The proposed new EU renewables directive: an interpretation

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11.4.2008

Under the proposed renewables Directive, Member States would commit to delivering additional renewable energy so that collectively they would generate 20% of energy from renewable sources by 2020. The requirements for each Member State are linked to the GDP. The Proposal offers two options for inter-Member State cooperation, based upon the assumption that it may be advantageous to develop additional renewables in countries with good resource basis to meet the target in countries with higher GDP. Either Member States can transfer guarantees of origin for renewables between governments or they can implement a system for private international trade of guarantees of origin. The paper discusses the economic and legal implications for national support schemes and suggests to possible extensions to enhance legal certainty for investors. The Proposal also makes provision for national action plans to support Member States in the implementation of national frameworks. We discuss the interaction of GO trade with national support mechanisms for renewables and with international trading and transfers, and the importance of credible responses in the case of non-compliance.

1 Introduction

The European Commission faced a tough challenge when drafting the proposed new renewables directive two months ago. How was it to deliver the 20% renewables target while: (i) ensuring efficient use of the resources available across Europe; and (ii) allocating the burden in a fair manner across Member States?

Figure 1 illustrates how the targets are to be allocated according to the economic strength of each of the Member States: every Member State has to contribute an additional 5.5% of renewables to its energy mix, and the remaining gap to the overall 20% target is then shared proportionately to the GDP of the Member States with minor additional adjustments.

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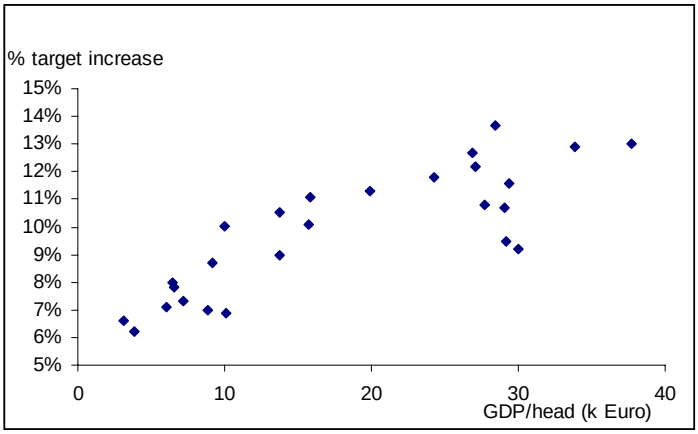

Figure 1 Target levels for EU Member States – closely linked to their GDP

This approach by itself, however, would not have allowed for an efficient use of the renewable resource bases of different Member States. The available biomass, wind, hydro, tidal and wave and solar resource base varies significantly across Member States. In this context, Figure 2 provides an illustration by country, indicating the current RES deployment (as of 2005) and the proposed renewables target for 2020, as well as possible trade volumes, assuming that all Member States deliver the same target level (corresponding to their additional realisable resource potentials).[2].

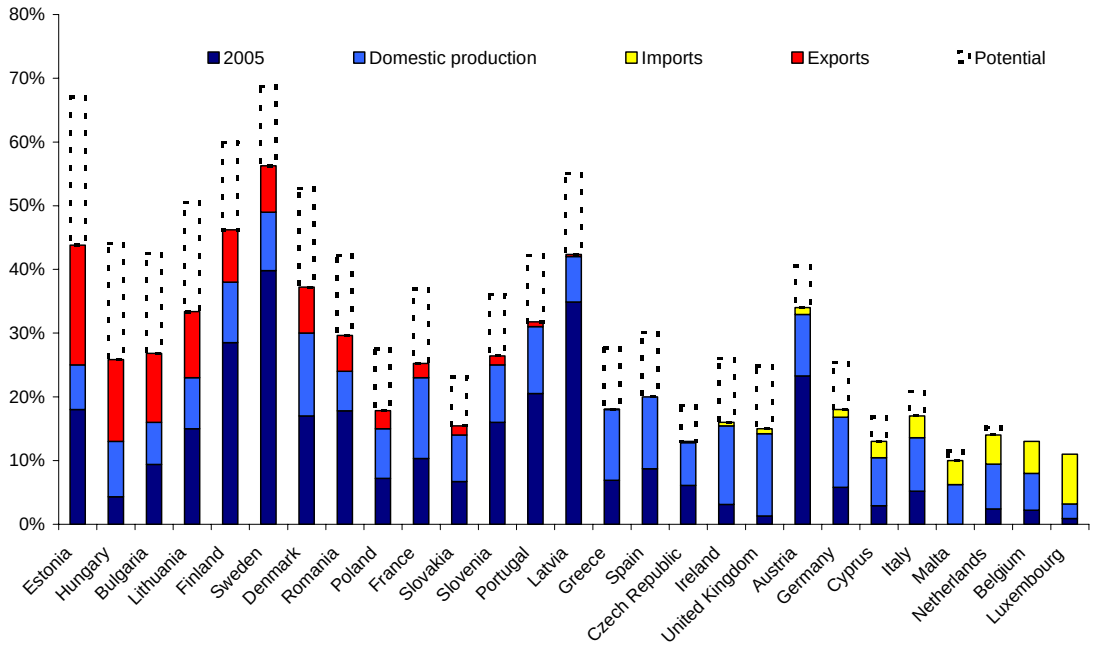

Figure 2 Renewables target relative to existing capacity – and traded volume if all Member States deliver the same target level

[2] Resource potentials are taken from the database of the Green-X model (www.green-x.at) – an independent computer tool enabling a comparative and quantitative analysis of the future deployment of renewable energies in all energy sectors (i.e. electricity, heat and transport), geographically constraint to the European Union. The database comprises consolidated information on potentials and corresponding cost for a broad basket of renewable energy technology options as applicable in the Member States of the European Union. The term 'additional realisable potential' refers to the unexploited fraction of the in total realisable mid-term potentials (up to 2020).

In principle, the proposed directive would allow for two approaches, aiming simultaneously to achieve both of the objectives (efficient use of resources and fair burden-sharing). It is intended that Member States can:

(a) trade their surplus or deficit of renewable generation at a government level; ***and/or***

(b) allow market participants to use a certain share of renewables, but can also give market participants the flexibility to trade guarantees of origin in other Member States (and it is made explicit that trade in GOs may take place independently of physical trade in the electricity generated).

The reminder of this paper will: discuss how both approaches are to be implemented (Section 2); analyse the legal issues arising from the proposals (Section 3); consider how the role of complementing policies at national level is reflected in national action plans (Section 4); and discuss three aspects where potential clarification and further work would seem to be desirable (Section 5).

2 How are the two approaches to trading implemented?

The basic unit defined by the proposed directive is a guarantee of origin (GO). This unit would be generated for every MWh of electricity and heat[3] produced from a renewable generator. Two main approaches are available for dealing with these guarantees.

2.1 Trade at government level

To enable governments to trade with each other, they first have to be the 'owner' of the tradable value of the renewables delivered within their country. This is ensured by Article 8(1)(a) of the proposed directive, which requires that the "guarantee of origin … shall be submitted for cancellation" in the Member State where it "receives support in the form of feed-in tariff payments, premium payments, tax reductions or payments resulting from calls for tenders".

To ensure that Member States do not sell their own renewable value while failing to deliver against their domestic target, an indicative trajectory has been defined (Figure 3). Member States would only be able to sell GOs submitted for cancellation within its jurisdiction to another Member State if the selling Member State had met or exceeded the interim targets of its indicative trajectory in the immediately preceding two-year period (Article 9(1)).[4] This proposed article seems to

[3] The inclusion of heating (and cooling) into the GO-scheme is limited to plants with a capacity of at least 5 MW_{th}.

[4] It might be argued that this article leaves open the question whether a MS has to exceed its trajectory only once (e.g. in 2011) and can then trade until 2020 or whether it has to be above the trajectory all the time. However, it seems likelier that it relates to *any* "immediately preceding two-year period" in which the Member State's share has been greater than or equal to its indicative trajectory. I.e., that position *vis-à-vis* the trajectory must be established for the relevant preceding two-year period every time any such transfer is attempted by the exporting MS. See, further, the Commission's explanations

provide a useful incentive for European co-operation. A Member State which wants to buy GOs from another Member State is likely to provide ongoing technical and other support to ensure that the selling Member State delivers its domestic objective and produces guarantees of origin which can be exported.

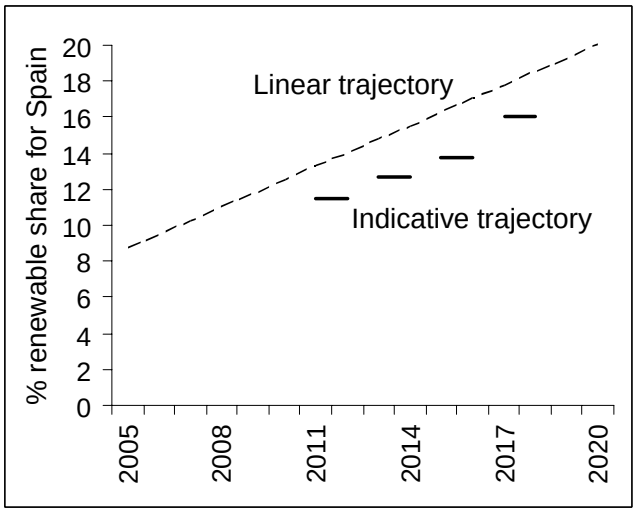

Figure 3 Indicative trajectory for renewable contribution, using the example of Spain

Some EU Member States have voiced concerns that domestic policies designed to support renewables could be undermined by the possibility that individual installations could trade such guarantees of origin at the installation level. Most feed-in tariffs, for example, provide funding which is differentiated according to technology and sometimes also according to the resource availability at a specific site. Thus, renewables with a lower-cost technology or better available resource would receive less support under their domestic scheme. The investors might instead avoid all domestic support schemes and directly sell the guarantees of origin in another Member State which does not purse such differentiation and thus might offer a higher price. This possibility would undermine the ability of Member States to implement technology and resource-differentiated support schemes, which are intended to support a technology portfolio and avoid high(er) consumer costs.

To address these concerns, under the proposed directive "Member States may provide for a system of prior authorisation of the transfer of guarantees of origin to persons in other Member States if [otherwise] it is likely to impair their ability to comply with [their renewable target or the] indicative trajectory" (Article 9(2), 2nd sentence). A further justification for the imposition by a Member State of such prior authorisation for (N.B.) imports *and* exports of guarantees of origin is "if [otherwise] it is likely to impair their ability to ensure a secure and balanced energy supply … [or] the achievement of the environmental objectives underlying their support scheme" (Article 9(2), 1st sentence).

