PROTECTION OF THE ENVIRONMENT AS A MANDATORY REQUIREMENT: THE POSSIBILITIES OF THE MEMBER STATES OF THE EUROPEAN UNION TO FAVOUR NATIONAL PRODUCTS

Heidi Kaarto

ABSTRACT

Over the years, the legal instruments of the European Union have been changed to increasingly contemplate environmental protection. Also, the CJEU has paved the way for environmental considerations by recognising in its case law that environmental protection is capable of restricting the free movement of goods. However, the Treaty amendments have not gone hand-in-hand with the development of the case law, and there seems to be one special loophole. Traditionally, only the express derogations from the free movement of goods rules were able to justify distinctly applicable measures, as compared to the mandatory requirements that could justify only indistinctly applicable measures. That is why the Court seems to now be between a rock and a hard place when it comes to distinctly applicable measures that could be justified on the grounds of environmental protection. This paper scrutinises the most recent case law of the CJEU and analyses whether the Court has even implicitly justified distinctly applicable measures on the grounds of environmental protection. The main purpose of the paper is to set the scene to explain the possibilities of the Member States to protect the environment to the detriment of the free circulation of goods.

Keywords: European Union, environment, free movement of goods, mandatory requirements, distinctly applicable measures

INTRODUCTION

The balancing of environmental interests with the free movement provisions has proven to be a challenging task not only for the Member States of the European Union (hereinafter "Member States") but also for the European Union (EU) institutions themselves. One recent and also practical example demonstrates this well: The new law in Hungary requires that retailers apply the same profit margins to domestic and imported agricultural and food products, although the cost of imported products is already subject to currency and exchange rate fluctuations. In turn, in Romania it is required that large retailers buy at least 51 per cent of food and agricultural products from local producers. The European Commission ('Commission') alleges that these rules on retail of agricultural and food products are in conflict with the free movement provisions and has sent letters of formal notice to Hungary and Romania in February 2017.[1]

Over the years, the fundamental legal instruments of the EU have been amended to increasingly contemplate environmental protection. It is, thus, necessary to see how the Court has managed to incorporate this constitutional evolution into its case law dealing with the interplay between trade and environment. The main purpose of this paper is to address the tension between the environment and trade and to examine in which kinds of circumstances the principles of environmental protection override the free circulation of goods. The hypothesis of the paper is that the Member States are allowed to directly discriminate against imported goods on the grounds of protection of the environment. The paper points out the most recent case law of the Court of Justice of the European Union (hereinafter "CJEU" or "the Court") concerning

[1] * The paper is a revised version of a Bachelor's Thesis and has been supervised by the Associate Professor of Tallinn University Law School, LLD Samuli Miettinen.
European Commission. (2017, February 15) Fact Sheet. February Infringements Package: Key Decisions. MEMO/17/234. Retrieved from http://europa.eu/rapid/press-release_MEMO-17-234_en.htm

the relationship between the internal market and the environment and analyses whether the Court has justified distinctly applicable measures restricting the free circulation of goods on the grounds of environmental protection.

I. THE TENSION BETWEEN THE FREE MOVEMENT OF GOODS AND ENVIRONMENTAL PROTECTION

In the past, the EU energy market liberalisation was dominated by the relatively market-oriented approach. This approach has, over the years, turned into the pursuit of a wide variety of goals, including the aim of reducing greenhouse gas emissions, which is part of the Europe 2020 Strategy for Smart, Sustainable and Inclusive Growth.[2] Finally, in 1988 in the *Danish Bottles* case[3] the CJEU justified the restriction of the free movement of goods on the grounds of environmental protection in cases of indistinctly applicable measures and, today, environmental protection has risen among the key objectives of the Union. This is demonstrated in various parts of the Treaties, including Article 11 of the Treaty on the Functioning of the European Union (TFEU), Article 114 TFEU and Article 3(3) of the Treaty on the European Union (TEU).

Nevertheless, problems and conflicts occur from time to time, as the EU legal order has been conceptualised in terms of economic integration already from the beginning. As we know, at the heart of this economic integration lies the internal market, which is based on the free movement provisions. It is, thus, only self-evident that clashes between environmental measures and free movement of goods rules take place on a regular basis due to their different, and usually opposite, objectives. In general, the aim of economic integration is to liberalise trade and to harmonise the internal market. On the contrary, protection of the environment requires the creation of regulatory measures while, at the same time, allowing differentiation.[4] Thus, the weighing of internal market related interests and the protection of the environment against each other is all about considering the economic values of the EU and the non-economic values of the Member States. It is then the task of the Court to consider the supervision and control mechanisms put in place by the Member States, as well as the enforcement conditions in order to determine whether they impose a double burden or additional costs on the products coming from other Member States.

What also brings additional complications to the weighing of economic interests against the non-economic ones is the fact that it is also surprisingly difficult to separate the two from each other: despite the fact that environmental regulations generally aim at protecting biodiversity and human health, they are bound to usually have economic consequences as well, which cannot be separated from the non-economic aims of the measures.[5] It has been even argued, on the one hand, that the Court aims at amending the state of matters through judicial interpretation and, on the other hand, that since the environmental protection measures must discriminate in order to be really effective, this derogation should be interpreted differently. However, no clear conclusions can be drawn from the intentions of the CJEU.[6]

Mandatory requirements can, in general, justify only indistinctly applicable measures as compared to Article 36 TFEU

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[2] European Commission. Communication from the Commission. Europe 2020. A Strategy for Smart, Sustainable and Inclusive Growth. COM(2010) 2020. Brussels, 3.3.2010.

[3] ECJ 20.9.1988, Case 302/86, Commission of the European Communities *versus* Kingdom of Denmark.

