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Innehåll/Content

Introduction

Gabriel Michanek, editor

Nordic Environmental Law Journal has now existed for two years. This is the fifth issue. The group of editors was recently extended to four persons. Professor Gabriel Michanek (Sweden) remains chief editor. Professor Helle Tegner Anker (Denmark), professor Ole Kristian Fauchald (Norway) and professor Timo Koivurova (Finland) are new co-editors.

This issue includes four articles. The first is written by William Henry Clune: *A Comparative Law Analysis of the Use of State-Level Green Procurement in the European Union and the United States*. Green procurement is used as a tool to achieve state level environmental policy objectives. There is a tension between federal economic goals and state procurement objectives. Clune examines how federal laws compare under both systems in promoting or restricting state level environmental procurement practices.

"Path dependence" is a well known concept in e.g. political science and economics, but rarely debated in academic legal research. The title of the second article is *Path Dependence in the Legal System: Implications for the Development of Wind Power*. Maria Pettersson defines "institutional path dependence" as decisions made in the past that affect future choices. Since the planning and location of energy installations, such as windmills, typically involves application of legal rules that to various extents are coloured by path dependence, the transformation of the energy system may prove difficult. Pettersson suggests in fact that path dependence of the legal regimes affecting wind power development in some instances is significant and that policy implementation therefore may be seriously hampered.

Also Katelijn Van Hende addresses energy policy issues, in her article *Internal and External Policy and Legal Challenges in the EU in Achieving a Sustainable, Competitive and Secure Internal Energy Market and the Integration of Electricity from Renewable Energy Sources into the Energy system*. Van Hende analyses the interrelationship between the three policy objectives – sustainable development, competitiveness and security –, as well as their relationship to the objective of integrating electricity from renewable energy sources.

The flexible cap and trade system conflicts in several respects with other legal instruments also used to mitigate emissions of green house gases. The fourth article, by Sebastian Houe, relates to this conflict: *Regulering af CO_2 med afgifter og kvoter – en dobbeltregulering?* Operators of activities falling under the Danish cap and trade system for CO_2-emissions were released from a CO_2 fee, which was seen as an unnecessary double regulation of the activities. In 2009, the EU commission disapproved the Danish exemption, due the EU provisions on state aid and harmonisation of energy taxation. The article examines the problem related to the Danish fee exemption, including the decision by the Commission and its consequences for Denmark.

A Comparative Law Analysis of the Use of State-Level Green Procurement in the European Union and the United States

William Henry Clune

Abstract

This paper undertakes a comparative law analysis of the use of state level procurement in the European Union and the United States to achieve state level environmental policy objectives. In both places, it is the tension between federal economic goals and state procurement objectives that continues to define the legal and operational contours of this field. As such, the questions to be examined relate to how federal laws compare under both systems in promoting or restricting state level environmental procurement practices. It is initially observed that the market participant exception to the dormant commerce clause gives U.S. states significant additional freedoms in their exercise of many procurement activities. However, recent and expanding Union legislative and judicial doctrines appear to be levelling the field in some respects. And in particular, as states in both the Union and the U.S. are increasingly relying upon green public procurement to play important roles in driving ambitious environmental and economic policy strategies, there may be some convergence between the U.S. and European systems in granting greater levels of flexibility to state procurement practices that are part of more complex projects.

1. Introduction[1]

The subject of this paper is a comparative law analysis of the use of state level procurement in the European Union ("the Union") and the United States ("the U.S.") to achieve state level ("local") environmental policy objectives. And the questions to be examined relate to how federal laws compare under both systems in promoting or restricting state level environmental procurement practices.

In fact, it's possible to make some clear comparisons between the general ways in which the European and U.S. systems operate. Specifically, both federal systems secure economic and free market rights, and the states (either U.S. states or European member nation states) operate semi-autonomously within their federations. Therefore, while state procurement activities are bound in both places to comply and not contradict with federal laws, it is precisely this tension between federal economic goals and state procurement objectives that continually defines the legal doctrines in this area.

It is with some irony, then, that it can be observed that U.S. states enjoy significant additional freedom in their exercise of many procurement activities as compared to Union member states even with their greater national sovereignty. One U.S. legal doctrine, the market participant exception to the dormant commerce clause, is primarily responsible for this divergence.

However, this is only the beginning of an intriguing comparison between the two systems, because it turns out that the strength of the market participant exception in the U.S. may decrease with the increasing complexity of

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many kinds of procurement projects. Simultaneously, Union legislative and judicial doctrines appear to grant greater levels of flexibility to state procurement practices that are part and parcel of more complex projects.

In fact, states in both the Union and the U.S. are increasingly relying upon public procurement to play an important role in driving ambitious environmental and economic policy strategies. Indeed, state procurement activities in both places are often part of legally and structurally complex undertakings with multiple objectives and complicated financing arrangements. And in these types of situations, there is some convergence between the U.S. and European systems as to how much freedom states have in their use of public procurement.

1.1. Defining State Procurement

State procurement goals may involve reducing environmental impacts from purchases, such as requiring public power generation utilities to purchase less polluting fuels. But green procurement is just as likely to involve incentivizing the growth of private green industries, such as linking public fuel purchases to specific renewable energy-producing sectors. And green procurement is equally about influencing the environmental behaviours of private market actors, such as mandating waste recycling and then building collection networks and facilities that permit or preference certain types of materials. Simply put, a state purchase of goods or services may, itself, be the environmental goal, but may, increasingly, be a means to other environmental goals.

In fact, the legal landscape in this area in both the Union and the U.S. has been driven in recent years by these types of combination procurement objectives involving a mix of private and public actors. As such, the legal and programmatic analysis in this paper will focus on several important areas of state procurement policy: material usage (including state purchasing and incentivizing of local products), state level recycling programs (including state purchases of goods and services, and which represents local decisions about material re-usage), waste disposal (also involving state purchases of goods and services, and which concerns state policies regarding long-term material non-usage), and state energy policies (particularly state purchasing, incentivizing, and support of renewable energy supplies and infrastructure).

1.2 Scale and Potential of State Procurement

Since the impact of state procurement on environmental goals increases with the state's share of the economic market, some information on size and scale may be a good way to start thinking about programmatic potential. For the Union as a whole, public spending (at combined local, state, and federal levels) as a percentage of GDP is approximately 45%.[2] In the United States, this same figure (also at combined local, state, and federal levels) is approximately 40%.[3] At these aggregated levels, then, the relative sizes and potential markets appear comparable.[4]

Obviously, though, total expenditures don't isolate spending for procurement, and

[2] See European Commission Economic Paper (2008); and see OECD Report (2003); and see Audet, D (2001).

[3] See US Department of Commerce Report (2011); and see Audet, D (2001).

[4] It should also be mentioned here that there are a number of factors that make creating accurate figures difficult in the environmental public procurement context: first, there are fundamental differences (and uses) of corporate and government accounting systems; next, government activities are often non-economic (non-market) goods, which can be difficult to assign values to; and, finally, these valuation problems are also found within the resulting environmental benefits, because these are also often non-market, aesthetic, and/or difficult to quantify. See European Commission Economic Paper (2008).

many government outlays need to be eliminated. But even when this is done, and all that remains is government spending for goods and services, many estimates still include government employee wage compensation; importantly, this expenditure should also be eliminated as it pertains to regular employees, whereas wages paid to service providers should be retained in procurement accounting.[5]

Looking to state level expenditures as a percentage of GDP for selected European member states, the first thing that becomes clear is how variable government spending for procurement (excluding government employee wages) is across nations: Hungary = 18%; Sweden = 15%; Austria = 12%; France = 9%; Germany = 7%; Belgium = 5%.[6] In fact, these figures show a variation of more than 300% between the highest and lowest procurement expenditures found in the Union. This may also indicate disparate potential impacts from environmental procurement projects.

Comparable figures for U.S. states are hard to find directly. However, some commentators have done studies estimating that as much as 50% of total state expenditures in the U.S. are used for the procurement of goods and services.[7] Using this simplified estimate in conjunction with detailed state-level finance data from the U.S. census, may allow some reasonable comparisons to be made for selected U.S. states, including the three largest states by GDP (California, Texas, and New York) and one smaller GDP state by way of comparison (Alabama).[8] Taking half, then, of overall state expenditures compared to state GDP figures produces the following estimates: California = 11%; Texas = 8%; New York = 12%; and Alabama = 10%.[9]

There seems to be less variation in expenditure levels between this small sample of U.S. states than was found in the Union. But overall, these levels appear comparable to those found in European member states, which suggests the potential impacts and benefits of environmental state procurement may also be comparable. On this point, again, the magnitude of these numbers doesn't demonstrate overwhelming buying power in state economic markets.[10] In fact, it has been claimed that the further procurement purchasing gets from centralized (federal) or cooperative (inter-state) action, the smaller the market shares become and the less effective it is for affecting policy goals.[11]

However, as already discussed, state purchasing may not only be an environmental end in itself, but may be part of much broader and inter-connected environmental and incentive goals. Obviously, the aforementioned market impacts and potentials may be greatly leveraged in such cases. This leveraging effect may be necessary for markets where states have little buying power, and may, on the other hand, be optimal for exploiting significant environmental gains in markets where states do have more significant market shares. While the legal context of these types of projects is certainly more complicated and uncertain, they also hold the greatest potential for states wishing to affect large scale, positive environmental impacts.

[5] See OECD Report (2000); OECD Report (2002); OECD Report (2003); and see Audet, D (2001).
[6] See OECD Report (2000); and see Audet, D (2001).
[7] See McCue, CP et al (2003).
[8] See US Department of Commerce Report (2011).
[9] Id.
[10] But see European Commission Report (2004), which points out that in specific markets, state governments may be more influential purchasers.
[11] See Audet, D (2001).

1.3 Examples of State Environmental Procurement Projects

Guidance from The European Commission and U.S. federal government for purchasing and procurement projects promotes the environmental lifecycle criteria, but also strongly emphasizes the use of widely accepted methodologies and technical standards.[12] Clearly, federal governments are protective of their internal markets, and may be seeking to avoid the types of legal confrontations and entanglements outlined in the sections below by employing more conservative approaches. So, for example, engineering and environmental standards that have already achieved consensus throughout the Union appear to be safe ground for inclusion as specifications in member state purchasing contracts.[13]

State and local environmental procurement programs, while having much in common with the federal programs, are also situated quite differently with respect to economic and legal constraints, and, perhaps, with respect to considerations about how to optimize impacts. While the following examples of state programs reflect the environmental and federal-state balancing issues introduced in the preceding sections, they also describe the full range of common practices for environmental procurement projects involving complex and mixed strategies.

San Joaquin: Buy Local, Buy Green

The "Buy Local, Buy Green" initiative in San Joaquin, California, is a collaborative marketing and procurement program undertaken by local businesses and the municipal government.[14] In contrast to the other examples in this section, this project isn't specific to any given category of goods or services, but is an attempt to get all regional private and public consumers to buy everything and anything from local producers and suppliers.

The fact that this program is legal in the U.S. will be an important point of departure from the situation in the Union, where it most certainly would not be allowed to stand.[15] The program's justifications are explicit and twofold: first, environmental benefits from reduced carbon emissions resulting from reduced transport driving distances; second, buying locally stimulates the local economy. Even this obviously discriminatory economic intent and impact is allowable, which will require some explanation later to square with the fact that distortionary burdening of interstate free markets is also protected against in the United States.

Austria: Material Usage

Next, consider a relatively simple example from Austria of hospital supply purchasing. Following a 1993 law requiring green procurement by all government agencies, Austria implemented several successful programs regarding purchases of building materials, office equipment, and cleaning supplies. To support these programs, Austria

[12] See US EPA Final Guidance (1999); and US EPA Guidelines (2011); and European Commission Report (2004).

[13] See, for example, European Commission; *Green Public Procurement Thermal Insulation Technical Background Report* (2010) at page 2 ("The core criteria are those suitable for use by any contracting authority across the Member States"). But note, even with technical specifications the Union may require an "or equivalent" provision that can, itself, be defined by its acceptance by another member state. See *Dundalk Water*, 45/87.

[14] See Greater Stockton Chamber of Commerce, *Responsible Purchasing Policy* and *Buy Local, Buy Green*.

[15] Cf *Commission v. Ireland*, 249/81 (a "buy Irish" government campaign, that didn't involve any other activities giving in-state undertakings any competitive advantages, and didn't necessarily result in any actual discriminatory results, was still prohibited as a state measure potentially discriminating against imports).

created an extensive catalogue of all products and supplies required to operate their agencies as a way of controlling purchasing and ranking the best environmental options.[16] The Austrian government also created its own eco-label to more broadly communicate its environmental assessments and to influence other, primarily Austrian, suppliers and manufacturers.[17]

For instance, The Vienna Hospital Association examined its use of detergents and cleansers in the context of its ordinary and medical requirements. Through this process, it reduced 120 cleansing agents found in its products to less than 40, thereby reducing chemical pollution to municipal waste-water.[18] In addition, the hospitals phased out PVC-packaging materials, thereby reducing burdens on municipal waste disposal.[19]

California: Recycling

Turning to another U.S. example, consider a California procurement program called The State Agency Buy Recycled Campaign ("SABRC") requiring state agencies to buy products with high recycled content.[20] As background, there are no federally mandated recycling programs, and most of the garbage collection, garbage disposal, and recycling also occurs at state and local levels, either owned publicly, or procured as services from private companies. Under the California program, a variety of purchasing goals are established that include, for example, reducing the purchase of white paper, reducing the purchase of any products made with virgin materials, increasing the percentage of recycled or used materials in products, and influencing state suppliers from the private sector to increase their use of recycled materials.[21]

For a state recyclable content procurement program to work well, however, there must be several other steps present in this process, including, at minimum, local collection and transportation. And, in fact, California public entities are involved in most of these other steps. For example, The California Beverage Container Recycling and Litter Reduction Act contains a deposit refund program in which a refundable tax is applied to all beverage containers to encourage their collection by operation of the fee redemption.[22]

And the process continues, because many recycling centres for materials like glass, aluminium, and paper in California are also publicly owned. With respect to paper, most of the actual recycling is done when it is sold to the pulp and paper industry, private undertakings, which then sell their new products (containing recycled content) back to consumers (including the state). The interesting point here is that the state of California's recyclable content procurement program is part of a larger state policy, in which the state exerts simultaneous influence as buyer, collector, and seller of recyclables.

Sweden: Biogas Infrastructure and Vehicles

Sweden has become actively involved over the last 15 years in projects related to biogas fuels and biogas vehicles. And, importantly, Swedish green procurement policies are driving components of these projects. In fact, taken together, these projects could reasonably be described as extensive and ambitious state efforts towards developing the technologies for producing biogas and biogas vehicles, and creating the critical demand and supply

[16] See Ines, O (2001).
[17] Id.
[18] Id.
[19] Id.
[20] See California PCC, Sections 12153-12156 (2009).
[21] Id.
[22] See California Division 12.1, Sections 14500 et seq (2010).

necessary for the long-term viability of the economic markets.[23] And, at present, Sweden's use of the biofuel it produces is among the highest in the world, using more than 50% of approximately 1.2 TWh of its biofuel energy production in 2006: with the largest portion of this domestic use (almost 25%) being used for vehicle fuelling.[24]

These biogas and biogas vehicle projects are being realized through many connected state and municipal activities, including and with participation and partnerships from the private sector. Funding, however, has been coming from Sweden in large amounts for many years: for example, according to the Swedish Energy Agency, during 2009 alone the government granted SEK 150 million (about $20 million) to promote and develop technology in the biogas sector; this money was distributed to a variety of public, private, and mixed groups involved in developing biofuel vehicles of every type, producing biogas, improving fuel production processes, and the like.[25]

And at the centre of these biogas investment projects is extensive state and municipal purchasing. In fact, as large as have been the research and development grants in this area, based upon the numbers outlined below Sweden has also spent a large amount of money in purchasing biogas vehicles, the biogas to run them, and all the related infrastructure and construction projects. Since 2009, all automobiles purchased by the Swedish government must be green cars.[26] In 2008, The City of Stockholm had 82 biogas buses and 60 biogas garbage trucks in operation.[27] By 2002, Linköping had replaced all of its diesel buses with biomethane buses, and had the world's first biogas train service.[28]

In 2003, it was estimated that there were more than 7000 biogas and natural gas vehicles being operated in Sweden, with the state and municipal sectors being responsible for a significant part of this purchasing.[29] More recent estimates suggest that these numbers have increased dramatically, with biogas vehicle purchases in 2007-2008 alone estimated at nearly 13,000 new vehicles, and with a growing consumer (non-state) share of the market.[30]

Sweden has also offered fiscal policy incentives over many years to households and consumers for the purchase of biogas vehicles. For example, through 2009 green car purchases, including biogas cars, were eligible for an SEK 10,000 government rebate, and many Swedish municipalities still offer free parking for green cars.[31]

An important point related to vehicles is that grants have been given for many years by the Swedish government to joint public-private research and development consortiums to subsidize technological advancements and economic development for biogas cars and trucks. Typically, and for example, the grant applicant is a regional, pro-business development body like Business Region Göteborg ("BRG"). However, the SEK 19,000,000 grant that BRG received last year from Sweden for its "BiMe Truck" program to develop viable

[23] Actually, what's presented here is a sample of the activities and organizations involved, but research suggests that these only scratch the surface of the true numbers in Sweden of currently active participants, stakeholders, and project partners.

[24] See Petersson, A (2009). And note: much of this fuel purchasing is done by the state, which, as shall be discussed, has acquired a significant fleet of biogas vehicles.

[25] See Swedish Energy Agency Press Releases (2011).

[26] See Naturvardsverket Report (2009).

[27] See SenterNovem Report (2009).

[28] See IEA Bioenerg (2006).

[29] See Jonsson, O et al (2003); and see Rydberg, T et al (2010).

[30] Id.

[31] See Östersunds Kommun Report (2009).

economic markets for new biogas heavy duty trucks is being spent in working partnership with Volvo, a Swedish-based private company that is also a world leader in developing biomethane diesel engines.[32]

The state's influence through green procurement also extends to both supplying inputs from and producing biofuels at its waste and sewage collection facilities. Among ongoing procurement projects are plant construction and upgrades to allow wastes to be transformed into biogas, and to increase plant capacities.[33] For example, Stockholm Vatten, the municipally-owned water company[34] has been involved for many years with treating sewage to produce biofuels: at the Hendriksdal treatment plant in Stockholm, anaerobic digestion of sewage produces upwards of 1,400 Nm3/h of biogas.[35] And, Stockholm Vatten's biofuel production is now tied to the city's procurement of green vehicles because the water company signed contracts with the City Council to supply the biogas required for the city's purchase of 120 new biogas buses.[36]

Of course, the private sector in Sweden has grown right along side the public sector in biogas production, including, for example SvenskBiogas AB and FordonsGas AB. And again, Swedish undertakings in this sector have benefited over the years from state funding. For instance, AGA Gas AB, a private Swedish energy undertaking[37], received SEK 17,300,000 from government grants in 2010 to improve the liquefaction process for biogas.

Additionally, from only a few biogas stations in Sweden just a few years ago, there are now over 100 biomethane re-fuelling stations in the country.[38] And, this is obviously quite important to anyone's decision to buy biogas cars, since they would not be attractive products, or effective parts of an environmental procurement strategy, without convenient places to refuel. These days, Swedish and other regional private companies also play integral roles in this growing re-fueling and fuel transport infrastructure; for example, AGA Gas AB transports biogas made at the Henriksdal facility to neighbourhood Shell service stations.[39]

And, no doubt, publicly subsidized projects and grants have also facilitated the private sector's entry into and expertise with these infrastructure and service roles. For instance, the state-subsidized BiMe Truck economic development program mentioned above also includes FordonsGas AB, a private company[40] dominant in Sweden in biogas refuelling infrastructure.

The success of these Swedish biogas projects from an environmental and economic perspective looks real. As with the following example from the U.S., the legality of these Swedish programs, particularly their procurement aspects, will be discussed after the relevant legal frameworks are examined.

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[32] See Swedish Energy Agency Press Releases (2011); and see Business Region Göteborg (2011); and note: to be precise, Volvo has had a dominant Swedish presence during the last 15 years of state granting, even though it was also owned by Ford. Volvo was recently bought by Geely, a Chinese company.

[33] See Balkenhoff, B et al (2010).

[34] Stockholm Vatten is owned by Stockholm Stadshus AB (98%), which is itself owned by City of Stockholm, and Huddinge municipality (2%); See Stockholms Stadshus AB, Annual Report (2009).

[35] See Hellström, D (2009).

[36] See Balkenhoff, B et al (2010). And, on the city's side, of course, was a matching green procurement item, the purchase of biogas from Stockholm Vatten.

[37] AGA is a wholly-owned subsidiary of the DAX-listed Linde Group; see The Linde Group, Annual Report (2009).

[38] See Balkenhoff, B et al (2010).

[39] See Held, J et al (2008) at page 68.

[40] FordonsGas AB is also half-owned by a private Danish company, Dong Energy; see Dong Energy, Annual Report (2009).

Arizona: Renewable Energy

Consider next a U.S. example from the energy sector, where a majority of states now have some form of Renewable Portfolio Standard ("RPS") or Environmental Portfolio Standard ("EPS") that requires a percentage of the state's electricity demand to be purchased from renewable sources. Often this threshold requirement is targeted to increase over time, and these mandates apply to a wide variety of private, public, and mixed producers, wholesalers, and distributers of energy.

In Arizona, for example, an EPS program requires that renewable energy (primarily solar and wind) supply 3% of in-state electricity demand in 2011, set to rise to as much as 30% by 2025.[41] Among those affected by the EPS mandates, are both the Arizona Salt River Project, one of the largest publicly-owned utilities in the U.S. that supplies Phoenix (Arizona's largest city) with power, and the Arizona Public Service Corporation, Arizona's largest private utility company. In addition, to offset the higher cost associated with using renewables to generate electricity, the Arizona Corporation Commission (the state utility agency that regulates the field) levies an EPS surcharge tax on all its in-state and out-of-state residential and commercial customers.[42]

Alongside the EPS, however, Arizona has also launched in recent years a variety of multi-million dollar solar and wind energy incentive programs to benefit in-state actors by offering generous tax credits, deductions, and exemptions: for the support and recruitment in Arizona of renewable energy manufacturing, supply, and support companies; for commercial installation of solar capacity; for residential installation of solar panels; for sales tax rebates for equipment purchases associated with wind power production, and so on.[43]

One initial observation, Arizona's EPS is legal.[44] And this point will be set aside for now, even if it looks like the state (as with Sweden's involvement in biogas) is using an inter-connected strategy of procurement, purchasing mandates, and taxes (including taxes that affect its out-of-state customers) to benefit (directly and indirectly) in-state renewable energy undertakings. In any case, Arizona, like California and several other states undertaking this combination of mandates and subsidies, is clearly leveraging its public role in the electricity market (as purchaser, owner, operator, and regulator) to broadly and aggressively influence the environmental behaviour of many in-state actors and market participants to create long-term supply and demand for renewable energy and related businesses.

2. Legal Frameworks in the European Union and the United States

The following legal frameworks and cases describe ongoing developments in the Union and the U.S. that are related, on the one hand, to balancing environmental objectives against those of the free market, and, on the other hand, how this process has become increasingly defined with respect to a local environmental focus. In fact, the most important legal aspects of state procurement activities are also related to this same balancing process. And the economic sectors discussed in most of the following cases, such as recycling, waste disposal, and energy policy, remain illustrative,

[41] See Arizona AC R14-2-1801 et seq (2007).
[42] Id.
[43] See Arizona SB 1403 (2009).
[44] And so is Illinois' RPS, which also contains provisions requiring that part of its renewable energy quota be purchased from in-state suppliers. See IL HB6202 (2009).

if not squarely in the centre, of the main legal considerations for environmental procurement.

2.1 The European Union

As in the U.S. system, federal primary law protection of free markets and economic integration remains one of the main legal constraints on many state activities, including environmental goals. After setting forth these basic treaty protections, the cases applying them to the environmental area will be examined. These foundational cases not only demonstrate the important principles developed by the European Court of Justice ("CJEU") to balance economic freedoms against local environmental objectives, but they continue to relate directly to legal issues surrounding state-level use of environmental procurement policies.[45]

Starting with Article 26 TFEU of The Treaty of Lisbon, the internal market is established:

The Union shall adopt measures with the aim of establishing and ensuring the functioning of the internal market ... [which] shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured.[46]

With respect to state procurement activities, which potentially involve the purchase of goods and services, but which also may affect the creation or re-location of business enterprises, most of the aforementioned free movement rights are applicable: Articles 34 and 35 TFEU pertain to goods; Article 49 TFEU applies to establishment; and Article 56 TFEU applies to services.[47] Importantly, and as compared to competition law, these provisions related to Union commercial practices are primarily concerned with state measures, and preventing state laws and actions from burdening free markets.

And while these economic freedoms operate legally in somewhat different ways, the basic protections are common to all of them. For example, the relevant provisions related to the free movement of goods read as follows: "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States."[48]

However, these economic rights are not absolute. For example, Article 36 TFEU defines the strongest class of possible state restrictions to the free movement of goods based upon justifications of "public morality, public policy, or public security."[49] While these categories sound rather broad, the CJEU protects free market interests vigorously, and only the most serious state interests will qualify.

Environmental protection, by comparison, is not an Article 36 derogation, but is one of the many legitimate public policy exceptions known as "mandatory requirements" that may, in some cases, permit a restricting of economic free movement.[50] And in considering the application of mandatory requirements, the Court

[45] In fact, state environmental interests had little or no presence in the governing treaties for much of the history of The European Communities, whereas economic and internal market goals were always of primary treaty importance. See Edward, D (2008) at page 4 ("So it is not surprising that, by the time environmental protection became a matter of serious public concern, there was already a substantial body of case law limiting any action on the part of Member States that might hinder the free movement of goods").

[46] See Article 26 TFEU. And to understand the historical importance to the Union of economic integration and the economic free movement rights is to understand their role, not only in promoting the creation of wealth, but as the central part of an ambitious peace-making enterprise. See Chalmers (2010) at Chapter 16.

[47] See Articles 34, 35, 49, and 56 TFEU.

[48] See Articles 34 TFEU.

[49] See Articles 36 TFEU. And note: while this treaty-based class of derogations are slightly different with respect to services and establishment, their general content and application is similar to that of goods.

[50] These mandatory requirements are court-created categories of derogations. See *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* ("*Cassis de Dijon*"), 120/78.

always applies proportionality, its principle balancing test, to ask if the public policy exception is proportionate to its claimed objectives when balanced against the costs of restricting treaty-protected free movement doctrines.[51]

Two additional treaty provisions, pertaining to taxation and state aid, should also be mentioned briefly.[52] Article 110 TFEU specifically prohibits tax discrimination that "directly or indirectly" imposes any tax on the products of other states "in excess" of that imposed on domestic products.[53] Taxation, as has already been seen in the examples above, is often a supporting component of state environmental and procurement projects, but, moreover, comes in many forms. In addition, Article 107 TFEU, prohibits "any aid" in "any form" by means of state resources that favours "certain undertakings or the production of certain goods."[54] In fact, state aid burdens out-of-state undertakings in a different manner than discriminatory taxation, by giving assistance to in-state undertakings that are competing with out-of-state (and un-aided) businesses.[55]

In fact, these principles of free market protection, as well as some of the specifically prohibited practices just mentioned, are the subject of many of the most important environmental and procurement cases in The Union. Starting, then, with *Waste Oils*, which was decided before environmental goals had a treaty basis, it was noted that environmental protection did appear in the preamble to the controlling oil recycling directive.[56] However, the CJEU found that the French law prohibiting the exportation of waste oil for recycling elsewhere (as opposed to within France under state-created programs) violated treaty protections of the free movement of goods.[57] By way of examining local environmental programmatic goals, cases like this one began defining when waste products would also be considered protected, commercial goods.[58]

By contrast, the CJEU in the *ADBHU* case applied proportionality in determining that some restrictions on economic free movement were justified by legitimate state environmental objectives.[59] Here, French prior approval requirements for exporting waste oils were justified by the need to ensure that the eventual disposal in some other Member State was

[51] See Article 5 TEU.

[52] On the other hand, legal doctrines related to services of general economic interest ("SGEI") will not be examined. See Article 106(2) TFEU. The provisions related to SGEI, or public services, note that while competition law still applies to undertakings entrusted by the state to undertake these services, they must still abide by competition law, but only so far as the "application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them." This area of law is certainly relevant to procurement, insofar as it applies to increasingly common mixed public-private buying and service arrangements. But since the focus of this paper is primarily the law's relation to state activities, analyzing the legal status of these private enterprises under competition law will not be considered here.

[53] See Article 110 TFEU.

[54] See Article 107 TFEU.

[55] But, the significance of both prohibitions is the simultaneous and closely-related prevention of state economic patronage of in-state undertakings and interference in the specific or general functioning of free markets.

[56] Syndicat national des fabricants raffineurs d'huile de graissage and others v. Groupement d'intérêt économique "Inter-Huiles" and others ("Waste Oils"), 172/82.

[57] Id at ¶ 14 ("Clearly the environment is protected just as effectively when the oils are sold to an authorised disposal or regenerating undertaking of another Member State as when they are disposed of in the Member State of origin").

[58] At this point, then, wastes that were, in fact, going to be transformed back into useful products were protectable goods.

[59] Procureur de la Republique v. Association de defense des brûlleurs d 'huiles usagees (ADBHU), 240/83.

"carried out in a way which avoids harm to the environment."[60]

In *Walloon Waste*, the last of the waste cases, the environmental policy goals were almost entirely local when The Commission challenged a Belgian law prohibiting the importation of waste into the country for disposal based upon environmental protection justifications.[61] The CJEU allowed the law to stand, even after noting that waste is a potentially valuable good under Article 34 TFEU, and, therefore, protectable as against state measures restricting movement and import.[62] The important step that distinguishes this case from previous rulings on this subject is the Court's characterization that waste "is matter of a special kind" because it can cause environmental harm. On this basis, environmental protection can justify restricting the movement of wastes into and through member states.

But, what's more, the *Walloon Waste* Court upheld this result against the Commission's argument that Belgium was still making an untenable discriminatory assumption that hazardous waste produced out-of-state was somehow more hazardous or environmentally harmful than hazardous waste produced in-state. The Court concluded that because of these "special" characteristics of waste it must "accordingly be disposed of as close as possible to the place where it is produced, in order to limit as far as possible the transport of waste."[63] In all of these ways, the ruling is quite favourable to local environmental interests and policy-making.

Turning to the recycling cases, there seems to be a similar progression, both in terms of a re-balancing in favour of environmental interests and in treating local policy concerns with increasing deference. Starting with the *Danish Bottle Case*, the Court agreed that environmental protection was an "essential" European Union objective, but it firmly limited its application when balanced against free economic movement rights.[64]

Compare this result to the more recent decision in *Radlberger*, which involved a German deposit-and-return requirement that similarly imposed costs and burdens on beverage makers who produced large proportions of non-reusable containers.[65] In fact, in this case the burden was found to be discriminatory, as foreign suppliers tended to use more non-reusable materials. Nevertheless, the CJEU allowed, in principle, that this type of program would be permissible given the importance of environmental objectives. In finding against the specific law at issue in this case, the Court's main requirement was that foreign producers be allowed a "reasonable transitional period" to adapt to the new program.

From the renewable energy area, the Court in *Outokumpu Oy* did not allow a Finnish tax scheme to stand that charged lower rates for locally produced electricity from renewable sources.[66] Even though the tax was clearly discriminatory, one explanation given was that the fungible nature of electricity being

[60] Id at ¶ 11.

[61] Commission of the European Communities v. Kingdom of Belgium ("Walloon Waste"), C-2/90.

[62] Id at ¶ 28 ("waste, whether recyclable or not, is to be regarded as 'goods' the movement of which ... must in principle not be prevented").

[63] Id at ¶ 34.

[64] See *Commission v. Kingdom of Denmark* ("*Danish Bottle Case*"), 302/86 (This rejection was based solely upon the program's purported burden to inter-state commerce, for while the Court discussed the law's potential burden to foreign undertakings, there was no claim of discriminatory impact since the reduction in numbers of allowable containers applied equally to Danish undertakings).

[65] See Radlberger Getrankegesellschaft mbH & Co v. Land Baden-Wurttemberg, C-309/02.

[66] See *Outokumpu Oy*, C-213/96.

imported meant that it was difficult to know if it was produced by more or less polluting means, which justified some disproportional burden in favour of local clean energy initiatives. The CJEU accepted the that environmental policy goals were important enough to impose some economic restrictions, but seemed concerned in its rejection of Finland's arguments that foreign suppliers had not even been given an opportunity to demonstrate the manner in which their power was produced.[67]

All of the environmental cases discussed so far involve legal issues that are also related to state purchasing, but the *Preussen Elektra* ruling deals directly with state green procurement.[68] Here, the CJEU upheld a German law requiring power suppliers to purchase electricity from in-state producers of renewable energy at above-market prices, the extra costs of which were to be shared among upstream and downstream energy market participants. The CJEU argued forcefully and on a number of grounds that Union environmental objectives were now sufficient to support this kind of state environmental program against free economic movement interests, even considering the fact that the law was clearly discriminatory in mandating purchases from in-state suppliers.[69]

In addition, though, the *Preussen Elektra* Court argued further that the German law did not involve state aid because there were a sizable number of private undertakings involved in sharing the costs of these in-state energy purchases. While this part of the ruling may (or may not) be persuasive with respect to avoiding treaty-based state aid prohibitions, it ignores the other, independent form of discrimination that has been created. In short, using state resources to favour in-state undertakings also burdens out-of-state businesses that are trying to compete in the same market on equal terms: the power suppliers in this case included private undertakings, but also those owned partially or wholly by the state; in fact, two of the eight German suppliers were majority state-owned; and, as such, Germany itself was subsidizing a substantial part of its renewable energy mandates to buy locally.[70]

While the underlying justifications for Germany's renewable energy purchase mandates and its de facto subsidy program were not discussed at length in the decision, the rationale is nonetheless clear. Without the state measures, in-state energy providers would not support relatively expensive in-state renewable energy producers (and for short and long-term environmental policy reasons, Germany wanted to support them); and, without the shared compensation scheme, too much of the increased cost burden would fall on one level of the energy supply and distribution market (and for economic reasons, Germany believed this might be disadvantageous or even disruptive of this crucial sector). But what also seems quite likely is that the German law has another longer-term economic objective to use state subsidies to build a strong and profitable in-state renewable energy industry.

Therefore, what's interesting here is that the CJEU addressed the direct form of purchasing discrimination in its balancing analysis, but didn't seem overly concerned with

[67] Id at ¶ 31 (The "Treaty therefore does not preclude the rate of an internal tax on electricity from varying according to the manner in which the electricity is produced and the raw materials used for its production, in so far as that differentiation is based, as is clear from the actual wording of the national court's questions, on environmental considerations").

[68] See Preussen Elektra AG & Schleswag AG, C-379/98.

[69] Id at ¶ 73-77 (citing various primary law environmental obligations, Union pledges to combat climate change, and the protection of health for animals and plants).

[70] Cf *Commission v. Ireland*, 249/81, supra.

the indirect form resulting from state subsidies. This is worth keeping in mind, because recent U.S. decisions appear much more concerned about matching potentially discriminatory impacts to public funding and subsidy sources.[71] And, further, the CJEU demonstrated again that it has become willing to allow significant and even discriminatory inter-state economic burdens in the promotion of locally focused, environmental program objectives.

But, finally, compare the seemingly expansive ruling of *Preussen Elektra* to recent statements made by the European Commission ("the Commission"). In guidance documents, the Commission stated that it would be discriminatory for a member state to apply criteria "penalising contractors solely on the basis of the distance they travel to deliver the goods."[72]

Important Directives, Block Exemptions, and the Post-Lisbon Situation

While there are many Union directives and regulations applying to environmental protection, climate change, and green energy, most of these play supporting roles with respect to the legal issues surrounding state environmental procurement.[73] There are two directives, however, which are directly applicable: the first of these sets forth most of the Union's substantive and procedural requirements affecting state procurement ("The Procurement Directive")[74]; the second directive provides more detail on similar subjects that applies to specific sectors, including water, energy, and transport ("The WETPS Procurement Directive").[75]

One of the Procurement Directive's first instructions to member states is to ensure that their government purchasing does not distort free and competitive economic markets.[76] In the very next paragraph, the Directive states that The Lisbon Treaty (and with specific reference to Article 6 TEU) requires that environmental protection be integrated into all state procurement decisions.[77]

Beyond this, the Procurement Directive is clear that environmental characteristics are valid award criteria for state purchasing activities.[78] More specifically, and while states may always award their purchasing contracts based upon low price, they may, alternatively, use other mixed considerations of valuation that include environmental performance characteristics.[79]

And moving beyond the products, it may also be appropriate to award contracts to applicants having other types of related environmental characteristics, including environmental management systems, their use of approved eco-labels, or established programs that reduce pollution and energy use in the manufacturing process.[80] The Procurement Directive encourages states to avoid awarding public contracts to parties who have been

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[71] See infra, West Lynn Creamery.

[72] See European Commission Report (2004) at page 39.

[73] That is, it's certainly persuasive when justifying state activities or purchasing against claims of interference with the free market if legitimate environmental mandatory requirements are also supported by explicit Union policy objectives. See, for example, Biofuels Directive, 2003/30/EC (which is not a binding law, but provides targets for conversions to biofuels); and see Directive on the Promotion of the Use of Energy from Renewable Sources, 2009/28/EC.

[74] See Directive on the Coordination of Procurement Procedures, Directive 2004/18/EC.

[75] See Directive on the Coordination of Procurement Procedures of Entities Operating in the Water, Energy, Transport and Postal Services, 2004/17/EC.

[76] See Directive on the Coordination of Procurement Procedures, Directive 2004/18/EC at Preamble 4. And note: While preamble language does not usually have legal force, it is important to understanding and interpreting legal acts, and is, therefore, persuasive and often cited by the CJEU.

[77] Id at Preamble 5.

[78] Id at Article 3(b).

[79] Id at Article 53(1)(a) on Contract Award Criteria.

[80] Id at Preamble at 44; and see Article 50; and see Article 23(6); and see Preamble at 29.

involved in criminal violations, including environmental crimes.[81] Operationally, the burden of compliance with the Procurement Directive falls upon the member states, although the Commission does offer assistance, including requirements that procurement notices be sent to the Commission before publication.[82]

The WETPS Procurement Directive contains the same introductory admonitions against market distortion and the same expectations regarding integrating environmental considerations.[83] In fact, the WETPS Procurement Directive's treatment of environmental procurement essentially parallels the provisions found in the Procurement Directive, making them directly applicable to the law's named sectors.[84]

Furthermore, the CJEU has already decided several important cases related to state-level environmental procurement that contributed to and were later codified as part of the aforementioned directives. And, moreover, these cases are quite favourable in their support of the state's ability to use buying power in an environmentally progressive manner. For example, in *Concordia Bus* the city of Helsinki opened a public procurement process to replace its municipal bus fleet.[85] Among the groups that tendered bids, were several out-of-state manufacturing undertakings (including "Concordia"), and a Finnish public corporation ("HKL") that ended up winning the contract.

This result was challenged by the foreign undertakings, who noted that the stringent environmental contract requirements for biofuel vehicles, as well as a relative scarcity in Finland of privately available biogas refuelling infrastructure, essentially guaranteed that the Finnish public company would prevail.[86] First, the CJEU decided that the "economically most advantageous tender" may include considerations of ecological and environmental protection.[87] And, next, the Court concluded that while non-discrimination "lies at the very heart of the public procurement directives" this did not preclude Helsinki from including strict environmental protection criteria even though "the contracting entity's own transport undertaking" was "one of the few undertakings able to offer a bus fleet satisfying those criteria."[88]

The next case is *EVN*, which involved an Austrian public procurement offering that sought suppliers of electricity.[89] The procurement competition criteria weighted heavily the suppliers' ability to produce energy produced from renewable sources. Citing the *Preussen Elektra* decision, the Court noted it "has already held that the use of renewable energy sources for producing electricity is useful for protecting the environment."[90] On this basis, the CJEU ruled that stringent environmental procurement requirements are "not incompatible with the Community legislation on public procurement."[91]

[81] Id at Preamble at 43.
[82] Id at Articles 35 and 36.
[83] See Directive on the Coordination of Procurement Procedures of Entities Operating in the Water, Energy, Transport and Postal Services, 2004/17/EC at Preamble 11 and 12.
[84] Id at Preamble 42, 53, and 54 and at Articles 3(b), 6, 38, and 52(3).
[85] See Concordia Bus Finland v. Helsingin kaupunki and HKL-Bussiliikenne, C-513/99.
[86] Id at ¶ 71 ("At the date of the invitation to tender, there was only one service station in the whole of Finland supplying natural gas. Its capacity enabled it to supply about 15 gas-powered buses. Shortly before the invitation to tender, HKL placed an order for 11 new gas-powered buses, which meant that the station's capacity was fully used and it was not possible to supply fuel to other vehicles. Moreover, the service station was only a provisional one").
[87] Id at ¶ 69.
[88] Id at ¶ 81 and 86.
[89] See EVN AG and Wienstrom GmbH v. Republic of Austria, C-448/01.
[90] Id at ¶ 40.
[91] Id at ¶ 43.

