



**UNIVERSITY
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Faculty of Law

Towards renewable energy through justifications

How the aim of advancing the transition to renewable energy sources has been used to justify measures hindering renewable energy trade in the European Union.

OT00BE42 The Law of the EU Internal Market
Bachelor's thesis

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This bachelor's thesis examines the relationship between the aim of advancing the transition to renewable energy and restrictions on renewable energy trade. Often national schemes or mechanisms create barriers to trade, which are forbidden by article 34 of the Treaty on the Functioning of the European Union. However, the Court of Justice of the European Union has often justified these barriers on the grounds of overriding requirements in the public interest relating to the protection of the environment, even if the measures were distinctly applicable. In this paper I argue that due to the aims of recent legislation and the entire EU, these justifications for restrictions on renewable energy trade are compatible with the internal market. This construction is based on doctrinal research of relevant legislation, case-law, the opinions of Advocate Generals and literature. The insufficient expression of the exception to the general rule governing justifying measures having equivalent effect to quantitative restrictions by recourse to overriding requirements in the public interest is discussed in this thesis.

Tämä notaarityö tarkastelee uusiutuvaan energiaan siirtymisen tavoittelun ja uusiutuvan energian kaupan rajoitusten välistä suhdetta Euroopan unionin oikeuden näkökulmasta. Usein kansalliset järjestelmät ja mekanismit voivat luoda Euroopan unionin toiminnasta tehdyn sopimuksen 34. artiklassa kiellettyjä esteitä kaupalle. Euroopan unionin tuomioistuimien on kuitenkin usein oikeuttanut näitä esteitä ympäristönsuojeluun liittyvillä yleisen edun mukaisilla pakottavilla vaatimuksilla esteiden avoimesti syrjivästä luonteesta huolimatta. Väitän viimeaikaisen lainsäädännön ja koko Euroopan unionin tavoitteiden perusteella, että uusiutuvan energian kauppaa rajoittavien toimenpiteiden oikeutukset ovat yhteensopivia sisämarkkinan kanssa. Tulkinta perustuu oikeusdogmaattiseen lainsäädännön, asiaankuuluvan oikeuskäytännön, julkisasiamiesten lausuntojen ja kirjallisuuden tutkimukseen. Työssä otetaan myös kantaa ympäristönsuojelun yhteydessä esiintyvän määrällisiä rajoituksia vaikutukseltaan vastaavien toimenpiteiden oikeuttamista koskevan yleisen säännön poikkeuksen riittämättömyyden ilmaisuun.

Key words: Energy, Renewable energy, Sustainability, European Union, Internal market, Justifications, Free movement of goods

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References

Bibliography

- Barnard, C. (2022). *The Substantive law of the EU: the four freedoms* (Seventh edition.). Oxford University Press.
- Sadeleer, N. de. (2014). *EU environmental law and the internal market* (First edition.). Oxford University Press.

Primary sources

- Consolidated version of the Treaty on the Functioning of the European Union. OJ C 202/47 7.6.2016
- Consolidated version of the Treaty on European Union. OJ C 202 7.6.2016
- Kyoto Protocol to the United Nations Framework Convention on Climate Change - Declaration. OJ L 130, 15/05/2002 P. 0004 - 0020.
- Paris Agreement [2016] OJ L 282/4.
- 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 [2001] OJ L 283, 27.10.2001, p. 33 – 40
- 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 sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC. [2009] OJ L 140/16.
- Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources [2018] OJ L 328/82
- Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [2019] OJ L 136/28

Journal articles

- Marek Szydło. How to reconcile national support for renewable energy with internal market obligations? The task for the EU legislature after *Ålands Vindkraft* and *Essent*. *Common Market Law Review*, Volume 52, Issue 2, (2015) pp. 489 – 510. Available at <https://doi-org.ezproxy.utu.fi/10.54648/cola2015030>
- María Dolores Sánchez Galera, 'The Integration of Energy and Environment under the Paradigm of Sustainability threatened by the Hurdles of the Internal Energy Market', (2017), 26, *European Energy and Environmental Law Review*, Issue 1, pp. 13-25, <https://doi-org.ezproxy.utu.fi/10.54648/eelr2017002>

- Sybe de Vries, 'European Court of Justice: Case Report', (2001), 10, European Energy and Environmental Law Review, Issue 6, pp. 193-205, <https://doi-org.ezproxy.utu.fi/10.54648/354867>
- Theodoros G. Iliopoulos, Paula Galbiatti Silveira, Sirja-Leena Penttinen, 'Legal Principles for a European Green Energy Transition', (2024), 33, European Energy and Environmental Law Review, Issue 6, pp. 248-253, <https://doi-org.ezproxy.utu.fi/10.54648/eelr2024026>
- Armin Steinbach, Robert Brückmann, Renewable Energy and the Free Movement of Goods, Journal of Environmental Law, Volume 27, Issue 1, March 2015, Pages 1–16, <https://doi.org/10.1093/jel/equ034>

Opinions of Advocate General

- Opinion of Advocate General Bot delivered on 8th of May 2013. Joined cases C-204/12 to C-208/12 Essent Belgium ECLI:EU:C:2013:294
- Opinion of Advocate General Bot delivered on 28th of January 2014. Case C-573/12 Ålands Vindkraft ECLI:EU:C:2014:37
- Opinion of Advocate General Bot delivered on 14th of April 2016. Case C-492/14 Essent Belgium ECLI:EU:C:2016:257
- Opinion of Advocate General CAMPOS SÁNCHEZ-BORDONA delivered on 11th of January 2024. Case C-624/22 BP France ECLI:EU:C:2024:30

Cases

- Case C-8/74 Dassonville ECLI:EU:C:1974:82
- Case C-120/78 Rewe Centrale v Bundesmonopolverwaltung für Branntwein ECLI:EU:C:1979:42
- Case C-379/98 PreussenElektra ECLI:EU:C:2001:160
- C-309/02 Radlberger Getränkegesellschaft and S. Spitz ECLI:EU:C:2004:799
- Case C-573/12 Ålands Vindkraft ECLI:EU:C:2014:2037
- Joined cases C-204/12 to C-208/12 Essent Belgium ECLI:EU:C:2014:2192
- Case C-242/17 L.E.G.O. ECLI:EU:C:2018:804
- Case C-558/22 Fallimento Esperia and GSE ECLI:EU:C:2024:209
- Case C-624/22 BP France ECLI:EU:C:2024:640

List of Abbreviations

Reg.	Regulation
Dir.	Directive
EU	European Union
TEU	Treaty on the European Union
TFEU	Treaty on the functioning of the European Union
TEC	Treaty establishing the European Community
CMLRev.	Common Market Law Review
SEA	The Single European Act
QR	Quantitative Restrictions
MEE	Measures having equivalent effect to quantitative restrictions
MS	Member State
The Court	The Court of Justice of the European Union
OJ	Official Journal of the European Union

