***1323 Essent Belgium NV v. Vlaams Gewest and others (Intercommunale Maatschappij voor Energievoorziening Antwerpen (IMEA) and others, intervening)**
(Case C-492/14)
Before the European Court of Justice (Second Chamber)
29 September 2016

[2017] 1 C.M.L.R. 39

Presiding , Ilešič PC ; Toader , Rosas , Prechal (Rapporteur) and Jarašiūnas JJ ; A.G. Bot
29 September 2016

Analysis

Discrimination; Electricity distribution; EU law; Imports; Quantitative restrictions; Renewable energy

H1 Free movement of goods—art.34 TFEU—art.36 TFEU—Belgium—green electricity—scheme for free distribution through distribution system—exclusion of energy imported from other Member State—environmental protection and sustainable development—considerable latitude—neither advantage nor direct support—increase in national production—proportional to objective obtained—incapable of justifying selectively free distribution—no discrimination against green electricity—access to system—third party—completion of internal market in electricity—prohibiting discrimination in access to distribution system—different treatment based on origin—prioritising generating installations producing green energy—useful for protection of environment—obligations relating to environmental protection—unequal access for EU electricity companies to national consumers—achievement by other means—hindering imports of electricity—measure having effect equivalent to quantitative restriction—irrelevance of scale of hindrance—public interest or overriding requirements—justification on basis of protection of environment—production stage—increase in national production of green electricity—possibility for limitations—conferring certain economic advantage—facilitate sale of green energy—not directly supporting producers of green electricity—financial advantage conferred primarily on supplier—no certainty of requirement to benefit—non-establishment of ability to achieve objective—failing to satisfy requirements of principle of proportionality—infringement of EU law.

H2 EB imported what it claimed was green electricity (electricity produced from renewable energy sources) from the Netherlands and supplied it to undertakings and private companies in Flanders. Having formed the view that it had suffered damage because the green electricity thus imported from another Member State ***1324** was, as a result of successive changes in Flemish legislation, excluded from a scheme for free distribution through the distribution system in Flanders, EB brought two actions before the *Nederlandstalige rechtbank van eerste aanleg te Brussel* (Dutch-language Court of First Instance, Brussels, Belgium). EB claimed that the Flemish Region should have been ordered to pay it compensation for that damage. EB also brought into the proceedings VREG, the body competent to rule on distribution tariffs, and a number of distribution system operators which had sought payment of distribution costs, so as to have the judgments declared applicable to those other parties. EB argued that, in adopting the regional legislation, the Flemish Region infringed EU law, in particular, arts 18 and 34 TFEU , and arts 3(1) and 11(2) of Directive 96/92 . The *Nederlandstalige rechtbank van eerste aanleg te Brussel* sought a preliminary ruling from the Court of Justice. The Court held that the provisions of arts 28 EC (now art.34 TFEU) and 30 EC (now art.36 TFEU), and of art.3(2) and (8) and art.20(1) of Directive 2003/54 , as well as arts 3 and 4 of Directive 2001/77 , read together, precluded legislation such as that at issue in the main proceedings, which imposed a scheme for the free distribution of green electricity through the distribution systems in the region concerned, while limiting the benefit of that scheme, in the case of the first decision, solely to green electricity fed directly into those distribution systems by the generating installations and, in the case of the second decision, solely to green electricity fed directly by such installations into the distribution systems in the Member State to which that region belonged.

H3 Request for a preliminary ruling from the *Nederlandstalige rechtbank van eerste aanleg te Brussel* (Belgium) under art.267 TFEU .

Held:

Environmental protection and sustainable development

H4 According to recitals 1 to 3 of Directive 2001/77 , such promotion of renewable energy sources, which was a high priority for the European Union, was justified in particular because the exploitation of those energy sources contributed to environmental protection and sustainable development, and could also have contributed to security and diversification of energy supply and made it possible to meet the Kyoto Protocol targets more quickly. [54]
Industrie du bois de Vielsalm & Cie (IBV) SA v Région wallonne (C-195/12) EU:C:2013:598; [2014] 1 C.M.L.R. 43, followed .

Various kinds of measures

H5 As regards the form that mechanisms of support for renewable energy sources at the national level may have taken, recital 14 of Directive 2001/77 did no more than list the various kinds of measures to which the Member States generally had recourse in that connection, namely, green certificates, investment aid, tax exemptions or reductions, tax refunds and direct price support schemes. [58]
Green Network SpA v Autorità per l'energia elettrica e il gas (C-66/13) EU:C:2014:2399; [2015] 2 C.M.L.R. 3, followed . ***1325**

Considerable latitude

H6 Directive 2001/77 allowed Member States considerable latitude for the purposes of the adoption and implementation of such support schemes for green electricity producers. [60]
Green Network SpA v Autorità per l'energia elettrica e il gas (C-66/13) EU:C:2014:2399; [2015] 2 C.M.L.R. 3, followed .

Neither advantage nor direct support

H7 The free distribution provided for by the regional legislation at issue in the main proceedings constituted neither an advantage nor direct support to green electricity producers, since that free distribution primarily benefited suppliers and therefore, in principle, the consumer. Free access to the distribution systems could only have indirectly therefore, if at all, also proved to have been a source of support for those producers and to that extent fell within the scope of art.4(1) of Directive 2001/77 . [61]

Increase in national production

H8 It was important also to take into account, in that context, the fact that art.3(1) and (2) of Directive 2001/77 made clear that national support mechanisms for producers of electricity as referred to in art.4 of Directive 2001/77 , which were used inter alia to help Member States achieve their respective national indicative targets under art.3 , had in principle to lead to an increase in national production of green electricity. [62]
Green Network SpA v Autorità per l'energia elettrica e il gas (C-66/13) EU:C:2014:2399; [2015] 2 C.M.L.R. 3, followed .

Proportional to objective obtained

H9 As art.3(1) of Directive 2001/77 made clear, such mechanisms had, like all other measures adopted by the Member States in order to achieve those national indicative targets, to be in proportion to the objective to be attained. [63]

Incapable of justifying selectively free distribution

H10 As regards the provisions of art.7 of Directive 2001/77 , concerning various issues relating to the grid, art.7(3) and the second subparagraph of art.7(6) were not capable of justifying measures under which distribution was selectively free of charge, such as those provided for by the regional legislation at issue in the main proceedings. [66]

No discrimination against green electricity

H11 As regards the first subparagraph of art.7(6) of Directive 2001/77 , that provision required the Member States to ensure that the charging of distribution fees did not discriminate against green electricity. [68] ***1326**

"Access to system"

H12 As regards, first, the concept of "access to the system" within the meaning of art.20(1) of Directive 2003/54 , that included not the connection which corresponded to physical connection to the system, but the right to use electricity systems. The term "access" was thus linked to the supply of electricity, including the cost of the service. Recitals 2, 6, 13, 15 and 17 of Directive 2003/54 stated in particular that such access had to be fairly priced and use non-discriminatory tariffs in order to ensure effective market access for all market players. [72]–[73]
Sabatauskas v Lietuvos Respublikos Seimas (C-239/07) [2008] E.C.R. I-7523, followed .