Thus, the clause on prior authorisation in principle allows Member States to prevent trade of guarantees of origin at the installation level. However, by virtue of the application of the principle of proportionality (given that, *prima facie*, such a

(Council – Note from the General Secretariat (7263/08), 11 March 2008, p. 4, para. II.3) concerning the timing in this regard (no inter-government trading until post-2013. to allow for the two-year period to be assessed).

requirement of prior authorisation infringes Article 28 of the EC Treaty),[5] this would be permitted only insofar as the justifying reasons explicitly laid down in Article 9(2) of the proposed directive could not be achieved by measures less restrictive of trade between Member States (see, e.g., recital 21 to the proposed directive). Systems of prior authorisation inherently should not be abused, e.g. as a means of arbitrary discrimination against exports or imports of guarantees of origin (see, again, recital 21 to the proposed directive and Article 30 of the EC Treaty). At the very least, this would mean that Member States would have to take constant and great care to ensure that neither export nor import constraints discriminated between guarantees of origin solely on the basis of their country of destination or origin, respectively. These legal matters are discussed further (in Section 3) below.

Thus the proposed directive would allow Member States to implement and insulate their domestic support scheme for renewables, and instead to pursue the trading of guarantees of origin at the government level. However, it is also clear that the proposals would require Member States to justify exactly why and how far such 'insulation' of their domestic scheme was required, on the basis of the specific criteria laid down in Article 9(2). Consequently, it remains an open question whether the measures given in Article 9(2) are sufficient effectively to protect the domestic support system against private trade of GOs.

2.2 Trade at installation level

The proposed directive also offers a framework which would enable Member States to allow installations established on their territory to trade at installation level. According to its Article 8(1)(b), GOs "shall be submitted for cancellation … [in the Member State where it] … is taken into account for the purposes of assessing an entity's compliance with a renewable energy obligation". Thus, an installation could produce renewable energy in one Member State and transfer the GO to a second Member State, provided that the installation became operational after the Directive had entered into force (Article 9(3)).

The first challenge posed by such an approach concerns the potential volatility of trading. A country might well be on track to deliver its renewable energy targets in one year and then find itself outbid in the subsequent year by a fellow Member State which offers higher payments for sellers of GOs. To avoid the uncertainty associated with this possibility, Article 8(2) of the proposed directive would require that, "[w]here an operator has submitted one or more guarantees of origin … [it] shall: (a) request guarantees of origin for all future production … from the same installation [and] (b) submit these … to the same [Member State]". While such an approach would potentially reduce the liquidity of trade in guarantees of origin, this needs to be balanced by the need to ensure some predictability in meeting the relevant national renewables target set by the proposed directive.

Thus, the international inter-installation trade in GOs would be limited to the time of the initial investment, since the operation of Article 8(2) of the proposed directive would then require such GOs to be submitted for cancellation in the Member

[5] See, e.g., Case 72/83 *Campus Oil* v. *Ministry for Industry and Energy* [1984] ECR 2727.

State into which that first trade took place. However, since stable revenue streams reduce the financing costs, most renewable projects (like conventional power projects pursued by project developers) require long-term contracts to hedge against the price risk. The constraint that would be imposed by the proposed Article 8(2) upon subsequent international re-trading of GOs might in practice have little negative impact upon the market.

Countries integrating their market for renewables based upon trade of GOs could create gateways to allow only certain volumes or types of GOs to be transferred using the feature of 'prior authorisation' (Article 9(2)). However, this would introduce additional complexities and uncertainties into the market, which would be likely to reduce predictability and liquidity, thus undermining the stability required if the mechanism is to be used to drive investment decisions into low Carbon electricity generation, and might therefore be undesirable.

Thus, the proposed directive would allow for installation-based trading of GOs between those Member States which wished to implement such a scheme. However, as stated and explained in the previous sub-section, it appears still to be an open question whether the measures given in Article 9(2) are sufficient effectively to protect those Member States which do not intend to participate in such trading.

2.3 The basic structure

The purpose of the GOs is to support investment in renewable energy technologies. Investment requires a simple and transparent framework.

The above discussion suggests that the proposed directive allows Member States to make a clear choice as to whether they want to pursue a national support scheme and trade at government level or whether they want to link an installation-based trading scheme with other Member States that wish to do so.

The directive is not, however, explicit about whether or not this amounts to an 'either/or' choice, and would thus in theory also allow Member States to pursue a hybrid strategy. While such a strategy might be exciting for economists to describe and explore, it might be even more exciting for market participants to exploit the loopholes which tend to emerge with the implementation of new, untested and complex market structures. This suggests that Member States might want to be cautious when considering a hybrid approach and might rather be better advised to decide clearly in favour of one or other of the two approaches.

The following section explores further whether, and if so how far, Member States have the opportunity to opt for a system based purely upon inter-government trade by fully excluding the option of trade by private participants.

3 Legal challenges for the implementation

A number of legal issues might be canvassed with regard to the proposed directive: standard issues for analysis in any legislative proposal concern the appropriate legal

basis in the EC Treaty for the adoption of an EC measure,[6] and whether that measure satisfies the criteria of subsidiarity and proportionality applicable to any proposed EC legislation by virtue of Article 5 EC. As drafted, the proposed Directive raises at least some legal uncertainty as to whether it introduces a new harmonised trade for a specific good: i.e. does it intend to set up GOs as 'the' tradable green certificate? This is then linked to the next layer of legal uncertainty concerning the question of whether the exemptions provided for in the proposal would be sufficient clearly to ensure the continued legal viability and stability of national support mechanisms.

Linked to this are questions which concern the appropriate interpretation of the provisions concerning the operation of GOs (their submission, cancellation and transfer), and how those provisions interact with the EC Treaty rules concerning the free movement of goods (in particular Articles 28 and 30 EC).

3.1 Pre-emption?

First, it should be noted that the proposed directive does not directly and explicitly provide for the replacement (or 'pre-emption', in the jargon) of Member States' national policies for the promotion of electricity generation from renewable sources. Article 8(1)(a) of the proposal specifically envisages that the operation of national support schemes[7] for renewables may be maintained, providing that electricity generated from such a supported source must submit its GOs for cancellation to the supporting Member State (to avoid double funding, as the Commission has explained).[8] Further, Article 9(2) of the proposal allows the Member State to subject transfers of GOs into or out of that state to a "prior authorisation system" where transfers would otherwise be "likely to undermine the achievement of the environmental objectives underlying their support scheme". This presumes that such support schemes must be possible in the first place (subject, of course, to any constraints imposed by the standard EC law rules concerning State aid, tax discrimination and the free movement of goods – a point to which we will return below). Indeed, in its recent clarifications to the Council the Commission has confirmed that:

[6] Here, the Commission has relied upon Art. 175 EC for the bulk of the proposed directive's environmental implications, alongside Art. 95 EC for Arts. 15 to 17 of the proposal (which focus upon harmonising sustainability criteria for the trade in biofuels): since both of these legal bases provide for the use of the co-decision procedure (requiring involvement and approval of both the Council and the European Parliament) this dual legal basis is procedurally unproblematic here.

[7] Defined in Art. 2(h) of the proposal as "a scheme, originating from a market intervention by a Member State, that helps energy from renewable sources to find a market by reducing the cost of production of this 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". Note that this is merely a definition of such schemes for the purposes of the operation of Arts. 8 and 9 of the proposed directive, *not* an attempt to establish national measures in a category which will then somehow be excluded or covered over by the proposed directive's scope of coverage.

[8] Council – Note from the General Secretariat (7263/08), 11 March 2008 (containing clarifications and explanations from the Commission concerning the proposal), p. 4 (para. II.2): the same applies to Art. 8(1)(b) where that electricity is included in complying with a 'renewable energy obligation' (i.e. under a green certificate system).

> "[t]he new GO system can be combined with existing systems of Tradable Green Certificates or even with feed-in and premium systems. Such integration would be determined by Member States on a case-by-case basis."[9]

From this wording alone, one may not deduce that the mere existence of the new tradable instrument of a GO as a result of the proposed directive would exclude the continuing operation of national support or subsidy measures for renewables.

3.2 Introducing the 'Guarantee of Origin' – creating a new 'good'

However, the legal effect of the proposal would be to introduce a new tradable certificate in the form of the GO, particularly since it is clear (Article 9(3), 2nd sentence) that GOs may be transferred accompanying "the transfer of the energy to which the [GO] relates, *or* may be separate from any such transfer" (emphasis added). Thus, the proposal would create a new 'good' (in the sense that it "can be valued in money and which [is] capable, as such, of forming the subject of commercial transactions"),[10] the free movement of which would in principle be protected by Article 28 EC against restrictions imposed by Member States upon the trade of such goods. This *prima facie* prohibition, however, would be subject to any justifiable restrictions upon such free movement. However, importantly, the legal effect of the introduction at the EC level of such trade in GOs would be that any restriction upon this trade, e.g. based upon the grounds of protecting and upholding the national support mechanisms such as the Feed-in Tariff systems, has to be seen as a barrier to trade. Thus, the national systems would fall from the current scheme of being independent legally sustainable national mechanism into the legal category of unsustainable obstacles to trade. On the one hand, it can be argued that such national measures were in principle subject to these free trade rules in any event, as a result of the Court's jurisprudence in the field of Article 28 EC (in particular, *PreussenElektra*, discussed below and in Annex I), which typically focuses upon the *effect* of such national measures, rather than their objective. But it should also be acknowledged that this point is not absolutely certain, which doubt could itself have an impact upon the reactions of investors under the regime intended by the proposed directive.

3.3 Free movement of goods – general points

The presumption of free trade in GOs as goods is reinforced by the default position established by Article 9(3), 1st sentence, of the proposed directive. Unless Member States choose, and are able, to utilise the provisions in Article 9(2) concerning prior authorisation, the first sentence of Article 9(3) allows private parties located in different Member States freely to transfer GOs to each other (subject only to the condition that the installation which generated the GO became operational after the date of the directive's entry into force). It is apparent, therefore, that the system of prior authorisation for transfer of GOs is on its face a restriction upon trade in GOs

[9] *Ibid*., p. 3, para. II.1. Note also that the Commission in its Explanatory Memorandum (n. 5, above) points out that Member States "retain" (subject to achieving the binding renewables target) "wide discretion to favour the development of the renewable energy sector in the way that suits their national potential and circumstances best" (p. 9, para. II.3).
[10] Case 7/68 Commission v. *Italy* (Italian Art Case) [1968] ECR 423.

and will therefore require justification. Since the electricity produced dos not need to be transferred as well, the 'virtual' nature of GO exchange allows traders to come into the scheme, alongside or independently of the renewable generation installation.

3.4 Justifying *prima facie* restrictions upon free movement – the 'prior authorisation system' and Article 28 EC

Given the foregoing analysis, the key issue thus concerns whether the proposal secures and justifies such a prior authorisation system, in the face of the prohibition laid down in Article 28 EC.

The proposal for the Directive may not explicitly create a fully harmonised and unified trade system for GOs. However, and in line with the above discussion of the legal effect of the proposed GO provisions, it is possible that the proposal could be interpreted, as a matter of law, as creating a harmonised GO trade mechanism for all EU Member States.