1 Introduction

1.1 Energy and free movement of goods in the EU

The internal market was and is one of the most prominent goals of the European Union, for it ensures an effective use of the available resources of member states increasing welfare and market stability.¹ The Single European Act paved the way for the completion of a full union by repackaging the four freedoms into the renamed internal or single market.² The four freedoms enacted in the Treaty on the functioning of the European Union (TFEU)³ are a crucial part of the unified economic system between Member States, which increases efficiency and overall welfare for end consumers.⁴ However, the EU has become something beyond a mere economic customs union.⁵ A myriad of legislation aims to ensure safety, unity of goods, and to even promote sustainability.⁶ The effect of renewable energy legislation, on the internal market will be the focus of this paper. In this paper I will argue that justifying restrictions on intra-EU renewable energy trade by recourse to the advancement of transition to renewable energy sources is compatible with the aim and principles of the EU internal market.

The general principles of the internal market have been established through legislative measures⁷, but also through the case-law of the Court of Justice of the European Union.⁸ The principle of the free movement of goods forbids all tariffs and also non-tariff barriers.⁹ These non-tariff barriers mean quantitative restrictions and restrictions of equivalent effect.¹⁰ However, these prohibitions are not absolute, as it is possible to derogate from them and set certain restrictions on trade. Exemptions can be justified by overriding requirements in the public interest¹¹ or by express derogations laid down¹² in the 36th article of the TFEU. One justification that has emerged for restrictions in renewable energy trade is the protection of the

¹ Barnard. pp 10-12.

² Barnard. P.17.

³ Article 26(2) TFEU, free movement of goods, services, capital and people.

⁴ Barnard. pp. 5 and 6.

⁵ inter alia. Galera, Maria. 'The Integration of Energy and Environment under the Paradigm of Sustainability threatened by the Hurdles of the Internal Energy Market', (2017), 26, European Energy and Environmental Law Review, Issue 1, p. 15.

⁶ inter alia Directive 2018/2001 (EU).

⁷ TFEU part three.

⁸ inter alia through case C-8/74 Dassonville, from which the definition for measures having equivalent effect originates.

⁹ TFEU articles 30 – 37.

¹⁰ TFEU article 34.

¹¹ inter alia, Case C-573/12 Ålands Vindkraft ECLI:EU:C:2014:2037.

¹² TFEU article 36

environment on the basis of advancing the transition to renewable energy sources, which has been classified as an overriding requirement in the public interest.¹³ One of the prime examples of this justification can be found in the Court's reasoning for case *Ålands Vindkraft*¹⁴ which will be discussed in detail later.

The focus of this paper will be on how the aim of advancing transition to renewable energy sources has been used to justify certain restrictions to the free movement of goods and are these types of justifications compatible with the EU internal market. The aim of this research is to create a clear view on what is the current relation between advancing renewable energy and the principle of free movement of goods.¹⁵ This paper also strives to explicate the reasoning of the Court and to analyse how the Court has construed the compatibility of renewable energy justifications with the goals set for the principle of free movement of goods.

Throughout the course of this paper, I will be answering the following research questions:

1. What is the current relation between intra-EU renewable energy trade and the principle of free movement of goods?
2. Are justifications based on the advancement of transition to renewable energy sources compatible with the internal market?

To answer the research questions mentioned above, I will first describe the current legislation and the relation between the TFEU and the renewable energy Directive 2018/2001¹⁶. I will also be discussing whether the subject matter has been exhaustively harmonized in certain fields. After this I will discuss some of the most relevant cases¹⁷ in the field of renewable energy that concern the free movement of goods. Focus will be on the reasoning the Court has laid down concerning the use of overriding requirements in public interest relating to the protection of the environment as a means of justifying measures having equivalent effect to quantitative restrictions. Finally, I will analyse the compatibility of using the aim of advancing the transition to renewable energy sources with the internal market especially in regard to the goals of the European Union.

¹³ Sadeleer, p. 313. The rules governing overriding requirements in the public interest have developed after the Cassis de Dijon judgement (C-120/78), from which the justification originates.

¹⁴ Case 573/12 *Ålands Vindkraft* paras 73 – 82.

¹⁵ Especially in relation to measures having equivalent effect to quantitative restrictions.

¹⁶ Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources [2018] OJ L 328/82 – 209.

¹⁷ Cases C-573/12 *Ålands Vindkraft* and C-624/22 *BP France*, joined cases C-204/12 to C-208/12 *Essent Belgium*.

1.2 Research materials and methods

The research material consists of the relevant European Union's legislation, case-law of the Court and literature relating to the internal market and renewable energy. The legislative material that is observed in this paper consists of Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources, the predecessors of the mentioned directive, and naturally the Treaty on the Functioning of the European Union.

For case-law I have chosen cases that concern specifically renewable energy and the free movement of goods, of which the most recent one being Case C-624/22 *BP France*.¹⁸ I have used the snowball method for finding relevant cases starting from the cases *BP France* and *Ålands Vindkraft*.¹⁹ However, I have chosen to use only the cases that have relevance to the legal principles governing the question at hand. In this paper I will mainly be discussing cases *BP France*, *Ålands Vindkraft*, and *Essent Belgium*²⁰ in debt, but other cases will be discussed when necessary.

As is common for research of law, I will be using a doctrinal approach for analysing the aforementioned materials. Through analysing statutes and the reasonings of the Court, I will strive to explain the current legal state of intra-EU renewable energy trade and how advancing the transition to renewable energy sources has been used to justify measures having equivalent effect to quantitative restrictions. I have also included relevant articles from Common market law review, Journal of Environmental Law, and European Energy and Environmental Law Review. I will be using these articles mainly in my evaluation of the compatibility of the principle of free movement of goods and the justification by recourse to overriding requirements in public interest relating to the protection of the environment.

¹⁸ Case C-624/22 *BP France* ECLI:EU:C:2024:640.

¹⁹ Case C-573/12 *Ålands Vindkraft* ECLI:EU:C:2014:2037.

²⁰ Joined cases C-204/12 to C-208/12 *Essent Belgium* ECLI:EU:C:2014:2192. Not to be confused with case C-492/14 *Essent Belgium* ECLI:EU:C:2016:732. In this paper I will be referring to the first with the name 'joined cases *Essent Belgium*'.