"Third party"

H13 As regards the concept of "third party" within the meaning of art.20(1) of Directive 2003/54 , the text of that provision itself explained that term by also using the term "system users", defined in art.2(18) of the directive as meaning any natural or legal persons supplying to, or being supplied by, a transmission or distribution system. Those users included suppliers of electricity, the Court having stated, inter alia, that, in order for eligible customers to be able, as stated in recital 4 of Directive 2003/54 , freely to choose their suppliers, it was necessary that suppliers should have had the right to access the distribution systems which carried electricity to customers. [74]–[75]
Sabatauskas v Lietuvos Respublikos Seimas (C-239/07) [2008] E.C.R. I-7523, followed .

Completion of internal market in electricity

H14 Open third party access to transmission and distribution systems established in particular by art.20 of Directive 2003/54 constituted one of the essential measures which the Member States were required to implement in order to bring about completion of the internal market in electricity. [76]
Sabatauskas v Lietuvos Respublikos Seimas (C-239/07) [2008] E.C.R. I-7523, followed .

Prohibiting discrimination in access to distribution system

H15 Article 16 of Directive 96/92 thus prohibited Member States from organising access to the distribution system in a discriminatory manner, this prohibition relating generally to all discrimination, including, therefore, any discrimination in terms of the cost of using the distribution system. [78]
AEM SpA v Autorità per l'energia Elettrica e per il Gas (C-128/03 & C-129/03) [2005] E.C.R. I-2861; [2005] 2 C.M.L.R. 60 ; Vereniging voor Energie Milieu en Water v Directeur van de Dienst Uitvoering en Toezicht Energie (C-17/03) [2005] E.C.R. I-4983; [2005] 5 C.M.L.R. 8, followed .

Specific expressions of general principle of equality

H16 Those provisions which required that the action of the State in creating access to the system should not have been discriminatory were specific expressions of the general principle of equality. [79] ***1327**
Vereniging voor Energie Milieu en Water v Directeur van de Dienst Uitvoering en Toezicht Energie (C-17/03) [2005] E.C.R. I-4983; [2005] 5 C.M.L.R. 8, followed .

Different treatment based on origin

H17 In the present case, although the regional legislation at issue in the main proceedings applied in the same way to all electricity suppliers using a distribution system that was located in the region concerned, it nevertheless did not lead to any exemption from the fees for the distribution of electricity delivered by those suppliers except where that electricity was green electricity fed directly into such a system or into a distribution system located in the Member State to which that region belonged, and therefore resulted in electricity suppliers being treated differently, depending in particular on the origin of the green electricity being marketed by those suppliers. [82]

Prioritising generating installations producing green energy

H18 As regards any possible justification for such a difference in treatment, art.11(3) of Directive 96/92 or art.14(4) of Directive 2003/54 could not in themselves have been invoked in order to justify it. Those

provisions did not deal with the charging of distribution costs; they merely provided that the system operators may have been required by a Member State to give priority, when dispatching generating installations, inter alia to generating installations producing green electricity. [83]

Useful for protection of environment

H19 The legitimacy of the objective of the regional legislation at issue in the main proceedings, namely promoting the production of green electricity, was not in doubt. The use of renewable energy sources for the production of electricity was useful for the protection of the environment inasmuch as it contributed to the reduction in greenhouse gas emissions, which were amongst the main causes of climate change that the European Union and its Member States had pledged to combat. [84]
Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt (C-204–208/12) EU: EU:C:2013:294; EU:C:2014:2192, followed .

Obligations relating to environmental protection

H20 Both art.3(2) of Directive 96/92 and art.3(2) of Directive 2003/54 authorised Member States to impose on undertakings in the electricity sector public service obligations relating, inter alia, to environmental protection, including climate protection. That appeared to be the case with regard to the regional legislation at issue in the main proceedings, in that it imposed on all operators of distribution systems in Flanders an obligation to distribute free of charge green electricity that was fed by producers directly into those systems or into distribution systems in Belgium, and was thus designed to promote growth in the production of green electricity. [87]–[88] ***1328**

Equality and non-discrimination

H21 The public service obligations established under those provisions had to not be discriminatory. Article 3(2) of Directive 2003/54 added, moreover, that those obligations had to guarantee equality of access for EU electricity companies to national consumers. [89]

Unequal access for EU electricity companies to national consumers

H22 While it appeared that all distribution system operators were subject to the regional legislation at issue in the main proceedings, so that no difference in treatment between them could apparently have been observed, that legislation nevertheless did not lead to any exemption from the fees for the distribution of electricity delivered by suppliers except where that electricity was green electricity fed directly into a system that was in the region concerned or into a distribution system in the Member State to which that region belonged, and therefore resulted in electricity suppliers being treated differently, depending in particular on the origin of the green electricity being marketed by them. That difference in treatment was therefore liable in particular to affect equality of access for EU electricity companies to national consumers within the meaning of art.3(2) of Directive 2003/54 . [90]

Achievement by other means

H23 It was, moreover, admittedly apparent from art.3(8) of Directive 2003/54 that, unlike the rule which applied under Directive 96/92 with regard to art.3(3) and art.16 thereof, Member States were permitted not to apply the provisions of art.20 of Directive 2003/54 providing for non-discriminatory third party access to the transmission and distribution systems insofar as the application of art.20 would have obstructed the performance, in law or in fact, of the public service obligations thus imposed on electricity undertakings. However, the Court had already held that, in order to be able to derogate in this way from the requirements of art.20 of Directive 2003/54 , Member States had, inter alia, to ascertain whether the performance by the system operators of their public service obligations could not have been achieved by other means which did not impact adversely on the right of access to the systems, which was one of the rights enshrined in Directive 2003/54 . [91]
Citiworks AG v Sächsisches Staatsministerium für Wirtschaft und Arbeit als Landesregulierungsbehörde (C-439/06) [2008] E.C.R. I-3913 ; Vereniging voor Energie Milieu en Water v Directeur van de Dienst Uitvoering en Toezicht Energie (C-17/03) [2005] E.C.R. I-4983; [2005] 5 C.M.L.R. 8, followed .

Establishing public service obligations with full regard

to treaty provisions

H24 The public service obligations established under Directives 96/92 and 2003/54 had to be so established, as was apparent from art.3(2) of each of those directives, having full regard to the relevant provisions of the Treaty, which included not only art.90 of the EC Treaty (now art.110 TFEU), to which art.3(2) of each of those directives referred, but also arts 30 of the EC Treaty (now art.28 TFEU) and art.36 of the EC Treaty (now, after amendment, art.30 TFEU), enshrining the free ***1329** movement of goods, as was apparent in particular from recitals 3, 15 and 19 of Directive 96/92 . [92]

Securing objective and necessity

H25 As regards art.86 EC (now art.106 TFEU), although art.3(2) of Directive 2003/54 , read in conjunction with that provision of the Treaty, allowed obligations to be imposed on undertakings responsible for operating a public service as regards, inter alia, setting prices for the supply of electricity, national legislation imposing such obligations had to be capable of securing the objective which it pursued and not go beyond what was necessary in order to attain it, so as to be consistent with the principle of proportionality. [93]
Enel Produzione SpA v Autoritaper l'energia elettrica e il gas (C-242/10), judgment of 21 December 2011 , not yet reported, followed.