However, if instead it is assumed that the proposal would introduce a new trade system but that it would not yet be a complete harmonisation of the trade rules for the exchange of GOs in the EU, then the extent to which restrictions upon such trade can be justified needs to be analysed.

3.4.1 Justifications – background

In the absence of EC harmonisation measures, Member States remain free to adopt such rules, provided that they pursue a legitimate objective and are proportionate (in the sense that the extent of any restriction upon trade must go no further than necessary to achieve that legitimate goal). A prior authorisation system amounts to direct discrimination against imports and/or exports, on the basis that the reason for the restriction upon trade relates directly to the origin/destination of the good in question. Traditionally, such measures could only benefit from a derogation from the Article 28 EC prohibition if they fall within the grounds listed in Article 30 EC,[11] but more recent case law has suggested a more flexible approach to the justification of such restrictions upon trade (at least in the environmental field).[12] This flexibility is exemplified by the judgment of the Court of Justice ('ECJ' or 'the Court')) in *PreussenElektra*, a detailed treatment of which is provided below (in Annex I to this paper). In its judgment in *PreussenElektra*, the Court did not clearly establish the nature of the restriction (in terms of its discriminatory effect) upon trade created by the former German power feed-in law, which has clear differences from the current German law, but the Court was willing, "in the current state of Community law concerning the electricity market", to acknowledge that the old German law was "not incompatible with Article 28". This was because such legal provisions aimed at the "protection of the environment" by contributing to the reduction in emissions of greenhouse gases (although the Court also referred to the protection of the life and

[11] Including, *inter alia* (and for our purposes most relevantly): public policy, public security and the protection of the health and life of humans, animals and plants.
[12] See, e.g., Case C-379/98 *PreussenElektra* v. *Schleswag* [2001] ECR I-2099, and the cases discussed in the Opinion of Advocate General Jacobs. This point is discussed further in Annex I, *infra*.

health of humans, animals and plants – an Article 30 derogation – in its reasoning). The judgment in *PreussenElektra* would clearly be the first port of call for any Member State seeking to justify a restriction such as the prior authorisation regime envisaged by the proposed directive.

3.4.2 Are national support measures for renewable electricity really 'trading rules' which fall within Article 28 EC?

It should be underlined, however, that the position and reasoning of the ECJ in *PreussenElektra* could be revisited even under the current Directive 2001/77/EC for the promotion of renewable energies.[13] In general, it is not crystal clear whether the outcome of a "*PreussenElektra II*" before the Court would automatically lead to the enforcement of the EC trade rules with respect to Feed-in Tariffs ('FiT') (such as under the current German law). Nor is it certain that the Court would either uphold such barriers as justifiable or require their modification or removal. Article 28 *et seq*. EC are only applicable to Member State measures which themselves are trade mechanisms or a measure having an effect equivalent to such direct trade barriers. One can question whether FiT mechanisms, and especially the current German FiT law (the Erneuerbare Energien Gesetz (EEG)), amount to a 'trading rule' or measure falling within the scope of Article 28 EC. *PreussenElektra* only dealt with the predecessor of the EEG, the Stromeinspeisungsgesetz.[14] Advocate General Jacobs suggested in his Opinion[15] that the Stromeinspeisungsgesetz did not serve the purpose of securing energy supply.[16] But the current German EEG is more specific on this point. Paragraph 1(1) EEG[17] strongly emphasises that the law serves the purpose of the sustainable development of national energy supply as well as promoting electricity generated from renewable sources ('RES'). Paragraph 1 further states that RES are domestic energy sources which are able to contribute to the independent supply of energy and to the security of supply. The German FiT law also enables Germany further to diversify its national energy mix in order also to fulfil its obligation from the law on phasing out of Nuclear Power in Germany "Gesetz zur geeordneten Beendigung der Kernenergienutzung zur gewerblichen Erzeugung von Elektrizität".[18]

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[13] The RECS green certificate trade initiative has already announced that legal action against further maintaining of Feed-in Tariff systems as national support mechanisms could be feasible: RECS International, 'Trade barriers to renewable energy in conflict with EU market laws', (Press Release, 26 October 2007); RECS International, 'Barriers to renewable energy in conflict with EU market laws', (Press Release, 26 October 2007: Summary of a workshop jointly organized by RECS International and DLA Piper, London on 17 October 2007).

[14] Gesetz über die Einspeisung von Strom aus erneuerbaren Energien in das öffentliche Netz, 7 December 1990, BGBl. I p. 2633 *et seq.*; 1994 p. 1618 *et seq.*; 1998 p. 730 *et seq.*; see http://www.umwelt-online.de/recht/energie/ein_ges.htm.

[15] Para. 209 of the Opinion of Advocate General Jacobs in *PreussenElektra* vs. *Schleswag*, n. 13, *supra*. It should be remembered, however, that the Advocate General: pointed out (para. 195) that the Court was not fully informed of the relevant facts on the issues relating to the free movement of goods, suggested that the oral procedure might be reopened to gain more information and highlighted that only tentative conclusions on those matters were possible in the circumstances (both para. 196).

[16] It should be noted, however, that the Court clearly did not reach the same overall conclusion as its Advocate General on the case; yet the Court's reasoning does not allow us to draw specific conclusions as to its position on this particular issue. See, further, the discussion of *PreussenElektra* in Annex I, *infra*.

[17] Promotion of Renewable Energy Sources Act (Gesetz zur Förderung Erneuerbarer Energien), as amended in 2004, BGBl. I 2004, p. 1918 *et seq.*; vid. http://www.erneuerbare-energien.de/inhalt/5982/.

[18] Bundesgesetzblat Teil I Nr. 26, 26 April 2002

The EC Treaty is based upon the principle that the EC may act to legislate only in fields where the Treaty has conferred competence upon the EC to act. In areas of activity where that competence is shared between the EC and its Member States, the EC must establish a legal basis for its action and must also justify the need for action on the EC level (satisfying the principle of subsidiarity) and for that extent of action (proportionality). Only then can a Member State be required to apply EC legislation in place of its own national rules on the subject. However, Member State rules which fall within the scope of directly effective provisions of the EC Treaty (such as Article 28 EC) may still need to be disapplied at national level unless they can be justified according to the Treaty, the Court's case law or any relevant EC legislation. The extent of this impact of such Treaty provisions obviously depends upon the scope of such provisions, as interpreted by the ECJ.

It must be evaluated on a case-by-case basis whether or not any given national measure, such as the FiT mechanism, constitutes a measure having equivalent effect in the light of the wording of Article 28 EC and thus amounts to a trade measure. It could be argued that a national FiT system itself might not be a measure which has an effect equivalent to a rule which regulates the cross-border trade in electricity. Instead, it could be argued that a FiT system amounts to a political instrument for the promotion of renewable energy which serves a complex variety of elements within a national energy policy. This argument is reinforced by current discussions concerning the further development of FiT systems such as the German law by opening the national FiT system up to allow access to the national support mechanism for electricity produced outside the relevant national system.[19] To this extent, therefore, it can be argued that there is strong evidence that, were the issue to be raised before the ECJ again, the Court might well recognize it as a national energy policy instrument and not a trade mechanism.[20]

Under the currently proposed definition of 'support mechanism' for the new Directive and the introduction of a new trade system, Member States' arguments in favour of their national support mechanisms being treated as policy and not trade instruments would be weakened. This is especially the case in view of the fact that the

[19] Moreover there is one aspect which is often neglected in the discussion of 'trade measures': at time of the *PreussenElektra* case there was (both for the judgment and for the Opinion of Advocate General Jacobs) little data available as to what other Member States do in view of installing and keeping their support mechanisms reserved for the national RES production (at the time of the facts of the case, Directive 2001/77/EC had not yet been adopted). In fact, all EU Member States have national support mechanisms which restrict access to national generation only, including Finland with its tax support mechanism. It is also not impossible that the British system might introduce such restriction in the future, at least in light of cherry-picking. This information then leads us back to the questions whether, first, such national measures are really' trading rules' at all and, second, even if they do amount to trading rules can they nevertheless be justified under either *Cassis de Dijon* (see n. 24, *infra*) and its progeny or Article 30 EC (as discussed in *PreussenElektra* itself – see Annex I).

[20] On the issue of distinction between a trade measure and a policy instrument, see Matthies in Grabitz/Hilf, Kommentar zur EU, Article 30, para. 8; see also Fouquet & Prall, 'Renewable Energy Sources in the Internal Electricity Market: The German Feed-In Model and its Conformity with Community Law' (2005) 2 *Journal for European Environmental & Planning Law* 309 *et seq.*, and 316 *et seq.*; on the question of the definition of 'trade measures' and of 'support mechanisms' in the proposed directive and the explanations of the proposal given by the European Commission, see Fouquet, & Johansson, 'European renewable energy policy at crossroads – focus on electricity and related support mechanisms', (forthcoming).

proposal would no longer privilege a support mechanism restricted to generators established on the national territory, as is currently ensured with Directive 2001/77/EC.

This argument is based upon the following provisions of the Directive. First, some of the Recital 14 acknowledges that Member States operate different support mechanisms at national level. Further, Recital 10 clarifies that the guarantee of origin required by the Directive's Article 5 does not require a Member State to recognise a purchase of a guarantee of origin from another Member State as contributing towards the first Member State's obligation, nor does the guarantee of origin imply the right to benefit from that other Member State's national support mechanisms. Recital 12 highlights that the EC's Guidelines for State aid for environmental protection recognise the need for public support in favour of renewable energy sources ('RES'). In general terms Recital 1 emphasises that there is a strong need for the EC to promote RES to achieve environmental and sustainable development goals. Meanwhile, Article 2(d) of the Directive defines the "consumption of electricity" as primarily including "*national* electricity production" (emphasis added). In conjunction with the provisions of Article 3, concerning the setting and monitoring of *national* indicative RES targets, and with the Annex to the Directive (which specifies the reference values for those national targets), this establishes an argument that the Directive specifically envisages that Member States can adopt national RES promotion measures the benefit of which could be limited purely to national generation capacity.[21] At the same time, it should be acknowledged that nothing in the text of the Directive explicitly and clearly guarantees the justifiability of such national RES support measures against the application of, e.g., Article 28 EC requiring the possibility of access to the benefit of such national measures by electricity generated in another Member State.[22] This suggestion to make explicit that such measures are acceptable under free movement law is developed below (see para. 3.5.2).

3.4.3 Justifications – specific grounds and the interpretation of Article 9(2) of the proposed directive

Under the proposed directive there would clearly exist a degree of EC harmonisation on the issue of justifiable restrictions upon trade in such circumstances, in the form of the provisions of Article 9(2). For the sake of the argument and balance in the interpretation of the proposal, it is assumed in the following that FiT systems in general would constitute measures having equivalent effect to a quantitative restriction upon trade. The effect of the provisions in Article 9(2) of the proposal is

[21] This argument also reflects the position taken by the German Government: Official comment to Commission and Council, 'Consequences of the COM proposal for a trading system for GOs' (31 March 2008).