[4] De Sadeleer, N. (2015) Trade versus Environmental Law – The Fable of the Earten Pot and the Iron Pot. *Environmental Policy and Law*, 45(1), p. 23.

[5] Józon, M. The Enlarged EU and Mandatory Requirements. – European Law Journal. Vol. 11. Issue 5. 2005, p. 558.

[6] Escámez, S.B. (2006) Restrictions to the Free Movement of Goods – The Protection of the Environment as a Mandatory Requirement in the ECJ Case Law. University of Lund. Master of European Affairs programme, Law, p. 1.

derogations that can justify distinctly applicable measures.[7] Distinctly applicable measures are those that are overtly discriminatory, as they have a different burden both in law and, in fact, on imported and domestic goods. In comparison, indistinctly applicable measures are covertly discriminatory; despite the fact that they apply in law equally to national and imported products, in fact, they place a heavier burden on the imported ones.[8] It is argued that environmental protection has a different nature than the other mandatory requirements recognised by the CJEU in its case law: environmental protection usually has a transnational nature and may be based on primary Union law. As will be seen later in this paper, it seems that environmental protection could also be treated differently from other mandatory requirements in cases of distinctly applicable measures distorting the smooth functioning of trade between the Member States. [9]

II. ENVIRONMENTAL PROTECTION AND DISTINCTLY APPLICABLE MEASURES

2.1. The justification of barriers on free trade on the grounds of environmental protection in cases of distinctly applicable measures

The case law shows that the room for manoeuvre left for the national authorities is contained within blurred limits. In the most recent case law of the CJEU[10], no consideration has even been given to the matter of whether the measure was discriminatory or not. The focus of the Court has, instead, been on market access and proportionality. Thus, in this way, the Court has avoided being in the position to make a distinction between direct and indirect discrimination.[11] Nevertheless, a conclusion can be made that there has been a shift towards a more environmentally friendly approach: the Court has delivered a handful of judgments in which environmental protection has been successfully relied on, despite the discriminatory nature of the measures.[12] In several cases, a national discriminating environmental legislation was accepted that was environmentally oriented. Thus, it seems that national measures that pursue a legitimate environmental objective may be justified under Article 36 TFEU or under the mandatory requirements doctrine, even if they discriminate against products coming from other Member States.[13] This was the case already in Ålands *Vindkraft,* in which the CJEU sent an important message by stating that the Member States are permitted to have their independently formulated national subsidy systems despite the fact that they discriminate against foreign energy producers. Thus, the Member States are allowed to exclude producers coming from other Member States from their subsidy systems. This decision conflicts with the object of creating a unified internal energy market, in which there are no barriers to trade in the EU. However, to this day the Court has not even clarified if and when discrimination against imported goods is justified on the grounds of environmental protection. After this case, the remaining problems are in favour of abandoning the existing distinction between discriminatory and non-discriminatory subsidy measures.[14]

Similarly, the Court allowed the different treatment of domestic waste and waste coming from abroad in *Walloon Waste*

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[7] See, for example, ECJ 16.1.2003, C-388/01, Commission of the European Communities *versus* Italian Republic, para. 19; ECJ 6.10.2009, C-153/08, Commission of the European Communities *versus* Kingdom of Spain, para 37; ECJ 30.3.2006, C-451/03, Servizi Ausiliari Dottori Commercialisti, para. 36; ECJ 29.5.2001, C-263/99, Commission of the European Communities *versus* Italian Republic, para. 15.

[8] Barnard, C. (2004). *The Substantive Law of the EU. The Four Freedoms*. Oxford University Press.

[9] Nowag, J. (2016). *Environmental Integration in Competition and Free-Movement Laws* (1st ed.). Oxford University Press.

[10] ECJ 10.2.2009, C-110/05, Commission of the European Communities *versus* Italian Republic, paras 58-59; ECJ 4.6.2009, C-142/05, Åklagaren *versus* Percy Mickelsson and Joakim Roos, paras 28, 31-33; ECJ 10.4.2009, C-265/06, Commission of the European Communities *versus* Portuguese Republic.

[11] Nowag, J. (reference 9)

[12] e.g. ECJ 9.7.1992, C-2/90, Commission of the European Communities *versus* Kingdom of Belgium ("Walloon Waste"); ECJ 14.7.1998, C-389/96, Aher-Waggon GmbH *versus* Bundesrepublik Deutchland; ECJ 13.3.2001, C-379/98, PreussenElektra AG *versus* Schleswag AG.

[13] Escámez, S.B. (reference 6) p. 45.

[14] Steinbach, A. & Brückmann, R. (2015) Renewable Energy and the Free Movement of Goods. *Journal of Environmental Law*, 27(1), p. 2.

and the discriminatory practices in the administration of subsidy systems for renewable energy in *PreussenElektra*. In the first one, the Court permitted the different treatment of domestic waste and waste coming from abroad due to the principle that waste should be disposed of as close to the source as possible.[15] This case is of exceptional importance as the CJEU had to determine whether a clearly distinctly applicable act could be justified on the grounds of the protection of the environment. To the surprise of many scholars, the measure was permitted. In turn, in *PreussenElektra*[16], the CJEU had to decide whether German law at that time on the promotion of renewable energy sources through a feed-in support scheme violated EU law. The CJEU also ruled in this case that discriminatory practices in the administration of subsidy systems for renewable energy did not violate the free movement of goods provisions.[17] The Court recognised that the measure was not discriminatory, as it had done in *Walloon Waste*, despite the fact that its effect was to limit the imports from traders located in other Member States.[18]