2 Legislative framework

2.1 Primary Law

One could argue that establishing a common market is and has been the most prominent aims of the European Union.²¹ The common or internal market is also established in the Treaty on the Functioning of the European Union (TFEU)²². The second paragraph of article 26 of the TFEU lays down the four freedoms, which are the free movement of goods, services, capital and persons. Because this paper discusses energy and the trade of energy, focus will be directed to the principle of free movement of goods, for electricity, be it from renewable or other sources, falls into the category of goods.²³ Due to the subject matter of this paper, focus will be directed at articles 34 – 37 TFEU²⁴, which lay down prohibition of quantitative restrictions and measures having equivalent effect on intra-EU trade.

At this point it should be pointed out that article 194 TFEU, which lays down general rules of energy for the Union policy, will not be examined in great detail, because the Court has not used this article in assessing the justifications by recourse to protection of the environment. A logical explanation is that the article in question obligates Member States to ensure the development of renewable energy, and thus this article has no direct connection to the trade of renewable energy. However, it must be stated that the article does bear significance in the teleological construction of the EU's energy policy²⁵ and thus, will be discussed more later.

I will be analysing the construction and application of articles 34 and 36 TFEU, for these are the main provisions of primary law, which legislate the trade of renewable energy and justifications for derogations. Article 34 TFEU states the following: “Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States”.²⁶ As can be seen from the wording of article 34 TFEU, in addition to quantitative restrictions, all measures having equivalent effect (MEE) are also prohibited in intra-EU trade.

²¹ Barnard. pp. 10–22.

²² Treaty on the Functioning of the European Union. Part three, first title.

²³ inter alia, Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods. OJ L136/39, art. 2(5).

²⁴ ex articles 28 – 31 TEC.

²⁵ e.g Case C-573/12 Ålands Vindkraft ECLI:EU:C:2014:2037, para 81; and Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources [2018] OJ L 328/82, recital 94 of the preamble.

²⁶ TFEU, article 34.

Article 36 TFEU sets out the express derogations, and in renewable energy trade related cases the Court has persistently referred to the protection of health and life of humans, animals or plants.²⁷ The application and construction of article 36 TFEU is well established through the case-law of the Court of Justice. However, for the most part the Court justifies restrictions and prohibitions on trade of renewable energy on the grounds of overriding requirements in the public interest, which originated from Case-law of the Court²⁸, and which has not been codified into legislation.

It is not farfetched to argue that the protection of health and life of humans, animals or plants could in theory be used to justify MEEs on the grounds of article 36 TFEU. However, the applicability of this justification has been questioned among some scholars, for this would require the Court to use the article 36 in a way contradictory to its wording.²⁹ As stated above the Court has repeatedly justified restrictions on renewable energy trade on the grounds of protecting the environment, which it has labelled as an overriding requirement in public interest,³⁰ but the protection of health and life of humans, animals or plants has persistently appeared in the reasoning of the Court.³¹ It could be that the Court refers to the public interest grounds of article 36 to battle the apparent contradiction of using rule of reason to justify measures that are directly discriminatory,³² but this matter will be discussed in more detail in Section 3.

2.2 Directive 2018/2001 and its predecessors

The Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (RED II) is a

²⁷ e.g. Steinbach and Brückmann. Renewable Energy and the Free Movement of Goods. *Journal of Environmental Law*, 2015, 27, 9-10; and Case C-242/17 L.E.G.O. ECLI:EU:C:2018:804, para 65.

²⁸ Case C-120/78 Rewe Centrale v Bundesmonopolverwaltung für Branntwein ECLI:EU:C:1979:42, para 8 of decision.

²⁹ Steinbach and Brückmann. Renewable Energy and the Free Movement of Goods. *Journal of Environmental Law*, 2015, 27, 9–10.

³⁰ Steinbach and Brückmann. Renewable Energy and the Free Movement of Goods. *Journal of Environmental Law*, 2015, 27, p. 10; and Sadeleer, pp 314.

³¹ In the judgement of the most recent case BP France ECLI:EU:C:2024:640 the Court does not explicitly use the wording of article 36 but refers generally in paragraph 65 to the public interest grounds listed in article 36.

³² Steinbach and Brückmann. Renewable Energy and the Free Movement of Goods. *Journal of Environmental Law*, 2015, 27, 11–12.

recast of Directive 2009/28 (RED I)³³, which is a recast of the Directive 2001/77³⁴. As is stated in the subject matter of the Directive³⁵, the Directive establishes “a common framework for the promotion of energy from renewable sources.”³⁶ In this section I will explain the most relevant rules for the scope of this paper. Focus will be on the rules set forth for national support schemes, for these have been the subject of case *Ålands Vindkraft*. The recitals of the preambles associated to support schemes will also be discussed as these display the aim of the EU legislature and the development of the legislative framework.

National support schemes were already established in the Directive 2001/77³⁷, but the EU legislature wished to ensure the functioning of these schemes in the recast Directive 2009/28.³⁸ In Directive 2018/2001 support schemes are defined to be any instrument, scheme or mechanism that Member States apply to promote the use of renewable energy by increasing the profitability of renewable energy for instance through tax exemptions or direct price support schemes.³⁹ The definition set out in Directive 2009/28⁴⁰ is practically identical to the aforementioned definition set out in Directive 2018/2001. A clear example of a support scheme defined in the Directive 2009/28 can be found from the case *Ålands Vindkraft*, where the producers of electricity were obligated to fulfil a certain quota of green certificates.

One fascinating aspect of the recasts 2009/28 and 2018/2001 is the fact that in both the EU legislature aims to grant Member States a certain amount of discretion in relation to support schemes.⁴¹ Firstly, this entails that the matter has not been completely harmonized, which will be discussed in more detail in the next section. Secondly, it would seem that the EU legislature is willing to give Member States a right to favour national electricity production on

³³ 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 sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC. [2009] OJ L 140/16 – 62.

³⁴ 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 [2001] OJ L 283, 27.10.2001, p. 33–40.

³⁵ Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources [2018] OJ L 328/82, art 1.

³⁶ The same is stated in the first article of Directive 2009/28 and of 2001/77, though the wording of directive 2001/77 differs slightly.

³⁷ 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 [2001] OJ L 283, 27.10.2001, art 4.

³⁸ [2009] OJ L 140/16, recital 25; Case C-573/12 *Ålands Vindkraft* ECLI:EU:C:2014:2037, para 40.

³⁹ OJ 2018 L 328/102, art 2(5).

⁴⁰ OJ 2009 L 140/27, art 2(k).