And the Court defended these rulings even in cases where petitioners attempted to show that the state's program may not ultimately be successful at achieving its environmental objectives.[92] In fact, the Court's only real objection to Austria's procurement procedure was its inability to verify whether or not the electricity produced by the contracting parties actually came from renewable sources.[93]

Next, with respect to the state aid prohibitions outlined earlier, there have been important block exemptions ("GBER") developed in recent years that apply directly to issues of green procurement, environmental protection, and renewable energy.[94] In essence, the GBER exempts listed classes of activities that might normally be considered to violate Union commercial practices or competition law, and does so in the interest of some overriding economic or public policy objective.[95]

As with the Procurement Directive, the burden of incorrect interpretation of the GBER falls upon the member states.[96] Further, compliance with the GBER obviates the need for member states to provide notice to the Commission in advance of planned state aid payments.[97] But, the Commission can also determine that the GBER does not apply or should be withdrawn if it finds a member state has over-reached or abused the provisions.[98] However, the Commission also publishes guidance documents that, while non-binding, are useful for providing member states more detailed examples and assistance for analyzing common situations.[99]

The GBER specifically exempts many kinds of "environmental investment aid for the promotion of energy from renewable energy sources" and "aid for environmental studies."[100] These categories of exemptions may also be relevant to state green procurement policies, as they may cover a variety of state purchasing arrangements that give private parties and undertakings favourable treatment or terms. However, the GBER goes further in its section on aid with "the acquisition of new transport vehicles enabling undertakings active in the transport sector to go beyond Community standards for environmental protection."[101] This Article relates directly to state environmental procurement activities, on their own behalf and on behalf of private undertakings.

The GBER also provides flexibility as to how state aid can be administered, covering, for instance, the use of tax exemptions and incentives in addition to direct investment.[102] In fact, one section of the GBER covers aid in the form of "reductions in environmental taxes"[103] Very important, however, is to remember that the GBER does not exempt subsidies or purchasing activities that discriminate against foreign undertakings: "This Regulation should not apply to export aid or aid favouring domestic over imported products."[104]

Finally, and moving on to another important development under Union law, The Lisbon Treaty's clear and expanded emphasis on environmental protection might also affect the ways the Court undertakes its balancing of

[92] Id at ¶ 53.
[93] Id at ¶ 51 and 52.
[94] See General Block Exemption Regulation for State Aid, Reg No 800/2008.
[95] Id at Article 3(1).
[96] Id at Preamble 5 ("This Regulation should exempt any aid that fulfils all the relevant conditions of this Regulation").
[97] Id at Preamble 1.
[98] Id at Preamble 6.
[99] See, for example, Commission Guidelines on State Aid for Environmental Protection.
[100] Supra at Articles 23 and 24.
[101] Id at Preamble 46 and Article 19.
[102] Id at Preamble 19.
[103] Id at Article 25.
[104] Id at Preamble 8.

environmental policy goals against the free economic movement doctrines. This, of course, may also affect the ability of states to undertake green procurement projects that impose some burdens on economic markets.

It's with Article 6 of the TEU that a genuine paradigm shift occurs within Union law.[105] While the CJEU has previously made use of and even developed fundamental right law doctrines, for the first time they are set forth as foundational principles in the treaty, legally equivalent in purpose and effect to all other Union laws, including those of free movement. For example, Article 6 TEU's recognition of the Charter of Fundamental Rights ("CFR") includes recognition of the CFR's environmental protections:

A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.[106]

In fact, The Treaty of Lisbon also expands upon the concept of "sustainability" found in previous treaties by recognizing that what's required are balanced social, economic, and environmental dimensions.[107] Although the *Schmidberger* case was decided before the Treaty of Lisbon was ratified, it's a good example of CJEU jurisprudence that reflects something similar to these new balancing elements. The case involved a lawfully registered environmental demonstration "on the Brenner motorway, the effect of which was to completely close that motorway to traffic for almost 30 hours."[108]

The *Schmidberger* petitioner claimed its trucking business suffered damages amounting to a restriction of the free movement of goods because Austrian authorities failed to prevent the demonstration and the resulting traffic obstruction.[109] For its part, the CJEU noted that the defendant's actions and inactions could be considered a measure of equivalent effect to a quantitative restriction,[110] but noted that "the protection of the environment and public health, especially in that region, may, under certain conditions, constitute a legitimate objective in the public interest capable of justifying a restriction of ... the free movement of goods."[111]

In fact, the Court then re-stated these ideas even more forcefully: "the Austrian authorities were inspired by considerations linked to respect of the fundamental rights of the demonstrators" which "form an integral part of the general principles of law" from which "the Court draws inspiration from the constitutional traditions common to the Member States."[112] Applying a proportionality analysis to these facts and principles, the CJEU then ruled that "the national authorities were reasonably entitled, having regard to the wide discretion which must be accorded to them in the matter, to consider that the legitimate aim of that

[105] Article 6(1), (2), and (3) TEU ("1. The Union recognises the rights, freedoms, and principles set out in the Charter of Fundamental Rights of the European Union ... which shall have the same legal value as the Treaties ... 2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms ... 3. Fundamental rights ... as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law").

[106] See Charter of Fundamental Rights, Article 37.

[107] See Article 3.3 TEU (The Union "shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment")

[108] Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich, Case C-112/00, ¶ 2.

[109] Id at ¶ 16.

[110] Id at ¶ 64

[111] Id at ¶ 66.

[112] Id at ¶ 69, 70.

demonstration could not be achieved in the present case by measures less restrictive."[113]

The striking and important results of *Schmidberger* are not only the CJEU's defence of environmental rights in the face of economic interests, but its deference to state values, and, just as importantly, to the flexibility member states require to implement their community and local objectives. In the context of The Lisbon Treaty's expanded protections of fundamental rights and the environment, an argument could be made that the re-balancing seen in *Schmidberger* is likely to proliferate. This, in turn, could have important implications for local-level environmental projects, including those in the green procurement area.

2.2 The United States

While provisions in the U.S. Constitution and rulings from relevant case law appear to create legal frameworks similar to the Union's internal market and free economic movement doctrines, commercial practices and relationships in the United States also developed quite differently. First, foundational principles and early cases will be set forth, including those developments in U.S. environmental law cases that relate to the procurement area. Next, procurement cases that define the contours of modern jurisprudence will be discussed.

To begin with, though, federal statutory sources are one category of legal authority that can be dispensed with fairly quickly with respect to state procurement. To be sure, there are many federal legislative and executive provisions relating to federal green procurement.[114] And this isn't to say there aren't any federal laws and agency practices relevant to state purchasing, but these aren't pervasive, and usually aren't overly constraining on state actions.[115]

Next, and moving to constitutional underpinnings, the commercial law relationship between the U.S. federal government and the individual states is founded upon several explicit and implied doctrines. Article I, § 8 of The U.S. Constitution enumerates the various explicit powers of Congress, including the commerce clause: "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[116] Moreover, Article I, §10 of The U.S. Constitution also expressly limits state powers in some areas, including the following: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws."[117]

The "dormant" or "negative" commerce clause is an implied legal doctrine building upon Article I, § 8's positive grant of commercial regulation (and the Constitution's supremacy clause[118]) by creating a negative converse obligation: states are prohibited from enacting laws which interfere with interstate commerce. Early U.S. Supreme Court cases asked if a state measure discriminated directly against economic interests from other states, or did so indirectly by favouring in-state

[113] Id at ¶ 93.

[114] See, for example, *Armed Services Procurement Act*, 10 U.S.C. § 2302 et seq (1994), which governs military procurement; and see *The Federal Property and Administrative Services Act*, 41 U.S.C. § 25 et seq (1949), which governs procurement by federal civil agencies; and see Executive Order 13101, *Greening the Government through Waste Prevention, Recycling, and Federal Acquisition* (1998).

[115] Of course, there are some exceptions. For example, under The Resource Conservation and Recovery Act, 42 U.S.C. § 82 et seq (1976), and Executive Order 13101, supra, state and local agencies that meet specific criteria are obligated to buy products with certain levels of recycled content.

[116] The Constitution of the United States, Article 1, Section 8, Clause 2.

[117] The Constitution of the United States, Article 1, Section 10, Clause 2.

[118] The Constitution of the United States, Article 6, Clause 2.

interests.[119] And, importantly, these prohibitions operate even in the absence of any federal legislation or pre-existing regulatory presence.[120] However, once The U.S. Congress does legislate to regulate interstate commerce in a given field, states gain some measure of flexibility in implementing the federal provisions.[121]

Subsequent applications of and judicial challenges to the dormant commerce clause led to the development of a series of balancing tests. For instance, facially discriminatory state laws are "virtually per se" invalid[122], but can still be saved if it can be shown that there is no less-restrictive means to advance important state interests (aside from economic benefits).[123] Where the state measure is not patently discriminatory, and it's primarily intended to enact legitimate state goals, but it still has "incidental" effects on interstate commerce, the Courts employ a balancing test to determine if the commercial burdens are "excessive in relation to the putative local benefits."[124] Similarly, if the state is regulating interstate commerce directly in an "even handed" manner, the "incidental" burden on interstate commerce will likewise by weighed against the actual benefits to local interests.[125]

In practice, the *Pike* case demonstrates that even non-discriminatory state laws may be held by federal courts to be unconstitutionally burdensome to interstate commerce by means of this balancing process.[126] And Courts are particularly sensitive to discriminatory intent, striking down disguised protectionism that is justified as legitimate public policy.[127] And, as might be expected, the dormant commerce clause has been applied to a wide variety of state measures, including transportation, taxation, state aid, utility regulation, and economic development.[128]

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[119] See Gibbons v. Ogden, 22 U.S. 1 (1824); and Willson v. Black-Bird Creek Marsh Co, 27 U.S. 245 (1829).

[120] See Oklahoma Tax Commission v. Jefferson Lines, 514 U.S. 175 (1995).

[121] See *Northwest Airlines, Inc v. County of Kent, Michigan*, 510 U.S. 355 (1994) (in this case, federal rules allowing airport taxation for specific purposes allowed defendants to set their own tax levels without being struck down under the dormant commerce clause because The Court found they were not unreasonable under or prohibited by the federal statute). Cf. The shared competencies of Member States and federal authorities in implementing Union Directives; but see *André Ambry*, C-410/96 (Member State's cannot implement Directives in contravention of other important Union goals or rights).

[122] See City of Philadelphia v. New Jersey, 437 U.S. 617 (1978).

[123] See *Maine v. Taylor*, 477 U.S. 131(1986) (here, a Maine law prohibiting the importation of out-of-state bait fish was upheld because of the state's environmental and ecological concerns that parasites harmful to local fish stocks were also being introduced with the out-of-state products).

[124] Pike v. Bruce Church Inc, 397 U.S. 137 (1970) at 142. And see Department of Revenue of Kentucky v. Davis, 128 S. Ct. 1801 (2008).

[125] *Pike v. Bruce Church Inc*, 397 U.S. 137 (1970) at 142.

[126] This is probably an appropriate place for a reminder that only U.S. Supreme Court cases have the force of supremacy throughout all federal and state jurisdictions.

[127] See *Hunt v. Washington State Apple Advertising*, 432 U.S. 333 (1977) (in this case, Washington State apple growers, who employed ratings standards stricter than federal standards, were prohibited by the State of North Carolina from affixing these ratings to products imported into North Carolina; this state measure was held to violate the dormant commerce clause by favoring in-state apple producers). Cf. *German Quality Products* C-325/00 (which seems to present the converse result disallowing "German Quality" stickers as creating a discriminatory bias towards German products within Germany; and perhaps this also raises an interesting question for the U.S. system of whether the Washington State ratings systems would be held discriminatory within Washington State as against out-of-state apple importers).

[128] Private parties and undertakings have standing in the U.S. to bring suits for alleged dormant commerce clause violations (cf. vertical direct effect for state measures restricting economic free movement in the Union). In the U.S., the party bringing suit bears the initial burden of proof that the state measure discriminates or places some burden on interstate commerce; at which point the burden shifts to the state to prove there is no discrimination or that the burden is not excessive compared to the benefits of a legitimate

Looking to seminal examples of commerce clause jurisprudence from the environmental area, in the *Clover Leaf Creamery* case the Supreme Court upheld a Minnesota law banning non-returnable plastic milk containers to promote recycling programs. The Court noted that the law was not excessively burdensome on out-of-state plastic companies under the dormant commerce clause compared to important state conservation interests.[129]

In *Sporhase*, a Nebraska water conservation initiative disallowed the withdrawal of groundwater from within its borders for use in another state unless that other state granted reciprocal rights to withdraw and transport water back into Nebraska. The Supreme Court held that this reciprocity requirement violated the dormant commerce clause by creating explicit barriers to commerce between the various states in the region.[130]

In the area of waste transportation and disposal, in *City of Philadelphia v. New Jersey*, a New Jersey statute prohibited the importation of most wastes originating from other states in order to protect its environment and reduce landfilling. However, The Supreme Court struck this measure down, noting that the exclusion was based only on the waste's place of origin, and not any other characteristic, environmental or otherwise.[131] The Court said that New Jersey was trying to isolate itself from environmental problems common to many U.S. states by imposing additional burdens and costs on out-of-state waste streams that it didn't impose on in-state waste producers.[132]

And finally, three important cases that describe key issues under U.S. law relevant to a wide variety of state procurement activities. First, the *New England Power* case involved a New Hampshire statute requiring in-state utilities to seek permission from the state before selling energy to any out-of-state buyer. The justification for this state measure was to ensure that state residents received the economic benefits from locally generated and supported hydroelectric power. In short, having already paid for the energy infra-structure investments, the people of New Hampshire wanted to keep the lower cost hydro-power for themselves. The Supreme Court invalidated the statute as being facially discriminatory to interstate commerce.[133]

In *Wyoming v. Oklahoma*, the state of Oklahoma cited natural resource management goals to justify legislation requiring the use of a minimum of 10% Oklahoma coal for all in-state utilities using coal. The state claimed the measure was necessary both to ensuring diversification of the state's energy portfolio and managing in-state coal resources into the future.[134] The Court rejected both arguments, finding the legislation discriminatory to out-of-

state interest. See *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

[129] *Minnesota v. Clover Leaf Creamery Co*, 449 U.S. 456 (1981). Cf. *Radlberger* C-309/02 (see supra, deposit-and-return program imposing costs on foreign suppliers upheld given important environmental policy justifications; but see *Commission v. Denmark*, 302/86 (see supra, re-usable container law struck down as not proportionate to environmental objectives).

[130] *Sporhase v. Nebraska*, 458 U.S. 941 (1982).

[131] Cf *Walloon Waste*, supra (the CJEU allowed restrictions on waste importation, even though these wastes were not fundamentally different in characteristics from those produced in-state).

[132] *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). Cf. *Walloon Waste*, C-2/90 (see supra, The Commission allowed a Belgian environmental law prohibiting the importation of waste into the country for disposal, noting that waste is of a distinguishable character from other kinds of goods).

[133] *New England Power Co. v. New Hampshire*, 455 U.S. 331 at 339 (1982) ("The order of the New Hampshire Commission, prohibiting New England Power from selling its hydroelectric energy outside the State of New Hampshire, is precisely the sort of protectionist regulation that the Commerce Clause declares off-limits to the states").

[134] Importantly, there was no claim or argument that this resulted in any environmental benefit beyond sound (and profitable) natural resource management.

state coal suppliers, and the justifications in favour of local interests wholly insufficient.[135]

The third case, *West Lynn Creamery*, remains seminally important to all state program efforts, but particularly those involving public funding or state aid.[136] Here, plunging milk prices threatened Massachusetts dairy farmers, persuading legislators to intervene with a non-discriminatory tax on all raw milk sold in the state, coupled with a subsidy to in-state dairy producers that consisted of the disbursement of the revenues from the aforementioned tax.

Interestingly, the Supreme Court noted that perhaps neither the tax nor the subsidy would be violative of the dormant commerce clause on their own, but in combination formed an unconstitutional discriminatory tariff that clearly benefited in-state undertakings at the expense of out-of-state actors. Problematically, though is footnote 15 of the decision: "We have never squarely confronted the constitutionality of subsidies, and we need not do so now."[137] In fact, it is reasonable to interpret *West Lynn Creamery* as rather ominously suggesting that the Court's protection of free markets under the Commerce Clause may be expanding again to the constraint of state activities.

After *West Lynn Creamery*, it could be argued that U.S. states need to carefully uncouple subsidies from funding sources. But in practice the ruling may threaten more ambitious state programs, and particularly those with high capital or start-up costs, such as renewable energy projects, that may require recoupment on behalf of in-state taxpayer investments. Recoupment is often attempted by states either by levying taxes aimed at out-of-state entities, or through creating competitive benefits bestowed primarily on in-state undertakings.

The Market Participant Exception

It is the "market participant" exception to the dormant commerce clause in the U.S. system that shifts the balance for procurement activities in favour of local level decision-making and policies. Consider the following, related descriptions of the market participant exception from U.S. federal court and Supreme Court jurisprudence:

When a state acts as a market participant, as a competitor in a market rather than primarily as a market regulator, these acts are not subject to the limitations of the commerce clause.[138]

When a state acts primarily as a market participant, no conflict between state actions and federal authority usually arises with respect to the commerce clause.[139]

As such, case law in the U.S. related to state procurement has shown considerable deference toward state level activities. However, as the following cases demonstrate, this deference has important limits that, in close relation to the basic principles set forth in the commerce clause cases discussed above, circumscribe the ability of state and local authorities to achieve many environmental objectives.

For example, *Alexandria Scrap* is an environmental case which actually introduced the market participant doctrine.[140] Here, a Maryland statute offered bounties to scrap processors to collect and recycle abandoned

[135] *Wyoming v. Oklahoma*, 502 U.S. 437 (1992).
[136] West Lynn Creamery Inc v. Healy, 512 U.S. 186 (1994).
[137] Id at page 199.
[138] See *Environmental Technology Council v. Sierra Club*, 98 F.3d 774 (4th Cir 1996), cert denied 521 U.S. 1103 (1997); and see *Western Oil and Gas Association v. Cory*, 726 F.2d 1340 (9th Cir 1984), judgement affirmed, 471 U.S. 81 (1985).
[139] See United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of City of Camden, 465 U.S. 208 (1984).
[140] Hughes v. Alexandria Scrap Corp, 426 U.S. 794 (1976).

automobiles, but the program effectively favoured in-state undertakings by requiring out-of-state actors to file burdensome documentation. Nevertheless, The Supreme Court upheld the state law by noting Maryland wasn't primarily acting as a regulatory agency here, but was actually making a decision to buy recycling services with its own state funds in a manner that also happened to affect inter-state economic markets: "Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favour its own citizens over others."[141]

Then again, the bounty paid in this case isn't really a clear-cut example of a state making a purchase, because it certainly also has elements of public monies being used to incentivize and influence economic markets to achieve environmental goals. Nevertheless, the Court characterized Alexandria Scrap as a straightforward procurement case, and is consistent in this way with other, early judicial decisions that were quite careful in trying not to expand the market participant exception to situations involving state support or subsidies.[142]

And this is an important point to emphasize, because the market participant exception does allow U.S. states the ability to purchase from in-state providers in a manner that discriminates against out-of-state options. As the cases being developed here suggest, however, it is the frequent combination of an ordinary state purchase (which can discriminate and burden interstate commerce because the state is acting only in its role as a market participant) and some other, connected subsidy, mandate, or tax (in which the state is acting more as a regulator) that may run afoul of the commerce clause. In fact, the relationship between procurement decisions and state support remained anything but clear in the case law, as Courts realized the line between them was often hard to fix, and particularly so when multiple state objectives were being pursued. Not surprisingly, this legal uncertainty also applied to many complex and expensive environmental projects.

For example, in the *Carbone* case, a city in New York State attempted to address municipal waste disposal in a more environmentally responsible manner, and contracted with a private company to build a modernized waste transfer facility to handle solid waste and remove recyclable materials.[143] To afford the $1.4 million price, the city agreed to allow the builder to operate the facility for five years and guaranteed it both high flows of materials and advantageous "tipping fees" to be charged to the waste collection undertakings that brought waste to the new facility; in return for these arrangements, the city would then be allowed to buy the facility for $1 after five years.

In its ruling, The Supreme Court struck down the city ordinance that allowed this arrangement to function, particularly the requirement that all public and private waste collectors deliver solid waste generated in the town to the new transfer facility. The Court noted the "flow control" regulation in this case was actually a financing measure so the city

[141] Id at 810.

[142] See Collins, Richard (1988) at 103-04 (The "Court has consistently described the immunity to be for 'market participants' rather than for subsidies ... [and] could readily distinguish a new case involving passive subsidies" and "Passive subsidies may not enjoy the same immunity from dormant commerce power scrutiny"). And see *Alliance for Clean Coal v. Miller*, 44 F.3d 591 at 597 (7th Cir 1995) ("[S]ince first enunciated [in *Alexandria Scrap*] the market participant doctrine has been narrowed to exclude many state actions that appear to be subsidy equivalents").

[143] C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994).

could build an important facility to provide environmentally important services.[144]

In *Carbone*, then, the form of the financing or subsidy, coupled with the fact that the law potentially discriminated against out of state disposal centers seeking business from local waste collectors, was held violative of inter-state commerce. In fact, the city's argument that the burden on inter-state commerce for environmental purposes was justified because there was no less restrictive means to achieve their objective was also rejected because of this same availability of other methods of public financing. And it was only in the dissent that the market participant exception was obliquely raised.[145]

In the *United Haulers* case, The U.S. Supreme Court broke with many years of disallowing state-level waste flow control regulations for environmental purposes.[146] As the Court began:

In C & A Carbone ... this Court struck down under the Commerce Clause a flow control ordinance that forced haulers to deliver waste to a particular private processing facility. In this case, we face flow control ordinances quite similar to the one invalidated in Carbone. The only salient difference is that the laws at issue here require haulers to bring waste to facilities owned and operated by a state-created public benefit corporation.

Problematically, then, and from the outset, the Court doesn't acknowledge the role the city took in *Carbone* to plan, initiate, solicit bids, contract, and arrange payment for the construction of a waste transfer and recycling facility, and in such a manner that it would fully own and operate the facility within 5 years. In fact, just as in *Carbone*, the state's plan in *United Haulers* involved building improved facilities, and paying for them by "restricting competition" on behalf of their newly created public-benefit corporation to ensure high volume and "above-market" tipping fees. Moreover, the plaintiffs in this case were waste haulers who showed they could dispose of waste collected in these counties at out-of-state disposal sites for much lower rates.

A more accurate way to describe the "salient" but "significant" difference the Court used to distinguish this case from *Carbone* would be that the mortgaged waste and recycling facilities in *Carbone* were temporarily owned by a private contractor, whereas in *United Haulers* they were temporarily owned by municipal bond holders (who are ultimately, of course, also private parties). Nevertheless, it is on this foundation that the Court continues. For example, the Court relies heavily on balancing, noting that any burden on inter-state commerce isn't excessive compared to the public environmental and health benefits created through extensive recycling programs. And the ruling appears favourable and supportive of the state's right to procure goods and services (here, both, in the form of a recycling center and its operational staff) for

[144] Interestingly, however, all concurring and dissenting opinions seemed to agree that state subsidization by other means (for example, via a general tax fund) of this local environmental program goal might be permissible even if it still led to a state subsidized procurement facility directly competing with out of state private waste disposal undertakings; Cf. the *Preussen Elektra* case, supra, and the manner in which the CJEU dealt with the prohibition against state aid under Union law.

[145] Id at 430 ("The Commerce Clause was not passed to save the citizens of Clarkstown from themselves. It should not be wielded to prevent them from attacking their local garbage problems with an ordinance that does not discriminate between local and out-of-town participants in the private market for trash disposal services and that is not protectionist in its purpose or effect. Local Law conveys a privilege on the municipal government alone, the only market participant that bears responsibility for ensuring that adequate trash processing services continue to be available to Clarkstown residents").

[146] United Haulers Association Inc. v. Oneida-Herkimer Solid Waste Management Authority, 550 U.S. 330 (2007).

legitimate environmental policy objectives (recycling), and even if it's all paid for through the use of non-discriminatory regulatory mandates (the flow control requirements and above-market tipping fees) that create a subsidized state enterprise that competes at a significant (almost monopoly) advantage against out-of-state undertakings:

The flow control ordinances in this case benefit a clearly public facility, while treating all private companies exactly the same. Because the question is now squarely presented on the facts of the case before us, we decide that such flow control ordinances do not discriminate against interstate commerce for purposes of the dormant Commerce Clause.[147]

It's interesting that the *United Haulers* Court didn't invoke the market participant exception. However, The Supreme Court addressed this oversight in a later case, in which it upheld a Kentucky development program that exempted state municipal bonds, but not out-of-state bonds, from taxation: "This case, like *United Haulers*, may also be seen under the broader rubric of the market participation doctrine."[148]

The final case relevant to state environmental procurement does little to clarify the relevant doctrines related to balancing criteria, environmental objectives, or the role of the market participant doctrine. In *New Energy*, The Supreme Court struck down an Ohio statute that gave a tax credit to offset vehicle fuel sales taxes on the condition that the fuel contained certain percentages of ethanol produced in Ohio.[149]

The statute certainly encouraged the use of greener fuels. But the non-discriminatorily applied and redeemed tax credit was also clearly designed to support and subsidize in-state green fuel industries. The Court, sounding much different than in *United Haulers*, argued that it is impermissible economic protectionism to use state regulatory provisions that benefit in-state actors and, thereby, burden out-of-state competitors.[150]

The Court did, however, agree that the environmental and health objectives of reducing "harmful exhaust emissions" are a "legitimate state goal." But, importantly, the Court then notes that encouraging out-of-state green fuel producers would be just as beneficial to these goals, and concludes that Ohio's alleged state interests are "occasional and accidental" to its main goal of favourably treating in-state ethanol producers.[151]

Moreover, the *New Energy* Court as easily dispenses with the market participant doctrine in the current subsidy context:

The market-participant doctrine has no application here. The Ohio action ultimately at issue is neither its purchase nor its sale of ethanol, but its assessment and computation of taxes -- a primeval governmental activity. To be sure, the tax credit scheme has the purpose and effect of subsidizing a particular industry, as do many dispositions of the tax laws. That does not transform it into a form of state participation in the free market.[152]

And, yet, the Court has one final point to make about states and their subsidies, stating that there are still circumstances, many perhaps, in which subsidies would be perfectly permissible. The distinction drawn here seems to turn on whether the state is also acting in a regulatory capacity (taxing, regulating, or mandating) in addition to only a purchasing capacity:

[147] Id at 342.
[148] Department of Revenue of Kentucky v. Davis, supra, at 1807.
[149] New Energy Company of Indiana v. Limbach, 486 U.S. 269 (1988).
[150] Id at 273-77.
[151] Id at 279.
[152] Id at 277.

The Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description in connection with the State's regulation of interstate commerce. Direct subsidization of domestic industry does not ordinarily run afoul of that prohibition.[153]

3. Comparative Law Conclusions

In both the Union and the United States, the challenging and interesting part of characterizing the legal frameworks of state environmental procurement is a function of combining three individually challenging areas of law: state rights, as balanced against federal protections of free markets; environmental law, a globally important and disputatious field; and public procurement, representing an area of legal rights and obligations unto itself. Nevertheless, there are many similarities in how European and U.S. laws developed in these areas, and also in how the respective state systems appear to be deploying environmental and procurement activities.

For example, cases from the CJEU and The U.S. Supreme Court dealing with environmental law as connected to a state-federal balancing of economic rights followed roughly the same pattern. First, was getting environmental issues to be recognized at all as against protections of the free market. Next, came the cases describing how important environmental goals at federal and inter-state levels might balance economic and internal market concerns. And, finally, cases from both systems seem to demonstrate increasing deference to environmental activities of a local and intra-state character.

Alternatively, consider general procurement issues combined with this same state-federal balancing of economic rights. Here, the U.S. system was certainly well ahead of the Union for many years with respect to state flexibility in purchasing, and this was primarily due to the market participant exception. For example, with or without an environmental justification, a U.S. state can still buy it's paper products from a local manufacturer at a relatively high price; and, the fact they're doing so to be environmentally responsible by paying more to reduce transport distances and related emissions is not something they would be called to balance against any discriminatory free market burden in the way member states in the Union surely would. That said, however, Union procurement directives have closed this gap somewhat by broadening the variety of criteria that states can permissibly consider when making purchases.

In other words, "buy local, buy green" programs like the one described in the example from San Joaquin would be very difficult to implement in Union member states, because they would likely be considered blatantly discriminatory against free economic movement. While Union directives and block exemptions do allow environmental factors to be considered in procurement, non-discrimination is still the underlying expectation.

And at this point, recall the Commission report concluding that green procurement programs could not, for example, exclude suppliers based upon the distances they have to travel.[154] Such transportation considerations are surely valid from an environmental standpoint, but it is the unavoidable local bias that distinguishes this situation from a case like *Concordia Bus*. While that decision seemed to be stretching the doctrine of allowing local purchasing based upon the growing importance of environmental policy objectives,

[153] Id at 278.

[154] See European Commission Report (2004) at page 39.

it is actually rather consistent with the aforementioned Commission guidance.

Specifically, *Concordia Bus* allowed the selection of a local producer because of environmental criteria that were so strict no existing out-of-state rivals could compete. It still, however, allowed for the possibility that out-of-state undertakings could, or someday might, compete. Compare this to the equally environmentally valid restriction on transport distances, which completely, and permanently, precludes any out-of-state undertaking from ever being selected. In this way, for example, the *Concordia Bus* decision still doesn't equal the greater flexibility granted to U.S. states by the market participant exception.

However, then there's *Preussen Elektra*, which seems to allow a quite blatant local bias in Union environmental purchasing. And while this case may signal a new direction in CJEU decision-making in this area, there are still some important nuances to understand here. For one, compare this to the U.S. system, where states are legally permitted to buy locally in order to economically preference domestic undertakings regardless of any environmental justifications. As the *New Energy* case made clear, even direct subsidization will not be considered problematic in procurement as long as the state is acting only as a purchaser, and isn't straying into other, mixed state regulatory functions.

And this is precisely where it may be possible to draw an important distinction with *Preussen Elektra*, which involved not only green purchases for their own sake, but in furtherance of the broader environmental goal of strengthening an in-state renewable energy industry. The *Preussen Elektra* court talked a lot about the subsidy and potential state aid components of Germany's program. Perhaps, then, *Preussen Elektra* isn't primarily about giving local green purchasing additional protections, so much as it's about acknowledging the importance of large scale state environmental policy goals and green procurement's important role in achieving them. In fact, given the CJEU's reasoning, there isn't much evidence to support the belief that the *Preussen Elektra* court would uphold the aforementioned restrictions on transport distances as part of a local green purchasing initiative.

On the other hand, the *Preussen Elektra* case may be signaling that when all three legal elements are considered together (environment, state rights, and procurement), the distance between Union and U.S. systems may be narrowing even further when procurement is combined with other, related state taxes, mandates, or subsidies. Moreover, environmental procurement directives have granted European member states significant latitude in conducting their environmental activities. In other words, by raising the importance and profile of environmental considerations, these Union legal instruments have also given member states stronger environmental justifications in restraint of inter-state trade. And, as discussed above, perhaps this deference to local environmental policy goals will increase further after The Treaty of Lisbon.

In addition, these combined and more complex environmental projects are becoming increasingly important to states acting to maximize programmatic environmental potentials. In this context, combining the Union's environmental procurement directives with important block exemptions to state aid for environmental projects has opened additional flexibility and options for member states. At the same time, it is precisely in these types of situations in the U.S. where application of the market participant exception often drops away, meaning that both systems are again

bound by baseline prohibitions against discrimination or over-burdening inter-state economic activities.

Actually, if Union legislative and judicial developments have opened up the European procurement landscape, recent U.S. Supreme Court procurement cases may be signaling a narrowing of options for these more complex and combined projects. Certainly, cases like *New Energy* and *West Lynn Creamery* seem to be taking an abruptly reactionary and market-protective path. Although, the recent *United Haulers* decision appears quite favourable to state environmental and procurement programs even when they add some burden to inter-state commerce.

But still, as cases in both systems demonstrate, there are real limits to how the state's leeway can be exercised, and many environmental and procurement situations continue to run into trouble. And this occurs in both systems where the discrimination against out-of-state actors appears too blatant, too unfair, or too burdensome (for example, *New England Power*, *New Energy*, and *Outokumpu Oy)*.

But, as of now, it's only in the U.S. that constitutional entanglements are also occurring where some structural characteristic of state purchasing or subsidies appears too directly tied to market discrimination (for example, *Carbone* and *West Lynn Creamery*). And it's only in the Union where discriminatory state purchasing that is entangled with broader environmental programmatic subsidies and goals has been explicitly upheld (*Preussen Elektra*). The closest U.S. case on this latter point is *United Haulers*, but The Supreme Court was quick to point out that the flow control regulations (and broader environmental objectives) were being upheld because the mandates were non-discriminatory.

Consider, then, how the example of Sweden's biogas procurement, investment, and subsidy programs might be analyzed under current Union law. In general, case lines ending with *Walloon Waste* and *Radlberger* seem to grant localities increasing deference for environmentally related activities. *Schmidberger* might be added here as well, particularly those aspects of the ruling sympathetic to the flexibility often required by local decision-makers in promoting important environmental goals. And *Preussen Elektra* is right on point, supporting green energy procurement efforts and buying arrangements, and even overlooking the indirect discriminatory effects of state subsidies used to develop local green energy markets.

While the Procurement Directive and the WETPS Procurement Directive explicitly prohibit purchasing that distorts free and competitive economic markets, they are broadly supportive of considering an expanding array of environmental criteria in procurement decision-making. In building so much local and regional expertise and infrastructure, it's hard to imagine that Sweden's biogas program efforts aren't often looking locally for inputs, supplies, and products. And, in fact, reading the directives in conjunction with *Concordia Bus* suggests that some amount of local preferencing will be allowable to support stringent environmental objectives.

And, the GBER has created broad exceptions that are quite relevant to Sweden's biogas programs. First, it allows using state funds to support general environmental investments: this would probably cover many of Sweden's large grants to private and mixed public-private technology and manufacturing development projects. The GBER also permits state-sponsored tax benefits for environmental purposes: and this certainly applies to Sweden's

tax rebates for green car purchases. And, finally, the GBER also allows certain amounts of state aid for the purchase of biofuel vehicles. Without knowing the exact limits of these provisions, it's plausible that Swedish money invested to help undertakings with marketing, sales, and buying incentives would be permitted; and, perhaps it's even possible that purchasing in this context could extend to infrastructure development (such as building refuelling facilities) or even other process-related investments that improve the prospects (such as higher quality or lower costs) for future potential purchases.

Then again, perhaps the applicability of the GBER's "environmental investment aid" could be contested with respect to developing in-state economic markets in green energy; and, this has been the focus of many of Sweden's grants to public-private partnerships. In other words, while you can make a good argument that building strong economic markets will encourage the spread and quality of green technologies, helping private undertakings establish profitable demand and supply markets may or may not be what the drafters of the GBER were contemplating.

And, interestingly, these new block exemptions became law in 2008, which doesn't apply to Sweden's procurement and subsidy programs that began well before that. What's more, discrimination is still prohibited under the GBER, so perhaps state activities that result in the creation of strong domestic biogas economies would still be vulnerable to legal challenges. But, leaving aside the idea of retrospective liability and some of the stricter issues of interpretation, it certainly looks like many of Sweden's biogas procurements and investments are on safer legal footing because of the GBER.[155]

By comparison, consider the U.S. green procurement example involving Arizona's EPS program. Under the *New Energy* line of reasoning: the state is a direct and major purchaser of energy (buying and selling), which perhaps grants Arizona some leeway under the market participant exception; then again, the state clearly shouldn't subsidize its own green energy economy with tax credits because this disadvantages out-of-state competitors; but, perhaps the EPS program, itself, is permissible because it's mandates and surcharges apply in a non-discriminatory way that are not directly connected to the other green energy subsidy programs.

Consider, next, *Carbone* and *United Haulers*. These rulings may disagree somewhat as to how the mixed private and public aspects related to the various players should affect the outcome. *United Haulers* was particularly supportive of state environmental program objectives, even when they are sometimes financed by the creation of subsidized state enterprises with significant competitive advantages over out-of-state undertakings.

Carbone, however, seemed more concerned about state buying and selling arrangements that might end up disbenefiting undertakings from other states seeking to do business in-state. And, neither case directly seems to offer Arizona safe harbour under the market participant exception as a major purchaser at

[155] Although on that upbeat note, consider the words of the General Manager and CEO of Tekniska Verken (one of Sweden's regional biogas development consortiums): "I am rather more concerned about fertility and the growing climate for operations like Tekniska Verken in the future. The level of interest in infrastructure, energy supply and environmental issues has increased dramatically in recent years, and this is very welcome. Despite this, there is a hint of a return to a more regulated market. In 2010, new rules will be introduced into the Competition Act, which will make it harder, if not impossible, for state-owned, municipal and county council-owned companies to carry on certain types of sales activities." See Tekniska Verken, Annual Report (2009) at page 4.

the centre of these green energy programs. Particularly on this last point, perhaps Arizona would be afforded more protection the greater the state's role as a legitimate purchaser of existing product on the market; as opposed, on the other side of the spectrum, to Ohio's unsuccessful argument in *New Energy* that is was a buyer *of* the new market.

And getting back to *West Lynn Creamery*, the Court might well look straight through purportedly separate state activities regarding buying green energy and subsidizing green energy economic markets when they are so clearly related to common programmatic objectives. In fact, if the Supreme Court is moving towards a renewed protection of free markets with *West Lynn Creamery*, cases like *New England Power* may increase in relevance in their insistence that the recoupment of monies in support of expensive, large-scale green energy investment projects does not justify Arizona burdening inter-state commerce.

Actually, and to draw some final conclusions for both systems, there are good reasons to believe that extensive state-partnered environmental programs will continue into the future, including those aspects related to state procurement. However, there are clearly some risks, as the legal doctrines are also always adapting to changing political climates and state programmatic strategies.

In fact, the vagueries and remaining uncertainties from the environmental procurement case law speak volumes to how fine the distinctions are between the different areas of law, between permissible and impermissible state purchasing, and between biased patronage versus legitimate investment. The crux of the balancing tests (where applicable) in both the Union and the United States has always been non-discrimination, and this applies equally to state procurement which has always been connected to the longstanding tug-of-war between states and federal governments over free markets.

And yet, going back to basics, public procurement in its simplest form is usually non-discriminatory when bids are fair and open to undertakings from all states. But once a state initiates a broadly-based economic and environmental program, it is difficult not to see the ultimate objectives, including the state purchasing components, for what they really are.

By intertwining many parallel activities in purchasing, tax incentives, direct subsidies, and regulatory mandates, states (like Arizona and Sweden) end up giving valuable incentive benefits to in-state businesses that they aren't giving to undertakings trying to build these same industrial sectors in other places. What, for example, is really the difference between a direct subsidy and discriminatory tax treatment? What, for that matter, is the discriminatory impact difference between giving in-state undertakings cash to develop new markets, and the two-step alternative of, first, subsidizing research and development of a new technology through state funding, and, second, using procurement programs to purchase that new technology from market-leading domestic suppliers?

Indeed, to become a successful and profitable company in advanced and innovative technology markets requires significant research, investment, and development expenditures. But these expenditures are unlikely to occur if undertakings are uncertain about the future market viability of their product lines. Further, this market development must include related markets for production inputs (parts), operation inputs (expertise, fuel, refuelling), and operation services (repair). When all of these stable market prerequisites are present,

this allows companies the opportunity to test, improve, and market their new products, thereby gaining significant first-mover advantages over existing competitors that don't have such domestically advantageous market environments.

Of course, the key legal element here is the state's participation. States may give grants to universities to conduct technology research, hoping this will spawn new economic markets. But, perhaps the types of programs under discussion here close the gap between state purchases and corporate profits a little too quickly. And if things go according to plan, the end result of all this state activity is a thriving domestic industry with many new and profitable in-state undertakings, where before there were none. And since the touchstone balancing principle of these types of environmental and procurement cases is still discrimination, how is this result not patently biased and discriminatory under federal free market protections?

And, yet, it could be argued that this is exactly how state green procurement and related projects should work, by letting states and their undertakings reap big economic rewards for doing important economic and environmental innovation. But, even if this were in some sense optimal and did benefit the environment, it still doesn't help us much in dealing with the law as it actually stands. These programs may be exonerated by their environmental purposes, and may be granted additional leeway because of their procurement-related functions, but they're still often discriminatory. And this presents some problems: in assessing legal risk and certainty, when giving advice to clients, and while trying to develop environmental procurement programs that fit legally into the state's other environmental and economic objectives.