[22] E.g. the asterisk footnote to the Annex to the Directive only explicitly states that Member States may assume that the EC's *State aid* rules and guidelines allow the adoption of national support measures: nothing is said about the free movement rules in that connection. Further, it could be argued Article 4 of Directive 2001/77/EC actually seems to indicate the opposite – "the Commission shall evaluate the application of mechanisms used in Member States according to which a producer of electricity, on the basis of regulations issued by the public authorities, receives direct or indirect support, and which could have the effect of restricting trade". The reference to trade restrictions goes further than a mere 'effect upon trade' required under the State aid rules, and seems to be a reference to Article 28 EC considerations.

summarised below (Table 1). Where such harmonisation exists, the Court has held from the earliest cases in this field[23] that, to the extent that those harmonising measures exclude inconsistent national rules, to justify restrictions upon trade Member States may only have recourse to the harmonised provisions. At the same time, it is also tolerably clear that such harmonisation measures cannot by legislation authorise restrictions upon trade which would not themselves have fallen within acceptable grounds of derogation or justification under the EC Treaty. For the purposes of argument here, it will be assumed that all of the grounds listed in Article 9(2) of the proposal would satisfactorily have fallen within those parameters, either as a matter of public security (in the sense of secure supplies of energy resources)[24] or of environmental protection (as in *PreussenElektra* itself or by virtue of their connection with the protection of the health and life of humans, animals and plants).

With this background in place, it only remains to analyse the extent to which Article 9(2) provides a practicable basis upon which a Member State could justify the introduction of a prior authorisation system. It is important to emphasise that, in the key test case of a system seeking to introduce such a system to safeguard the operation of a domestic feed-in tariff, the provisions of the proposed directive limit the grounds of justification only with regard to the prior authorisation system itself. Any challenge to the "underlying" feed-in tariff would still fall to be considered under the Treaty rules for justifying such a system, so that the reasoning in *PreussenElektra* would still seem applicable.[25]

With regard to the proper interpretation of the justification provided by Article 9(2), 1st sentence, for a Member State to decide to subject the transfer of GOs to a prior authorisation system, one of the key questions will be the scope of the notion that allowing transfers "is likely to undermine the achievement of the environmental objectives underlying their support scheme". Here, it is vital not to conflate the goals of the proposed directive itself and those further goals that a Member State's own renewables policy might seek to pursue. As the Commission has pointed out in its recent clarifications to the Council on the subject:

> "Member States that prefer to use feed-in tariffs can prohibit the transfer of GOs to other Member States. It is recalled that feed-in tariffs allow giving differentiated rewards to different renewables technologies, which the GO system cannot (because GOs will have a converging trading price). This key benefit of feed-in systems is the main reason why GOs can be traded freely only provided the Member State agrees."[26]

[23] See, e.g., the seminal judgment in Case 120/78 *Cassis de Dijon* [1979] ECR 649.
[24] See the *Campus Oil* case, n. 6, above.
[25] Although we should note the concern raised by some critics that it should no longer apply so flexibly to such national feed-in systems now that the "current state of Community law concerning the electricity market" has developed significantly, in the light of the legislative package of 2003 on the internal market in electricity and natural gas, and subsequent measures. Against this, it might be argued that the combination of earlier flexible case law on environmental protection, allied with the obligation in Art. 6 EC to integrate environmental policy into other areas of activity under the EC Treaty and the advent of the Renewables Directive 2001/77/EC ([2001] O.J. L283/33) might suggest that the Court is likely to continue to adopt a relatively non-intrusive position with regard to the justifiability of such national feed-in systems.
[26] See n. 9, *supra*, p. 5, para. II.3.

But this explanation is immediately followed by the subsequent clarification given by the Commission to the Council:

> "Member States can limit (further) the transfer of GOs at any time during the application of the Directive subject to the conditions in Art. 9, as long as existing long-term contracts are respected. The conditions in Art. 9 would preclude a prohibition on GO transfers for only one specific year."

The first explanation clearly admits that GO can only rely upon a trading price, which would mean a uniform price**,** depending upon the marginal costs of the last, most expensive kWh of RES energy that is needed for target achievement.[27] It also clearly demonstrates that the Commission appreciates the significance of leaving open to the Member State the possibility of providing differentiated levels of support for different renewables technologies. This is also an indication that it seems possible for a Member State to implement and retain a *justifiable national* environmental objective[28] which goes beyond those envisaged by the proposed directive and could thus be relied upon to justify a prior authorisation system (which otherwise would amount to a breach of Article 28 EC).

The second explanation given by the European Commission underlines the limitation of transfer of GO during the application of the Directive. The approach taken by the Commission in its further explanations to the Council of the proposed directive, while providing some clarification, do not establish absolute clarity in how best to interpret the proposal as it stands, and its implications. It could mean that any exclusion of a part of the Directive can only be justified for one specific year and only be limited at all if the exemption conditions of the Directive itself are met and even then only "as long as" long-term contracts would not be endangered by the exclusion,[29] following the general legal rule of restrictive exemption approach (*singularia non sunt extendenda*). This leads back the overall principle of restricted right for exemptions from free trade and to Article 9(2) of the proposed Directive.[30] On this interpretation,[31] the explanation of the Commission would leave the national legislator greatly constrained, and perhaps even empty-handed, in pursuing national support measures such as FiTs.

It becomes clear that the Commission considers that a Member State decision to prevent the free trade in GOs by private parties would only be accepted as a justifiable restriction upon trade in certain circumstances: the criteria in Article 9(2) would have to be satisfied and such a restriction would have to be one which was both

[27] See also German Government, Official comment to Commission and Council, 'Consequences of the COM proposal for a trading system for GOs' (31 March 2008).

[28] I.e. measures to achieve the goal of offering differentiated levels of support to secure the development of a portfolio of renewables technologies.

[29] The point about long-term contracts presumably relates to the situation where a long-term contract for GO transfer has been entered into at a point in time where the relevant Member State *did* permit transfer of GOs, and thus relates to a requirement to respect such acquired contractual rights as a form of 'property'

[30] See also Fouquet & Johansson, n. 21, *supra*.

[31] E.g. it could be argued that the explanation is not saying that exclusion could only be justified for a 'specific year: certainly, the wording of Article 9 itself is by no means so restricted. Nor is it entirely clear that the Commission is correct to say that the Article 9 conditions would not permit a prohibition on GO transfers for only one specific year: again, the wording of Article 9 itself does not suggest that conclusion.

necessary and proportionate to the achievement of that environmental goal, and one which would not (without specific and convincing evidence to the contrary) amount to "a means of arbitrary discrimination" (Article 9(2), 3rd sentence, of the proposed directive). A similarly structured analysis would have to be employed in testing the justifiability of restrictive national measures relying upon, for example, security of supply grounds.

Provision of proposed directive	**Grounds for MS choosing to restrict GO transfers by private parties**	**GO transfers *out of* MS**	**GO transfers *into* MS**
Art. 9(2), 1st sentence	Impairing MS's ability to secure a balanced and secure energy supply	√	√
Art. 9(2), 1st sentence	Likely to undermine the achievement of the environmental objectives underlying the MS's support scheme	√	√
Art. 9(2), 2nd sentence	Impairing MS's ability to comply with its renewables target in Art. 3(1) / Part A, Annex I	√	X
Art. 9(2), 2nd sentence	Impairing MS's ability to ensure that share of energy from renewables is ≥ indicative trajectory in Part B, Annex I	√	X

Table 1 Justifying the restriction of transfers of GOs

It may be argued, however, that it could prove difficult for Member States to rely upon the derogation provisions under Article 9(2). In general, such exemptions for Member States can only be justified if there is no other tool which would have a lesser impact upon free trade while still achieving the justifiable objective. According to an early Commission Directive on the subject, "the restrictive effect on free movement of goods cannot be disproportionate to the object aimed at" or is not justified "where the same objective can be attained by another means hindering trade as little as possible".[32] This has the potential to add a further legal uncertainty for the acceptance of national feed-in systems in the context of GOs under the proposed directive. The proposal no longer explicitly shelters the priority for locked-in national support mechanisms. The currently applicable Directive 2001/77/EC expressly stipulates that for reasons of environmental protection it is justified to support only domestically generated electricity by national support mechanisms. The current

[32] See e.g. Article 3 of Commission Directive 70/50/EEC of 22 December 1969 based upon the provisions of Article 33(7), 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, [1970] O.J. L13/29.

Commission proposal, however, does not contain a comparable provision. On the contrary, it explicitly establishes trade between persons as a basic principle for Europe-wide support for renewable energies.

Thus, it can be concluded that the operation of Article 9(2) would not give Member States a completely free choice as to whether or not to adopt a prior authorisation system for trade in GOs; at the same time, the exclusionary effects of the proposed directive upon such justificatory arguments must not be overstated.

3.5 Possible amendments aimed at clarifying the legal implications and application of the proposed directive

From the preceding discussion in this section, there emerge two potential areas in which the legal certainty of the current proposed directive might give some cause for concern. The first is the extent to which Member States would be free to choose to opt out of *any* transfers of GOs by private parties, and the second relates to the grounds upon which Member States would be allowed to rely for the purpose of justifying the imposition of any restrictions upon trade in GOs – i.e. the justifiable terms and conditions of any prior authorisation system that might be adopted.

3.5.1 Clarifying the position with regard to Member State rules on GOs transfer

As things stand, under Article 9(1) transfers of GOs between MS governments will become the rule, subject to certain preconditions, and the trade of GOs between persons equally will become the rule according to the Article 9(3) presumption in favour of free transferability. Member State derogations from that presumption of free trade in GOs would rely upon the exemption criteria laid down in Article 9(2), supplemented by the Court's case law. It is arguable that those criteria do not offer concrete and viable tools, and certainty for Member States seeking to opt out of such a trading mechanism. (See the discussion in 3.5.2, below, for ways of making the operation of such derogations clearer.)

One way of clarifying the position would be to allow Member States to choose whether or not to opt *in* to a system in which GOs would be freely transferable. Depending upon the drafting of Article 9 as a whole, this could mean:

> (a) if a Member State were to choose *not* to allow for GO transferability between private parties, then the presumption in Article 9(3) would not apply: thus, the decision not to allow transfers of GOs in such circumstances would not itself need to be tested against Article 28 EC (*provided that* the provision in the directive which allowed this choice to be made would itself be held compatible with the EC Treaty as not being a disproportionate restriction upon such trade in the circumstances);
>
> (b) if a Member State were to choose to *allow* GO transferability between private parties, then this could mean that the presumption in Article 9(3) *would* apply, and:

(i) no prior authorisation system should be possible (i.e. a choice is made to allow trade and thereafter no restrictions upon it could be imposed by the Member State); *or*

(ii) that free trade could still be subjected to a prior authorisation system, either as currently laid down in Article 9(2) or in a modified/expanded form (again, see the discussion in 3.5.2, below) by that Member State, covering both imports and exports of GOs.