Hindering imports of electricity

H26 Legislation such as the regional legislation at issue in the main proceedings was capable of hindering—at least indirectly and potentially—imports of electricity, especially green electricity, from other Member States. [97]

Measure having effect equivalent to quantitative restriction

H27 Encouraging, as it did, operators, particularly electricity suppliers, to buy green electricity produced in the particular region or in the Member State to which that region belonged, owing to the economic advantage arising from the fact that the distribution of that electricity was free of charge, such legislation had to be regarded as a measure having an effect equivalent to a quantitative restriction as referred to in art.28 EC (now art.34 TFEU). [98]
Commission of the European Communities v Italy (103/84) [1986] E.C.R. 1759, followed .

Irrelevance of scale of hindrance

H28 A national measure did not fall outside the scope of the prohibition laid down in art.28 EC (now art.34 TFEU) merely because the hindrance to imports which it created was slight and because it was possible for imported products to be marketed in other ways. [99]
Commission of the European Communities v Italy (103/84) [1986] E.C.R. 1759, followed .

Public interest or overriding requirements

H29 National legislation which constituted a measure having equivalent effect to quantitative restrictions may nonetheless have been justified on one of the public interest grounds listed in art.30 EC (now art.36 TFEU) or by overriding requirements. In either case, the national provision had, in accordance with the principle of proportionality, to be appropriate for ensuring attainment of the objective pursued and had to not go beyond what was necessary in order to attain that objective. [100] ***1330**
Ålands Vindkraft AB v Energimyndigheten (C-573/12) EU:C:2014:37; EU:C:2014:2037; [2015] 1 C.M.L.R. 10, followed .

Justification on basis of protection of environment

H30 National measures that were capable of hindering intra-Community trade could, thus, inter alia, have been justified by overriding requirements relating to the protection of the environment and notably by the concern to promote an increase in the use of renewable energy sources for the production of electricity, which was useful for such protection and which was also designed to protect the health and life of humans, animals and plants, which were among the public interest grounds listed in art.30 EC (now art.36 TFEU). [101]
Ålands Vindkraft AB v Energimyndigheten (C-573/12) EU:C:2014:37; EU:C:2014:2037; [2015] 1 C.M.L.R. 10, followed .

Production stage

H31 The fact that a national support scheme was designed to favour directly the production of green electricity, rather than solely its consumption, could have been explained, in particular, by the fact that the green nature of the electricity related only to its method of production and that, accordingly, it was primarily at the production stage that the environmental objectives in terms of the reduction of greenhouse gases could actually have been pursued. [105]
Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt (C-204–208/12) EU:C:2013:294; EU:C:2014:2192, followed .

Increase in national production of green electricity

H32 It followed from a reading of art.3(1) and (2) in conjunction with art.4 of Directive 2001/77 that national support mechanisms for producers of electricity as referred to in the latter article, which were used inter alia to help Member States achieve the respective national indicative targets imposed on them by that directive, had in principle to lead to an increase in national production of green electricity. [106]
Green Network SpA v Autorità per l'energia elettrica e il gas (C-66/13) EU:C:2014:2399; [2015] 2 C.M.L.R. 3, followed .

Possibility for limitations

H33 That circumstance, combined in particular with the fact that EU law had not harmonised the national support schemes for green electricity, meant that it was possible in principle for Member States to limit access to such schemes to green electricity production located in their territory. [107]
Ålands Vindkraft AB v Energimyndigheten (C-573/12) EU:C:2014:37; EU:C:2014:2037; [2015] 1 C.M.L.R. 10, followed .

Conferring certain economic advantage

H34 An obligation to purchase green electricity at minimum prices was capable of conferring a certain economic advantage on producers of that type of electricity, ***1331** since it guaranteed them, with no risk, higher profits than they would have made in its absence. [108]
PreussenElektra AG v Schleswag AG (C-379/98) [2001] E.C.R. I-2099; [2001] 2 C.M.L.R. 36, followed .

Facilitate sale of green energy

H35 Commenting on national support schemes that used the mechanism of what were known as "green certificates", the Court had observed that the obligation for electricity suppliers to obtain a quota of such certificates from green electricity producers was designed in particular to guarantee those producers a demand for the certificates they had been awarded and in that way to facilitate the sale of the green energy that they produced at a price higher than the market price for conventional energy. The Court also pointed out in that regard that the effect of that scheme in terms of offering an incentive for electricity producers in general to increase their production of green electricity did not appear to be open to doubt; nor, consequently, did it appear possible to call into question the ability of that scheme to attain the legitimate objective pursued in the circumstances of the case. [109]
Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt (C-204–208/12) EU:C:2013:294; EU:C:2014:2192, followed .

Fostering investment in new installations

H36 Such green energy support schemes, whose production costs seemed to be still quite high as compared with the costs of electricity produced from non-renewable energy sources, were inherently designed in particular to foster, from a long-term perspective, investment in new installations, by giving producers certain guarantees about the future marketing of their green electricity. [110]
Ålands Vindkraft AB v Energimyndigheten (C-573/12) EU:C:2014:37; EU:C:2014:2037; [2015] 1 C.M.L.R. 10, followed .

Not directly supporting producers of green electricity

H37 In the present case, with regard to the scheme for the free distribution of green electricity established by the regional legislation at issue in the main proceedings, unlike the national support schemes for green electricity in the form of purchase obligations or green certificates, it was not the purpose of that scheme to give direct support to producers of green electricity.

[111]

Financial advantage conferred primarily on supplier

H38 The free distribution of green electricity constituted a financial advantage conferred primarily on the supplier of such electricity, which may, in certain circumstances, depending notably on the sale price which the consumer was charged by the supplier for his electricity, to a certain extent and indirectly also have benefited the consumer. [112] ***1332**

No certainty of requirement to benefit

H39 Such a support mechanism offered no certainty that the economic advantage thus obtained for suppliers would ultimately have actually and essentially been required to benefit producers of green electricity, particularly the smallest local generating installations which the Flemish Region claimed to have wanted to support, which were not both producers and suppliers. [113]

Dependent on various factors

H40 The benefit that such green electricity producers may have derived from that economic advantage would have depended on various factors specific to the markets, such as, for example, electricity prices on the market, supply and demand, or the balance of power between the operators involved and the extent to which suppliers would have been prepared to allow producers to benefit from that advantage. [114]

Non-establishment of ability to achieve objective

H41 In view of what was thus the indirect, uncertain and risky nature of any support that might have flowed for the green electricity producer himself from the free distribution scheme at issue in the main proceedings, the genuine ability of that scheme to achieve the legitimate objective pursued in the present case, which was to create an effective incentive for operators to produce more green electricity notwithstanding the additional costs of production, thus contributing to the Member States' achievement of the indicative production targets imposed on them under art.3 of Directive 2001/77 , had not been established. [115]

Failing to satisfy requirements of principle of proportionality

H42 On account of that indirect, uncertain and risky nature, and given that there were, moreover, other methods—such as, for example, the grant of green certificates—which did contribute in a certain and effective way to the pursuit of the objective of increasing green electricity production, notably without undermining the introduction of third-party free access to distribution systems on terms that were non-discriminatory, as provided for, inter alia, in art.20(1) of Directive 2003/54 , that being one of the measures that was essential to bringing about completion of the internal market in electricity, regional legislation such as that at issue in the main proceedings did not satisfy the requirements arising under the principle of proportionality, and that the interference with that free access and with the free movement of goods which it entailed could not, therefore, have been justified by that objective. [116]

