main arguments were advanced to this end. Both are nearly identical to the two employed in *Ålands vindkraft* and illustrate that in spite of changes in the regulatory framework provided by RED 2001 and RED 2009, the starting point remains intact. Firstly, ECJ pointed out that it is primarily at the production stage that the reduction of GHG can be pursued, explaining why a national support scheme favour directly the production rather than the consumption of RES-E solely. Additionally, it followed from RED 2001 that member states were allowed to set their indicative targets on the basis of national RES-E production. It is noteworthy that ECJ here, unlike in *Ålands vindkraft*, does not mention the difficulty to systematically distinguish RES-E at grid level arising from the perceived nature of electricity. By neither raising this issue nor referring to the relevant dictum in *Ålands vindkraft*, the AG's argument that the definition of consumption also included imported RES-E remains uncontradicted. Secondly, as regards the fact that the TGC scheme at issue does not benefit also the RES-E production in other member states, ECJ observed that the starting points, the renewable energy potential and the energy mix of each state vary. Guaranteeing the proper functioning of national RES support schemes, as recognized in RED 2001, is one important mean of achieving an increased use of energy from RES. Additionally, it was considered essential that member states are able to control the effects and costs of their schemes according to their potential. whilst maintaining investor confidence.

Having found that the reservation of the TGC scheme exclusively to RES-E production in the Flemish territory did not infringe the principle of proportionality, ECJ proceeded and considered whether the other features of the legislation at hand satisfied the proportionality requirement. The review largely duplicates the proportionality assessment in *Ålands vindkraft*. Accordingly, member states did not exceed the bounds of discretion by adopting a TGC scheme which through the quota obligation is designed to have the additional costs to be borne by the market. The effect of the quota obligation in terms of stimulating a higher RES-E production did not appear to open to doubt; nor, consequently, its ability to attain the legitimate objective. Provided that a genuine market exists in which it is possible to obtain certificates under fair terms, the fact that package sales are not prohibited appeared to be an additional incentive for RES-E producers to increase their output. Provided that neither the method for determining the fine nor the amount went beyond what is necessary for providing an incentive, the verification of which ECJ leaved to the national court, the administrative fee was considered necessary.

In light of these considerations ECJ concluded that the Flemish TGC scheme at issue was not precluded by article 34 and 36 TFEU, provided, however, that two conditions are met. Firstly, that mechanisms are established which ensure the creation of a genuine market for certificates in which supply can match demand, reaching some kind of balance, so that it is actually possible for the relevant suppliers to obtain certificates under fair terms. Secondly, that the administrative fee in case of non-compliance with the quota obligation does not exceed what is necessary to encourage RES-E producers to actually increase

their output and obligated suppliers to actually purchase the required certificates, by avoiding in particular excessive penalties.

2.3.4 Preliminary assessment

The approach by the ECJ basically reiterates the dicta of *Ålands vindkraft* and continues on the two-tier justification approach established in *PreussenElektra*. The regulatory landscape, both in terms of primary law and secondary law, lies in the middle of the ones surrounding these cases. The favourable approach is thus maintained. However, in contrast to the previous judgement, the ECJ explicitly conditions its verdict on the establishment of two aspects, namely mechanisms establishing a genuine market and the method for determining the administrative fine. These two aspects constitutes prima facie restrictions on state discretion, but not in respect of a principal RES-E support scheme design since a TGC scheme were cleared in the previous judgement. To what extent this imposes substantive constraints on state discretion will be discussed below.

2.4 Overall assessment

2.4.1 The doctrinal issue and intensity of review

As previously mentioned the question of whether a discriminatory measure may be justified on the basis of the mandatory requirements doctrine – and conversely, whether it is only possible to justify under article 36 TFEU – is one of the key doctrinal issues in this area of law. Legal certainty, one may argue, is contingent upon a clear answer to this fundamental question. In the absence of legal certainty in this regard the very basis for state discretion is uncertain. The assessment by ECJ of three national/regional and, therefore, prima facie discriminatory RES-E support schemes provided a golden opportunity to finally settle this issue. Unfortunately, the ECJ did not seize the opportunity. On a general level, therefore, the key doctrinal question remains unsettled. In the specific cases presented, the ECJ has even refrained from examining whether the RES-E support schemes constitutes discriminatory MEEs.

However, notwithstanding the importance of a precedent which formally settle the doctrinal issue and provide guidance for cases concerning other measures, the case law on the RES-E support schemes assessed provide in my opinion legal certainty sufficient to identify how similar measures may be assessed. This assertion is not casted into doubt by the confinement of the *PreussenElektra* judgement to "the current state of Community law concerning the electricity market" and the similar expression in *Ålands vindkraft* that the territorial limitation may in itself be considered necessary in light of how "EU law currently stands." Firstly, these seemingly similar statements were made in quite different regulatory frameworks: the first one in the absence of secondary legislation regarding RES, the other one in the context of the second legislation package regarding RES. Additionally, while the *PreussenElektra* dictum was uttered in relation to at least the perceived nature of electricity and the absence of GO's the establishment of which was then discussed, the dictum in *Ålands Vindkraft* is related to the absence of harmonisation which enables member states to territorially limit their RES-E schemes - the latter being the very starting point of this essay.

Thus, albeit ECJ's reasoning in *PreussenElektra* was (and is) highly confusing, the two-fold justification track originally established has been relied on in subsequent cases. The intensity of review, or rather the lack thereof, in respect of the prima facie discriminatory character of the support schemes assessed have also been maintained. The principal approach identified is thus constituted, first, by classifying the measure as an MEE (at least indirectly as in *PreussenElektra*) without examining nor mentioning its discriminatory character, and second, by justifying the measure and the objective pursued on the basis of environmental protection as a mandatory requirement and the protection of health and life of humans, animals and plants under article 36 TFEU. Other policy and/or legal reasons are taken into account at this stage but are subordinated the principal justification bases. In respect of the treaty based justification basis, the intensity of scrutiny is rather low. As mentioned in connection with *PreussenElektra*, several objections, general as well as specific, can be raised against the view that an increased use of RES-E is also designed to protect the health and life of humans, animals and plants. This is not a denial of the scientific basis for such a view but rather a questioning of how fundamental legal concepts are understood in this context, given that – as illustrated for instance by the preamble to UNFCCC – "there are many uncertainties in predictions of climate change, particularly with regard to the timing, magnitude and regional patterns thereof." In any event, the fact that the somewhat sloppy establishment of this justification basis have been upheld in two subsequent cases, without further elaboration, makes it clear that it is a firmly rooted pillar in the ECJ's two-tier justification approach. It is submitted that this exceptional two-tier approach provides states with considerable discretion as to the choice between the principal support schemes assessed.

However, from *Ålands vindkraft* and onwards a seemingly rigorous proportionality assessment have become integral to the justification assessment. This is a direct response to the AG's opinion in *Essent Belgium*, rendered prior to the opinion in *Ålands Vindkraft*, where he called upon the ECJ to clarify its position on the key doctrinal issue. He recommended the ECJ to expressly acknowledge the possibility to justify discriminatory measures on the basis of environmental protection, provided however that the measure undergoes a strict or reinforced proportionality assessment.[258] The ECJ certainly applied a stricter or at least a wider proportionality assessment, comprising aspects of the legislation not immediately related to the dispute, but did not clarify its principal position in respect of the doctrinal issue. It is commonly held that the ECJ, in the context of preliminary rulings, provides the interpretation of EU law whilst the national courts apply that interpretation to the particular facts of the case. However, the more detailed interpretation provided, the closer it approximates application.[259] This is one of the aspects that enables/constrains state discretion and is perhaps most relevant in the context of the proportionality principle whose interpretation the ECJ can leave to the national courts. Historically, there is a tendency that if the proportionality review is undertaken by the ECJ the

[258] AG opinion para 91 and 94 in Cases C-204/12 to C-208/12 *Essent Belgium*. See also AG opinion para 79 in Case C-573/12 *Ålands vindkraft*.
[259] Craig 2006:711, Barnard 2009:295.

measure is found disproportionate. In contrast, the measure is upheld when reviewed by the national courts.[260]

In view of this, does the fact that a seemingly stricter proportionality assessment has been adopted suggest that the scope of state discretion has gradually diminished? Several aspects must be taken into account in order to answer the question. Firstly, it must be born in mind that the shift towards the stricter proportionality review is nevertheless rooted in the perceived nature of electricity which, in the absence of exhaustive harmonisation, necessitate the territorial limitation of RES-E schemes. Such a starting point significantly enables state discretion since it relates to the nature of the good traded which is common to all states and RES-E support schemes.

Secondly, the fact that the interpretation provided by the ECJ gradually have become more detailed and extended means that it to a larger extent controls the final application of the national courts. Formally, this restricts state discretion, since a state run the risk of having at least one component of its RES-E support scheme being held disproportionate. In essence, one could argue, the mere shift to a stricter review restricts in itself state discretion. This could however also enable state discretion in cases where the ECJ, as in *Ålands vindkraft*, essentially gives clearance to the whole national RES-E support scheme. In order to evaluate the substantial implications of this shift it is necessary to examine in what respect and on what level of scrutiny the assessment has changed.

The assertion that territorial limitations are necessary is by the ECJ mainly based on the absence of harmonisation, a territorialised understanding of the environmental objectives pursued by RES-E, the applicable RED which in its view authorizes national RES targets based on production and, furthermore, the fact that there are various national differences and that it is essential that states are able to control the effects and costs of their support schemes. Even though the arguments pertaining to the RED's as such are reasonable, it is in my view far from obvious to consider territorial limitations arising from secondary legislation as necessary in the absence of exhaustive harmonisation, since it departs from the principle that trade distortions arising from minimum harmonisation should be assessed under primary law. This indicates a circulatory reasoning on part of the ECJ where the absence of exhaustive harmonisation serves to justify trade distorting measures under primary law. Additionally, as repeatedly illustrated by the AG, RES-E promotion within EU is not inherently contingent upon a territorialised approach. I therefore submit that in respect of the territorial limitation, the seemingly stricter proportionality review is in fact quite lenient.

This is however not necessarily the case in respect of the other features assessed. In the seemingly general approach related to the quota obligation and its fulfilment, it is noteworthy that the ECJ in *Essent Belgium* explicitly conditioned the compatibility with article 34-36 TFEU upon two aspects which were left to the national court to finally interpret: mechanisms establishing a genuine market for certificates and the method of calculation of the administrative fee. Disregarding the historical tendency on behalf of national courts to find the national measure proportionate, the fact that the ECJ

[260] Barnard 2010:172, Barnard 2009:295.

conditioned the outcome represents a prima facie restriction of state discretion in this regard. It is not entirely clear why the outcome differed between *Ålands vindkraft* and *Essent Belgium*.[261] The only apparent difference between the cases in this regard is that in the former case the certificates are actually sold on a market open to competition according to the referring court[262] but nothing is stated on how the fee is calculated. In contrast, according to the legislation in *Essent Belgium* the fine is fixed at 125 EURO[263] for each certificate not surrendered whilst nothing is stated about the market conditions. The non-clearance by the ECJ in this regard constitutes a restraint of state discretion, but not in respect of a principal RES-E support scheme design. Moreover, in spite of being a restraint, it is in my view highly unlikely that the ECJ under similar circumstances would find a measure disproportionate on other grounds than its territorial limitation. The reason for this, I submit, is that the dispute was triggered by the territorial limitation and not the amount of the administrative fee or absence of genuine market conditions (the latter of which may arguably be remedied on the basis of antitrust law). Additionally, in contrast to the constituting parts of a RES-E support scheme, the territorial limitation RES-E support schemes is explicitly authorized by both RED 2001 and RED 2009. Hence, a judgement finding the latter components disproportionate may be criticized on reasons of legitimacy and its internal logic if it simultaneously does not find the territorial limitation disproportionate. One can in fact pursue the argument that such an outcome would amount to positive harmonisation i.e. defining a positive criteria for the clearance of a RES-E support scheme while upholding the territorial limitation enabled by secondary legislation which evoked article 34 in the first place. Even though the creative and law making role sometimes pursued by the ECJ cannot be underestimated, such a scenario is in my opinion unlikely. I therefore conclude that the shift toward a seemingly stricter proportionality assessment is more of a formal than substantial move in ECJ's favourable approach towards RES-E support schemes. In any event, it does not signify a preference in respect of a specific principal RES-E support scheme.

2.4.2 Balancing the trinity

The two distinguished and recurring justification grounds are environmental protection and the protection of health, life of humans, animals and plants. Technically, they originate from different sources of law – case law and treaty based derogations respectively – and are as a main rule also applicable to different facts. Substantially, however, they are highly interrelated since the policy underpinning environmental protection in ECJ's view is also designed to protect the health and life of humans, animals and plants. Accordingly, ECJ has consistently balanced the trinity in favour of the sustainability criteria in its territorialised sense. Moreover, it has consistently disregarded the deterritorialised approach to environmental protection put forward by the AG in *Ålands vindkraft* and *Essent Belgium*. The fact that the AG in these cases have

[261] Compare van Calster 2014:65 according to which the Flemish scheme differ rather drastically from the Swedish scheme, inter alia, because of less transparent terms and larger degree of vertical integration. This can certainly be the case but nothing in the judgements or the AG opinions suggest that they were informed of such market structures.
[262] Case C-573/12 *Ålands vindkraft* para 115.
[263] Cases C-204/12 to C-208/12 *Essent Belgium* para 22.

reached conclusions opposite to those by the ECJ mainly based on a deterritorialised approach to environmental protection nevertheless suggests a change in legal discourse that over time may affect the ECJ.

Energy security concerns have consistently been downplayed. The only occasion where such concerns were expressly raised but also dismissed was in the early case of *PreussenElektra*. This may seem quiet odd given that following the judgement the amount of RES-E in the energy mix has significantly increased in EU. Arguably, the AG's dismissive opinion in *PreussenElektra* together with the favourable ECJ approach in respect of other justification bases affected the legal discourse and in particular the viability of submitting energy security concerns. The fact that one of the justification bases available for the RES-E support schemes assessed is based on article 36 TFEU ultimately provide the same type of robustness as energy security would provide, although the suitability of the former can be discussed. However, to the extent the territorialised approach towards environmental protection is abandoned in favour of a deterritorialised one, it cannot be excluded that the ECJ will approach these measures from the perspective of energy security. Firstly, the aspects of states' energy mix have been touched upon by ECJ in the two latest cases. Additionally, the fact that the ECJ in the case concerning the latest regulatory landscape for the first time abandoned overloaded references to environmental issues and in particular the integration principle in favour of a reference to the new energy provision in article 194 TFEU, suggests a shift towards an understanding of RES-E support schemes as increasingly energy related issues. Thirdly, the direction towards the long-term objective of EU energy and climate policy to an almost carbon-free energy sector by 2050 - by commentators considered an industrial revolution[264] - may very well elevate the importance of RES-E to the modern economy. According to the Commission, the share of RES-E in the energy mix will amount to nearly 100% by 2050.[265] This is not to say that the ECJ has not consistently balanced the trinity in favour of the sustainability criteria but rather that a shift in its jurisprudence can be discerned which may be accelerated in light of the increasing deployment of RES-E. Nevertheless, if and when the amount of RES-E reaches the heights of being of paramount importance to the modern economy, it will most likely not be in a need for territorial support schemes.