3.5.2 Clarifying the grounds for justifying restrictions upon trade in GOs

If it is feared that the reliance in the analysis above upon cases such as *PreussenElektra* leaves too much uncertainty for Member State authorities in deciding how (and how far) to restrict free transferability of GOs under Article 9(2), one solution could be to provide a fuller explanation of available justifications for such trade restrictions *in the directive itself*. This could be done by adding a further paragraph to Article 9 of the current proposal, in which the specific reasons which justify resort to a prior authorisation system could be laid down in greater detail. This might be thought to be of particular importance in the case of the criterion concerning the 'underlying environmental objectives' of national support schemes which provide for differentiated levels of support at national level for different renewable technologies.

Alternatively, it would be possible to provide in Article 9 of the proposed directive that the grounds for justifying recourse to such prior authorisation could be established by the Commission in secondary legislation, drawn up and approved under the 'Comitology' procedure. 'Comitology' is an EC decision-making process involving the delegation of power (to adopt decisions and standards, and sometimes to amend legislation) by the Council to the Commission, subject to the approval of a committee composed of Member State representatives. There are now four main forms of Committee procedure: the 'Advisory', 'Management' and 'Regulatory' Committee Procedures and the 'Regulatory Procedure with Scrutiny', each of which grants a progressively stronger role to the Committee. The current Comitology Decision is Decision 1999/468/EC[33] (as amended by Decision 2006/512/EC[34]). According to the 'Regulatory Committee Procedure' (under Article 5 of the Comitology Decision), the Commission submits a draft to the Committee, which adopts an opinion by Qualified Majority Vote (QMV) (a form of vote weighting, under which a certain threshold of votes (representing a particular proportion of the Member States and their populations) must be met).[35] The measure cannot be adopted unless the Committee gives a positive opinion. If this does not happen, the Council can act by QMV to adopt, or, under one variant, by simple majority to block.

[33] Council Decision, [1999] O.J. L184/23.
[34] Council Decision, [2006] O.J. L200/11: its principal change to the regime concerned the introduction of a new procedure for the exercising of implementing powers: the "regulatory procedure with scrutiny". The idea of this new procedure is to place the two branches of the Community legislature on an equal footing, at least in matters subject to the co-decision legislative procedure under Article 251 EC, as regards monitoring how the Commission exercises the implementing powers conferred upon it.
[35] On QMV, see (e.g.) Dashwood and Johnston, 'The Institutions of the Enlarged EU under the Regime of the Constitutional Treaty' (2004) 41 *CMLRev*. 1481, esp. 1493-1500 and 1513-1516.

The provision of a more detailed list of justificatory criteria (and indeed the circumstances of their application), whether explicitly in the text of the proposed directive itself or subsequently adopted by the Commission via the Comitology process, could serve to increase the predictability and certainty of the implementation process for Member States and private parties operating under the new regime for the promotion of energy from renewable sources.

Of course, the possibility of some legal challenge, whether to the proposed directive itself (once adopted) or to the implementation and/or application of the measure by any given Member State, cannot be excluded, particularly given that most scenarios look likely to involve some restriction of what would otherwise be free trade in goods. But if care is taken to craft the legal regime laid down by the directive, such risks of subsequent (successful) legal challenge should be minimised.

3.5.3 An alternative suggestion

Another way to address these concerns would be to acknowledge explicitly that Directive 2001/77/EC is at current the best common denominator to help the legislator in developing the new proposal. There is a need to ensure, on the one hand, flexibility in relations between Member States, both to enable them to assist each other in reaching the renewables targets and to ensure that national support mechanisms may still be relied upon for the sake of the smooth and rapid deployment of renewable energies.

The following principles should be reiterated and integrated into the new proposal:

> (a) clarify that national support mechanisms are market access enhancing devices in view of the internal energy market which is still distorted by the non-internalisation of externalities;
>
> (b) provide full freedom of choice for Member States to develop the most suitable and effective national support mechanisms given the current full range of possibilities, from energy taxation to FiT or other systems providing a technology-specific premium.
>
> (c) clarify that GOs as such are not *per se* tradable green certificates and do not constitute as such a right – and obligation – as a tradable certificate. In order to chance the quality of a GO towards a tradable certificate member state need to authorise this legal transformation into a certificate with a specific sealed deed on this document.
>
> (d) Security that access to national support mechanisms for imported green electricity is left to the decision of the respective member state under full liberty and the principle of reciprocity.

The Directive should then better clarify the specific possibilities for cooperation and flexibility between Member States, via different and equally viable approaches: e.g.

statistically justified transfer of increased RES share with the effect of counting towards RES targets; via the exchange of GOs, again with the effect of counting towards the RES target; via joint project planning in the relevant other Member State or by opening access to the support mechanism (and thus the RES target balance) for electricity produced in neighbouring Member States but directly fed into the grid of the other Member State providing the support mechanism.

Under these suggestions, the first three paragraphs of Article 9 should thus be amended and, as a result, the following paragraphs of that article could become obsolete.

4 Alignment of national action plans and GOs trading

The proposed directive envisages (in its Article 4) that all Member States have to submit national action plans by 31 March 2010 to the European Commission. These national action plans must demonstrate how the Member State will deliver renewables to meet the indicative trajectory and the 2020 target.

Making Member States responsible for delivering the binding renewables target is an integral part of the proposed directive (by contrast with the purely indicative targets currently to be found in Directive 2001/77/EC). National governments have to remove barriers to the large-scale use of renewables, for example in grid access design, congestion management, balancing markets, planning regimes and administrative processes. These key issues are identified in the proposed directive (see Article 12, Administrative procedures, regulations and codes; Article 13, Information and training; and Article 14, Access to the electricity grid) and all require action on the part of national administrations to secure their achievement. This will require a strong and continued commitment from national governments and their administrations. National targets produce this commitment and make it more credible: they allow performance to be measured, and thus are conducive to the effective management of the necessary national policy processes.

The proposed directive is not explicit as to how the national action plans should reflect the role of trading between installations or Member States. The logic of the approach would suggest that where Member States envisage that some of their target will be delivered from renewables in other countries this would have to be demonstrated in a credible fashion.

Where governments envisage trading at a government-to-government level, they could present contracts with other governments which specify the volume and time-frame of GOs that will be transferred between the countries. As all Member States will have to submit national action plans to the Commission, the Commission should relatively easily be able to verify whether the different transfer volumes envisaged at the government level are consistent *inter se*.

Where governments intended to implement schemes which would allow for installation-based international trading of GOs, the very nature of trading would make it difficult directly to link the envisaged import volumes to envisaged exports from

other countries. However, the Commission would still be in a position to compare, on the one hand, the total import volume of GOs envisaged by Member States that did not intend to deliver their target domestically with, on the other hand, the total export volume made available by Member States which wanted to leverage their renewable resource base. If the envisaged import volume exceeded the available export volume, then all imports could be scaled back proportionally and Member States would be required to re-visit their strategy to deliver the renewables target even with lower import volume at the installation level.

Under the proposed directive, the European Commission would clearly play an important role in ensuring the international consistency of national action plans. This is potentially very significant, since many Member States expect their industry to buy renewable credits on the European market: without a corresponding supply of renewable GOs, the certificate price could easily rise to a pre-defined ceiling where that is envisaged in the scheme (e.g. UK) – thus missing the target –, or to high levels which would not be acceptable politically. The ability of the European Commission to ensure such coordination was demonstrated with the decision of phase II national allocation plans under the EU Emissions Trading Scheme. Member States initially seemed to have ignored the impact of their generous allocation upon the European carbon market and wanted to allocate too many allowances for carbon dioxide emissions to their national industry. The Commission rejected these lax national allocation plans in the second phase of the scheme, and the robust carbon prices currently observed suggest that the market valued (and responded to) that strong intervention.

5 Points for discussion and the way forward

5.1 Legal challenges to secure national instruments and Member State trade

At the moment the instrument of "prior authorisation" is an important component for maintaining investment security based on currently successful national support systems in Europe. However, as pointed out in section 3 above, some doubts exist, whether the provisions given in the proposed directive to limit trade at installation level are sufficient and legally robust. Since such uncertainty may delay or prevent investments in renewable capacity, it appears vital to increase the legal robustness and, consequently, to assure the practical implementation of the optional "prior authorisation" provisions.

As the practical implications of international installation-based GO trading are emerging, the number of countries that seem to be interested in linking their support schemes with this approach seems to have declined dramatically. If there is no viable set of countries that would intend to trade using the installation-based approach, then the proposed directive could be simplified and investment stability increased by removing the corresponding provisions from the directive altogether. Alternatively, strategies such as those canvassed above (in Section 3.5) might serve to improve the legal certainty of the proposal concerning such inter-installation transfers.

5.2 Penalties for Member State failure to meet the renewables target?

Under any system which sets targets to be achieved, the open question arises: what penalty will apply to those Member States which do not meet the relevant target? As currently drafted, the proposed directive does not specify such a penalty. However, it does require that Member States which fail to deliver against their indicative trajectory would be required to submit an updated national action plan which should demonstrate how the Member State aimed to get back on track (see Article 4(3) of the proposed directive).

One could argue that Member States which fail to meet the target should have to pay a penalty corresponding to the avoided costs of buying additional guarantees of origin in the inter-Member State or installation-based trading environment.[36] The threat of such a financial penalty might provide an incentive for Member States to ensure that they deliver against their national action plan and national targets, and could thus support and reinforce the implementation of the scheme envisaged under the proposed directive. It does, however, also run the risk that Member States see the financial penalty as an 'easy way out' (unless a mechanism were also included to ensure that the obligation (with regard to the remaining portion of the target still to be achieved) endured even beyond the end of the relevant reference period, similar to the position under the EU's Emissions Trading Scheme). A shared and clear understanding of the purpose of the renewable targets could probably address this concern.

Concerning the emissions trading sector, a legal evaluation recently proposed the introduction of a direct penalty mechanism which could be operated by the European Commission.[37] A strong compliance structure based upon ambitious reduction targets would initiate progressive emission abatement up to 2020. The two legislative proposals from the European Commission, the amended Emissions Trading System ('ETS') directive[38] and the Effort Sharing decision,[39] aim to reduce the EU's greenhouse gas emissions by 2020 and foresee a linear annual emission reduction path.[40] The existing infringement procedure under Article 226 EC takes on average

[36] As the draft of the proposed directive stands, however, it seems that there is no express legal basis for the imposition of such penalties upon defaulting Member States. The only obvious legal mechanism by which a penalty might be imposed upon a Member State for failure to achieve the result required by the proposed directive would seem to be via an enforcement action by the Commission against the recalcitrant Member State under Article 226 of the EC Treaty, followed by a subsequent action under Art. 228 EC requesting that the Court of Justice impose a penalty payment (which could include a lump sum and a periodic penalty) for the Member State's failure to take the action required to comply with the first judgment under Article 226 EC. As is immediately apparent even from this short description, however, this procedure would be lengthy and cumbersome.