In fact, in some important ways state environmental procurement policies are intended to interfere with existing business practices and norms on regional or even international levels. It makes perfect sense that many states would prefer to emphasize local environmental goals they can see, control, and directly influence. Put the two elements together, however, and it isn't hard to understand some of the criticisms and concerns with achieving local environmental preferences that may affect or disrupt (and possibly in an uncoordinated manner) broader economic equilibriums.

And as a result, federal governments have their own strategic procurement preferences, ones often based upon consensus (and perhaps conservative) standards and approaches. This is certainly not to suggest that universally accepted environmental standards may not be helpful for state-level purchasing decisions. It's possible that the easiest and legally safest ways for states to conduct green procurement would be to reproduce federal programs on a smaller scale. But the specific focus of this paper is with local level environmental activities, the idea being that one-size solutions might not be possible to efficiently scale down, may fail to recognize important local environmental potentials and considerations, and, worst of all, may result in a routinization of low grade environmental performance within many states for the sake of greater inter-state economic integration.

In this sense, perhaps states should play more of a role in challenging and expanding upon federal environmental policies by testing more of their own programs and projects. This may be particularly true for state-level environmental procurement projects, which, given their diversity of form, their increasingly mixed private-public components, and the rapidly evolving legal contexts in which they

operate, could continue to play significant roles in innovating environmental solutions in both Europe and the United States.

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Path Dependence in the Legal System – Implications for the Development of Wind Power

Maria Pettersson

Abstract

Institutional path dependence means that decisions made in the past affect future choices. The core of the formal institutional framework – the legal system – reflects choices already made, while the result of today's legal application is the basis for future rulings. Since the planning and location of energy installations, such as windmills, typically involves application of legal rules that to various extents are coloured by path dependence, the transformation of the energy system may prove difficult. A more sustainable energy system thus depends e.g. on the design of the institutional framework and whether the law is promoting or counteracting the diffusion of renewable energy technology such as wind power. The aim of this paper has been to analyse the legal implementation of wind power in Sweden on the basis of presumed path dependence. The paper illustrates that the path dependence of the legal regimes affecting wind power development in some instances is significant and that policy implementation therefore may be seriously hampered. The purposes for which expropriation of land is possible in Sweden were for example founded in the early 20th century, a time in which very few thought of producing energy by harnessing wind. Although time has changed, the regulation remains and the rules are – if not hampering – at best neutral vis-à-vis wind power development. The resource management provisions under the Environmental Code also show clear signs of institutional path dependence; regardless of repeated criticism from e.g. the Council of Legislation (Swe: Lagrådet) regarding the rules' applicability the system persists and continues to confuse both legal scholars and practitioners. The municipal planning monopoly and right of veto is another feature of the Swedish institutional framework that produces self-reinforcing sequences that are hard to breach. And without municipal consent, energy policy, and particularly wind power policy, is very difficult to implement. Although the institutional path dependence suggests a complex and complicated situation, the norms, expectations, traditions, customs etc. that constitute the social structure in which the law is embedded can change, and so can the law. The more recent legal application demonstrates that the law can in fact be applied in favour of wind power development even facing strong preservation interests. This may be a sign of a necessary change happening.

Towards sustainable energy supply: necessary institutional rethinking?[156]

Sustainable development is a development where natural resources are not depleted to a level that put their continuing growth at risk.[157]

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[157] Sustainable development is widely understood to rest on three interdependent dimensions: ecological, social and economic sustainability. The three dimensions need to be addressed simultaneously in policy-making to reach the aspired social goal (UNCED 1992). Hence it follows that economic growth cannot be

Energy resources are doubtless one of the most essential components of human life, and the supply of energy is a fundamental prerequisite for the subsistence and development of modern society. Like many other natural resources, some energy resources are however in short supply and in danger of being exhausted. Sustainable energy supply thus calls for use of renewable, rather than non-renewable, energy sources. Still, regardless of the presumption that an *un*sustainable development will possibly get in the way of human subsistence itself; there are many barriers on the road to sustainable development. The *path dependence* that typically characterises institutional (and other) systems suggests that development is constrained by previous choices; as time goes by, the relative costs for altering a system increases and so does the relative gain of sustaining at least part of it. For example, once decentralisation of power has been effected, it becomes more costly to eliminate municipal self-governance; once a law has been adopted and gone into effect, it becomes more costly to adopt a different law; and, once a judicial precedence has been established and relied upon, the costs of reversal grow. And so on and so forth.

Introduction and aim

This paper deals with the issue of path dependence in law in the context of energy policy implementation. More specifically, the implementation of an energy policy that stipulates an increased use of renewable energy in general and wind power in particular. Sweden, as the rest of the world, faces serious challenges in this respect. The imminent threat of environmental disasters as a result of for example climate change together with a widespread desire to increase the security of supply and hence overall stability, call for extensive and cross-disciplinary action. The path dependence of the institutional system however affects the ability to implement change. *The purpose of this paper is to analyse and discuss the legal implementation of wind power in Sweden on the basis of the theory of path dependence.*

Setting the energy policy context

Energy accounts for 80 percent of all greenhouse gas emission in the EU which makes it a huge propelling force for environmental degradation in general and climate change in particular (COM/2007/0001). It also makes the energy sector the most important target for e.g. climate change mitigation measures; an increased use of renewable energy is often viewed as a key to a more sustainable future (COM/2006/848 final). In keeping with *An Energy Policy for Europe*, one fifth of total primary energy supply shall stem from renewable energy by 2020. By expanding the share of renewable energy, a number of environmental and energy objectives are expected to be achieved, for example reduced greenhouse gas emissions, decreased pollution, and increased security of supply.

Also in Sweden, the main energy objective is since long a conversion from the exploitation and use of non renewable energy resources (in particular fossil fuels and uranium) to a more diversified energy mix with a large share of renewable energy. The supply of electricity rests heavily on hydro and nuclear power generation, whereas the development of "new

allowed to surpass social or environmental considerations. It also implies that socio-economic concerns must be taken when introducing new environmental objectives. In practice, there are no easy ways to combine the three dimensions (Meadowcroft 2005). In this paper, focus is on the role of law in achieving sustainable development. Consequently, the analysis holds no attempts to determine or discuss matters such as the continuation of the existing fossil fuels or the level of supply required for subsistence.

renewables", such as wind power, has been much more modest. The difference in installed capacity compared to for example Denmark, the United Kingdom and Germany is significant, while others like Norway, shows much the same poor record as Sweden (Pettersson 2008).

An important condition for the transformation of the energy system is that "there is already a system in place, i.e., the present energy infrastructure with associated actors and institutional framework." (Johnson 2011). Connected to the use of a certain technology is thus also the legal system that governs the planning, location and operation of energy installations. The development of legal systems that support the implementation of the policies required to transform the energy system is of great importance (ibid.). Besides the necessary change in perspective, it is a matter of creating adequate economic incentives to stimulate investments in renewable energy technologies and to adjust the institutional setting to fit the "new" situation.

Method and case study

This study draws upon Swedish, Danish, Norwegian and English legislation. Methodologically, certain functions of the legal systems are studied, partly to explicate current valid law and partly to analyse the rules in relation to the theory of self-reinforcing path dependence. A specific focus is placed on path dependence in connection with the legal implementation of wind power policy. The study utilises on work conducted within the research project *Pathways to Sustainable Energy Systems*, primarily Pettersson (2008) (see Pettersson, 2011 1b).

Theoretical framework: path dependence

The general idea of path dependency suggests that choices made in the past affects (constrain or expand) the subsequent range of possible or reasonable choices. A decision to take a left instead of a right turn at a crossroads might forever foreclose the possibility to explore what was down the road from the right turn. Not necessarily because the right turn option is no longer there, but because it would be too costly (time, fuel etc.) to go back. The choice to take a left turn will thus to some extent control also were we go from there. Or as Margaret Levi puts it:

> "Path dependence is to mean, if it is to mean anything, that once a country or region has started down a track, the costs of reversal are very high. There will be other choice points, but the entrenchments of certain institutional arrangements obstruct an easy reversal of the initial choice. Perhaps the better metaphor is a tree, rather than a path. From the same trunk, there are many different branches and smaller branches. Although it is possible to turn around or to clamber from one to the other – and essential if the chosen branch dies – the branch on which the climber begins is the one she tends to follow." (Margaret Levi 1997)

According to Hathaway (Hathaway 2001) three strands of path dependence theory can be identified: evolutionary path dependence, increasing returns path dependence, and sequencing path dependence. Each of these three strands has implications for the course and development of the legal system. The new evolutionary theory, characterised by "punctuated equilibria"[158], offers a model which

[158] Unlike the classical Darwinian hypothesis where evolution is described as a slow and gradual

according to Hathaway "provides a useful lens on the process of legal evolution in a common law system" (Hathaway 2001, p. 142). Despite substantial contextual differences, the theory "indicates the central importance of the brief but crucial punctuations that open up windows of opportunity for sweeping change." (Hathaway 2001, p. 142). Translated into a legal context, such opportunities arise for example when new laws are prepared or when legal issues are appealed for the first time to the Supreme Court. A very important implication of the understanding of this pattern is the possibility to provoke such windows of opportunity, for example by appeals or by submitting proposals to parliament (Hathaway 2001, p. 143). *'Returns to scale'* is, in short, a way of describing how output responds to proportional increases in input. The concept of *increasing returns to scale* is hence used to explain a situation where output increases by a greater proportion than the input (see e.g., Nicholson 1998). According to Hathaway increasing returns to scale arise mainly as a result of: "large fixed costs, which lead to falling unit costs when output increases; learning effects, which lower costs as production becomes more common; co-ordination effects, which confer benefits for taking action similar to others; and self-reinforcing or adaptive expectations, which lead actors to react to current conditions in ways that enhance the likelihood that similar conditions will persist in the future." (Hathaway 2001).[159] When these features are present in a system, the costs for taking an additional step in the same direction will be lower, or the benefits higher, than taking a step in a different direction. This in turn implies a very strong self-reinforcing sequence where the previous pattern tends to repeat itself.

Mahony (Mahony 2000) explains the term self-reinforcing sequence as a type of path dependence where an institutional pattern is produced by increasing returns (utility or benefit) and states that: "With increasing returns, an institutional pattern – once adopted – delivers increasing benefits with its continued adoption, and thus over time it becomes more and more difficult to transform the pattern or select previously available options" (Mahony 2000, p. 508). Accordingly, sequences with self-reinforcing properties imply that over time it becomes difficult or even impossible to change direction.[160]

According to Pierson (Pierson 2000) the usage of the concept of path dependence tends to vary between a wider and a narrower perception. In the wider version, path dependence is taken to mean the causal relevance of previous stages in a temporal sequence (chronological order). Pierson however argues that this wider perspective has little usage since "it entails only the loose and not very helpful assertion that 'history matters'". (Pierson 2000 p. 252). He thus argues that the general notion of path dependence, which he defines as the causal way in which previous decisions affect future choices, should be limited to "positive feedback", or self-reinforcement, since it implies that with time the relative benefits – the increasing returns – of

development where natural variations combined with competition for limited resources leads to a natural selection where the fittest species survive, the new evolutionary theory describes a pattern where periods of stagnation are interrupted by periods in which new species are rapidly branching out from existing stocks in a process of speciation (Hathaway 2001, p. 113-115).

[159] Note that it is not necessary for a system to exhibit all four features for it to be increasing returns to scale.

[160] Mahony distinguishes between self-reinforcing sequences and reactive sequences, where the latter are defined as "chains of temporally ordered and causally connected events." (Mahony 2000, p. 509). In a reactive sequence, late events are driven by reactions to earlier events; each step is dependent on prior steps.

maintaining some feature of the system increases. With this narrower definition path dependence is taken to imply that previous moves in a certain direction will produce further development in that same direction, which according to Pierson, "is well captured by the idea of increasing returns." (Pierson 2000 p. 252).

Institutional path dependence

Institutions are here defined as rules for human interaction.[161] In this sense, the institutional framework provide a structure for social and economic interaction by outlining the social order to which we are part and restrict our conduct by imposing norms and regulations (North 1993). The primary role of the institutional framework is thus to reduce uncertainties (transaction costs) in the interface among humans since cooperation usually is considered worthwhile if the outcome can be predicted (cf. game theory). However, although the structure for interaction provided by the institutions provides stability, it does not necessarily provide efficiency. While well defined property rights are generally considered to prevent e.g. resource depletion (cf. The Coase theorem), the ownership structure may well serve only a few powerful interests. The persistence of inefficient, or undesirable, institutions can be explained by the occurrence of path dependence (e.g. Pettersson 2008, p. 15).

"If the highest rates of return in a society are to be made from piracy, then organisations will invest in knowledge and skills that will make them better pirates; if organisations realize the highest payoffs by increasing productivity then they will invest in skills and knowledge to achieve that objective" (North 1994, p. 3)

Institutional path dependence thus implies that when an institution, such as a law, is produced, the choices that forms the decision have a constraining effect into the future (Greener 2005). For example, when a law has been passed or a precedent case decided, it will take considerable efforts to change the path, even if the institution in time becomes less desirable. The same is valid for the distribution of authority and responsibility; since people or groups in power typically have obtained their positions as a result of the institutional arrangements, there will be a certain disinclination to initiate or promote (radical) changes. The formal institutional framework is thus strongly characterised by increasing returns and likely to produce a self-reinforcing sequence.

Reasons for Institutional change

According to North institutional changes occur for two main reasons: changes in relative prices (or utility) or altered preferences. Regarding changes in legislation for example, this implies that, faced with a proposal for a new law, the Swedish Parliament will pass the new legislation only if a majority of the members perceive the proposal as superior compared with the existing legal situation. And since the proposal reflects the perception and ambition of its initiator, the institutional changes that follow from the new law will be a result of the initiator's perception that the new situation will imply a higher utility than the previous. Amendments in formal institutions thus typically reflect political or economical objectives aiming to get the highest pay-off in terms of utility, investments, seats or period of office etc. (see North 1990, pp. 129-130 and

[161] The concept of institutions has to be distinguished from the concept of organisations. To use North's analogy to sports, institutions constitute the rules of the game whereas the organisations serve as players and it is the players' duty to play the game to the best of their ability within the framework of the established rules (North 1993. p. 18).

1994, pp. 4-5). The origin of the second cause for change, i.e., altered preferences, is naturally hard to capture; peoples' preferences may change by reason of almost anything, but clearly changes in relative prices play a role also in this context since vast adjustments in relative prices have a tendency to alter peoples' behaviour and in time also their likes and dislikes.

Greener (Greener 2005) speaks of endogenous and exogenous changes in a path dependent system, where endogenous changes come about as a result of fragmentation within established groups creating "separate identities and differentiated ideas" (Greener 2005, p. 67). Endogenous changes can be simplified as "changes from within" and may for example occur if a 'significant group' can no longer sustain its system due to built in incompatibility that result in disintegration and, eventually, changes (ibid.). In the legal system, endogenous changes may arise as a result of observed inconsistencies in the law, for example contradictory provisions that cause difficulties in applying the law. Exogenous changes are consequently changes that derive from external factors, such as fiscal crises. Exogenous changes may also emerge through "challenging ideas that are backed by vocal and powerful vested interests" (ibid.). Although expressed very differently, Greener's terminology corresponds fairly well to North's causes for institutional change. The first oil crisis is an example of a highly unexpected external (exogenous) source of change which suddenly and dramatically altered the relative price on energy causing major political and financial changes all over the world and altering the positioning of the actors on the energy market. A perhaps less dramatic example of an exogenous source of change in the formal institutional framework is the amendments in the forest related legislation in e.g. Sweden and British Columbia following storm or climate change induced pest outbreaks (see e.g. Keskitalo et al. 2011; Pettersson & Keskitalo 2011).

Prior to, and over time alongside with, the institutional impacts of the oil-crisis concern over the balance between humanity and the environment grew and assumed international proportions. In the 1960s, Rachel Carson's book *Silent Spring* (1962) and Garreth Hardin's article *Tragedy of the Commons'* (1968) became landmarks that, together with a chain of environmental catastrophes, brought together the environmental community,[162] and in 1972 the first environmental conference was held in Stockholm.[163] Together with the modified preferences caused by the environmental awakening in the 1960s, the changed relative prices on energy resulting from the oil-crises helped form the mainstream European energy policy of today; a policy that to a large extent focuses on energy conservation and an increased use of renewable energy resources. In consequence, although the oil-prices that stroke the world with amazement eventually dropped, the damage, in terms of fear of e.g., heavy oil-dependence, was already done and the concerns for the human impact on the environment remained. From a legal perspective, the work initiated in Stockholm, that continued and twenty years later landed in the Rio Earth Summit, has resulted in the creation and amendment of countless international, regional and national laws.

[162] See UNEP "Integrating Environment and Development 1972-2002".

[163] United Nations Conference on the Human Environment, Stockholm, Sweden.

The path dependence of the legal regimes involved in the wind power development

The legal system normally includes rules that indicate how, by whom and for what purpose resources may or may not be employed. The function of the law on this matter is thus typically to control the utilisation and management of the country's resources. Since energy installations, such as wind power stations, require admission to considerable land- and water areas where sometimes large and visible constructions will be located, the development normally activates a number of legal regimes of which some of the most significant are indeed related to the utilisation of wind, land and water areas. In a Swedish context, this includes primarily environmental law, such as land use and planning law and authorisation rules, but also the area of expropriation law and energy law is activated (Pettersson 2008). In the following examination of the possible path dependence of the legal regimes involved in the planning, location and installation of windmills, the specific energy laws are however excluded. The legal rules regarding construction of and access to transmission lines as well as the green certificate system in Sweden are fairly straightforward and have not been subject to any major legal disputes.

The one hundred year old expropriation purposes

In Sweden, the right to harness wind for energy purposes is, in principle, unregulated. The right of disposition of land based wind resources is generally considered to belong to the proprietor (e.g. Michanek 1990, Pettersson 2008). In essence, the installation of windmills on private land thus requires either consent or expropriation. The legal situation regarding the possibility to expropriate land to harness wind energy in Sweden is however uncertain; although expropriation to meet 'the need for electric power' is allowed (ch. 2, s. 3, Expropriation Act) the law speaks not of extraction, but rather of use of land. Although Michanek concludes that the provision only targets expropriation for the need for land, and not the extraction of energy in itself, he also notes that in practice it is of course possible to apply for expropriation permit on the grounds that land is needed for the installation. In this case, however, "it has to be presumed that the purpose of expropriating the land is, objectively, to extract the energy resource", which thus presumably would not be permitted since it is not a ground for expropriation (Michanek 1990, pp. 523-524). An expropriation permit shall moreover not be granted if the purpose (i.e. the energy production) can be better met by other means (ch. 2, s. 12, Expropriation Act). This means that even if it was possible to expropriate land to install windmills with the intention to extract the energy resource, this would have to be the best way to meet the purpose (Pettersson 1990).

The expropriation purposes in ch. 2 s. 3 originate from the 1917 Expropriation Act and the purpose was likely to pave the way for energy installations such as coal power plants and not to extract energy resources (Michanek 1990, p. 523). At the advent of the 1972 Expropriation Act the primary energy resources were hydropower, coal and uranium, all of which were regulated separately and thus explicitly excluded from the Expropriation Act (Ibid). The motives behind the expropriation purposes under Swedish law are based on almost 100 year old circumstances; a time when few people thought of, for example, wind power as a supplier of electricity. While it seems imperative to amend the law to explicitly allow for expropriation for the purpose of energy extraction, the institutional path dependence suggests that considerable efforts will be required (Greener 2005).

The path dependence of the resource management provisions

The competition over land has many origins. The main issues in connection with the development of wind power are linked to protection, such as landscape preservation, and conflicting use, such as forestry or reindeer herding. In Sweden, the balancing of opposite interests is based on the resource management rules in the Environmental Code. The rules derive from the late 1960s and a desire to allocate the country's natural resources more efficiently. The demand for natural resources had increased and the conflicts over use and allocation of resources intensified. In 1972, *guidelines on national physical planning* (for the management of land and water areas) were accepted by the Parliament, but not laid down in law (C 1972:1, Prop. 1972:111)). In connection with the advent of the Planning and Building Act, it became necessary to establish the guidelines in law.[164] Thus, without any major changes, the management provisions were laid down in the 1987 Natural Resources Act and in 1998 the rules were almost intact transferred to the Environmental Code.

Before the adoption of the Natural Resources Act, the Council of Legislation (Swe: Lagrådet) was very critical to the formulation of the rules. It was the Council's view that although statements in order to give the rules a more precise content were made in the motives to the law, "one ought to require that the ones affected by the law are able to form an opinion regarding the content and legal effect of the legislation." The large span between the motives to the law and the actual legal text was furthermore said to "balance on the limit of what in this regard is consistent with high quality legislation." (Prop. 1985/86:3, p. 225). The Council's critique was revisited (and agreed upon) in the bill to the Environmental Code, but the government argued that since the provisions have been in place a long time and applied by a large number of authorities in many cases, and no substantial change was intended, changes could lead to unnecessary ambiguities (Prop. 1997/98:45, pp. 243-44).

Before moving on to the question of the system's path dependence, some basic knowledge of the provisions is necessary. The *basic* resource management provisions (ch. 3, Environmental Code) are applicable in matters related to new (or changed) use of land and water areas in Sweden. As a general assessment rule, s. 1 gives direction for the assessment of conflicts of interests, stating that "Land and water areas shall be used for the purposes for which the areas are best suited in view of their nature and situation and existing needs. Priorities shall be given to use that promotes good management from the point of view of public interests." In addition to the general rule, different types of land and water areas are regulated. The provisions address specific interests that are connected to certain areas by reason of quality or suitability. Areas that are particularly suitable for wind power shall for example – *to the extent possible* – be safeguarded against activities that may interfere with the wind interest, or, if the area is designated national interest for wind power, it *shall* be safeguarded against such activities (ch. 3, s. 8. See also Pettersson 2008, pp. 35-43). Areas with high natural or cultural values are likewise protected against activities that may significantly damage the values (ch. 3, s. 6. Ibid). In the *special* resource management provisions (ch. 4, Environmental Code) certain (geographically identified) areas of the country

[164] According to the proposal for the Planning and Building Act, the government could only interfere with the municipal planning if legally established national interests were not taken into account. For the new planning system to be consistent, the guidelines thus had to be converted to legal rules (Prop. 1985/85:3, p. 8).

are protected against exploitation activities due to their natural or cultural values. These areas are entirely of national interest (s. 1).

Due to weak formulations and ambiguous content the discretion of especially the basic provisions is large. As a result, the outcome of the rules is rather unpredictable. The rules are moreover designed to steer away from interfering or damaging activities rather than to promote or protect interests, which makes the regulation relatively ineffective as am instrument for managing the country's natural resources (see Michanek 1993; 1990, Söderholm et al. 2007 and Pettersson 2008).

The Swedish system for 'national planning' thus shows clear evidence of path dependence; the original choice in terms of the 1972 guidelines seems to have been a limiting factor for the subsequent possibility to choose another way to deal with planning on national level. The largest opportunities to change direction and improve the legal situation did not result in any substantial changes in the face of the critique and despite the vague formulation of the rules. The need to reduce the uncertainty regarding the outcome of the legal application and make it clear under which circumstances (if any) for example wind power development is a possible choice is apparent. Clear and explicable balancing rules can also uphold a stronger protection against damaging activities; both preservation and development interests would therefore attain a stronger position with clear balancing criteria in place. Nevertheless, a reversal from the original path seems to have been obstructed by the institutional structures established as a result of the initial decision, in terms of the role of the sector authorities, the already designated areas of national interest, legal practice and the trial system etc.

Another interesting characteristic of particularly the special resource management provisions is that they very much reflect a traditional (prior to the Environmental Code) 'environmental protection perspective'. Areas are protected for their natural and cultural values against all kind of development. It is therefore particularly conservation interests that are considered worthy of protection. The sustainability objective on the other hand implies that also development can contribute to this goal. A transformation of the energy system to involve less use of non-renewable energy sources, such as coal and oil, means that the very prerequisites for development are preserved.

In sum, although the design of the resource management provisions is somewhat outdated and ill-suited with regard to the scope of sustainable development, the institutional path dependence implies that considerable efforts are required to change the pathway.

Self-reinforcing municipal self-government?

The basic principle for the Swedish form of government is that all public power proceeds from the people. The democracy in Sweden is accomplished through e.g. local self-government (ch. 1, s. 1, Instrument of Government). Municipal sovereignty is thus a fundamental part of the Swedish governance and the planning system is no exception; a consistent feature of the draft for the 1987 Planning- and Building Act was the principle of decentralised decision making (Prop. 1985/86:1). Accordingly, ch. 1 s. 2 in the Planning and Building Act states that planning of land and water areas is a matter for the municipalities. The planning system is of great importance for the possibility to implement energy policy, especially wind power, not least since the development of energy installations typically requires some sort of municipal consent either in the form of a detail plan or by a right of veto (Pettersson 2008). Again, it seems appropriate to account for some of the issues in connection with the

planning system before discussing its possible path dependence.

There are several problems attached to the planning monopoly in the context of energy policy implementation. First of all, it is imperative for the implementation of national policy that local decision making in the form of physical plans reflects the overarching objectives on which the policy is founded. In Sweden, the lack of vertical integration between national planning objectives on the one hand and legally binding plans on the other has created a system that is best characterised by 'global policies and local obstacles' (see e.g. Söderholm et al. 2007). The weak steering capacity of the system furthermore implies that the strongest link between, for example, the national wind power planning goal and the legally binding detail plans is the recommended areas of national interest for wind power. Even if the responsibility to designate such areas is completed, there are no guarantees that the designations are respected in the subsequent planning.

The vertically integrated Danish planning system shows that it is not impossible to rely on the principle of decentralisation and still have in place sufficient integration functions. The requirement under Danish law to pay due consideration to the upper level planning and to strive to implement adopted plans seems to have had a positive effect on the possibilities to effectively carry out, in this case, wind power planning objectives. The contents of plans can also be influenced by guidelines that provide substantial direction on how to comprise for example the development of wind power in the planning process as is the case in Norway and England (Pettersson 2008).

Another implication of the planning monopoly is the difficulties to contest undue planning or planning inactivity. Theoretically, it is possible for the government to order (via an injunction) municipalities to adopt, change or repeal a plan, if they for example failed to take national interests into account (ch. 11, s. 15). The problem is that no such injunction has ever been issued in accordance with the planning- and building act, so the rule is practically without importance. Although it is indeed possible to start using the rule now, it is highly unlikely to happen; the Swedish municipal self-government is very resilient and deeply founded in the institutional framework.

The planning monopoly shows clear evidence of self-reinforcing sequences; the increasing returns for those in power have presumably produced an institutional pattern that is very difficult to transform: "the political and economical organizations that have come into existence as a consequence of the institutional matrix typically have a stake in perpetuating the existing framework" (North 1994). Thus, people who have gained their position as a result of the current system will usually want that system to continue.

Permits and institutional path dependence

Energy installations typically require some sort of authorisation (i.e., permit, licence, concession etc.). The basis for all types of authorisation is a need to control activities beforehand, for example to prevent damage, like long-term pollution, or avoid inflexible solutions as a result of poor planning. A standard trial for permit roughly includes material consideration of the development's overall social, economical and environmental effects. Typical factors attended to in the trial for energy installations in general and windmill installations in particular are the size and location of the installation, its environmental impacts (which depends on e.g., the location) and the risks involved in the construction and operation of

the facility.[165] From the viewpoint of the operator, one of the strongest reasons in favour of applying for (and getting) a permit in accordance with the Environmental Code is the legal certainty that comes with it; the possession of a valid permit implies in principle a right to operate continuously on condition that the terms of the agreement are not violated (ch. 24, s. 1, EC).[166]

Although it is legally possible to set stricter environmental requirements for operators with a valid permit,[167] activities may well be below the radar of the supervising authority and hence operate for a very long time without updating either the permit or the conditions thereof. Apart from the obvious institutional path dependence that follows from the fact that it is an established legal construction that also has been in place for quite some time, it also implies weak incentives for changes or improvements. From the point of view of wind power development the construction of the permit system mainly implies two things. First of all the straightforward consequence that once a permit has been obtained, the activity can in principle continue if the conditions are complied with. Second of all, the more complicated and indirect implication that follows from the fact that other competing energy facilities (e.g. hydropower and nuclear power plants) hold valid permits issued many decades ago. In the future, it is a risk that these permits may stand in the way of wind power development.

[165] Not all authorisation requirements have explicit environmental origins. A concession can for example aim primarily to guarantee an efficient energy production. Even so, environmental concerns are usually attended to in the, in most cases, required environmental impact assessment.

[166] Note that the possession of a permit does not exclude the right to claim for damages.

[167] If it turns out that the activity causes significant unforeseen adverse effects, or if it is necessary to comply with EU-law etc., it is possible to withdraw a valid permit (see further ch. 24, s. 3, EC). A permit can moreover be subject to review if the activity, for example contributes to non-compliance with an environmental quality standard, or if inconveniences that could not be anticipated when the permit was granted have occurred (se further ch. 24, s. 5).

Sustainable development: a new path?

This paper illustrates how the path dependence of the institutional system risks putting obstacles in the way of a development involving transformation of the energy system towards a more sustainable future. Although sustainable development is at the heart of the Swedish environmental law, its status and application is still debatable. According to Nicholas de Sadeleer the "hard centre" of the sustainability concept is the objective to retain the preconditions for development for both present and future generations (de Sadeleer 2002, p. 373). The intrinsic conflict of interest: sustain or develop implies that "caught between an economic logic seeking to maximize production --- and an ecological logic, sustainable development is situated at the junction of interests that are *a priori* at loggerheads." (de Sadeleer 2002, p. 373). Still, without ecological sustainability there can be no development, so while ecological sustainability is indeed a prerequisite for development, the opposite is not true (Westerlund 1997, pp. 25-27).

Should the concept of sustainable development therefore be viewed as a legal principle against which the legal system should respond? The core function of legal principles is to express the underlying purpose of legal rules. To be defined as a legal principle, the rule must thus be carried by the legal system, for example via positive legal rules, and it must also be recognised by the legal community (e.g. MacCormick and Weinberger). The ownership institute in the Swedish legal system constitutes such a legal principle; in principle ownership

implies a complete right of disposal. The owner of, for example a piece of land is free to do as he pleases with his property; he may use it, sell it or even destroy it, unless the law says otherwise.[168] The main function of the positive legal rules in relation to the ownership institute is thus to control conflict situations and deviations from the basic principle, for instance for the benefit of legal certainty or environmental protection. In the same way concession- or permit requirements are deviations from the main principle that the form for agreements is free (Strömholm 1996, pp. 179-183).

The inherent ambiguity of the definition of sustainable development argues against considering it a legal principle; there are too many contradictory aspects of the current definition for it to be substantiated by the legal system as a whole. It can, *and shall*, however be considered by the judiciary when the provisions of the Environmental Code is applied. This implies that although it is perfectly possible to arrive at a solution without invoking the sustainability objective (which will not be contested on the basis of not involving, or inconsistency with, the objective of sustainable development), and the legal system therefore cannot completely prevent unsustainable development, the introduction of sustainable development at the heart of the Environmental Code implies a new path, that may well be walked on.

The development of wind power in Sweden: a sign of changed preferences?

The wind power takeoff in Sweden has certainly been uneven. In the face of a long-term objective to increase the share of wind power together with a rather strong support system, the development until the beginning of the 2000s was very slow. In 2002 the total installed capacity of wind power was 304 MW and in 2006 it amounted to 572 MW. Towards the end of the decade the development picked up speed and the installed capacity doubled between the years 2008 (1 021 MW) and 2010 (2 163 MW) (http://www.gwec.net); a fairly small amount compared to other European countries, but a strong sign of a changing path in Sweden. A large part of the explanation for the sudden takeoff is due to strong efforts in terms of support systems, establishment of a national wind power network and wind power coordinators, together with attempts to facilitate the regulatory framework (http://sweden.gov.se).

The development can be traced also by following the legal application. Signs of path dependence are evident in the initial phase of wind power development in Sweden as well as in the transition period between Environmental Protection Act and the Environmental Code. In early court cases regarding wind power development before the Environmental Court of Appeal (i.e., before 2005), the environmental benefits of renewable energy were not in the foreground. In fact, concepts like sustainable development and sustainable energy supply were hardly mentioned (Pettersson 2008). Focus was often put on the intervention in the landscape caused by the installations, and the protected values were generally held very high (cf. Judgment of the Environmental Court of Appeal in case M 7625-00, M 623-02, M 8328-99). In several of the cases where permit for the development were indeed granted, the decision appears to be based on the lack of sufficiently strong opposite interests, rather than benefits attached to the wind interest (cf. Judgement of the Environmental Court of Appeal in case M 9540-99, M 1391-01, M 2602-07) (Pettersson

[168] The Swedish or ownership right is referred to as *negatively determined,* (Bergström, S. (1956) "Om begreppet ägande rätt inom fastighetsrätten" *Svensk Juristtidning* 1956 s. 145-162).

2008, Michanek & Söderholm 2006). These earlier assessments thus seem to have been made in a spirit according to which environmental protection is primarily achieved through conservation rather than via implementation of environmentally friendly technology (Pettersson 2008).

It was not until 2004, six years into the existence of the Environmental Code and its objective to promote a sustainable development, that a ruling of the Environmental Court of Appeal explicitly referred to the sustainability objective as a basis for judicial decisions. In two cases from 2004 and 2005 the court introduced the judicial decision by asserting that ch. 1, s. 1 para. 2 in the Code implies "a specification of how to interpret the concept of sustainable development and includes a direction about how the substantial provisions in e.g. chapter 2 shall be applied."[169] (Case M 9408-03 and M 10499-02) (Author's translation). The development of land based wind power was first referred to by the court as a general interest, part of sustainable development, in 2005.[170] In this case, the court stated that the trial in accordance with the resource management provisions should include balancing between the public interest to expand the share of wind power in support of sustainable development and the public interest to protect valuable natural and cultural environments. At the end, the court found:"that the public interest to increase the share of wind power to promote sustainable development speaks in favour of approving the installation." (Author's translation). The opposite interests were thus not considered of such importance as to prevent installation on the selected site and permit was granted (Case M 2966-04). Following this case, a number of cases involving the development of wind power have been decided by the Environmental Court of Appeal and in the cases were the issue involved assessment of conflicting interests the majority has lately fallen out to the advantage of wind power.

In 2008, increased use of renewable energy as part of achieving the objective of the Environmental Code as well as other environmental quality objectives was put forward in a case concerning the establishment of wind power in an area containing high natural values (primeval forest). The area was designated national interest for reindeer herding as well as for wind power production. The court did not see any conflict between the reindeer herding interest and the wind power interest and no balancing were thus needed in this respect. It was furthermore concluded that the development could not take place without damaging the natural values of the areas; area losses as well as fragmentation of the primeval forests would be inevitable. The court nevertheless decided to authorise development in three out of four suggested areas on condition the precautionary measures

[169] Chapter 2 in the Environmental Code contains the so called general consideration rules, i.e. basic environmental requirements that specify what is required to protect the environment at large. With regard to, for example wind power, the rules imply e.g. that special consideration has to be paid to the choice of location and that precautions must be taken. Author's note.

[170] It should be noted here that the Environmental Court of Appeal had made this argument before in the context of offshore wind power development. In case 833-99 the court argued that the support granted to wind power (i.e. the investment subsidies and the environmental bonus) should be regarded as an adopted environmental value and hence a benefit from a public point of view in the cost-benefit assessment in accordance with the general conditions for hydraulic operations (ch. 11, s. 6, EC). The government shared the court's opinion and asserted that the increased share of renewable energy resulting from the development is in line with the objective of the Environmental Code (Decision and statement from the Environmental Court of Appeal to the government 2000-01-17 in case M 833-99 and decision of the government 2000-03-09).

promised by the actor would be sufficient to prevent long term damage (Case M 2210/08).

Three cases were decided by the Environmental Court of Appeal in 2009. In the first case, the conflicting interest was an untouched area of natural beauty. The area had however not been formally protected in any way and no special hazards for animal or plant species were reported. Although the investigation of alternative sites could be questioned on the grounds that it was limited to one municipality, the court decided to accept it in consideration of the wind power planning goal. The court stated that: "With society's goal for wind power in the country as a whole, a large number of sites will need to be claimed for developments." (Case M 7051-07).

The second, and much more controversial, case concerned the installation of 30 windmills on the low mountain Sjiska within Kaitum mountain primeval forest which is a nature reserve and part of the Natura 2000 network. The area was also subject to a writ of protection of the landscape. After request from the City Council the Environmental Court submitted the case to the government for examination of permissibility. In 2007, the government decided to authorise the development and in 2008 permit was granted by the Environmental Court.[171] The judgement was appealed to the Environmental Court of Appeal on various grounds. The Judicial Board (Swe: Kammarkollegiet) did not share the view of the Court that the government's permissibility trial formed the basis for the trial for permit and dispensation; the Swedish Environmental Protection Association (Svenska Naturskydds-föreningen) claimed that "the permit is in violation of so many legal rules that the Environmental Court of Appeal must review the case under extraordinary forms." (Author's translation); and the Swedish Environmental Protection Agency deemed that the basis for the decision needed to be supplemented (in terms of exact locations of foundations and routing paths) to minimise damage to the interests worthy of protection. The Environmental Court of Appeal makes the assessment that the development may cause significant damage to the environment and that permit according to the rules for Natura 2000 areas and the nature reserve regulations therefore is required. Regarding the authority of the government's decision the court argues that it is clear that area protection as well as conditions for permit has been considered. The assessment is therefore taken to include permissibility in accordance with all relevant provisions in the EC. The role of the court is then to permit the development and examine issues not covered by the government's decision. Accordingly, considering the defined conditions, the court did not find that the development was prevented by the rules regarding Natura 2000 areas. Regarding the nature reserve regulations, the court decided to permit the construction of buildings and the felling of trees necessary for the development (case M 5226-08).

The third case concerned the appeal of a permit granted by the Environmental Court for an offshore windmill installation. The Judicial Board primarily sought cancellation of the permit because of the serious risks the location

[171] The Swedish Environmental Protection Association (Svenska Naturskyddsföreningen) contested the decision and claimed for the Supreme Administrative Court to declare the government's decision invalid. The Association stated that the government's decision violates a number of provisions in the EC, here among the location requirement, the resource management provisions, the rules on environmental impact assessments and the protection of Natura 2000 areas. After review of the decision, the Supreme Administrative Court concluded that the government's decision did not violate any legal rule in the manner proposed by the applicant; the government has not misinterpreted any facts or otherwise exceeded the limits of discretion in this case, nor have there been any errors in the handling of the case (Case nr 1989-08).

would imply for the endangered cod; the site in question constitute a unique spawning area for the species. The Environmental Court of Appeal began by noting the conditions for the selection of sites in accordance with the EC (i.e., the location rule, the resource management provisions and their connection to the sustainability objective). Thereafter the court stated that wind power is a renewable energy source that supports the objective of the EC, is imperative in the achievement of the climate commitments, and necessary to reach the wind power planning goal. However, in keeping with the environmental quality objectives adopted by the parliament, the goal of reduced climate impact shall however be achieved "in such a way and at such a rate that preserves biological diversity." The court therefore considered that the also development of renewable energy must be adjusted to protect ecosystems. The siting of the installation in this case was thus strongly questioned and the court did not consider the company's investigation of alternative sites acceptable since it was limited to one municipality: "it can not be excluded that there might be other sites along the coastline that are suitable for wind power and that does not constitute spawning area for the cod." (Author's translation). The Court therefore finds that the company has not sufficiently shown that the purpose of the activity can be achieved with a minimum of damage and inconvenience at the selected site and rejects permit (case M 294-08).

In a very controversial case from 2010, the Environmental Court as well as the Environmental Court of Appeal granted permit for a windmill installation in an area that is habitat for the golden eagle. The area in question was designated national interest for energy production as well as reindeer herding but, in consideration of the national wind power planning goal and other climate related commitments, both the Environmental Court and the Environmental Court of Appeal judged that the wind power interest best promotes a sustainable development (cf. ch. 3, s. 10, EC). Regarding the area's high geological values, the Environmental Court believes that traces from similar processes are available nearby and that the damages caused by the installation therefore will not reduce the geological interest for the area as a whole. Concerning the golden eagle, the court finds that there is a risk that the development will damage the existing population and believe that "it is reasonable to assume that the population will be reduced by an expansion." (Author's translation). The negative impacts are however, in the court's opinion, acceptable in consideration of the area's viable population of golden eagles. The Environmental Court of Appeal notes that a main issue in the case is whether the planned development is harmful to area's high natural values: untouched landscape and high geological values. Concerning the landscape, the court does not believe that the area will be affected by the windmills to an extent that prevents permit. As for the geological values, it is concluded that no formal protection has been established for this reason. Since the development will only claim a small part of the area, the Environmental Court of Appeal finds the two interests compatible and thereby establishes the Judgement of the Environmental Court (case M 10316-09).