2.4.3 Conclusion and generality: FIP and TENFIT?

It has been argued above that the ECJ, under articles 34 and 36 TFEU, employs a highly favourable approach towards the RES-E support schemes assessed.To what extent, then, can this approach in respect of the schemes assessed be generalised and understood as "equally applicable" to FIP and TENFIT schemes? Nothing in ECJ's reasoning suggests a preference towards a certain principal support scheme. The shift towards a seemingly stricter proportionality assessment in judgements concerning the TGC schemes has above been explained as a response to the AG's call for clarification on a key doctrinal question. Thus, the difference between ECJ's approach in *PreussenElektra*, at one hand, and *Ålands vindkraft* and *Essent Belgium*, at the other hand, cannot be explained by the different support schemes. The difference between *Ålands*

[264] Jacobsson et al 2009:2143f.
[265] Commission 2011:6.

vindkraft and *Essent Belgium* is likely to be explained by a different assessment of components constituting the scheme. Nevertheless, the principal scheme design remained the same in both cases. In spite of being difficult to forecast the future examination of FIP and TENFIT, there are two aspects that in my opinion enable a generalisation of ECJ's approach to these schemes. Firstly, these schemes, just like the ones assessed, are as starting point national which means that they will contain a territorial limitation. Secondly, albeit all RES-E support scheme designs are different, the largest difference is commonly held to be the one between TGC schemes and FIT schemes. As indicated above both FIP schemes and TENFIT schemes can be described as elaborations of the original FIT scheme. These two aspects makes it very likely that the ECJ's favourable approach towards in effect the two most disparate RES-E support schemes will be upheld also in respect of FIP schemes and TENFIT schemes. I therefore conclude that states, in the context of articles 34 and 36 TFEU, retain a considerable scope of discretion as to the principal RES-E support scheme design.

3 RES-E support schemes and state aid

In the following I will first present and discuss the two ECJ cases dealing with RES-E support schemes and the concept of state aid. Having presented these cases isolated I will proceed to a presentation of the day-to-day state aid control regime in which the Commission plays a crucial role, notably in respect of the compatibility assessment. Subsequently, I will undertake an overall assessment of state discretion under the material state aid regime, taking into account and ECJ's case law and Commission's soft law. I will pursue the argument that due to the characteristics of the state aid regime, the shift toward an intervening compatibility approach on part of the Commission significantly constrains state discretion in respect of the principal RES-E support scheme design and amounts, in principle, to positive harmonisation from above and intervenes in states energy rights.

3.1 PreussenElektra: FIT scheme

3.1.1 Background and measure

The German FIT law has already been described in the context of articles 34 and 36. It will then be recalled that the scheme obliged DSO's to purchase at minimum prices the RES-E produced in their area of supply. The purchase obligation is also relevant in the context of state aid provisions. However, other elements are relevant as well. As regards the minimum price it was calculated on the basis of the average nationwide sales price for electricity but differentiated according to the RES technology employed, which in effect meant that the price paid by DSO for RES-E was higher than its real economical value. The FIT scheme contained a hardship clause to the effect that when DSO's purchase of RES-E exceeded 5% of the total amount of electricity sold over the previous year, the additional costs entailed would be borne by the upstream TSO. In reaching this threshold, the obliged Schleswag invoiced PreussenElektra for the additional costs which gave rise to the dispute. It should be mentioned that PreussenElektra was a wholly owned subsidiary of another company which was

100% privately owned. PreussenElektra had a majority shareholding in Schleswag of which the remaining third was in the hands of municipal authorities. According to the referring court, the individual undertakings were precluded by law and by circumstance from passing on the additional costs to the final consumers but this was contested and in the AG's view there was indeed serious doubts whether this was really the case.

For the purpose of analysing whether it amount to state aid, the measure consists of 1) the obligation to purchase RES-E at minimum prices exceeding its real economic value, and 2) the mechanism allocating the financial burden among DSOs and TSOs.

3.1.2 Notion of aid

3.1.2.1 Other conditions than state resources

The ECJ initially noted, "as a preliminary observation", that there was no dispute as to whether the purchase obligation conferred a certain economic advantage on RES-E producers, "since it guarantees them, with no risk, higher profits than they would make in its absence."[266] The question of whether the measure also distorted competition and affected intra-Union trade was not touched upon. Neither did the submitted observations argue that these constituting elements were lacking. Under these circumstances the opinion by AG is highly indicative of the state of law. In his view, correctly in my opinion:

> There can indeed be little doubt that the elevated minimum price for electricity produced form renewable sources combined with purchase obligation confers a considerable and specific economic advantage on producers of that type of electricity, thereby distorts competition between the different categories of producers and ultimately affects trade in electricity between Member States.[267]

3.1.2.2 Granted by a state or through state resources

Accordingly, the contested issue is whether the advantage provided by the FIT law is "granted by a Member State or through State resources" within the meaning of article 107(1) TFEU. The doctrinal question underlying the dispute is whether the phrase is to be understood in a broad or in a narrow sense. Put differently, whether financing through state resources is a constitutive element of the notion of state aid. In AG's understanding of the case law it certainly is.

In a first step the ECJ stated that its case law showed that only advantages granted directly or indirectly through State resources were to be considered as aid. In this regard ECJ refuted the argument pursued by supporters of an expansive interpretation according to which "aid granted trough State resources" cover measures financed through public funds whilst "aid granted by a Member State" cover all remaining measures which are not financed through state resources.[268] ECJ held that the distinction made in the provision did not:

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[266] Case C-379/98 *PreussenElektra* para 54.
[267] AG opinion para 112 in Case C-379/98 *PreussenElektra*.
[268] AG opinion para 109, 134, 153 in Case C-379/98 *PreussenElektra*.

> [S]ignify that all advantages granted by a State, whether financed through State resources or not, constitute aid but is intended merely to bring within that definition both advantages which are granted directly by the State and those granted by a public or private body designated or established by the State.[269]

This statement is followed by extensive references to *Van Tiggele*, *Sloman Neptun*, *Kirsammer-Hack*, *Viscido*, *Ecotrade* and *Piaggio*.

The first case concerned a measure fixing minimum retail prices for gin and the ECJ concluded that such a measure, "with the objective of favouring distributors of a product at the exclusive expense of consumers", could not constitute an aid since it was not granted, directly or indirectly, through state resources.[270] The second case concerned a German international ship register which enabled certain shipping undertakings under German flag to subject seafarers of certain countries to less favourable working conditions and salaries than those applicable to German nationals. The ECJ, reiterating the quota above, found that the legislation only sought to alter in favour of shipping undertakings the framework within which contractual relations were formed between said undertakings and their employees and did not constitute an additional burden for the state or public bodies.[271] The potential loss of tax revenue arising from such a measure was considered inherent in the system and not a mean of granting a certain advantage to the undertakings concerned. Similarly, in *Kirsammer-Hack* which concerned a measure that exempted small and medium-sized undertakings from paying compensation and legal expenses in the event of unjustified dismissals, the ECJ reiterated the previous quote and found that no transfer of state resources were conferred upon the exempted undertakings.[272] Likewise, in *Viscido* the ECJ adhered to the quote and found that the non-application of a generally applicable labour legislation concerning fixed-term employment contracts to a single undertaking did not involve a transfer of state resources.[273] The quote was also reiterated in *Ecotrade* and *Piaggion* concerning an Italian law which by way of derogation from ordinary insolvency rules allowed certain undertakings to be placed under extraordinary administration and to be granted special protection from execution where it was highly likely that state or public bodies – hence state resources – would be among the principal creditors. In these cases, however, the ECJ did not establish that the measure amounted to state aid but left this assessment to the national court.

According to inter alia the Commission, PreussenElektra and Schleswag, the case at hand should be distinguished from *Van Tiggele* by virtue of the purchase obligation in addition to the fixing of minimum prices the financial burden of which was borne by competitors to RES-E producers.[274] Also, in contrast to the facts assessed in the three labour law related cases, PreussenElektra and the Commission held that the measure in the instant case

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[269] Case C-379/98 *PreussenElektra* para 58.
[270] Case 82/77 *Van Tiggele* para 24-25. See also AG opinion para 118 in Case C-379/98 *PreussenElektra*, Hanchner, Ottervanger and Slot 2012:61.
[271] Joined Cases C-72/91 to C-73/91 *Sloman Neptun* para 19, 21. See also AG opinion para 127 in Case C-379/98 *PreussenElektra* as well as Kuhn 2001:366, Hanchner 2012:61, 66, 84, 90, 331, 338.
[272] Case C-189/91 *Kirsammer-Hack* para 16-17.
[273] Joined Cases C-52/97 to C-54/97 *Viscido* para 13-14.
[274] AG opinion para 119, 148 in Case C-379/98 *PreussenElektra*.

obliged competitors to transfer money directly to the aided undertakings.[275] However, the Commission invoked the two last cases - *Ecotrade* and *Piaggion* – as authority for classifying the FIT law in question as state aid. Relying on data showing that the German state and/or public authorities owned the majority of the capital of the majority of undertakings that operated both as TSOs and conventional electricity producers as well as DSOs, the Commission held that since the FIT law did not differentiate between publicly and privately owned undertakings state resources in effect financed the measure. I will call this argument the second best one. To what extent these arguments were considered by the ECJ will be seen below. Sufficient to note at this juncture is that according to one commentator all five cases (*Ecotrade* and *Piaggio* treated as one) referred to by the ECJ is representative of its "long-standing concern that certain legitimate policy choices should not be caught by the State aid prohibition."[276]

In a second step, turning to the instant FIT scheme, the ECJ stated that the purchase obligation did not involve any direct or indirect transfer of state resources to RES-E producers. As a consequence, the allocation of the financial burden arising from the purchase for DSOs as between them and other private undertakings could not constitute a direct or indirect transfer of state resources either. In light of these considerations, the court preliminary concluded that "the fact that the purchase obligation is imposed by statute and confers an undeniable advantage on certain undertakings" was not capable of conferring upon it the character of state aid within the meaning of article 107(1) TFEU. Obviously, the court does not distinguish between the issue of whether the FIT scheme transfer resources and the issue of whether the transferred resources are to be considered as state resources. The FIT scheme undoubtedly transfer resources and these are made of the difference between the fixed (and higher) minimum price and the lower market value. The question that the ECJ arguably should have examined, either directly or upon a finding that resources are transferred, is whether the resources constitute state resources.[277] In AG's view the sums transferred under the FIT scheme:

> [N]ever are and never will be at the disposal of the German authorities. No public authority enjoys at any moment any rights with regard to those sums. In fact they never leave the private sphere.[278]

Since the ECJ did not handle this question one cannot assume that it shared AG's view, at least not at the time of the judgement. In any event, the statement, albeit formally correct, disregard the economic effects of such an approach. AG's view was a response to the argument put forth by inter alia the Commission who claimed that the FIT scheme converted private resources into state resources. More specifically, by requiring TSO's to pay money to DSO's without receiving anything in return, the measure approximated parafiscal charges[279] used to

[275] AG opinion para 149 in Case C-379/98 *PreussenElektra*.
[276] Jaeger 2012:3.
[277] See for instance Heidenham 2009:39.
[278] Ag opinion para 166 in Case C-379/98 *PreussenElektra*.
[279] Charges/duties/levies are parafiscal if the allocation of their return, in contrast to taxes, are predetermined. The usage of the term is however not defined by the courts. See Heidenhain 2009:31. See also Hanchner, Ottervanger and Slot 2012:130 on the relationship with indirect taxation.

finance aid measures. The effect of the scheme was thus considered analogous to the ones yielded by taxation insofar that resources were withdrawn from the private sector and committed to a public interest objective. In my opinion this was the best argument put forward for the purpose of classifying the measure as state aid. In AG's view the decisive component was whether the state exercised control over the resources and in the case of parafiscal charges, the money became the property of the state before it was redistributed, which were not the case here. The problem with such a view is that it presupposes administrative action on part of the state or bodies attributed to it and can arguably easily by circumvented by establishing legislation, such as the FIT law in question, which canalises resources towards a predefined public interest without having the state involved in anything but adopting the legislation. Accordingly, there is a very fine – if not purely formalistic – line between minimum price systems accompanied by a purchase obligation and parafiscal charges.[280]

Furthermore, the ECJ omitted to examine the second best argument put forward (mentioned above) i.e. the measure was partially or wholly financed by publicly owned undertakings and hence amounted to state resources. The AG was uncertain as to the proper interpretation of the judgements in *Ecotrade* and *Piaggio*, the final assessment of which ECJ left it to the national court, but stated that if they nonetheless served as authority for the argument pursued, they should be subject to one main qualification, namely that state/public undertakings should be among the chief creditors/financers of the aided undertaking(s). In this regard he relied on the data provided by the German government stating that only two of eight – in contrast to six of nine, as submitted by the Commission – of the undertakings operating as both (grey electricity) producers and TSOs were controlled by the state. No data was available for the ownership structures of the distribution undertakings but they were, according to Germany, subject to rapid changes with a clear tendency towards private ownership. Together with the fact that PreussenElektra was privately held and also held the majority share of Schleswag, the AG concluded that the qualification was not met. The outcome is however not evident. Firstly, two of eight undertakings controlled by the state may nonetheless be sufficient to conclude that the state are among the chief creditors/financers of the aided undertakings. *Ecotrade* and *Piaggio* do not in my view establish a firm quantitative criterion in this regard. Secondly, the fact that no data were available on the ownership structures of the distributors who inevitably would have to bear the costs up to the 5 % threshold is a rather good argument for leaving the final assessment to the national court, or at least not concluding definitely on this issue and leave it open for reconsideration. Thirdly, the fact that the concrete application of the FIT scheme in the instant case did not formally involve undertakings controlled by the state/public bodies, does not contradict the argument that the FIT scheme in general was partially financed by undertakings controlled by the state. I submit that the ECJ, by neither examining whether the resources transferred constituted state resources nor expressly limiting or considering the economical effects of such an approach, employed a lenient approach toward the RES-E scheme in question.

[280] See for similar points Jaeger 2012:3f and Heidenhain 2009:39.

In a third step the ECJ considered the two remaining arguments in favour of classifying the measure as state aid. The first argument held that the FIT-scheme negatively affected the economic results of the undertakings subject to the purchase and compensation obligation and hence entailed a corresponding loss in tax revenue for the state. Such a consequence was however considered to be an inherent feature of the relevant provisions and could not be regarded as a conferral of an advantage at the expense of the state. Although the first argument is weak in my opinion, the legal basis for the second one is even weaker and arguably illustrates the fear of the repercussions of not classifying the scheme as state aid. Under the second argument the Commission held that in order to preserve the effectiveness of articles 107-108 TFEU it was necessary to interpret state aid so as to include measures having equivalent effect which, like the FIT-scheme in question, was decided upon by the state but financed by private undertakings. To this end, it submitted by analogy case law on article 101 TFEU (an antitrust provision) read in conjunction with article 10 EC, now contained in article 4(3) second and third subparagraph TEU. The ECJ, having noted that article 101 TFEU concern only the conduct of undertakings whilst article 107 TFEU refer directly to measures undertaken by the member states, briefly stated that article 4(3) TEU could not be used to extent the scope of article 107 TFEU to conduct by state that does not fall within it.

In light of these considerations ECJ concluded that the purchase obligation and the allocating mechanism prescribed by the FIT scheme did not amount to state aid.

3.1.3 Preliminary assessment

The lenient approach on behalf of ECJ effectively implies that as long as the state and/or public authorities/undertakings are not administratively involved in directing the advantages and its financial burden among certain undertakings, the support scheme will prevail and not amount to state aid. It has been suggested elsewhere that the *PreussenElektra* judgement did not deal with the potentially wider meaning of whether aid was granted "through State resources *in any form whatsoever*" within the meaning of article 107(1) TFEU and, as a consequence, left aside the potential application of private funds under state control.[281] Apart from presupposing the very existence of state control, the suggestion seems to misunderstand ECJ's reasoning and possibly conflate the issue of whether financing through state resources is a constituting element of aid, which the court certainly held, and the fact that it omitted to examine whether the resources constituted state resources. Also, supporters of an extensive interpretation invoked the element "in any form whatsoever",[282] whilst the ECJ as well as AG clearly opted for a narrow approach. Therefore, private funds arising from legislation and whose apportioning and administration is voluntarily (for practically reasons or the like) taken care of by private undertakings operating in that market will not following *PreussenElektra* amount

[281] Hanchner, Ottervanger and Slot 2012:61f. See also p. 65 where the authors wrongly state that the ECJ did not examine whether the measure "constituted an additional charge for the German state – in the form of tax revenue foregone."
[282] Ag opinion para 137 in Case C-379/98 *PreussenElektra*.

to state aid. To what extent the precedent established in PreussenElektra is relevant for subsequent and updated FIT schemes will be seen below.