The most recent case law of the CJEU has confirmed the conclusions drawn from the earlier cases relating to the interplay between the environment and trade. The CJEU delivered an interesting judgment[19] a couple of years ago on the alleged breach of Finnish legislation on excise duty on certain beverage packaging and the retail sale of alcoholic beverages laid down for environmental and public health reasons. The case concerned Mr Visnapuu, who had forum shopped Estonia's lower prices on alcohol by offering clients living in Finland home delivery of alcoholic beverages purchased in Estonia. As Mr Visnapuu had made no declaration to Finnish customs and excise, he circumvented many excise duties imposed for health and environmental reasons. The CJEU considered in its judgment a variety of different questions relating to the interplay between environment and trade.[20] The law at issue allowed national manufacturers of alcoholic beverages to sell their own production provided that it was obtained by fermentation and contained a maximum of 13 per cent alcohol by volume of ethyl alcohol. The Court noted that despite the fact that a derogation is provided only for national manufacturers, no conclusion can be directly made that the health and public policy grounds have been diverted from their purpose and used to discriminate against imported goods or indirectly to protect certain national products. Thus, the conclusion of the Court was that the legislation at issue in the case was not precluded by Articles 34 and 36 TFEU.

In its judgment[21] from 2016, the CJEU considered a preliminary question relating to the importation of chemical products into Sweden without notification about the importation to the Kemikalieinspektionen within the prescribed time limit. In this case, the Court gave guidance on the conditions to be met by the registration requirements in order for them to be justified on the grounds of protection of the environment. The referring Court inquired whether the REACH Regulation[22] had to be interpreted as precluding national legislation, requiring the importer of chemical products to register the products with the competent national authority, when the importer is already under an obligation under that regulation to register the same product with the European Chemicals Agency (ECHA). The Court noted that the registration required in the case at hand was not a pre-condition for importing chemical products but only a way to enable the national authorities to

[15] ECJ 9.7.1992, C-2/90, Commission of the European Communities *versus* Kingdom of Belgium ("Walloon Waste"), para. 34.

[16] ECJ 13.3.2001, C-379/98, PreussenElektra AG *versus* Schleswag AG.

[17] *Ibid.,* para. 81.

[18] *Ibid.,* para. 70.

[19] ECJ 12.11.2015, C-198/14, Valev Visnapuu *versus* Kihlakunnansyyttjä (Helsinki) and Suomen valtio.

[20] Van Calster, G. (2017, June 9) Gavc Law. Cheers to that! The CJEU on excise duties, alcohol, packaging and regulatory autonomy in Valev Visnapuu. Retrieved from https://gavclaw.com/2015/11/23/cheers-to-that-the-cjeu-on-excise-duties-alcohol-packaging-and-regulatory-autonomy-in-valev-visnapuu/

[21] ECJ 17.3.2016, C-472/14, Canadian Oil Company Sweden AB and Anders Rantén *versus* Riksäklagaren.

[22] Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/195/EC and 2000/21/EC as amended by Commission Regulation (EU) No 552/2009/ of 22 June 2009 as regards Annex XVII. OJ L 164. 26.6.2009.

maintain a database. The Court came to the conclusion that the REACH Regulation does not prohibit that kind of registration requirement, provided that the registration does not constitute a pre-condition to the placing of those products on the market. In addition, the registration must concern information different from that required by the regulation and it must contribute to the achievement of the objectives pursued by the regulation.

Finally, there are some other cases demonstrating the uncertainties the Court faces when it comes to distinctly applicable measures and environmental protection. The first is *Sydhavnens*[23], which has been interpreted to allow discriminatory measures on the grounds of protection of the environment.[24] As the Court held in the case that any restrictions on exports could not be justified on the grounds of environmental protection, particularly those on waste destined for recovery,[25] it has been argued that some export restrictions could be justified.[26] Similarly, the *Aher-Waggon* case has been interpreted as allowing discriminatory measures on the grounds of protection of the environment.[27] Despite these views, the fact remains that the Court has never formally taken the stance on whether discriminatory measures are justified on the grounds of the protection of the environment.[28] More recently, the CJEU has only clarified in the *Mac*[29] case that Member States are not permitted to deny the authorisation for parallel import on the grounds that the plant protection product in question does not have market authorisation granted under Directive 91/141[30]in the exporting Member State. However, the product must be identical to a product to which a parallel import authorisation has been granted in accordance with the directive in the importing state. In paragraph 40 of the judgment, the Court underlined that a total prohibition based on the presumed inadequacy of information is not justified in parallel re-importation cases.

What is also positive is that the Court has, in most of the recent cases, favoured the protection of the environment without even considering the volume of trade affected by the measure. The case has been so, for instance, in the afore-mentioned cases of *PreussenElektra* and *Aher-Waggon*[31]. The latter can additionally be considered as an indication of the Court's increasingly open attitude towards taking domestic externalities into account. In that case, the Court did not even consider the effects on the volume of intra-Community trade but focused its analysis on the necessity of the measure. Finally, the Court accepted the measure despite its discriminatory nature. This can be considered as a clear departure from the earlier free movement cases. [32]

2.2. The Assimilation of the Treaty Derogation of Protection of Health and Life of Humans, Animals and Plants with Environmental Protection

It seems on the basis of the case law studied that environmental protection can justify distinctly applicable measures; however, the next problem is how does the CJEU justify the restriction of free movement of goods on the grounds of environmental protection in cases of distinctly applicable measures? The scholars have suggested that the Court has, essentially,

[23] ECJ 23.3.2000, C-209/98, Sydhavnens Sten & Crus.

[24] e.g. Vedder, H.H.B. (2001) Environmental Protection and Free Competition: A New Balance? *Legal Issues of Economic Integration*, 28(1), p. 105.