Infringement of EU law

H43 Failing as it did to satisfy the requirements arising under the principle of proportionality, regional legislation such as that at issue in the main proceedings infringed the provisions of art.28 EC (now art.34 TFEU) and 30 EC (now art.36 TFEU), art.3(2) and art.16 of Directive 96/92 , art.3(2) and (8) and art.20(1) of Directive 2003/54 , and arts 3 and 4 of Directive 2001/77 . [117] ***1333**

H44 Cases referred to in the judgment:

- 1 AEM SpA v Autorità per l'energia Elettrica e per il Gas (C-128/03 & C-129/03) [2005] E.C.R. I-2861; [2005] 2 C.M.L.R. 60
- 2 Ålands Vindkraft AB v Energimyndigheten (C-573/12) EU:C:2014:37; EU:C:2014:2037; [2015] 1 C.M.L.R. 10
- 3 Citiworks AG v Sächsisches Staatsministerium für Wirtschaft und Arbeit als Landesregulierungsbehörde (C-439/06) [2008] E.C.R. I-3913
- 4 Commission of the European Communities v Italy (103/84) [1986] E.C.R. 1759
- 5 Enel Produzione SpA v Autoritaper l'energia

elettrica e il gas (C-242/10), judgment of 21 December 2011 , not yet reported
•6 Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt (C-204–208/12) EU:C:2013:294; EU:C:2014:2192
•7 Green Network SpA v Autorità per l'energia elettrica e il gas (C-66/13) EU:C:2014:2399; [2015] 2 C.M.L.R. 3
•8 Industrie du bois de Vielsalm & Cie (IBV) SA v Région wallonne (C-195/12) EU:C:2013:598; [2014] 1 C.M.L.R. 43
•9 Land Oberösterreich v ČEZ as (C-115/08) [2009] E.C.R. I-10265
•10 PreussenElektra AG v Schleswag AG (C-379/98) [2001] E.C.R. I-2099; [2001] 2 C.M.L.R. 36
•11 Procureur du Roi v Dassonville (8/74) [1974] E.C.R. 837; [1974] 2 C.M.L.R. 436
•12 Sabatauskas v Lietuvos Respublikos Seimas (C-239/07) [2008] E.C.R. I-7523
•13 Société Arcelor Atlantique et Lorraine v Premier Ministre (C-127/07) [2008] E.C.R. I-9895
•14 Vereniging voor Energie Milieu en Water v Directeur van de Dienst Uitvoering en Toezicht Energie (C-17/03) [2005] E.C.R. I-4983; [2005] 5 C.M.L.R. 8

H45 Further cases referred to by the Advocate General:

•1 Commission of the European Communities v Belgium (C-2/90) [1992] E.C.R. I-4431; [1993] 1 C.M.L.R. 365
•2 Commission of the European Communities v Italy (7/68) [1968] E.C.R. 423; [1969] C.M.L.R. 1
•3 Commission of the European Communities v Italy (C-263/85) [1991] E.C.R. I-2457
•4 EI Du Pont de Nemours Italiana SpA v Unità Sanitaria Locale No.2 di Carrara (C-21/88) [1990] E.C.R. I-889; [1991] 3 C.M.L.R. 25
•5 Essent Netwerk Noord BV v Aluminium Delfzijl BV (C-206/06) [2008] E.C.R. I-5497; [2008] 3 C.M.L.R. 32
•6 Nagy v Vas Megyei Rendőr-főkapitányság (C-583/14) EU:C:2015:737
• 7 Vlaamse Dierenartsenvereniging VZW v Belgische Staat (C-42/10, C-45/10 & C-57/10), judgment of 14 April 2011 , not yet reported

H46 Legislation referred to by the Court:

• Treaty on the Functioning of the European Union, arts 34 and 36
• Directive 2003/54, arts 3 and 20
•Directive 2001/77, arts 3 and 4
• Directive 96/92, arts 3 and 16 ***1334**

H47 Representation

• D. Haverbeke and W. Vandorpe , advocaten, for Essent Belgium NV.
• S. Vernaillen , advocaat, for Vlaams Gewest and the VREG.
• S. Lekkou and V. Pelekou , acting as Agents, for the Hellenic Republic.
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Opinion [1]

Introduction

AG1 This request for a preliminary ruling concerns the interpretation of arts 12 , 28 and 30 EC , and of art.3(1) and (4) of Directive 2003/54 concerning common rules for the internal market in electricity and repealing Directive 96/92 . [2]

AG2 The request has been made in proceedings between Essent Belgium NV [3] and, inter alia, Vlaams Gewest (Flemish Region) raising the issue of the non-contractual liability of that region owing to its adoption of successive rules reserving the benefit of the free distribution of electricity produced from renewable sources of energy [4] to green electricity fed directly into the distribution systems, initially, in the Flemish Region and, thereafter, throughout the Member State of which that region forms part.

AG3 In Ålands Vindkraft , [5] and Essent Belgium , [6] the Court allowed the benefit of national support schemes for the production of green electricity using tradable certificates to be limited solely to the production of green electricity in the Member State concerned.

AG4 Having already had the opportunity to set out the reasons why such territorial limitations on support schemes do not seem to me to be compatible with the

requirements of the free movement of goods, [7] I shall not mount a rearguard action, although I do not find the Court's reasoning in those judgments to be persuasive.

AG5 I shall, in this Opinion, confine myself to determining whether the Court's reasoning may be transposed to a scheme for the free distribution of green electricity such as those at issue in the main proceedings.

AG6 I shall answer this question in the affirmative, on the basis of the principle of non-discrimination which is set out in, inter alia, art.12 EC and Directive 96/92 , [8] Directive 2003/54 and Directive 2001/77 , [9] as well as in arts 28 and 30 EC , which must be interpreted as not precluding national legislation such as that at issue in the main proceedings, which, in reserving the benefit of the free distribution of ***1335** green electricity solely to generating installations directly connected to the distribution systems in the Member State concerned or in a region of that State, thereby excludes generating installations located in other Member States.

Legal context

EU law

Legislation on the internal electricity market

AG7 The gradual completion of the internal electricity market has entailed the adoption of several successive directives, including Directive 96/92 and Directive 2003/54 .

Directive 96/92

AG8 Recital 4 of Directive 96/92 emphasised the importance of establishing the internal market in electricity in order to increase efficiency in the production, transmission and distribution of electricity, while reinforcing security of supply and the competitiveness of the European economy and respecting environmental protection.

AG9 Recital 28 of that directive stated that, for reasons of environmental protection, priority could be given to the production of green electricity.

AG10 Article 11(2) and (3) of that directive provided:

> • "2. In any event, [the electricity distribution system operator] must not discriminate between system users or classes of system users, particularly in favour of its subsidiaries or shareholders.
> • 3. A Member State may require the distribution system operator, when dispatching generating installations, to give priority to generating installations using renewable energy sources or waste or producing combined heat and power."

AG11 Article 16 of Directive 96/92 provided:

> "For the organisation of access to the system, Member States may choose between the procedures referred to in Article 17 and/or in Article 18 . Both sets of procedure shall operate in accordance with objective, transparent and non-discriminatory criteria."

Directive 2003/54

AG12 Directive 2003/54 , which came into force on 4 August 2003, was repealed by Directive 2009/72 . [10]

AG13 Recital 26 of Directive 2003/54 stated that

> "the respect of the public service requirements is a fundamental requirement of this Directive, and it is important that common minimum standards, respected by all Member States, are specified in this Directive, which take into account the objectives of common protection, security of supply, environmental protection and

> equivalent levels of competition in all Member ***1336** States. It is important that the public service requirements can be interpreted on a national basis, taking into account national circumstances and subject to the respect of Community law."