⁴¹ OJ, 2018. L 328/85, recital 22; OJ 2009 L 140/26, recital 25.

the grounds of ensuring that Member States are able to achieve the EU's renewable energy target set for 2030.⁴²

For case *BP France* an important aspect of Directives 2009/28 and 2018/2001 is the regulation of biofuels and mass balance evaluation. In essence biofuels are considered to be renewable energy as long as they are made in a sustainable fashion.⁴³ To ensure that biofuels marketed in the internal market meet the regulated sustainability standards, the mentioned directives also set an obligation on the usage of a mass balance test. According to the article 29 of Directive 2018/2001, Member States are not allowed to refuse to take into account the sustainability of biofuels produced in other Member States, if these biofuels have been produced according to a mass balance test accepted by the Commission.⁴⁴

However, the mass balance test is designed to ensure that the biofuels in question are produced in a sustainable manner, but this test is inadequate for evaluating the share of biogenic material (particles) in the finalized product.⁴⁵ It must also be noted that the Commission has implemented a delegated regulation, which sets out an obligation to use a carbon-14 analysis that is said to be the only reliable way to measure the share of biogenic particles in biofuel after co-processing.^{46, 47} As the Advocate General and Court concluded in case *BP France* the legislature did not intend the mass balance test to be used to evaluate the share of renewable energy in the finished product⁴⁸ and therefore it does not preclude Member States from implementing additional measures for evaluating the share of biogenic material in the finished product.

2.3 Secondary law and harmonisation

One of the most prominent questions that must be answered is whether the matter of renewable energy has been harmonized through secondary law. It has been decided in the case-law of the Court of Justice that if a matter has been subject to exhaustive harmonization at EU level, any national measure relating to that subject must be assessed in the light of that

⁴² OJ 2018 L 328/85, recital 22.

⁴³ OJ 2018 L 328/82, recital 94 and paras. 33 and 24 of article 2.

⁴⁴ Case C-624/22 BP France ECLI:EU:C:2024:640, para 43.

⁴⁵ Opinion of Advocate General Sanchez-Bordona on case C-624/22 BP France, points 49-56.

⁴⁶ Case C-624/22 BP France ECLI:EU:C:2024:640, para 53. Means a process where biofuels are produced in a common process with fossil fuels.

⁴⁷ Case C-624/22 BP France ECLI:EU:C:2024:640, para 70.

⁴⁸ Opinion of the Advocate General Sanchez-Bordona on Case C-624/22 BP France, points 51 to 55; Case C-624/22 BP France ECLI:EU:C:2024:640, paras 54 and 55.

EU measure instead of primary law.⁴⁹ In regard to renewable energy the Court has taken a stance that the EU legislature does not aim to create exhaustive harmonization of national support schemes for green energy.⁵⁰

The Court came to a similar conclusion in the recent case *BP France*, when deciding whether the directive 2009/28 or 2018/2001 exhaustively harmonized testing methods for HVO content of fuels produced in a co-processing procedure.⁵¹ Even though the aforementioned directives harmonize the trade of biofuel in a very specific manner⁵², the Court concluded from the recitals and the wording of directives 2009/28⁵³ and 2018/2001⁵⁴ that it cannot be inferred that the purpose of the relevant articles is to regulate the evaluation of the share of energy from renewable sources in these fuels.⁵⁵ A significant reasoning in favour of applicability of article 34 TFEU that emerges from both cases *BP France* and *Ålands Vindkraft* is the fact that Member States retain discretion in the matter at hand or at least the specifics of the procedures in question are not detailed.⁵⁶

From the reasoning of the Court in cases concerning renewable energy trade and free movement of goods, it can be concluded that the EU legislature has not tried to exhaustively harmonize the entire field of renewable energy trade.⁵⁷ This same interpretation can be made by examining the recitals of Directives 2009/28 and 2018/2001. For instance, the already mentioned recital 22 of Directive 2018/2001 states the following:

For the proper functioning of national support schemes, it is vital that Member States continue to be able to control the effect and costs of their national support schemes in accordance with their different potentials. One important means by which to achieve the aim of this Directive remains to guarantee the proper functioning of national support schemes under Directives 2001/77/EC and 2009/28/EC, in order to maintain investor confidence and allow Member States to design effective national measures for their respective contributions to the Union's

⁴⁹ inter alia, C-309/02 Radlberger Getränkegesellschaft and S. Spitz, para. 53.

⁵⁰ Case C-573/12 Ålands Vindkraft ECLI:EU:C:2014:2037, paras. 59 – 63; and Marek Szydło. How to reconcile national support for renewable energy with internal market obligations? The task for the EU legislature after Ålands Vindkraft and Essent. (2015) 52 CMLRev 489, 494.

⁵¹ Case C-624/22 BP France ECLI:EU:C:2024:640, para 60.

⁵² Case C-624/22 BP France ECLI:EU:C:2024:640, paras 43, 44.

⁵³ 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 sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC. [2009] OJ L 140/16 – 62.

⁵⁴ Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources [2018] OJ L 328/82 – 209.

⁵⁵ Case C-624/22 BP France ECLI:EU:C:2024:640, para 46.

⁵⁶ Case C-624/22 BP France ECLI:EU:C:2024:640, para 60; and Case C-573/12 Ålands Vindkraft ECLI:EU:C:2014:2037, paras. 56 – 64.

⁵⁷ Case C-573/12 Ålands Vindkraft ECLI:EU:C:2014:2037, para 59.

*2030 target for renewable energy and for the national targets that they have set for themselves.*⁵⁸

From the wording of the recital above it is possible to come to the same conclusion that the Court made in cases *Ålands Vindkraft*⁵⁹ and *Fallimento Esperia and GSE*⁶⁰ on the EU legislature's aim of harmonization of renewable energy schemes. The legislature emphasizes the need for maintaining investor confidence, which should foster the possibility for Member States to achieve the targets set for 2030.

Clearly the aim of the EU legislature is to ensure that Member states retain a certain degree of autonomy for the use of support schemes. Even in the case *BP France* where the Court concluded that the Directive 2018/2001 lays down specific harmonization regarding the trade of biofuels⁶¹, the Court nevertheless concluded, according to the grounds discussed in the previous section, that the harmonization cannot be extended to concern matters that are not explicitly stated in the legislation.⁶² It is natural to argue that this requirement of exhaustive and explicit harmonisation, which can be seen recurring in the Court's reasoning, complies with the legal norm established on harmonizations. This construction that the Court has adopted ensures that the legislation is not used in ways the legislature did not intend it to be used.

Considering the preambles of the recast 2018/2001 it seems that even though the goals and the obligations of decarbonization have been made more ambitious, the EU legislature does not see a need to harmonize all factors of renewable energy trade inside the EU. Considering the reasoning stated in the recitals of the preambles, I argue that the main goal of the Directives concerning renewable energy is to create an energy system that enables Member States to produce and sell renewable energy according to the existing potential of the Member State in question. In addition, it would seem like the legislature strives to harmonize legislation of fields where there exists a high risk of conduct that could hinder the transition to sustainability.⁶³

The non-exhaustive harmonization, discretion relating to national support schemes and will of the legislature are some of the reasons why I argue that justifying MEEs hindering intra-EU

⁵⁸ Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources [2018] OJ L 328/85.