Conclusions

The theory of path dependence provides a theoretical basis as to why the mills of development grind slowly. Like other systems, the legal system evolves gradually over time and the development is based on existing legal frameworks and precedent. By applying the theory of path dependence our understanding of why changes may be difficult to implement

increases. This study shows that all three strands of path dependence presented by Hathaway can be traced in the development of wind power in Sweden. The concept of increasing returns is a way of describing how existing frameworks continues to exist as a result of e.g. falling costs and learning and coordination effects. In a legal context, radical departures from the existing path are indeed fairly uncommon. Although the phenomenon is not only a result of "accidental" increasing returns; changes in the legal system must be done in a certain order and conform to certain principles, the concept of increasing returns still explains the institutional path dependence of the legal system; the lower costs/higher benefits of taking additional steps in the same direction applies. The relative benefits (regardless of origin or motive) of staying on the same path produce self-reinforcing sequences where the pattern is repeated. For a long time the development of wind power in Sweden was more or less stationary; in spite of rather substantial economic incentives the legal framework in general and the municipal self-government in particular, seemed to prevent the development from taking off. However, as this study illustrates, more recent court cases indicates that things have changed rather dramatically. The perception of wind power, previously viewed as an industrial activity, and one that for the most part suffered defeat in the battle for what purpose that best protected the environment, has now evolved into a situation where not even the presence of golden eagles is enough to prevent its development. Is it possible that the great efforts to direct the development and advance the position of wind power have been strong enough to provoke a window of opportunity and enforce a change of the path? Or is it an endogenous change where sustainable development has gradually come to play a bigger role in legal application? Or is it the imminent threat of climate change that together with an increasing need for security of supply has produced tools that are powerful enough to synchronise the endeavours towards a more sustainable future? Regardless of which it seems clear that, at this time, the environmental benefits of wind power have gained the upper hand over other interests. Although development is indeed often path dependent, the development of wind power in Sweden shows that paths can change.

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Internal and External Policy and Legal Challenges in the EU in Achieving a Sustainable, Competitive and Secure Internal Energy Market and the Integration of Electricity from Renewable Energy Sources into the Energy system

Katelijn Van Hende

Abstract

This article assesses the internal and external legal and policy challenges that the EU faces in creating a sustainable, competitive and secure internal energy market. It also examines the EU's concrete efforts to integrate electricity from renewable energy sources into the energy system. The internal policy objectives of sustainable development, competitiveness and security of supply are interrelated. In order to take concrete action in the energy policy area, it is important that these objectives are consistently applied. This article also analyses the interrelationship between these three policy objectives, as well as their relationship to the objective of integrating electricity from renewable energy sources. Although there are ambiguities in the relationship between the achievement of an internal energy market based on the three internal policy objectives and the integration of electricity from renewable energy sources into the energy system, there is also a clear positive connection with the integration of electricity from renewable energy sources into the energy system. This is, for instance, displayed by: the potential to reduce the dependence on energy imports from primary conventional energy sources; a potential diversification of the energy mix; and new market entrants. The integration of electricity from renewable energy sources into the energy system has a potential role to play as a long-term policy remedy in the EU's external energy relations and should receive greater focus in the interface between the internal and the external policy challenges that the EU faces today in establishing a sustainable, competitive and secure internal energy market, since the latter is intended to be consistently applied both internally and externally.

Introduction[172]

The energy sector contributes to the greenhouse effect, with almost 80% of the EU's total greenhouse gas emissions stemming from energy-related emissions.[173] This makes energy and its role within a policy for sustainable energy development one of the biggest challenges that the EU faces today.[174] At present, the EU's energy and climate policy goals are both included in the Europe 2020 strategy for smart, sustainable and inclusive growth and the flagship initiative of a

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[173] European Commission Communication, *Europe 2020. A strategy for competitive, sustainable and secure energy*, COM (2010) 639 final, 10 November 2010, 2.

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'resource-efficient Europe', of which the Energy Roadmap 2050 initiative forms part. One of the urgent tasks under the current policy framework is to agree on tools that can ensure a competitive, secure and sustainable path for Europe.[175] The Renewable Energy Directive 2009/28/EC of 23 April 2009 (hereafter the 'RES Directive'), which establishes a common framework for the promotion of energy from renewable energy sources (RES), sets mandatory targets for the overall share of energy from RES in the gross final energy consumption.[176] This share is also set by sectoral breakdown. The EU will need to double the share of electricity from renewable energy sources (RES-E) from 16% in 2006 to over 30% and will need to ensure that the share of energy from renewable energy sources in all forms of transport in 2020 is at least 10% of the final consumption of energy in each Member State to reach an overall renewable energy target of 20% by 2020.[177] In addition, the Electricity Directive 2009/72/EC of 13 July 2009 (hereafter the '2009 Electricity Directive') promotes the integration of electricity production from RES and fair access to the network in order to remove barriers preventing access by new market entrants and RES-E.[178] The development and integration of RES have become both legal and political issues because they help to combat climate change and they contribute to the security of the EU's energy supply.[179] The current European economic and social system is based on centralised conventional energy sources, such as oil, coal, natural gas and nuclear energy and their distribution systems.[180] A shift to integrating renewable energy sources into this system will pose challenges.

This article will assess the legal and policy challenges in the creation and development of a sustainable, competitive and secure internal energy market and the integration of energy from RES into the conventional energy system, more specifically the integration of RES-E into the electricity grid. The development of energy from RES is not only relevant in relation to RES-E, but also for the purposes of renewables for heating and cooling (RES-H and RES-C) and renewable transport fuels (RES-T). Although the European Commission and the EU Member States have made a long-term commitment to developing RES in the various different sectors, this article focuses on the integration of RES-E.

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This is mainly because the focus of most Member States has so far primarily been on the development of RES-E, even though there have been some recent developments in policy efforts developing mechanisms to support increased use of RES-T.[181]

Firstly, this article will give a short overview of the current EU energy legal framework following the adoption of a new energy title in the Treaty on the Functioning of the European Union (TFEU), Title XXI. Not only will the new Article 194 TFEU be analysed, but other new elements that have been introduced with the entry into force of the TFEU and the Treaty on European Union (TEU) with the Lisbon Treaty, such as the 'spirit of solidarity', will also be examined.

Secondly, it will introduce the current EU energy policy framework, which is based on three policy objectives, namely sustainable development, competitiveness and security of supply. These policy objectives form part of the EU's ambition to achieve a sustainable, competitive and secure internal energy market.

Thirdly, it will set out the internal and external challenges that the EU faces in its efforts to create and develop a sustainable, competitive and secure internal energy market and to integrate RES into this market, more specifically the integration of RES-E into the conventional energy system as an example of concrete action under the current EU framework.

As regards the internal legal and policy challenges, the first internal challenge that this article will assess is the interrelationship of the EU's three energy objectives of sustainability, competitiveness and security of supply.[182] The second internal challenge that will be assessed is how these objectives are related to the integration of RES-E into the energy system. This part of the article thus aspires to assess how the EU's policy and legal framework is applied to the EU's internal action in terms of its primary energy objectives, as well as how it is applied in terms of concrete action taken under the current framework (such as the integration of RES-E).

As regards the external challenges, the first challenge that will be discussed relates to the fact that the development of an EU energy legal and policy framework is influenced by the EU's dependence on foreign energy imports. This article analyses how this dependence influences the EU's concerns in relation to security of supply. It not only looks at its influence on the internal energy objectives, but also deals with the externalisation of the EU's internal policy objectives when entering into agreements with third countries. The role of the integration of RES-E into the energy system will also be discussed. The final issue that will be discussed is whether the element of solidarity could provide solutions in times of supply disruptions. In this last part on the EU's external challenges, the interface between the internal legal and policy challenges (which in this article centres on RES) and external legal and policy challenges (which in this article centres on the EU's dependence on energy sources from fossil fuels) that the EU is facing will become clear. In addition, there will be a

[181] See also P. CONNOR, V. BÜRGER, L. BEURSKENS, K. ERICSSON, C. EGGER, *Overview of RES-H/RES-C Support Options, D4 of WP2 from the RES-H Policy project, a report prepared as part of the IEE project 'Policy development for improving RES-H/C penetration in European Member States (RES-H Policy)'*, May 2009, www.res-h-policy.eu/downloads/RES-H_Policy-Options_(D4)_final.pdf (last consulted on 19 November 2011), 7.

[182] See also European Commission Green Paper, *A European Strategy for Sustainable, Competitive and Secure Energy*, COM (2006) 105 final, 8 March 2006.

summary of the various ideas and issues expressed throughout the article.

1. The Legal Basis of the EU's Current Energy Policy

1.1 A New Energy Title in the Treaty on the Functioning of the European Union: A Step Forward?

The original Treaty establishing the European Economic Community[183] only covered policy areas which were connected to the establishment and functioning of the 'common market'.[184] After the adoption of the Treaty establishing the European Community (TEC), Article 3 thereof also included ancillary Community policy areas.[185]

Energy is now listed under Article 4(2)(i) TFEU as a shared competence.[186] Although Article 3(u) TEC mentioned measures in the sphere of energy, it did not confer specific competences to the former 'European Community' to lay down such measures.[187] Hence, its legal initiatives were derived from the competences in the fields of the environment, research, and infrastructure (more specifically trans-European energy networks), as well as from the internal market and competition provisions.[188] Since the Lisbon Treaty entered into force, the EU's specific competence in the energy policy area is for the first time[189] formalised in the TFEU. Since the entry into force of this new Energy Title, the EU no longer has to avail itself of a constructed legal basis; it can now take measures by direct reference to Article 194 TFEU.[190]

However, although it may have formalised the legal basis of the EU's energy policy, it is questionable whether the introduction of the

[183] The Treaty establishing the European Economic Community was signed in Rome on 25 March 1957 and entered into force on 1 January 1958. It was amended to establish the European Community by the Treaty on European Union of 7 February 1992.

[184] K. LENAERTS, P. VAN NUFFEL, *Constitutional Law of the European Union*, 2nd edition, London, Sweet & Maxwell, 2005, 82.

[185] Consolidated version of the Treaty Establishing the European Community, *OJ* 24 December 2002, C 325/33; K. LENAERTS, P. VAN NUFFEL, *Constitutional Law of the European Union*, 2nd edition, London, Sweet & Maxwell, 2005, 82.

[186] Article 4 (2)(i) TFEU.

[187] K. LENAERTS, P. VAN NUFFEL, *Constitutional Law of the European Union*, 2nd edition, London, Sweet & Maxwell, 2005, 323.

[188] Before the adoption of a separate Title on energy in the Lisbon Treaty, the Union could inter alia use Articles 95, 175 and 208 TEC (cfr. B. DELVAUX, A. GUIMARAES-PUROKOSKI, 'Chapter 1: vertical division of competences between the European Community and its Member States in the energy field – some remarks on the evolution of Community energy law and policy', in B. DELVAUX, M. HUNT, K. TALUS (eds.), *EU Energy Law and Policy Issues, ELRF Collection*, 1st edition, Rixensart, Euroconfidentiel, 2008, 28-29.); A. POINTVOGL, 'Perceptions, realities, concession – What is driving the integration of European energy policies?', *Energy Policy*, vol. 37, no. 12, 2009, 5704; B. EBERLEIN, 'Regulation by cooperation: the "third way" in making rules for the internal energy market', in P. CAMERON (ed.), *Legal aspects of EU energy regulation*, Oxford, Oxford University Press, 2005, 63.

[189] This proposal was already included in the Treaty establishing a Constitution for Europe, but did not enter into force and consequently did not lead to the adoption of a constitution for the EU; see Article III-256 of the Treaty establishing a Constitution for Europe covering energy policy.

[190] The ordinary legislative procedure consists of qualified majority voting in the Council as well as the co-decision procedure between the European Parliament and the Council (Article 289 TFEU and Article 294(2) TFEU). As an exception, there is a special legislative procedure requiring unanimity in the Council and consultation of the European Parliament, and this applies to measures primarily of a fiscal nature. Also, Member States may determine the conditions for exploiting their energy resources, the choice between different energy sources and the general structure of their energy supply without prejudice to Article 192(2)(c) (Article 194(2) *in fine* TFEU); See also J. M. BENEYTO, 'From Nice to the Constitutional Treaty: Eight Theses on the (Future) Constitutionalisation of Europe', in S. GRILLER and J. ZILLER (eds), *The Lisbon Treaty, EU constitutionalism without a Constitutional Treaty?*, Vienna, Springer, 2008, 6.

new Energy Title has in fact changed anything substantively.

It could be argued that this formalisation brings a significant change in competence for the EU, but as is stated above, before the introduction of the Energy Title under the TFEU, the EU could de facto take the same measures as long as its action fell within any of the other close competences.[191] Moreover, it has been argued that the fact that Article 194 TFEU refers to the EU's energy policy in the context of 'the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment' not only places the policy area in an environmental perspective but would also entail a limitation of its scope to the internal market.[192] Furthermore, Member States retain the right to determine the conditions for exploiting their energy resources, their choice between different energy sources and the general structure of their energy supply under Article 194(2) *in fine* TFEU. Thus the question remains whether the adoption of a separate Energy Title has expanded the EU's scope of action as much as was intended.

1.2 Member States and Their Energy Resources: A Step Backwards?

Although the introduction of an explicit legal basis for the energy policy area under Article 194(1) TFEU appears to be a step forward, five factors attenuate this analysis.

Firstly, the wording of Article 194(2) TFEU means there is a limit on the scope of the measures that can be taken in the energy policy area. It provides that the measures that can be taken on the basis of Article 194 TFEU do not affect the Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply.

Secondly, if the EU takes measures on the basis of Article 194 TFEU, as a general rule the ordinary legislative procedure applies, with the reservation that such measures do not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply and without prejudice to Article 192(2)(c).[193] The latter provides for a derogation in relation to environmental policy: measures that significantly affect a Member State's choice between different energy sources and the general structure of its energy supply are adopted by the Council acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions.

If the Treaty article which serves as the legal basis for taking a certain measure dictates a procedure of qualified majority voting and co-decision, it sometimes does not give the Member States sufficient assurance that their political preferences will prevail. A Member State can influence its national representatives in the Council, but even if they vote accordingly, they can be in the minority. This is, however, corrected by the co-decision

[191] See, for instance, regarding the previous proposal in the Constitutional Treaty J.-C. PIELOW, G. BRUNEKREEFT, E. EHLERS, 'Legal and economic aspects of ownership unbundling in the EU', *Journal of World Energy Law & Business*, vol. 2, no. 2, 2009, 102-103; See also B. DELVAUX, A. GUIMARAES-PUROKOSKI, 'Chapter 1: vertical division of competences between the European Community and its Member States in the energy field – some remarks on the evolution of Community energy law and policy', in B. DELVAUX, M. HUNT, K. TALUS (eds), *EU Energy Law and Policy Issues, ELRF Collection,* 1st Edition, Rixensart, Euroconfidentiel, 2008, 28-29.

[192] H. VEDDER, 'The Treaty of Lisbon and European Environmental Law and Policy', *Journal of Environmental Law*, vol. 22, no. 2, 2010, 291.

[193] Article 194(2) and (3) TFEU.

procedure with the European Parliament, where the Member State might still have influence. As there is a derogation in relation to a Member State's choice between different energy sources and the general structure of its energy supply (Article 194(2) TFEU *juncto* Article 192(2)(c)), Member States still have the benefit of unanimity voting in the Council in relation to such matters.

However, following the Lisbon Treaty, Article 48(7) TEU contains the much-discussed 'passerelle clause', which has added to the debate about 'creeping competences'.[194] This clause provides that the European Council may adopt a decision authorising the Council to act by qualified majority where the TFEU or Title V TEU provides for the Council to act by unanimity; and where the TFEU provides for legislative acts to be adopted by the Council in accordance with a special legislative procedure to adopt a decision allowing for the adoption of legislative acts in accordance with the ordinary legislative procedure.[195] However, not only may national parliaments oppose this within six months of the date of notification to the national parliaments, but the European Council must also act by unanimity and obtain consent from the European Parliament (which needs to consent by a majority of component members).[196] In conclusion, Member States have the chance to intervene before such a step is taken.

Thirdly, measures in the energy policy area do not fall within the exclusive competence of the EU, but are instead a shared competence.[197]

Fourthly, as the energy policy area does not fall within the exclusive competence of the EU, the principle of subsidiarity applies: this serves as a filter and screens the lawfulness of acts adopted in exercise of the EU's competence.[198] This principle was introduced as a reaction to the fact that some Member States were concerned about the exercise of powers by the former 'European Community', and to the fact that majority voting in the Council had created a fear that Member States might be confronted with Community action restraining their freedom in certain policy areas.[199] The Lisbon Treaty has introduced an early warning system, whereby the Member States act as guardians of the principle of subsidiarity since they are granted a right to intervene in relation to legislative proposals which would violate this principle.[200]

In addition, the principle of proportionality applies, requiring that the means employed must be suitable to attain the objectives of the Treaty and should not go beyond what is necessary to achieve such objectives.[201]

Fifthly, the TEU contains a clause (see Article 4(2) TFEU) safeguarding the Member States' national identities and putting emphasis on safeguarding national security, which in the

[194] See, for instance, M. A. POLLACK, 'The End of Creeping Competence? EU Policy-Making Since Maastricht', *Journal of Common Market Studies*, vol. 38, no. 3, 2000, 519; J. LODGE, 'Federalism and the European Parliament', *Publius*, vol. 26, no. 4, 1996, 63.
[195] Article 48(7) TEU.
[196] Article 48(7) TEU.
[197] Article 4(2) (i) TFEU

[198] Article 5(3) TEU; K. LENAERTS and P. VAN NUFFEL, *Constitutional Law of the European Union,* 2nd edition, London, Sweet and Maxwell, Thomson Reuters, 2005, 101; P. CRAIG and G. DE BÚRCA, *EU Law text, cases and materials,* 4th edition, Oxford, Oxford University Press, 2008, 100.
[199] K. LENAERTS and P. VAN NUFFEL, *Constitutional Law of the European Union,* 2nd edition, London, Sweet and Maxwell, Thomson Reuters, 2005, 101.
[200] Article 6 of Protocol (No 2) on the application of the principles of subsidiarity and proportionality, *OJ* 30 March 2010, C 83/206.
[201] Article 5(4) TEU; see also B.E. OLSEN, 'The subsidiarity principle and its impact on regulation', Chapter 2 in B.E. OLSEN and K. E. SØRENSEN (eds.), *Regulation in the EU,* Copenhagen, Thomson A/S, 2006, 46.

energy field could relate to a Member State's security of supply.

It has been argued that in the energy field, public security translates into security of supply and that there is a connection between the development of the single European energy market and national security. A more integrated EU internal energy market would provide less room for national security measures as it would itself provide greater security for Member States.[202] Therefore, Member States that are concerned about controlling energy issues that they consider to be of primary national importance might see their rights in matters of national energy security cut back by the accomplishment of the EU energy market.[203] In the *Campus Oil* case, the link between an interruption in the supply of petroleum products and public security was clearly made and it allowed Member States to deviate from Treaty obligations in the interests of public security.[204] The aim of ensuring a minimum supply of petroleum products was regarded as transcending purely economic considerations and thus capable of constituting an objective covered by the concept of public security, but the scope for deviation has more recently been scrutinised by the European Court of Justice.[205] Although in this more recent case law the Court has recognised security of supply as a ground for justification for a limitation on the free movement of capital, it also emphasised that the exigencies of public security must be interpreted strictly and that public security may only be relied on if there is a genuine and sufficiently serious threat to the fundamental interests of society and refers to former case law to that regard.[206]

In conclusion, the fact that more powers have been conferred on the EU, whether directly by the adoption of Article 194 TFEU or indirectly (e.g. by making qualified majority voting the ordinary legislative procedure and by a 'passerelle clause'), does not prevent the Member States being able to exercise their influence in relation to energy matters. In my opinion, this concern on the part of the Member States that they might lose control over their national political and economical interests in energy matters is, as demonstrated by the above examples, expressed in the Treaty framework, the masters of which are the Member States. Such concern could have implications for the EU's internal and external action in this field, as it is necessary for the EU to act with one voice in its relations with external energy providers, on which it has become so heavily dependent over the years.[207]

1.3 Energy Solidarity in the EU Treaty Framework: *Quid*?

The Lisbon Treaty reinforces a Europe of rights and values, freedom, solidarity and security

[202] C. PADRÓS, E.E. COCCIOLO, 'Security of energy supply: When could national policy take precedence over European law?', *Energy Law Journal*, vol. 31, no. 1, 2010, 33 and 35.

[203] See also C. PADRÓS, E.E. COCCIOLO, 'Security of energy supply: When could national policy take precedence over European law?', *Energy Law Journal*, vol. 31, no. 1, 2010, 33 and 35.

[204] Case 72/83, *Campus Oil Ltd. and Others v Minister for Industry and Energy and Others* [1984] ECR 2727, para. 34; C. PADRÓS, E.E. COCCIOLO, 'Security of energy supply: When could national policy take precedence over European law?', *Energy Law Journal* 2010, vol. 31, no. 1, 40.

[205] Case C-72/83, *Campus Oil Ltd. and Others v Minister for Industry and Energy and Others* [1984] ECR 2727, para. 35; C. PADRÓS, E.E. COCCIOLO, 'Security of energy supply: When could national policy take precedence over European law?', *Energy Law Journal*, vol. 31, no. 1, 2010, 40.

[206] Case C-463/00, *Commission v Spain* [2003] ECR I-4581, para. 72; C. PADRÓS, E.E. COCCIOLO, 'Security of energy supply: When could national policy take precedence over European law?', *Energy Law Journal*, vol. 31, no. 1, 2010, 46.

[207] *Infra* 4.1.

and contains new mechanisms of solidarity; solidarity is also emphasised in relation to energy.[208] Article 194(1) TFEU lays down that the Member States should achieve the goals stated therein in a 'spirit of solidarity'; however, it is currently unclear what this reference means as there is not a reference to a 'principle of solidarity'. Yet the 'principle of solidarity' is specifically mentioned in relation to other policy areas: border checks, asylum and immigration.[209] Moreover, Title V TEU deals with the EU's external action and specific provisions on the Common Foreign and Security Policy. In this regard, Article 21 TEU refers to the requirement of respect for the 'principles of equality and solidarity' in the Union's action on the international scene.[210]

The Lisbon Treaty includes a number of references to the concept of 'solidarity' in a broader sense. Firstly, in relation to Title V TEU regarding general provisions on the Union's external action and specific provisions on the Common Foreign and Security Policy, many references are made to the concept of solidarity. Article 24 TEU includes the provision that the EU's Common Foreign and Security Policy should be based on the development of 'mutual political solidarity' between the Member States and that within the framework of the principles and objectives of the EU's external action, the Member States must support the EU's external and security policy actively in a 'spirit of loyalty and solidarity'.[211] Article 31 TEU lays down that decisions made under Chapter 2 (which deals with specific provisions on the Common Foreign and Security Policy) are taken by the European Council and the Council on the basis of unanimity and that the adoption of legislative acts is excluded.[212] It further lays down that a Member State which abstains in a vote must 'in a spirit of mutual solidarity' refrain from any action that is likely to conflict with or impede EU action based on a decision resulting from abstaining in that vote and that other Member States must respect this position.[213] Finally, Article 32 TEU includes the provision that in determining a common approach, each Member State must consult its fellow Member States within the European Council or the Council before undertaking any action on the international scene or entering into commitments which could affect the EU's interests. It is explicitly stated that Member States must 'show mutual solidarity'.[214]

Secondly, Article 3(3) TEU makes an explicit reference to solidarity, stating that the Union must promote solidarity among Member States. Article 3(5) TEU also makes a reference to solidarity, but it is referring to the EU's relations to the wider world rather than just referring to solidarity among Member States.

Thirdly, the Lisbon Treaty has brought in a 'solidarity clause' in Article 222 TFEU, with an explicit requirement that the EU and its Member States 'act jointly in a spirit of solidarity' in the event of terrorist attacks or natural or man-made disasters (although it is not clear as to the legal obligations resulting from the term 'spirit of solidarity').[215]

Bearing in mind that the former pillar structure is no longer in place, the phrase in Article 222(1) TFEU ('The Union and its

[208] See, for instance, 'The Treaty at a glance' at http://europa.eu/lisbon_treaty/glance/index_en.htm (last consulted on 19 November 2011).
[209] Article 80 TFEU.
[210] Article 21 TEU.
[211] Article 24(2) and (3) TEU.
[212] Article 31(1) TEU.
[213] Article 31(1) TEU.
[214] Article 32 TEU.
[215] See also Swedish Institute of International Affairs, *The European Union's Solidarity Clause: Empty Letter or Effective Tool? An analysis of Article 222 of the Treaty on the Functioning of the European Union*, Occasional Uipapers, no. 2, 2010, www.ui.se/upl/files/44241.pdf (last consulted on 19 November 2011).

Member States shall act jointly in a spirit of solidarity') seems to indicate that this is more than an inter-governmental obligation, and rather that it relates to the Member States *and* the EU – which now also has legal personality – together.[216] However, in Article 222(2) TFEU the Treaty specifically states that 'the other Member States shall assist it'; thus, there the spirit of solidarity seems to be imposed on the Member States alone.[217]

Fourthly, Article 122 TFEU provides that the Council on a proposal of the European Commission may decide, in a 'spirit of solidarity' between the Member States, upon appropriate measures in a particular economic situation (with severe issues in relation to energy supply being particularly targeted).

Finally, in relation to recent developments, the EU's cohesion policy (laid down in Article 3 TEU and Articles 174 until 178 TFEU) and the European Commission's strategy for 'smart, sustainable and inclusive growth' should be mentioned.[218] In the period 2007-13, cohesion policy programmes have so far allocated over 9 billion euro for the promotion of energy efficiency and renewable energies.[219] During a speech on the political guidelines for the next European Commission on 3 September 2009, Commission President Barroso set out a 'transformational agenda' (i.e. not based on business as usual or routine) and restated the need to review the budget to respond to new priorities.[220] The Commission President urged moving away from a narrow focus on net balances and proposed moving 'towards an approach based on solidarity, burden-sharing and equity which is comprehensive and shared by all'.[221]

Thus, the element of solidarity in a broader sense has taken different forms, as shown by the above examples. Firstly, solidarity can

[216] Article 47 and 222 TFEU; Swedish Institute of International Affairs, *The European Union's Solidarity Clause: Empty Letter or Effective Tool? An analysis of Article 222 of the Treaty on the Functioning of the European Union*, Occasional Uipapers 2010, no. 2, www.ui.se/upl/files/44241.pdf (last consulted on 19 November 2011), 6.

[217] Swedish Institute of International Affairs, *The European Union's Solidarity Clause: Empty Letter or Effective Tool? An analysis of Article 222 of the Treaty on the Functioning of the European Union*, Occasional Uipapers 2010, no. 2, www.ui.se/upl/files/44241.pdf (last consulted on 19 November 2011), 6-7.

[218] European Commission Communication, *Europe 2020. A strategy for smart, sustainable and inclusive growth*, COM (2010) 2020 final, 3 March 2010, 21; see also E. M. BASSE, 'Urbanization and Growth Management in Europe', *The Urban Lawyer*, vol. 42, no. 4/vol. 43, no. 1, *A 2020 View of Urban Infrastructure: A Festschrift Symposium in honor of J.C. Juergensmeyer on the occasion of his 45th year of teaching law.*

[219] European Communication, *Second Strategic Energy Review, An EU Energy Security and Solidarity Action Plan*, COM (2008) 781 final, 13 November 2008, 12.

[220] J. BACHTLER, C. MENDEZ, F. WISHLADE, *Challenges, Consultations and Concepts: Preparing for the Cohesion Policy Debate*, European Policy Research Paper, no.74, February 2010, European Policies Research Centre, University of Strathclyde, Glasgow, www.eprc.strath.ac.uk/eprc/documents/PDF_files/EPRP_74_ChallengesConsultationsandConceptsPreparingfortheCohesionPolicyDebate.pdf (last consulted on 19 November 2011), 3; J.M. BARROSO, *Political guidelines for the next Commission*, 3 September 2009, http://ec.europa.eu/commission_2010-2014/president/pdf/press_20090903_en.pdf (last consulted on 19 November 2011), 36.

[221] European Commission Communication, *Second Strategic Energy Review, An EU Energy Security and Solidarity Action Plan*, COM (2008) 781 final, 13 November 2008, 12; J.M. BARROSO, Political guidelines for the next Commission, 3 September 2009, http://ec.europa.eu/commission_2010-2014/president/pdf/press_20090903_en.pdf (last consulted on 19 November 2011), 36.

[221] J. BACHTLER, C. MENDEZ, F. WISHLADE, *Challenges, Consultations and Concepts: Preparing for the Cohesion Policy Debate*, European Policy Research Paper, no. 74, February 2010, European Policies Research Centre, University of Strathclyde, Glasgow, www.eprc.strath.ac.uk/eprc/documents/PDF_files/EPRP_74_ChallengesConsultationsandConceptsPreparingfortheCohesionPolicyDebate.pdf (last consulted on 19 November 2011), 3.

entail an obligation from one Member State in relation to another Member State. Secondly, solidarity can entail an obligation from the EU level to Member State level, as a requirement that the institutions help or stand by the Member States in times of need. Thirdly, solidarity can entail an obligation on the Member States to respect duties flowing from their Member State status. Fourthly, solidarity can be an obligation that rests on the EU in its entirety, namely the EU institutions as well as §the Member States, to act in a certain way towards third states.

It should be noted that Member States could still argue that such solidarity obligations encroach on their national procedures (as has, for instance, been mentioned by Advocate General Slynn in relation to protection of the environment in a matter regarding nuclear power stations).[222] Thus, a balance will need to be struck between solidarity on the one hand and public security on the other. However, the Court has already held that Member States are prohibited[223] from upsetting the balance between the benefits and the burdens of their membership of the EU based on a unilateral perception of their national interests.[224]

In conclusion, it is clear from the above assessment that there is a difference between the relatively vague reference to the 'spirit of solidarity' mentioned in Article 194 TFEU and the clear references to a 'principle of solidarity' in other parts of the Treaty framework. The question is what is meant by the statement in Article 194 TFEU that the EU's policy on energy must aim 'in a spirit of solidarity between the Member States' and what obligations it entails. Both the aims of ensuring the functioning of the energy market and of ensuring the security of energy supply are mentioned in the Article. It has been argued that solidarity between Member States is necessary in order to deal with the challenge of energy disruptions.[225] This view will be discussed further in relation to energy supply issues.[226]

2. The EU's Energy Legal and Policy Framework for a Sustainable, Competitive and Secure Internal Energy Market

2.1 Sustainable Development

Discussions regarding the concept of 'sustainable development' have resulted in numerous definitions of the term, yet the concept remains rather vague.[227] Following the Brundtland Commission, a development is regarded as sustainable if it meets the needs of the present generations without compromising the ability

[222] Opinion of Advocate General Slynn delivered on 8 June 1988 on Case 187/87, *Land de Sarre and Others v Ministre de L'Industrie, des Postes et Télécommunications et du Tourisme and Others* [1988] ECR 5013 : 'the principles of 'effet utile' […] and of Community solidarity […] seem to me to require in the interest of health and safety, efficiency and the protection of the environment, whilst not unduly encroaching on national procedures […]'.

[223] Also, dixit Advocate General Poiares Maduro in relation to reform of the Common Agricultural Policy, it also prohibits the older Member States within the Council from arbitrarily upsetting the balance of benefits and burdens established by accession instruments in favour of future Member States (see Opinion delivered on 21 June 2007 on Case C-273/04, Poland v. Council [2007] ECR I-8925, para. 51).

[224] Case 39/72, *Commission v. Italy* [1973] ECR 101, para. 24; Case 128/78, *Commission v. United Kingdom* [1979] ECR 419, para 12.

[225] See J-M. GLACHANT, F. LÉVÊQUE AND P. RANCI, 'EU Energy security of supply: conclusions', in F. LÉVÊQUE, J-M- GLACHANT, J. BARQUÍN, C. VON HIRSCHHAUSEN, F. HOLZ, W. J. NUTTALL (eds.), *Security of Energy Supply in Europe, Natural Gas, Nuclear and Hydrogen,* Loyola De Palacio Series on European Energy Policy, Cheltenham, Edward Elgar, 2010, 295.

[226] *Infra* Section 4.2.

[227] U. STEGER, W. ACHTERBERG, K. BLOK, H. BODE, W. FRENZ, C. GATHER, G. HANEKAMP, D. IMBODEN, M. JAHNKE, M. KOST, R. KURZ, H. G. NUTZINGER, T. ZIESEMER, *Sustainable Development and Innovation in the Energy Sector,* Lausanne, Springer, 2010, 27.

of future generations to meet their own needs.[228]

Sustainable development encompasses social, economic and environmental aspects, which each lead to further related issues. Following S. Lélé, the concept of sustainable development has by many people been used interchangeably with what he calls 'ecological sustainability'.[229] But S. Lélé also takes the view that social as well as ecological conditions influence ecological sustainability.[230] Thus, in broad terms sustainable development aspires to combine a growing concern for environmental issues with socio-economic issues.[231]

As U. Steger et al. argue, the concept of sustainability should neither be burdened with specific requirements which fulfil the most stringent ecological criteria, nor should the concept be left so vague that it can mean everything and nothing; they thus argue in favour of a balance between these two extremes and also in favour of making the concept operational.[232] In this article, sustainable development will be analysed in terms of the role it plays in the achievement of a sustainable, competitive and secure internal energy market and its role as a link to these other policy objectives. To assess this role it needs to be placed in its legal framework.

Under the former EU Treaty framework, sustainable development was mentioned in the preamble to the TEU, in Article 2 of the TEC[233] as well as in the integration clause of Article 6 TEC[234].

Following the Lisbon Treaty, the preamble to the TEU continues to take the principle of sustainable development into account. However, whereas the former Article 2 TEC referred to sustainable development of economic activities, this is now contained in the current Article 3 TEU. This states that the EU shall establish an internal market and work for the sustainable development of Europe, which is inter alia based on balanced economic growth, stable prices, a high level of protection and improvement of the quality of the environment.[235] Thus, the legal framework at least suggests a link between sustainable development and the internal market.[236] It has been argued that this new reference to 'Europe' in Article 3 TEU makes sustainable develop-

[228] Brundtland Commission, World Commission of Environment and Development (WCED) 1987, Our Common Future, Chapter 5: Towards Sustainable Development, www.un-documents.net/ocf-02.htm#I (Last consulted on 19 November 2011); U. STEGER, W. ACHTERBERG, K. BLOK, H. BODE, W. FRENZ, C. GATHER, G. HANEKAMP, D. IMBODEN, M. JAHNKE, M. KOST, R. KURZ, H. G. NUTZINGER, T. ZIESEMER, *Sustainable Development and Innovation in the Energy Sector,* Lausanne, Springer, 2010, 27.

[229] S. LÉLÉ, 'Sustainable Development: A Critical Review', *World Development,* vol. 19, no. 6, 1999, 608-609.

[230] S. LÉLÉ, 'Sustainable Development: A Critical Review', *World Development,* vol. 19, no. 6, 1999, 609-610.

[231] B. HOPWOOD, M. MELLOR and G. O'BRIEN, 'Sustainable Development: Mapping Different Approaches', *Sustainable Development,* vol. 13, no. 1, 2005, 38-52.

[232] U. STEGER, W. ACHTERBERG, K. BLOK, H. BODE, W. FRENZ, C. GATHER, G. HANEKAMP, D. IMBODEN, M. JAHNKE, M. KOST, R. KURZ, H. G. NUTZINGER, T. ZIESEMER, *Sustainable Development and Innovation in the Energy Sector,* Lausanne, Springer, 2010, 27.

[233] Which states: 'to promote throughout the Community a harmonious, balanced and sustainable development of economic activities'.

[234] Which states: 'Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development'.

[235] Article 3 (3) TEU: 'shall establish an internal market' and 'shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress and a high level of protection and improvement of the quality of the environment.'.

[236] *Infra* Section 3.1

ment a more cross-cutting horizontal objective that not only relates to economic development, but possibly also relates to technological development.[237] Finally, sustain-able development is also covered in the integration clause (new Article 11 TFEU), which states that 'environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development'.[238] This means that sustainable development has to be taken into account when the EU takes action in the field of energy policy. Due to its formal central placement in Part One of the TEC on 'principles', it has been argued that the unique position of the 'environmental integration principle' has now changed, as further integration principles (a general integration principle, a sex equality integration principle, an employment and social integration principle, a non-discrimination integration principle, a consumer protection integration principle and an environmental and animal welfare integration principle) are placed under a separate Title II of Part One TFEU on 'provisions having general application'.[239] Moreover, the question has been raised as to why the cultural integration clause, the industrial policy integration clause and the social cohesion integration clause are not adopted under Title II of Part One TFEU, but remain in Part Three TFEU.[240] This article later examines the role the integration principle plays in the interrelationship between the policy objectives of sustainable development, competitiveness and security of supply.[241]

The first application of sustainable development in this article is thus, following Article 11 TFEU, the requirement of integrating environmental protection requirements into the implementation of EU policies and activities. The requirement that environmental protection must be integrated into the definition and implementation of EU policies and activities also applies to the implementation of activities or policies relating to RES-E integration into the energy system.

Secondly, it has been argued that the different dimensions of sustainable development (legal, social, political, scientific and economic) should be made clear, and further that they must be integrated and cannot be considered in isolation.[242] The achievement of sustainable development requires the integration of economic, social and environmental considerations.[243] RES and RES-E not only relates to the environmental aspect of sustainability, but also relates to meeting essential human needs, as well as to economic growth and perceived needs such as the patterns of our energy use, which are socially and culturally determined.[244]

Although this article focuses on sustainable development in the EU energy context, with a

[237] H. VEDDER, 'The Treaty of Lisbon and European Environmental Law and Policy', *Journal of Environmental Law*, vol. 22, no. 2, 2010, 287-288.
[238] Article 11 TFEU.
[239] H. VEDDER, 'The Treaty of Lisbon and European Environmental Law and Policy', *Journal of Environmental Law*, vol. 22, no. 2, 2010, 289.
[240] See Articles 167(4), 173 (3) and 175 TFEU; H. VEDDER, 'The Treaty of Lisbon and European Environmental Law and Policy', *Journal of Environmental Law*, vol. 22, no. 2, 2010, 290.
[241] *Infra* Section 3.1.
[242] A. RØNNE, 'The Legal Dimension of Sustainable Development with the Emphasis on the Energy Sector', *Retfærd, Nordisk Juridisk Tidsskrift*, Law and Ecology Special Issue, 1994, 55.
[243] World Commission of Environment and Development (WCED), *Our Common Future: Report of the World Commission of Environment and Development*, www.un-documents.net/ocf-02.htm#IV (last consulted on 19 November 2011).
[244] World Commission of Environment and Development (WCED), *Our Common Future: Report of the World Commission of Environment and Development*, www.un-documents.net/ocf-02.htm#IV (last consulted on 19 November 2011).

focus on the environmental protection aspect of sustainable development, it has been demonstrated that also in this context sustainable development cannot be reduced to its environmental meaning alone, but extends to, inter alia, economic growth and technological development.

2.2 Competitiveness

The notion of competitiveness in this article relates to competitiveness in the context of the EU's energy policy and thus relates to the establishment of an internal competitive energy market. Article 194 TFEU mentions the aim of ensuring 'the functioning of the energy market'.[245]

The origin of the notion of an 'internal energy market' in EU primary law is to be found in Article 129b of the 1992 Treaty on the European Union (the Maastricht Treaty), in which the EU was to contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infra-structures.[246]

Traditionally, energy services have not been open to competition as in the EU Member States incumbent companies had exclusive rights to provide certain services. From the late 1980s onwards, the European Commission initiated a liberalisation process, whereby the Member States were encouraged to open up their markets and abandon the energy monopolies on the basis of free movement rights derived from the common Treaty framework.[247]

The EU agreed to liberalise the electricity market in 1996 and the first electricity and gas directives aimed to remove national monopolies and stimulate cross-border trade by introducing third party access and protection against discrimination by vertically integrated utilities.[248]

This liberalisation process was reinforced by the second energy package, which replaced the gas and electricity directives[249] and forced Member States to open their markets by imposing a regulated third party access regime[250], by establishing rules regarding ownership unbundling and national regulatory bodies, all of which facilitate competition.[251] For instance, the Electricity Directive 2003/54/EC of 26 June 2003 (hereafter the '2003 Electricity

[245] Article 194(1)(a) TFEU.

[246] Article 129b(1) Treaty on European Union, *OJ* 29 July 1992, C 191.

[247] W. GELDHOF, F. VANDENDRIESSCHE, 'Chapter 1: European Electricity and Gas Market Liberalisation. Background, Status, Developments', in B. DELVAUX, M. HUNT, K. TALUS (eds.), *EU Energy Law and Policy Issues, ELRF Collection*, 1st Edition, Rixensart, Euroconfidentiel, 2008, 33.

[248] Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, *OJ* 30 January 1997, L27/20; Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market on natural gas, *OJ* 21 July 1998, L204/1.

[249] Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, *OJ* 15 July 2003, L176/37; Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, *OJ* 15 July 2003, L176/57.

