Court of Justice upholds national limitations to renewables support schemes.

On 1 July 2014, the Grand Chamber of the Court of Justice of the European Union (“CJEU”) ruled in the case C-573/12 Ålands Vindkraft AB v Energimyndigheten that the Swedish renewables support scheme, which promotes the production of green electricity on Swedish territory, is compatible with Directive 2009/28/EC1 as well as with the free movement of goods.

Context

In Sweden, green certificates may be awarded to renewable electricity production installations on Swedish territory. These certificates are sold in turn to electricity suppliers or other users that are obliged to achieve certain “quotas” of green certificates, proportionate to the amounts of electricity they supply or use. Specific fees are due by suppliers and users holding insufficient green certificates. The certificates are meant to form an additional source of income for green producers, which can help cover the higher cost of renewable production.

In 2009, Ålands Vindkraft AB sought approval from the competent Swedish authority, Energimyndigheten, to be awarded green certificates for its wind farm located in the Åland archipelago in Finland. The Swedish authority refused the application on the ground that, under Swedish law, green certificates can be awarded only to installations located in Sweden. This notwithstanding the fact that Alands’ wind farm is connected to the Swedish electricity distribution network and the green energy produced is delivered only in Sweden.

Ålands Vindkraft AB subsequently brought an action before the Swedish Administrative Court Förvaltningsrätt i Linköping to obtain annulment of the decision of the Swedish authority and seeking approval of its application. Ålands Vindkraft AB argued that the refusal is in breach of the free movement

of goods laid down in Article 34 of the Treaty on the Functioning of the European Union ("TFEU"). According to Ålands Vindkraft AB, the Swedish system leads to a situation where approximately 18% of the Swedish electricity consumption market is reserved to Swedish green electricity producers, to the detriment of electricity imports from other Member States.

The Swedish Administrative Court decided to refer the case for a preliminary ruling to the CJEU.

**European Court Ruling**

On the first preliminary question, the CJEU ruled that the Swedish renewables support scheme, insofar as it supports the production of green electricity, falls within the scope of the RES Directive. Furthermore, the CJEU noted that Member States implementing a support scheme are not required to extend their support to green electricity produced in other Member States.

On the second preliminary question, the CJEU recognised that the Swedish support scheme may impede the import of electricity produced in other Member States, especially green electricity. This is because users and suppliers needing to hold a certain number of green certificates will contract with producers offering those certificates and buy whole electricity packages from the same producers. Consequently, the support scheme is considered a restriction of the free movement of goods, as laid down in Article 34 TFEU.

However, according to the established case law of the CJEU, restrictions to this principle may be justified on one of the grounds listed in Article 36 TFEU or by overriding requirements. Justification is possible to the extent that those restrictions are proportionate, meaning that restrictions must be appropriate to attain their objective and must not go beyond what is necessary in order to achieve that objective (e.g., Commission v Austria, C 524/07, Pb. C. 2008, 717, para 54).

Applying these principles to the Swedish support scheme, the CJEU held the restriction to be justified by the public interest objective of promoting the use of renewable energy sources, so as to protect the environment and combat climate change. Furthermore, the CJEU acknowledged that, for the purpose of achieving that objective, the measures taken justifiably target the production stage rather than the consumption stage. In addition, the CJEU stated that, according to the current state of EU law, which does not provide for harmonisation of all national renewables support schemes, Sweden could legitimately preserve its support scheme to the national production of green electricity, to attain the abovementioned public interest objective.

Finally, the CJEU referred to its established case law and noted that it is up to the referring court, taking into account all relevant elements, to determine whether or not the Swedish regulation (including the renewables support scheme) implementing EU law, is compatible with the general principles of law, especially with the principle of legal certainty. (e.g., Plantanol, C 201/08, Pb. C. 2009, 539, para 43 et seq.)
It is noteworthy that the CJEU did not follow Advocate-General Y. Bot, who went in another direction with his conclusion of 28 January 2014. In his opinion, the Swedish support scheme was incompatible with Article 34 TFEU and could not be justified by any of the justification grounds laid down in Article 36 TFEU. Furthermore, he argued that the provisions (e.g., Article 3, para 3) of the RES Directive, enabling Member States to exclude or restrict renewable energy producers from other Member States from the award of green certificates, are invalid.

It can be assumed that, with this judgment, the CJEU has determined its position. Deviating from this in the near future will not be self-evident.