Renewable Energy Sources in the Internal Electricity Market: The German Feed-in Model and its Conformity with Community Law

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I. Introduction

With Directive 96/92/EC1, the European Union agreed to create an internal market for electricity. The introduction of market forces means that, first of all, markets have to be developed at the national and European level. At the time when this Directive came into force, these markets were mostly dominated by publicly owned companies or direct public enterprises. In these circumstances the possibility of choice of supplier for both industrial and household customers was not available, regardless of whether suppliers sold electricity from their own country or from a facilitated trade in electricity between different countries.

All of the European Commission’s evaluation reports on the electricity market so far have underlined that obstacles still prevail. The succeeding Directive 2003/84/EC2 therefore states that liberalisation shall be sped up3. An essential condition for the completion of the internal electricity market is non-discriminatory access to the transmission or distribution network; otherwise – the Directive states – competition will not work4. Regulation (EC) No. 1228/2003 on the conditions for access to the network for cross-border exchanges in electricity is5, therefore, equally important6. On the other hand, under Article 6 EC, the protection of the environment is to be integrated into the definition and implementation of Community policies and activities referred to in Article 3 EC. Environmental protection includes the reduction of greenhouse gas emissions and, consequently, the promotion of renewable energy sources (RES) – a project addressed in Directive 2001/77/EC7.

The Member States have chosen different regulatory models to promote RES. Some have opted to establish a system which requires electricity producers to generate a certain percentage of energy from RES. If they fail to reach their quota, which increases on an annual basis, they can buy “Green Certificates” from producers generating more RES-Electricity than required. Complementary, penalties will be imposed for unfulfilled quotas (quota system). The majority of the EU Member States9 have chosen a compulsory priority for RES installations in respect of network access, in combination with minimum remuneration (feed-in system). So far, only the feed-in model has proven to be a successful support mechanism even though the quota system, as an idea, had been favoured by the European Commission at the time when the first internal drafts for Directive 2001/77/EC appeared at the end of the 1990s10.

Nevertheless, pressure is being applied to countries favouring feed-in systems, especially by associations that represent the major traditional utilities in Europe who constantly claim that feed-in systems, such as the German or Spanish ones, are not compatible with Community law. Whilst the legal grounds for arguments against the feed in mechanisms were, at first, based on the issue of

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3 Considerants (1), (3) Directive 2003/84/EC.
4 Considerants (6), (7) Directive 2003/84/EC.
8 E.g. Italy, UK, Ireland.
9 E.g. Germany, Spain, Austria, Greece.
State aid, they are now focussing on the free movement of goods. It is being claimed that priority access for domestically produced RES electricity hinders the acquisition and import of RES electricity from other Member States or third countries, especially from Norway with its rich hydro power resources.

Legally, this approach is based on an attempt to tie in several ECJ-judgments dealing with the movement of goods under Article 28 EC. The major criticism is that the obligation of transmission and distribution network operators to accept domestic RES as part of their supply provision, is seen as a constraint on the import of RES electricity. This, in turn, is seen as a breach of Article 28 EC, since purchasers cannot meet their demand by ordering these goods from a supplier based in another Member State11.

Whilst the ECJ judgment of March 2001 in the Preussen Elektra case held that, "in the current state of Community law concerning the electricity market, statutory provisions of a Member State which, first, require private electricity supply undertakings to purchase electricity produced in their area of supply from RES at minimum prices higher than the real economic value of that type of electricity, and, second, distribute the financial burden resulting from that obligation between those electricity supply undertakings and upstream private electricity network operators are not incompatible with Article 28 of the EC Treaty, such provisions being useful for protecting the environment in so far as the use of RES which they are intended to promote contributes to the reduction in emissions of greenhouse gases which are amongst the main causes of climate change which the EC and its Member States have pledged to combat"12.

The following article will try to broaden the discussion, which is currently dominated by a narrow view on market obstacles and does not reflect issues such as the lack of level playing fields in the overall electricity and energy sector, the missing internalisation of external costs for fossil fuel and nuclear based electricity, the obligations of all Member States to reach their RES electricity targets in line with European legislation and international commitments, and, moreover, the fact that energy policy is not a Common European Policy but remains at the sole discretion of the respective Member State.

After a general introduction on major obstacles in the traditional energy markets and national energy security issues (II), the German feed in model (III) and the secondary regulatory Community framework (IV) will be presented. The legal analysis will show that the EEG does not violate European law and, especially, is not an obstacle to trade or is, at the very least, consistent with the fundamental principles of the EC Treaty (V). In the scope of this article, we will not evaluate primarily the question as to which of the different systems is the most efficient as well as the most effective, especially since none of the quota systems has so far shown any sustainable or strong increase in electricity from RES sources and thus it is difficult to compare such a system with the, in general, very successful feed-in systems. We will nevertheless, give some ideas on what aspects that will need to be considered, when ultimately a harmonised system is established (VI).

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11 ECJ, Judgment in Case C-379/98 – Preussen-Elektro, paragraph 72; Judgment in Case 72/83 – Campus Oil, paragraph 16; Judgment in Case C-21/88 – Du Pont Nemours Italiana, paragraph 11.
12 ECJ, Judgment in Case C-379/98 – Preussen-Elektro.