[250] Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network of cross-border exchanges in electricity, *OJ* 15 July 2003, L176/1; Regulation (EC) No 1775/2005 of the European Parliament and of the Council of 28 September 2005 on conditions for access to the natural gas transmission networks, *OJ* 3 November 2005, L289/1.

[251] U. SCHOLZ AND S. PURPS, 'The application of EC Competition Law in the Energy Sector', *Journal of European Competition Law & Practice*, , vol. 1, no. 1, 2010, 37-38.

Directive'[252] had the objective of separating the elements of vertical integration of the electricity undertakings in order to level the playing-field.[253] This objective was designed to achieve a market free from state interference and non-vertically integrated companies truly competing with each other across borders within the EU by 2005. However, this objective was not achieved, which led to the continuation of market failures, as confirmed by the 2009 Electricity Directive, which states that the rules on legal and functional unbundling provided for in the 2003 Electricity Directive have not led to an effective unbundling of transmission system operators.[254]

The third EU energy package consists of a new Electricity Directive (i.e. the 2009 Electricity Directive), a new Gas Directive, a Regulation on conditions for access to the natural gas transmission networks, a Regulation on conditions for access to the network for cross-border exchanges in electricity and a Regulation establishing an Agency for the Cooperation of Energy Regulators, to ensure a truly competitive energy market.[255] This third package aims to prevent discriminatory access to networks and stimulate investment in energy infrastructure; it also includes rules on effective unbundling of electricity and gas networks and offers Transmission System Operators a choice between three models for effective unbundling.[256] Such regulation is necessary to prevent uncompetitive behavior, stimulate new market entrants and guarantee non-discriminatory network access. These aspects will be discussed further on in relation to sustainable development, security of supply and integration of RES-E.[257]

2.3 Security of Supply

A standard definition of security of supply is a 'flow of energy supply to meet demand in a manner and at a price level that does not disrupt the course of the economy in an environmental sustainable manner'.[258] Security

[252] Directive 2003/54/EC concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, *OJ* 26 June 2003, L 76/37.

[253] P. RYAN, 'A Re-energized Approach to a Competitive European Electricity Market', *Journal of Energy & Natural Resources Law*, vol. 27, no. 1, 2009, 48.

[254] Recital 10 to Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, *OJ* 14 August 2009, L 211/55; P. RYAN, 'A Re-energized Approach to a Competitive European Electricity Market', *Journal of Energy & Natural Resources Law*, vol. 27, no. 1, 2009, 49. These market failures do not only exist within the EU; see, for instance, D. HELM, 'Energy policy: security of supply, sustainability and competition', *Energy Policy*, vol. 30, no. 3, 2002, 173-184.

[255] Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, *OJ* 14 August 2009, L 211/55; Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, *OJ* 14 August 2009, L 211/94; Regulation (EC) No 713/2009 of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, *OJ* 14 August 2009, L 211/1; Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003, *OJ* 14 August 2009, L 211/15; Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005, *OJ* 14 August 2009, L 211/36.

[256] European Commission, *The entry into force of the EU third energy package*, http://ec.europea.eu/energy/gas_electricity/legislation/doc20110302_entry_into_force_third_package.pdf (last consulted on 19 November 2011); See, for instance, in relation to electricity Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, *OJ* 14 August 2009, L 211/55.

[257] *Infra* Sections 3.1 and 3.2.

[258] J.-M. CHEVALIER, 'Security of energy supply for the European Union', European Review of Energy Markets, vol. 1, no.3, November 2006, 2.

of energy supply in broad terms refers to the prospect of energy supply without disruptions.[259]

It is estimated that production of oil, gas and coal in the EU will decrease in the years to come and that the dependence of the EU on foreign energy sources will increase, which has meant that the issue of energy security has returned to prominence.[260] The Commission's Green Paper of 2000 regarding a European strategy for the security of energy supply lays down the core elements for such a long-term energy strategy.[261] It refers to sustainable development, as enshrined in former Articles 2 and 6 TEU, and the need to respect environmental concerns. Further on in this article the link between sustainable development and security of supply will be discussed.[262]

Under the current Treaty framework, ensuring security of supply is one of the aims covered by Article 194 TFEU.[263] Moreover, Directive 2005/89/EC concerning measures to safeguard security of electricity supply aims at safeguarding the security of supply in order to ensure the proper functioning of the internal energy market.[264] Security of supply is thus linked to competitiveness and market liberalisation, which will be examined later in this article.[265]

Threats relating to energy security vary between the different Member States as they depend on the energy choices made by the Member States as well as their geographical location.[266] The concept of energy security has thus been seen as an elusive concept.[267] The EU's dependence on external energy sources involves the need to readdress the EU's common external action at EU level in the field of energy security, as well as the need to reconsider the concept of energy solidarity.[268] The external challenges of the EU in relation to security of supply, crisis mechanisms and the concept of solidarity will be discussed later in this article.[269]

2.4 Achieving a Sustainable, Competitive and Secure Internal Energy Market: The 'Trinity'

The current EU energy framework is based on a 'trinity'[270] of competitiveness, sustainability and security of supply.[271]

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[259] See International Energy Agency, *Security of Supply in Electricity Markets*, Paris, IEA, OECD, 2002, 9.

[260] See also M.M. ROGGENKAMP, C. REDGWELL, I. DEL GUAYO, A. RØNNE (eds.), *Energy Law in Europe – National, EU and International Regulation*, second edition, Oxford, Oxford University Press, 2007, 1269; Eurostat, energy production and imports, http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Energy_production_and_imports (last consulted on 19 November 2011).

[261] European Commission Green Paper: *Towards a European Strategy for the Security of Energy Supply*, COM (2000) 769 final, 29 November 2000.

[262] *Infra* Section 3.1

[263] Article 194(1)(b).

[264] Directive 2005/89EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment, *OJ* 4 February 2006, L 33/22.

[265] M.M. ROGGENKAMP, C. REDGWELL, I. DEL GUAYO, A. RØNNE (EDS.), *Energy Law in Europe – National, EU and International Regulation*, second edition, Oxford, Oxford University Press, 2007, 1269; *infra* Section 3.1.

[266] G. GREVI, *CFSP and Energy Security*, EU Institute for Security Issues, Paris, 23 October 2006, www.iss.europa.eu/uploads/media/rep06-12.pdf (last consulted on 19 November 2011), 2.

[267] G. GREVI, *CFSP and Energy Security*, EU Institute for Security Issues, Paris, 23 October 2006, www.iss.europa.eu/uploads/media/rep06-12.pdf (last consulted on 19 November 2011), 2.

[268] M.M. ROGGENKAMP, C. REDGWELL, I. DEL GUAYO, A. RØNNE (EDS.), *Energy Law in Europe – National, EU and International Regulation*, 2nd edition, Oxford, Oxford University Press, 2007, 196.

[269] *Infra* Sections 1.3 and 4.2.

[270] A. POINTVOGL, 'Perceptions, realities, concession – What is driving the integration of European energy policies?', *Energy Policy*, vol. 37, no. 12, 2009, 5704.

[271] The literature mentions these three policy objectives together as the three key objectives of the EU's energy policy; see for instance: E. M. BASSE, 'Regulatory

The three policy goals of competition, energy security and environmental protection were for the first time identified as being the most relevant objectives to the energy sector in the Commission's 1995 White Paper on the internal energy market.[272] The liberalisation of the electricity market followed from the White Paper. The application of the three policy objectives indicates the relationship between them in establishing an internal competitive, sustainable and secure internal energy market.

The three policy goals stimulate the achievement of the EU's climate and energy goals. More concretely: sustainability will inter alia contribute to the combating of climate change by the promotion of RES and energy efficiency; competitiveness will inter alia establish a truly competitive internal energy market and both improve energy infrastructure and make access to the grid system non-discriminatory; and, finally, security of supply will inter alia guarantee that supply and demand of energy are in balance and will coordinate the flow of energy between Member States and other involved parties.[273]

The EU faces internal as well as external legal and policy challenges to achieve this internal energy market, based on the policy objectives of sustainable development, competitiveness and security of supply (around which the framework is designed and thus on which the consistency of the framework depends).

3. Internal Challenges of the EU in Integrating RES-E into a Sustainable, Competitive and Secure Internal Energy market

3.1 Interrelationship of the EU's Internal Energy Objectives with Special Regard to Integration of RES-E into the Energy System

In its 1995 White Paper, the Commission stressed that the objectives of overall competitiveness, security of energy supply and environmental protection were considered the most relevant to the energy sector and underlined not only that energy could have an effect on two or sometimes three of these policy objectives but also that these effects might be contradictory.[274] According to the 1995 White Paper, energy policy must aim wherever possible to reconcile these objectives while at the same time being consistent; it must also maintain such consistency in the future, despite the fact that the Commission acknowledges that sometimes a choice has to be made as to the relative weight to be given to the various policy objectives.[275] Article 7 TFEU lays down that 'The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers'.[276] Thus, when the EU takes action in its internal energy market, such action must ensure consistency between its policies and activities.

approaches related to renewable energy technologies in the EU and Denmark with solar energy technologies as examples', *Environmental Liability*, vol. 5, 2010, 183; M. BENINI, 'Europe's Electricity Supply Security: Strengthening the Chain', *CEPS Policy Brief* , no. 224, November 2010, 1; K. D. PATLITZIANAS, H. DOUKAS, A. G. KAGIANNAS, J. PSARRAS, 'Sustainable energy policy indicators: Review and recommendations', *Renewable Energy*, vol. 33, no. 5, 2008, 966; K. VERHAEGEN, L. MEEUS, B. DELVAUX, R. BELMANS, 'Electricity produced from renewable energy sources – What target are we aiming for?', *Energy Policy,* vol. 35, no. 11, 2007, 5578.

[272] European Commission White Paper, *An energy policy for the European Union,* COM (95) 682 final, 13 December 1995.

[273] P. VOUTILAINEN, 'Developing energy policy for Europe: a Finnish perspective on energy cooperation in the European Union', *Energy Law Journal*, vol. 29, no. 1, 2008, 124-125.

[274] European Commission White Paper, *An energy policy for the European Union,* COM (95) 682 final, 13 December 1995, 14

[275] European Commission White Paper, *An energy policy for the European Union,* COM (95) 682 final, 13 December 1995, 5 and 14.

[276] Article 7 TFEU.

Since the relationship between sustainable development, competitiveness and security of supply is often presented as a triangle relationship, the internal consistency of such relationship is crucial to maintaining a balance within the internal energy market. The interrelationship of the internal energy objectives will now be examined as part of an assessment of the EU's internal and external challenges in achieving a sustainable, competitive and secure internal energy market and integrating RES-E into the energy system and market within the current framework that has been described above.[277] In this article, the context of such interrelationship between the policy objectives is the internal energy market; thus the points of connection that will be used to assess the relationship between the policy objectives will stem from concrete measures or situations within the energy market and the current legal and policy framework (i.e. after the third energy package).

As to the interrelationship between sustainable development and competitiveness, three points of connection will be assessed.

As to the first point of connection between sustainable development and competitiveness, an important question under the current energy policy framework is whether there is a link between sustainability and competitiveness in the process of electricity market liberalisation and measures related to levelling the playing-field in the market for RES. As explained above, the electricity markets were traditionally regulated and controlled by the state, under which there were monopolies and consumers did not have a choice of electricity company. The European Commission started a liberalisation process in order to break up monopolies and open the market to competition. Measures were introduced establishing common rules for a competitive internal market in electricity along with a gradual liberalization of the electricity markets.[278]

As explained above, the rules on legal and functional unbundling as provided for in the 2003 Electricity Directive have not led to an effective unbundling of Transmission System Operators (TSOs).[279] Yet such measures for effective separation of generation and transmission are crucial to prevent anti-competitive behaviour and ensure non-discriminatory access to the network for other market entrants.[280] Without such measures effectively separating networks from activities of generation and supply (effective unbundling), there is an inherent risk of discrimination in the operation of the network as well as a lack of incentives for vertically integrated undertakings to invest adequately in

[277] *Supra* Section 2.4

[278] Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, *OJ* 30 January 1997, L 027; G. KÜPPER, E. DELARUE, B. DELVAUX, L. MEEUS, D. BEKAERT, B. WILLEMS, S. PROOST, W. D'HAESELEER, K. DEKETELAERE AND R. BELMANS, 'Does More International Transmission Capacity Increase Competition in the Belgian Electricity Market?', *The Electricity Journal*, vol. 22, no. 1, January-February 2009, 21.

[279] *Supra* Section 2.2; Recital 10 to Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, *OJ* 14 August 2009, L 211/55; P. RYAN, 'A Re-energized Approach to a Competitive European Electricity Market', *Journal of Energy & Natural Resources Law*, vol. 27, no. 1, 2009, 49. These market failures do not only exist within the EU; see for instance D. HELM, 'Energy policy: security of supply, sustainability and competition', *Energy Policy*, vol. 30, no. 3, 2002, 173-184.

[280] T. JAMASB, M. POLLITT. 'Electricity Market Reform in the European Union: Review of Progress toward Liberalization and Integration', *The Energy Journal*, vol. 26, European Energy Liberalisation Special Issue, 2005, 13.

their network.[281] It has been argued that previously incumbent electricity companies are typically vertically integrated and neither wish to lose their market share nor customers, and even after market liberalisation they have a vested interest in discriminating against competitors by controlling network access.[282] To prevent a situation in which an incumbent would have an incentive to discriminate against competitors (e.g. by preferential network access to its own supply branch), effective separation ('unbundling') from the commercial activities of incumbents should ensure impartiality in relation to other market participants.[283]

As the electricity sector depends on investment, it is difficult for new competitors to enter the market.[284] Liberalisation of access to the network is thus crucial for access by RES to the network as it creates a level playing-field for new market entrants.[285] Under the third energy package, the 2009 Electricity Directive provides for measures to ensure effective unbundling and acknowledges that only the removal of incentives for vertically-integrated undertakings to discriminate against competitors regarding network access and investment can ensure such effective unbundling.[286] Moreover, it is laid down in the RES Directive (2009/28/EC) that priority and guaranteed access for RES-E are important to integrate RES into the internal electricity market (see Article 16(2)(b)) and this will be further discussed in terms of the relationship between competitiveness and the integration of RES-E.[287] Thus, the first point of connection shows how a market failure in the electricity market has an impact on the access by renewable electricity producers and how the RES Directive and measures under the third energy package have an effect on both competitiveness and the access of RES to the electricity grid.

As to the second point of connection it is important to consider how the integration principle (Article 11 TFEU) is taken into account in measures relating to competitiveness. Environmental problems which are caused by grey electricity production are dealt with in the EU by applying a number of principles (Article 191(2) TFEU), such as the 'polluter pays' principle, which is designed to internalise the negative environmental externalities of economic activity when designing economic and market-based instruments.[288] Thus, one of the legal solutions to make renewable energy production more competitive could be to enforce a legal

[281] Recital 9 to Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, *OJ* 14 August 2009, L 211/55.

[282] E. DZIADYKIEWICZ, 'Refusal to Grant Third-Party Access by an Electricity Transmission System Operator – Overview of Competition Law Issues', *Journal of Energy & Natural Resources Law*, vol. 25, no. 2, 2007, 115-116.

[283] E. DZIADYKIEWICZ, 'Refusal to Grant Third-Party Access by an Electricity Transmission System Operator – Overview of Competition Law Issues', *Journal of Energy & Natural Resources Law*, vol. 25, no. 2, 2007, 116.

[284] C. PADRÓS, E.E. COCCIOLO, 'Security of energy supply: When could national policy take precedence over European law?', *Energy Law Journal*, vol. 31, no. 1, 2010, 32. Note that the question has already been raised as to why cross-border cooperation between independent rather than integrated network operators would be less likely to engage in collusive behaviour: see R. BOSCHECK, 'The EU's Third Internal Energy Market Legislative Package: Victory of Politics over Economic Rationality?', *World Competition,* vol. 32, no. 4, 2009 600.

[285] E. DZIADYKIEWICZ, 'Refusal to Grant Third-Party Access by an Electricity Transmission System Operator – Overview of Competition Law Issues', *Journal of Energy & Natural Resources Law,* vol. 25, no. 2, 2007, 115.

[286] E.g. Recital 11 to, and Article 9 of, Directive 2009/72/EC.

[287] *Infra* Section 3.2.

[288] E. M. BASSE, 'Regulatory approaches related to renewable energy technologies in the EU and Denmark with solar energy technologies as examples', *Environmental Liability*, no. 5, 2010, 183.

mechanism internalising the external costs of the polluting energy production. As the costs of the clean-up measures are reflected in the costs of the goods and services generating the pollution through consumption, consumers would also be incentivised to consider the product's effect on the environment under such a model.[289] Applying the 'polluter pays' principle could thus be a legal method of achieving an internalisation of external costs.[290] It has been argued that one of the reasons for increasing the share of renewable energy was the integration of the 'polluter pays' principle in all policy domains.[291] However, this article does not examine this issue in depth, as not only are there many disagreements as to whether such internalisation of external costs in the energy sector would have the desired effect on the market in the first place but also this article is only written from a legal perspective. The aim of this article is just to show that there is a connection in this regard between sustainability and competitiveness. The second point of connection thus shows how the 'environmental integration principle' (Article 11 TFEU) is related to competitiveness.[292]

As to the third point of connection, the place of sustainability under a true internal energy market will be considered. Under a true internal energy market, the consumer has a real choice of supplier at a fair and competitive price, which often allows that consumer to choose electricity produced from RES.[293] It should be noted that the free choice of supplier has been gradually achieved as part of the liberalization process. Since 11 July 2007 all individuals have the right to choose their supplier. Prior to that date, only non-household consumers could do so.[294]While producers are mainly concerned with a secure demand of energy at the highest possible price, consumers are mainly concerned with a secure supply of energy at an affordable price.[295] A study in the United States showed that allowing energy consumers to choose their means of electricity generation could in fact increase the use of green power sources by 40% for the eight years following the study.[296] This demonstrates what could happen in the EU with the introduction of instruments such as the 'guarantees of origin', as provided for under Article 15(2) of the RES Directive. Such instruments provide the consumer with a guarantee that the electricity originates from a green source. The European Commission's third energy package should strengthen this development, as it will in principle guarantee a real choice of supplier for consumers. In addition, obligations on smart metering would make it possible for

[289] E. LARSON, 'Why Environmental Regimes in the US, the European Community, and Japan Have Grown Synonymous with the Polluter Pays Principle', *Vanderbilt. Journal of Transnational'Law*, vol. 38, 2005, 541-544.

[290] Whether or not a model of internalisation of external costs is a viable solution in economic terms is not dealt with in this article, as this article only covers legal matters. Therefore, in this article only a legal hypothetical solution is proposed.

[291] D. FOUQUET, T.B. JOHANSSON, 'European renewable energy policy at crossroads – focus on electricity support mechanisms', *Energy Policy*, vol. 36, no. 11, 2008, 4080.

[292] *Supra* Section 2.1.

[293] P. VOUTILAINEN, 'Developing energy policy for Europe: a Finnish perspective on energy cooperation in the European Union', *Energy Law Journal*, vol. 29, no. 1, 2008, 123-124.

[294] Case T-87/05, *EDP v. Commission* [2005] ECR II-3745, para. 109-110; J. FAULL, A. NIKPAY, *The EC Law of Competition*, 2nd edition, Oxford, Oxford University Press, 2007, 1368.

[295] J. PEROVIC, 'Changing markets, politics, and perceptions: dealing with energy (inter-)dependencies', in A. WENGER, R. W. ORTTUNG, J. PEROVIC (eds.), *Energy and the Transformation of International Relations. Toward a New Producer-Consumer Framework*, Oxford, Oxford University Press, 2009, 40.

[296] See 'Consumer choice could increase renewable energy', *Pollution Engineering*, vol. 34, no. 1, 2002, 8.

consumers to obtain information on the source and price of electricity.[297] This would thus enhance the relationship between sustainable development and competitiveness and would strengthen a competitive *and* sustainable internal energy market.

These three non-exhaustive points of connection thus show the interrelationship between competitiveness and sustainable development.

As to the interrelationship of the policy objectives of competitiveness and security of supply, the relation of security of supply to fair prices and competition has been referred to as follows: 'greater competition equals greater security', as a vertically-integrated energy company would not have any incentives to increase its network capacity or to expose itself to competitive risk-taking.[298] It has been argued that separation of network management from production and distribution activities should enhance competition, making way for new market entrants in the energy market, and this should on its turn enhance security of supply.[299] Recital 11 to the 2009 Electricity Directive confirms that ownership unbundling is an effective way of solving an inherent conflict of interest – since it implies the appointment of the network owner as the system operator and its independence from supply and production interests – and ensuring security of supply. Hence, facilitation of market enlargement and competition should improve security of supply as this should decrease barriers to trade and market entrance.[300] On the other hand, if trade decreases so will the usable cross-border interconnection capacity, and if the latter decreases, so does security of supply.[301] Insufficient interconnection capacity could in addition have negative effects on market power as it could increase market concentration.[302] A coherent regulatory policy ought to enhance electricity interconnection, import and export and trade with third countries.[303]

Moreover, security of supply also relates to the concept of a 'reasonable price' over a continuous period.[304] Security of supply thus benefits from a competitive internal energy market with a fair price, but as shown under the relationship between sustainable development and competitiveness, it also benefits from a sustainable internal energy market under which the consumer has a free choice of supplier and can be incentivized – for instance by green certificates or indirectly by measures that would increase the price for grey energy – to choose green electricity over grey electricity.

[297] See, regarding requirements to implement intelligent metering systems, the Electricity Directive 2009/72/EC and the Energy Services Directive 2006/32/EC (note that there is a proposal for a directive on energy efficiency and repealing directives 2004/8/EC and 2006/32/EC, with minimum requirements for metering in Annex VI, COM(2011)370, 22 June 2011.

[298] C. PADRÓS, E.E. COCCIOLO, 'Security of energy supply: When could national policy take precedence over European law?', *Energy Law Journal*, vol. 31, no. 1, 2010, 39.

[299] C. PADRÓS, E.E. COCCIOLO, 'Security of energy supply: When could national policy take precedence over European law?', *Energy Law Journal*, vol. 31, no. 1, 2010, 39.

[300] J.M. GLACHANT, F. LÉVÊQUE, P. RANCI, 'Some Guideposts on the Road to Formulating a Coherent Policy on EU Energy Security of Supply', *The Electricity Journal*, vol. 21, no. 10, 2008, 17.

[301] J.M. GLACHANT, F. LÉVÊQUE, P. RANCI, 'Some Guideposts on the Road to Formulating a Coherent Policy on EU Energy Security of Supply', *The Electricity Journal*, vol. 21, no. 10, 2008, 17.

[302] See also R. BOSCHECK, 'The EU's Third Internal Energy Market Legislative Package: Victory of Politics over Economic Rationality?', *World Competition,* vol. 32, no. 4, 2009, 596.

[303] C. F. ZIMMERMANN, K. TALUS, 'Regulation of Electricity Markets at EU Level', *European Energy and Environmental Law Review,* vol. 17, no. 1, 2008, 17.

[304] J.-M. CHEVALIER, 'Security of energy supply for the European Union', *European Review of Energy Markets,* vol. 1, no.3, November 2006, 3.

Finally, as to the interrelationship of the policy objectives of sustainable development and security of supply, renewable energy sources would increase the diversification of energy sources in the energy mix. An increase in energy diversification leads to an increase in the security of supply, which follows from the above considerations. This relates to the discussion that will follow on the relationship between the policy objectives of the internal energy market and the integration of RES-E into the energy system. The integration of RES-E into the energy system has proven to be crucial for security of supply because diversification of the energy supply – by integration of renewable sources – is likely to ensure improved handling of short-term energy supply disruptions.[305]

Thus, the objectives of achieving a sustainable, competitive and secure internal energy market are interrelated in efforts to achieve a true internal energy market, under which there is clean, affordable and secure energy and a real choice of supplier for energy consumers, strengthened by the legal framework (such as the RES Directive; the 2009 Electricity Directive and other measures under the third energy package).

3.2 Relationship of the EU's Internal Energy Objectives to the Integration of RES-E into the Energy System

As it has been shown that the energy objectives of achieving a sustainable, competitive and secure internal energy market are interrelated, this article will now consider how this relates to the concrete integration of RES-E into the grid–system and broader conventional energy system.

Firstly, regarding the relationship between a sustainable energy market and the integration of RES-E into the energy system, the objective of sustainable development does not always have a consistent outcome when applied to the integration of RES-E into the energy system. For instance, the establishment of offshore electricity interconnectors is in line with the policy objective of sustainable development and might contribute to a future increase in the integration of renewable electricity into the grid- and energy system. However, the permitting and licensing procedure for the establishment of submarine cables may for instance be held back by the Natura 2000 framework, which protects natural habitats.[306] The latter is nonetheless also part of the EU's sustainability objective as it is designed to protect and preserve nature, which forms an integral part of the environmental protection policy under Article 11 TFEU. This shows how policy objectives could conflict in their application, for example in electricity infrastructure and future RES-E integration into the energy system. However, as stated earlier, Article 7 TFEU contains a 'general integration principle', requiring the EU to ensure consistency between all policies and activities.[307] In the energy sector, the principle of integration not only has the potential to resolve contradictions (e.g. as explained above

[305] T. HAGENBUCH, 'Establishing an Aggressive Legal Framework for the Future of Wind Energy in Europe', *Vanderbilt Journal of Transnational Law*, vol. 42, 2009, 1603.

[306] Habitats Directive 92/43/EEC, *OJ* 22 July 1992, L 206/7 and Birds Directive 2009/147/EC. *OJ* 26 January 2010, L 20/7. See also the Ramsar Convention: 'considering the fundamental ecological functions of wetlands as regulators of water regimes and as habitats supporting a characteristic flora and fauna, especially waterfowl', Convention on Wetlands of International Importance especially as Waterfowl Habitat, Ramsar, Iran, 2 Feburary 1971, www.ramsar.org/cda/en/ramsar-documents-texts/main/ramsar/1-31-38_4000_0 (last consulted on 19 November 2011).

[307] Article 7 TFEU; see also H. VEDDER, 'The Treaty of Lisbon and European Environmental Law and Policy', *Journal of Environmental Law*, vol. 22, no. 2, 2010, 287.

in Section 3.1 in the event that the principle of integration was applied to the internalisation of negative environmental externalities or the 'polluter pays' principle so that the negative effects on the environment of carbon intensive activities would be taken into account), but it is sometimes itself the source of contradictions. Infrastructure development, which is necessary to connect certain energy sources to the electricity grid (e.g. offshore wind farms), and the application of nature protection laws have already caused academic disagreement as to their consistency.[308] In conclusion, the integration principle shows how sustainable development and integration of RES-E into the energy system are interrelated and how their relationship can be ambiguous: the integration principle might on the one hand assist sustainable development and RES-E integration into the energy system, but they could equally conflict when being applied (even if Article 7 TFEU requires that there should be consistency between the EU's policy of protecting the environment and the activity of RES-E integration into the energy system). Thus, the relationship between sustainable development and integration of RES-E into the energy system is somewhat ambiguous.

Secondly, regarding the relationship between a competitive internal energy market and the integration of RES-E into the energy system, a competitive internal energy market would contribute to the integration of RES-E into the energy system. As discussed above, measures such as effective separation of networks prevent discrimination by incumbent companies and are designed to level the market playing-field for other entrants to the network and to guarantee non-discriminatory access. Article 16(2)(a) of the RES Directive (2009/28/EC) states that Member States should ensure that TSOs and Distribution System Operators (DSOs) guarantee the transmission and distribution of electricity produced from RES and Article 16(2)(b) further states that Member States must provide for priority or guaranteed access to the grid-system of electricity produced from RES. Thus, even though such priority or guaranteed access might at first be seen as an ambiguity working against the intended fair and non-discriminatory access, it does in fact ensure impartiality of the network operators versus other market participants; it has been argued that without such measures the incumbent might discriminate by granting preferential access to the network to its own supply branch.[309]

Thus, there is a relationship between measures increasing competitiveness and integration of RES-E into the energy system, as competition in the current regulatory framework stimulates the integration of RES-E into the energy system. Not only does the RES Directive contain such interface between competitiveness and RES-E integration into the energy system, but in addition the 2009 Electricity Directive facilitates access to the network and removes barriers preventing access by new market entrants and RES-E as well as promoting the integration of production

[308] H. LECHELER, expert opinion, 'Harmonisation of the European legislative framework for the construction of transmission lines and environmental protection. Proposal for improving the relevant secondary legislation in the simplest and most efficient way possible', Annex II to European Coordinator's Third Annual Report of Georg Wilhelm Adamowitsch, projects of European interests, 'Connection to offshore wind power in Northern Europe (North Sea-Baltic Sea)' & 'Salzach neu (AT) – Tauern (AT) Line', December 2009 to October 2010, 15 November 2010, http://ec.europa..eu/energy/infrastructure/tent_e/doc/off_shore_wind/2010_annual_report_annex2_en.pdf (last consulted on 19 November 2011).

[309] E. DZIADYKIEWICZ, 'Refusal to Grant Third-Party Access by an Electricity Transmission System Operator – Overview of Competition Law Issues', *Journal of Energy & Natural Resources Law*, vol. 25, no. 2, 2007, 116.

of RES-E.[310] Recital 6 to the latter Directive states that a well-functioning internal market in electricity should provide producers with the proper incentives to invest in new power generation and confirms that this includes RES-E.[311] The Directive moreover includes a provision regarding the general objectives of the regulatory authority which includes helping to achieve the development of secure, reliable and non-discriminatory systems in line with general energy policy objectives, energy efficiency as well as the integration of large- and small-scale production of electricity from RES and distributed generation in transmission and distribution networks.[312] The current legal framework implementing the objective of competitiveness thus has an effect on RES-E integration into the energy system.

In its turn, the legal framework of RES-E production as such also influences competitiveness as it enables new market entrants which focus on renewable energy production. In addition, the legal framework promoting the use of RES might stimulate consumers to choose electricity from RES-E above electricity from other energy sources after the introduction of a real choice of supplier and also the system of guarantees of origin under Article 15 of the RES Directive, as it provides in its second paragraph that Member States ensure the issuing of a guarantee of origin in response to a request from a producer. The latter might have an effect on the position of the producer in question if the Member State decides not to grant its support.

Thirdly, regarding the relationship between a secure internal energy market and the integration of RES-E into the energy system, the future of our energy supply will depend on energy from RES, which indicates the need for policies supporting the integration of RES-E into the energy system.[313] It has been claimed that the integration of RES-E into the energy system would strengthen security of supply because a long-term policy remedy for supply shortages could be a greater diversification of primary sources in the generation of energy.[314] This is because diversification of the energy supply could mean better handling of short-term energy supply disruptions.[315] However, this depends which risk aspects of security of supply are targeted.[316] In this context it would for example reduce the risks of dependence on primary energy imports. However, integration of RES-E into the grid might pose new challenges linked to grid connection, management of the networks or problems regarding storage.

[310] A. JÄGER-WALDAU, M. SZABÓ, N. SCARLAT, F. MONFORTI-FERRARIO, 'Renewable Electricity in Europe', *Renewable and Sustainable Energy Reviews*, vol. 15, no. 8, October 2011, 3706-3707.

[311] Recital 6 to Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, *OJ* 14 August 2009, L 211/55.

[312] Article 36(d) Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, *OJ* 14 August 2009, L 211/55.

[313] T. HAGENBUCH, 'Establishing an Aggressive Legal Framework for the Future of Wind Energy in Europe', *Vanderbilt Journal of Transnational Law*, vol. 42, 2009, 1599; P. DEL RIO, 'A European-Wide Harmonized Tradable Green Certificate Scheme for Renewable Energy: Is it Really So Beneficial?', *Energy Policy*, vol. 33, no. 10, 2005, 1239.

[314] M. BENINI, Europe's Electricity Supply Security: Strengthening the Chain, CEPS Policy Brief, no. 224, November 2010.

[315] T. HAGENBUCH, 'Establishing an Aggressive Legal Framework for the Future of Wind Energy in Europe', *Vanderbilt Journal of Transnational Law*, vol. 42, 2009, 1603.

[316] See, in relation to other aspects of security of supply, J.-M. GLACHANT, F. LÉVÊQUE and P. RANCI, 'Some Guideposts on the Road to Formulating a Coherent Policy on EU Energy Security of Supply', *The Electricity Journal*, vol. 21, no. 10, 2008, 13-18.

In conclusion, the achievement of a competitive and secure energy market promotes integration of RES-E into the energy system, but the relationship between a sustainable energy market and the integration of RES-E into the energy system is in need of further clarification. As shown, the policy objective of sustainability is, however, interrelated to both the achievement of a competitive internal energy market (e.g. energy prices and consumer choice) and security of supply. It has been shown above that the integration of RES-E into the energy system is likely to positively affect competitiveness and security of supply as measures to achieve such integration level the playing-field for new market entrants (and specifically for RES-E due to priority access) and have a positive impact on the diversification of the energy mix. However, even though the integration principle requires that environmental protection requirements are taken into account and Article 7 TFEU states that the EU must ensure consistency between its policies and activities, the integration of RES-E and its relationship to sustainable development and environmental protection is ambiguous and not consistent in its application.

4 External Challenges of the EU in the Creation of a Sustainable, Competitive and Secure Internal Energy Market and the Role of Energy from Renewable Energy Sources

4.1 The EU's Energy Dependence and Security of Supply

This part of the article will first show how dependent the EU has become on energy sources located in third countries and how this affects the EU's internal and external policy objective of security of supply and will secondly assess what role the integration of RES-E into the energy system could play in relation to this situation.

Although this part of the article does not focus on RES-E, but rather on the EU's dependence on energy from fossil fuels, it does demonstrate the interface between the EU's internal and external objectives in creating an internal energy market.

In relation to the EU's action at international level, a consistent framework for sustainability, competitiveness and security of supply is just as important as internally within the EU, since the EU depends on external energy partners for the energy supply, which puts security of supply at the core of the EU´s external energy agenda. In its external energy policy the EU is focused on ensuring the security of the EU's energy supply, support for international efforts to combat climate change and the promotion of worldwide EU access to energy.[317] This part of the article relates to integration of RES as it raises the question of whether such integration could play a role in decreasing some of the supply risks.

The dependence of the EU on third countries over the period 1997-2007 is documented by a rise in dependency on external suppliers from 45,0 % to 53,1 %.[318] This dependence will only increase as according to a 2007 report by the European Commission, the EU's energy dependence will jump from 50 % of the total EU energy consumption to 65 % by 2030.[319] The EU's energy dependence on third

[317] European Commission Communication, *An Energy Policy For Europe*, COM (2007) 1 final, 10 January 2007; H. PRANGE-GSTÖHL, 'Enlarging the EU's internal energy market: Why would third countries accept EU rule export?', *Energy Policy*, vol. 37, no. 12, 2009, 5296.

[318] European Economic and Social Committee, Opinion on 'Energy supply: what kind of neighbourhood policy do we need to ensure security of supply for the EU?', TEN/443, 15 March 2011, 2.4.1; Eurostat, *Energy, transport and environment indicators,* 2009 edition.

[319] European Commission Communication, *An Energy Policy for Europe* COM (2007) 1 final, 10 January 2007.

countries underlines the strategic nature of energy and the influence it has on the EU's geopolitical interest in countries outside the EU.[320] The EU is dependent on cooperation with developed and developing countries, energy producers and consumers, and transit countries.[321] Moreover, some of the energy producers are located in unstable regions or countries that have difficult relations with the EU and in any future assessment of its cooperation with other regions, the EU may need to reassess the prioritisation of its foreign policy objectives.[322] An understanding of the EU's geopolitical interest in third countries is necessary to ensure the security of the energy flowing to the EU and to formulate a common response to supply disruptions.[323]

The dependence of the EU on third country suppliers could explain the EU's engagement in external action and the need to bind third countries to its internal policy goals.[324] The EU's external action in energy matters is not only influenced by the energy dependence of the EU as a whole, but is in addition affected by the geopolitical security preferences of the Member States individually.[325] Different energy priorities between the Member States could give rise to more bilateral agreements between Member States and third countries.[326] This gives rise to different 'webs of relations' between the Member States and third countries, which could hamper developments in the EU's external energy policy.[327]

The Commission's 2006 Green Paper looks at the question of whether there should be a common external policy on energy in the EU.[328] The Green Paper states that 'the effectiveness and coherence of the EU's external energy policy is dependent upon the progress with internal policies and, in particular, the creation of the internal market of energy'.[329] There has been a development whereby internal energy objectives are being externalised and over the last few years non-Member States have begun to participate in pursuing the EU's internal policy goals even though those states remain outsiders to the internal EU structure.[330] It has been argued that a new generation of 'energy interdependence' provisions should be developed in agreements with third country producers.[331]

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[320] C. PADRÓS, E.E. COCCIOLO, 'Security of energy supply: When could national policy take precedence over European law?', *Energy Law Journal*, vol. 31, no. 1, 2010, 33.

[321] P. VOUTILAINEN, 'Developing energy policy for Europe: a Finnish perspective on energy cooperation in the European Union', *Energy Law Journal*, vol. 29, no. 1, 2008, 124-125.

[322] S. KEUKELEIRE AND J. MACNAUGHTAN, *The Foreign Policy of the European Union,* Hampshire, Palgrave Macmillan, 2008, 241 and 244.

[323] D. TRIANTAPHYLLOU, 'Energy Security and Common Foreign and Security Policy (CFSP): The Wider Black Sea Area Context', *Southeast European and Black Sea Studies,* vol. 7, no. 2, June 2007, 290.

[324] S. LAVENEX, 'EU external governance in "wider Europe"', *Journal of European Public Policy*, vol. 11, no. 4, 2004, 681 and 694.

[325] See also M.M. ROGGENKAMP, C. REDGWELL, I. DEL GUAYO, A. RØNNE (eds.), *Energy Law in Europe – National, EU and International Regulation,* Oxford, Oxford University Press, 2007, 196.

[326] I. DIMITROVA, 'EU-Russia Energy Diplomacy: 2010 and Beyond?', *Connections*, *The Quarterly Journal of the PfP Consortium,* vol. 9, no. 4, 2010, 8.

[327] E. KUŞKU, 'Enforceability of a common energy supply security policy in the EU: an intergovernmentalist assessment', *Caucasian Review of International Affairs,* Vol. 4, no. 2, Spring 2010, 145.

[328] Commission Green Paper, *A European Strategy for Sustainable, Competitive and Secure Energy*, COM (2006) 105 final, 8 March 2006, 5.

[329] Commission Green Paper, *A European Strategy for Sustainable, Competitive and Secure Energy*, COM (2006) 105 final, 8 March 2006, 14.

[330] See, for instance, P.J. CARDWELL, 'EuroMed, European Neighbourhood Policy and the Union for the Mediterranean: Overlapping Policy Frames in the EU's Governance of the Mediterranean', *Journal of Common Market Studies*, vol. 49, no. 2, 2011, 220-222.

[331] European Commission Communication, *Second Strategic Energy Review. An EU Energy Security and*

The EU has developed 'circles' or 'rings of energy cooperation' around its internal energy market.[332]

According to the analysis of H. Prange-Gstöhl, the first circle built around the EU internal energy market consists of those who are already signatories to the Energy Community Treaty, and have EU membership perspective.[333] This Energy Community binds the EU and contracting parties to the rules of a common energy market. This is supported by the Energy Community Treaty, establishing an internal market in electricity and gas, not only within the EU Member States, but including Albania, Bosnia and Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, Montenegro, Serbia and UNMIK, as well as Moldova and Ukraine after their accession in 2009.[334] In addition, Georgia, Norway and Turkey have observer status.[335] Thus, for this cooperation circle the EU has established a binding legal framework between itself and the other Energy Community members with a supporting policy framework, including the Black Sea Synergy and the Baku Initiative, which includes non-EU members in the establishment of a common energy market.[336]

The Energy Community is a community between the EU and the contracting parties and extends the EU's internal energy market with the aim of creating a stable regulatory and market framework to attract investment, create an integrated energy market and enhance security of supply and competition.[337] The Treaty establishing the Energy Community enforces legally binding rules.[338] The contracting parties give their legal commitment

Solidarity Action Plan, COM (2008) 781 final, 13 November 2008, 8.

[332] A. PIEBALGS, 'External projection of the EU internal energy market', SPEECH/06/712, Brussels, 20 November 2006, 3; H. PRANGE, *A ring of friends…'? EU external energy policy and regulatory boundary shifting towards its eastern neighbourhood*, paper prepared for the 6th CEEISA Convention 'Global and Regional Governance – European Perspectives and Beyond', panel on 'Energy Security and EU's Eastern Neighborhood', 24-26 May 2007, Wroclaw, Poland, available at www.ceeisaconf.uni.wroc.pl/wordy/papers%201%20session/Prange.doc (last consulted on 19 November 2011); H. PRANGE-GSTÖHL, 'Enlarging the EU's internal energy market: Why would third countries accept EU rule export?', *Energy Policy*, vol. 37, no. 12, 2009, 5298.