3.2 Vent de Colère: FIT scheme

3.2.1 Background and measure

This case concerns a FIT scheme comprising a purchase obligation in respect of RES-E produced from wind power at prices higher than the market price for electricity. The undertakings subject to the obligation are the distributors operating the network to which the RES-E production installations are connected (i.e. DSOs, possibly also TSOs). As such it is quite similar to the scheme assessed in *PreussenElektra*. However, whilst the pricing method was predetermined in law in the latter case, the price calculating procedure in the instant case was laid down by orders of the French Minister for Economy and Minister of Energy after consultation with the Higher Council of Energy and the French energy regulator (CRE). Eligible additional costs arising from the purchase obligation, determined by the Minister of Energy, was offset by a Public long-term investment group (CDC) who maintained for that purpose a specific account. The compensation paid for distributors was passed on to final consumers who were obliged to pay to the mentioned account and faced an administrative penalty in case of non-compliance. The amount of charge was set in proportion to the quantity of electricity consumed and to cover other expenses, such as the management costs of CDC. Several individuals brought action and claimed that this amounted to state aid. The question asked by the referring court was basically whether the mechanism for offsetting amounted to state aid.

3.2.2 Notion of aid

3.2.2.1 Other conditions than state resources

The ECJ initially stated that all four conditions must be met in order to amount to state aid but that the question referred by the national court only concerned one of them. The national court indeed considered that three of the conditions – advantage liable to affect intra-Union trade and impact on competition – were met.[283] Accordingly, an affirmative answer on part of the ECJ would in effect imply that the FIT scheme would be classified as state aid. In my opinion AG's opinion in *PreussenElektra* is equally applicable to the facts at hand, especially in light of the increased amount of RES-E in the EU and the developments at the grid level enabling to a larger degree cross-border trade of RES-E.

3.2.2.2 Granted by a state or through state resources

Having identified at the outset that the measure in order to constitute state aid must be granted directly/indirectly through state resources and attributable to the state, the ECJ found that the offset mechanism was clearly established by law and therefore fulfilled the latter criterion. The court then turned to the first criterion and noted that the sums intended for the offsetting mechanism were

[283] Case C-216/12 *Vent De Colère* para 9, 15.

collected from all final electricity consumers in France and entrusted CDC, that the amount of charge imposed in this regard was determined annually by the Minister for Energy by order on a proposal from CRE and that an administrative penalty was imposed in the event of failure to pay the charge. Account was also taken to the fact that, in contrast to the wording of the FIT scheme but relied on by the French state at the hearing, the purchase obligation would ultimately be covered in full by the French state if the sum of the charges collected was not sufficient and that the obliged undertakings retained the charges to the extent their additional costs were not covered to the (highly contradicting) effect that these funds was not channelled through the account of CDC. It should be noted that it is firmly established that (at least) aid granted through a public or private body appointed or established by the state to administer the aid falls within the prohibition scope (i.e. a narrow interpretation of the second limb). This criterion was interpreted in *Italy v Commission* concerning legislation that reduced the social charges on undertaking in the Italian textile industry but where the lost state revenue was offset by contributions by employers to an unemployment insurance fund. In that case the ECJ held that since the funds were financed through compulsory contributions imposed by state legislation and managed and apportioned by its provisions, they must nevertheless be regarded as state resources even if institutions distinct from public authorities administered them.[284] The ECJ referred both to this case and the aforementioned criterion. Accordingly, the court in the instant case could have simply pointed out that at least some – or, according to the wording of the law, all – of the charges were channelized through the account by CDC and concluded that this amounted to state aid. However, the ECJ spent quite a lot paragraphs to establish that the sums managed by CDC remained under public control. ECJ thus noted, in essence, that CDC was acting as an intermediary in the management of those funds, that it was a public law corporation whose key personnel were appointed by governmental and other public institutions, that it provided several services for CDR without making any profits from its activity and that its managements costs were financed by the charges levied on final consumers. Therefore, the ECJ concluded, the sums managed must be regarded as remaining under public control. As such the reasoning and its outcome is anything but surprising.

However, the ECJ then added that all those factors – the role of CDC – distinguished the instant case from *PreussenElektra* where the purchase obligation at fixed minimum prices did not amount to any direct/indirect transfer of state resources. It also referred to the judgement in *Essent Netwerk Noord* who pointed out that the private undertakings in *PreussenElektra* had not been appointed by the state to manage a state resource but were bound by an purchase obligation by means of their own financial resources. Therefore, the court proceeded and formally clarified one of the omitted issues in the latter case, the funds involved in *PreussenElektra* could not be considered as state resources since they were not at any time under public control and there was no offsetting mechanism such as that in the instant case. Accordingly, the offsetting mechanism arising from the purchase obligation and financed by all final consumers in the French territory amounted to an intervention through state resources and ultimately state aid.

[284] Case 173/73 *Italy v Commission* para 16.

Two aspects should be noted here. Firstly, the ECJ validates the approach in *PreussenElektra*. The formal clarification that the funds involved there did not amount to state resource does in fact only subtract a formal component from its favourable approach, since the same result would have been achieved by the remaining skeleton which disregarded the economic effects of the outcome. Secondly, the means employed by the ECJ to distinguish the instant case from *PreussenElektra* clearly departs from AG's view. According to him:

> [T]he primary factor distinguishing the present case from the mechanism examined by the Court in *PreussenElektra* is that the burden of financing the obligation to purchase electricity from wind power at a price higher than the market price applies to all consumers of electricity in France, irrespective of whether they purchase green energy or not, knowing that, in the liberalised electricity market, the achievement of which is one of the primary objectives of the Union, competition exists between the producers and the suppliers of energy. While conceding that, physically, electricity from different sources are mixed together in the distribution network, I note that, with regard to the mechanism in the main proceedings, it is impossible for the suppliers to differentiate, for tariff purposes, between the different categories of consumers, and that it is impossible for consumers to opt for or against purchasing renewable energy.[285]

The AG's view warrants several comments. Firstly, he seems to take into account a policy reason that is far from necessary in order to settle the question of whether the funds at stake amount to state resources. Secondly, the question of whether and to what extent the resources financing the FIT scheme in *PreussenElektra* ultimately were passed on to the final consumers, remained unanswered in those proceedings and the question was neither expressly considered by the ECJ. Nothing in that scheme explicitly precluded TSOs/DSOs to pass on the costs to the next level in the supply chain: DSOs and final consumers, respectively. Rather, assuming that AG's view in that case was correct, the obstacles to pass on the costs were based on the refusals by the authorities in the region where Schleswig operated to authorise higher tariffs.[286] Therefore,

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[285] AG opinion para 50-51 in Case C-262/12 Vent De Colère.

[286] It should be noted that the AG - in the opinion para 86 in Case C-379/98 *PreussenElektra* – seem to contradict himself or at least not provide a clear answer on the possibility to actually pass on the costs to final consumers: "The refusals by the authorities of the Land Schleswag-Holstein to authorise higher tariffs for electricity supplied to final consumers, which were invoked in order to prove that there were legal impediments to pass on the supplementary costs, seem to be based on other reasons and do not imply that those authorities failed to recognize those supplementary costs as legitimate. Moreover, it appears from replies to another written question put by the Court that the SreEG 1998 [the FIT law], by allowing the supplementary costs to be taken into account in calculating tariffs, does allow network operators affected by the purchase obligation to pass on the supplementary costs to competitors who want to deliver electricity through the network in question. That in turn enables the network operators to pass on supplementary costs to final consumers without having to fear competition from suppliers not subject to obligations of the StrEG 1998." Firstly, the fact that the authorities refuses to authorise higher tariffs but nevertheless consider the additional costs of RES-E as "legitimate" does not answer the question of whether they are actually eligible to include in the tariff. Secondly, the possibility to pass on the costs to competitors is theoretically sound but does not provide an answer to why these, under circumstances where grey electricity are cheaper, would deliberate the purchase of RES-E.

assuming that authorities in other regions de facto allowed the passing on of costs to final consumers or at least that such an effect of the FIT scheme was envisaged by the German legislator, the AG in the instant case seems to draw the wrong conclusion. Thirdly, and most importantly, to the extent that AG's view would have prevailed and taken into account in the judgement it could be read so as to suggest that RES-E support schemes that pass on the costs to the consumers without there being a choice for the latter to refuse the additional cost/RES-E, would - for some additional reason or another – amount to state aid. This would then potentially comprise all RES-E schemes. Thus, the fact that ECJ distinguished the instant case from *PreussenElektra* on other grounds than the AG enhances state discretion.

3.2.3 Preliminary assessment

The outcome of Vent de Colere undoubtedly constraints state discretion in respect of FIT schemes where the state and public bodies are deeply involved in apportioning and channelizing the financial means. The judgement is therefore anything but surprising. The only surprising element is that the French state, in the aftermath of the considerably favourable scope provided by *PreussenElektra*, succeeded to construct a FIT scheme that so blatantly amounted to state aid *and* brought it before ECJ.[287] At the very same time, the outcome seemingly enhance state discretion in that it expressly validates the favourable approach in *PreussenElektra* and, in particular, also disregards AG's opinion on how the financial burden is passed on to final consumers.

3.3 Commission's decisional practice and soft law

By virtue of being the final arbitrator of EU law the judgements of the ECJ (and partly the General Court[288]) exert a decisive influence. However, in the context of the state aid control its role is generally confined to interpret the notion of aid in cases brought before it and, to a lesser extent, review whether in particular the Commission has manifestly transgressed its powers. In the context of states principal choice of RES-E support scheme design, the Commission has at the outset monopoly of the ex ante day-to-day control and monitoring of state aid[289] and enjoys in this regard considerable discretion. As previously mentioned, the ECJ has granted the Commission a broad scope of discretion concerning, first, whether a measure amounts to state aid whenever the assessment is based on technically or economically complicated considerations, and, second, whether the aid measure is compatible with the internal market under article 107(3)(c) TFEU and as elaborated by inter alia guidelines. The most prominent

[287] The procedural background is that France omitted to notify the scheme to the Commission which, in view of ECJ's judgement, means that it runs the highly inconvenient risk of being obliged to recover the illegal aid. This would not necessarily have been the case if the measure would have been notified diligently, even if it amounted to state aid.
[288] Over the years a clear rift have been visible between the ECJ and the General Court in the context of state aid law, downplaying the rulings of the latter in contentious cases. See for instance Biondi 2013.
[289] See for instance Heidenhain 2009:575. Until 2014, operating aid was not subject to the general block exemption regime. The changes does however not affect substantial state discretion, but rather its procedural aspects. See footnote 311.

Commission defeats relates however to the first aspect of which perhaps the most notable case is the judgement in *PreussenElektra*.[290]

Having these aspects in mind, the following discussion will present and analyse Commission's decisional practice and its preconditions in the context of RES-E support schemes. The purpose is both to clarify whether these schemes may amount to state aid and to illustrate how the compatibility regime is functioning for the purpose of delimitating state discretion in this regard. Generally, it is quite uncommon that the Commission adopt negative decisions, and this is especially true for the individual decisions in respect of RES-E schemes below. It has been suggested that the low rate of negative Commission decisions, rather than signifying the ineffectiveness of the aid control regime, is a consequence of states' anticipation of Commission control and consequently their framing of aid measures in a way that fits the criteria defined in soft law. In particular, the less precise the Commission's soft law is on compatible aid, the easier it becomes for states to justify distortive aid on this imprecise basis.[291] Thus, if RES-E support schemes amount to aid measures, the scope of state discretion will ultimately depend on the (im)precision of the compatibility criteria laid down in soft law. In order to illustrate such a turn in the degree of precision and hence state discretion, a comparison is necessary between the newly adopted EEAG and the previous EAG. Since the concept of aid is objective and not subject to shifting compatibility criteria, the following discussion contains two parts.

The first part comprises four individual decisions concerning all principal RES-E support schemes and deals accordingly with whether they amount to aid and, if so, whether they may be considered compatible with the internal market under 2008 EAG. When necessary to illustrate the broader picture, the assessment of whether the measure amounts to aid will be contrasted with other decisions concerning the same principal RES-E support scheme. The second part presents the new EEAG and illustrate briefly its application in one of the few decisions that had been taken under it.

3.3.1 Commission's decisions under EAG

In comparison to the 2001 EAG, the 2008 EAG went much further in recognizing the relationship between state aid and climate change.[292] Also, the 2008 EAG continued the trend evident in the previous EAG of extending the scope of aid considered compatible with the internal market pursuant to article 107(3)(c) TFEU.[293] The compatibility framework basically consists of two steps. The first step comprises general assessment criteria such as whether the aid measure is aimed at a well defined objective of common interest, whether it is well designed to deliver to objective (i.e. appropriate, proportional, incentivizing effect) and whether the distortions of competition is limited.[294] The second step comprises the specific criteria on RES-E support schemes, which are classified as operating

[290] Blauberger 2008:9, 17f. See also de Cecco 2013:45 according to which the Commission enjoys more discretion in respect of whether the measure is compatible with the internal market. See also Heidenhain 2009:755 according to which this issue is less clearcut than the discretion enjoyed under article 107(3) TFEU.
[291] Blauberger 2008:17, 23.
[292] See for instance Kaur 2009:283.
[293] Maca 2009:20, Blauberger 2008:15.
[294] EAG point 16.

aid.[295] TGC schemes and tenders (not necessarily TENFIT) are considered as market based mechanisms that allow RES-E producers to benefit indirectly from guaranteed demand for their energy. Where such a mechanism constitute state aid, it may nevertheless be authorised for a period of 10 years provided that the member state show that it is 1) essential to ensure the viability of the RES technology concerned, 2) does not result in overcompensation and 3) does not dissuade RES-E producers from becoming more competitive. Other support schemes, such as FIP and FIT which compensates directly for the difference between production costs and market, are allowed until the generation plant has been fully depreciated according to normal accounting rules but allow a normal return on capital. The requirements are, first, that any investment aid is deducted from the amount of operating aid and, second, that the state submits specific information on the mechanism and in particular how the amount of aid is calculated.[296] How this criterion is practised, and to which of the categories TENFIT belongs, will bee seen below.

3.3.1.1 Romanian TGC scheme

3.3.1.1.1 Notion of aid

This TGC scheme[297] contained all the basic elements: the issuance of certificates for eligible RES-E producers – 1 certificate/MWh, subsequently subject to RES-E technology differentiation – and a quota obligation on electricity suppliers. It also contained a price limitation setting a lower and higher threshold within which the certificates could be traded. The certificates that grant RES-E producers an additional income could be sold on a centralised green certificate market and/or on the bilateral contract market. A penalty was imposed in the event of non-compliance with the quota obligation, collected by a TSO and subsequently transferred to an Environmental fund and then granted by the authorities to certain undertakings involved in RES production (this was made under the *de minimis aid* rules, and does not raise any questions regarding the principal RES-E scheme as such).