[37] Fouquet, 'Towards a Better Compliance Structure for the European Emission Reduction Policies until 2020: A Legal Evaluation, a Direct Penalty Proposal and a Call for an Independent European Emission Abatement Agency', (For Friends of the Earth Europe), March 2008.

[38] Proposal for a Directive of the European Parliament and the Council amending Directive 2003/87/EC so as to improve and extend EU greenhouse gas emission allowance trading system.

[39] Proposal for a Decision of the European Parliament and of the Council on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020.

[40] The proposed new ETS Directive, in its Article 9, outlines that the Community-wide quantity of allowances issued each year starting in 2013 shall decrease in a linear manner beginning from the mid-point of the period 2008-2012. Article 3 of the proposed Effort Sharing decision outlines that Member

several years until fines have to be paid by the relevant Member State and is insufficient to respond in a timely fashion if Member States miss their annual emissions reduction targets. In the worst case scenario, this could mean that the infringement procedure would only become effective long after 2020. EC law has many decades of experience with direct penalty mechanisms, especially in the field of the Common Agricultural Policy ('CAP') and the cow milk quota regulation. They have not yet been applied in environmental legislation. It is high time to change this situation concerning the climate policy of Europe. The current ETS directive proposal and the Effort Sharing decision should be amended so as to establish the direct levy principle and to transfer power to the European Commission to enforce such penalties. The details and rules for such a system need to be laid down in an appropriate Commission regulation, in line with the Comitology procedure as provided in the ETS Directive and linked to in the Effort Sharing decision proposal. The Effort Sharing decision should have a similar provision which links it directly to this penalty mechanism.

The idea of direct fine mechanisms in the field of market-related policies which are based on caps and quota system is not unusual in the European Treaties. One noteworthy example in many aspects is Article 53 ECSC, which stipulated that the High Authority could "after consulting the Consultative Committee and the Council, authorise the making, under conditions which it shall determine and under its control, of any financial arrangements common to several enterprises which are deemed necessary for the accomplishment of the missions defined in Article 3 and compatible with the provisions of the present Treaty and in particular Article 65." The European Community has from its beginnings been accustomed to facing market situations where excess production calls for quotas and specific cap systems in trade. The European Community's Common Fisheries' Policy ('CFP'), under which the European Commission sets maximum allowable catches, provides another example in this vein. The "Common Organisation of the Markets in Sugar" provides for seven different levies, all of which have revenue titles under "Own Resources" in EU's budget and within the framework of the Common Agricultural Policy.[41]

The EC also possesses an important mechanism of Commission-controlled penalties to attain quota objectives in the milk levy scheme. This mechanism is based upon Article 37 EC,[42] under Title II of the Treaty (Agriculture). This specific legal basis therefore excludes making a direct legal link to this mechanism when introducing a penalty system on ETS and Effort Sharing. But the principle of the milk penalty system could serve as useful and established example, the main elements of which could be applied in establishing ETS penalty structures. The cow milk levy scheme was introduced in 1984 and was designed to reduce the imbalance between supply and demand for milk and milk products.[43] Just as the basic structure of such

States shall annually limit greenhouse gas emissions in a linear manner towards their 2020 target. In introducing a specific borrowing mechanism in between the periods of around 2% per year from 2013 onwards, the European Union proposes a good balancing system for the annual cuts.

[40] See Budget, Chapter 11.

[42] Article 37 Paragraph (2), 3rd sentence EC: "The Council shall, on a proposal from the Commission and after consulting the European Parliament, acting by a qualified majority, make regulations, issue directives, or take decisions, without prejudice to any recommendations it may also make."

[43] The penalty system under the milk quota regulation has quite substantial consequences: in 1997 for example, the penalties on detected above-quota production of milk in Italy alone were higher than EURO 325 million. By October 2005 the European Commission had issued EURO 364 million in fines

direct penalty mechanisms could be extended to the emission trading rules, so it could also be applied to the renewable energy directive proposal.

5.3 Renewables portfolio

The long-term EU emissions reduction targets require a portfolio of renewable energy technologies. These technologies are currently at different cost levels. The experience gained from the development of increased levels of installed capacity in on-shore wind power, and other technologies, has demonstrated that the costs of technologies fall with increasing experience.

The proposed directive as currently drafted does not directly encourage Member States to pursue policies that contribute towards the development of such a portfolio. It would be valuable to envisage complementary policy measures to deliver this objective. The national action plans could be a suitable framework to allow Member States to demonstrate their efforts in developing the portfolio of renewable technologies. For example, it would be very useful if Member States had to demonstrate in their national action plans how they are planning to achieve more ambitious goals as we move towards the year 2030.

On the contrary, if countries were to decide to pursue installation-based trade in guarantees of origin, then the support provided will be undifferentiated across technologies and fuels, and would thus not encourage earlier stage technologies. If countries were to provide this additional support via capital grants, additional subsidies, or tax schemes, then according to Article 8(1)(a) the guarantees of origin produced by the relevant installation would have to be submitted for cancellation in the same Member State and thus could not be traded internationally.

This suggests that if any country really wanted to pursue installation-based international trading of guarantees of origin (and it is not clear at the present time which are the potential candidate Member States which might want to pursue this approach), then Article 8(1)(a) would need to be expanded. Member States should be allowed to provide additional technology-specific support and declare that they would still allow installations to export guarantees of origin.

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after nine Member States had exceeded their milk quotas for the year up to 31 March 2004. For further details, see Fouquet, 'Towards a better compliance structure', n. 38 *supra*, at 28ff.

Annex I – The *PreussenElektra* case and the surrounding legal arguments and context*

(a) Facts and legal background to the case

The German *Stromeinspeisungsgesetz* (StrEG) laid down a system to ensure that energy produced from renewable sources can gain access to the grid and thus to the national market. In line with the policy to support renewable energy, all 'electricity supply undertakings which operate a general supply network' were obliged to purchase all of the renewable electricity[44] produced within their area of supply.[45] Furthermore, they had to pay a fixed minimum price for that electricity, calculated on the basis of the average nationwide sales price for electricity. These prices were set at such a level as to provide, in effect, a subsidy to generators of renewable electricity. Under the original incarnation of this law in 1990, price levels had been set at 90% of the average sales price for wind-generated electricity[46] and 75% for other sources (increased to 80% by an amendment passed in 1994).[47] Over time, the level of subsidy in real terms had risen as production levels and efficiency, particularly in the wind power sector, had increased. The Commission had been keeping a close eye on these developments and had voiced its concerns that the German system was incompatible with Community State aid law. It had even suggested changes to the method for the calculation of the subsidies involved.[48] Changes wrought by the 1998 legislation[49] implementing Directive 96/92/EC provide for a new compensation mechanism for the distributor in cases of 'hardship'. Much of the Advocate General's Opinion and the Court's judgment in *PreussenElektra* dealt with this issue and it is sufficient for our purposes to note that both Advocate General Jacobs and the Court of Justice concluded that this complex of duties which provides support for renewable energy producers did not amount to State aid. This was basically because the support came directly from the utilities and not from state resources.[50]

However, the authors would like to focus here on the discussion of the compatibility of this purchasing obligation with the free movement of goods.[51] The

* This Annex is an updated, re-worked and somewhat abbreviated version of a piece originally drafted by Angus Johnston in collaboration with Dr Eleanor Spaventa (now of Durham University). I am extremely grateful for her permission to use elements of that earlier draft here.

[44] From specified sources: water, wind, sun and biomass (Para. 1 StrEG 1998).

[45] Para. 2(1), StrEG 1998 (BGBl. 1998 I, 730).

[46] Para. 3(2), StrEG 1990 (BGBl. 1990 I, 633).

[47] BGBl. 1994 I, 1618.

[48] Letter to the German Government, 25 October 1996, following complaints by the electricity supply undertakings about the impact of the renewables purchasing obligation upon them.

[49] *Gesetz zur Neuregelung des Energiewirtschaftsrechts* (Law reforming the Law on the Energy Supply Industry) (BGBl. 1998 I, 730).

[50] Environmental campaigners welcomed this ruling, although for them the logic behind such support measures is that 'electricity prices do not reflect the environmental costs incurred by other forms of power generation' (*EU Energy Policy*, Issue 142, 31 October 2000). For discussion of these matters, see (e.g.) Bronckers & van der Vlies, 'The European Court's *PreussenElektra* judgment: Tensions between EU principles and national renewable energy initiatives' [2001] *ECLR* 458 and Baquero Cruz & de la Torre, 'A Note on *PreussenElektra*' (2001) 26 *ELRev.* 489.

[51] It seems clear that electricity is treated as a good for the purposes of the E.C. Treaty: see Case 2/64 *Costa* v. *ENEL* [1964] E.C.R. 1, Case C-393/92 *City of Almelo* v. *Energiebedrijf IJsselmij* [1994]

original legislation referred only to the obligation on the electricity suppliers to purchase electricity generated from renewable sources 'within their area of supply': as drafted, this could only cover power produced in Germany. The introduction in 1998 of a new rule concerning 'off-shore installations' seems to underline the national focus of this obligation: renewable electricity produced in an installation situated outside a supplier's area must be purchased by the operator of the network located closest to that installation.[52] When read with the new Paragraph 1 of the 1998 law, it is clear that the obligation applies only to electricity that has been generated in Germany. There are some significant difficulties in making an assessment of the purchasing obligation under Article 28 EC: the exact impact of the 1998 law on the importation of electricity from other Member States is at best unclear; it is difficult to establish whether imports of renewable electricity are even technically feasible and it is especially tricky to distinguish such power from that generated from conventional sources.[53] Nevertheless, given the earlier conclusion concerning the allegation that the system amounted to an illegal state aid, the free movement issue could be 'decisive for the outcome of the main proceedings' in the national court.[54]

From a purely free movement of goods perspective, *PreussenElektra* raises some important questions in that it constitutes a further threat to the already shaky consistency of the Court's case law on discriminatory restrictions to trade. As is well known, the ECJ has introduced a double system of justifications: indistinctly applicable rules – capable of hindering trade – may be justified according to the mandatory requirements of public interest, whilst discriminatory restrictions may be justified only according to the (exhaustively listed) Treaty derogations. However, environmental protection was not a matter of sufficient concern when the Treaty was drafted and is thus not mentioned as one of the grounds which allows a departure from the Treaty.

The Court, however, has found that environmental protection was to be considered as one of the mandatory requirements: usually mandatory requirements may be invoked only to justify non-discriminatory restrictions;[55] however, this was not the case in the *Walloon Waste*[56] case. Here, the Commission attacked a discriminatory measure aimed at avoiding waste dumping in one of the Belgian regions. Belgium argued that the measure was justified on environmental protection grounds, whilst the Commission argued that such measure, being discriminatory, could not be so justified. Environmental protection might very well be a mandatory requirement of public interest, but it is not listed in Article 30 and cannot thus be invoked to justify discriminatory restrictions. The Court faced a conundrum: was it to

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E.C.R. I-1477 and Cases 157, 158, 159 and 160/94 the '*Energy Cases*' (enforcement actions by the Commission against the Netherlands, Italy, France and Spain respectively).