[333] H. PRANGE, *´A ring of friends…'? EU external energy policy and regulatory boundary shifting towards its eastern neighbourhood*, paper prepared for the 6th CEEISA Convention 'Global and Regional Governance – European Perspectives and Beyond', panel on 'Energy Security and EU's Eastern Neighborhood', 24-26 May 2007, Wroclaw, Poland, http://www.ceeisaconf.uni.wroc.pl/wordy/papers%201%20session/Prange.doc, 6 (last consulted on 19 November 2011).

[334] Council Decision 2006/500/EC of 29 May 2006 on the conclusion by the European Community of the Energy Community Treaty, *OJ* L 198, 20 July 2006, 15-17; Energy Community Ministerial Council Decision 2009/03/MC-EnC on the accession of the Republic of Moldova to the Energy Community Treaty of 22 December 2009; Energy Community Ministerial Council Decision 2009/04/MC-EnC on the accession of Ukraine to the Energy Community Treaty of 22 December 2009.

[335] European Commission, Report under Article 7 of Decision 2006/500/EC, COM (2011) 105 final, 2, 10 March 2011.

[336] European Commission Communication, *Black Sea Synergy – A New Regional Cooperation Initiative*, COM (2007) 160 final, 11 April 2007; H. PRANGE, *A ring of friends…'? EU external energy policy and regulatory boundary shifting towards its eastern neighbourhood*, paper prepared for the 6th CEEISA Convention 'Global and Regional Governance – European Perspectives and Beyond', panel on 'Energy Security and EU's Eastern Neighborhood', 24-26 May 2007, Wroclaw, Poland, www.ceeisaconf.uni.wroc.pl/wordy/papers%201%20session/Prange.doc, 6 (last consulted on 19 November 2011).

[337] See Energy Community and the Treaty establishing the Energy Community, http://www.energy-community.org/pls/portal/docs/808177.PDF; European Commission, Report under Article 7 of Decision 2006/500/EC, COM (2011) 105 final, 2, 10 March 2011.

[338] The Treaty establishing the Energy Community was signed in Athens on 25 October 2005 and entered into force on 1 July 2006, www.energy-community.org/portal/page/portal/ENC_HOME/ENERGY_COMMUNITY/Legal/Treaty (last consulted on 11 September 2011).

to formally adopt the EU rules which are relevant and to apply and enforce them. For contracting parties that reach EU candidate status or potential candidate status, the level of such implementation is one of the decisive elements in the negotiations for accession to the EU.[339] The rules within this Energy Community are similar to the EU's internal energy market rules and include competition rules, provisions relating to renewables, environmental safeguards, etc.[340] This circle thus includes countries without official Member State status (but with the potential to become Member States) that are nonetheless signatories to the Energy Community Treaty.[341] This results in a 'sectoral internal market'[342] that includes non-Member States.

According to the analysis of H. Prange-Gstöhl, the second circle consists of neighbourhood countries (European Neighbourhood countries officially without EU membership perspective) 'willing' to engage in the reform process and adopt EU internal market principles so as to become members of the Energy Community in the near future.[343]

According to the analysis of Prange-Gstöhl, the third circle consists of 'countries in the neighbourhood of the neighbourhood' (countries lying beyond the immediate 'neighbourhood').[344] These countries are neither EU Member States nor do they have the perspective of becoming Member States, but they could in the future become members of the Energy Community.[345] In the Commission's 2010 Communication, the integration of energy markets and regulatory frameworks with the EU's neighbours is one of the suggested actions under the priority to strengthen the external dimension of the EU energy market.[346] In relation to such action, the Communication states that the Energy Community Treaty should be implemented and extended to all EU's neighbours that are willing to adopt the EU's market model.[347]

Indeed, under this structure the EU is gradually expanding its governance beyond the circle of its Member States, which S. Lavenex refers to as 'external governance'; this occurs as the institutional or legal boundary is moved beyond the circle of Member States.[348] In case of the Energy Community, such boundaries of EU rules and authority are moved by adopting the former *acquis* of the internal energy market rules in the Energy Community, but keeping its institutional boundary closed to states that reach beyond the immediate 'neighbour-

[339] European Commission, Report under Article 7 of Decision 2006/500/EC, COM (2011) 105 final, 2, 10 March 2011, 7-8.

[340] A. PIEBALGS, ;External projection of the EU internal energy market', SPEECH/06/712, Brussels, 20 November 2006.

[341] H. PRANGE-GSTÖHL, 'Enlarging the EU's internal energy market: Why would third countries accept EU rule export?', *Energy Policy*, vol. 37, no. 12, 2009, 5298.

[342] H. PRANGE-GSTÖHL, 'Enlarging the EU's internal energy market: Why would third countries accept EU rule export?', *Energy Policy*, vol. 37, no. 12, 2009, 5299.

[343] A. PIEBALGS, 'External projection of the EU internal energy market', SPEECH/06/712, Brussels, 20 November 2006; H. PRANGE-GSTÖHL, 'Enlarging the EU's internal energy market: Why would third countries accept EU rule export?', *Energy Policy*, vol. 37, no. 12, 2009, 5298.

[344] A. PIEBALGS, 'External projection of the EU internal energy market', SPEECH/06/712, Brussels, 20 November 2006; H. PRANGE-GSTÖHL, 'Enlarging the EU's internal energy market: Why would third countries accept EU rule export?', *Energy Policy*, vol. 37, no. 12, 2009, 5298.

[345] H. PRANGE-GSTÖHL, 'Enlarging the EU's internal energy market: Why would third countries accept EU rule export?', *Energy Policy*, vol. 37, no. 12, 2009, 5298.

[346] European Commission Communication, *Energy 2020 . A strategy for competitive, sustainable and secure energy*, COM (2010) 639, 10 November 2010, 18.

[347] European Commission Communication, *Energy 2020 . A strategy for competitive, sustainable and secure energy*, COM (2010) 639, 10 November 2010, 18.

[348] S. LAVENEX, 'EU external governance in "wider Europe"', *Journal of European Public Policy*, vol. 11, no. 4, 2004, 683.

hood'.[349] Thus it does indeed seem that the EU is moving towards 'politics of inclusion'.[350]

In my opinion, a perception of interdependence is very relevant in the EU's pursuit of internal and external energy objectives and the growing concern for security of supply and national security. In this context, the policy of security of supply is designed to limit exposure of national or regional economies to fluctuating energy prices and is concerned with ensuring available energy resources in order to cope with a shortage of capacity.[351]

Possible threats in supply disruptions from third country suppliers are detrimental to the EU's internal energy market and it is therefore in the EU's interest to diversify its supply of oil and gas through multiple sources.[352] The diversification of the energy supply was not only put forward at EU level in the RES-E Directive 2001/77/EC (which was repealed by the RES Directive) as a reason to give priority to the promotion of RES-E, but has also been used as an argument at Member State level in favour of implementing national production targets in relation to the need for diversification of the national domestic energy generation mix.[353] The diversification of the energy supply is motivated by the desire for resources, and such diversification might also have an impact on the fees for transporting the energy.[354] The diversification of the national energy mix can be used to compare Member States within the EU; for instance, in some countries there is complete dependence on energy imports. This point can be further illustrated by the dependence on Russian gas supplies of the Member States which joined the EU in or after 2004.[355] A heavy dependence of the EU on energy from conventional energy sources located outside the EU could gradually be decreased by diversifying the energy mix within the EU.

In this context, recital 5 to Directive 2005/89/EC concerning measures to safeguard security of electricity supply mentions the need to ensure availability of back-up capacity in promoting electricity from RES and in addition emphasises the need to take into account the long-term effects of the growth of electricity demand in order to meet the Community's environmental commitments and reduce

[349] S. LAVENEX, 'EU external governance in "wider Europe"', *Journal of European Public Policy*, vol. 11, no. 4, 2004, 681, 683 and 694.

[350] T. CHRISTIANSEN, F. PETITO, B. TONRA, 'Fuzzy politics around fuzzy borders: the European Union's "near abroad"', *Cooperation and Conflict*, vol. 35, no. 4, 2000; 389; S. LAVENEX, 'EU external governance in "wider Europe"', *Journal of European Public Policy*, vol. 11, no. 4, 2004, 681-682.

[351] E.g. France's energy independence and the security of supply; cfr. S. MERITET, 'French perspectives in the emerging European Union energy policy', *Energy Policy*, vol. 35, no. 10, 2007, 4769.

[352] E. KUŞKU, 'Enforceability of a common energy supply security policy in the EU: an intergovernmentalist assessment', *Caucasian Review of International Affairs*, vol. 4, no. 2, Spring 2010, 148.

[353] Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market, *OJ* 27 October 2001, L 283/33 repealed by Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable energy sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, *OJ* 5 June 2009, L 140/16; K. VERHAEGEN, L. MEEUS, B. DELVAUX, R. BELMANS, 'Electricity produced from renewable energy sources – What target are we aiming for?', *Energy Policy*, vol. 35, no. 11, 2007, 5578.

[354] I. DIMITROVA, 'EU-Russia Energy Diplomacy: 2010 and Beyond?', *Connections, The Quarterly Journal of the PfP Consortium*, vol. 9, no. 4, 2010, 2. Note that the dependence of the EU on Russian imports also has the opposite effect, namely that Russia is dependent on its natural resources to maintain its strategic position; see, for instance, D. G. HAGLUND and F. MÉRAND, 'Translantic relations in the new strategic landscape: implications for Canada', *International Journal*, vol. 66, no. 1, Winter 2010-11, 30.

[355] S. MERITET, 'French perspectives in the emerging European Union energy policy', *Energy Policy*, vol. 35, no. 10, 2007, 4768.

dependence on imported energy.[356] Moreover, Article 3(c) of the Directive states that, in implementing measures in the first paragraph (i.e. that Member States must ensure a high level of security of electricity supply by necessary measures to facilitate a stable investment climate and by defining roles and responsibilities of competent authorities and all relevant market actors and publishing information thereon), Member States may also take account of the adoption of new technologies, in particular renewable energy technologies.[357] Moreover, Article 5(2)(a) of the Directive refers to additional measures that the Member States could take in terms of facilitating new generation capacity and the entry of new generation companies in the market. The latter emphasises the connection to the interrelationship of competitiveness and integration of RES-E into the market.[358] The Directive is additionally important in relation to smart metering (see for instance Article 5(d)) and grids, promoting the use of RES-E.

The development of RES is a great potential source of indigenous energy in the EU and the integration of RES into the internal energy market and thus the EU's energy consumption has a role to play. It would increase the security of supply as it would provide opportunities to diversify the EU's energy mix; it could therefore gradually reduce the EU's current energy dependence. In addition, it could loosen the Member States' control over supply management in terms of national security measures. The potential for the development of RES to decrease dependence has also been suggested by the European Economic and Social Committee, which has proposed reducing the EU's dependence by adopting more binding policies on, inter alia, renewable energies.[359] As stated above, the relationship between integrating RES-E into the conventional electricity system and market (and thus also electricity consumption) and the policy objectives of sustainability, competitiveness and security of supply could be part of a long-term policy remedy for supply shortages and it has the potential slowly to decrease dependence on primary sources located outside the EU. This underlines the interface between the EU's internal and external legal and policy challenges. However, it should be noted that even under the scenario of moving towards a European 'SuperSmart Grid', involving an integrated grid with 100% of electricity generation from RES by 2050, the EU would be partially dependent on importing renewable power from North Africa.[360]

[356] Recital 5 to Directive 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment, *OJ* 4 February 2006, L 33/22.

[357] Article 3(3)(c) Directive 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment, *OJ* 4 February 2006, L 33/22.

[358] Article 5(2)(a) Directive 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment, *OJ* 4 February 2006, L 33/22; *supra* Section 3.2.

[359] European Commission Communication, *Second Strategic Energy Review. An EU Energy Security and Solidarity Action Plan,* COM (2008) 781 final, 13 November 2008, 13; European Economic and Social Committee, Opinion on 'Energy supply: what kind of neighbourhood policy do we need to ensure security of supply for the EU?', TEN/443, 15 March 2011, Conclusion 1.1.11.

[360] PricewaterhouseCoopers, *100 % Renewable Electricity. A Roadmap to 2050 for Europe and North Africa,* www.supersmartgrid.net/wp-content/uploads/2010/03/100-renewable_electricity-roadmap.pdf (last consulted on 19 November 2011)

4.2 Disruptions in Supply Streams and Solidarity Mechanisms

After the oil shock in 1973, the European Commission warned the Member States about the failure of certain supply streams, emphasising that sources should be sufficiently diversified and that none of those sources should be too exclusively concentrated.[361] However, Member States were reluctant to cede any of their sovereignty in this area and responded separately to the Commission's recommendations, despite the fact that they could be exposed to pressure from energy providers.[362] It should be noted that the European Commission's 1995 White Paper went on to underline that as the Community was to move towards an integrated and more competitive energy market, there would be a need for increased solidarity on energy matters.[363]

Some years later, the EU has for instance taken action by means of Directive 2005/89/EC concerning measures to safeguard security of electricity supply and infrastructure investment.[364] This measure was taken on the basis of the old Article 95 TEC (new Article 114 TFEU), i.e. the approximation of laws which have as their object the establishment and functioning of the internal market. Besides the Directive on the security of electricity supply, the EU has also taken measures with regard to natural gas, strategic oil stocks and stocks of crude oil and petroleum products.[365] The latter measures are for instance taken on the basis of the old Article 100 TEC (new Article 122 TFEU), relating to economic policy and supply issues.

Although the EU has certain measures in place in order to guarantee security of supply, the Member States' powers in relation to their energy sources and the management of their energy supply could hamper the development of new measures creating solidarity mechanisms for the Member States to cooperate if, for example, major gas disruptions occur.[366] Although energy security and solidarity are often mentioned in one breath[367], at present Member States are still mainly concerned with pursuing individual production targets.[368] It has been noted by I. Dimitrova, that 'the "single player' attitude of the member states might challenge the Lisbon Treaty's solidarity clause, and could even threaten the EU's unity'.[369]

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[361] K. FISCHER, 'A Meeting of Blood and Oil: the Balkan Factor in Western Energy Security', *Journal of Southern Europe & the Balkans*, vol. 4, no.1, 2002, 77.

[362] E. KUŞKU, 'Enforceability of a Common Energy Supply Security Policy in the EU: An Intergovernmentalist Assessment', *Caucasian Review of International Affairs,* vol. 4, no. 2, 2010, 146.

[363] European Commission White Paper, *An energy policy for the European Union,* COM (95) 682 final, 13 December 1995, 2.

[364] Regulation (EU) No 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC, *OJ* 12 November 2010, L 295/1; Directive 2005/89/EC of the European Parliament and the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment, *OJ* 4 February 2006, L 33/22.

[365] Council Directive 2006/67/EC of 24 July 2006 imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products, *OJ* 8 August 2006, L 217/8; Council Directive 2009/119/EC of 14 September 2009 imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products, *OJ* 9 October 2009, L 265/9.

[366] See also I. DIMITROVA, 'EU-Russia Energy Diplomacy: 2010 and Beyond?', *Connections, The Quarterly Journal of the PfP Consortium,* vol. 9, no. 4, 2010, 11.

[367] See, for instance, the energy security and solidarity action plan, European Commission, *Second Strategic Energy Review – An EU Energy Security and Solidarity Action Plan*, COM (2008) 744 final.

[368] K. VERHAEGEN, L. MEEUS, B. DELVAUX, R. BELMANS, 'Electricity produced from renewable energy sources – What target are we aiming for?', *Energy Policy*, vol. 35, no. 11, 2007, 5579.

[369] I. DIMITROVA, 'EU-Russia Energy Diplomacy: 2010 and Beyond?', *Connections, Quarterly Journal of the PfP Consortium,* vol. 9, no. 4, 2010, 2.

Concerns regarding the EU's security of supply call into question the scope of the Union's solidarity in the internal energy market.[370] The adoption of the 'spirit of solidarity' in the Treaty framework is a necessary step forward to creating a true internal energy market in the EU.[371]

The concept of 'solidarity' in the Lisbon Treaty could possibly be used to tackle supply stream issues. This mechanism could, for instance, guarantee the pooling of resources in the event of a need for emergency access to gas reserves.[372] It should be noted that, as the European Economic and Social Committee reported, there have been advances on for instance strategic gas reserves and the use of a solidarity commitment.[373] In Regulation No. 994/2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC, it is mentioned that it is necessary to provide for solidarity and coordination in response to supply crises concerning preventive action as well as a reaction to concrete supply disruptions and that Member States should devise measures to exercise solidarity in order to strengthen the solidarity between Member States in the event of a Union emergency and in particular to support Member States exposed to less favourable geological or geographical conditions.[374] Regulation No. 994/2010 determines that it provides for transparent mechanisms 'in a spirit of solidarity' in the event of emergency at Member State, regional and Union levels and throughout the Regulation makes several references to the concept of solidarity.[375] This Regulation is part of the framework of the Second Strategic Energy Review – Securing our Energy Future of the European Commission of July 2009.[376]

The question is whether the provisions in relation to which the 'spirit of solidarity' applies can trigger more action to broaden cooperation in the energy field. It should be noted that Regulation No. 994/2010 concerning measures to safeguard security of gas supply was adopted on the basis of Article 194(2) TFEU, which seems to point in the right direction. The European Economic and Social Committee still calls for efforts by the EU institutions to tackle the issues related to security of supply on the basis of solidarity.[377] The provisions of the Lisbon Treaty could represent the legal basis that is needed to implement measures on the basis of the principle of solidarity referred to in the EU

[370] H. BJØRNEBYE, Investing in EU energy security: exploring the regulatory approach to tomorrow's electricity production, in Energy and Environmental Law Series, Alphen aan den Rijn, Kluwer Law International, 2010, 71-72.

[371] C. PADRÓS, E.E. COCCIOLO, 'Security of energy supply: When could national policy take precedence over European law?", *Energy Law Journal*, vol. 31, no. 1, 2010, 53.

[372] J.M. GLACHANT, F. LÉVÊQUE, P. RANCI, 'Some Guideposts on the Road to Formulating a Coherent Policy on EU Energy Security of Supply', *The Electricity Journal*, vol. 21, no. 10, 2008, 14.

[373] European Economic and Social Committee, Opinion on 'Energy supply: what kind of neighbourhood policy do we need to ensure security of supply for the EU?', TEN/443, 15 March 2011, 4.3.

[374] Recitals 5 and 36 to Regulation (EU) No 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC, *OJ* 12 November 2010, L 295/1.

[375] Article 1 of Regulation (EU) No 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC, *OJ* 12 November 2010, L 295/1.

[376] Available at http://ec.europa.eu/energy/strategies/2009/2009_07_ser2_en.htm (last consulted on 19 November 2011).

[377] European Economic and Social Committee, Opinion on 'Energy supply: what kind of neighbourhood policy do we need to ensure security of supply for the EU?', TEN/443, 15 March 2011, Conclusion 1.1.13.

Treaty framework.[378] However, it is questionable whether the Member States are ready for the enforcement of a 'principle of solidarity'.

Conclusion

This article has assessed some of the internal and external legal and policy challenges that the EU faces in the creation of a sustainable, competitive and secure internal energy market, and its efforts to integrate RES-E into the energy system (and more broadly into the energy market), as well as the surrounding policy and legal framework.

The current legal framework after the Lisbon Treaty includes a specific legal basis for measures in the energy policy area: Article 194 TFEU. However, such action is still heavily restrained by the Member States' rights in relation to their energy resources, their structure of supply and their national security. This could cause problems externally, as Member States still hold on to bilateral relationships with third countries inter alia based on their national security concerns and strategic partnerships. Yet a solid common external energy policy and response is necessary in order gradually to decrease the EU's dependence on external energy importers by focusing on strengthening its policies on energy efficiency, its diversification of the energy mix and its development of RES. The further development of such a common response to energy issues faced by the EU at international level could grow further out of a notion of 'solidarity', but it remains a fact that the Lisbon Treaty refers to a 'spirit of solidarity' rather than a 'principle of solidarity' (with the latter term used in relation to other issues such as border checks, asylum and immigration in Article 80 TFEU).[379] These choices should not be overlooked and it should be kept in mind that Member States remain masters of the Treaty. For the EU to uphold a solid external energy policy – dealing with its disadvantage of dependence on third countries – it should first and foremost have a solid internal energy policy framework. Therefore, a consistent application of its internal energy objectives in terms of concrete action is crucial, paying particular attention to the EU's role in the Energy Community, where it is gradually externalising its internal objectives. Under the current internal energy policy framework, sustainable development, competitiveness and security of supply are heavily interrelated in the attempt to achieve a sustainable, competitive and secure internal energy market. A threat to one of these objectives thus possibly threatens the potential to achieve a fully sustainable, competitive and secure internal energy market. As to concrete action within this framework, the integration of RES-E into the energy system would provide for opportunities to strengthen the sustainable, competitive and secure internal energy market, such as a diversification of the energy mix, as well as increased security of supply, more new market entrants and increased competitiveness. However, the integration of RES-E into the current framework is still hampered by market failures, as well as by failures in regulation.[380] As has been shown above, the EU does not always consistently apply its internal objectives when taking concrete action in the energy field; and it has been aware of this risk since the European Commission's 1995 Communication. For instance, in integrating RES-E into the

[378] A. BIAVA, 'The impact of the Russia-Ukraine Gas Disputes on the European Union Gas Market: The Energy Solidarity Issue' in B. DELVAUX, M. HUNT EN K. TALUS, *EU Energy Law and Policy Issues*, ELRF collection, 2nd Edition, Rixensart, Euroconfidentiel, 2010, 30.

[379] Article 194(1) TFEU.

[380] See also D. HELM, 'Energy policy, security of supply, sustainability and competition', *Energy Policy*, vol. 30, no. 3, February 2002, 175.

energy system, the application of sustainable development and environmental protection through the integration principle is ambiguous. Thus there is room for improvement as to the consistency of the internal framework, as this consistency becomes even more urgent in relation to the EU's ambitions in the external sphere. There should therefore not only be more focus on the consistency of the internal framework, but also on the interface between the internal consistency of the energy policy framework and the external action and the potential role for RES-E integration into the energy system. Such integration of RES-E into the energy system does indeed provide some long-term remedies for some of the internal and external challenges referred to above, but it will in its turn introduce new challenges, as even in an integrated 'SuperSmart Grid', the EU would depend on renewable sources from North Africa. Therefore, the need for back-up capacity when promoting electricity from RES remains acute.

Regulering af CO_2 med afgifter og kvoter – en dobbeltregulering?

Sebastian Houe

Abstract

A recent decision of the European Commission from June 2009 overruled Danish legislation concerning enterprises covered by the European Emission Trading System (EU ETS). Under the Danish scheme, enterprises covered by the EU ETS are exempted from carbon tax on fuel consumption for production purposes. The exemption is a result of the discussions on whether a carbon tax imposed on the concerned enterprises can be seen as unnecessary double regulation. The Danish legislator's attempt to remedy potential double regulation was, however, set aside by the Commission based on the state aid rules under European Union law as well as harmonised provisions in the area of energy taxation. The article looks further into the issue of the Danish carbon tax exemption, including an analysis of the Commission's decision in the state aid matter and its implications from a Danish perspective.

1. Indledning[381]

Folketinget vedtog i 2004 en foranstaltning, som fritager de kvoteomfattede industrivirksomheder for CO_2-afgift af brændselsforbrug anvendt i produktionsprocesser. Foranstaltningen havde til formål at afhjælpe en eventuel dobbeltregulering af den kvoteomfattede industri, som var underlagt henholdsvis CO_2-afgift samt EU's ordning for handel med emissionskvoter (EU ETS).[382] Afgiftsfritagelsen skulle have virkning fra 1. januar 2005 i forbindelse med påbegyndelsen af kvotemarkedet i EU. Fritagelsen medførte i visse tilfælde et beskatningsniveau under de harmoniserede minimumssatser, som er fastlagt i energibeskatningsdirektivet.[383] Kommissionen fandt bl.a. på denne baggrund, at foranstaltningen udgjorde ulovlig statsstøtte til den kvoteomfattede industri. Efter underkendelsen af de danske regler har det således ikke været muligt at gennemføre reguleringen som planlagt. Kommissionens endelige afgørelse i statsstøttesagen forelå den 17. juni 2009.[384]

Nærværende artikel behandler problemstillingen vedrørende eventuel dobbeltregulering af den kvoteomfattede industri. Fokus vil være på afgiftsfritagelsen for CO_2-afgift, herunder den danske statsstøttesag ved Kommissionen. Da problemstillingen ikke tidligere er belyst i dansk skatteretlig litteratur, vil der i de indledende afsnit blive foretaget en nærmere

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[382] Indført ved Europa-parlamentets og Rådets direktiv 2003/87/EF af 13. oktober 2003 om en ordning for handel med kvoter for drivhusgasemissioner i Fællesskabet og om ændring af Rådets direktiv 96/61/EF (herefter kvotedirektivet). Senest ændret ved Europa-parlamentets og rådets direktiv 2009/29/EF af 23. april 2009 om ændring af direktiv 2003/87/EF med henblik på at forbedre og udvide ordningen for handel med kvoter for drivhusgasemissioner i Fællesskabet.

[383] Rådets direktiv 2003/96 EF af 27. oktober 2003 om omstrukturering af EF-bestemmelserne for beskatning af energiprodukter og elektricitet (herefter energibeskatningsdirektivet).

[384] Kommissionens beslutning af 17. juni 2009 om støtteordning C 41/06 (ex N 318/A/04) som Danmark planlægger at gennemføre til godtgørelse af CO_2-afgiften for det kvoteomfattede brændselsforbrug i industrien (herefter statsstøttesag C 41/2006), EUT 2009 L 345/18.

undersøgelse af kvotemarkedet samt energibeskatningen i EU mv. Afsnit 2 indeholder en introduktion til klimadebatten, herunder reguleringen ved markedsbaserede instrumenter samt præsentation af problemstillingen vedrørende det danske afgiftssystem og den EU-retlige regulering. I afsnit 3 foretages en kortere beskrivelse af CO_2-afgiften samt EU's kvotemarked. I afsnit 4 redegøres for reguleringen af CO_2-udledning med henholdsvis afgifter og kvoter, herunder de samfundsøkonomiske betragtninger samt reguleringen i dansk lovgivning. I afsnit 5 foretages en analyse af den danske statsstøttesag. I afsnit 6 redegøres kort for de lovgivningsmæssige konsekvenser, som statsstøttesagen har medført i Danmark, herunder hvorledes reguleringen sker fremadrettet. Afsnit 7 indeholder en kortere perspektivering samt afsluttende bemærkninger.

2. Klimaregulering

2.1 Klima og markedsbaserede instrumenter

Det internationale fokus på global opvarmning har medført et ønske om markant reduktion i udledningen af drivhusgasser inden for en overskuelig årrække. Det er i videnskabelige sammenhænge sandsynliggjort, at menneskeskabte aktiviteter bidrager til en forøget koncentration af drivhusgasser.[385] Den forøgede koncentration af drivhusgasser kan hovedsagelig tilskrives brugen af fossile brændsler som f.eks. kul, mineralolie og naturgas. Det antages i dag, at de menneskeskabte udledninger af drivhusgasser ændrer atmosfærens sammensætning og dermed bidrager til klimaforandringer. Særligt anses den forøgede udledning at resultere i temperaturstigninger.[386] Klimaforandringerne, herunder temperaturstigninger og følgerne heraf, frygtes at have problematiske konsekvenser for det økosystem, som vi kender i dag.[387]

Mængden af udledte drivhusgasser kan reguleres ved hjælp af forskellige markedsbaserede instrumenter. Disse virkemidler kan anvendes hver for sig eller i kombination med hinanden. I denne sammenhæng er særligt afgifter og kvoter interessante. Ved afgifter sker der beskatning på baggrund af den udledte mængde, hvilket skaber et økonomisk incitament til at reducere udledningen. Ved kvoter er den maksimale udledning derimod fastlagt på forhånd.[388] Fordelingen af kvoterne kan herefter ske på baggrund af fastlagte allokeringsplaner eller ved auktion på baggrund af udbud og efterspørgsel samt en kombination heraf.

2.2 Det danske afgiftssystem og EU

I Danmark har der siden 1992 eksisteret en afgift på udledningen af CO_2. Med indførelsen af EU's ordning for handel med emissionskvoter i 2005 er udledningen af CO_2 fra de kvoteomfattede virksomheder endvidere reguleret gennem kvotesystemet. Som ovenfor nævnt har det i denne forbindelse været diskuteret, hvorvidt der er tale om unødvendig dobbeltregulering af de pågældende virk-

[385] Se hertil Treut, Hervé Le m.fl.: "Historical Overview of Climate Change Science", IPPC (2007), s. 100; fra kapitel 1 i Working Group I Report: "The Physical Science Basis".

[386] Se hertil Trenberth, Kevin E. m.fl.: "Observations: Surface and Atmospheric", IPCC (2007), s. 241ff.; fra kapitel 3 i Working Group I Report: "The Physical Science Basis".

[387] For en gennemgående redegørelse, se Working Group II Report: "Impacts, Adaption and Vulnerability", IPCC (2007). For en kortere redegørelse, se Olsen Lundh, Christina: "Att ransonera utsläppsutrymme", 2010, s. 97ff.

[388] Der eksisterer flere forskellige varianter af kvotesystemer. Kvotesystemet, som behandles i nærværende artikel, er et såkaldt "cap-and-trade"-system, hvor den maksimale udledning er fastsat på baggrund af systemets "cap" (loftet).

somheder. Lovgiver har anset dette for at være tilfældet, og Folketinget vedtog i 2004 en lovgivning, som fritager de kvoteomfattede industrivirksomheder for CO_2-afgift af energiforbrug anvendt i produktionsprocesser. CO_2-udledningen fra disse virksomheder skulle herefter alene være reguleret ved EU's ordning for handel med CO_2-kvoter. EU-Kommissionen underkendte imidlertid den danske ordning i sin oprindelige form, idet afgiftsfritagelsen ikke kunne anses for at være forenelig med de EU-retlige statsstøtteregler særligt som følge af harmoniserede bestemmelser på området.

Kommissionens underkendelse af den danske afgiftsfritagelse er som fremhævet ovenfor en følge af de harmoniserede regler for energibeskatningen i EU, der reguleres ved energibeskatningsdirektivet fra 2003.[389] Direktivet indeholder bestemmelser om harmonisering af afgift på elektricitet og energiprodukter (brændsler). Særlig relevant er minimumsatserne for afgifter på elektricitet og de forskellige energiprodukter, herunder de fossile brændsler som kul, mineralolie og naturgas samt direktivets bestemmelser vedrørende medlemsstaternes muligheder for at afgiftslempe og afgiftsfritage bestemte anvendelser af elektricitet og energiprodukter. Direktivet virker i tæt samspil med de EU-retlige statsstøtteregler. En overholdelse af særlige bestemmelser i direktivet, herunder minimumssatserne, kan således medføre, at en national foranstaltning, der udgør statsstøtte, kan godkendes som forenelig statsstøtte i overensstemmelse med EUF-traktatens bestemmelser.[390]

Problemstillingen i forbindelse med den danske afgiftsfritagelse var, at de kvoteomfattede virksomheder, som blev fritaget for CO_2-afgift af energiforbrug anvendt i deres produktionsprocesser, samtidig var fritaget for energiafgift af det samme energiforbrug. En fritagelse for CO_2-afgift medførte derfor et beskatningsniveau under de harmoniserede minimumssatser opstillet i energibeskatningsdirektivet. Direktivet opstiller ikke en sondring mellem brændselsforbrug, som anvendes henholdsvis inden eller uden for den kvoteomfattede sektor. Brændselsforbruget i kvoteomfattede virksomheder er således omfattet af energibeskatningsdirektivets anvendelsesområde, hvorfor medlemsstaterne ved udformning af national lovgivning skal respektere bestemmelserne i direktivet, herunder minimumssatserne. Kommissionen ville alene godkende den danske ordning, hvis minimumssatserne for det respektive energiforbrug blev overholdt. Der foreligger tilsvarende sager for andre medlemslande i EU.[391]

3. CO_2-afgiften og EU's kvotesystem

Både den danske CO_2-afgift og EU's ordning for handel med CO_2-kvoter er vigtige markedsbaserede instrumenter i forsøget på at nedbringe udledningen af drivhusgasser. De grundlæggende egenskaber ved de to virkemidler er dog forskellige. Det samme er endvidere tilfældet for det bagvedliggende retsgrundlag.

3.1 Den danske CO_2-afgift

Den danske CO_2-afgift er en ren national afgift, som blev indført i 1992.[392] Det fremgår af det oprindelige lovforslag, at formålet med afgiften er at nedbringe energiforbruget og herigennem

[389] Jf. supra note 383.

[390] For en nærmere omtale af energibeskatningsdirektivet, se Bakkfer, Anuschka m.fl.: "Tax and the Environment: A world of possibilities", 2009, s. 61ff.

[391] Se nærmere herom i afsnit 5.

[392] Vedtaget ved lov nr. 888 af 21. december 1991. Afgiften reguleres i dag i lovbekendtgørelse nr. 321 af 4. april 2011, lov om kuldioxidafgift af visse energiprodukter (CO_2-afgiftsloven).

reducere CO_2-udledningen.[393] Af hensyn til danske virksomheders konkurrenceevne var det kun private forbrugere, som blev fuldt ud belastet af afgiften. Der var således forskellige refusionsordninger for erhvervslivet, hvor det var muligt for virksomhederne at få delvis tilbagebetaling af afgiften alt efter den udførte aktivitet. Siden afgiftens indførelse er refusionsmulighederne for erhvervslivet løbende blevet reduceret. Med indførelsen af EU's ordning for handel med CO_2-kvoter kom der imidlertid fornyet fokus på afgiftens relevans for den kvoteomfattede sektor, herunder muligheden for at fritage brændselsforbruget i de kvoteomfattede virksomheder.

CO_2-afgiften virker i tæt samspil med energiafgifterne, idet pligten til at svare CO_2-afgift er bestemt af pligten til at svare energiafgift. CO_2-afgiften omfatter således de energiprodukter, hvoraf der også skal svares energiafgift af forbrug her i landet. Der skal svares energi- og CO_2-afgift af de fossile brændsler som kul, mineralolie og naturgas.[394] Argumentet for CO_2-afgiften er, at der ved afbrænding af fossile brændsler udledes kuldioxid (CO_2) til luften. Endvidere skal der svares energi- og CO_2-afgift (energispareafgift) af elektricitet.[395] Afgiftssatserne for de enkelte brændsler er forskellige, og satsen er fastlagt ud fra det gennemsnitlige kulstofindhold i det pågældende brændsel. Sammenhængen er, at et højt kulstofindhold resulterer i en høj CO_2-udledning, da kulstof omdannes til CO_2 ved forbrænding. For 2011 udgør afgiften 158,2 kr. pr. ton CO_2, som udledes til luften. Afgiften indekseres med 1,8 % årligt frem til 2015. Herefter skal indekseringen følge udviklingen i nettoprisindekset.[396]

3.2 EU's ordning for handel med CO_2-kvoter

Et af de vigtigste instrumenter i EU's klimapolitik udgøres af ordningen for handel med CO_2-kvoter (EU ETS).[397] Der er tale om et såkaldt "cap-and-trade"-system, hvor den maksimale udledning af drivhusgasser er fastlagt på forhånd ved udstedelse af omsættelige emissionskvoter. Kvoteordningen har sit udspring i Kyoto-protokollens fleksible mekanismer, som i international sammenhæng danner grundlaget for reduktionen af drivhusgasser.[398] Protokollen udgør en international aftale, som fastlægger bindende kvantitative reduktionsforpligtelser vedrørende

[393] Se hertil lovforslag nr. L 97 af 6. november 1991 (vedtaget som lov nr. 888 af 21. december 1991), almindelige bemærkninger.

[394] Fra 1. januar 2010 er der endvidere indført CO_2-afgift på ikke bionedbrydeligt affald anvendt som brændsel. Baggrunden herfor er, at afbrænding af affald sjældent er CO_2-neutralt, da affaldet ofte indeholder rester af plast og andre energiholdige materialer, som bl.a. er fremstillet ved hjælp af olie. Se hertil lovforslag nr. L 126 af 4. februar 2009 (vedtaget som lov nr. 461 af 12. juni 2009), almindelige bemærkninger, afsnit 3.1.1.

[395] Forbruget af elektricitet medfører ikke direkte udledning af kuldioxid, men elektriciteten fremstilles ofte ved afbrænding af fossile brændsler på kraftvarmeværkerne. En stor del af denne produktion er reguleret ved EU's kvoteordning, hvorfor effekten af CO_2-afgiften kan diskuteres, jf. de samfundsøkonomiske betragtninger i afsnit 4.1. Endvidere er en betydelig del af den danske elproduktion i dag baseret på CO_2-neutral vind- og biomasseenergi. For denne elektricitet synes det misvisende, at der skal svares CO_2-afgift. Lovgiver valgte derfor fra 2010 at omdøbe CO_2-afgiften på elektricitet til *energispareafgift*. Der er ikke materiel forskel fra den tidligere CO_2-afgift, og afgiften reguleres fortsat i CO_2-afgiftsloven. Se hertil lovforslag nr. L 207 af 22. april 2009 (vedtaget som lov nr. 527 af 12. juni 2009), bemærkninger til § 5, nr. 1 og 2.

[396] Jf. mineralolieafgiftslovens § 32 a affattet ved lov nr. 527 af 12. juni 2009, § 4, nr. 33.

[397] For en nærmere redegørelse for kvotesystemet, se Faure, Michael og Peeters, Marjan: "Climate Change and European Emissions Trading: Lessons for Theory and Practice", 2008.

[398] Kyoto Protocol to the United Nations Framework Convention on Climate Change, United Nations 1998. Protokollen kan findes på http://unfccc.int/resource/docs/convkp/kpeng.pdf . For en nærmere redegørelse, se endvidere Basse, Ellen Margrethe m.fl.: "Miljøretten Bind 6", 2008, s. 622ff.

drivhusgasser[399] for de nationer, der har ratificeret protokollen, og som står anført på Annex I (de industrielle lande) i FN's klimakonvention.[400] Det er efter protokollen tilladt, at der etableres såvel nationale som regionale markeder for salg af kvoter. EU (omfattende de oprindelige 15 stater) har i denne forbindelse valgt at ratificere protokollen på vegne af medlemsstaterne for herefter at udarbejde en byrdefordelingsaftale inden for det indre marked. Reduktionsforpligtelsen for EU udgør samlet 8 % i løbet af perioden 2008-2012 sammenlignet med udledningen i 1990.[401] Kvotemarkedet i EU reguleres ved kvotedirektivet fra 2003.[402] Første kvoteperiode vedrørte perioden 2005-2007. Anden kvoteperiode følger Kyoto-protokollen (2008-2012). Tredje kvoteperiode vedrører 2013-2020, jf. nedenfor.

I den indeværende kvoteperiode (2008-2012) er det primært de energitunge virksomheder, som er omfattet af EU's kvoteordning. Der er tale om energirelaterede aktiviteter med en indfyret effekt på mere end 20 MW, produktion og forarbejdning af ferrometaller, mineralindustri samt andre industrirelaterede aktiviteter. Omfattet er således de tunge udledere af drivhusgasser, herunder større kraftvarmeværker, olieraffinaderier samt industrivirksomheder som cement-, glas-, tegl-, stål- og papirfabrikker.[403] Kvoteordningen omfatter aktuelt ca. 40 % af medlemslandenes drivhusgasudledning.[404] De kvoteomfattede virksomheder får tildelt kvoterne på baggrund af deres historiske CO_2-udledning, og kvoterne tildeles gratis.[405] Denne tildelingsmekanisme betegnes som "grandfathering".[406]

En kvote defineres som et bevis for retten til at udlede ét ton CO_2-ækvivalent. Kvoterne er omsættelige og kan overdrages efter reglerne i kvotedirektivet. I første og anden kvoteperiode sker fordelingen af kvoter på baggrund af nationale allokeringsplaner (NAP)[407] for de enkelte medlemsstater, som disse er forpligtet til at udarbejde inden for de rammer, der er opstillet ved kvotedirektivet.[408] Allokerings-

[399] De drivhusgasser, som er omfattet af Kyoto-protokollen, er CO_2, CH_4, N_2O, HFC, PFC og SF_6, jf. protokollens Annex A. Beregning af udledningen af drivhusgasser sker med udgangspunkt i CO_2, hvorfor der ved måling af andre drivhusgasser end CO_2 sker omregning til CO_2-ækvivalenter (CO_2).

[400] United Nations Framework Convention on Climate Change, United Nations 1992. Konventionen kan findes på http://unfccc.int/resource/docs/convkp/conveng.pdf.

[401] Jf. Kyoto-protokollens Annex B.

[402] Jf. supra note 382.

[403] For en fuldstændig liste over de omfattede aktiviteter, se kvotedirektivets bilag I.

[404] Se hertil Commission Staff Working Document, Impact Assessment, Document accompanying the Package of Implementation measures for the EU's objectives on climate change and renewable energy for 2020, SEC(2008) 85/3, s. 4. Se endvidere Energistyrelsen: "Kort og Godt om CO2-kvoter", december 2008, s. 2, hvor det anslås, at kvoteordningen omfatter ca. 44 % af drivhusgasudledningen i EU.