The Commission found that the additional income caused by the quota obligation resulted in an advantage that strengthened the position of RES-E producers in relation to their competitors in the EU and therefore had potentially distorting effects on competition and also was likely to affect the intra-Union trade. Turning to the intricate issue regarding state resources, the Commission found that the issuance of certificates to RES-E producers was likely to constitute state resources. The Commission sought in this regard to substantiate its claim by way of analogy with a previous decision regarding tradable emission credits under a NOx trading scheme.[298] Under its decisional

[295] EAG point 20: "operating benefits means, for the purposes of calculating eligible costs, in particular cost savings or additional ancillary production directly linked to the extra investment for environmental protection and, where applicable, benefits accruing from other support measures whether or not they constitute State aid (operating aid granted for the same eligible costs, feed-in tariffs or other support measures)."
[296] EAG point 109-110.
[297] SA. 33134, public version.
[298] Case N 35/2003. This decision was subsequently annulled by the General Court (previously CFI) in Case T-233/04 on the basis that the scheme did not constitute a selective measure. This judgement was however annulled by the ECJ in Case C-279/08 P *Commission v Netherlands* on the

practise the Commission had established a distinction according to which permits/credits was classified as either 1) intangible assets representing a market value which the authorities/state could have sold/auctioned, leading to foregone revenues, or 2) authorised proof of a certain production that could not be sold/auctioned, hence not leading to foregone revenues for the state. Having basically found that the permits did not solely serve as authorised proof and that the authorities had an option to sell/auction the permits, the Commission concluded that the trading scheme involved state resources and hence amounted to state aid. In the instant case, however, the Commission noted a difference between the emission permits that the State could sell itself on the market, and the green certificates, which was deemed to constitute proof of a certain amount of RES-E produced. Nevertheless, the Commission continued:

> [T]he fact remains that the State provides certain undertakings with an asset, which has a monetary value, and that asset originates with the State which has created it. This is further demonstrated by the fact that the undertakings not having purchased the necessary number of certificates on the market are subject to a penalty – hence, the certificates created by the State serve as an alternative to payment of a fine which would constitute State resources.[299]

One could at first sight be induced to think that the monetary value ascribed to the certificates stems from the fact that the Romanian TGC scheme contains a lower and upper price limitation to the effect that a certificate inevitably will be a bearer of the monetary value within this range. However, in a footnote to the first sentence the Commission explains that this is only an additional reason for not viewing certificates as only proof of RES-E produced that solely acquire value in the hands of the undertakings subject to certificate trading. This is a significant shift in the decisional practise in comparison with, for instance, the assessment of a Swedish TGC scheme and a Belgian TGC scheme a decade ago where the Commission found that the offering of certificates for free to the produces did "not constitute loss of State resources, since the certificates are merely a proof that the green electricity has been produced" and the resources was neither taken from the state budget.[300] No statements were made in this regard to the effect that the certificates constituted assets or monetary value in the hand of the state and therefore amounted to state resources the free offering of which amounted to loss of state revenue. The shift in the decisional practice may perhaps be attributable to a legal discourse in which green certificates are sought analogised to tradable permits. In the judgement concerning the latter, the ECJ – in upholding the judgement of the General Court – explicitly tied the issuance of allowances considered as assets to the fact that by not selling/auctioning these, the state concerned had foregone state resources.[301] Additionally, the General Court explicitly rejected the attempts to analogize

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basis that the General Court erred in law when assessing the selectivity criteria. All in all, the original decision by the Commission was essentially upheld. See also de Sadeeler 2014:446f and Weishaar 2012:98f.

[299] SA. 33134, public version, para 54.

[300] N 789/2002, public version, page 7 and N 550/2000 respectively, the latter via Case T-233/04 para 76.

[301] Case C-279/08 P *Commission v Netherlands* para 102, 107.

between green certificate and the tradable permit scheme.[302] Also that scheme contained an administrative fee in case of non-compliance but nothing in the judgement suggest that it alone would be sufficient for the purpose of classifying the measure as state aid. Moreover, the fact that the selling/auctioning of permits is one of the main design options in emissions trading schemes, but not contemplated in the context of TGC scheme, make the use of analogies difficult. Accordingly, it is not obvious that the Commission's stance in respect of the TGC-scheme would be upheld by the ECJ.

3.3.1.1.2 Compatibility

Arguably aware of the difficulties to classify TGC scheme as state aid in the absence of precedent on this matter, the Commission held that it was not necessary in the present case to take a definitive position in this regard, because even if state aid was involved, the measure was compatible with the internal market according to article 107(3)(c) TFEU and the former applicable 2008 EAG.

As previously mentioned the authorisation of a TGC scheme amounting to state aid was possible provided that the state can show that the support scheme 1) is essential to support the viability of the RES concerned, 2) does not in the aggregate result in overcompensation and 3) does not dissuade RES-E producers from becoming more competitive. The first condition was considered fulfilled since the levelised production costs exceeded the market price of electricity and the support appeared necessary in order to achieve the mandatory target Romania had been ascribed under RED 2009. Based inter alia on long-term estimations of the production costs and a commitment of the Romanian authorities to adapt the notified measure in time in order to avoid overcompensation, the Commission considered the second condition met as well. The third condition was easily met, not least since the TGC scheme was considered to provide an incentive for RES-E producers to increase efficiency of their production. Also the general incentive criterion was considered met, since in the absence of the notified aid, there would insufficient incentive to undertake or carry on such RES-E production. The Commission thus concluded that the TGC scheme was compatible with the internal market in accordance with article 107(3)(c) TFEU.

3.3.1.2 Finnish FIP scheme

3.3.1.2.1 Notion of aid

Under this FIP scheme,[303] concerning RES-E produced from wind and biogas, the RES-E producers obtained an additional source of income on top of that received from the conventional sale of the RES-E at the market in competition with other market participants. This income was guaranteed and covered the difference between the market price and the production costs. The support element was paid out from the Finnish state budget.

The Commission found that the notified FIP scheme allowed the aided undertakings to be relieved, by means of state resources transferred directly from the state budget, of a part of the costs which they would normally have to

[302] Case T-233/04 para 76.
[303] SA. 31107, public version.

bear themselves. This strengthened their position in relation to competitors in EU and was therefore considered to have potentially distorting effects the competition. Since the RES-E produced might be subject to intra-Union trade, the advantage was likely to affect the trade in this regard. Thus, the measure amounted to state aid within the meaning of article 107(1) TFEU. This assertion is anything but surprising. A nearly identical outcome was reached in respect of a British FIP-mechanism where, though, the top-up payment was provided by a state owned company.[304]

3.3.1.2.2 Compatibility

As previously mentioned the only specific requirements in this regard is, first, that any investment aid is deducted from the production costs when determining the amount of operating aid, and, second, that the state concerned submits a detailed calculation method concerning the amount of aid. In light of the submitted information by the Finnish authorities, the Commission concluded that both conditions were met as well as providing a normal return of capital (or more specifically the absence of overcompensation). Also the general incentive criterion was considered met, since in the absence of the notified aid, there would be insufficient incentive to undertake or carry on such RES-E production. However, in order to avoid overcompensation in time the Finnish authorities committed themselves to monitor the production costs on a yearly basis and adapt the aid when necessary. The measure was considered compatible with the internal market.

3.3.1.3 Dutch TENFIT scheme

As previously mentioned TENFIT schemes are constituted by an initial bidding/tendering-mechanism but the actual support is provided by a scheme design under the REFIT scheme family: FIT or FIP. In the decisional practice of the Commission, the existence of an initial bidding mechanism is subordinated the assessment of the underlying support mechanism for the purpose of classifying both whether aid is granted and whether it is compatible with article 107(3)(c) TFEU and the guidelines. In fact, it is hardly considered. This is not surprising in the context of assessing the concept of aid but may have a role in the compatibility assessment, not least since the compatibility criteria in the 2008 Guidelines are slightly different, at least formally. However, as seen above in the context of TGC and FIT, the difference is anything but clear.

A case in point is a Dutch FIP scheme who amounted to state aid but was considered by the Commission in 2002 to be compatible with the internal market. Netherlands sought approval 2007 for basically the same scheme that now, though, introduced a tender procedure for larger generation plants "where there is more competition between the different projects."[305] Considering the issue of whether the scheme amounted to state aid, the Commission referred to its previous assessment in 2002. The initial bidding mechanism was also totally disregarded in the compatibility assessment undertaken by the Commission in 2007. This approach was duplicated in 2012 when Netherlands sought (and

[304] SA.36196, public version, para 17 and 48.
[305] N 478/07, p 5.

obtained) approval for a modified version of its scheme which contained the very same tender mechanism.[306]

3.3.1.4 Austrian FIT scheme

3.3.1.4.1 Notion of aid

Under this FIT scheme[307] a Green Electricity Clearing & Settlement Company (OeMAG) was obliged to purchase RES-E from eligible producers (e.g wind, photovoltaic, hydro) at a guaranteed minimum price. For certain types of RES technologies, an additional bonus could be paid on top to the normal minimum prices. The minimum price aimed to compensate for the difference between the production costs for RES-E and the market price for electricity. OeMAG was monitored by inter alia a ministry of the Austrian state and had the responsibility to amongst other allocate the physical flow of RES-E to distributors as well as to monitor, collect and transfer the cash flows in this regard.[308] Two types of charges recovered the costs of the purchase obligation on part of OeMAG. Firstly, via a fixed lump sum to be paid by electricity consumers which varied according to the grid level to which the consumers were connected. Secondly, via a charge to be paid by all Austrian electricity consumers connected to the grid the amount of which was determined on a yearly basis by a Minister of the state.

The Commission found that the FIT scheme conferred an advantage on RES-E producers, that the measure was selective and that the said producers were active on electricity markets where intra-Union trade took place. It omitted to mention whether competition was likely to be distorted or whether the trade was affected but these conditions must be assumed fulfilled. Since the FIT scheme was adopted by law it was attributed to the state. As regard the question of whether the scheme amounted to state resources it should be mentioned that this decision was taken prior to ECJ's judgement in *Vent De Colère*. Accordingly, the Commission had to rely on another arguments concerning the funding of FIT schemes, albeit the principal question – notwithstanding the industrial market context – could be resolved by reference to for instance *Italy v Commission* (mentioned above, in the assessing of *Vent de Colère*). The Commission referred to the judgement in *Essent Netwerk* which concerned the recovering of stranded costs (i.e. non-market compatible costs) in the electricity sector and where the legislation designated a company for that purpose.[309] Since the legislation imposed the surcharges for the recovering on private entities, designated and strictly monitored a company to collect these resources which it could not use

[306] SA.34411, public version.
[307] SA.33384, public version.
[308] The physical allocating element does not expressly follow from Commission's decision but from other presentations by OeMAG, such as: https:// www.energy-community.org/portal/page/portal/ENC_HOME/DOCS/1422180/OEMAG_Austrian_Show_Case_Energy_Community_upd.pdf.
[309] It should perhaps be mentioned that the additional costs accruing from RES-E production very well may be categorized as stranded costs, as for instance noted by Cameron 2002:24 para 1.43. See also the general definition in Mortensen 2008:389 footnote 2. The relevant question here however is not how the costs are classified but whether their recovering amount to state resources in view of the legislation in question, and *Vent de Colère* has resolved this in the context of RES-E support schemes.

for purposes other than those provided by the law, the ECJ concluded that they amounted to state resources.[310] Applying the very same reasoning on the Austrian FIT scheme and the role of OeMAG in it, the Commission found that the measure amounted to state resources and hence constituted state aid. This conclusion fits perfectly well with the judgement in *Vent de Colère*.

3.3.1.4.2 Compatibility

In view of the detailed calculation method and other information submitted by the Austrian authorities, the Commission found that the aid did not result in overcompensation, neither in relation to the productions costs nor in relation to other aid (i.e. avoiding cumulation). Duplicating the formula employed in the other decisions above, the aid was considered to provide an incentive effect.

3.3.2 EEAG 2014-2020

In contrast to the quite vague 2008 Guidelines under which all principal RES-E support schemes could be and also was considered compatible with the internal market, the new EEAG[311] provides a significantly different and more prescriptive approach.

As to the general conditions for aid in the context of energy from RES, the new Guidelines maintain the previous requirements on a well-defined objective, appropriateness of the aid, incentive effect etc.[312] Furthermore, the Commission notes that the national implementation of the targets set by RED 2009 not always result in the most efficient market outcome and under certain conditions, therefore, state aid can be an appropriate instrument. Although the EEAG apply up to 2020 (coinciding with the expiry of RED 2009), it should nonetheless prepare ground for achieving the objectives set in the 2030 framework. The RES target for 2030 has subsequently been set to at least 27% for the EU.[313] Significantly, under the intermediate period, the Commission expects that established (not defined) RES will become grid-competitive, implying especially that aid should be phased out in a digressive way. The new EEAG are considered to be consistent with that objective and will ensure cost-effective delivery through market-based mechanisms.[314]

The shift towards market-based mechanisms is highly significant in the context of the specific criteria on operating aid for RES-E production. In order to incentivise the market integration of RES-E, a general rule comprising three cumulative conditions will be applied from 1 January 2016 to all new RES-E schemes. The first requirement is that aid is granted as a premium in addition to the market price (top up) whereby the generators sell its electricity directly in the market. The second requirement is that beneficiaries are subject to balancing

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[310] Case C-206/06 *Essent Netwerk* para 66, 68-69.

[311] It should be mentioned that if a non-TGC-scheme fulfil one or several of the criteria under the new EEAG, it may under certain circumstances be exempted from the notifying procedure under article 108(3) TFEU and automatically be considered compatible with the internal market. See Commission Regulation No 651/2014, notably articles 42-43. This, however, concerns procedural aspects of state discretion and does not affect the question of which principal RES-E support scheme the state can adopt.

[312] EEAG section 3.1.

[313] European Council 2014:7.

[314] EEAG point 107-108.

responsibilities (i.e. ensure that electricity supply always meets demand at any given time), unless no liquid intra-day market exists. The third requirement is that measures are put in place to ensure that generators have no incentive to generate RES-E under negative prices. All in all, this is an elevation of FIP schemes and a clear signal that FIT schemes are to be phased out. Although balancing requirements is a system stability issue common to all RES-E support schemes, it is nevertheless most relevant – as is the third requirement – in the context of FIT schemes which typically do not provide incentives to stop generating electricity during periods of low demand.[315] However, the general rule will not apply to installations the electricity capacity of which is less than 500 kW or demonstration projects, except for RES-E from wind energy whose capacity exceed 3 MW. In these cases, albeit not specified, one must assume that FIT schemes are possible to employ. The narrow scope of this exception is perhaps best illustrated by the definition of demonstration projects which are projects "demonstrating a technology as a first of its kind in the Union and representing a significant innovation that goes well beyond the state of art."[316] Even though this is a qualitative criterion, the quantitative criterion establishing the 500 kW threshold will in effect only be applicable to very small installations. Given the limited scope of this exception, states ability to adopt FIT schemes on a wider basis is highly constrained.

Moreover, in a transitional phase covering 2015 and 2016, aid for at least 5% of the planned new electricity capacity should be granted in a competitive bidding[317] process on the basis of clear, transparent and non-discriminatory criteria. However, from 1 January 2017 all aid must be granted through such a competitive bidding process which in effect means that TENFIT scheme based on a FIP support mechanism will be required. If such a bidding process is open to all RES-E producers (i.e. technology neutral), the Commission will presume that the aid is proportionate and does not distort competition to an extent contrary to the internal market.

Exemptions from competitive bidding is basically provided for 1) states that demonstrates that it would lead to higher support levels (e.g. avoid strategic bidding), result in low project realisation rates (e.g. avoid underbidding) or that only one or very limited number of projects/sites could be eligible, as well as 2) installations of small capacity or demonstration projects. In the absence of a bidding mechanism, the general rules prescribing a FIP scheme apply. Additionally, the competitive bidding process can be limited to certain RES-E technologies where the opposite would lead to suboptimal results, such as the need to achieve diversification of supply and the promotion of longer-term potential of a new and innovative RES-E technology.

TGC schemes are also allowed. The compatibility criteria established under 2008 Guidelines remains, namely that the state provide sufficient

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[315] See for instance Held et al 2014:28f. See also point 137 of the EEAG which refers back to this condition, "when technically possible", in the context of TGC-schemes.

[316] EEAG point 45.

[317] EEAG point 43 defines competitive bidding process as a non-discriminatory bidding process that provides for the participation of a sufficient number of undertakings and where the aid is granted on the basis of either the initial bid submitted or a clearing price. In addition, the budget or volume related to the bidding process is a binding constraint leading to a situation where not all bidders can receive add.

evidence to the effect that such support 1) is essential to ensure the viability of the RES concerned, 2) does not in the aggregate result in overcompensation and 3) does not dissuade producers from becoming more competitive. The main difference between the previous guidelines is that no differentiation in support levels is allowed, unless the state demonstrates the need for this on the basis of the exemption grounds applicable to competitive bidding processes above. Accordingly, the Romanian TGC scheme presented above which differentiated among RES-E technology, is not permissible under the new Guidelines unless the state demonstrates that it is needed.