AG14 Article 2(3) and (5) of that directive respectively defined "transmission" as

> "the transport of electricity on the extra high-voltage and high-voltage interconnected system with a view to its delivery to final customers or to distributors"

and "distribution" as "the transport of electricity on high-voltage, medium voltage and low voltage distribution systems with a view to its delivery to customers".

AG15 Article 3 of that directive, which is found in Ch.II , entitled "General rules for the organisation of the sector", set out in para.1 the principles of free competition and non-discrimination between electricity undertakings.

AG16 However, art.3(2) of Directive 2003/54 authorised the Member States to impose on electricity undertakings, in the general economic interest, public service obligations which could relate to security, including security of supply, regularity, quality and price of supplies and environmental protection, including energy efficiency and climate protection, provided that those obligations "[are] clearly defined, transparent, non-discriminatory, verifiable", and "guarantee equality of access for EU electricity companies to national consumers". Article 3(4) of the directive stated that if the Member State granted compensation or exclusive rights for the fulfilment of those obligations, it had to be done "in a non-discriminatory and transparent way".

AG17 Moreover, art.3(7) of the directive permitted the Member States to

> "implement appropriate measures to achieve the objectives of social and economic cohesion, environmental protection, which may include energy efficiency/demand-side management measures and means to combat climate change, and security of supply."

Such measures might include

> "the provision of adequate economic incentives, using, where appropriate, all existing national and Community tools, for the maintenance and construction of the necessary network infrastructure, including interconnection capacity."

AG18 Article 14 of Directive 2003/54 , which appears in Ch.V , entitled "Distribution System Operation", provided in para.2 that,

> "in any event, [the distribution system operator] must not discriminate between system users or classes of system users, particularly in favour of its related undertakings."

Article 14(4) of that directive expressly permitted the Member States to

> "require the distribution system operator, when dispatching generating installations, to give priority to generating installations using renewable energy sources or waste or producing combined heat and power."

AG19 Article 20(1) of that directive left it to the Member States to take the necessary measures to implement a system of third party access to the transmission and ***1337** distribution systems based on published tariffs and "applied objectively and without discrimination between system users".

AG20 Article 23 of Directive 2003/54 required the Member States to designate regulatory authorities at least responsible for ensuring non-discrimination, effective competition and the efficient functioning of the market and for fixing or approving, prior to their entry into force, at least the methodologies used to calculate or establish in particular the terms and conditions for connection and access to national networks, including transmission and distribution tariffs. Those authorities had the authority to require transmission and distribution system operators, if necessary, to modify the terms and conditions, tariffs, rules, mechanisms and methodologies referred to in paras 1, 2 and 3 of art.23 to ensure that they were proportionate and applied in a non-discriminatory manner.

Legislation on the promotion of green electricity

AG21 The legislation applicable *ratione temporis* to the main proceedings is Directive 2001/77 , which was repealed by Directive 2009/28 . [11]

AG22 Recital 1 of Directive 2001/77 recognised the need to promote renewable energy sources as a priority measure, while recital 2 stated that the promotion of green electricity was a high Community priority.

AG23 Recital 14 of that directive mentioned the importance of guaranteeing the proper functioning of the mechanisms of support for renewable energy sources at the national level, until a Community framework was put into operation, while recital 15 stated that it was too early to adopt such a framework.

AG24 Recital 19 of Directive 2001/77 referred to the necessity of taking into account, when favouring the development of a market for renewable energy sources, the positive impact on regional and local development opportunities, export prospects, social cohesion and employment opportunities, especially as regards small and medium-sized undertakings as well as independent power producers.

AG25 Pursuant to art.1 of Directive 2001/77 , the purpose of the directive is

> "to promote an increase in the contribution of renewable energy sources to electricity production in the internal market for electricity and to create a basis for a future Community framework thereof."

AG26 Article 4 of that directive, entitled "Support schemes", provided at para.1 :

> "Without prejudice to Articles 87 and 88 [EC] , the Commission shall evaluate the application of mechanisms used in Member States according to which a producer of electricity, on the basis of regulations issued by the public authorities, receives direct or indirect support, and which could have the effect of restricting trade, on the basis that these contribute to the objectives set out in Articles 6 and 174 [EC] ."

AG27 Article 7 of the directive, entitled "Grid system issues", provided as follows:

> • "1. Without prejudice to the maintenance of the reliability and safety of the grid, Member States shall take the necessary measures to ensure that transmission system operators and distribution system operators ***1338** in their territory guarantee the transmission and distribution of [green electricity]. They may also provide for priority access to the grid system of [green electricity]. When dispatching generating installations, transmission system operators shall give priority to generating installations using renewable energy sources in so far as the operation of the national electricity system permits.
> • 2. Member States shall put into place a legal framework or require transmission system

operators and distribution system operators to set up and publish their standard rules relating to the bearing of costs of technical adaptations, such as grid connections and grid reinforcements, which are necessary in order to integrate new producers feeding [green electricity] into the interconnected grid.These rules shall be based on objective, transparent and non-discriminatory criteria taking particular account of all the costs and benefits associated with the connection of these producers to the grid. The rules may provide for different types of connection.

• 3. Where appropriate, Member States may require transmission system operators and distribution system operators to bear, in full or in part, the costs referred to in paragraph 2.

•…

• 6. Member States shall ensure that the charging of transmission and distribution fees does not discriminate against [green electricity], including in particular electricity from renewable energy sources produced in peripheral regions, such as island regions and regions of low population density.Where appropriate, Member States shall put in place a legal framework or require transmission system operators and distribution system operators to ensure that fees charged for the transmission and distribution of electricity from plants using renewable energy sources reflect realisable cost benefits resulting from the plant's connection to the network. Such cost benefits could arise from the direct use of the low-voltage grid.

•…"

Belgian law

AG28 In order to promote the production of green electricity, the Flemish Government instituted a scheme for the free use of the distribution system for the benefit of producers of green electricity.

AG29 According to art.15 of the *vlaams decreet houdende de organisatie van de elektriciteitsmarkt* (Flemish Decree of 17 July 2000 on the organisation of the electricity market) [12] :

> "The system operator shall perform, free of charge, all tasks necessary for the distribution of green electricity, with the exception of connection to the distribution system. ***1339**
>
> The Flemish Government may impose restrictions on the arrangement referred to in the first paragraph."

AG30 Article 15 of the Electricity Decree was repealed with effect from 1 January 2005 by art.61 of the *vlaams decreet houdende bepalingen tot begeleiding van de begroting 2005* (Flemish Decree of 24 December 2004 on measures to accompany the 2005 budget). [13]

AG31 Before that provision was repealed, the detailed rules for the application of the free distribution scheme underwent significant changes, as evidenced by the successive adoption of three decisions.