[405] Jf. kvotedirektivets art. 10, hvorefter medlemsstaterne er forpligtet til at tildele mindst 95 % af kvoterne gratis for første kvoteperiode (2005-2007) og 90 % gratis for anden kvoteperiode (2008-2012).

[406] For en nærmere behandling af tildeling ved "grandfathering", se Woerdman, Edwin m.fl.: "European emissions trading and the polluter-pays principle: assesing grandfathering and over-allocation", s. 128ff. i Faure, Michael og Peeters, Marjan: "Climate Change and European Emissions Trading: Lessons for Theory and Practice", 2008, Woerdman, Edwin m.fl.: "Energy prices and emissions trading: windfall profits from grandfathering", European Journal of Law and Economics, 2009 og Hepburn, Cameron m.fl.: "Emissions Trading and Profit-Neutral Grandfathering", Department of Economics Discussion Paper Series Nr. 295, Oxford University, december 2006. Det skal bemærkes, at kvotevirksomhederne, udover køb af kvoter, kan udvide deres kvoteloft ved at købe såkaldte JI og CDM kreditter. Retten hertil beror på de enkelte medlemslandes beslutning, jf. nærmere herom i den netop anførte litteratur.

[407] Se f.eks. Miljøministeriet: "National allokeringsplan for Danmark i perioden 2008-2012", 6. marts 2007.

[408] Kriterierne for den nationale tildelingsplan fremgår særligt af kvotedirektivets bilag III.

planerne skal forelægges Kommissionen.[409] I perioden 2008-2012 giver direktivet mulighed for, at medlemsstaterne kan sælge eller bortauktionere op til 10 % af det totale antal kvoter frem for tildeling ved "grandsfathering".[410] Danmark har ligesom de øvrige medlemsstater valgt ikke at benytte sig af denne mulighed.[411] Dette begrundes med hensynet til de kvoteomfattede virksomheders konkurrenceevne set i lyset af Danmarks reduktionsbyrde.[412]

I 2009 blev der vedtaget et revideret kvotedirektiv, som har til formål at regulere kvotemarkedet i EU for tredje kvoteperiode (2013-2020).[413] Der gælder ingen internationale forpligtelser i denne periode. Det er endnu ikke på internationalt plan lykkedes at vedtage en aftale, der skal dække perioden efter Kyotoprotokollens udløb. Med vedtagelsen af det reviderede kvotedirektiv er kvotemarkedet blevet udvidet i tredje kvoteperiode. Bl.a. skal luftfarten i EU medtages under ordningen, hvilket dog allerede sker fra 1. januar 2012.[414] Endvidere sker der store ændringer i tildelingsmekanismerne. Det bestemmes i det reviderede direktiv, at auktionering skal være den mest fremherskende tildelingsmetode inden for kvotemarkedet. Medlemsstaterne er således forpligtet til at sælge kvoterne på auktion bortset fra særlige undtagelser fastlagt i direktivet.[415] Det betyder, at de kvoteomfattede virksomheder igennem (nationalt) afholdte auktioner skal betale den til enhver tid gældende markedspris for retten til at udlede ét ton CO_2 i den relevante periode frem for som tidligere at modtage disse rettigheder gratis. Dog er der vedtaget en række midlertidige regler for selve tildelingen, der giver mulighed for at fravige hovedreglen om auktion. Det bestemmes i denne forbindelse, at udfasningen af gratiskvoter skal ske gradvis. Dette betyder, at 20 % af den samlede mængde kvoter vil komme på auktion i 2013, hvilket forøges til 70 % i 2020.[416] Den delvise gratistildeling udfases lineært med lige store mængder hvert år med henblik på at bringe den ned på nul i 2027.[417] For elsektoren tildeles der som hovedregel ingen gratiskvoter, hvilket medfører fuld auktion fra første dag i tredje kvoteperiode.[418] Baggrunden herfor er, at elproducenterne kan overvælte udgifter til kvoter i elprisen.[419]

En væsentlig undtagelse til hovedreglen om auktion i næste kvoteperiode findes i bestemmelserne vedrørende "carbon leakage". Undtagelsen har til formål at beskytte de industrier, der vurderes at være i væsentlig risiko for konkurrenceforvridning som følge af de forøgede omkostninger ved køb af kvoter. Det betyder, at de pågældende industrier fortsat vil få tildelt gratiskvoter i den

[409] Jf. kvotedirektivets art. 9, stk. 3. Kommissionens kompetence i forhold til at afvise de nationale allokeringsplaner er omdiskuteret. Praksis fra Retten i Første Instans viser, at Kommissionens kompetence er begrænset, jf. sag T-183/07, *Polen mod Kommissionen* og sag T-263/07, *Estland mod Kommissionen*, hvor Retten i begge tilfælde annullerede Kommissionens beslutning. Begge sager er appelleret til Domstolen (sag C-504/09 P og sag C-505/09 P), hvorfor der afventes en endelig afklaring.

[410] Jf. supra note 405.

[411] Danmark valgte i perioden 2005-2007 at udnytte muligheden for at sælge eller bortaktionere op til 5 % af de tildelte kvoter, jf. supra note 405.

[412] Se hertil Miljøministeriet: "National allokeringsplan for Danmark i perioden 2008-2012", 6. marts 2007, afsnit 6.7 (s. 56).

[413] Europa-parlamentets og rådets direktiv 2009/29/EF af 23. april 2009 om ændring af direktiv 2003/87/EF med henblik på at forbedre og udvide ordningen for handel med kvoter for drivhusgasemissioner i Fællesskabet (herefter det reviderede kvotedirektiv).

[414] Jf. det reviderede kvotedirektivs bilag I, nr. 6. For en fuldstændig liste over udvidelsen af aktiviteter, se direktivets bilag I.

[415] Jf. det reviderede kvotedirektivs art. 10.

[416] Jf. det reviderede kvotedirektivs art. 10a, stk. 11.

[417] Ibid.

[418] Jf. det reviderede kvotedirektivs art. 10a, stk. 1, 4. punktum.

[419] Jf. præamblen til det reviderede kvotedirektiv, pkt. (19).

kommende periode, hvorfor de som udgangspunkt ikke skal auktionere sig til kvoter.[420] Begrebet "carbon leakage" dækker over den situation, hvor CO_2-udslippet i et land stiger som følge af et andet lands forsøg på at nedbringe sit CO_2-udslip. Herved opnås alene forbedringer på nationalt plan, men på globalt plan vil der ikke være klimamæssige gevinster. Derimod vil der blot være tale om en geografisk flytning af udledningen.[421] Særligt kan "carbon leakage" være relevant, hvor de store udledere i industrien vælger at flytte produktionen fra i-lande til u-lande, hvor kravene til reduktion er væsentlig lavere eller ikke eksisterende. Der findes dog ingen empiriske beviser for, at "carbon leakage" finder sted.[422] Begrebet er imidlertid aktualiseret ved fraværet af en internationalt bindende aftale efter 2012. Kommissionen har på baggrund af særlige kriterier vedtaget, hvilke sektorer der skal være omfattet af undtagelsen[423]. Disse sektorer skal i perioden tildeles gratiskvoter på baggrund af såkaldte benchmarks. Hermed menes, at tildelingen skal ske på baggrund af præstationen for de 10 % mest effektive anlæg i en (del)sektor.[424] Omfanget af undtagelsesbestemmelsen estimeres til at være ca. 25 % af de samlede emissioner under kvotemarkedet.[425] Endnu mere interessant er det, at de godt 160 (del)sektorer, som Kommissionen har udpeget, tegner sig for hele 77 % af de samlede produktionsindustrier under kvotemarkedet.[426]

4. Regulering af CO_2 med henholdsvis afgifter og kvoter

CO_2-afgiften og EU's ordning for handel med CO_2-kvoter er to forskellige markedsbaserede virkemidler, som har til formål at adfærdsregulere det samme område. Afgiften giver en variabel mængde en fast pris, hvorimod kvoterne giver en fast mængde en variabel pris.[427] Der kan i denne forbindelse være visse udfordringer i forbindelse med etableringen af et omkostningseffektivt og funktionsdygtigt system, hvor instrumenterne fungerer i samspil med hinanden. I dansk sammenhæng har problemstillingen fra politisk side været i fokus siden vedtagelsen af kvotedirektivet i EU.[428]

[420] Jf. det reviderede kvotedirektivs art. 10a, stk. 12.

[421] For en nærmere behandling af "carbon leakage", se Andersen, Mikael Skou og Ekins, Paul: "Carbon-Energy Taxation: Lessons from Europe", 2009, s. 215ff.

[422] Ibid. Ved en undersøgelse af effekterne af miljøskattereformer i seks EU-medlemsstater i perioden 1995-2005 forekommer der ikke empiriske beviser for, at "carbon leakage" finder sted.

[423] Se hertil Kommissionens afgørelse af 24. december 2009 om opstilling af en liste over, hvilke sektorer og delsektorer der anses for at være udsat for en betydelig risiko for "carbon leakage", EUT 2010 L 1/10.

[424] Jf. det reviderede kvotedirektivs art. 10a, stk. 2. Det er ikke fuldstændig klart, hvilken form for effektivitet, der henvises til i bestemmelsen. Det må dog antages, at bestemmelsen henviser tilbage til de benchmarks, der skal defineres med udgangspunkt i direktivets art. 10a, stk. 1, afsnit 3-5.

[425] Se hertil EU-Kommissionen: FAQ om "carbon leakage". Kan findes på Kommissionens hjemmeside under Emission Trading System, Carbon Leakage.

[426] Ibid.

[427] For en nærmere behandling af de to virkemidler, herunder fordele og ulemper, se Milne, Janet E.: "Carbon Taxes Versus Cap-and-Trade: The Relative Burden and Risks of Market-Based administration". Forfatteren påpeger bl.a., at et "cap-and-trade"-system medfører en væsentlig større administrativ byrde end en CO_2-skat. Dette gælder både for de offentlige myndigheder og de private aktører. Se endvidere Maker, Abhinav: "To Cap or To Tax? An Economic and Legal Argument in Favour of Carbon Taxes over a Cap on Trade to Combat Climate Change". Forfatteren argumenterer for, at en CO_2-skat er at foretrække frem for et "cap-and-trade"-system. Endvidere behandles WTO-retlige overvejelser i forbindelse med en CO_2-skat. Ovenstående artikler kan findes i "Critical Issues in Environmental Taxation: International and Comparative Perspectives (Volume VII)", 2009. For en behandling i dansk sammenhæng, se Skatteministeriet: "Omfanget af dobbeltregulering af CO_2-udledningerne ved kvoter og afgifter", marts 2006, s. 9ff.

[428] Se hertil Finansministeriet m.fl.: "En omkostningseffektiv klimastrategi", februar 2003, kap. 11 (s. 223ff.).

4.1 Samfundsøkonomiske betragtninger

Ud fra et samfundsøkonomisk synspunkt tilsiger en økonomisk optimal og efficient regulering af drivhusgasudledningen, at der bør være ensartet marginal tilskyndelse til reduktion af udledningen på tværs af de forskellige aktører. Marginalomkostningerne ved at udlede CO_2 skal således være uafhængig af, hvorvidt den enkelte virksomhed er omfattet af kvoteordningen eller ej.[429] Den optimale løsning vil ud fra et teoretisk synspunkt være, at virksomhederne inden for kvotesystemet køber deres kvoter af staten ved auktion eller på det frie marked. Virksomhederne uden for kvotesystemet skal derimod være underlagt en CO_2-afgift af samme størrelse som kvoteprisen. Dette scenarie vil give såvel økonomisk efficiens i reduktionsindsatsen samt en lige byrdefordeling for virksomhederne.[430] Hensynet til virksomhedernes konkurrenceevne spiller dog også en væsentlig rolle, hvorfor et økonomisk efficient system ikke nødvendigvis er hensigtsmæssigt ud fra konkurrencemæssige synspunkter.

Ud fra en betragtning, hvor der alene fokuseres på CO_2-udledning, og hvor kvotemarkedet fungerer optimalt, opnås der ingen klimamæssige gevinster ved, at danske kvoteomfattede virksomheder tillige er underlagt CO_2-afgift. Den samlede CO_2-udledning i den kvoteomfattede sektor i EU er fastsat ved den overordnede "cap". CO_2-udledning fra de kvoteomfattede virksomheder i EU er således berammet ved hjælp af dette loft. Såfremt CO_2-afgiften medfører, at de danske kvoteomfattede virksomheder energieffektiviserer eller skifter til vedvarende energi med lavere CO_2-udledning til følge, vil disse virksomheder opleve et overskud af kvoter. Det oversydende antal kvoter vil imidlertid blive solgt videre i kvotesystemet. Køberne vil være kvoteomfattede virksomheder i andre EU-medlemsstater, som ikke kan dække deres udledning ved de gratis tildelte kvoter, og hvor køb af yderligere kvoter vil være mere rentabelt end investering i energieffektivisering eller vedvarende energi. Udledningen af drivhusgasser vil således blot flyttes fra Danmark til et andet land i EU, hvorfor der ikke sker en reduktion globalt.[431] Ovenstående forudsætter som tidligere fremhævet, at kvotemarkedet fungerer efter hensigten. Det har imidlertid vist sig, at der er sket en overallokering af kvoter i EU. Det totale kvoteloft er således fastsat for højt i forhold til det faktiske behov, hvorfor det samlede antal udstedte kvoter væsentlig overstiger den reelle CO_2-udledning fra den kvoteomfattede sektor. Endvidere har den økonomiske krise medført en nedgang i produktionen, hvilket har bevirket et fald i udledningen af drivhusgasser, som ikke var indregnet i forbindelse med udstedelse af kvoterne.[432] Der er tale om overallokering af kvoter både i første og anden kvoteperiode. I første kvoteperiode oplevede markedet en kvotepris på 0 kr. som følge af, at udbuddet langt oversteg efterspørgslen.[433] For anden

[429] For en nærmere redegørelse af de økonomiske aspekter ved regulering af CO_2, se Andersen, Mikael Skou og Ekins, Paul: "Carbon-Energy Taxation: Lessons from Europe", 2009.

[430] Ibid., s. 224f. For en nærmere behandling af problem-stillingerne i forbindelse med dobbeltregulering, her-under den mest omkostningseffektive reduktion af CO_2-udledningen, se Soares, Claudia Dias: "Energy tax treatment of undertakings covered by emissions trading", EC Tax Review 2007-4. Forfatteren påpeger, at omkostningerne ved at udlede CO_2 skal være ens for virksomheder henholdsvis inden og uden for kvote-sektoren. Endvidere omtales statsstøttesagerne, som analyseres i afsnit 5.

[431] Se hertil Soares, Claudia Dias: "Energy tax treatment of undertakings covered by emissions trading", EC Tax Review 2007-4.

[432] Se hertil Andersen, Mikael Skou og Ekins, Paul: "Carbon-Energy Taxation: Lessons from Europe", 2009, s. 242f.

[433] Ibid., hvor forfatterne opstiller en tabel over udviklingen i kvoteprisen.

kvoteperiode har prisen dog endnu ikke været så lav.

Når kvotemarkedet ikke fungerer efter hensigten foranlediget ved en overallokering af kvoter, som det er forekommet i EU, kan en CO_2-afgift være berettiget ud fra klimamæssige betragtninger. Hvor der er markant overskud af kvoter i forhold til markedets behov, vil en reduktion af CO_2-udledningen fra dansk territorium, som følge af CO_2-afgiften, således ikke medføre tilsvarende udledning et andet sted i kvotesystemet, idet behovet for yderligere udledning ikke eksisterer. Hermed resulterer afgiften i en faktisk reduktion af den globale CO_2-udledning.[434]

4.2 Reguleringen i dansk lovgivning

Problemstillingen vedrørende dobbeltregulering er i dansk lovgivning forsøgt løst over flere omgange. Folketinget vedtog i 2004 en lovændring i CO_2-afgiftsloven, som helt fritog de kvoteomfattede industrivirksomheder for CO_2-afgift af brændselsforbrug anvendt i produktionsprocesser.[435] Med indførelsen af EU's kvoteordning var det således lovgivers opfattelse, at der ikke længere eksisterede klimamæssige begrundelser for at opretholde afgiften for de pågældende virksomheder.[436] Reglerne skulle have virkning fra 1. januar 2005 i forbindelse med indførelsen af første kvoteperiode i EU (2005-2007). Som følge af statsstøttereglerne, herunder samspillet med de harmoniserede EU-bestemmelser på det respektive område, kunne Kommissionen dog ikke godkende foranstaltningen i sin oprindelige form, jf. analyse af statsstøttesagen i afsnit 5.[437]

I forbindelse med implementeringen af den energipolitiske aftale fra 2008[438] blev CO_2-afgiften yderligere tilpasset kvoteordningen i EU. Formålet med ændringerne var primært at ligestille virksomheder, som befandt sig henholdsvis inden og uden for kvotesektoren. CO_2-afgiften blev sat op til 150 kr. pr. ton CO_2, som var den forventede fremtidige pris på en CO_2-kvote. Samtidig blev de forskellige refusionsordninger vedrørende industriens brændselsforbrug uden for kvoteordningen afskaffet. Inden for kvotesektoren skulle der fortsat gælde fuld afgiftsfritagelse for industrivirksomhedernes brændselsforbrug. Incitamentet (marginalomkostningerne) til at reducere udledningen med ét ton CO_2 ville således være det samme, uanset om virksomheden var omfattet af kvotesystemet eller ej. Dette uanset at kvoterne er tildelt gratis. For virksomheder inden for kvotemarkedet ville incitamentet

[434] Ibid., s. 249ff., hvor forfatterne anfører det fornuftige i at supplere kvotemarkedet med en CO_2-afgift, indtil markedet opnår modenhed og stabilitet. For en undersøgelse af de negative samfundsøkonomiske konsekvenser ved overlappende regulering, se Böhringer, Christoph, Koschel, Henrike og Moslener, Ulf: "Efficiency losses from overlapping regulation of EU carbon emissions", Journal of Regulatory Economics, 2008.

[435] Jf. lov nr. 464 af 9. juni 2004, § 3, nr. 1. Alene industrivirksomhederne kan opnå tilbagebetaling af CO_2-afgiften. Tilbagebetalingen vedrører kun energiforbrug anvendt til produktion og ikke til rumopvarmning mv. Producenter af fjernvarme er ikke omfattet af fritagelsen. Fjernvarme er altid belastet med afgifter. Det afgørende for tilbagebetalingen af afgifterne er herefter, hvem der forbruger fjernvarmen samt anvendelsen af varmen.

[436] Jf. ovenstående afsnit kan denne overbevisning diskuteres i de tilfælde, hvor kvotemarkedet ikke fungerer efter hensigten.

[437] Ved fremsættelse af lovforslaget var det regeringens overbevisning, at foranstaltningen kunne anses for at være forenelig med EU-retten, jf. lovforslag nr. L 229 af 14. april 2004 (vedtaget som lov nr. 464 af 9. juni 2004), bemærkninger til § 3, nr. 1: *"Samlet set kan fuld tilbagebetaling af CO_2-afgiften for det kvoteomfattede brændselsforbrug ske i overensstemmelse med energibeskatningsdirektivet"*.

[438] Aftale af 21. februar 2008 mellem regeringen (Venstre og Det Konservative Folkeparti), Socialdemokraterne, Dansk Folkeparti, Socialistisk Folkeparti, Det Radikal Venstre og Ny Alliance om den danske energipolitik i årene 2008-2011.

være kvotens salgsværdi (150 kr.), og for virksomheder uden for kvotemarkedet ville incitamentet være afgiftsbesparelsen (150 kr.).[439] I 2011 udgør CO_2-afgiften som nævnt 158,2 kr. pr. ton CO_2, idet afgiften hvert år indekseres. Den aktuelle kvotepris ligger omkring 100-150 kr. Prisen varierer dog fra dag til dag. Idet kvoteprisen er et resultat af udbud og efterspørgsel, hvorimod CO_2-afgiften er fastsat i lovgivningen, kan det være vanskeligt at gennemføre ovenstående intentioner i praksis. En mulig løsning på problemstillingen vedrørende et ensartet incitament til at reducere udledningen henholdsvis inden og uden for kvotemarkedet er yderligere harmonisering af reglerne på EU-plan. En harmoniseret tilpasning mellem CO_2-afgiften og kvoteprisen vil kræve en ændring af energibeskatningsdirektivet.

Som følge af den danske statsstøttesag har det ikke været muligt fuldt ud at fritage de kvoteomfattede virksomheder for betaling af CO_2-afgift. Dette er som fremhævet i indledningen en konsekvens af, at virksomhederne ved denne foranstaltning beskattes lavere end EU's minimumssatser foreskrevet i energibeskatningsdirektivet. Statsstøttesagens konsekvens for den danske regulering undersøges i afsnit 6.

5. En EU-retlig vurdering af afgiftsfritagelsen

Formålet med den danske afgiftsfritagelse for CO_2-afgift er at afhjælpe den eventuelle dobbeltregulering af den kvoteomfattede sektor. Forudsat at kvotemarkedet fungerer optimalt, eksisterer der ikke klimamæssige begrundelser for at opretholde CO_2-afgiften for kvotevirksomhederne. Dog skal det i denne forbindelse bemærkes, at der kan være forbehold, idet kvotemarkedet endnu ikke har opnået den nødvendige stabilitet, jf. ovenfor. Kommissionen har vedrørende dobbeltreguleringen udtalt, at EU's kvoteordning og de harmoniserede regler for energibeskatning, i det mindste i et vist omfang, til dels har samme målsætning. Kommissionen anfører, at det kan overvejes at undtage de kvoteomfattede virksomheder fra visse elementer i energibeskatningsdirektivet, såfremt reguleringen i tilstrækkeligt omfang kan ske gennem kvoteordningen.[440] Ved medlemsstaternes forsøg på at afhjælpe en eventuel dobbeltreguleringen gennem afgiftsfritagelser eller andre foranstaltninger er det imidlertid nødvendigt, at de EU-retlige regler overholdes. Forskellige ordninger kan potentielt udgøre statsstøtte til den kvoteomfattede industri. Endvidere er det af afgørende betydning, at de pågældende foranstaltninger er i overensstemmelse med de grundlæggende miljøretlige principper i EU-retten, herunder særligt "forureneren betaler"-princippet fastlagt i art. 191, stk. 2 EUF (tidligere art. 174, stk. 2 EF).[441] Udgangspunktet for dette princip er, at forureneren indregner miljøomkostningerne i sin egen forbrugs- eller produktionsbeslutning, hvorved miljøeffekten internaliseres, og forureneren selv kommer til at bære omkostningerne ved forureningen. Såfremt princippet ønskes overholdt strengt, skal det pågældende markedsinstrument (f.eks. afgift eller kvote) have et niveau, som svarer til den miljømæssige omkostning ved yderligere

[439] Se hertil Finansministeriet m.fl.: "En omkostningseffektiv klimastrategi", februar 2003, s. 224ff. For en nærmere behandling af problemstillingen, se endvidere lovforslag nr. L 168 af 28. marts 2008 (vedtaget som lov nr. 528 af 17. juni 2008), almindelige bemærkninger, afsnit 1.2 og 3.1.

[440] Se EU-Kommissionen: "Grønbog om markedsbaserede instrumenter til miljøpolitiske og andre beslægtede formål", KOM(2007) 140 endelig, afsnit 3.2.

[441] Jf. art. 191, stk. 2 EUF, hvoraf det bl.a. fremgår, at Unionens politik på miljøområdet *"… bygger på (…) princippet om, at forureneren betaler."*

forurening.[442] Den statsstøtteretlige vurdering skal således ske i overensstemmelse med bl.a. dette princip.

5.1 Introduktion til forbuddet mod statsstøtte

Bestemmelserne om statsstøtte findes i art. 107-109 EUF (tidligere art. 87-89 EF). Det er bestemmelsernes særlige opgave at dæmme op for de forstyrrende virkninger, medlemsstaternes adfærd i støttemæssig henseende kan have på et velfungerede indre marked. I denne forbindelse opstiller art. 107, stk. 1 EUF et forbud imod foranstaltninger, 1) der indebærer støtte under enhver tænkelig form (støttebegrebet), 2) som ydes af staten eller gennem statsmidler, 3) som begunstiger visse virksomheder eller produktioner (selektivitet), og 4) som fordrejer eller truer med at fordreje konkurrencevilkårene samt påvirker samhandlen mellem medlemsstaterne.[443] Samtlige betingelser skal kumulativt være opfyldt, førend en støtteforanstaltning kan karakteriseres som uforenelig statsstøtte i traktatens forstand.[444] Statsstøtteforbuddet er dog ikke absolut, men modificeres i et vist omfang af såvel andre dele af statsstøttebestemmelserne som andre traktatbestemmelser. I forhold til afgiftsfritagelser er særligt art. 107, stk. 3, litra c) EUF relevant. Efter denne bestemmelse kan bl.a. afgiftsforanstaltninger, der udgør statsstøtte, godkendes som forenelige med det indre marked. Udgangspunktet for en eventuel godkendelse er beskyttelseshensyn til klima og miljø.

Den statsstøtteretlige vurdering af en medlemsstats nationale foranstaltninger foretages af Kommissionen. Med forbehold for prøvelse ved Domstolen agerer Kommissionen således som kompetent myndighed på området med eksklusiv kompetence til at vurdere en given støtteordning.[445] Kommissionens beføjelser følger af art. 108 EUF. Medlemsstaterne har pligt til at underrette (notificere) Kommissionen om nye afgiftsforanstaltninger, herunder ændringer i den eksisterende afgiftsstruktur, såfremt der er risiko for, at de nye tiltag indeholder elementer af statsstøtte, jf. art. 108, stk. 3 EUF.[446] Af samme bestemmelse følger endvidere en *standstill-forpligtelse*, hvorefter medlemsstaterne ikke må gennemføre de påtænkte foranstaltninger, førend Kommissionens endelige godkendelse foreligger. I overensstemmelse med standstill-forpligtelsen blev den danske afgiftsfritagelse for CO_2-afgift anmeldt til Kommissionen.

5.2 Kommissionens vurdering af afgiftsfritagelsen

For at fastlægge de EU-retlige rammer, som medlemsstaterne kan agerer under i forhold til afhjælpningen af en eventuel dobbeltregulering af den kvoteomfattede industri, er det nødvendigt at identificere og analysere de kriterier, som Kommissionen opstiller. Den danske statsstøttesag kan ikke behandles isoleret, idet der foreligger tilsvarende sager for andre medlemsstater i EU. Således har Sverige og Slovenien haft sager ved Kommissionen vedrørende kvoteomfattede virksomheders

[442] Jf. definitionen i EF-retningslinjer for statsstøtte til miljøbeskyttelse, EUT 2008 C 82/01, pkt. 70, nr. 25. For en nærmere behandling af "forureneren betaler"-princippet, se Jans, Jan H. og Vedder, Hans H. B.: "European Enviromental Law", 2008, s. 43ff.

[443] Jf. f.eks. sag C-345/02, *Pearle BV*, præmis 33 og sag C-280/00, *Altmark Trans*, præmis 75, hvor Domstolen opremser betingelserne i art. 107, stk. 1 EUF.

[444] Jf. sag C-345/02, *Pearle BV*, præmis 32 og sag C-280/00, *Altmark Trans*, præmis 74.

[445] Jf. sag C-119/05, *Lucchini*, præmis 52, de forenede sager C-261/01 og C-262/01, *Eugene van Calster*, præmis 45 og sag 78/76, *Steinke & Weinlig*, præmis 9.

[446] Støtte omfattet af Kommissionens forordning (EF) Nr. 800/2008 af 6. august (generel gruppefritagelsesforordning) er dog undtaget fra anmeldelsespligten.

fritagelse for CO_2-afgift.[447] Den svenske sag er på mange områder at sammenligne med den danske. Efter de svenske regler skulle brændsel anvendt i visse kvoteomfattede anlæg fritages for CO_2-afgift. Som ved den danske ordning medførte dette situationer, hvor beskatningen af det enkelte brændsel ville være under de harmoniserede minimumssatser i energibeskatningsdirektivet. Efter Kommissionens indledning af den formelle undersøgelsesprocedure valgte de svenske myndigheder imidlertid at tilbagekalde notifikationen for senere at anmelde en revideret ordning.[448] Reguleringen i den reviderede ordning er ikke i samme grad at sammenligne med den danske ordning, idet minimumssatserne overholdes i den nye svenske ordning. Sagen vedrørende den oprindelige foranstaltning indeholder imidlertid værdifulde betragtninger, hvad angår beslutningen om at indlede den formelle undersøgelsesprocedure. I den slovenske ordning er der ligeledes tale om en overholdelse af minimumssatserne, hvorfor sagen på dette væsentlige punkt adskiller sig fra den danske sag.

I analysen af den danske statsstøttesag skal det undersøges, hvorfor afgiftsfritagelsen for CO_2-afgift efter Kommissionens vurdering udgjorde statsstøtte omfattet af art. 107, stk. 1 EUF. Herefter skal det undersøges, hvorfor Kommissionen ikke godkendte den pågældende foranstaltning som forenelig støtte efter art. 107, stk. 3, litra c) EUF.

5.2.1 Statsstøttevurdering efter art. 107, stk. 1 EUF

I vurderingen af den danske afgiftsfritagelse for CO_2-afgift bemærkede Kommissionen indledningsvist, at den foreslåede foranstaltning fritager de kvoteomfattede industrivirksomheder for omkostninger, som de ellers skulle afholde som en sædvanlig del af driften. Ordningen udgør således en økonomisk fordel for disse virksomheder, hvorfor der er tale om støtte.[449] Endvidere bemærkede Kommissionen, at foranstaltningen i sin egenskab af afgiftsfritagelse finansieres af staten ved hjælp af statsmidler.[450] Afgiftsfritagelsen er således en følge af statens handlinger og resulterer i et tab af statsindtægter. Støttemodtagerne er aktive på markeder, hvor der er konkurrence og handel mellem medlemsstaterne, hvorfor afgiftsfritagelsen potentielt kan fordreje konkurrencen og påvirke samhandlen.[451] Det

[447] For den svenske sag, se statsstøttesag C 46/2006 (ex N 347/2006) – Fritagelse for CO_2-afgift på brændstoffer, der bruges i anlæg, der er omfattet af EU's ordning for handel med kvoter for drivhusgasemissioner (herefter statsstøttesag C 46/2006), EUT 2006 C 297/27. For den slovenske sag, se Kommissionens beslutning af 23. november 2005 om den statsstøtteordning, Slovenien gennemfører i medfør af sin lovgivning om miljøafgifter på emission af kuldioxid, EUT 2006 L 268/19.

[448] Se hertil statsstøttesag C 46/2006 – Meddelelse fra Kommissionen i henhold EF-traktatens til artikel 88, stk. 2 – tilbagetrækning af anmeldelse, EUT 2008 C 55/16. Vurderingen af den reviderede ordning fremgår af state aid case N 22/2008 – Sweden: "CO_2-tax reduction for fuel used in installations covered by EU ETS".

[449] Jf. statsstøttesag C 41/2006, pkt. 22. Samme argumentation anvendes i den svenske sag, jf. statsstøttesag C 46/2006, pkt. 14. Vurderingen er i overensstemmelse med domspraksis på området, hvor et afgørende element i forhold til støttebegrebet er, om den virksomhed eller sektor, som støtteforanstaltningen er rettet imod, opnår en økonomisk fordel, som ikke ville være opnået på sædvanlige markedsvilkår, jf. de forenede sager T-204/97 og T-270/97, *EPAC*, præmis 66 og sag C-39/94, *SFEI/La Poste*, præmis 60. Det er uden betydning, hvorvidt modtagerens situation forværres, forbedres eller slet ikke ændres i forhold til den situation, der forelå inden støtteforanstaltningens implementering, jf. de forenede sager T-211/04 og sag T-215/04, *Gibraltar mod Kommissionen*, præmis 186, sag C-143/99, *Adria-Wien Pipeline GmbH*, præmis 41 og sag 57/86, *Grækenland mod Kommissionen*, præmis 10.

[450] Jf. statsstøttesag C 41/2006, pkt. 22 og 37. Dette blev ligeledes bemærket i den svenske sag, jf. statsstøttesag C 46/2006, pkt. 14.

[451] Jf. statsstøttesag C 41/2006, pkt. 22 og 37. Dette blev ligeledes bemærket i den svenske sag, jf. statsstøttesag C 46/2006, pkt. 16. Som det fremgår af Kommissionens beslutninger, er betingelserne vedrørende fordrejelse af

afgørende element i Kommissionens vurdering efter art. 107, stk. 1 EUF var herefter selektivitetskriteriet, herunder hvorvidt afgiftsfritagelsen begunstiger visse virksomheder eller produktioner.

Kriteriet vedrørende selektivitet er ofte det bestemmende element i statsstøtteretlig sammenhæng. Vurderingen af de øvrige kriterier i statsstøtteforbuddet er typisk mindre centrale. Derimod indeholder selektivitetskriteriet en omfattende vurdering fra Kommissionens side. Årsagen er fast domspraksis på statsstøtteområdet, hvoraf det følger, at ikke alle differentierede afgiftsforanstaltninger skal betragtes som selektive. Såfremt den selektive karakter kan begrundes i afgiftssystemets *karakter eller opbygning*, foreligger der ikke selektivitet efter art. 107, stk. 1 EUF.[452] I disse tilfælde vil der således ikke være tale om statsstøtte, selvom foranstaltningen indeholder et selektivt element.

I forbindelse med Kommissionens vurdering af afgiftsfritagelsen gjorde de danske myndigheder gældende, at den foreslåede foranstaltning ikke tildeler støttemodtagerne en fordel, eftersom afgiftsfritagelsen omfatter alle virksomheder, der er underlagt dobbeltreguleringen og således faktuelt og retligt befinder sig i samme situation.[453] Såfremt Kommissionen skulle anse foranstaltningen som selektiv, gjorde de danske myndigheder subsidiært gældende, at selektiviteten er retfærdiggjort i afgiftssystemets karakter og opbygning. Argumentet fra den danske regering var, at CO_2-afgiften efter indførelsen af EU's kvoteordning ikke længere tjener et miljømæssigt formål, idet afgiften ikke længere er et effektivt instrument til at mindske emissioner.[454]

I sit svar på argumentationen fra de danske myndigheder bemærkede Kommissionen, at der på baggrund af domspraksis kan opstilles en standardiseret analyse ved vurderingen af selektivitetskriteriet. Analysen består af 1) identifikation af en referenceordning, 2) fastlæggelse af fravigelsen fra denne referenceordning og 3) muligheden for at begrunde fravigelsen på grundlag af ordningens karakter og opbygning.[455]

Kommissionen udleder den standardiserede analyse af de forenede sager T-211/04 og T-215/04, *Gibraltar mod Kommissionen*, der vedrørte selskabsbeskatning i Gibraltar. I afgørelsen fastslog Retten i Første Instans, at det ved selektivitetsvurderingen er nødvendigt

konkurrencen og påvirkning af samhandlen tæt knyttet til hinanden. Såfremt en virksomhed modtager støtte, med den konsekvens at virksomhedens position styrkes i forhold til andre virksomheder, som den støttemodtagende virksomhed konkurrerer med i samhandlen inden for det indre marked, må det antages, at begge betingelser er opfyldt, jf. sag 730/79, *Philip Morris*, præmis 11.

[452] Jf. sag C-159/01, *Holland mod Kommissionen*, præmis 42, hvor betegnelsen dog er ordningens *karakter eller forvaltning* og sag C-143/99, *Adria-Wien Pipeline GmbH*, præmis 42 og 49. Denne praksis bekræftes endvidere i meddelelse fra Kommissionen om anvendelse af statsstøttereglerne på foranstaltninger vedrørende direkte beskatning af virksomheder, EFT 1998 C 384/03, pkt. 16. For en nærmere behandling af selektivitetskriteriet, se endvidere Hancher, Leigh, Ottenvanger, Tom og Slot, Piet Jan: "EC State Aids", 2006, s. 52ff.

[453] Jf. statsstøttesag C 41/2006, pkt. 38. Det er ved domspraksis fastslået, at det i forbindelse med statsstøttevurderingen er afgørende, om en given foranstaltning isoleret set begunstiger visse virksomheder frem for andre, der befinder sig i en tilsvarende faktisk og retlig situation, jf. sag C-88/03, *Azorerne*, præmis 54 og 56, sag C-143/99, *Adria-Wien Pipeline GmbH*, præmis 41 og sag C-75/97, *Maribel bis/ter*, præmis 28-31.

[454] Jf. statsstøttesag C 41/2006, pkt. 38. Samme argumentation blev fremført i den svenske sag, hvor de svenske myndigheder bemærkede, at naturen og logikken i den svenske strategi vedrørende klimaforandringer er at afskaffe CO_2-afgiften for de virksomheder, der er omfattet af EU's kvoteordning, eftersom den logiske og økonomiske baggrund for strategien er at afskaffe markedsbaserede styringsmidler, såfremt de ikke bidrager til mindre emission, jf. statsstøttesag C 46/2006, pkt. 15 og 27.

[455] Jf. statsstøttesag C 41/2006, pkt. 39.

som *første led* at identificere og undersøge, hvad der er den almindelige eller *normale* ordning inden for det respektive skattesystem. Herefter skal det som *andet led* i forhold til denne normale skatteordning vurderes, hvorvidt en gunstig foranstaltning har selektiv karakter ved at udgøre en undtagelse fra den normale ordning, herunder hvorvidt foranstaltningen differentierer mellem aktører, der i forhold til det formål, der forfølges med det respektive skattesystem, befinder sig i en tilsvarende faktisk og retlig situation. Såfremt dette er tilfældet, skal det som *tredje led* vurderes, om foranstaltningens selektive karakter er en følge af arten eller opbygningen af det skattesystem, som ordningen udgør en del af. Kan der svares bekræftende på tredje led, vil ordningen ikke udgøre statsstøtte.[456]

Kommissionen identificerede referenceordningen som den generelle energibeskatningsordning, der primært er fastlagt gennem de harmoniserede afgifter i energibeskatningsdirektivet. Energibeskatning inkluderer alle indirekte afgifter, som belaster et energiprodukt. Ved at fritage kvotevirksomhederne for CO_2-afgift begunstiger ordningen disse virksomheder sammenlignet med virksomheder uden for kvotesystemet, hvorfor referenceordningen fraviges. Det er i denne forbindelse uden betydning, at kvotevirksomhederne er pålagt byrder i henhold til EU's kvotesystem. Energibeskatningsordningen og EU's kvoteordning har kun til dels samme formål.[457] Kvoteordningen sigter udelukkende mod at mindske udledningen af drivhusgasser, hvorimod den generelle energibeskatning også har andre målsætninger, herunder fremme af energieffektivitet samt inddrivelser af indtægter til staten. Det var således Kommissionens opfattelse, at kvoteordningen ikke kunne anses for sammenlignelig med referenceordningen, hvorfor den som følge heraf ikke udgjorde en del af den generelle energibeskatningsordning.[458] Det skal hertil bemærkes, at afgiftsforanstaltninger af rent teknisk karakter i princippet anses for generelle, hvis formålet med den respektive ordning f.eks. er at undgå dobbeltbeskatning, hvorfor der i disse tilfælde ikke vil være tale om statsstøtte.[459] Afgiftsfritagelsen for CO_2-afgift opfylder dog ikke denne betingelse, idet kvoteordningen i overensstemmelse med ovenstående betragtninger ikke kan anses som et beskatningsinstrument.[460] Der er som konsekvens heraf ikke tale om dobbeltbeskatning af de kvoteomfattede virksomheder. Problemstillingen kan derimod mere korrekt betegnes som *dobbeltregulering*. Kommissionen fandt således, at afgiftsfritagelsen udgjorde en selektiv fordel set i forhold til det almindelige energibeskatningssystem harmoniseret ved energibeskatningsdirektivet.[461] Den selektive karakter kunne ikke begrundes i ordningens karakter og

[456] Jf. de forenede sager T-211/04 og sag T-215/04, *Gibraltar mod Kommissionen*, præmis 141 og 143-145.

[457] At energibeskatningsordningen og EU's kvoteordning kun til dels har samme formål fremgår endvidere af Kommissionens bemærkninger i "Grønbog om markedsbaserede instrumenter til miljøpolitiske og andre beslægtede formål", KOM(2007) 140 endelig, jf. også afsnit 5.

[458] Jf. statsstøttesag C 41/2006, pkt. 40. Kommissionen identificerede ikke på samme måde en referenceordning i den svenske sag. Dog lagde de tilsvarende vægt på, at energibeskatningsdirektivet og kvoteordningen er to separate instrumenter, der kun til dels har samme politiske målsætninger. Særligt har minimumssatserne til formål at harmonisere konkurrencevilkårene på det indre marked. Såfremt kvotevirksomhedernes fritagelse for CO_2-afgift medfører en beskatning under de respektive minimumssatser, kan fritagelsen fordreje konkurrencen og herigennem forhindre et velfungerende indre marked, jf. statsstøttesag C 46/2006, pkt. 37.