[25] ECJ 23.3.2000, C-209/98, Sydhavnens Sten & Crus., para. 48.

[26] Vedder, H.H.B. (reference 24)

[27] e.g. Kingston, S. (2010) Integrating Environmental Protection and EU Competition Law: Why Competition Isn't Special. *European Law Journal*, 16(6), pp. 780, 794.

[28] Nowag, J. (reference 9), p. 1.

[29] ECJ 6.11.2014, C-108/13, Mac GmbH *versus* Ministère de l'Agriculture, de l'Agroalimentaire et de la Forêt.

[30] Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market. OJ L 230. 19.8.1991.

[31] ECJ 14.7.1998, C-389/96, Aher-Waggon GmbH *versus* Bundesrepublik Deutchland.

[32] Józon, M. (reference 5) p. 560.

two different options: either to read the Article 36 TFEU derogations so as to include environmental protection or to apply the mandatory requirements doctrine despite the distinctly applicable nature of the measure in question.[33] However, at least the case law of the CJEU does not provide a clear answer as to whether the mandatory requirements could, for instance, be assimilated with those of protection of health and life of humans, animals or plants; the Court has neither ruled out this possibility nor accepted it.[34] Nevertheless, the Court has declared, as to the relationship between the objectives of protection of the environment and protection of health that it is clear from Article 174(1) of the Treaty on the European Community (EC) (now Article 191 TFEU), that the protection of human health is one of the aims of the Union policy on the environment.[35] Those objectives are closely linked, in particular in connection with the fight against pollution, the purpose of which is to limit the dangers to health concerned with the deterioration of the environment. The objective of protection of health is, therefore, already incorporated, in principle, in the objective of protection of the environment.[36] The close relationship between the environment and health and life of humans, animals and plants can be seen also in that the clause of Article 36 TFEU requiring that the protection of health and life of humans, animals or plants has been successfully pleaded in various environmental cases.[37] By way of illustration, one could mention the *Aher-Waggon* case[38], in which aircrafts were required to be registered in order to minimise noise pollution.

In the same way as the CJEU has avoided having to answer the question of whether environmental protection can justify distinctly applicable measures and has, instead, implicitly justified discriminatory measures on the basis of environmental protection, the CJEU has only implicitly assimilated environmental protection with the Article 36 TFEU derogations. One example of this is the *Bluhme* case, which has been interpreted to indicate the direction that the Court is willing to read the written justifications contained in Article 36 TFEU more broadly.[39] In that case, the Court reasoned that measures aiming at maintaining biodiversity can be justified under Article 36 TFEU.[40] Julian Nowegian argues that the connections the Court made in its reasoning between the protection of health and life of plants of Article 36 TFEU and the protection of biodiversity could be applied to environmental protection more generally.[41] According to Nowegian, one can conclude from the judgment delivered by the Court in that case that discriminatory measures can be justified by environmental protection by using Article 36 TFEU.[42]

Additionally, in its most recent case law the CJEU seems to have done away with the distinction between distinctly and indistinctly applicable measures and, in that way, has assimilated the protection of environment with the Article 36 TFEU derogations. In 2014, the CJEU delivered its judgment in *Essent Belgium*[43] and declared that Member States are allowed to exclude guarantees of origin from other Member States when requiring the suppliers to surrender tradable certificates. In its reasoning, the CJEU clearly joined mandatory requirements with Article 36 TFEU derogations into a single group

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[33] Oliver, P. J. (1999) Some Further Reflections on the Scope of Articles 28-30 (ex 30-6) EC. *Common Market Law Review*, 36(4), pp. 804-805; Notaro, N. (2000) The New Generation of Case Law on Trade and Environment. *European Law Review*. Vol. 5, pp. 467, 490-491.

[34] Escámez, S.B. (reference 6)

[35] ECJ 8.7.2010, C-343/09, Afton Chemical Limited *versus* Secretary of State for Transport, para. 32; ECJ 22.12.2010, C-77/09, Gowan Comércio Internacional e Servicos Lda *versus* Ministero della Salute, para. 71.

[36] ECJ 11.12.2008, C-524/07, Commission of the European Communities *versus* Republic of Austria, para. 56.

[37] De Sadeleer, N. (2013) Environmental Regulatory Autonomy and the Free Movement of Goods. *Jean Monnet Working Paper Series. Environmental and Internal Market.* Vol. 1, 27-28.

[38] ECJ 14.7.1998, C-389/96, Aher-Waggon GmbH *versus* Bundesrepublik Deutchland.

[39] ECJ 3.12.1998, C-67/97, Criminal proceedings against Ditlev Bluhme.

[40] *Ibid.,* para. 33.

[41] Nowag, J. (reference 9)

[42] *Ibid.*

[43] ECJ 11.7.2014, C.204/12, Essent Belgium NV *versus* Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt.

of excuses and, according to Peers, applied a mandatory requirement to "a facially discriminatory measure"[44]. The Advocate General suggested in its opinion that the Court should wipe away the distinction between discrimination *de jure* and discrimination *de facto* and, in that way, overturn the earlier case law. However, the CJEU only abandoned the distinction between the two forms of discrimination but did not overturn its previous case law. Indeed, the abandonment of the distinction between distinctly and indistinctly applicable measures makes sense: the different treatment of those measures is irrational, as the trade-restrictive effect of both distinctly and indistinctly applicable measures can be identical, and the harsher treatment of distinctly applicable measures may function as an incentive for the Member States to design neutral measures to discriminate against imported goods. However, as distinctly applicable measures are illegal, their justification should be more difficult than in the case of indistinctly applicable measures.[45] Advocate General Bot stated as follows in paragraph 94 of the opinion in *Essent Belgium*, "I think that discriminatory measures, particularly those which infringe a principle as fundamental as that of the prohibition of direct discrimination on grounds of nationality, ought to be subject to a strict requirement of proportionality."[46]