AG32 First of all, the *besluit van de vlaamse regering inzake de bevordering van elektriciteitsopwekking uit hernieuwbare energiebronnen* (Decision of 28 September 2001 of the Flemish Government promoting the production of electricity from renewable energy sources) [14] made free distribution available in respect of

electricity produced in a region other than the Flemish Region or abroad. According to art.14 of that decision:

> "…
>
> The system operator shall perform, free of charge, the tasks referred to in Article 15 of the [Electricity Decree] …
>
> As regards electricity not produced in the Flemish Region, the authority responsible for issuing green-electricity certificates for the generating site concerned shall provide the regulatory authority with a certificate guaranteeing that that electricity was produced from a renewable energy source … and is intended for an end-user in Flanders.
>
> …"

AG33 Next, as amended by the Decision of 4 April 2003, [15] which came into force on 30 April 2003, art.14 of the Decision of 28 September 2001 limited the benefit of free distribution solely to generating installations located in the Flemish Region. Article 14 was worded as follows:

> • "§ 1 In accordance with the second paragraph of Article 15 of the [Electricity Decree], free distribution, as referred to in the first paragraph of Article 15 of that Decree, is restricted to the feed-in of electricity produced by the generating installations connected to the distribution systems in the Flemish Region.
> • § 2 Suppliers of [green electricity] shall not charge, in an interim invoice to, or the final account of, the end-user of that electricity any fee for the cost for its distribution …
> •…"

AG34 Having been seised of an action brought by Essent for annulment of art.2 of the Decision of 4 April 2003, the *Raad van State* (Council of State, Belgium) suspended operation of that provision by a judgment of 12 January 2004.

AG35 Subsequent to that suspension, there followed, thirdly, the adoption of the *besluit van de vlaamse regering inzake de bevordering van elektriciteitsopwekking uit hernieuwbare energiebronnen* (Decision of 5 March 2004 of the Flemish Government promoting the production of electricity from renewable energy sources), ***1340** [16] which repealed and replaced the Decision of 28 September 2001 with effect from 23 March 2004.

AG36 Article 18 of the Decision of 5 March 2004 provided:

> • "§ 1 In accordance with the second paragraph of Article 15 of the [Electricity Decree], free distribution, as referred to in the first paragraph of Article 15 of that Decree, is restricted to the electricity supplied to end-users connected to a distribution system in the Flemish Region which is produced from a renewable energy source, as provided for in Article 15, in a generating installation which feeds its electricity directly into a distribution system in Belgium.
> • § 2 Suppliers of [green electricity] shall not charge in the final account of the end-users of that electricity any fee for the cost of its distribution …
> •…"

AG37 Having been seised of an action brought by Essent for annulment of art.18 of the Decision of 5

March 2004, the *Raad van State* suspended operation of that provision by a judgment of 23 December 2004, before dismissing the action by a judgment of 13 November 2012.

AG38 Following the repeal of art.15 of the Electricity Decree by the Flemish Decree on measures to accompany the 2005 budget of 24 December 2004, art.18 of the Decision of 5 March 2004 was repealed, with effect from 1 January 2005, by the Decision of the Flemish Government of 25 March 2005. [17]

The dispute in the main proceedings and the questions referred for a preliminary ruling

AG39 Since 2003, Essent has been providing customers residing in the Flemish Region with electricity which it imports from the Netherlands and which, it claims, is green electricity.

AG40 Being of the opinion that it had suffered damage in losing the benefit of free distribution on the distribution system in the Flemish Region as a result of the legislative changes introduced by the Decision of 4 April 2003, and then by the Decision of 5 March 2004, Essent brought an action for liability before the *rechtbank van eerste aanleg te Brussel* (Court of First Instance, Brussels) against, inter alia, the Flemish Region, requesting that the judgment to be delivered be declared enforceable against, inter alia, the *Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt* (Flemish regulator of the gas and electricity market), [18] the body competent to rule on electricity distribution tariffs and any free distribution, and against various private and public distribution system operators which had claimed payment of distribution costs from Essent.

AG41 In support of those claims, Essent argued, inter alia, that the provisions excluding green electricity from other Member States from the benefit of free distribution were contrary to arts 12 and 28 EC , as well as to art.3(1) and art.11(2) of Directive 96/92 . ***1341**

AG42 It is in that context that the *rechtbank van eerste aanleg te Brussel* (Court of First Instance, Brussels) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

"(1) Should Article 28 and Article 30 EC be interpreted as precluding a regulation of a Member State—in the present case the Electricity Decree, read in conjunction with the Decision of 4 April 2003—restricting the free distribution of green electricity to the feed-in of electricity produced by the generating installations connected to the distribution systems in the Flemish Region and excluding electricity from generating installations which are not connected to distribution systems in the Flemish Region?

(2) Should Article 28 and Article 30 EC be interpreted as precluding a regulation of a Member State—in the present case the Electricity Decree, read in conjunction with the Decision of 5 March 2004 as applied by [the regulator]—which restricts the free distribution of green electricity to electricity produced by generating installations which feed directly into a distribution system in Belgium and excludes from free distribution the electricity produced by generating installations which do not feed directly into a distribution system in Belgium?

(3) Is a national rule as referred to in question 1 and question 2 compatible with the principle of equal treatment and the prohibition of discrimination as embodied inter alia in Article 12 EC and Article 3(1) and (4) of the then Directive 2003/54 ?"

My assessment

Preliminary observations

AG43 First of all, it is necessary to determine which provisions of EU law are relevant in order to reply to the request for a preliminary ruling.

AG44 In this connection, it must be observed, with regard in the first place to the provisions applicable *ratione temporis* , that, notwithstanding the fact that the national court did not refer to Directive 96/92 , having regard to the fact that the Decision of 28 September 2001 was adopted before the entry into force of Directive 2003/54 , the request for a preliminary ruling must be examined in the light not only of the rules set out in that directive but also of those set out in Directive 96/92 .

AG45 It must be observed, with regard in the second place to the provisions applicable *ratione materiae* , that, although the national court referred exclusively to art.3(1) and (4) of Directive 2003/54 in affirming the principle of non-discrimination in secondary law, that directive contains other provisions which are relevant insofar as they constitute particular expressions of that principle in the implementation of access to transmission and distribution systems.

AG46 What is more, it must be noted that Directive 2001/77 contains, inter alia, in art.7 , specific provisions relating to the conditions for the connection and distribution of green electricity. ***1342**

AG47 In accordance with settled case law, [19] I shall reply to the request for a preliminary ruling in the light of all the provisions of Directive 2003/54 and Directive 2001/77 that may be relevant to the issues raised.

AG48 I shall consider this request, first of all, from the perspective of non-discrimination, before going on to examine it from the perspective of the free movement of goods. [20]

The third question

AG49 By its third question, the national court asks, in essence, whether the rules of non-discrimination contained in art.12 EC and in Directive 96/92 , Directive 2003/54 and Directive 2001/77 preclude national legislation such as that at issue in the main proceedings which, by reserving the benefit of free distribution of green electricity solely to generating installations directly connected to the distribution systems located in the Member State concerned or in a region of that State, thereby excludes generating installations located in other Member States.

AG50 I observe that the relevant directives contain various provisions which are similarly specific expressions of the principle of non-discrimination, even though they appear to address differing concerns.

AG51 Among the relevant provisions of secondary law, there are some which enshrine, in a general way, the principle of non-discrimination in the electricity sector, while others relate more specifically to the prohibition of any discrimination against green electricity. Finally, others seem to enshrine a principle of positive discrimination in favour of green electricity.

AG52 A first series of provisions establishes, in a general way, the principle of non-discrimination in relation to access to transmission and distribution systems.