⁵⁹ Case C-573/12 *Ålands Vindkraft* ECLI:EU:C:2014:2037, para 59.

⁶⁰ Case C-558/22 *Fallimento Esperia and GSE* ECLI:EU:C:2024:209, para 45.

⁶¹ Case C-624/22 *BP France* ECLI:EU:C:2024:640, para 43.

⁶² Case C-624/22 *BP France* ECLI:EU:C:2024:640, para 46.

⁶³ OJ 2018 L 328/82, recital 96.

trade by recourse to overriding requirements in the public interest relating to the protection of the environment is compatible with the principles of EU law. It would seem that the legislature has intended to allow national support schemes regardless of the fact that these schemes are very likely to hinder intra-EU trade.⁶⁴ It would be against the function of the European Union's legal system to render an aspect of passed law *de facto* unenforceable on the grounds of article 34 of TFEU, when there exists a system of exemptions for measures that have been deemed necessary in the name of public interest. Another question, which is discussed later, is whether the current approach is justifiable, given its clear contradiction of the rules formerly used to justify distinctly applicable MEEs.

⁶⁴ See the citations of recitals above. The restrictive effect on intra-EU trade can be seen from the cases *PreussenElektra*, *Ålands Vindkraft*, *Essen Belgium* (joint) and *BP France*.

3 Compatibility of renewable energy justifications with the principle of free movement of goods

3.1 Justifications for measures having equivalent effect

Article 34 of the TFEU prohibits all quantitative restrictions in intra-EU trade, but it also prohibits all measures having equivalent effect. The Court laid down the principles governing measures having equivalent effect in the *Dassonville* case. According to the judgement measures that are capable of hindering intra-EU trade directly or indirectly are to be considered as having an effect equivalent to quantitative restrictions.⁶⁵

As it has been stated above, it is possible to justify restrictions or prohibitions of intra-EU trade on the grounds of article 36 TFEU. However, on the grounds of established case-law it is also possible to justify these restrictions on intra-EU trade on the grounds of overriding reasons in the public interest.⁶⁶ This legal norm cannot be found in legislation, as it relies solely on the decisions of the Court of Justice. Thus, the extent and application of this policy is decided by the Court.

For a measure to be justifiable through rule of reason⁶⁷, the measure has to conform with the principles of proportionality. Essentially, proportionality means that a measure must not hinder intra-EU trade any more than what is necessary to achieve the justifiable aim of the restrictive measure.⁶⁸ This proportionality test has been present in all of the three main cases discussed in this paper⁶⁹, for all of the measures were concluded to be MEEs and thus the only possible way to justify them is through public interest reasons listed in article 36 TFEU or by overriding requirements in the public interest.⁷⁰

One of the most important things to note in this matter is that according to the former case-law of the Court, rule of reason could only be applied to national rules that did not

⁶⁵ Case 8/74 *Dassonville* ECLI:EU:C:1974:82, para 5.

⁶⁶ Case C-120/78 *Rewe Centrale v Bundesmonopolverwaltung für Branntwein* ECLI:EU:C:1979:42, para 8 of decision.

⁶⁷ Or on the public interest grounds listed in article 36 TFEU.

⁶⁸ *Sadeleer*, pp. 333 – 341; Joined cases C-204/12 to C-208/12 *Essent Belgium* ECLI:EU:C:2014:2192, para 96; and Case C-573/12 *Ålands Vindkraft* ECLI:EU:C:2014:2037, para 83.

⁶⁹ Cases *BP France*, *Ålands Vindkraft* and Joined cases *Essent Belgium*.

⁷⁰ See Case C-573/12 *Ålands Vindkraft* ECLI:EU:C:2014:2037, paras 76 – 119; and Joined cases 204/12 to 208/12 *Essent Belgium* ECLI:EU:C:2014:2192, paras 89 – 116.

discriminate and were indistinctly applicable.⁷¹ Interestingly, the Court decides in cases *Ålands Vindkraft* and *Essent Belgium* that the territorial restrictions of legislations in question which were distinctly applicable, satisfy the requirements of proportionality. Szydło argues that this stance differs from other case-law concerning justifications and proportionality.⁷²

Due to the controversy that inter alia Szydło pointed out, the policy of justification has been somewhat unclear after cases *Ålands Vindkraft* and *Essent Belgium*, because experts were uncertain could directly discriminatory measures be justified by overriding reasons of public interest or not.⁷³ This take of the Court has stirred controversy and most scholars agree that a certain level of clarity is required.⁷⁴ I will assess this controversy in more detail in the next section.

3.2 Advancement of the transition to renewable energy as a justification

The already mentioned case *Ålands Vindkraft* is a prime example of how overriding reasons in the public interest are used to justify measures having equivalent effect to quantitative restrictions that impose restrictions on intra-EU energy trade. However, this particular case is not the first where the Court had to take a stand on the matter. In the case *PreussenElektra* the Court concluded that the purchase obligation imposed did, in fact, at least possibly hinder intra-Community trade⁷⁵ and thus it was according to the established case-law⁷⁶, in breach of TEC article 30.⁷⁷

However, the Court then followed by stating that the imposed system is useful for the protection of the environment in so far as it contributes to the reduction in emissions of greenhouse gases, which are the leading cause of climate change that the European community and thus also its Member States have pledged to combat. The Court continued by reasoning that this type of scheme promotes growth in the renewable energy sector, which is

⁷¹ Steinback and Brückmann. Renewable Energy and the Free Movement of Goods. *Journal of Environmental Law*, 2015, 27, p. 10.

⁷² Marek Szydło. How to reconcile national support for renewable energy with internal market obligations? The task for the EU legislature after *Ålands Vindkraft* and *Essent*. (2015) 52 CMLRev 489, 504.

⁷³ Marek Szydło. How to reconcile national support for renewable energy with internal market obligations? The task for the EU legislature after *Ålands Vindkraft* and *Essent*. (2015) 52 CMLRev 489, 502.

⁷⁴ Steinback and Brückmann. Renewable Energy and the Free Movement of Goods. *Journal of Environmental Law*, 2015, 27; María Dolores Sánchez Galera, 'The Integration of Energy and Environment under the Paradigm of Sustainability threatened by the Hurdles of the Internal Energy Market', (2017), 26, *European Energy and Environmental Law Review*, Issue 1, pp. 21-22.

⁷⁵ Case C-379/98 *PreussenElektra* ECLI:EU:C:2001:160, para 71.

⁷⁶ Case 8/74 *Dassonville* ECLI:EU:C:1974:82, para 5.