[52] Para. 2(2), StrEG 1998.

[53] Para. 195 of the Opinion of Advocate General Jacobs in Case C-379/98 *PreussenElektra* v. *Schleswag AG*, delivered on 26 October 2000 (hereafter, 'the Opinion'). The Court made a similar point in para. 79 of its judgment. (N.B. The opinion and judgment use the old EC Treaty numbers, while this paper uses those in force after the Amsterdam Treaty for convenience.)

[54] Para. 194 of his Opinion.

[55] Case 302/86 *Commission* v. *Denmark* (Danish Bottles) [1988] ECR 4607, para 9. The Court had already found in case 240/83 *Procurateur de la République* v. *Association de Défense des Brûleurs d'Huiles Usagées* [1985] ECR 531 that environmental protection is one of the Community's essential objectives which might justify limitations to trade imposed by the Community itself.

[56] Case C-2/90 *Commission* v. *Belgium* (Walloon Waste) [1992] ECR I-4431.

declare the measure unlawful even though it had been adopted in pursuance of an interest widely felt to be of great importance? Or was it to disregard its own case law so as to be receptive to the challenges faced by modern industrial societies? The Court chose a pragmatic approach: environmental protection is indeed a primary goal of the Community and Member States' measures which pursue such goal, as the one at issue, may be so justified. It might be wondered whether this 'sensible' and pragmatic approach has not contributed to the Member States' inaction as far as Treaty amendments are concerned: although four rounds of amendments postdate the *Walloon Waste* case, environmental protection has not yet been added to the list of the Article 30 derogations. Thus, it was to be expected that sooner or later a similar problem would arise again; and, once more, the Court has demonstrated its receptiveness to the need to protect the environment. Whilst the Court's preference for allowing Member States to pursue environmental protection is welcome, *PreussenElektra* added confusion and legal uncertainty for economic operators and national courts: to what extent can discriminatory measures be justified on grounds not contained in Article 30? Is environmental protection the only ground which can be added to the list, or, as *Decker*[57] suggests, are there others? Does the distinction between indistinctly applicable measures and discriminatory measures, and between mandatory requirements and the Treaty derogations, still hold good?[58]

(b) The Opinion of Advocate General Jacobs

After having suggested that the Court reopen the oral procedure in order properly to address the free movement of goods aspect which had not been fully argued at the Hearing, Advocate General Jacobs went on to examine the issue and found that Article 28 indeed applied, since, according to consistent case law electricity is to be considered a good.[59] On the basis of established case law, there was for Advocate General Jacobs little difficulty in establishing that such a measure has an effect equivalent to a quantitative restriction: *Campus Oil* made clear that any obligation to purchase a certain amount of products from a national source acts so as to restrict the ability of importing that same product from another Member State. By its restriction to German-produced renewable electricity, the StrEG favoured the "marketing of electricity of German origin to the detriment of imported electricity": indeed, Schleswag asserted that it had been offered Swedish renewable electricity at a reasonable price, but had been forced to decline to purchase it due to its obligation to take all of the wind-generated electricity from its own supply area.[60]

Could this infringement be justified? Any argument based on maintaining the security of supply would seem to be doomed in this context. Advocate General Jacobs's remarks on the *Campus Oil* case are fully in line with the clear analysis of

[57] Case C-120/95 *Decker* v. *Caisse de Maladie des Employés Privés* [1998] E.C.R. I-1831.
[58] The distinction has recently come under attack by some authors, as well as by Advocate General Jacobs.
[59] Case 6/64 *Costa* v. *ENEL* [1964] ECR 585; Case C-393/92 *City of Almelo* [1994] ECR I-1477; C-158/94 *Commission* v. *Italy* [1997] ECR I-5789; C-213/96 *Outukumpu Oy* [1998] ECR I-1777.
[60] Paras 200-202 of his Opinion. Without arguing the point, Advocate General Jacobs advised that, even if a *de minimis* rule does exist under Article 28 EC, the figure of 1% of total German electricity consumption provided by renewables could not be viewed as negligible. Hence, the mechanism of the StrEG was in principle an infringement of Article 28 EC.

Advocate General Cosmas in his Opinion on the *Energy Cases*.[61] He stressed the dangers of an *interruption* in oil supplies that could threaten the *very existence* of the country, so that the fact that the Irish rules were designed to ensure the availability of a minimum supply would allow a public security justification. These strict criteria are reflected in Advocate General Jacobs's swift dismissal of the argument: he commented that "wind as an energy source is not yet as important for the modern economy as petroleum products. The special economic role of petroleum products was a decisive factor in the Court's rather exceptional judgment in *Campus Oil*".

Of both greater interest and difficulty is the argument that environmental protection could justify the restriction. First of all, it is important to characterise the nature of the restriction in question: here, it is clear that renewable electricity of foreign origin is treated differently, both in law and in fact, from that produced in Germany.[62] The interveners, Germany and the Commission sought to rely both on the Electricity Directive and on environmental protection. The Advocate General found the Directive not to be applicable to the facts of the case since the rules at issue were discriminatory. He thus proceeded to analyse whether, notwithstanding such discrimination, the rules could be justified under the Treaty on environmental protection grounds.

In this context, and after having criticised the reasoning in the *Walloon Waste* case, Advocate General Jacobs stated that that case demonstrated that it might be desirable that directly discriminatory measures be justifiable on environmental protection grounds. Thus, highlighting the confused state of the case law, he found the time ripe for the Court to clarify its position and that "a more flexible approach" is desirable in case of the imperative requirement of environmental protection. In order to strengthen his view, the Advocate General relied on Article 6 EC – which states that environmental protection is one of the principles informing all Community policies – finding that Article 6 is not merely programmatic but rather imposes legal obligations. Further, he found that since environmental measures are likely to be inherently discriminatory, a consideration reflected also in Article 174(2) EC [*ex* 130r(2)], which provides that "environmental damage should as a priority be rectified at source", the exclusion of discriminatory measures from the environmental protection justification would risk undermining the very purpose of the national measure. He thus suggested that environmental protection could be properly invoked in this case and proceeded to analyse the proportionality of the measure. He found that the fact that the measure was trying to rectify the damage produced by greenhouse gas emissions failed to satisfy the proportionality requirement, since energy produced from renewable sources outside Germany would reduce greenhouse gas pollution to the same extent. As to the whether or not the measure was justified because of possible loss of energy through transmission over long distances, the Advocate General left the assessment to the national court.

(c) The judgment of the Court

[61] Delivered on 26 November 1996, [1997] ECR I-5701, paras. 69-85, esp. para. 81ff.
[62] Para. 220 of his Opinion.

The Court found the rules at issue "not incompatible" with Article 28; after having found the measure to be capable – at least potentially – of hindering intra-Community trade, it proceeded to assess whether "such a purchase obligation is nevertheless compatible with Article [28]", having regard to its aim and/or the particular features of the electricity market.

The Court referred to various sources and reasons which made the measure not incompatible with Article 28: thus the measure sought to combat greenhouse gases, one of the main causes of climate change which both the Community and the Member States have pledged to combat in international Conventions. Further, the policy also aimed at protecting "the health and life of humans, animals and plants", and Article 130r(2) [now 176(2)] EC, as well as (after the entry into force of the Treaty of Amsterdam) Article 6 EC require environmental protection to be integrated in Community policy. The Court referred to the electricity internal market directive[63] then in force and to the fact that it is difficult to determine the origin of electricity once it is introduced in the distribution system. It drew support for this view from the Commission's proposal that a system of certificates of origin for electricity produced from renewable sources should be established in order to make trade in that type of electricity reliable and possible in practice. It the concluded that "in the current state of Community law concerning the electricity market, legislation such as … [that at issue] is not incompatible with Article [28] of the Treaty."

(d) Analysis

(i) Mandatory requirements and other justifications/derogations

The Court once again was called upon to reconcile the impossible: legitimate environmental concerns and its previous case law on free movement of goods. The Advocate General's suggestion that the Court should expressly allow discriminatory measures to be justified on environmental protection grounds, although attractive in principle, poses some problems: Article 6 of the Treaty provides that environmental protection must be integrated in the definition and implementation of all Community policies mentioned in Article 3 EC.[64] Article 3 EC lists the activities of the Community, which include both the abolition of customs duties, quantitative restrictions on import and export of goods and measures having equivalent effect (which seems of more direct relevance here) as well as the achievement of the internal market. It is thus clear that, in the case of secondary legislation, a measure that allowed discrimination to occur would thus be compatible with the Treaty if it was necessary for the protection of the environment. This would hold true even though secondary legislation must comply with Article 28 and 30: Article 6 seems to be *lex specialis* in this respect.

The problem, however, is whether Article 6 also constitutes a derogation from other Treaty provisions: i.e., whether Article 6 can be considered as *lex specialis* in respect of the prohibition for Member States to introduce quantitative restrictions and measures having equivalent effect. Article 6 seems to impose an obligation only upon

[63] Directive 96/92/EC [1997] O.J. L27/20.
[64] This principle has also been incorporated in Article 37 of the Charter of Fundamental Rights for the European Union.

the Community legislator: it is difficult to interpret it as a limitation on the Treaty free movement rights in the absence of Community harmonising legislation.

This might be the reason why the Court avoided following Advocate General Jacobs' analysis, preferring instead to employ rather sibylline reasoning: it is worth noting that the Court avoided mentioning both discrimination and justifications (whether Treaty derogations or mandatory requirements), suggesting instead that, rather than being justified, a discriminatory measure which pursues an environmental protection aim does not fall within the scope of application of Article 28. A similarly tortuous path had been followed in *Walloon Waste*, in which the Court relied upon what is now Article 176 EC in order to find that the measures at issue were not in fact discriminatory. The solution in *PreussenElektra* – the lack of any reference to discrimination and exclusion of the measure from Article 28 rather than justification – might indicate the Court's willingness to change its definition of a measure having equivalent effect.

So far, the Court has distinguished three types of measures which fall within Article 28 and are contrary to it unless justified by one of the Treaty derogations: first of all, quantitative restrictions. In this case, the prohibition contained in the Treaty is clear and the measure can be justified only by the Treaty derogations (a source of equal rank which so allows). The only uncertainty relates to absolute bans on imports; those were first considered by the Court to be a quantitative restriction, since they amount to a zero quota, but have more recently been assessed in relation to the mandatory requirements, thereby suggesting that a non-discriminatory import ban might be considered as a measure having equivalent effect.

Second, there is the category of discriminatory measures. These are – except in a few cases – automatically considered as measures having equivalent effect and, since they fall within Article 28, again, they can be justified only having regard to the Treaty derogations. This interpretation is partly teleological, discrimination on grounds of "nationality" being one of the "evils" that the Treaty sought to eradicate, and partly supported by the text of Article 30 which excludes arbitrary discrimination from its scope of application, thus suggesting that non-arbitrary discrimination must necessarily be justified.