[459] Jf. meddelelse fra Kommissionen om anvendelse af statsstøttereglerne på foranstaltninger vedrørende direkte beskatning af virksomheder, EFT 1998 C 384/03, pkt. 13, første led.

[460] Jf. statsstøttesag C 41/2006, pkt. 42.

[461] Jf. statsstøttesag C 41/2006, pkt. 43.

opbygning, idet formålet med energibeskatningsordningen er at beskatte energiprodukter. Afgiftsfritagelsen for CO_2-afgift er ikke i overensstemmelse med dette formål. Det forhold, at dobbeltreguleringen øger kvotevirksomhedernes marginalomkostninger uden at mindske den samlede emission, er kun relevant i forhold til spørgsmålet om støttens eventuelle forenelighed med art. 107, stk. 3, litra c) EUF, herunder særligt med hensyn til støttens proportionalitet.[462] Kommissionen fandt på denne baggrund, at afgiftsfritagelsen for CO_2-afgift udgjorde statsstøtte omfattet af art. 107, stk. 1 EUF.[463]

5.2.2 Støttens forenelighed med art. 107, stk. 3, litra c) EUF

Statsstøtte omfattet af art. 107, stk. 1 EUF er som udgangspunkt uforenelig med det indre marked. Statsstøttereglerne giver dog mulighed for at godkende statsstøtte til miljøbeskyttelse.[464] Som konsekvens heraf kan støtteforanstaltninger vedrørende miljø- og energiafgifter i særlige tilfælde godkendes som forenelige med det indre marked efter art. 107, stk. 3, litra c) EUF. Kommissionen har i denne forbindelse udarbejdet nogle retningslinjer, hvoraf det bl.a. fremgår, hvilke betingelser der skal være opfyldt, for at støttegivende afgiftsforanstaltninger kan godkendes som forenelig statsstøtte.[465] I forbindelse med notifikation af den danske afgiftsfritagelse var det de tidligere 2001-retningslinjer, som var gældende på daværende tidspunkt.[466] Det fremgår dog af de nye 2008-retningslinjer, at Kommissionen vil anvende disse på alle foranstaltninger, hvor beslutningen skal træffes efter offentliggørelsen af de nye retningslinjer.[467] Samtidig fremgår det af 2008-retningslinjerne, at der ved udarbejdelsen ikke forelå tilstrækkelig erfaring vedrørende afgiftslempelser og afgiftsfritagelser i de tilfælde, hvor virksomhederne deltager i handelsordninger for emissionstilladelser.[468] Som konsekvens heraf kunne de opstillede principper i retningslinjerne ikke ubetinget anvendes på den danske afgiftsfritagelse i forbindelse med Kommissionens vurdering. Kommissionen bemærkede dog i deres beslutning, at der ved vurderingen af afgiftsfritagelsen skulle hentes inspiration i de kriterier, som er fastlagt i de pågældende retningslinjer, herunder særligt med hensyn til, hvorvidt støtten er nødvendig og proportionel.[469]

[462] Jf. statsstøttesag C 41/2006, pkt. 44. For en vurdering af støttens proportionalitet, se afsnit 5.2.2.4.

[463] Jf. statsstøttesag C 41/2006, pkt. 47. Også i den svenske sag fandt Kommissionen ved undersøgelserne i forbindelse med indledning af den formelle undersøgelsesprocedure, at afgiftsfritagelsen ikke kunne begrundes i ordningens karakter og opbygning, hvorfor der var tale om statsstøtte omfattet af art. 107, stk. 1 EUF, jf. statsstøttesag C 46/2006, pkt. 15 og 16.

[464] Muligheden for at godkende statsstøtte til miljøbeskyttelse følger som en konsekvens af integrationsprincippet i art. 11 EUF (tidligere art. 6 EF), hvoraf det fremgår, at miljøbeskyttelseskrav skal integreres i udformningen og gennemførelsen af Unionens politikker, særligt med henblik på at fremme en bæredygtig udvikling. Statsstøttereglerne kan således ikke alene behandles ud fra en konkurrenceretlig tilgang, idet der ligeledes skal tages hensyn til miljøbeskyttelseskrav. Undtagelsesbestemmelserne til statsstøtteforbuddet skal i overensstemmelse med Domstolens praksis fortolkes indskrænkende, jf. sag T-106/95, *FFSA*, præmis 173.

[465] EF-retningslinjer for statsstøtte til miljøbeskyttelse, EUT 2008 C 82/01. Retningslinjerne for støtte i form af afgiftslempelser og afgiftsfritagelser findes i pkt. 57 samt pkt. 151-159.

[466] Se hertil EF-rammebestemmelser for statsstøtte til miljøbeskyttelse (2001-retningslinjer), EUT 2001 C 37/03.

[467] Jf. EF-retningslinjer for statsstøtte til miljøbeskyttelse (2008-retningslinjer), EUT 2008 C 82/01, pkt. 204.

[468] Ibid., pkt. 68.

[469] Jf. statsstøttesag C 41/2006, pkt. 48. Se nærmere herom i afsnit 5.2.2.3 og 5.2.2.4.

5.2.2.1 Afgiftsfritagelsen og eventuelle positive følger

Ved vurderingen af støttens forenelighed med det indre marked skulle det efter Kommissionens opfattelse bestemmes, om den positive virkning af afgiftsfritagelsen opvejer de potentielt negative virkninger for handel og konkurrence, herunder hvorvidt den pågældende ordning opnår et mål af fælles interesse for det indre marked. Kommissionen fandt i denne forbindelse, at målene med EU's kvoteordning og CO_2-afgiften er at opnå et højere miljøbeskyttelsesniveau. Afgiftsfritagelsen har derimod alene til formål at fritage kvotevirksomhederne for en afgiftsbyrde med den konsekvens, at der opnås en konkurrencemæssig fordel, hvilket ikke isoleret set kan betragtes som et mål af fælles interesse. Kommissionen bemærkede dog, at der eventuelt kan opnås miljømæssige fordele ved, at fritagelsen muliggør indførelse eller opretholdelse af højere afgiftsniveauer for andre virksomheder.[470]

5.2.2.2 Afgiftsfritagelsen og de harmoniserede EU-regler

Kommissionen bemærkede, at lempelser og fritagelser fra harmoniserede afgifter skal være forenelige med relevant EU-lovgivning på området for at kunne godkendes i statsstøtteretlig sammenhæng.[471] I denne forbindelse er særligt energibeskatningsdirektivet relevant, herunder direktivets minimumssatser for hvert energiprodukt.[472] Efter direktivet er det dog muligt at fravige EU's minimumssatser, såfremt nærmere angivne betingelser er opfyldt. Medlemsstaterne kan anvende afgiftssatser ned til nul for energiintensive virksomheder defineret i overensstemmelse med direktivets art. 17, stk. 1, litra a), jf. art. 17, stk. 2. Endvidere kan der anvendes afgifter ned til 50 % af minimumssatserne for andet erhvervsmæssigt forbrug, jf. stk. 3. Det følger imidlertid af art. 17, stk. 4, at de begunstigede virksomheder skal indgå særlige aftaler, deltage i ordninger for handel med emissionsrettigheder eller være omfattet af lignende foranstaltninger, som sikrer opfyldelsen af miljøbeskyttelsesmål eller forbedret energieffektivitet. Resultatet skal stort set svare til, hvad der ville være opnået, hvis minimumssatserne var blevet overholdt.[473] På baggrund af direktivets bestemmelser synes der således at være hjemmel til et beskatnings-

[470] Jf. statsstøttesag C 41/2006, pkt. 49. Et af argumenterne til støtte for en fritagelses forenelighed med EU-retten er således muligheden for yderligere differentiering af virksomhederne, ved at der kan indføres eller opretholdes højere afgiftsniveauer for andre aktører end de støttemodtagende, jf. EF-retningslinjer for statsstøtte til miljøbeskyttelse, EUT 2008 C 82/01, pkt. 57. Argumentet anvendes ligeledes af Kommissionen i vurderingen af den reviderede svenske ordning, jf. state aid case N 22/2008, pkt. 24.

[471] Dette fremgår f.eks. af sag T-184/97, *BP Chemicals mod Kommissionen*. I sagen blev det fastslået, at afgiftsfritagelser for mineralolieprodukter i forbindelse med pilotprojekter skal fortolkes i overensstemmelse med mineraloiledirektivets art. 8, stk. 2, litra d) (Rådets direktiv 92/81/EØF af 19. oktober 1992 om harmonisering af punktafgiftsstrukturen for mineralolier), jf. præmis 59, 60 og 79. Mineraloliedirektivet er senere blevet afløst af energibeskatningsdirektivet. Kravet om overholdelse af relevant EU-lovgivning i forbindelse med den statsstøtteretlige vurdering fremgår endvidere af EF-retningslinjer for statsstøtte til miljøbeskyttelse, EUT 2008 C 82/01, pkt. 152.

[472] Minimumssatserne fremgår af energibeskatningsdirektivets bilag I. Minimumsafgiften på f.eks. naturgas til erhvervsmæssige opvarmningsformål er 0,15 EUR pr. GJ, som i dansk lovgivning er omregnet til 4,9 øre pr. Nm^3 naturgas, jf. gasafgiftslovens (lovbekendtgørelse nr. 312 af 1. april 2011), bilag 8.

[473] Følgende fremgår af energibeskatningsdirektivets art. 17, stk. 4: "Virksomheder, der benytter de muligheder, (…), skal indgå aftaler, ordninger med omsættelige tilladelser eller tilsvarende foranstaltninger(…) Aftalerne, ordningerne med omsættelige tilladelser eller de tilsvarende foranstaltninger skal resultere i, at miljøbeskyttelsesmål nås, eller at energieffektiviteten forbedres, og resultatet skal stort set svare til, hvad der ville være opnået, hvis EF's standardminimumsafgiftssatser var blevet anvendt."

niveau under minimumssatserne for de kvoteomfattede virksomheder. Dette kan dog ikke konkluderes på baggrund af Kommissionens bemærkninger.[474] Kommissionen tilkendegav, at det ikke kan udelukkes, at EU's kvoteordning som helhed svarer til, hvad der ville være opnået ved at pålægge de begunstigede virksomheder CO_2-afgift.[475] Kommissionen bemærkede dog videre, at princippet bag statsstøttereglerne er at acceptere afgiftsfritagelser og afgiftslempelser i de tilfælde, hvor minimumssatserne respekteres. Derimod skal der anlægges en strengere praksis i de situationer, hvor støttemodtagerne beskattes under de lige konkurrencevilkår, som er fastsat ved hjælp af de harmoniserede minimumssatser.[476] I sådanne tilfælde betragtes den pågældende foranstaltning som særlig fordrejende, hvorfor det er nødvendigt i detaljer at vurdere støttens nødvendighed og proportionalitet.[477]

5.2.2.3 Støttens nødvendighed

I forhold til støttens nødvendighed bemærkede Kommissionen, at der ved denne betingelse skal tages stilling til, 1) om valget af støttemodtagere er udvalgt på objektive og klare kriterier, 2) om der er en betydelig stigning i produktionsomkostningerne, og 3) om denne stigning kan væltes over på forbrugerne, uden at det fører til betydelig salgsnedgang.[478] Betingelserne skal kumulativt være opfyldt. Vedrørende afgiftsfritagelsen fandt Kommissionen i denne forbindelse, at det første kriterium er opfyldt, idet deltagelse i EU's kvoteordning kan anses for at være en objektiv og klar betingelse. Endvidere fandt Kommissionen, at også det andet kriterium er opfyldt, idet kvotevirksomhederne er energiintensive, hvorfor CO_2-afgiften medfører en betydelig stigning i deres produktionsomkostninger.[479] Hertil konstaterede Kommissionen imidlertid, at de danske myndigheder ikke havde fremlagt oplysninger om støttemodtagernes faldende omsætning eller markedsandele, men derimod kun havde fremlagt oplysninger om den kvoteomfattede industris CO_2-emissioner for tidligere år. På baggrund af de fremlagte oplysninger var det

[474] Kommissionen konstaterede, at spørgsmålet om, hvorvidt virksomheder underlagt EU's kvoteordning er omfattet af hjemlen i art. 17, stk. 4, står åbent. Kommissionen ønskede således ikke at give svar på, om virksomheder, der er underlagt EU's kvoteordning, som følge heraf er omfattet af hjemlen i bestemmelsen, eller om de pågældende virksomheder for at opfylde kravet skal optages i særskilte ordninger, som ikke er obligatoriske efter EU-retten, jf. statsstøttesag C 41/06, note 32. I den svenske sag opfordrede Kommissionen de svenske myndigheder til at fremkomme med yderligere oplysninger, som kunne anvendes til brug for en vurdering af afgiftsfritagelsen i forhold til energibeskatningsdirektivets art. 17, stk. 4, jf. statsstøttesag C 46/2006, pkt. 42. Sverige valgte som ovenfor nævnt at anmelde en revideret ordning.

[475] Jf. statsstøttesag C 41/2006, pkt. 50.

[476] Jf. også Kommissionens forordning (EF) Nr. 800/2008 af 6. august 2008 om visse former for støttes forenelighed med fællesmarkedet i henhold til traktatens artikel 87 og 88 (Generel gruppefritagelsesforordning), art. 25, hvoraf det fremgår, at afgiftslempelser er forenelige med art. 107, stk. 3 EUF, såfremt de begunstigede virksomheder mindst betaler minimumsafgiften for det pågældende energiprodukt efter energibeskatningsdirektivet, samt at lempelsen højst ydes for en tiårig periode. Sådanne lempelser er endvidere fritaget for anmeldelsespligten efter art. 108, stk. 3 EUF.

[477] Jf. statsstøttesag C 41/2006, pkt. 52.

[478] Jf. statsstøttesag C 41/2006, pkt. 53. Kommissionen anvender her de kriterier, som fremgår af EF-retningslinjer for statsstøtte til miljøbeskyttelse, EUT 2008 C 82/01, pkt. 158. Kommissionen finder således inspiration i de kriterier, som fremgår af retningslinjerne, herunder særligt de forskrifter som vedrører tilfælde, hvor støttemodtagerne ikke opfylder kravene til energibeskatningsdirektivets minimumssatser, jf. retningslinjernes pkt. 154-159.

[479] Kommissionen bemærkede i denne forbindelse, at kvotevirksomhederne er energiintensive som defineret i energibeskatningsdirektivets art. 17, stk. 1, litra a), jf. statsstøttesag C 41/2006, pkt. 54. Sådanne virksomheder vil pr. definition opleve høje produktionsomkostninger ved beskatning af energiprodukter.

ikke godtgjort, at en parallel anvendelse af kvotesystemet og CO_2-afgiften medfører betydelig stigning i produktionsomkostningerne, som ikke kan overvæltes på forbrugerne uden at resultere i væsentlig salgsnedgang for den kvoteomfattede industri. Det tredje kriterium var således ikke opfyldt, hvorfor afgiftsfritagelsen ikke kunne anses for nødvendig.[480]

5.2.2.4 Støttens proportionalitet

I forhold til støttens proportionalitet bemærkede Kommissionen, at afgiftsfritagelser skal betragtes som proportionelle, hvis 1) hver enkelt støttemodtager betaler en andel af den nationale afgift, der modsvarer virksomhedens miljøresultater sammenlignet med resultaterne for den bedste teknik inden for EØS-området, 2) støttemodtagerne mindst betaler 20 % af den nationale afgift, eller 3) støttemodtagerne indgår aftaler med myndighederne, hvor de forpligter sig til at nå miljøbeskyttelsesmål, der har samme virkning som punkt 1 eller 2 eller har samme virkning som energibeskatningsdirektivets minimumssatser.[481] Modsat nødvendighedskriteriet skal blot én af ovenstående betingelser være opfyldt. De danske myndigheder anførte i denne forbindelse, at der ikke var kendskab til den bedste teknik på området. I relation til statsstøttevurderingen er det medlemsstaternes opgave at oplyse om den bedste teknik.[482] Danmark var således ikke i stand til at sandsynliggøre, at proportionalitetskriteriet var opfyldt vedrørende dette punkt. Ligeledes ville støttemodtagerne efter foranstaltningen komme til at betale en afgiftssats under 20 % af den nationale afgift, hvorfor heller ikke dette punkt kunne opfyldes. Vedrørende det tredje kriterium bemærkede de danske myndigheder, at en række af de pågældende kvotevirksomheder allerede har indgået frivillige aftaler med myndighederne, hvorefter de har ret til at betale en afgiftssats, der er lavere end minimumsatserne.[483] Efter den danske regerings opfattelse erstatter EU's kvoteordning behovet for sådanne aftaler, hvorfor der ikke er krav om yderligere indsats fra dansk side i forhold til afgiftsfritagelsen. Kommissionen bemærkede hertil, at der ikke var fremlagt oplysninger om mekanismer, der kan sikre, at afgiftsfritagelsen kun bliver indrømmet de kvotevirksomheder, der har nettoomkostninger ved at deltage i EU's kvoteordning. Dette vil betyde, at kun de virksomheder, som ikke kan dække deres CO_2-udledning ved de gratis tildelte kvoter, men derimod skal købe ekstra emissionsrettigheder, bliver omfattet af afgiftsfritagelsen. Sådanne oplysninger kunne efter Kommissionens opfattelse give en indikation af, hvorvidt støtten står i rimeligt forhold til målet. Hertil anførte Kommissionen dog videre, at den miljømæssige logik ved en sådan foranstaltning ville være tvivlsom, eftersom virksomheder, der er tvunget til at købe yderligere kvoter, fordi de ikke har mindsket deres forurening, ville blive begunstiget af afgiftsfritagelsen.[484] Kommissionen bemærkede afslutningsvist, at

[480] Jf. statsstøttesag C 41/2006, pkt. 54 og 55.

[481] Jf. statsstøttesag C 41/2006, pkt. 56. Også her anvender Kommissionen de kriterier, som fremgår af EF-retningslinjer for statsstøtte til miljøbeskyttelse, EUT 2008 C 82/01, jf. retningslinjernes pkt. 159.

[482] Jf. EF-retningslinjer for statsstøtte til miljøbeskyttelse, EUT 2008 C 82/01, pkt. 156.

[483] Jf. statsstøttesag C 41/2006, pkt. 14 og 57. De danske myndigheder henviste i denne forbindelse til statsstøttesag N 540/2002 – Danmark: "Energipakken – Ændring af proceslisten", hvorefter Kommissionen tidligere har godkendt en ordning, som tillader energiintensive virksomheder at betale en afgiftssats, der ligger under minimumssatserne.

[484] Jf. statsstøttesag C 41/2006, pkt. 24 og 58. Kommissionen bemærkede ligeledes i den svenske sag, at det strider mod miljømæssig logik at afgiftsfritage de virksomheder, der har nettoomkostninger ved at deltage i kvoteordningen. Hermed opnås en fordel for de virksomheder, der ikke har formået at mindske forureningen eller tilmed har øget deres forurening, jf. statsstøttesag C 46/2006, pkt. 37.

de danske myndigheder i alle tilfælde ikke havde godtgjort, at afgiftsfritagelsen er begrænset til de virksomheder, som på grund af individuel produktion er tvunget til at købe ekstra kvoter, hvorfor det ikke kunne påvises, at afgiftsfritagelsen var proportionel.[485]

5.2.2.5 Konkurrencereglerne og "forureneren betaler"-princippet

Afslutningsvis bemærkede Kommissionen, at danske virksomheder uden for kvoteordningen samt virksomheder i andre medlemsstater enten iagttager de ens konkurrencevilkår, der er fastlagt ved minimumsafgifterne, eller overholder de regler, som er specificeret i retningslinjerne for statsstøtte til miljøbeskyttelse. Efter Kommissionens opfattelse ville fritagelsen for CO_2-afgift øge konkurrenceevnen for kvotevirksomheder, der opererer i Danmark, og den ville således i unødigt omfang fordreje konkurrencen med virksomheder i andre medlemsstater. På denne baggrund konkluderede Kommissionen, at afgiftsfritagelsen ikke kunne betragtes som forenelig med art. 107, stk. 3, litra c) EUF.[486] Såfremt minimumssatserne i energibeskatningsdirektivet respekteres, ville foranstaltningen derimod kunne erklæres forenelig med det indre marked. Dette ville endvidere sikre en overholdes af "forureneren betaler"-princippet. Som fremhævet ovenfor er dette princip udgangspunktet i forhold til de EU-retlige principper på miljøområdet. Princippet ville ikke kunne overholdes, såfremt de kvoteomfattede virksomheder fuldt ud fritages for CO_2-afgift, idet kvoterne er tildelt gratis, hvorfor virksomhederne ikke bliver pålagt omkostninger i forbindelse med deres forurening.[487] Det kan i denne sammenhæng fremhæves, at de danske myndigheder overser et grundlæggende traktathjemlet princip i EU-retten på klima- og miljøområdet. Allerede af denne årsag synes det vanskeligt at argumenterer for, at afgiftsfritagelsen ville kunne gennemføres i sin oprindelige form. Kommissionen konkluderede i overensstemmelse hermed, at den pågældende afgiftsforanstaltning kunne godkendes som forenelig statsstøtte efter art. 107, stk. 3, litra c) EUF, såfremt de kvoteomfattede virksomheder mindst betaler de minimumssatser, der gælder for hvert energiprodukt, enten i form af CO_2-afgift eller i form af anden energiafgift.[488] Ordningen skal derimod anses som uforenelig med traktaten i de tilfælde, hvor støttemodtagerne beskattes lavere end de harmoniserede minimumssatser.[489]

5.3 Vurdering af Kommissionens kriterier

I den danske statsstøttesag udtalte Kommissionen sig ikke eksplicit om, hvorvidt

[485] Jf. statsstøttesag C 41/2006, pkt. 58 og 59.

[486] Jf. statsstøttesag C 41/2006, pkt. 60 og 61. Der vil dog ikke være tale om statsstøtte efter art. 107, stk. 1 EUF i de tilfælde, hvor støttebeløbet ligger under de tærskler, som er fastsat i Kommissionens forordning (EF) Nr. 1998/2006 af 15. december 2006 om anvendelse af traktatens artikel 87 og 88 på de minimis-søtte, jf. statsstøttesag C 41/2006, pkt. 62.

[487] Jf. statsstøttesag C 41/2006, pkt. 24 og 63. Også i den svenske sag bemærkede Kommissionen, at "forurener betaler"-princippet skal overholdes i forbindelse med statsstøtte på miljøområdet, hvorfor en fritagelse for CO_2-afgift skal overholde dette princip, jf. statsstøttesag C 46/2006, pkt. 36. Dog er der i juridisk og økonomisk litteratur argumenteret for, at "forureneren betaler"-princippet også overholdes ved gratis tildeling af kvoter, jf. Woerdman, Edwin, Arcuri, Alessandra og Clò, Stefano: "Emissions Trading and the Polluter-Pays Principle: Do Polluters Pay under Grandfathering?", Review of Law & Economics, 2008.

[488] Jf. statsstøttesag C 41/2006, pkt. 64, 67 og 68. Det er således uden betydning, om minimumsafgiften betales i form af CO_2-afgift eller anden energiafgift. Dette er endvidere i overensstemmelse med energibeskatningsdirektivets art. 4, stk. 2, hvorefter afgiftssats defineres som *"… den samlede byrde, der pålægges i form af alle indirekte afgifter (undtagen moms), der beregnes direkte eller indirekte af mængden af energiprodukter eller elektricitet ved overgangen til forbrug."*

[489] Jf. statsstøttesag C 41/2006, pkt. 69.

regulering af den kvoteomfattede industri med henholdsvis kvoter og CO_2-afgift udgør uhensigtsmæssig dobbeltregulering. Kommissionen fastslog derimod, at den generelle energibeskatning i EU reguleret ved energibeskatningsdirektivet tilgodeser andre og bredere hensyn end kvoteordningen, hvis formål specifikt er at regulere udledningen af drivhusgasser. De harmoniserede regler for energibeskatning, herunder minimumssatserne, sikrer bl.a. lige konkurrencevilkår for virksomhederne i de forskellige medlemslande. Derfor kunne fritagelsen for CO_2-afgift ikke accepteres af Kommissionen i de tilfælde, hvor beskatningen er lavere end de harmoniserede minimumssatser.

Energibeskatningsdirektivets art. 17 synes at indeholde hjemmel til et afgiftsniveau under EU's minimumssatser for virksomheder, som er underlagt EU's ordning for handel med CO_2-kvoter, selvom Kommissionen valgte ikke at tage eksplicit stilling til dette spørgsmål.[490] Dog vurderede Kommissionen på støttens *nødvendighed* og *proportionalitet*. Denne vurdering synes ikke at have noget selvstændigt formål, såfremt fritagelsen er direktivstridig. En afgiftsfritagelse, som strider mod energibeskatningsdirektivet, ville i intet tilfælde kunne gennemføres. Kommissionens afgørelse synes derfor ikke at være ganske klar på dette punkt. Hertil skal det bemærkes, at muligheden for lempelser i energibeskatningsdirektivets art. 17 i alle tilfælde skal fortolkes i overensstemmelse med traktatens bestemmelser. De grundlæggende principper i traktaten, herunder "forureneren betaler"-princippet, skal overholdes ved anvendelsen af den sekundære EU-ret. En lempelse efter direktivets art. 17 skal derfor nødvendigvis være i overensstemmelse med de traktathjemlede principper. På denne baggrund synes Kommissionens afgørelse at være korrekt.

På baggrund af Kommissionens bemærkninger i statsstøttesagen kan det som udgangspunkt fastslås, at Kommissionen ikke i samme grad anser reguleringen med henholdsvis kvoter og CO_2-afgift som unødvendig dobbeltregulering. I alle tilfælde vejer hensynet til den generelle energibeskatningsordning, herunder de lige konkurrencevilkår, højere end den pågældende problemstilling. Endvidere sikrer minimumssatserne en overholdelse af "forureneren betaler"-princippet, som i alle tilfælde skal accepteres, uanset hvilken foranstaltning medlemsstaterne ønsker at gennemføre. Det synes derfor yderst vanskeligt for medlemsstaterne at gennemføre afgiftsfritagelser, hvor visse virksomheder beskattes lavere af deres energiforbrug, end de harmoniserede minimumssatser foreskriver.[491] Fritagelsen skal i alle tilfælde kunne anses for nødvendig og proportionel ud fra de kriterier, som er opstillet på statsstøtteområdet. Ligeledes kræver en overholdelse af de grundlæggende miljøretlige principper i EU-retten, at de begunstigede virksomheder oplever en eller anden form for *reel økonomisk belastning* i forbindelse med deres forurening. Det er i denne forbindelse ikke tilstrækkeligt at se på marginalomkostningerne ved udledningen, jf. hertil de samfundsøkonomiske betragtninger i afsnit 4.1. På denne baggrund synes udgangspunktet derfor at være, at den eneste reelle mulighed for at få en afgiftsfritagelse godkendt som forenelig statsstøtte efter art. 107, stk. 3 EUF er en

[490] Se hertil afsnit 5.2.2.2. Energibeskatningsdirektivets art. 17, stk. 4 er gengivet i supra note 473.

[491] Dog er særlige produktionsprocesser undtaget fra energibeskatningsdirektivets anvendelsesområde, hvorfor der ikke er krav om overholdelse af minimumssatserne for disse processer, jf. direktivets art. 4, litra b). Der er tale om kemisk reduktion, elektrolyse, metallurgiske- og mineralogiske processer.

overholdelse af minimumssatserne opstillet i energibeskatningsdirektivet.[492]

6. Dansk lovgivning efter afgørelse i statsstøttesagen

Som følge af den danske statsstøttesag har det ikke været muligt i fuld udstrækning at gennemføre de regler, som blev vedtaget af Folketinget i 2004. I forbindelse med skattereformen i 2009 er der imidlertid sket væsentlige ændringer i dansk lovgivning vedrørende energiafgifter. Fra 2010 har det således været muligt at fritage den kvoteomfattede industri for CO_2-afgift af brændselsforbrug anvendt i produktionsprocesser. Ligeledes er der vedtaget lovgivning for reguleringen i perioden 2005-2009, så afgiftsfritagelsen i denne periode opfylder de krav, som fremgår af Kommissionens afgørelse.

6.1 Regulering i perioden 2005-2009

Såfremt de kvoteomfattede industrivirksomheder fritages for CO_2-afgift i perioden 2005-2009, resulterer dette i et beskatningsniveau under de harmoniserede minimumssatser. Som tidligere fremhævet er dette en konsekvens af, at virksomhederne i samme periode har været fritaget for energiafgift af brændselsforbrug anvendt i produktionsprocesser. For at gennemføre afgiftsfritagelsen var det således nødvendigt at vedtage revideret lovgivning, som lever op til kravet om et beskatningsniveau i overensstemmelse med minimumssatserne.

Folketinget vedtog som konsekvens heraf en ordning, hvorefter de kvoteomfattede industrivirksomheder for perioden 2005-2009 kunne få tilbagebetalt den afregnede CO_2-afgift ned til niveauet for minimumssatserne på de enkelte brændsler.[493] Visse virksomheder med særligt energiintensive produktionsprocesser har i den pågældende periode betalt en afgiftssats af deres brændselsforbrug, som ligger under minimumssatserne. Dette er en konsekvens af de energieffektiviseringsaftaler, som virksomhederne kan indgå med myndighederne. Tidligere kunne virksomheder med sådanne aftaler bl.a. opnå et tilskud til CO_2-afgift af brændselsforbrug i productionsprocesserne, så beskatningsniveauet i visse situationer kom under minimumssatserne. Denne ordning er notificeret og godkendt af Kommissionen.[494] I disse tilfælde kunne virksomhederne ikke opnå tilbagebetaling af CO_2-afgift vedrørende perioden 2005-2009 for brændselsforbruget anvendt til de energiintensive produktionsprocesser, da beskatningen i forvejen har været under minimumssatserne.

6.2 Regulering fra 2010 og frem

Ved skattereformen i 2009 skete der væsentlige ændringer i den danske lovgivning på området

[492] Jf. Kommissionens vurdering af den reviderede svenske ordning, hvor minimumssatserne overholdes ved beskatning af de kvoteomfattede virksomheders energiforbrug. Som følge heraf fandt Kommissionen, at der er tale om forenelig statsstøtte efter art. 107, stk. 3 EUF, jf. state aid case N 22/2008, pkt. 27 og 28.

[493] Jf. lov nr. 1384 af 21. december 2009, § 5, nr. 6 (CO_2-afgiftslovens § 8 a). Se endvidere lovforslag nr. L 63 af 18. november 2009 (vedtaget som lov nr. 1384 af 21. december 2009), almindelige bemærkninger, afsnit 1, hvoraf det fremgår, at *"Tilbagebetalingen beregnes, så der betales EU's minimumsafgifter, hvorved betingelsen herom i Kommissionens statsstøtteafgørelse overholdes."* Det skal i denne forbindelse bemærkes, at der skal betales svovlafgift af fossile brændsler, såfremt svovlindholdet er over 0,05 % Dette er typisk tilfældet for f.eks. fuelolie. Såfremt minimumssatsen er betalt via den kvoteomfattede virksomheds betaling af svovlafgift, kan virksomheden få hele CO_2-afgiften tilbagebetalt (jf. CO_2-afgiftslovens § 8 a, stk. 2, 3. pkt.).

[494] Jf. statsstøttesag N 540/2002 – Danmark: "Energipakken – Ændring af proceslisten" (supra note 483). Ordningen vedrørende tilskud til CO_2-afgift af virksomhedernes brændselsforbrug i produktionsprocesser er ophævet fra 1. januar 2010. Se hertil lov nr. 528 af 17. juni 2008, § 6, sat i kraft ved bekendtgørelse nr. 1125 af 1. december 2009, § 3. Se endvidere lovforslag nr. L 168 af 28. marts 2008 (vedtaget som lov nr. 528 af 17. juni 2008), bemærkninger til § 6.

for energiafgifter.[495] Skattereformen tog sit udgangspunkt i den politiske aftale Forårspakke 2.0.[496] Et af hovedelementer i aftalen var, at det skal være dyrere at forurene, hvorimod det skal belønnes at passe bedre på miljøet. Som konsekvens heraf blev der bl.a. indført afgiftsstigninger for erhvervslivet.

Tidligere kunne virksomheder få tilbagebetalt den fulde energiafgift af brændselsprodukter, som blev anvendt i deres produktionsprocesser.[497] Fra 2010 er dette ikke længere tilfældet, idet der sker en reduktion i tilbagebetalingen.[498] Hermed belastes energiforbruget i virksomhedernes produktionsprocesser med en andel af energiafgiften. Dette gælder, uanset om den enkelte virksomhed er kvoteomfattet eller ej.[499] Ændringerne i lovgivningen medfører, at det fra 1. januar 2010 har været muligt at fritage de kvoteomfattede industrivirksomheder for CO_2-afgift af det brændselsforbrug, som anvendes i produktionsprocesserne. Baggrunden herfor er, at virksomhederne gennem reduktionen i tilbagebetalingen af energiafgifter belastes væsentlig højere end minimumssatserne. Som fremhævet ovenfor er dette i overensstemmelse med Kommissionens afgørelse samt energibeskatningsdirektivet, hvorefter det er uden betydning, hvorledes minimumsafgiften betales, herunder om det er i form af CO_2-afgift, energiafgift eller anden indirekte afgift på det respektive brændsel. Med virkning fra 2010 er afgiftsfritagelsen derfor gennemført som oprindelig vedtaget af Folketinget i 2004.

7. Sammenfatning og perspektivering

Siden indførelse af EU's kvotemarked har det været diskuteret, hvorvidt der fortsat er argumenter for at opretholde CO_2-afgiften for den kvoteomfattede industri i Danmark. Det har fra lovgivers side været fremhævet, at en opretholdelse af den nationale afgift for de pågældende virksomheder er uhensigtsmæssig dobbeltregulering. I forbindelse med starten på første kvoteperiode i 2005 vedtog Folketinget således en foranstaltning, som fritog de kvoteomfattede industrivirksomheder for CO_2-afgift af brændselsforbrug anvendt i produktionsprocesser. Foranstaltningen medførte imidlertid et beskatningsniveau for brændselsforbruget, som lå under de harmoniserede minimumssatser fastlagt i energibeskatningsdirektivet. Som følge heraf udgjorde afgiftsfritagelsen ifølge EU-Kommissionen ulovlig statsstøtte til den pågældende industri. Kommissionen kunne alene godkende ordningen under forudsætning af, at minimumssatserne blev overholdt.

I hvilket omfang, der er tale om uhensigtsmæssig dobbeltregulering, skal i høj grad vurderes ud fra et samfundsøkonomisk perspektiv. Teoretisk tilsiger den mest optimale løsning, at der skal være ensartet marginal tilskyndelse til reduktion af udledningen på

[495] Af de væsentligste vedtagne lovændringer på området for energiafgifter kan fremhæves lov nr. 527 af 12. juni 2009 og lov nr. 461 af 12. juni 2009. Som følge af den danske statsstøttesag vedtog Folketinget senere på året lov nr. 1384 af 21. december 2009 med det formål at bringe den danske regulering i overensstemmelse med statsstøttereglerne.

[496] Aftale af 24. februar 2009 mellem regeringen og Dansk Folkeparti: "Forårspakke 2.0 – Vækst, klima, lavere skat."

[497] Derimod har det siden vedtagelsen af *Energipakken* i 1995 været udgangspunktet, at virksomhederne skal betale fuld afgift af det energiforbrug, som anvendes til rumopvarmning og varmt brugsvand i virksomheden. Baggrunden herfor er, at dette energiforbrug har store lighedstegn med private husholdningers forbrug. Se f.eks. lovforslag nr. L 209 af 6. april 1995 (vedtaget som lov nr. 405 af 22. maj 1996), almindelige bemærkninger.

[498] I 2010 udgjorde reduktionen 7,8 % af energiafgiften, og i 2011 udgør reduktionen 7,7 %, jf. lov nr. 527 af 12. juni 2009, § 2, nr. 21 samt bilag 6 (naturgas), § 3, nr. 21 samt bilag 6 (kul) og § 4, nr. 26 samt bilag 5 (mineralolie). Se endvidere lovforslag nr. 207 af 22. april 2009 (vedtaget som lov nr. 527 af 12. juni 2009), almindelige bemærkninger, afsnit 2.3.

[499] De særlige processer, som er undtaget fra energibeskatningsdirektivets anvendelsesområde, jf. supra note 491, er fritaget for reduktionen i tilbagebetalingen.

tværs af de forskellige aktører. Marginalomkostningerne ved at udlede CO_2 skal således være uafhængig af, hvorvidt den enkelte virksomhed er omfattet af kvoteordningen eller ej. Denne tilstand kan opnås ved, at kvotevirksomhederne erhverver kvoter af staten ved auktion eller på det frie marked. Virksomheder uden for kvotesystemet skal i stedet være underlagt en CO_2-afgift af samme størrelse som kvoteprisen. Implementeringen af kvotemarkedet har dog været forbundet med vanskeligheder, og kvoteprisen har særligt i første periode været meget ustabil med en mindstepris på nul. Det har således ikke været muligt at opnå en optimal situation.

Med Kommissionens afgørelse i den danske statsstøttesag kan det konstateres, at afgiftsfritagelser, der medfører et beskatningsniveau under minimumssatserne, ikke kan retfærdiggøres med henvisning til uhensigtsmæssig dobbeltregulering. Det fremgår i relation hertil, at den generelle energibeskatning i EU, reguleret ved energibeskatningsdirektivet, tilgodeser andre og bredere hensyn end kvoteordningen, hvis formål specifikt er at regulere udledningen af drivhusgasser. Ifølge Kommissionen sikrer de harmoniserede regler for energibeskatning bl.a. lige konkurrencevilkår for virksomhederne, uanset om disse er omfattet af kvotemarkedet eller ej. Fritagelse til den kvoteomfattede industri udgør en risiko for konkurrenceforvridning, idet kvotevirksomhederne i første og anden kvoteperiode ikke har udgifter til køb af kvoter. Kvoterne tildeles således gratis på baggrund af den historiske udledning ("grandfathering"). Som følge heraf sikrer minimumssatserne endvidere, at det traktathjemlede "forureneren betaler"-princip overholdes. Derfor kan kvotemarkedet på baggrund af den nuværende regulering ikke i sig selv retfærdiggøre, at minimumssatserne tilsidesættes. Dette synes den daværende danske regering umiddelbart at overse i forbindelse med udformning og notifikation af afgiftsfritagelsen.

Endvidere kan det diskuteres, hvorvidt det aktuelt er en økonomisk belastning for kvotevirksomhederne at være underlagt et marked, hvor kvoterne i indeværende periode tildeles ved "grandfathering". Som følge af nedgang i produktionen, omlægning til CO_2-neutral energi mv. er det muligt for en række virksomheder at sælge overskydende kvoter. De gratis tildelte kvoter resulterer hermed i en egentlig *fortjeneste* for de pågældende virksomheder og ikke en økonomisk belastning. Samtidig fritages virksomhederne for CO_2-afgift af brændselsforbruget anvendt i produktionsprocesser. Umiddelbart synes det derfor vanskeligt at argumentere for, at den aktuelle situation kan anses som bebyrdende for kvotevirksomhederne.[500]

Det har på europæisk plan været diskuteret, i hvilket omfang energibeskatningsdirektivet skal tilpasses kvotemarkedet. Kommissionen har den 13. april 2011 fremsat forslag til revidering af direktivet.[501] Forslaget indeholder bl.a. indførelse af en harmoniseret CO_2-afgift på 20 EUR pr. ton kuldioxid for de virksomheder, der ikke er omfattet af kvotemarkedet. Ifølge Kommissionen vil forslaget bl.a. udsende et stærkt prissignal for CO_2 samt skabe lige konkurrencevilkår for erhvervslivet i EU.[502] Forslaget vil således

[500] Se i samme retning sag C-279/08 P, *Holland mod Kommissionen*, hvor lignende betragtninger anføres som begrundelse for, at en hollandsk ordning vedrørende tildeling af emissionskvoter for NO_x-udledning udgjorde statsstøtte.

[501] Se hertil KOM(2011) 169 endelig.

[502] Se hertil Europa – Press Releases – Energy taxation: "Commission promotes energy efficiency and more environmental friendly products", Bruxelles, 13. april 2011. Vedtagelse af harmoniseringsbestemmelser vedrørende indirekte skatter kan ske med hjemmel i art. 113 EUF (tidligere art. 93 EF). Med Lissabontraktaten er der imidlertid indført et nyt

bidrage til at skabe lige tilskyndelse til reduktion af drivhusgasser på tværs af de forskellige aktøre.

hjemmelsgrundlag til vedtagelse af energiafgifter mv., jf. art. 194, stk. 3 EUF. Der kan i denne forbindelse opstå procedurekonflikter som følge af tvivl om hjemmelsgrundlaget. Spørgsmålet om hjemmelsgrundlaget er en diskussion i sig selv. Se hertil Vedder, Hans H. B: "The Treaty of Lisbon and European Environmental Law and Policy", Journal of Environmental Law, februar 2010, s. 285-299.