⁷⁷ Current article 36 TFEU.

among the priority objectives of the Community.⁷⁸ In addition, the Court did mention that the policy is also designed to protect the health and life of humans, animals and plants, which complies with article 30 TEC.⁷⁹

Interestingly, these grounds for justifying MEEs in the most recent cases are either the same or similar to the ones present in case *PreussenElektra*. One could argue that this fact indicates that the aim of environmental protection and importance of renewable energy solutions has been present in the EU legal system and that the most recent codifications are not creating new law, but these acts are reinforcing and amending existing legal principles. This does not, however, exclude the apparent problem of derogating from the existing legal rules set out in case-law and treaties, when the current stance has not been explicitly expressed. To highlight the mentioned problem, let us discuss one of the most important and recent cases in this matter.

The importance of the case *Ålands Vindkraft* can be seen from the grounds of judgement of the Court. The förvaltningsrätten i Linköping addressed a question concerning the application of the *PreussenElektra* judgement to the case at hand. The national court was uncertain whether the decisions made in *PreussenElektra* were valid anymore, for the Swedish legislation did not demand that suppliers purchased electricity from Swedish producers and after the delivery of the *PreussenElektra* judgement Directives 2001/77 and 2009/28 had been adopted.⁸⁰ However, the aforementioned Directives did not dismiss the applicability of TFEU articles 34 and 36 when deciding the justifiability of the national legislation. This is a consequence of the non-exhaustive harmonization discussed above in this paper.

The national court's concern was not unbased, for the Directives still played a role in construction of the justification in cases *Ålands Vindkraft*⁸¹ and *Essent Belgium*.⁸² From paragraphs 97 through 99 of the *Ålands Vindkraft* judgement, it can be concluded that the implementation of the aforementioned Directive 2009/28 has served as a reinforcing factor for basing the justification on the EU's aim of advancing transition to renewable energy sources. The same applies to case *Essent Belgium*, where the Court reinforced the argument in favour of justifying the legislation on grounds of advancing the transition to renewable energy sources, as this would conform with the goals set in Kyoto Protocol.⁸³ Szydło argues that the

⁷⁸ Case C-379/98 *PreussenElektra* ECLI:EU:C:2001:160, paras 73 – 74.

⁷⁹ Current article 36 TFEU.

⁸⁰ Case C-573/12 *Ålands Vindkraft* ECLI:EU:C:2014:2037, para 30.

⁸¹ inter alia, Case C-573/12 *Ålands Vindkraft* ECLI:EU:C:2014:2037, paras 97 – 99.

⁸² inter alia, Joined cases 204/12 to 208/12 *Essent Belgium* ECLI:EU:C:2014:2192, para 92.

⁸³ Joined cases 204/12 to 208/12 *Essent Belgium* ECLI:EU:C:2014:2192, para 92.

Court denies the discriminatory nature of the legislation unconvincingly and points out that in most cases the Court has justified import restrictions by recourse to overriding reason in the public interest relating to the protection of the environment, even though this does not mean that all similar cases will always be automatically justified.⁸⁴ I agree to some degree with Szydło on the take that the Court denies the direct discriminatory nature of the legislation quite unconvincingly. The Court more or less brushes the question of direct discrimination away by stating that the legislation in force hinders the effective trade between Member States⁸⁵, which conforms with the interpretation laid down in case *Dassonville*⁸⁶.

However, it should also be taken into account that the Court referred to earlier case-law in which it concluded that the protection of the environment can justify even restrictions which are directly discriminatory.⁸⁷ Thus, like Szydło mentions, the cases *Ålands Vindkraft* and *Essent Belgium* have not weakened the capability of overriding reasons in the public interest relating to the protection of the environment to justify directly discriminatory restrictions on intra-EU trade. On the contrary, the cases mentioned prove this capability at least to some extent.

Advocate General *Bot* mentioned in his opinion on the joined *Essent Belgium* case that according to case-law the environmental scope of the matter may either neutralize the discriminatory nature of the measure or dismiss the need for assessing the discriminatory nature.⁸⁸ In the same opinion General Advocate *Bot* expressed concern about the approach of the Court stating that the basis of justifying distinctly discriminatory MEEs by recourse of environmental protection had not been stated in legislative work nor explicitly in the reasonings of the Court.⁸⁹ He took the view that this approach is not suitable from the viewpoint of legal certainty.⁹⁰

In his opinion on the case C-492/14 *Essent Belgium* General Advocate *Bot* declared quite clearly his dissatisfaction with the rulings of the Court in the cases *Ålands Vindkraft* and the

⁸⁴ Marek Szydło. How to reconcile national support for renewable energy with internal market obligations? The task for the EU legislature after *Ålands Vindkraft* and *Essent*. (2015) 52 CMLRev 489, 501.

⁸⁵ Case C-573/12 *Ålands Vindkraft* ECLI:EU:C:2014:2037, paras 75; and Joined cases 204/12 to 208/12 *Essent Belgium* ECLI:EU:C:2014:2192, para 88.

⁸⁶ Case 8/74 *Dassonville* ECLI:EU:C:1974:82, para 5.

⁸⁷ Case C-573/12 *Ålands Vindkraft* ECLI:EU:C:2014:2037, para 77; and Marek Szydło. How to reconcile national support for renewable energy with internal market obligations? The task for the EU legislature after *Ålands Vindkraft* and *Essent*. (2015) 52 CMLRev 489, 503.

⁸⁸ Opinion of Advocate General *Bot* on joint cases *Essent Belgium*, point 92

⁸⁹ Opinion of Advocate General *Bot* on joint cases *Essent Belgium*, point 92

⁹⁰ Opinion of Advocate General *Bot* on joint cases *Essent Belgium*, point 93

joined cases *Essent Belgium*.⁹¹ As stated above, the Court ruled that the MEEs were permissible by recourse to overriding requirements of public interest relating to the protection of the environment.

Interestingly like in the case *PreussenElektra*, the Court mentioned in both cases *Ålands Vindkraft* and *Essent Belgium* the of protection the health and life of humans, animals or plants, which are among the public interest reasons stated in article 36 TFEU.⁹² I would argue that the Court mentions article 36 for the purpose of combatting the aforementioned apparent contradiction with former legal rules concerning rule of reason justifications. The use of article 36 can be seen as a factor reinforcing the special position of renewable energy. The Court seems to have an ambition to create a special standing for environmental justifications, which would be similar to the public interest reasons set out in article 36. This ambition seems logical, if one considers all the international agreements, such as the Kyoto protocol, and the binding legislative targets for share of renewable energy and decarbonization.⁹³

In light of the recent case-law,⁹⁴ it can be concluded that unproportional measures cannot be justified even on the grounds of advancing the transition to renewable energy sources. The Court ruled in case *BP France* that a measure that was clearly unproportional and discriminatory could not be justified on the grounds of protecting the environment.⁹⁵ In this particular case the French government required a carbon-14 analysis for imported co-processed biofuels, even though the consignments had been assessed according to a mass balance test approved by the Commission. This requirement, however, did not concern biofuels of French origin.