2.3. Concluding Remarks

On the basis of the case law studied, it seems that the CJEU is calling for the legislators to make a change in the legal status of environmental protection as a mandatory requirement. The CJEU has explicitly justified distinctly applicable measures on the basis of environmental protection without implicitly stating that the Member States are allowed to discriminate against imported goods on the grounds of environmental protection. Also, the fact that the CJEU has implicitly assimilated environmental protection in its case law with the Article 36 TFEU derogations supports the conclusion that the CJEU is not satisfied with the present state of matters. Moreover, the Court seems to have wiped away the existing distinction between indistinctly and distinctly applicable measures all together, which seems like a rational choice, taking into account the fact that indistinctly applicable measures can also be covertly discriminatory. Nevertheless, it is only understandable that the Court has not dared to expressly declare that environmental protection can justify distinctly applicable measures; the task of the Court is to interpret, not to legislate. Additionally, if the Court expressly allowed the justification of distinctly applicable measures on the basis of environmental protection, it would mean that the Court would have to overturn its previous case law. In the future, it remains to be seen whether the CJEU justifies distinctly applicable measures on the grounds of assimilating environmental with the Treaty derogations or by the mandatory requirements doctrine. In light of the present case law, it seems that the Court has already opted for the first option.

III. ENVIRONMENTAL PROTECTION IN CASE OF PUBLIC PROCUREMENT

3.1. The present framework

According to the public procurement indicators, government expenditure on works, goods and services represents around 14 per cent of EU GDP, amounting to about EUR 1.8 trillion every year.[47] Therefore, a significant contribution towards not only national and international, but also local and regional sustainability goals can be made by buying goods, services and works with a reduced environmental impact. Indeed, the European Commission has announced that the environmental goals relating to climate change, sustainable consumption and production and resource use can be achieved through Green Public Procurement (GPP). [48]

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[44] Fontanelli, F. (2014, September 19) EU Law Analysis. Expert insight into EU law developments. The Essent judgment: Another revolution in the case law on free movement of goods? Retrieved from http://eulawanalysis.blogspot.fi/2014/09/the-essent-judgment-another-revolution.html

[45] *Ibidem.*

[46] ECJ 8.5.2013, Joined Cases C-204/12 to C-208/12, Opinion of Advocate General in Essent Belgium NV *versus* Vlaamse Regularingsinstantie voor de Elektriciteits- en Gasmarkt

[47] European Commission. (2015) *Public Procurement Indicators 2013*. European Union.

[48] European Commission. (2016) *Buying green! A Handbook on Green Public Procurement* (3th ed.). European Union.

The legal framework for public procurement is defined by the provisions of the TFEU and by the EU Public Procurement Directives[49] that have facilitated the achievement of the EU environmental goals by enabling public authorities to take environmental considerations into account.[50] The new EU public procurement directives demonstrate an increasingly open approach towards protection of the environment, as before it was not clear to what extent the environmental requirements could be taken into account in case of public procurement.[51] The directives clarify how the contracting authorities are able to contribute to the protection of the environment and the promotion of sustainable development while, at the same time, ensuring that they obtain the best value for money for their contracts.[52] Thus, the directives include environmental considerations and the full life-cycle costing of products when awarding contracts.[53] Next, this paper will examine whether the new directives leave room for the Member States to discriminate against foreign economic operators on the grounds of environmental protection.

3.2. The possibilities of the Member States of the European Union to favour national products by environmental reasons

Although the new public procurement directives demonstrate an increasingly open approach towards environmental considerations, strict rules have been put in place to prevent the contract authorities from discriminating against economic operators coming from other Member States: it is required that the awarding criteria are linked to the subject - matter of the contract, that they do not confer an unrestricted freedom of choice on the contracting authority, that they ensure the possibility of effective competition, and that the criteria are expressly mentioned in the contract notice and tender documents.[54] Also, the contracting authorities are required to ensure that the definition of the contract does not affect access to the tender by other EU operators or operators from countries with equivalent rights.[55] In addition, objectively verifiable and non-discriminatory criteria are to be accessible to all interested parties.[56] Thus, in principle, the contracting authorities of the Member States cannot discriminate against economic operators on the grounds of protection of the environment, as the procurements are to be non-discriminatory and open.

It is argued that a more is now towards a more protectionist approach applied by some countries. For instance, the French President Emmanuel Macron recently suggested a "Buy European Act" that would restrict the possibilities of the companies from third countries to bid for public procurement contracts within the Union.[57] However, as the EU wants to see more open public procurement markets also outside the EU, it is unlikely that the EU would restrict the abilities of the companies from third countries to bid for public procurement contracts in the EU Member States.[58] The European Commission has

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[49] *Ibid*.

[50] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC. OJ L 94. 28.3.2014; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC. OJ L 94. 28.3.2014; Directive 2014/23/EU of the European Parliament and of the Council of 26 February on 2014 on the award of concession contracts. OJ L 94. 28.3.2014.

[51] HE (108/2016 vp) Hallituksen esitys eduskunnalle hankintamenettelyä koskevaksi lainsäädännöksi. (In English: *Government proposal for the law concerning public procurement*), p. 1.

[52] Point 91 of Directive 2014/24/EU (reference 51)

[53] European Commission. (2017, September 6) Environment. EU public procurement directives. Retrieved from http://ec.europa.eu/environment/gpp/eu_public_directives_en.htm

[54] European Commission (reference 48)

[55] *Ibidem*.