Although the main requirement that aid should be granted through FIP-schemes and subsequently TENFIT schemes will apply from 1 January 2016 and 1 January 2017 respectively, the EEAG arguably already exert significant influence to that effect. Firstly, states decision to adopt a certain principal RES-E support scheme is highly strategic, taking into account especially the status and future development of grey energy supply as well as the estimated need of electricity for domestic industries. Accordingly, signalled changes coming into effect within a one or two-year time frame will affect states current decisions. Secondly, even though the previous controlled RES-E schemes has been approved for either a 10 year period or until the plant has depreciated, any modification or alteration of such a scheme within the meaning of article 108(3) TFEU will have to be notified to the Commission whereby it will apply the Guidelines that are applicable at the time of its assessment – EEAG that is.

The shift towards the phasing out FIT schemes and the relative insignificance of the prescribed time frames is illustrated in an individual decision concerning a German FIP scheme that nevertheless provided for FIT-mechanism for small-scale installations and also as a last resource clause to be used in exceptional situations.[318] Having found that both mechanisms amounted to state aid but fulfilled the general compatibility criteria, the Commission turned to the specific compatibility criteria and assessed the compatibility of the FIP-scheme in light of the accompanying FIT-mechanism. The part of the FIT mechanism that concerned small installations fulfilled the thresholds under EEAG and was considered compatible with the internal market. The other part of the FIT-mechanism was designed as a security net where the intermediary (who would sell RES-E on the market) became insolvent; a situation Germany considered extremely rare. Considering that it entailed a 20% reduction of the guaranteed price and thus did not incentivize producers to rely on it, the Commission found that it was compatible with the internal market for the period up to 31 December 2016. This illustrates that FIT schemes, even when employed as exceptional and largely theoretical last resource mechanisms, are gradually phased out.

3.4 Overall assessment

3.4.1 The doctrinal and empirical question: generality

The fact that *PreussenElektra* settled a key doctrinal issue in state aid law has proved to be insufficient for the increasingly complex and state intervening RES-E support schemes. To the extent ECJ's approach in that case could be explained

[318] SA.38632, public version, para 246.

by its recognition of RES-E support as a legitimate objective, the limits of such an approach was seen in *Vent De Colère*. If the FIT scheme at stake in the latter case would have been classified as something else than state aid, the notion state aid would have been deconstructed beyond recognition. To the extent it is possible to consider "good" policy objectives as such under article 107(1) TFEU at all, it is nonetheless difficult to discern a favourable approach on part of ECJ in the context of classifying RES-E support measures.

Admittedly, it is impossible to exhaustively conclude on whether a principal REFIT scheme will amount to state aid or not. An assertion in this respect will ultimately depend on a case-by-case evaluation of the particular scheme in question. Theoretically, it is possible to envisage and construct FIT schemes similar to the one employed in *PreussenElektra*, solely based on statuary purchase obligations and minimum prices. Together with the possibility to pass on the costs to final consumers, as indirectly allowed by ECJ in *Vent De Colère* by not falling back on AG's opinion in this regard, one could conclude that FIT schemes in principle can escape the state aid prohibition. The latter feature can also theoretically be constructed so as to fund FIP schemes without indirect/direct state involvement (apart from adopting the law). In practice, however, such "simple" solutions has increasingly been abandoned and replaced by entities designated by law to channelize and collect the resources funding the schemes. This is seen in *Vent De Colére* and especially in Commission's decisional practice. After all, it is difficult to envisage a private undertaking that voluntarily collects and channelize resources necessary for the scheme without being mandated by the state. In such cases, characterizing FIP schemes and updated FIT schemes, the measures amounts to state aid. According to the description of the financing mechanisms of REFIT and ultimately TENFIT schemes in the introductory chapter, these were (and is) financed either directly by governmental resources or, and to significantly higher degree, by way of passing on the costs to the consumer base. In the former case, it is obvious that the measure will amount to state aid. In the latter case, governmental resources may be directly involved as an intermediary fund scheme before the additional costs are finally passed on. This will clearly amount to state aid, as seen by *Vent De Colére*. However, even if the passing on of the additional costs does not rely directly on intermediary governmental resources, the scheme may nevertheless constitute aid. The description in the introductory chapter stated that a TSO is typically *designated* for the purpose of aggregating and administrating the additional costs involved. Irrespective of whether the relevant entity is a TSO or another actor, the key term here is designated. If this designation is instituted by an obligation imposed by law or, broadly speaking, a governmental/public decision, the scheme in question will amount to state aid, since the state will be deemed to exercise control of the resources involved. The issue of whether a TSO or the like may be designated on a voluntarily basis, for instance by market operators due to practical reasons arising from the market conditions, have above been assumed to be difficult to establish in practice. In particular, it is doubtful whether states would be able to rely on such "loose" constructions the proper functioning and foreseeability of which would be in the hands of the market operators and their goodwill. Even if this was possibly the case in the *PreussenElektra*, the judgement is anything but clear on the crucial issue of how

the resources was channelized in general. Summing up, FIT and FIP schemes will in general amount to state aid.

Since the deciding factor is whether the funds involved are "granted by a State or through State resources," the incorporation of an initial tendering procedure in any of those schemes – hence TENFIT – does not alter the assessment. This is clearly seen in Commission's decisional practice and nothing suggests that the Union courts would not uphold such an approach. After all, it is highly unlikely that the mere administration of the tendering procedure amount to state aid when the underlying FIP or FIT mechanism does not constitute state resources. Accordingly, the assessment of whether a TENFIT scheme amount to state aid will ultimately rest on an assessment of the underlying mechanism.

In respect of TGC schemes the recent shift on part the Commission is significant. Its reconsideration of the previous stance to the effect that certificates now are (non-definitely) considered as state resources is not convincing. The reasoning underlying its position is uncertain and is possibly inferred from case law on tradable emission permits. As previously mentioned, the General Court explicitly rejected such an analogy whilst the ECJ explicitly tied the outcome to the fact that the permits could have been sold/auctioned by the state. The auctioning/selling of such permits is however a common design option for tradable permit schemes, in sharp contrast to TGC schemes. Moreover, the broad discretion the Commission is entitled to in relation to the existence of aid presumes that the decision is based on a complex technical or economic assessment.[319] The unclear basis for Commission's classification together with said case law clearly indicates that it would have difficulties on this matter if it were brought before the Union courts. However, in the absence of court clarification and especially states willingness to bring this matter before them, the classification of TGC schemes as state resources will prevail.

In summary, REFIT and TENFIT schemes in general amount to state aid, but this is not necessarily the case for TGC schemes. However, in Commission's decisional practice all principal RES-E support schemes currently amount to state aid.

3.4.2 Compatibility: positive integration and energy rights

Until recently, the effects for states of having its RES-E support scheme classified as state aid was that it fell within Commission's regulatory net largely characterized by procedural obligations, such as the submission of relevant information and monitoring obligations. Indeed, the common factor characterizing the compatibility assessment of all principal support schemes under 2008 EAG was the requirement to illustrate the absence of overcompensation. This is a quite general and vague criterion, largely consisting of economical assumptions and estimations on future market developments on the basis of information submitted. Assuming that states have the best knowledge of the (national) market conditions and market behaviour underpinning their support schemes, they will be in a position to gather and in particular frame such information so as to fulfil the general criterion established to the satisfaction of the Commission. Accordingly, the imprecision of 2008 enabled state discretion.

[319] Hanchner, Ottervanger and Slot 2012:60 and the case law cited in footnote 50.

However, with the adoption of the EEAG**,** the general and non-prescriptive compatibility criteria were replaced with a much more precise and prescriptive criteria. Under the new compatibility regime, FIT schemes are gradually phased out in favour of TENFIT schemes based on FIP mechanisms. TGC schemes are still largely assessed under the old criteria but must now be technologically neutral. It remains to be seen how strict the Commission will apply these new criteria from 2016 and 2017 respectively, but nothing – neither the wording of its soft law nor the individual decision regarding the German FIT-mechanism applicable in extraordinary circumstances – suggest that states will be in a position to freely choose between the principal RES-E support schemes. Thus, within two years, states will primarily be able to decide between a TGC scheme and a TENFIT scheme with a FIP funding mechanism. FIP schemes as such may be employed, provided that the states demonstrate their viability. In contrast, the exceptions for adopting FIT schemes are highly limited. Although nothing in the EEAG precludes the systematic and large-scale usage of the exception, in particular a wide scale deployment of small scale installations not exceeding the threshold alone but nevertheless produce considerable amount of RES-E in the aggregate, states will likely refrain from such usage since it would entail considerable investment (aid) costs in the aggregate. The conclusion, accordingly, is that state discretion under state aid law is constrained to the effect that TGC schemes and TENFIT schemes underpinned by a FIP mechanism gradually are the two principal support scheme designs primarily available for states.

By positively defining the substantive criteria that must be met in order to be considered compatible with the internal market and significantly constraining state discretion in this regard, the new prescriptive EEAG amounts to positive integration or harmonisation. Basically, whilst negative integration is characterised by the removal of national barriers to trade at EU level, positive integration/harmonisation refers to positively defined criteria's harmonizing different national regulations into a common EU standard.[320] However, in contrast to for instance the RED directives adopted by national governments, the harmonisation in question is carried out by a supranational actor and hence imposed from above.[321] Additionally, the new prescriptive approach likely intervene in all the three energy rights to which states are entitled pursuant to article 194(2) TFEU, namely the right to "determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply."[322] Assuming that RES constitutes indigenous energy resources,[323] the constraints on state discretion in the context discussed likely intervenes in states first energy right, namely the right to determine the conditions for exploiting its energy resources. In particular, given that FIT schemes are considered to be particularly useful for the promotion of immature

[320] See for instance Padros and Cocciolo 2010:35, Stone Sweet 2010:18, Scharpf 1999:45.
[321] Blauberger 2008.
[322] See for instance Tews 2014:12f for a similar though unspecified suggestion.
[323] AG opinion para 109 in Case C-573/12 *Ålands vindkraft*. See also Fouquet 2013:16. Compare however Delvaux 2013:259 and 345, para 739 and 983 respectively, suggesting that only energy resources that are important to all states are included in the first energy right, such as oil, natural gas and uranium. However, given that uranium is heavily relied on by some countries but not by others, the very same proportion in respect of RES will be equally important to all countries.

RES technologies[324] that not necessarily are small scale installations nor demonstration projects, the constraints on choosing such schemes will inevitably affect the second energy right, namely states unilateral choice between different energy sources. The same argument is equally applicable to the third energy right, since it comprises states right to decide its energy mix.[325] As previously mentioned, the relationship between the energy rights contained in the energy provision (article 194) and the environmental provision (article 192), subject to a threshold, is not settled. Accordingly, in the context of *adopting* secondary legislation, the practical application of the energy rights may be subject to a threshold criterion; that is, that their subject matter shall be affected significantly. To what extent this is the case here can certainly be discussed and would ultimately require an empirical assessment upon a quantification of the threshold. However, since the immediate context do not concern the adoption of secondary legislation, I consider it safe to conclude that the outcome at face value intervene in at least two of the energy rights enshrined in article 194(2) TFEU.

In summary, the constrains on state discretion in respect of principal support scheme design is mandated by positive integration from above and intervenes in states energy rights.

4 Assessment: legitimacy and trinity

The outcome is twofold and follows the internal market regimes. At the one hand, under articles 34-36 TFEU, the ECJ has granted member states considerable discretion as to the choice of the principal RES-E support scheme design. At the other hand, under the state aid regime, the scope of state discretion is increasingly constrained to the effect that FIT schemes and to a lesser extent FIP schemes are phased out in favour of TENFIT schemes based on FIP mechanisms and TGC schemes.

From a state-perspective, the outcome is unsatisfying insofar that an exceptional two-tier justification under the first regime is of little help when state discretion is increasingly constrained under the latter. First and foremost, however, the outcome raises legitimacy concerns, which in the context of especially EU law – it is argued – may substantiate legal arguments. Prior to the judgement in *Ålands vindkraft*, one commentator for instance suggested that if the ECJ followed AG's opinion to the effect that national RES-E support schemes would have to support foreign RES-E production, the domestic legitimacy for the national support scheme in question would be in danger.[326] Similarly, following the consultation phase on the new EEAG where it became evident that the Commission attempted to intervene in national energy mix issues, the legitimacy of such an approach was questioned.[327] Both allegations illustrate that legitimacy of European decision-making is not a purely academic[328] concern, since they may either alone or in the extension underpin legal arguments. At the same time, however, the allegations suffer from a non-precise or at least a narrow concept

[324] See for instance OECD 2011:134 Ragwitz 2012:19, del Rio and Artigiues 2014:294.
[325] Delvaux 2013:345 para 985.
[326] von Unger 2014:116.
[327] Thieffry 2014:290.
[328] Compare Scharpf 1999:12.

of legitimacy. In the remainder of this essay, therefore, I will discuss whether the outcome may be considered legitimate, both from a input and a output conceptualisation taking into account the energy trinity. It must be pointed out that given the amount and breadth of aspects that possibly can affect a legitimacy assessment, the following discussion will inevitably and at least formally be incomplete. The purpose is nevertheless to tentatively point out the central and substantial argumentative threads that in any event can be identified in view of the outcome, and conclude thereon.

4.1 Input legitimacy

The two legitimacy concerns raised above clearly relates to the concept of input legitimacy. As previously mentioned, this concept is based on whether the outcome can be derived from the preferences of the members of a given community, as expressed by participation and/or consensus.[329] The European Parliament and the Council, composed of representatives of the Union's citizens and the relevant ministry of each state respectively,[330] adopted both RED's. Accordingly, the prescribed minimum harmonisation and the unconstrained state discretion arising from both RED's originate from the will of the states concerned. This is equally true for the unilateral adoption of RES-E schemes preceding EU secondary legislation to that effect, such as Germanys FIT scheme assessed in *PreussenElektra*. Consequently, the outcome under articles 34-36 TFEU may be considered legitimate insofar that those preferences were upheld and justified, in spite of being outright discriminatory. This would not have been the case if the AG's opinion in *Essent Belgium* and *Ålands vindkraft* had been upheld.

Conversely, the input legitimacy of the outcome under the state aid regime is rather weak. The outcome not only constrains state discretion trough a positively defined criteria by a supranational actor not subject to domestic accountability, but also intervenes in states energy rights. Under the treaty provisions on competence, such a result would at most be possible to achieve by way of unanimity under the special legislative procedure. Additionally, as a device for input legitimacy[331] and by virtue of being highly significant in renewable energy matters, the principle of subsidiarity would have to be complied with. Accordingly, the outcome under the state aid regime may be considered as illegitimate, at least from an input perspective.

4.2 Output legitimacy

Under this concept the decisive factor is whether the common welfare of a given constituency is effectively promoted, and legitimacy is derived from the capacity to solve problems requiring collective solutions.[332] Also, in contrast to input related criteria, output legitimacy relies more on representation than direct participation. Accordingly, this legitimacy depends on institutional mechanisms that can balance two potentially conflicting purposes: hinder the abuse of public power and at the same facilitate effective problem solving.[333] These aspects are

[329] Scharpf 1999:6f.
[330] Articles 14(2) and 16(2) TFEU.
[331] See for instance Eriksen and Fossum 2004:452.
[332] Scharpf 1999: 6, 11.
[333] Scharpf 1999:13.

procedural and do not provide any guidance on whether a given outcome may be considered legitimate on substantial grounds i.e. *what* the potentially solved problem is constituted of. Rather, they seek to ascertain that the substantial outcome is reached by procedurally fair means. In the following these two procedural aspects will be shortly assessed. Additionally, the substantive outcome will be analysed from a trinity perspective.