AG53 Thus, arts 3(1) and 14(2) of Directive 2003/54 , which are respectively drafted in terms which are more or less identical to those of arts 3(1) and 11(2) of Directive 96/92 , require that the actions of the State and of system operators in implementing access to the system be non-discriminatory. That prohibition must be compared with that set out in art.16 of Directive 96/92 , which prohibits the Member States from organising access to the systems in a discriminatory manner, whether they choose the procedure for negotiated access to the system or the single buyer procedure, and with that set out in art.20(1) of Directive 2003/54 , which provides that the Member States must ensure the implementation of a system of third party access to the transmission and distribution systems based on published tariffs applicable to all eligible customers and "applied objectively and without discrimination between system users".

AG54 The general principle of non-discrimination in system access also finds particular expression in the tasks conferred on the regulatory authorities by art.23(1)(f) and (4) of Directive 2003/54 , which provides that they are responsible for "ensuring non-discrimination" and "effective competition", in particular with regard to the terms, conditions and tariffs for connecting new producers of electricity "to guarantee that these are objective, transparent and non-discriminatory". Those guarantees must be obtained taking account in particular of "the costs and

benefits of the various renewable energy sources technologies". ***1343**

AG55 A second series of provisions relates more specifically to the prohibition of discrimination against green electricity.

AG56 Thus, art.7(2) of Directive 2001/77 provides that the standard rules relating to the bearing of costs of technical adaptations which are necessary in order to integrate new producers feeding green electricity into the interconnected grid must be based on "objective, transparent and non-discriminatory criteria" taking particular account of all the costs and benefits associated with the connection of those producers to the grid.

AG57 Following the same logic, art.7(6) of that directive requires the Member States to ensure that the charging of transmission and distribution fees does not discriminate against green electricity,

> "including in particular electricity from renewable energy sources produced in peripheral regions, such as island regions and regions of low population density."

The provision states that, where appropriate, the Member States are to put in place a legal framework or require transmission system operators and distribution system operators to ensure that fees charged for the transmission and distribution of green electricity reflect realisable cost benefits resulting from the plant's connection to the network, and those reductions in cost may "arise from the direct use of the low-voltage grid".

AG58 A third series of provisions establishes the possibility of positive discrimination justified by the objective of environmental protection.

AG59 I place in that category art.3(2) of Directive 2003/54 , which essentially repeats the wording of art.3(2) of Directive 96/92 , allowing the Member States to impose on undertakings operating in the electricity sector public service obligations, which may relate, inter alia, to "environmental protection", "including energy efficiency and climate protection", [21] provided that those obligations are "clearly defined, transparent, non-discriminatory and verifiable" and "guarantee equality of access for EU electricity companies to national consumers". [22]

AG60 Article 11(3) of Directive 96/92 , art.14(4) of Directive 2003/54 and art.7(1) of Directive 2001/77 , which gave green electricity priority access to the grid system, must also be included in that category.

AG61 Does the prohibition of any discrimination, in particular in the area of tariffs, between system users preclude a Member State from adopting measures, such as those at issue in the main proceedings, which provide for free distribution only in respect of green electricity fed directly into the distribution systems?

AG62 In the first analysis, the answer seems clear, inasmuch as the measure providing for distribution to be free of charge seems to constitute twofold discrimination, first, as between green electricity and electricity not produced from renewable energy sources and, secondly, as between electricity fed directly into the distribution systems and electricity, such as imported electricity, which is first fed into the transmission systems. Moreover, the latter discrimination seems directly to contradict the rule set out in the first subparagraph of art.7(6) of Directive 2001/77 , which prohibits discrimination by reference to the geographical origin of green electricity. ***1344**

AG63 However, it remains to be seen whether such discrimination can be justified by invoking the aim of promoting the use of renewable energy sources.

AG64 Although the Court has not expressly named the possibility of invoking environmental protection as a justification for discriminatory measures, which would have permitted useful clarification of case law that has been described as "confusing", [23] several of its judgments can nevertheless only be understood if it is assumed that such an objective is acceptable as justification for measures whose discriminatory character has been established previously.

AG65 A phenomenon whereby the discrimination is concealed emerges clearly from the case law, although the process that is at play in reaching that result is shrouded in a certain degree of mystery.

AG66 I recall that, in Commission v Belgium , [24] concerning the case referred to as "Walloon waste", the Court, while stating that imperative requirements can be taken into account only in the case of measures which apply without distinction to both domestic and

imported products, nonetheless accepted, on the basis of the principle that environmental damage should as a matter of priority be remedied at source, and of the principles of self-sufficiency and proximity, that,

> "having regard to the differences between waste produced in different places and to the connection of the waste with its place of production,"

the contested measures which prohibited the importing of waste into the region concerned could not be regarded as discriminatory. [25]

AG67 It was therefore by applying the case law according to which the principle of equal treatment requires that comparable situations are not treated differently and that different situations are not treated in the same way that the Court avoided a finding of discrimination, and the fact that the situation was different owing to the "particular nature of waste" justified different treatment.

AG68 In PreussenElektra , [26] the Court, without attaching importance to whether a national rule requiring electricity suppliers to buy green electricity produced in their supply area at minimum prices was discriminatory or not, found that that rule was not incompatible with the free movement of goods, on the grounds, inter alia, that the measure was useful for environmental protection and was "also" designed to protect the health and life of humans, animals and plants, which constitute public interest grounds as defined by art.30 EC .

AG69 Finally, I note that in Essent Belgium , [27] on the question relating to possible infringement of the rules of non-discrimination, the Court stated, in particular, that

> "the referring court [had] not explain[ed] how [the green certificate] scheme … [was] liable to give rise to differential treatment constituting discrimination on grounds of nationality, nor how such differential treatment, if it did occur, ***1345** should be distinguished from that relating to the guarantees of origin and imports of electricity originating from other Member States, which [was] already covered by the first question referred," [28]

which invited the Court to examine that national measure in the light of the free movement of goods.

AG70 The question of discrimination is thus absorbed into a general examination of the question whether there is any obstacle and the possible justification for it.

AG71 Even though the basis for the solution seems to have changed and it is, furthermore, difficult to determine whether it is to be found in the abandonment of the rule that only a measure which applies without distinction may be justified by one of the imperative requirements enshrined in the case law of the Court, or in the linking of the promotion of renewable sources of energy to some of the public interest grounds set out in art.30 EC , it is possible to infer from those precedents that the Court accepts that discriminatory national measures may be justified by the objective of environmental protection, subject to the condition that they comply with the principle of proportionality. [29]

AG72 I cannot see why the position should be any different where the national measure is to be examined in the light not of the general principle of non-discrimination but of the particular enactments of that principle contained in provisions of secondary law.

AG73 In my view, those rules on non-discrimination would preclude reliance on the environmental protection justification only if they prohibited or harmonised national legislation on the restrictions which may be applied to imports of green electricity for the purpose of promoting renewable energy sources. In other words, it would only be if a provision of secondary law prohibited all obstacles to the import of green electricity, or stated expressly in what cases restrictions may be accepted in order to ensure the promotion of green electricity, that the Member States would no longer have any leeway authorising them to rely on such grounds to justify a restriction.

AG74 Yet I find no such provisions either in Directive 96/92 and Directive 2003/54 , or in Directive 2001/77 , given that art.7(6) of the latter, which is intended to prohibit discrimination against green electricity generating installations based on a geographical

criterion, in particular where they are situated in peripheral regions which are subject to difficulties connecting to the main European electricity grids, cannot be interpreted as excluding any difference in treatment based on a national criterion and justified, according to the Court's reasoning, by the highlighting of an objective situational difference between the production of domestic green electricity and the production of green electricity in other Member States.