[56] Article 68(2) of Directive 2014/24/EU (reference 50); Article 83(2) of Directive 2014/25/EU (reference 50)

[57] Smith, P. (2017, May 18) Using Public Procurement to Achieve Political and Social Goals. Public Spend Forum Europe. Retrieved from http://publicspendforumeurope.com/2017/05/18/using-public-procurement-to-support-national-interests-protectionism-on-the-rise

[58] European Commission. (2017, March 29) Trade. Public procurement. Retrieved from http://ec.europa.eu/trade/policy/accessing-markets/public-procurement/

already made a proposal for a new set of tools through which it would be possible to open up negotiations with countries outside the EU, to enable them to further open their public procurement markets.[59]

Concerning the situation inside the EU, nothing actually prevents the contracting authorities from using, for instance, award criteria that confer an unrestricted freedom of choice and from formulating environmental award criteria so that it artificially forecloses the market. As these practices are strictly prohibited by the transparency rules of the procurement directives, the monitoring authorities are likely to notify the national auditing authorities, courts or tribunals or other appropriate authorities or structures about the violations of the EU public procurement rules as required by the directives.[60] Nevertheless, the public procurement directives leave room for the contracting authorities to apply fair rules while, at the same time, enhancing the local producers' possibilities to participate in the procurement. They may use, for instance, terms that suit the local producers, but the terms must be fair for the non-local producers as well. Thus, the contracting authorities could set some special conditions for the realisation of the procurement contract relating to the environment. Through these special conditions, the contracting authorities can, in turn, encourage the local producers to make bids. Furthermore, the new public procurement directives encourage the contracting authorities to split up the big procurements which may, in turn, encourage the participation of small local producers.

The CJEU has delivered various judgments in which it has assessed the possible discriminatory nature of the systems laid down by the Member States. In *the Concordia Bus* case, it held that the system used by the Community of Helsinki was justified to be adequately specific and objective, as the system for awarding extra points for lower levels of noise and nitrogen oxide emissions had been specified and published before the evaluation of tenders.[61] In turn, in *the EVN Wienstrom* case[62] an award criterion on the amount of electricity produced from renewable sources in excess of the expected consumption of the contracting authority was ruled inadmissible. The reason for this was that the contracting authority could not verify the criterion effectively, as the award criterion was not linked to the subject matter of the contract. However, no judgments have been delivered by the CJEU concerning the new public procurement directives and the steps the contracting authorities have taken to protect the environment.

IV. CHALLENGES AHEAD

4.1. The possibilities of the Member States of the European Union to apply distinctly applicable measures to protect the environment

On the basis of the findings of this paper, it can be concluded that the CJEU has, indeed, one acute task: to expressly clarify whether environmental protection can justify distinctly applicable measures. Until today, the judgments of the CJEU have, on the contrary, avoided addressing the question of whether the measure was distinctly applicable or not. This has been the case, for instance, in *Mickelsson and Roos* where the CJEU, although justifying the measure on the basis of environmental protection, did not consider the issue of whether the measure was distinctly applicable. However, arguments have been raised on behalf of the discriminatory nature of the measure in question in the case.[63] The Court has applied the same line

[59] European Commission Proposal for a regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries. Brussels, 21.3.2012, COM(2012) 124 final.

[60] Article 83 of Directive 2014/24/EU (reference 50)

[61] ECJ 17.9.2002, C-513/99, Concordia Bus Finland

[62] ECJ 4.12.2003, C-448/01 EVN AG and Wienstrom GmbH *versus* Republic of Austria

[63] N. de Sadeleer. L´examen, au regard de l'article 28 CE, des règles nationales régissant les modalités d'utilisation de certains products. JT. 2009, p. 249 (referred to in Poncelet, C. Free Movement of Goods and Environmental Protection in EU Law: A Troubled Relationship? *International Community Law Review,* Vol. 15, p. 188); Opinion of Advocate General Kokott in ECJ C-142/05 (reference 10), paras. 58-60.

in other more recent cases as well.[64] Also, the approach the Court applied in *PreussenElektra* has led to wide discussion and confusion among the scholars. Although the Court decided to justify the measure at hand on the grounds of protection of the health and life of humans, animals and plants, it appeared that the measure had a closer connection with the protection of the environment. Thus, it is argued that the judgment the CJEU gave in the case increased the amount of legal certainty even further. Again, the judgment was an indication of the uncertainty the Court itself faces about the discriminatory measures and environmental protection.[65]

Advocate General Jacobs has pointed out that as environmental protection measures restricting the free circulation of goods typically make a distinction based on the nature and origin of the cause of harm, it should not even be required for environmental measures to be non-discriminatory.[66] Moreover, after the adoption of the Treaty of Lisbon and the recognition of the principle of a high level of environmental protection and improvement of the quality of the environment in the Charter of Fundamental Rights of the European Union (´CFR´), the Court should feel more comfortable to abandon the distinction between distinctly and indistinctly applicable measures where the measure protects the environment. The aforementioned should be applied in cases where there is no full harmonisation, no disguised restriction on trade and where the proportionality principle is observed. This conclusion is supported by the fact that environmental concerns are required to be integrated into the other EU policies. When considering Article 3(3) TFEU and Article 37 CFR, it seems to be self-evident that environmental protection ranks at the same level with free movement provisions. In addition, the mandatory requirements do not, in general, represent less legitimate interests than those expressly mentioned in the Treaty. The CJEU must probably also accept that the EU goes through an integration process in which the values that were present at the time of drafting the TFEU have changed and evolved. On the basis of constitutional amendments, it is clear that the protection of the environment is one of these new values that deserve legal protection.[67] It will be interesting to see whether the environmental protection will be balanced via making an exception for environmental protection or via a broad interpretation of the written justification contained in the treaties.