The Court concluded, in accordance with the reasons stated in section 2.2 of this paper, that the implemented directive 2018/2001 and its predecessor did not preclude legislation that required carbon-14 analysis for the prevention of fraud. However, the Court decided in accordance with the Opinion of Advocate General Sanchez-Bordona that the legislation

⁹¹ Opinion of Advocate General Bot on case C-492/14 *Essent Belgium*, para 4 of introduction.

⁹² Case C-573/12 *Ålands Vindkraft* ECLI:EU:C:2014:2037, para 80; and joined cases C-204/12 to C-208/12 *Essent Belgium* ECLI:EU:C:2014:2192, para 93

⁹³ inter alia, Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources [2018] OJ L 328/82 – 209

⁹⁴ Case C-624/22 *BP France* ECLI:EU:C:2024:640

⁹⁵ Case C-624/22 *BP France* ECLI:EU:C:2024:640, paras 69 – 77.

constituted a MEE and that this measure was not justifiable, for it did not fulfil the requirements of proportionality.⁹⁶

The judgement of the Court in case *BP France* conforms with Szydło's interpretation that even though the Court had extended the use of protection of environment as a justification, it does not mean that all environment justifications are successful.⁹⁷ It would seem that protection of the environment through advancing the transition to renewable energy sources has achieved a status as a possible justification for MEEs as long as the measure in question conforms with the principle of proportionality.

However, from the judgement given in case *BP France* it can be concluded that the rules decided in cases *Ålands Vindkraft* and *Essent Belgium* are still in force. In paragraph 64 of the judgement the Court in case *BP France* it is stated that it is possible to justify restrictions hindering intra-EU trade on the grounds of protection of the environment.⁹⁸ An important notice would be that even in this most recent case the Court considers the justification of the MEEs in question by recourse to overriding reasons in the public interest instead of protection of the health and life of humans, animals and plants.

Interestingly, this part of the wording of the article 36 TFEU is not mentioned in the Court's reasoning. It would seem that the Court has concluded that due to the well-established case-law implying the possibility to justify measures of equivalent effect to quantitative restrictions by recourse to overriding requirements in the public interest relating to the protection of the environment, it is no more necessary to reinforce this approach of justifying distinctly applicable measures by referring to article 36.⁹⁹

3.3 Is the current approach suitable?

Regardless of the development in the renewable energy legislation and the more ambitious goals set out in the Directive 2018/2001¹⁰⁰, the Court has not removed the requirement of proportionality for cases involving the advancement of the transition to renewable energy.

⁹⁶ Case C-624/22 *BP France* ECLI:EU:C:2024:640, para 75; Opinion of Advocate General Sanchez-Bordona on case C-624/22 *BP France*, points 100 and 102

⁹⁷ Marek Szydło. How to reconcile national support for renewable energy with internal market obligations? The task for the EU legislature after *Ålands Vindkraft* and *Essent*. (2015) 52 *CMLRev* 489, 501. Footnote number 44.

⁹⁸ Case C-624/22 *BP France* ECLI:EU:C:2024:640, para 68. It is important note, that the Court refers to the judgement of the L.E.G.O case which refers to the judgement given in the case *Ålands Vindkraft*.

⁹⁹ inter alia, Case C-242/17 L.E.G.O. ECLI:EU:C:2018:804, para 64

¹⁰⁰ Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources [2018] OJ L 328/82 – 83

Advocate General *Bot* proposed in his opinion in the case *Ålands Vindkraft* that directly discriminatory MEEs could be justified using overriding requirements in the public interest, if these measures pass a 'reinforced' proportionality test.¹⁰¹ I agree with the view of Advocate General *Bot*. This reinforced proportionality test could be a way to combat the clear distinction from previous case-law concerning MEEs, and that this reinforced model would conform with the development of the legislation of the European Union.¹⁰²

However, regardless of what approach is implemented, this implementation must be expressed explicitly either in legislation or in the case-law of the Court. As Advocate General *Bot* declared, the exception to the rule that distinctly applicable MEEs cannot be justified by recourse to overriding requirements in the public interest, is not stated expressly but surreptitiously in the Court's judgements¹⁰³, which is not suitable from the view of legal certainty.

I would regardless argue that the stand the Court has taken on the use of the advancement of the transition to renewable energy as a justification for restrictions hindering intra-EU trade, is correct. Especially in light of the most recent case-law¹⁰⁴ it can be confirmed that the Court has not created an arbitrary system of exemptions to the prohibitions on restrictions that hinder intra-EU trade. Proportionality is still concerned when making decisions on the justifiability of measures restricting trade,¹⁰⁵ which ensures that measures that are not suitable for the achievable benefit are not authorized in the internal market.

In addition, if the goals of the European Union and its internal market are considered, the approach of the Court is beneficial for the internal market in a long shot. As it is multiple times stated in case-law and the preambles of Directive 2018/2001¹⁰⁶, the EU and thus its Member States have committed to decarbonization and the advancing the transition to renewable energy to combat climate change through international treaties such as the Paris agreement. From the recitals 2 through 6 of the preambles of Directive 2018/2001¹⁰⁷ it can be

¹⁰¹ Opinion of Advocate General Bot on case C-573/12 *Ålands Vindkraft*, point 79; Opinion of Advocate General Bot in joined cases C-204/12 to C-208/12 *Essent Belgium*, points 92 - 98.

¹⁰² Opinion of Advocate General Bot on case C-573/12 *Ålands Vindkraft*, points 92 and 93.

¹⁰³ Opinion of Advocate General Bot in joined cases C-204/12 to C-208/12 *Essent Belgium*, point 92.

¹⁰⁴ Case C-624/22 BP France ECLI:EU:C:2024:640

¹⁰⁵ Case C-624/22 BP France ECLI:EU:C:2024:640, para 65.

¹⁰⁶ inter alia, Case C-242/17 L.E.G.O. ECLI:EU:C:2018:804, para 64; and recital 2 of the preamble for Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources [2018] OJ L 328/82.

¹⁰⁷ Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources [2018] OJ L 328/82 – 83

constructed that one of the aims of renewable energy regulations is also to ensure the longevity of the European Union. For instance, recital 3 of the mentioned preamble states that the aim of the Directive is to ensure for instance innovation and security of energy supply.¹⁰⁸

From the recital mentioned above it can be concluded that the aim of the EU legislature is to ensure security, development, innovation and leadership in the field of energy. Even though it is not explicitly stated, there most likely exists no controversy about the fact that these aims can be categorized as long-term goals. With regard to the reasons stated above, I argue that the construction of justifications for restrictions on intra-EU renewable energy trade that the Court has laid down in case-law is in line with the goals of the European Union, the goal of the internal market, and the recent development of renewable energy legislation.

