

The European Court of Justice and renewables nationalism

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Summary

Last week's surprise ECJ judgement on Finnish wind producer Alands Windkraft, went against the opinion of its own advocate general in ruling that member states' can legally exclude imported energy from renewable subsidy schemes. The decision was celebrated by some European governments keen to retain control over the costs of national renewable energy support schemes. The decision was also welcomed by renewables associations who feared that imported energy would disrupt markets and damage investor confidence. The ECJ has provided member states with a powerful legal tool with which to control the pace of the 'Europeanisation' of renewable energy and the broader electricity market.

This month's European Court of Justice (ECJ) decision concerning small Finnish wind producer Alands Vindkraft's right to access the Swedish renewable subsidy scheme went largely unnoticed. However, the ruling - which upheld the right of member states to limit subsidy support to renewable electricity producers on their own territory - goes to the heart of what it will take to build a single market in renewables.

Alands Vindkraft operates from Finland's Alands archipelago, which is both Swedish-speaking and connected to the Swedish power grid. Alands Vindkraft had been refused the right to sell its power under the Swedish renewables support system on the grounds that it was producing electricity in Finland. In response, the company had brought a case to the ECJ arguing that the Swedish government had violated the freedom of movement of goods as articulated in Article 34 of the Treaty of

the Functioning of the European Union (TFEU).

The ECJ's decision came as a surprise to most observers. The ECJ's own Advocate General Yves Bot had already published an opinion ruling that the Swedish government had indeed discriminated against Alands Vindkraft according to Article 34 of the TFEU. He went on to recognise that the 2009 Renewables Directive allows such discrimination if there is sufficient justification on grounds of environmental protection.

However, he argued that limiting renewables support schemes to national producers is not justifiable on grounds of environmental protection, and is in fact damaging to the spread of environmentally-friendly renewable technologies.

The key disagreement was on this last point. The ECJ directly contradicted

Bot, arguing that far from being damaging for the future of the EU's environmental policy it was "essential that Member States be able to determine whether and, if so, to what extent their national support schemes are to apply to green energy produced in other Member States."

The European Commission grudgingly welcomed the decision, but it highlighted the gulf between the Commission's aspiration for a truly European energy system, and the reality that is Europe's fragmented national markets. Ultimately, although the fragmentation of the market suits national governments and many investors today, the industry as a whole is in danger of missing an important opportunity for the future.

European policy, national cost

The Alands case is the latest round of an on-going struggle between the Commission and member states. The Commission has consistently pressed for more cross-border integration of the European energy market, including for renewables. In its May energy security report to the Council the Commission declared that "member states should initiate the Europeanisation of renewable energy support systems through improved coordination of national support schemes".

Member states however remain reluctant to limit their policymaking autonomy, relying on Article 194 of the TFEU to defend the "Member State's right to...determine its choice between different energy sources and the general structure of energy supply". This was highlighted in Germany, where Economy Minister Sigmar Gabriel commended the ECJ's decision as "a clear signal on the continued support for renewable energy in Europe".

Reaction among the Brussels renewable associations was also broadly in favour of the ECJ judgement. In part this demonstrated a level of concern that in an open European market member states might engage in a 'race to the bottom' to avoid becoming flooded with renewable energy producers seeking the highest subsidy support. Some even voiced concerns that member states might seek to unpick the 2009 Renewables Directive.

But it also indicated the fragility of investor confidence in European renewables after a period of national subsidy support retrenchment, policy change and a clear desire within the Commission to curb some of the excesses of the renewables subsidy boom of the last five years. The resulting preference of many investors to remain in

protected and stable national markets echoes the experience in other sectors such as telecoms and professional services where the deepening of the Single Market has met stubborn resistance.

Certainly Sigmar Gabriel and the German government had been concerned that the ruling might lead to an influx of imported renewable electricity from other countries, increasing the subsidy cost burden for German consumers. Not only would the sight of German euros being paid out to foreign companies have been politically uncomfortable, but had the ECJ followed the advocate general's opinion, it would have essentially tied German consumers into paying for renewables production over which their politicians and policymakers had no control.

This political problem of collective subsidisation and the terms on which it is acceptable to member states is familiar from five years of bank bailouts and the associated resolution rules. It goes to the heart of the issue for member state governments. They have signed up to nation-specific targets for renewable production in 2020. To meet these each member state has set out their own renewable support policies based on their understanding of the costs. Ultimately member states fear that if the policy tools became European, the responsibility and the cost would remain national.

'Renewables nationalism'

The ECJ has provided member states with a powerful legal tool with which to control the pace of the 'Europeanisation' of renewable energy and the broader electricity market. Given the instinctive localism of member states over energy matters this is likely to act as a strong brake.

The ECJ's decision is however not the end of the road for deeper integration of European renewable energy. The economic rationale for siting renewable generation where it is most efficient remains powerful, and particularly compelling at a time when both member states and the Commission are focussing on reducing European energy costs and boosting competitiveness.

In addition, the signs from the March European Council are that Europe will go ahead with an EU-wide renewables target for 2030, but without setting individual member state targets. In the longer term this could reshape the way in which national policymakers think about renewable energy production, making them more comfortable thinking on a Europe-wide scale, although concern

over costs and a political reluctance to fund foreign companies are likely to continue to lead to defensiveness.

of renewables may come to be considered by the industry as a whole as something of a missed opportunity.

Within industry there is some support for the Commission's European vision. RECS International - a pan-European renewables association including members GDF Suez, Eon, RWE, Vattenfall and Dong - lamented the ECJ's decision which they argued "allowed the continuation of protectionist electricity support schemes which encourage electricity producers to go for the highest subsidies and not the most cost-efficient new renewables." They support cross-border integration as a method of driving cost efficient production.

The mechanisms for driving this integration are already in place. The Renewables Directive allows for the trading of renewable energy production - either through physical transmission of power or statistical 'on paper' transfers - to allow member states to meet their renewable energy production targets with production from outside of their territory. To date it has not been taken up outside of Norway and Sweden. However, if for example the UK places a moratorium on onshore wind, policymakers may begin to look again seriously at the possibility of trading renewable 'credits' from elsewhere.

Advocates of renewable energy - both within governments and in civil society - face something of a dilemma. At a time of acute concern over energy costs, the future health of renewables in Europe - not least the political credibility of subsidy support schemes - will be dependent on producers and policymakers taking every opportunity to rationalise, increase efficiency and drive down costs. However one of the core policy tools for doing just that - the Europeanisation of energy markets - remains the subject of marked suspicion among many investors and national policymakers. As a result, the renewables industry is facing a trade-off between consolidating its position in national energy markets in the short-term against the longer term benefits of rationalisation, market access and scale.

Reaction to the ECJ decision from governments and renewables associations suggest that for now supporters of renewable energy will take the short term win of increased investor certainty and 'renewable nationalism'. Given the concerns of member states and the recent travails of the European renewables industry, this is understandable. Ultimately however, the failure to make the argument for the Europeanisation

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