4.2. What level of protection does the environment need?

In the past, the CJEU has considered that "a high level of protection" of the environment does not have to be the highest level of protection technically possible.[68] Back then, statements similar to the aforementioned one sparked wide discussion among the academics, who were of the opinion that the Treaty requirements relating to the high level of protection of the environment seem to indicate a totally different direction. In light of the case law studied, it is clear that the CJEU still favours trade over environmental considerations. Though a better balance between the environment and trade has been struck by the Lisbon Treaty, environmental protection is still only an exception to the free movement of goods and is not even listed among the express derogations contained in Article 36 TFEU. Environmental issues have, especially in the case of the EU internal market, been secondary to the interests relating to the free movement of goods. The problem seems to lie partly in that environmental concerns are not taken as seriously as they should be – economic success seems to be more prevalent in many cases.

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[64] Poncelet, C. (reference 63), p. 188; ECJ 15.3.2007, C-54/05, Commission of the European Communities *versus* Republic of Finland; ECJ 11.12.2008, C-524/07, Commission of the European Communities *versus* Republic of Austria; and ECJ 6.10.2011, C-443/10, Philippe Bonnarde *versus* Agence de Services et de Paiement.

[65] *Ibid*., p. 187. Look also: ECJ 14.12.2004, C-463/01, Commission of the European Communities *versus* Federal Republic of Germany, ECJ 14.12.2004, C-309/02, Radberger GetränkegesellschaftmbH and S. Spitz versus Land Baden-Württemberg; ECJ 15.11.2005, C-320/03, Commission of the European Communities *versus* Republic of Austria.

[66] Opinion of Advocate General Jacobs in ECJ 13.3.2001, C-379/98 PreussenElektra AG *versus* Schleswag AG, para. 233.

[67] Poncelet, C. (reference 63), pp. 181, 190-191.

[68] ECJ 14.7.1998, C-341/95, Gianni Bettati *versus* Safety Hi-Tech Srl.

Nevertheless, in the most recent case law even the Court itself seems to have changed its attitude towards the interplay between economic and environmental interests and has recognised that environmental considerations should gain more weight. It is only reasonable because, for instance, Article 11 TFEU requires the integration of environmental policy requirements into the definition and implementation of all other policies. There is no similar requirement in case of the free movement provisions. Also, paragraph 3 of Article 114 TFEU states that the Commission proposals in the area of the internal market are to be based on a high level of environmental protection. This provision is also one of its kind, as it contains quality requirements for individual measures proposed by the Commission. Finally, the Member States are allowed, on the basis of Articles from 114(5) to 114(8) TFEU, to adopt new environmental measures even after the EU has adopted harmonisation measures on the basis of Article 114(1) TFEU. It is not required for the measures to be limited to reasonable ones. All these arguments suggest that the legislator should also accept the fact that the values of the society have changed, and that environmental protection should be recognised to be of equal importance as the treaty derogations contained in Article 36 TFEU. This is supported by the fact that governments and companies have also found out the benefits gained through the protection of the environment related to innovation, resource- efficiency and boosting the economy.[69]

One of the main challenges for the future is to determine the level of protection the environment needs. Until today, there has been no consensus among the politicians regarding the level of protection to be achieved. This, in turn, brings with it the risk that the protection levels will be lowered.[70] This has indeed already been the situation with the Packaging Waste Directive, which grants the Southern Member States the possibility to decide to postpone the attainment of recycling targets.[71] Krämer has expressed an opinion that if the European institutions were made to explain and make transparent, as required by the transparency rule, Article 37 of CFR and the Aarhus Convention, the manner in which they have integrated environmental interests in the decisions they adopt, then environmental integration would take a huge step forward.[72] Whether the EU institutions manage to strike a balance between trade and environmental interests remains to be seen.[73]

4.3. The reduction of risk of clashes between the environmental rules and the free movement of goods through positive harmonisation

In the future, in order to minimise the possible discrimination against foreign products on the grounds of environmental protection, the EU should aim at ascertaining the compatibility of environmental measures with the free movement provisions. The harmonisation process is likely to reduce the risk of clashes between the environmental rules and the free movement of goods.[74] At the moment, the state of harmonisation standards is far from perfect, and there are many product categories that are not harmonised at all. This has resulted in a situation, where the environmental protection levels vary greatly between the Member States. This, in turn, means that when the standards in the recipient state are stricter than those of the exporting state, the national courts are left with the task of reviewing the justification of domestic measures.[75] The prevailing view seems to be, unfortunately, that environmental and health regulations are regulatory burdens and distort the internal market and the competition between the businesses. Also, it is argued that environmental issues should be

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[69] European Commission. (2016) Magazine of the Directorate-General for the Environment. *Environment for Europeans*. No. 61, p. 7.

[70] De Sadeleer, N. (2013) The Principle of a High Level of Environmental Protection in EU Law: Policy Principle of General Principle of Law? *Iustus Förlag AB*, p. 453.

[71] Article 6(5) of Directive 94/62/EC of the European Parliament and of the Council of 20 December 1994 on packaging and packaging waste. OJ L 365. 31.12.1994.

[72] Krämer, L. *Giving a Voice to the Environment by Challenging the Practice of Integrating Environmental Requirements into the other EU Policies* in Kingston, S. (2013). *European Perspectives on Environmental Law and Governance.* Taylor and Francis.

[73] De Sadeleer, N. (reference 4) p. 27.