Another part of legislation that conforms with the approach of the Court is article 194 TFEU. As stated above in this paper, this article lays down rules concerning the energy policy of the EU. In subparagraph 1(c) it is stated that the energy union will aim to promote the development of new and renewable energy sources. Even though protection of the environment has not been added to the express derogations listed in article 36 TFEU, the aim of advancing renewable energy has been codified into the TFEU, i.e. the concept of advancing the use of energy from renewable sources is not completely unfamiliar to the treaties.

It should be continued that the Court has utilized article 36 TFEU in its reasoning for the aforementioned cases but in all of the cases the Court justified the restriction on trade on the grounds of overriding requirements in the public interest relating to the protection of the environment. The more flexible take on the utilisation of article 36 that the Advocate Generals encouraged in cases *PreussenElektra* and *Ålands Vindkraft* is difficult to justify, for the article 36 has not been changed.¹⁰⁹

I agree to some extent with Steinbach and Brückmann on the matter that the construction that the Court has laid down with its case-law regarding renewable energy trade contradicts the idea of an internal and coherent energy market.¹¹⁰ Though, I would perhaps argue that the current construction of the Court hinders the advancement of an internal energy market but does not prevent it. One of the goals of the EU is to create an internal energy market that is

¹⁰⁸ Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources [2018] OJ L 328/82.

¹⁰⁹ Steinbach and Brückmann. *Renewable Energy and the Free Movement of Goods*. *Journal of Environmental Law*, 2015, 27, p. 11.

¹¹⁰ Steinbach and Brückmann. *Renewable Energy and the Free Movement of Goods*. *Journal of Environmental Law*, 2015, 27, p. 15.

efficient and sustainable.¹¹¹ To achieve this there exist a need to implement renewable energy solutions in Member States, which the discussed exception arguably advances.

Considering all said above in this paper I argue that the stance of the Court does not constitute a failure in regards of the principle of free movement of goods. When we take into account the will of the EU legislature and the aim of the internal market, the stance of the Court advances the goals of the EU. However, I also argue that the current surreptitiously legal state of justifying directly discriminatory measures is insufficient, and thus the Court has to express the legal rule that distinctly applicable MEEs can be justified by recourse to overriding requirements in the public interest relating to the protection of the environment.

The same result can also be achieved through new legislation that sets out the use of protection of the environment as a justification for MEEs restricting renewable energy trade is required, but I do not find this necessary, for the mentioned exception has been adopted by the Court. It has been made clear that the protection of the environment can be used to justify MEEs, but a clear expression stating this to be also possible for directly discriminatory MEE has not been expressed in a sufficient manner.

¹¹¹ e.g. OJ 2018 L 328/85, recital 20.

4 Conclusions

The aim of the internal market of the European Union is to ensure efficiency inside the Union and increasing security and development of Europe by increasing economic dependency between member states.¹¹² To create this dependency and economic efficiency, the internal market's principle of free movement of goods laid down in the Treaty on the functioning of the European Union.¹¹³ The subject matter of this paper is to analyse the relation of EU's renewable energy legislation and the principle of free movement of goods. Through the analysis conducted and according to the reasons stated in this paper, the following conclusion can be made.

The Directive 2018/2001¹¹⁴ and its predecessors that legislate the promotion of the use of energy from renewable sources does not nor does it aim to harmonize the entire field of renewable energy trade. For instance, Member states retain discretion in regard to national support schemes for renewable energy. If EU legislation does not exhaustively regulate the subject matter of law in question, the alleged failure of national legislation to adhere to EU law must be heard applying the relevant provisions of primary law.¹¹⁵ In light of the case-law discussed in this paper, it can be deduced that the Court does not acknowledge harmonization, if the harmonization is not interpretable from the legislative material. This means that it is likely that quite often measures having equivalent effect to quantitative restrictions relating to renewable energy trade will be heard applying articles 34 and 36 TFEU.

The current extent of justifications for restrictions having equivalent effect to quantitative restrictions by recourse to overriding requirements in the public interest relating the advancement of transition to renewable energy sources can be deduced from the case-law analysed in this paper. From the reasoning of the rule of the Court and its invariability through the changes in legislation and time, it can be concluded that the Court has ruled the protection of the environment¹¹⁶ as an overriding requirement in public interest, which can be used to justify hindrance on intra-EU renewable energy trade as long as the legislation in question satisfies the requirements of proportionality.

¹¹² Barnard, p. 5 and 6.

¹¹³ TFEU part three, titles one and two.

¹¹⁴ Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources [2018] OJ L 328/82 – 209.

¹¹⁵ *inter alia*, C-309/02 *Radlberger Getränkegesellschaft and S. Spitz*, para. 53.

¹¹⁶ Also including the advancement of transition to renewable energy.

The Court has also adopted a construction that distinctly applicable MEEs can be justified by recourse to overriding requirements in the public interest as long as these measures conform with the principle of proportionality.¹¹⁷ The most recent case *BP France* highlights that not all MEEs can be justified on the basis of protecting the environment. The measures have to be proportionate, i.e. achieve justifiable benefit without going beyond what is necessary, because no other less restrictive measure is available.¹¹⁸

The Court has persistently referred to the express derogations of article 36, but in the most recent case *BP France* the Court did not refer to the exact wording of article 36. Though there is no clear reason for this, it could be that it has become unnecessary, through the well-established case-law, to reinforce the construction of the exception to the general rule concerning overriding requirements in the public interest.

The last question discussed in this paper is the compatibility of the aforementioned justification on the grounds of an overriding requirement in public interest relating to the protection of the environment with the principle of free movement of goods. By examining the aims of the internal market of the European Union and the renewable energy legislation, it can be concluded that the justifying derogations from the free movement of goods on the grounds of advancing renewable energy is compatible with the internal market of the European Union as long as the Court does not lower the requirement for proportionality in cases regarding renewable energy trade.

From the judgments analysed in this paper it is evident that the Court mainly evaluates rule of reason justifications relating to the protection of the environment mainly through the principle of proportionality. It would seem that through the case-law of the Court the protection of the environment has been established as a self-evident overriding requirement in the public interest. However, the exception to the rule that overriding requirement in the public interest cannot be used to justify distinctly applicable measures has not been expressed in legislation or the judgements of the Court in a sufficient manner.

¹¹⁷ See section 3.2 of this paper.

¹¹⁸ inter alia, Case C-624/22 *BP France* ECLI:EU:C:2024:640, paras 69 – 77.