4.2.1 Procedural criteria

Considering the outcome under the state aid regime it must first be recalled that the EU has exclusive competence in this area of law.[334] In particular, the Commission has exclusive competence in respect of the compatibility assessment.[335] In this connection it must be pointed out that three rounds of public consultation in which inter alia member states and other stakeholders submitted their opinions preceded the issuance of the EEAG.[336] Even though such participation hardly replaces legislative competence, it nevertheless approximates input legitimacy but from an output representation criteria.

Several arguments can be advanced in order to qualify the claim that the issuance and application of soft law (e.g. guidelines, communications, notices) in general enables effective problem solving.[337] Firstly, such a usage is a common feature for public authorities in all legal systems, including the EU. It is of particular importance in areas where the Commission is dealing with a large number of cases, notably in the context of state aid.[338] The use of soft law enables the administration to cope with an increasing workload[339] and enables in that way an effective problem solving. Secondly, a strict and consistent enforcement of soft law facilitate transparency, legal security and credibility,[340] which are constituting elements of output legitimacy. The precision in EEAG is considerable, both in itself and especially in comparison with the previous EAG. Even though it remains to bee seen how the Commission will apply the EEAG, nothing currently suggests that it will be anything but strict and consistent. To the contrary, by binding itself to its soft law and thereby decreasing its exposure to political pressure,[341] the Commission has very good reasons to adhere to a consistent and strict application. This is particularly so in the context of EEAG whose intervention in states energy rights may be criticized on basis of input

[334] Article 3(1)(b) TFEU. See also Rusche 2013:105f.
[335] See for instance Regulation 734/2013 recital 2.
[336] See for instance Breuvart and Jestaedt 2014.
[337] It has been suggested elsewhere that the use of informal rule making, including the issuance and application of guidelines, is not unproblematic because the amount of instruments employed by the Commission can be confusing for users of the system. See for instance Craig 2008:1086 footnote 81 to that effect. Even though this may be true at a general level, especially for undertakings operating in several industries and at different markets, this is hardly the case in the context of RES-E production. The EEAG as such is anything but confusing. To the contrary, the precise wording of the EEAG is one of the distinguishing factors in comparison with previous guidelines. Moreover, even if interrelated regimes concerning e.g. environmental taxes and tradable emission permits may raise concerns about the precise effects in the aggregate on the energy sector, such concerns is arguably inherent in all legislative processes and business strategies of undertakings concerned. Also, the precision in guidelines, as well its substantial features discussed below, mitigates this aspect.
[338] Craig 2006:641f.
[339] Craig and de Burca 2008:1086.
[340] Craig and de Burca 2008:1086.
[341] Blauberger 2008:6, 12f.

legitimacy. It is in my view obvious that the EEAG enables effective problem solving.

The assessment is seemingly more complicated as to whether the Commission has abused its powers in adopting EEAG and applying it on individual decisions. As previously mentioned, the Commission enjoys considerable discretion as to whether aid is compatible with article 107(3) TFEU.[342] ECJ has consistently held that the Commission may adopt guidelines or policies as to how it will exercise its discretion under article 107(3) TFEU, provided that they do not derogate from treaty provisions.[343] Thus the EEAG cannot prescribe compatibility conditions that do not comply with primary law. However, in the context of the analysed compatibility constraints on state discretion provided by the EEAG, this condition becomes a self-referential exercise since other treaty provisions does not regulate RES-E support schemes in this particular regard and the assessment of whether a scheme (considered as aid) is compatible with the internal market cannot be based on other grounds than the mentioned article the interpretation of which is in the hand of the Commission.[344] The only practical example conceivable is where countries employing technologically differentiated TGC schemes, such as the Romanian above, objects to the prescribed criteria on technologically neutral certificates on the basis that certificates do not amount to state aid in the first place and that the EEAG, accordingly, do not comply with primary law in this regard. This is surely relevant for countries employing technologically differentiated TGC schemes but concerns the question of how a principal support scheme is designed and not which of them a state may choose. It should perhaps be mentioned that the intervention by EEAG in states energy rights under the treaty cannot be considered as a derogation from primary law, since these rights are only applicable in legislating matters. In summary, it is very difficult to contend that the constraints provided by EEAG in respect of principal support scheme design do not comply with primary law.

The Commission is subject too far more substantial constraints in its decisional practice regarding the compatibility assessment than in adopting the soft law under which the individual decisions are taken. Since this issue will have to be assessed on a case-by-case basis and goes well beyond the question of whether the outcome rendered by inter alia the EEAG may be considered legitimate, I will only point out one aspect that reinforce one of the arguments presented above. According to settled case law it is for the EU courts to verify whether the Commission, in adopting its decision, comply with its own Guidelines.[345] This is an additional reason for the Commission to adhere to a strict and consistent application of the EEAG, which in turn increase legal

[342] See for instance Hanchner 2012:59 and the case law cited.
[343] See for instance Quigley 2009:section 7.2 footnote 34 and Craig and de Burca 2008:1087 footnote 75 and the case law cited.
[344] An illustrative example of the opposite situation is that the Commission in EEAG point 122 consider that RES-E support schemes "should in principle" be open to RES-E production in other states i.e. not containing the territorial limitations assessed under articles 34-36 TFEU. The cases on this issue – *Ålands vindkraft* and *Essent Belgium* – were pending before the ECJ at the time EEAG was issued. The outcome of these cases clearly illustrate one aspect that the Commission must comply with i.e. it cannot approve RES-E support schemes on the condition that these do not contain territorial limitations since these are allowed under other treaty provisions.
[345] See for instance Case T-27/02 *Kronofrance v Commission* para 79.

certainty and ultimately enable effective problem solving. Overall there are in my view compelling reasons to conclude that the outcome under the state aid regime fulfil the procedural output legitimacy criteria.

The question of whether the outcome under articles 34-36 TFEU comes up with output legitimacy is in effect a question of whether it facilitates effective problem solving, since the ECJ hardly can be accused for having transgressed its competence in this regard. Two aspects related to consistency and legal certainty are important here. As previously mentioned both RED's provides for minimum harmonisation in respect of how the national targets set are to be achieved. Even if recitals to both RED's more or less recognize the need for territorial limitations,[346] this issue is not exhaustively regulated. It is in essence for the states to decide on this matter as long as the prescribed procedural obligations and/or the targets are met.[347] Consequently, trade distortions arising from territorial limitations shall solely be assessed on the basis of primary law. The ECJ surely assess these limitations under primary law but justify these measures by reference to inter alia the absence of exhaustive harmonisation.[348] Effectively, the ECJ sidesteps a rule of higher rank by way of reference to a rule of lower rank and the established practise that trade distortions arising from minimum harmonisation shall be assessed under primary law.[349] It is argued that the inconsistency in this regard does not facilitate effective problem solving, since the ECJ in effect disapply an established interpretation technique in this area of law.

Secondly, the two-justification track employed in these three cases raises legal certainty concerns. The question of whether discriminatory measures pursuing environmental protection aims may be justified constitutes a long standing but not yet settled issue under articles 34-36 TFEU.[350] Suggestions has been made that ECJ's inconsistent approach in environmental protection cases is based on a combination of a realist and a formalist jurisprudence, without however recognizing that legal certainty is at risk or that "the court is acting unjustly or without principle" but rather that "a new theory that can explain this apparent contradiction should be developed."[351] This reasoning suffers in my opinion from a serious drawback, since the ECJ, by not formally clarifying its principal position on these matters, clearly communicate that it does not have a principle other than resolving the issues before it on a case-by-case basis. Developing a theory on this inconsistent basis will hardly amount to one (consistent) theory, but rather several theories, whereby the outcome in terms of legal uncertainty impede effective problem solving. The exceptional two-tier justification approach first provided by *PreussenElektra* added an extra layer of confusion and legal uncertainty for economic operators and national courts.[352] Although this exceptional approach in the immediate context of RES-E production has been upheld in the subsequent cases *Ålands vindkraft* and *Essent*

[346] RED 2001 recital 14 and RED 2009 recital 25.
[347] For a discussion of indirect enforcement techniques in respect of both REDs, in spite of the first one being solely indicative, see Truby 2013:699ff and Peeters 2014:49.
[348] Case C-573/12 *Ålands vindkraft* para 92 and 94, Joined Cases C-204/12 to C-208/12 *Essent Belgium* para 97.
[349] For a general discussion on the latter point, see Oliver 2012:238f, 484f.
[350] See for instance Jacobs 2006.
[351] Engle 2008:129.
[352] See for instance Johnston et al 2008:132, Jacobs 2006:192ff.

Belgium, the ECJ has nevertheless abstained from clarifying whether the departure from the general principle can be relied on principally. This is not to say that the three cases on territorial limitations of RES-E schemes do not provide authority sufficient for the conclusion that said schemes under certain circumstances are allowed. The point is rather that the underlying doctrinal and more general question – which the ECJ had the opportunity to clarify – remains unanswered and, accordingly, that it does not in general enable effective problem solving. All in all, the outcome under articles 34-36 TFEU may be questioned on the basis of output legitimacy criteria.

4.2.2 Substantial criteria: delivering the trinity

Having assessed the procedural output legitimacy criteria, the remaining question is whether the substantive outcome under both regimes effectively promotes the common welfare of EU's constituency. The common welfare in this context shall be understood as the objectives pertaining to the energy trinity. Are these effectively promoted by the contradicting outcome?

The rationale put forward by the Commission is based on the prognosis that *established* RES will become grid-competitive during the intermediate period between 2020 and 2030, which in its view implies that subsidies should be phased out in a degressive way. Grid-competitiveness or grid parity is basically reached when RES-E costs the same or less as the (conventional) electricity on the national market including costs of construction, operation etc.[353] The EEAG is considered consistent with this objective and "will ensure the transition to a *cost-effective* delivery through market-based mechanisms."[354] The key terms here are established RES and cost efficiency. As already mentioned, there is a common perception that FIT schemes are appropriate instruments for immature technologies which is roughly equivalent to the most non-competitive technologies. The reason is that those schemes decreases the market risk, provides a higher degree of investor confidence and, accordingly, supress the non-competitive element of immature technologies. This, however, take place at the expense of cost efficiency in developing RES-E in general, since the same amount of subsidies vested into mature RES technologies produces more electricity in the aggregate. Accordingly, and roughly amounting to a tautology, there is a compelling case for considering cost efficiency by way of promoting the most mature technologies as an effective mean to deliver more RES-E in the aggregate. Nevertheless, it cannot be assumed that all national legislators and policy makers prioritize this criterion in their decision-making, at least not in terms of promoting the most mature technologies.

Cost efficiency concerns were also raised during the assessment under articles 34-36 TFEU, though indirectly. AG's adherence to "prudent and rational utilisation of natural resources"[355] contained in article 191(1) TFEU and call for "reducing the cost of renewable energy by permitting a more rational location of production"[356] is in effect a cost efficiency criterion under the banner of deterritorialised environmental protection. The compelling case for cost efficiency in the context of state aid is in my opinion even stronger under articles

[353] See for instance Ydersbond and Sveen 2014.
[354] EEAG point 108, my emphasis.
[355] AG opinion para 109 in Case C-573/12 *Ålands vindkraft*.
[356] AG opinion para 110 in Cases C-204/12 to C-208/12 *Essent Belgium*.

34-36 TFEU. On the assumption that RES-E support schemes would have to set a cap for the total amount of support given that corresponds to the RES target the country in question aims to achieve, a prohibition of territorial limitations would lead to the promotion of the absolutely most mature technologies within the EU as a whole instead of within each member state. In fact, a deterritorialized cost efficiency approach could very well lead to an outcome in which states heavily depending on immature technologies would end up with nearly no domestic RES-E production at all. The problems ECJ associates with this approach (or at least the arguments put forward by the AG) in terms of potentially declining investor confidence, an (im)proper functioning of the support schemes and states (in)ability to control the costs of the schemes are hardly eternal, since states as well as businesses inevitably adjust to new market conditions; in this case from a mainly national RES-E market to an European market in which they already are present. Also, the assumption underlying the reasoning presumes that states will adjust their schemes in order to control their costs. Nevertheless, this is an outcome the majority of member states will oppose, and the ECJ has granted them authority to do so in the absence of exhaustive harmonisation.

From the trinity perspective employed by the Commission, the discussed cost efficiency criterion represent a triple-win solution in terms of 1) sustainability, since it enable higher and/or easier met RES targets, 2) security of supply, since it would decrease the electricity prices and thus approximate affordability, 3) competitiveness, since it inter alia pushes for the integration of RES-E into the conventional electricity market. One can indeed argue that the output legitimacy in this intertwined area of internal market/energy/climate change policy ultimately depend upon the deliverance of the trinity. Such an assertion simultaneously displays the weakness of solely relying on input legitimacy. Recalling that states energy rights cuts through the legal bases for secondary legislation in energy and environmental matters, the adoption of cost efficiency criteria in the context of RES-E production to the effect that territorial limitations are waived and/or the use of certain support schemes is restricted would have to rely on significant support by the member states. In the absence of sufficient support, there will be considerable gap between the policy objectives and the legal means to achieve them. Surely, such a tension between collective action and sovereignty concerns, between policy and law, is hardly new and characterises the very essence of European decision-making. Nevertheless, given the gravity of climate change mitigation and its intimate or glocalized interrelationship with energy matters as well as EU's alleged international leadership under the former, the sole reliance on state support in legislative matters is inappropriate for the purpose of effectively promoting the trinity. Under such circumstances I consider it perfectly reasonable for the Commission, who "shall promote the general interest of the Union,"[357] to employ a cost efficiency criterion under the compatibility assessment to the effect that FIT and partly FIP schemes are gradually phased out. After all, the EU enjoys exclusive competence in state aid matters and both schemes generally amount to state aid which, as a starting point, is prohibited. Assuming that the trinity would be easier to deliver on a non-discriminating internal market, the approach by the ECJ in this regard impedes the possibility of an effective implementation.

[357] Article 17 TEU.

Accordingly, considered from a trinity perspective focusing on cost efficiency, the outcome under the state aid regime and under articles 34-36 TFEU may be considered as more and less legitimate, respectively.

4.3 Conclusion

The fact that state discretion is constrained under the state aid regime, but upheld under articles 34-36 TFEU, corresponds from the perspective of input criteria to less and more legitimacy, respectively. However, considered from procedural output criteria, the assessment is altered. In view of inter alia the precision provided by the EEAG, as well as the exceptional two-tier justification approach employed by the ECJ in a context characterized by legal uncertainty, the outcome is considered as more and less legitimate, respectively. The cost efficiency criterion provided by the EEAG to the effect that FIT and partly FIP schemes are gradually phased out is likely to enable a more effective implementation of the policy objectives pertaining to the trinity. This illustrates a potential weakness of input legitimacy, since it relies heavily on the formal consent of states instead of the benefits that can be achieved in the aggregate by collective action – even when imposed from above. In contrast, cost efficiency is decreased by the territorially confined approach employed by the ECJ. Thus, where the ECJ justifies discrimination within the internal market and among the member states to the detriment of a cost efficient fulfilment of the trinity, the approach by the Commission mitigates these effects by way of promoting cost efficiency within the member states. How does this add up then?
In the best of both worlds, the glocalised features of the trinity would be better promoted within a genuine or non-discriminating internal market, at least from the perspective of cost efficiency. Until then, though, I consider the overall outcome as more or less legitimate.