[74] De Sadeleer, N. (2017) Free Movement of Goods and Environmental Product Standards. *Jean Monnet Working Paper Series. Environment and Internal Market*. Vol. 3, p. 4.

[75] De Sadeleer, N. (reference 4) p. 26.

regulated only through soft law.[76] However, soft law measures are seen as ineffective tools when it comes to the elimination of direct discrimination against renewable energy generated in other Member States.[77]

Tougher harmonisation through, for example, directives concerning products, renewables, nature conservation and energy efficiency would be effective not only for the environment but also for the competitiveness of the Member States' economies.[78] This is demonstrated by the following example: infringements of EU law typically occur in the field of environmental regulation, public procurement and taxation. For instance, only 3.4 per cent of public tenders were given to bidders coming from other Member States during the years between 2006 and 2010. This, in turn, affects the free circulation of goods as the diverging environmental standards and discriminatory measures in awarding contracts in the field of public procurement are liable to impede or even prevent the businesses from doing business in other Member States.[79] Thus, tougher harmonisation and, for instance, granting financial advantages for environmentally better goods would enable businesses across the EU to have better possibilities of doing business in other Member States. Also, at the moment all Member States in the EU are permitted by the provisions of the EU secondary law to have discriminatory support schemes for renewable energy. It is questionable whether these schemes are compatible with the free movement provisions and some other EU primary law rules and principles.[80] The CJEU has regarded in its case- law, including Ålands *Vindkraft* considered earlier in this paper, that the Member States are permitted to lay down far-reaching limitations in case of renewable energy markets. In the future, the only way to allow the electricity from one Member State to enter the markets of other Member States is the aforementioned harmonisation of the renewable energy schemes.

Overall, the EU is more environmentally-oriented in today's world than in the past, as the values of the society have changed and will also change in the future. The CJEU has justified discriminatory measures, for instance, in *Aher-Waggon, PreussenElektra* and most recently in *Brenner Heavy Lorries*. Also, the implementation period of the public procurement directives that leave room for environmental considerations expired on 18 April 2017.[81] If everything goes as planned, a significant contribution can be made to sustainable production and consumption, as the public authorities are allowed *inter alia* to require that the goods the bidders deliver fulfil the requirements contained in environmental labels.[82] As the whole EU is becoming more environmentally friendly day by day and tries to accommodate environmental interests with the objectives relating to the internal market, it is all the more important that the CJEU expressly declares what kind of measures the Member States are permitted to lay down in order to consider environmental interests. Thus, further research is needed as the case law relating to the interplay between the environment and the economy develops. All in all, the findings of the article indicate that a Treaty amendment should be made relating to the status of environmental protection in order to ensure legal certainty.

CONCLUSIONS

The Lisbon Treaty stroke a better balance between trade and environment and declared the objective of attaining a high level of environmental protection. Environmental protection was raised among the most important values of the CJEU, despite the fact that environmental protection is not mentioned among the derogations contained in Article 36 TFEU. It

[76] I*bidem*.

[77] Szydlo, M (2015) 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.* 52(2), pp. 507-508.

[78] De Sadeleer, N. (reference 4), p. 27.

[79] Hafner, M., Robin, E. and Hoorens, S. (2014, September) The Cost of Non-Europe in the Single Market. Free Movement of Goods. European Parliamentary Research Service. Retrieved from http://www.europarl.europa.eu/EPRS/EPRS_STUDY_536353_CoNE_Single_Market_I.pdf

[80] *Ibidem*.

[81] European Commission. (2017, August 31) Internal Market, Industry, Entrepreneurship and SMEs. Legal rules and implementation. Retrieved from https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation_en

[82] European Commission. EU Public Procurement reform: Less bureaucracy, higher efficiency. An overview of the new EU procurement and concession rules introduced on 18 April 2016. Ref. Ares (2016) 1875822. 20.4.2016.

seems that the case law of the CJEU mirrors the changes that were brought by the EU treaties, as the CJEU has allowed the restriction of free trade on the grounds of environmental protection despite the discriminatory nature of the measure. This has been the case, for instance, in *Bluhme*, *Sydhavnens* and *Aher-Waggon.* This seems to indicate that the CJEU also holds that environmental protection is by no means of less important value than, for instance, the health grounds contained in Article 36 TFEU. The more environmentally-oriented approach applied by the Court in the most recent judgments relating to the conflict between trade and environment seems like a sign for the legislators to make a change in the legal status of environmental protection as a derogation from the free movement provisions. This conclusion is supported by the fact that the CJEU has assimilated in its case law the treaty derogation of protection of health and life of humans, animals and plants with environmental protection.

In the future, the CJEU has yet to expressly declare whether environmental protection justifies applicable measures. It is argued among the scholars that the CJEU has, indeed, two different options: either to read the written exception contained in Article 36 TFEU so as to include protection of the environment or to apply the case law relating to the mandatory requirements despite the distinctly applicable nature of the measure in question. The fact that the Court has already assimilated the Article 36 TFEU derogations in its case law with environmental protection supports the first option. It seems that the hypothesis of the paper seems to be right at least in light of the latest case law of the CJEU; however, no clear conclusions can be made about the intentions of the Court, as the Court has not yet expressly declared that environmental protection can justify distinctly applicable measures.

Both an effective policy on the environment and the elimination of barriers on free trade require the elimination of barriers through harmonised rules on the EU level. Also, the effectiveness of the new, more environmentally-conscious public procurement directives depends mostly on their enforcement in the Member States. The practical problem of how to coordinate national environmental policies with the internal market will remain topical for several years: new studies are required when the Court delivers new judgments on the relationship between trade and environmental protection.

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