Foundation FRET

PRESS STATEMENT **18/02/2013**

National support scheme for renewable energy: referral made to the ECJ on compatibility with EU law

FRET[1] welcomes the decision of the Administrative Court in Linköping, Sweden, to request a preliminary ruling from the European Court of Justice (ECJ) on the compatibility with EU law of the refusal by the Swedish Energy Agency (Energimyndigheten) to allocate green electricity certificates to the Oscar wind power plant located in Finland.[2] The case is an example of the tension existing between the EU internal market rules and national support schemes for renewable energy. The request of the Swedish Court puts into question the very legality of national preferences in the promotion of electricity generation from renewable sources, on the basis of Directive 2009/28/EC of the European Parliament and of the Council on renewable energy and of the Treaty on the Functioning of the European Union (TFEU).

FRET supports the allegation by the plaintiff, Ålands Vindkraft AB, that Energimyndigheten's practice of excluding foreign producers from the national support scheme constitutes an unjustified restriction on sales into Sweden of foreign generated renewable electricity. FRET views the practice as being unlawfully discriminatory, in breach of the EU fundamental principle of free movement of goods under Article 34 TFEU. The Agency's decision to reject the Oscar plant's application for certificates was based on national provisions aimed at increasing domestic renewable energy consumption. According to the Agency's interpretation of those rules, only facilities located within Sweden's borders are considered eligible for allocation of green electricity certificates.

The Administrative Court has requested the ECJ to issue a preliminary ruling clarifying whether Directive 2009/28/EC should be interpreted as allowing a Member State to run a national support scheme, which benefits economically only producers of renewable energy located geographically within the country. If that is found to be the case, then further clarification is expected on whether such a scheme could constitute a quantitative restriction on imports or a measure having an equivalent effect under Article 34 TFEU and thereby be incompatible with EU internal market rules.

FRET notes that Article 34 TFEU has direct effect and creates individual rights for foreign producers of renewable energy to take part in a national "quota and certificate" or "feed-in tariff" scheme. FRET believes that territorial restrictions based on a literal interpretation of Directive 2009/28/EC constitute an illegitimate form of discrimination - in breach of the EU Treaties - against exporters of electricity who use or buy from renewable generation sources in the exporting country. On previous occasions, the ECJ has ruled that similar national restrictions are at odds with the fundamental rule of free movement of goods.

In its Judgment of 13 March 2001 in Case C-379/98, *PreussenElektra AG v Schleswag AG,* the ECJ found that the German feed-in tariff scheme infringed Article 34 TFEU, but could be exempted based on the immature characteristics of the electricity market and EU liberalisation legislation applicable at that time. Current power market and liberalisation circumstances reflect more than ten years of development – a period in which competition and liquidity have been established and two further sets of measures to strengthen the internal energy market have been introduced. There is no reason why, now, cross-border trade in renewable energy attributes should not be reliable, based on a standardised instrument separated from the trade of electricity like the EU 'Guarantee of Origin' (GO), and consonant with the operation of the electricity sector at the wholesale level, including sophisticated means of linking national markets. Thus consumption of renewable electricity in the EU would be promoted even if producers outside Sweden were allowed to participate in the Swedish support scheme. Circumstances surrounding the promotion of renewable energy have, in the view of FRET, changed so much that the exception under the *PreussenElektra* ruling can no longer apply.

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[1] FRET is the Foundation for a Renewable Energy Transition, established in 2009. The Foundation promotes open markets in renewable energy for the whole of Europe.

[2] A summary of the referral for a preliminary ruling was published in OJ C 38/16 of 9 February 2013.

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FRET maintains that **not only does a national approach to promoting the development of renewable energy contradict EU internal market rules; it also comprises an inefficient and unnecessarily costly means of meeting targets**.

Market-based, demand-driven schemes to support renewable energy, fully open to cross-border trade in electricity, and coordinated with the EU Emissions Trading System, would allow real freedom of investment and provide the flexibility necessary for enhanced competition. But they could also safeguard continuing development of the production and supply of renewable power (including the provision of financial support where still required), while minimising internal electricity market distortions. In that regard, a preliminary ECJ ruling on the discriminatory practice currently applied in Sweden, and reflected in most current national renewable energy support schemes, may help provide a strong push in the right direction.

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