5 References

Bibliography

Abolhosseini, Shahrouz and Heshmati, Almas (2014), "The Main Support Mechanisms to Finance Renewable Energy Development" in *Renewable and Sustainable Energy Reviews*, Vol. 40, pp. 876-885

Amundsen, Eirik S. and Nese, Gjermund (2009), "Integration of Tradable Green Certificates Markets: What can be Expected?" in *Journal of Policy Modelling*, Vol. 31, pp. 903-922

Batlle, Carlos; Pérez-Arriaga, Ignacio J. and Zambrano-Barragán, P. (2011), *Regulatory Design for RES-E Support Mechanisms: Learning Curves, Market Structure, and Burden-Sharing.* Working Paper 2011-011. MIT Center for Energy and Environmental Policy Research

Barnard, Catherine (2009), "Derogations, Justifications and the Four Freedoms: Is State Interest Really Protected" in Barnard, Catherine and Odudu, Okeoghene (Eds.) *The Outer Limits of European Union Law.* Portland: Hart Publishing

Barnard, Catherine (2010), *The Substantive Law of the EU*. Oxford: Oxford University Press

Biondi, Andrea (2013), "State Aid is Falling Down, Falling Down: An Analysis of the Case Law on the Notion of Aid" in *Common Market Law Review*, vol. 50, pp. 1719-1744

Birnie, Patricia; Boyle, Alan and Redgewell, Catherine (2009), *International Law and the Environment.* Oxford: Oxford University Press

Blok, Kornelis (2007), *Introduction to Energy Analysis*. Amsterdam: Techne Press

Breuvert, Charlotte and Jestaedt, Thomas (2014), "European Union Issues New Guidelines on State Aid for Environmental Protection and Energy" in *Jones Day*: http://www.jonesday.com/european-union-issues-new-guidelines-on-state-aid-for-environmental-protection-and-energy-04-18-2014/ [Accessed 2014-12-27]

Brick, Kerri and Visser, Martine (2009), Gr*een Certificate Trading.* Cape Town University: http://www.erc.uct.ac.za/Research/publications/09Brick-Visser_Green_certificate_trading.pdf [Accessed 2014-12-26]

Buchan, David (2009), *Energy and Climate change: Europe at the Crossroads*. Oxford: Oxford University Press

Calliess, Christian and Hey, Christian (2013), "Multilevel Energy Policy in the EU: Paving the Way for Renewables?" in *Journal for European Environmental & Planning Law*, Vol. 10:2, pp. 87-131

Cameron, Peter (2002), *Competition in Energy Markets: Law and Regulation in the European Union*. Oxford: Oxford University Press

Cherp, Aleh and Jewell, Jessica (2011), "The Three Perspectives on Energy Security: Intellectual History, Disciplinary Roots and the Potential for Integration" in *Environmental Sustainability*, Vol. 3:1, pp. 1-11

Cherp, Aleh and Jewell, Jessica (2014), "The Concept of Energy Security: Beyond the Four As" in *Energy Policy*, Vol. 75, pp. 415-421.

Couture, Toby and Gagnon, Yves (2010), "An Analysis of Feed-In Tariff Remuneration Models: Implications for Renewable Energy Investment" in *Energy Policy*, Vol. 38, pp. 955-965

Craig, Paul (2006), *EU Administrative Law.* Oxford: Oxford University Press

Craig, Paul (2012), "Competence and Member State Autonomy: Causality, Consequences and Legitimacy" in Micklitz, Hans W. and De Witte, Bruno (Eds), *The European Court of Justice and the Autonomy of the Member States.* Cambridge: Intersentia

Craig, Paul and de Burca, Grainne (2008), *EU Law*. Oxford: Oxford University Press

Craig, Paul and de Burca, Grainne (2011), *EU Law*. Oxford: Oxford University Press

Cross, Eugene Daniel; Hancher, Leigh and Slot, Piet Jan (2001), "EC Energy Law" in Roggenkamp, Martha M; Rønne, Anita; Redgwell, Catherine and Del Guayo, Inigo (Eds), *Energy Law in Europe*. Oxford: Oxford University Press

Davide Farah, Paolo and Rossi, Piercarlo (2011), "National Energy Policies and Energy Security" in *European Energy and Environmental Review*, pp. 232-244

del Rio, Pablo and Mir-Artigues, Pere (2014), "Combination of Support Instruments for Renewable Electricity in Europe: A Review" in *Renewable and Sustainable Energy Reviews,* Vol. 40, pp. 287-295.

Delgado Piqueras, Francisco (2012), "Towards a European Regulatory Scheme for the Promotion of Green Power: Ensuring Energy Supply, Environmental Protection and Sustainable Development" in *European Public Law*, Vol. 18:4, pp. 665-680

Delvaux, Bram (2003), "The EC State Aid Regime regarding Renewables: Opportunities and Pitfalls" in *European Environmental Law Review*, pp. 103-112

Delvax, Bram (2013), *EU Law and the Development of a Sustainable, Competitive and Secure Energy Policy*. Cambridge: Intersentia

de Jager, David; Klessman, Corinna; Stricker, Eva; Winkel, Thomas; de Visser, Erika; Koper, Michèle; Ragwitz, Mario; Held, Anne; Resch, Gustav; Busch, Sebastian; Panzer, Christian; Gazzo, Alexis; Roulleau, Thomas; Gousseland, Pierre; Henriet, Marion and Bouillé, Arnaud (2011), *Financing Renewable Energy in the European Energy Market.* Ecofys by order of European Commission.

de Sadeleer, Nicolas (2013), "Environmental Regulatory Autonomy and the Free Movement of Goods" in *Jean Monet Working Paper Series, Environment and Internal Market,* Vol. 2013/1, pp. 1-33

de Sadeleer, Nicolas (2014), *EU Environmental Law and the Internal Market*. Oxford: Oxford University Press (first edition)

Dhondt, Nele (2003), *Integration of Environmental Protection into other EC Policies.* Amsterdam: Europa Law Publishing

Dupont, Claire (2013), Climate Policy Integration into EU Energy Policy. PHD dissertation. Zelzate: University Press

Elkind, Jonathan (2012), "Energy Security: Call for a Broader Agenda" in Pascual, Carlos and Elkind, Jonathan (Eds), *Energy Security. Economics. Politics, Strategies, and Implications.* Washington: The Brookings Institution

Engle, Eric (2008), "Environmental Protection as an Obstacle to Free Movement of Goods: Realist Jurisprudence in articles 28 and 30 of the E.C. Treaty" in *Journal of Law and Commerce*, Vol. 27, pp. 113-135

Epps, Tracey and Green, Andrew (2010), *Reconciling Trade and Climate.* Northampton: Edward Elgar Publishing

Eriksen, Erik Oddvar and Fossum, John Erik (2004), "Europe in Search of Legitimacy: Strategies of Legitimation Assessed" in *International Political Science Review*, Vol. 25:4, pp. 435-459

Fagiani, Riccardo (2014), *Market-Based Support Schemes for Renewable Energy Sources.* PH.D Dissertation. Delft: Next Generation Infrastructures Foundation

Fernández Armenteros, Mercedes and Lefevere, Jürgen (2001), "ECJ 13 March 2001, Case C-379/98, PreussenElektra Aktiengesellschaft v. Schleswag Aktiengesselschaft" in *Review of European, Comparative & International Environmental Law*, Vol. 10:3, pp. 343-347

Flanagan, Anne (2012), "Authorization and Licencing" in Walden, Ian (Edt), *Telecommunications Law and Regulation*. Oxford: Oxford University Press

Fouquet, Doerte and Johansson, Thomas B. (2008), "European Renewable Energy Policy at Crossroads – Focus on Electricity Support Mechanisms" in *Energy Policy*, Vol. 2008, pp. 4079-4092

Fouquet, Dörte (2013), "Policy Instruments for Renewable Energy – From a European Perspective" in *Renewable Energy*, Vol. 49, pp. 15-18

Gormely, Laurance W. (2009), *EU Law of Free Movement of Goods and Customs Union*. Oxford: Oxford University Press

Gram Mortensen, Bent Ole (2008), "The European Court of Justice, Decision in Case C-206/06, Essent Netwerk Noord BV" in *European Energy and Environmental Law Review*, Vol. 2008 December, pp. 388-393

Gunst, Andreas (2005), "Impact of European Law on the Validity and Tenure of National Support Schemes for Power Generation from Renewable Energy Sources" in *Journal of Energy & Natural Resources Law*, Vol. 23:2, pp. 95-119

Haas, Reinhard; Panzer, Christian; Resch, Gustav; Ragwitz, Mario, Reece and Held, Anne (2011), "A Historical Review of Promotion Strategies for Electricity from Renewable Energy Sources in EU Countries" in *Renewable and Sustainable Energy Reviews*, Vol. 15, pp. 1003-134

Hacket, Steven C. (2011), *Environmental and Natural Resources and Economics.* New York: M. E. Sharpe

Haghigi, Sanam S. (2008), "Energy Security and the Division of Competences between the European Community and its Member States" in *European Law Journal*, Vol. 14:4, pp. 461-482

Hancher, Leigh; Ottervanger, Tom and Slot, Piet Jon (2012), Eu State Aids. London: Sweet & Maxwell

Hancher, Leigh and Salerno, Francesco Maria (2012), "Energy Policy after Lisbon" in Biondi, Andrea; Eeckhout, Piet and Ripley, Stefanie (Eds), *EU Law after Lisbon.* Oxford: Oxford University Press

Hannon, Julie-Anne (2010), "The EU Renewable Energy Directive: What Primary Concerns Does it Raise? Uncertainty and Implementation Issues from an Irish Perspective?" in *CEPMLP Annual Review*, Vol. 15, pp. 1-31

Hart, Craig A. (2010), *Climate Change and the Private Sector.* New York: Routledge

Heidenhain, Martin (2010), *European State Aid Law*. Oxford: Hart Publishing

Hettne, Jörgen and Eriksson Otken, Ida (Eds.) (2011), *EU-rättslig metod*. Stockholm: Norstedts Juridik AB (second edition)

Held, Anne; Ragwitz, Mario; Gephart, Malte; de Visser, Erika and Klessman, Corinna (2014), *Design Features of Support Schemes for Renewable Electricity*. Utrecht: ECOFYS Netherlands

Hildingson, Roger; Stripple, Johannes and Jordan, Andrew (2010), "Renewable Energies: A Continuing Balancing Act?" in Jordan, Andrew; Huitema, DaveM van Asselt, Harro; Rayner, Tim and Berkhout, Frans (Eds) *Climate Change Policy in the European Union*. Cambridge: Cambridge University Press

Jacobs, Francis (2006), "The Role of the European Court of Justice in the Protection of the Environment" in *Journal of Environmental Law*, Vol. 18:2, pp. 185-205

Jacobsson, Staffan; Bergek, Anna; Finon, Dominique; Lauber, Volkmar; Michell, Catherine; Toke, David and Verbruggen, Aviel (2009), "EU Renewable Energy Support Policy: Faith or Facts?" in *Energy Policy*, Vol. 37, pp. 2143-2146

Jaeger, Thomas (2012), "Good Old Friend: Article 107's Double Control Criterion" in *European State Aid Law Quarterly*, Vol. 2012:3, pp. 535-538

Jansen, Jaap C. and Uyterlinde, Martine A. (2004) "A Fragmented Market on the Way to Harmonisation? EU Policy-Making on Renewable Energy Promotion" *Energy for Sustainable Development,* Vol. VIII, pp. 93-107

Johnston, Angus; Neuhoff, Karsten; Fouquet, Dörte; Ragwitz, Mario and Resch, Gustav (2008), "The Proposed New EU Renewables Directive" in *European Energy and Environmental Review,* pp. 126-145

Johnston, Angus and van der Marel, Eva (2013), "Interpreting the New EU Energy Provision" in *European Energy and Environmental Law* Review, pp. 181-199

Johnston, Angus; Heffron, Raphael J. and McCauley, Darren (2014), "Rethinking the Scope and Necessity of Energy Subsidies in the United Kingdom" in *Energy Research & Social Science*, Vol. 2014:3, pp. 1-4

Jordan, Andrew and Rayner, Tim (2010), "The Evolution of Climate Policy in the European Union: An Historical Overview" in Jordan, Andrew; Huitema, DaveM van Asselt, Harro; Rayner, Tim and Berkhout, Frans (Eds) *Climate Change Policy in the European Union*. Cambridge: Cambridge University Press

Jäger-Waldau, Arnulf; Szabó, Márta; Scarlat, Nicolae and Monforti-Ferrario, Fabio (2011), "Renewable Electricity in Europe" in *Energy Policy*, Vol. 15, pp. 3703-3716

Kaur, Sanmeet (2009), "Using State Aid to Correct the Market Failure of Climate Change" in *Review of European, Comparative & International Environmental Law,* Vol. 18:3, pp. 268-285

Kingston, Suzanne (2013), "Surveying the State of EU Environmental Law: Much Bark with Little Bite?" in *International and Comparative Law Quarterly*, Vol. 62, pp. 965-982

Kitzing, Lena, Mitchell, Catherine and Morthorst, Poul Erik (2012), "Renewable Energy Policies in Europe: Converging or Diverging?" in *Energy Policy*, Vol. 51, pp. 192-201

Klein, Christopher A. (2012), "Renewable Energy At What Costs? Assessing the Effect of Feed-In Tariff Policies on Consumer Electricity Prices in the European Union" in *Georgetown Public Policy Review*, Vol. 181, pp. 43-62

Koenig, Christian and Kühling, Jürgen (2002), "EC Control of Aid granted through State Resources" in *European State Aid Law Quarterly*, Vol. 2002:1, pp. 7-18

Krieglstein, Felix B. (2001), "Renewable Energy Schemes and EC State Aids Provisions" in *European Environmental Law Review*, pp. 51-56

Krieger, Heike; de Boer, Claas and Steeg, Helga (2001), "International Organizations and their Activities in the Energy Sector" in Roggenkamp, Martha M; Rønne, Anita; Redgwell, Catherine and Del Guayo, Inigo (Eds), *Energy Law in Europe*. Oxford: Oxford University Press

Krämer, Ludvig (Edt.) (2001), *EU Environmental Law.* London: Sweet & Maxwell

Kröger, James (2013), "Nationally Exclusive Support Schemes for RES Electricity Production and the Free Movement of Goods" in *Journal for European Environmental & Planning Law*, Vol. 10:4, pp. 378-393

Kuhn, Tilman (2001), "Implications of the 'Preussen Elektra' Judgement of the European Court of Justice on the Community Rules on State Aid and the Free Movement of Goods" in *Legal Issues of Economic Integration*, pp. 361-376

Kulovesi, Kati; Morgera, Elisa and Munoz, Miquel (2011), "Environmental Integration and Multi-Faceted International Dimensions of EU Law: Unpacking the EU's Climate and Energy Package" in *Common Market Law Review*, Vol. 48, pp. 829-891

L'Abbate, Angelo; Fulli, Ginaluca; Star, Fred and Peteves, Stathis D. (2008), *Distributed Power Generation in Europe: Technical Issues for Further Integration*. European Commission. Joint Research Centre. Institute for Energy. Luxemburg: Office for Official Publications of the European Communities

Langlet, David and Mahmoudi, Said (2011), *EU:s miljörätt*. Stockholm: Norstedts Juridik AB (third edition)

Larsson, Robert L. (2006), *Energisäkerhet. Sveriges och Europas beroende av importerade energibärare.* Stockholm: FOI, Swedish Defense Research Agency

Lauber, Volkmar (2004), "REFIT and RPS: Options for a Harmonised Community Framework" in *Energy Policy*, Vol. 32, pp. 1405-1414

Lauber, Volkmar (2011), "The European Experience with Renewable Energy Support Schemes and Their Adoption: Potential Lessons for Other Countries" in Renewable Energy Law and Policy Review, Vol. 2011:2, pp. 120-132

Lenz, Carl Otto (1994), "The Role and Mechanism of the Preliminary Ruling Procedure" in *Fordham International Law Journal*, Vol. 18, pp. 388-409

Lind, Arne and Rosenberg, Eva (2014), "How Do Various Risk Factors Influence the Green Certificate Market of Norway and Sweden?" in Energy Procedia, Vol. 58, pp. 9-15

Lord, Richard; Goldberg, Silke; Rajamani, Levanya and Brunnée, Jutta (2012), "Overview of legal issues relevant to climate change" in *Climate Change Liability*. Cambridge: Cambridge University Press

Lundgren, Tommy; Stage, Jesper; Tangerås, Thomas and Carlén, Björn (2013), *Energimarknaden, ägandet och klimatet*. Stockholm: SNS Förlag

Menanteau, Philippe; Finon, Dominique and Lamy, Marie-Laure (2003), "Prices versus Quantities: Choosing Policies for Promoting the Development of Renewable Energy" in Energy Policy, vol. 31, pp. 799-812