The third group concerns indistinctly applicable measures. Those, according to the earlier case law of the Court, were to be considered as measures having equivalent effect only insofar as not adopted in order to pursue a mandatory requirement of public interest not inconsistent with Community law. Thus, an indistinctly applicable measure would fall within the scope of Article 28 only if not justified by the mandatory requirements. It could then be assessed whether it was justified by Article 30 (although this was more of an academic exercise, the scope of the mandatory requirements being broader than the scope of the Treaty derogations).

This "tripartition" allowed the Court effectively to police Member States' measures, while also achieving a desired level of flexibility in the scrutiny of contested measures without overstepping its judicial function in favour of a "legislative one". Thus, the mandatory requirements were viewed as something intrinsic to the definition of measures having equivalent effect.

The environmental protection cases, possibly together with *Decker*, might then suggest a shift in the definition of measures having equivalent effect. If previously discriminatory measures would have been automatically caught by Article 28, it is possible that from now on a discriminatory measure falls within Article 28 only insofar as not justified by the mandatory requirements or the Treaty derogations. Thus a measure, whether discriminatory or indistinctly applicable, would fall within the scope of application of Article 28 only in so far as not justified by the mandatory requirements or by the Treaty derogations (the use of which would be rather limited). There is no textual limitation to such an interpretation, since it is for the Court to interpret whether or not a measure has an effect equivalent to a quantitative restriction. However, it should be borne in mind that for consistency's sake this solution can be endorsed only if it is of general application and not limited to environmental protection cases. Whether this is a desirable outcome is for the Court to decide.

Should this not be the case, and should the Court feel that the problem arises only in environmental protection cases, then it could give a broader interpretation to the protection of health of animals, humans and plants. By reading these three grounds conjunctively as opposed to disjunctively, the Court could include the protection of the environment in Article 30 EC.

This is as far as Article 28 and 30 are concerned. However, as has been noted by other authors,[65] the case also seems at odds with another case on electricity. In *Outokumpu*,[66] the Court had to assess the compatibility of the Finnish taxation system for electricity with Community law. The Finnish rules provided different rates of taxation for electricity according to the source if production; thus environmentally friendly electricity benefited from a lower tax rate than electricity produced from polluting sources. Imported electricity was subject to only one rate, calculated having regard to the average tax rates applied internally: this method was chosen because it was allegedly not possible for the authorities to assess the way the electricity had been produced. *Outokumpu* thus complained that the system of taxation was discriminatory. Indeed, the effect of the average single tax rate was that energy produced from polluting energy sources abroad would benefit from a reduced level of taxation in comparison with the equivalent domestic energy, whilst non-domestic, environmentally friendly energy would be subject to a higher tax rate than domestically produced electricity. However, the system would still maintain the competitive advantage of domestically produced green energy *vis-à-vis* all other types of energy whether, even if imported.

The main issue was whether such a differentiated system of taxation must be considered discriminatory and thus inconsistent with Article 90 (*ex* 95) EC. Advocate General Jacobs found that the difference in treatment was justified because it was in pursuance of environmental policy and because there was no reasonable alternative. The Court, on the other hand, found that the Finnish rules did breach Article 90, since the rules at issue did not even allow the importer the opportunity to demonstrate that the energy had been produced according to a particular method. This statement seems inconsistent with the findings in *PreussenElektra* and it might be that *Outukompu* has

[65] See, e.g., Baquero Cruz & de la Torre, n. 51 above, at 498ff.
[66] Case C-213/96 *Outokumpu Oy* [1998] ECR I-1777.

been overridden and that a differentiated system of taxation would now be accepted by the Court. However, we are not entirely persuaded that that would, or indeed should, be the case. The purpose of the Finnish system of taxation was to ensure that green electricity would not suffer a competitive disadvantage *vis-à-vis* imported non-green energy which is cheaper to produce. The system put in place by Finnish law was rather draconian, in that it did not allow the importer the possibility to prove that the energy had indeed been produced in an "expensive" manner and that it should accordingly benefit from a lower tax rate. If such a possibility had been given to importers then the system would have achieved its goal. (And, indeed, the EC law requirement (laid down by Article 5(1) of the current Renewables Directive)[67] that Member States must provide for the certification of the origin of electricity now serves to facilitate this process.)

By contrast, the rules at issue in *PreussenElektra* seemed to have been adopted in pursuit of a more complex policy: not the production of green electricity *per se*, but the production of green electricity *in* the region. In that regard, Advocate General Jacobs's suggestion that, if there were a method to certify the origin of green electricity, the rules would not be necessary does not take into account the fact that environmental policy might be *regional*. Indeed, he recognised earlier in his Opinion that environmental policy is likely to be discriminatory due to this kind of regional basis.[68] This is entirely consistent with Article 174 EC, which provides that environmental damage should be rectified at source.

Thus, imported green electricity might not ensure the achievement of the purpose of a regional development of renewable energy which avoids concentration of pollution in those Community regions in which it is more difficult and expensive (due to a lack of natural resources) to produce green electricity. In this sense, the German policy not only pursued a national interest which deserves protection, but also a Community interest in a balanced development. It is, therefore, possible that the difference between the German and Finnish policy might justify the different findings of the Court. The Finnish policy was directed at ensuring that green energy could compete with imported as well as domestic, non-green electricity and the draconian rule was not strictly necessary. The German system, on the other hand, was directed at "subsidising" the regional production of green electricity: in this way, the additional costs of producing that type of electricity would be redistributed amongst all German consumers. The rule was thus necessary to achieve this goal.

This suggests that, even though its reasoning seemed somewhat confused, the Court has decided to maintain the dichotomy between Treaty derogations and mandatory requirements and their respective fields of application. However, the ruling does not present a solution to the problem, in that, as noted by Advocate General Jacobs, the case law of the Court in this field does not do much to help legal certainty. Thus, apart from the Advocate General's solution, some authors have suggested that the dichotomy between Treaty derogations and mandatory requirements be disposed of and that mandatory requirements be treated simply as additional grounds of derogation available both for discriminatory and non-discriminatory restrictions. The reasons which might lead to the Court choosing to avoid such a development have

[67] Directive 2001/77/EC on the promotion of electricity produced from renewable energy sources in the internal electricity market [2001] O.J. L 283/33.
[68] See para. 226ff of his Opinion.

been highlighted in more detail elsewhere: to do so would risk adopting what would amount to a judicial amendment to a Treaty provision and this would do very little to increase the legitimacy of the Court's activities. Furthermore, to allow discriminatory restrictions to be justified on environmental protection grounds without relying upon a Treaty provision entails not only a considerable departure from the Court's previous case law, but for reasons of consistency would also demand that all the mandatory requirements justifications also be available for discriminatory restrictions, which could be impractical, and this might very well be the reason which led Advocate General Jacobs to rely upon Article 6 EC instead.

What other solutions are available? It is submitted that the text of the ruling, together with a slight amendment to the interpretation of Article 30 could provide us with the solution to the problem. If we examine the judgment carefully:

- in para. 74 the Court highlighted that the EC and its Member States are members of UNFCCC and Kyoto Protocol, and also emphasised the importance of these environmental objectives as evinced by various Resolutions adopted, and programmes (such as ALTENER)[69] developed, by the Community; and

- in para. 75 the Court tied this discussion in with protection of health and life of humans, animals and plants, and thus explicitly connected such objectives with Article 30 EC (i.e. the express Treaty derogations from Article 28 EC);

- then, in para. 76 the Court underlined the legal requirement laid down in the EC Treaty itself that environmental objectives must be integrated into other EC policies (relying upon the old Article 130r(2) EC and the current Article 6 EC).

Drawing the strands of the earlier discussion together with this summary, this suggests that reliance upon Article 6 EC, possibly in conjunction with Article 30 EC, may well provide the most secure foundation for the approach taken by the Court in *PreussenElektra*, without doing significant violence to the approach taken by the Court in its previous case law on mandatory requirements under Article 28 EC.

(ii) Energy implications

The judgment is a clear recognition by the ECJ of the perceived need for EC action, since the Community has committed itself to emissions cuts under the Kyoto Protocol. The Court also emphasised the way that such action accords with declared policy priorities and earlier programmes within the EC. This statement forms a major contextual point for the rest of the relevant 'considerations' which it went on to take into account. It was also clear that major legislative proposals were known to be under

[69] See http://ec.europa.eu/energy/res/altener/index_en.htm for details of the ALTENER and ALTENER II programmes on renewable energy, whose objectives are now incorporated in the EC's 'Intelligent Energy – Europe' programme (on which see http://ec.europa.eu/energy/intelligent/index_en.html).

discussion, both in the field of greenhouse gas emissions trading schemes[70] and of a climate change programme in general.[71] The Court's permissive and hands-off approach here made sense in a climate of relative uncertainty as to the exact shape of future, specific legislative proposals in a sensitive area.

One might also highlight the potential dangers of the perhaps blunter approach under Article 28 EC, not allowing for the practical difficulties that might be encountered in the relevant situations under such national renewables promotion schemes. For example, Advocate General Jacobs suggested in his Opinion that the proportionality of the German measures might undergo quite strict testing by the national court when the case returned to it from the ECJ. He made a number of comments which highlighted particular areas in the operation of the StrEG which he thought would need further and careful investigation: it suffices here to highlight his argument that the generation of electricity from renewable sources in other Member States which could then be sold to Germany would be equally effective in securing reductions in greenhouse gas emissions, thus meaning that (for him) the claimed environmental justification for the restrictive effects of the StrEG upon trade was not proportionate to the goal to be achieved.

Interestingly, however (and published in the Official Journal almost contemporaneously with the Opinion of Advocate General Jacobs in *PreussenElektra*), the Commission in its Explanatory Memorandum to the proposal for what became the current Renewables Directive, explored some of these trade issues in the context of possible future harmonisation. The danger of the suggestion of Advocate General Jacobs that the nationality ground be removed and foreign electricity allowed access to the German grid on similar terms 'is that the co-existence of different schemes, even if open to foreign producers, may lead to distortions of the market, e.g. when all [renewables] producers will try to benefit from the national system offering the best conditions, e.g. in terms of prices paid'.[72] Furthermore, there was a generally perceived wisdom shared among those in the drafting and negotiation process that we are still at too early a stage to propose the exact shape of any more comprehensive harmonisation of these schemes – the Commission, the Economic and Social Committee and the European Parliament are at one on this issue. And it is tolerably clear that this position continues to prevail in 2008, during the process of negotiating the latest proposal for a new renewables directive.

[70] See the Commission Green Paper, 'Greenhouse Gas Emissions Trading within the EU' COM(2000)87.

[71] See the Commission's proposal at the time to establish a 'European Climate Change Programme' COM(2000)87.

[72] 'Proposal for a Directive of the European Parliament and of the Council on the promotion of electricity from renewable energy sources in the internal electricity market' COM(2000)279 final, 10 May 2000 ([2000] O.J. C311/320 (31 October 2000)), at 6. Advocate General Jacobs's Opinion in *PreussenElektra* was handed down on 26 October 2000.