Máca, Vojtêc (2009), "New Guidelines of the EU Commission on Environmental State Aid: Who will Gain and Who will Lose?" in *Common Law Review*, Vol. 11, pp. 19-23

Massai, Leonardo (2012), *European Climate and Clean Energy Law and Policy*. New York: Earthscan

Mendonca, Miguel; Jacobs, David and Sovacool, Benjamin (2010), *Powering the Green Economy. The Feed-in Tariff Handbook.* London: Earthscan

Morata, Francesc and Solorio Sandoval, Israeil (Eds.) (2012), *European Energy Policy*. Cheltenham: Edward Elgar Publishing Limited

Munoz, Miquel; Oschmann, Volker and Tàbara, J. David (2007), "Harmonization of Renewable Electricity Feed-In Laws in the European Union" in *Energy Policy*, Vol. 35, pp. 3104-3114

Nielsen, Lene and Jeppesen, Tim (2003), "Tradable Green Certificates in Selected European Countries – Overview and Assessment" in *Energy Policy*, Vol, 31, pp. 3-14

Neuwirth, Rostam J. (2010), Governing Glocalization: 'Mind the Change' or 'Change the Mind'? Draft article: http://www.umac.mo/fss/pa/4th_conference/doc/all%20paper/Session%201/Panel%201-1%20Globalization%20and%20the%20Role%20of%20Government/2%20Rostam%20J.%20Neuwirth/01_RJ_Neuwirth_%28Governing_Glocalisation_-_Mind_the_Change%29_21-10-2010.pdf [accessed 20 February 2015]

OECD (2011), *Environmental Performance Reviews: Portugal 2011*: http://browse.oecdbookshop.org/oecd/pdfs/product/9711031e.pdf [accessed 20 February 2015]

Olsen Lundh, Christina (2010), *Att ransonera utsläppsutrymme*. Uppsala: Iustus Förlag

Oliver, Peter (Edt.) (2010), *Oliver on Free Movement of Goods in the European Union*. Oxford: Hart Publishing

Oschmann, Volker (2006), "Renewable Energy Sources in European Law: An Overview" in Journal for European Environmental & Planning Law, Vol. 2006:6, pp. 478-485

Padros, Carlos and Cocciolo, Endrius E. (2010), "Security of Energy Supply: When Could National Policy Take Precedence Over European Law?" in *Energy Law Journa*l, Vol. 31:31, pp. 31-54

Parra, Francisco (2004), *Oil Politics. A Modern History of Petroleum*. New York: I.B. Tauris

Peeters, Marjan (2014), "Governing Towards Renewable Energy in the EU: Competences, Instruments, and Procedures" in *Maastricht Journal of European and Comparative Law,* Vol 21:1, pp. 39-63

Poullikkas, Andreas; Kourtis, George and Hadjipaschalis, Ioannis (2012), "An Overview of the EU Member States Support Schemes for the Promotion of Renewable Energy Sources" in *International Journal of Energy and Environment*, Vol. 3:4, pp. 553-566

Quigley, Conor (2009) *European State Aid Law and Policy.* Portland: Hart Publishing

Ragwitz, Mario; Steinhilber, Simone; Breitschopf, Barbara; Resch, Gustav; Panzer, Christian; Ortner, Andre; Busch, Sebastian; Rathmann, Max; Klessmann, Corinna; Nabe, Christian; de Lovinfosse, Isabelle; Neuhoff, Karsten; Boyd, Rodney; Junginer, Martin; Hoefnagels, Ric; Cusumano, Niccolo; Lorenzoni, Arturo; Burgers, Jitske; Boots, Maroeska; Konstantinaviciute, Inga and Weöres, Botond (2012), *RE-Shaping: Shaping an Effective and Efficient European Renewable Energy Market*. D23 Final Report. Intelligent Energy – Europe (IEE), ALTENER:

Reiche, Danyel (2003), "Renewable Energies in the Accession States" in (Edt.) *Handbook of Renewable Energies in the European Union II. Case studies of all Accession States.* Frankfurt am Main: Peter Lang

Reiche, Danyel and Bechberger, Mischa (2004), "Policy Differences in the Promotion of Renewable Energies in the EU Member States" in *Energy Policy*, Vol. 32, pp. 843-849

Reiche, Danyel and Bechberger, Mischa (2005), "Renewable Energies in the EU – Member States in Comparison" in Reiche, Danyel (Edt.) *Handbook of Renewable Energies in the European Union. Case studies of the EU-15 States.* Frankfurt am Main: Peter Lang

Redgwell, Catherine (2007), "International Regulation of Energy Activities" in Roggenkamp, Martha, Redgwell Catherine, Rønne, Anita and del Guayo, Iñigo (Eds.), *Energy Law in Europe*. Oxford: Oxford University Press

Resch, Gustav; Liebmann, Lukas; Ortner, André; Busch, Sebastian; Panzer, Christian; Ragwitz, Mario; Steinhilber, Simone; Klobasa, Marian; Winkler, Jenny; Gephart, Malte; Klessman, Corinna; Isabelle de Lovinfosse; Papaefthymiou; Nysten, Jana V.; Fouquet, Dörte; Johnston, Angus; van der Marel, Eva; Banez, Fernando; Batlle, Carlos; Fernandes, Camilla; Frias, Pablo; Linares, Pedro; Olmoros, Luis; Rivier, Michel; Knapek, Comillas Jaroslav; Karlik, Tomas; Faber, Thomas; Steinbaecker, Sylvia; Borasoy, Bugra; Toro, Felipe and Plascencia, Luis (2014), *Design and Impact of a Harmonised Policy for Renewable Electricity in Europe*. Final Report of the Beyond2020 Project – Approaches For a Harmonisation of RES-(E) Support in Europe. Intelligent Energy – Europe (IEE), ALTENER.

Ringel, Marc (2006), "Fostering the Use of Renewable Energies in the European Union: The Race between Feed-In Tariffs and Green Certificates" in *Renewable Energy,* Vol. 31, pp. 1-17

Rowlands, Ian H. (2005), "The European Directive on Renewable Electricity: Conflicts and Compromises" in *Energy Policy*, Vol. 33, pp. 965-974

Rusche, Martin (2013), "The Almunia Package: Legal Constraints, Policy Procedures, and Political Choices" in Szyszczak, Erika Willem van de Gronden, Johan (Eds) *Financing Services of General Economic Interest.* The Hague: Springer

Sands, Philippe; Peel, Jacqueline; Fabra, Adriana and MacKenzie, Ruth (2012), *Principles of International Environmental Law*. Cambridge: Cambridge University Press

Scharpf, Fritz (1999), *Governing in Europe*. Oxford: Oxford University Press

Smil, Vaclav (1994), *Energy in World History*. Colorado: Westview Press

Snell, Jukka (2014), "The Internal Market and the Philosophies of Market Integratin" in Barnard, Catherine and Peers, Steve (Eds.), *European Union Law.* Oxford: Oxford University Press

Spevanta, Eleanor (2009), "The Outer Limit of the Treaty Free Movement Provisions: Some Reflections on the Significance of *Keck*, Remoteness and *Deliége*" in Barnard, Catherine and Odudu, Okeoghene (Eds.) (2009), *The Outer Limits of European Union Law.* Portland: Hart Publishing

Stone Sweet, Alec (2010), "The European Court of Justice and the Juducilization of EU Governance" in *Living Reviews in European Governance*, Vol. 5:2, pp. 1.50: http://www.livingreviews.org/lreg-2010-2 [accessed 10 December 2014]

Syrpis, Phil (Edt) (2012), *The Judiciary, the Legislature and the EU Internal Market*. Cambridge: Cambridge University Press (first edition)

Sweeney, James A. (2007), "A 'Margin of Appreciation' in the Internal Market: Lessons from the European Court of Human Rights" in *Legal Issues of Economic Integration*, Vol. 34, pp. 27-52

Tews, Kerstin (2014), *Europeanization of Energy and Climate Policy: New Trends and their Implication for the German Energy Transition Process*. FFU-Report 03-2013. Berlin: Freie Universität

Thieffry, Patrick (2014), "State Aid Modernisation in Action: Regional Airports and Renewable Energies" in *ERA Forum*, Vol. 15, pp. 283-302

Toke, David (2008), "The EU Renewables Directive – What is the Fuss about Trading?" in *Energy Policy*, Vol. 36, pp. 3001-3008

Truby, Jon (2014), "Enforcement Activism of the EU's Renewable Energy Directive During the Global Financial Crisis" in *William & Mary Environmental Law and Policy Review,* Vol. 2013-2014:3, pp. 695-708

van Calster, Geert (2014), "Climate Change and Renewable Energy as a Super Trump for EU Trade Law" in *Journal of Renewable Energy Law and Policy*, Vol. 1/2014, pp. 60-66

van Hende, Katelijn (2011), "Internal and External Policy and Legal Challenges in the EU in Achieving a Sustainable, Competitive and Secure Internal Energy Market and the Integration of Electricity from Renewable Energy Sources into the Energy system" in *Nordic Environmental Law Journal*, pp. 53-85

Vaquero, Àlvaro Núnez (2013), "Five Models of Legal Science" in *Revus*, Vol. 19, pp 53-81: http://revus.revues.org/2449 [accessed 25 January 2015]

Verhaegen, Karolien; Meeus, Leonardo and Belmans, Ronnie (2009), "Towards an International Tradable Green Certificate System – The Challenging Example of Belgium" in *Renewable and Sustainable Energy Reviews*, Vol. 13. Pp. 208-215

von Unger, Moritz (2014), "Germany's Renewable Energy Law, State Aid and the Internal Market" in *Journal for European Environmental & Planning Law*, Vol. 11, pp. 116-136

Weishaar, Stefan (2012), "EU State Aid Law and National Climate Regulation" in Peeters, Marjan; Stallworthy, Mark and de Larragan Javier de Cendra (Eds), Climate Law in EU Member States. Northampton: Edward Elgar Publishing

Wiener, Jonathan B. (2007), "Think Globally, Act Globally: The Limits of Local Climate Policies" in University of Pennsylvania Law Review, Vol. 155, pp. 1961-1979

Wilke, Marie (2011), *Feed-In Tariffs for Renewable Energy and WTO Subsidy Rules: An Initial Legal Review.* ICTDS Programme on Trade and Environment. Trade and Sustainable Energy Series. Issue Paper no. 4. International Centre for Trade and Sustainable Development, Geneva, Switzerland: www.ictds.org

Zillman, Donald N.; Roggenkamp, Martha M,; Barrera-Hernández, Lila and del Guayo, Inigo (2012), "Energy Networks and the Law: Innovative Solutions in Changing Markets" in Roggenkamp, Martha M; Barrera-Hernández, Lila; Zillman, Donald N. and del Guayo, Inigo (Eds.), *Energy Networks and the Law.* Oxford: Oxford University Press

Ydersbond, Inga Margrete and Sveen, Thea (2014), "The Ålands case and the future of renewables in Europe" in *Energi og Klima*: http://energiogklima.no/kommentar/the-aland-case-and-the-future-of-renewables-in-europe/ [accessed 7 September 2014]

Legislation and guidelines

Commission Directive 70/50 EEC on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty.

Directive 96/92/EC of the European Parliament and of the Council concerning common rules for the internal market in electricity.

Directive 2001/77/EC of the European Parliament and of the Council on the promotion of electricity produced from renewable energy sources in the internal electricity market.

Directive 2003/53/EC of the European Parliament and of the Council concerning common rules for the internal market in electricity and repealing Directive 96/92/EC.

Directive 2009/28/EC of the European Parliament and of the Council on the promotion of use of energy from renewable energy sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC.

Directive 2009/72/EC of the European Parliament and of the Council concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC.

EAG (2008), *Community Guidelines on State aid for Environmental Protection*. Communication from the Commission.

EEAG (2014), *Guidelines on State aid for environmental protection and energy 2014-2020.* Communication from the Commission.

SÖ 2012:5, Avtal med Norge om en gemensam marknad för elcertifikat: http://www.regeringen.se/content/1/c6/21/58/18/fd5e3fda.pdf [accessed 2014-12-26]

Table of cases

Case 173/73 *Italy v Commission.*
Case 3/76 *Kramer*.
Case 8-74 *Dassonville*.
Case 82/77 *Van Tiggele.*
Case 72/83 *Campus Oil.*
Case C-21/88 *Du Pont de Italiana SpA.*
Cases C-72/91 to C-73/91 *Sloman Neptun.*
Case C-189/91 *Kirsammer-Hack*.
Case C-180/96 *United Kingdom v Commission.*
Case C- 213/96 *Outokumpu Oy*.
Case T-199/96 *Labaratoires pharmaceutiques Bergaderm.*
Cases C-52/97 to C-54/97 *Viscido*.
Case C-200/97 *Ecotrade*.
Case C-295/97 *Piaggio*.
Case C-379/98 *PreussenElektra*.
Case C-192/01 *Commission v Denmark.*
Case T-27/02 *Kronofrance v Commission.*
Cases C-158-04 to C-159/04 *Alfa Vita.*
Case T-233/04 *Commission v Netherlands.*
Case C-206/06 *Essent Netwerk.*
Case-279/08 P *Commission v Netherlands*.
Case C-573-12 Ålands *vindkraft*.
Cases C-204/12 to C-208/12 *Essent Belgium*.
Case C-216/12 *Vent De Colère.*

Table of decisions

N 789/2002, public version, 382 Final
N 478/07, public version, 6875
SA. 31107, public version, 1750
SA. 33134, public version, 4938

SA. 33384, public version, 565 Final
SA. 34411, public version, 5858 Final
SA. 36196, public version, 5079 Final
SA. 38632, public version, 5081 Final

Official material

Commission (2000), *Towards a European Strategy for the Security of Energy Supply*. Green Paper. Com 0769 Final

Commission (2005), *The Support of Electricity from Renewable Energy Sources.* Communication from the Commission. COM 627 Final

Commission (2006), *A European Strategy for Sustainable, Competitive and Secure Energy.* Green Paper. COM 105 Final

Commission (2008), *An EU Energy Security and Solidarity Action Plan.* Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. COM 781 Final

Commission (2008b), *Proposal for a Directive of the European Parliament and of the Council on the Promotion of the Use of Energy from Renewable Energy Sources.* COM 19 Final

Commission (2010), *Energy 2020: A Strategy for Competitive, Sustainable and Secure Energy*. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. COM 639 Final

Commission (2010b), *Free Movement of Goods: Guide to the Application of Treaty Provisions Governing the Free Movement of Goods.* Luxemburg: Publications Office of the European Union

Commission (2011), *A Roadmap for Moving to a Competitive Low Carbon Economy in 2050.* Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. COM 112 Final

European Council (2014), Note from General Secretariat of the Council to Delegations. Conclusions from 23 and 24 October 2014. EUCO 169/14

European Parliament (2008), *An Overview of Global Greenhouse Gas Emissions and Emissions Reduction Scenarios for the Future.* DG Internal Policies of the Union. Policy Department Economic and Scientific Policy. IP/A/CLIM/NT/2007-07. PE 400.994

Danish Presidency of the Council of the European Union (2012). *Information on the quantified emission limitation or reduction objectives (QELROs) for the second commitment period under the Kyoto Protocol*. 19 April 2012

IPCC 2007, "Summary for Policymakers" in *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change.* Cambridge: Cambridge University Press

Norwegian Ministry of Petroleum and Energy (2010), Press Release: Norway and Sweden agree on a common market for green certificates: https://www.regjeringen.no/en/aktuelt/g/id627384/ [accessed 2014-12-26]

Swedish Ministry of Sustainable Development (2006), *Fact Sheet on Renewable Electricity with Green Certificates.* Regeringskansliet. Stockholm: Government Offices Graphic Services, http://www.government.se/content/1/c6/06/47/22/2c000830.pdf [accessed 2014-12-23]

Jag, Hunar Aljaderi, registrerades på kursen hösten 2014. Jag har inte omregistrerats och ej heller deltagit i några examinationstillfällen.