AG75 Those are the reasons why I propose to reply to the third question that the rules on non-discrimination in art.12 EC and Directive 96/92 , Directive 2003/54 and Directive 2001/77 do not preclude national legislation such as that at issue in the main proceedings which, by reserving the benefit of free distribution of green electricity solely to generating installations directly connected to the distribution systems situated in the Member State concerned, or in a region of that State, thereby ***1346** excludes generating installations situated in other Member States, provided that that national legislation complies with the principle of proportionality inasmuch as it is appropriate to the aim in view and does not go beyond what is necessary in order for that aim to be attained.

AG76 I shall analyse the proportionality of the schemes at issue in the main proceedings from the perspective of the free movement of goods.

The first and second questions

AG77 By its first and second questions, which must be considered together, the national court asks, in essence, whether arts 28 and 30 EC must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, by reserving the benefit of free distribution of green electricity solely to those generating installations directly connected to distribution systems situated in the Member State concerned, or in a region of that State, thereby excludes generating installations situated in other Member States.

AG78 The question referred is therefore whether the schemes at issue in the main proceedings are liable to impede imports of electricity, in particular green electricity, from other Member States and so constitute measures having equivalent effect to a quantitative restriction on imports, which are in principle prohibited by art.28 EC unless the rules can be objectively justified.

AG79 Since that question clearly calls to mind those to which the Court replied in its two recent judgments of Ålands Vindkraft , [30] and Essent Belgium , [31] on the consistency with EU law of national schemes to support the production of green electricity, the starting point for the reasoning to be followed is to determine whether the nature of the solutions arrived at in those two cases can simply be transposed to this case or whether, on the contrary, this case involves particular factors that would justify a departure from them.

AG80 Indeed the interested parties who presented observations to the Court were not wrong in this respect.

AG81 On the one hand, the Flemish Region, the Greek Government and the Commission argue, reasoning by analogy, that the territorial limitations to the schemes for the free distribution of green electricity must be regarded as justified since, like the legislation at issue in the cases which gave rise to the judgments of Ålands Vindkraft , [32] and Essent Belgium , [33] they pursue the legitimate objective of encouraging the use of renewable sources of energy in the production of electricity. However, there is a notable difference between the position of the Flemish Region on the one hand, and that of the Greek Government and the Commission on the other, which is worthy of mention. According to the Flemish Region, the limitation on the free distribution of green electricity does not constitute a measure having equivalent effect to a quantitative restriction on imports insofar as, relating as it does exclusively to electricity fed directly into the distribution systems, it does not have the effect of limiting the cross-border exchange of electricity, which can occur only on transmission systems, not on distribution systems. The Greek Government and the Commission, on the other hand, take the view that the rules in question ***1347** constitute measures having equivalent effect, but that these are justified by the objective of environmental protection, subject, according to the Commission, to a more detailed examination of their proportionality which it is for the national court to undertake, taking account of the cumulative effect of any other mechanisms for supporting the production of green electricity.

AG82 Essent, taking the opposite view, argues that there are differences which in its view preclude any transposition of the earlier case law. It maintains, inter

alia, that, although the green certificate system constitutes a mechanism for supporting the production of green electricity guaranteeing, via the regulatory authority, an advantage to the producer before market forces take over, by permitting certificates to be negotiated on a specific market under equitable conditions, the scheme for the free distribution of green electricity relates exclusively to the distribution and consumption of electricity, unilaterally favours suppliers and has a far more significant financial impact, since distribution costs during the period concerned represented up to 37 per cent of the final electricity account.

AG83 However questionable the reasoning in Ålands Vindkraft , [34] and Essent Belgium [35] may in my view be, it is not now, in this Opinion, possible to propose that the solution which they contain be abandoned, since such a reversal of the case law presupposes a significant development in the legal framework which this case is not; on the contrary it relates to a long-standing and much-deliberated legal situation. I shall therefore examine the compatibility of national legislation such as that at issue in the main proceedings with the provisions of the EC Treaty on the free movement of goods following the form of analysis set out in those judgments.

AG84 Therefore, once I have determined whether the schemes at issue in the main proceedings constitute obstacles to the free movement of goods, I shall consider whether those obstacles, if such they are, may be justified by the objective of promoting the use of renewable energy sources.

Obstacle to the free movement of goods

AG85 Initially the formula was to be found in Dassonville , [36] which states that all national measures which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be regarded as measures having an effect equivalent to quantitative restrictions. [37]

AG86 In this regard it must be noted that the legislation at issue in the main proceedings is indeed capable of hindering—at least indirectly and potentially—imports of electricity, [38] especially green electricity, from other Member States.

AG87 Insofar as it is common ground that imported electricity is necessarily transmitted by the intermediary of the transmission network, and cannot be fed directly into the distribution systems situated in the Flemish Region or Belgium, the limitation ***1348** of free distribution to green electricity produced by generating installations directly connected to those distribution systems particularly advantages green electricity produced in the Flemish Region or Belgium and disadvantages imported electricity.

AG88 Since only electricity generating installations situated in the Flemish Region or Belgium can benefit from the advantage conferred, it matters little that such a preferential scheme might also have a restrictive effect on the Flemish or Belgian installations which are directly connected not to the distribution network but to the transmission network. [39]

AG89 National legislation such as that at issue in the main proceedings therefore constitutes a measure having equivalent effect to a quantitative restriction on imports incompatible with art.28 EC unless it is objectively justified.

Possible justification

AG90 Referring to settled case law, in Ålands Vindkraft , [40] and Essent Belgium , [41] the Court stated that national legislation or a national practice that constitutes a measure having equivalent effect to quantitative restrictions may be justified on one of the public interest grounds listed in art.30 EC , or by overriding requirements; in either case, the national provision must be appropriate for ensuring attainment of the objective pursued and must not go beyond what is necessary in order to attain that objective. [42]

AG91 Next, linking the objective of promoting the use of renewable energy sources for the production of electricity to the case law concept of overriding requirements and public-interest grounds set out in art.30 EC , the Court considered that objective to be capable in principle of justifying barriers to the free movement of goods.

AG92 Having accepted that principle, the Court went on to examine the proportionality of the barrier to free movement resulting from national aid schemes for green electricity.

AG93 It is necessary to conduct a similar assessment

of the proportionality of the domestic measures at issue in the main proceedings, in order to determine whether those measures are necessary and appropriate for securing the attainment of the objective of promoting the use of renewable energy sources.

AG94 With regard, first of all, to the appropriateness of the domestic measures at issue in the main proceedings for securing attainment of the objective pursued, it is necessary to point out that, unlike the support schemes examined in the context of the cases which gave rise to Ålands Vindkraft , [43] and Essent Belgium , [44] which are intended to favour directly the production of green electricity, [45] the measures for free distribution of green electricity at issue in the main proceedings do not directly favour producers since they principally benefit suppliers, and possibly consumers, provided that suppliers pass the benefit they derive from free distribution on to them. ***1349**

AG95 However, those measures seem appropriate for ensuring attainment of the objective pursued insofar as, by eliminating the cost of distribution, they encourage suppliers to increase the proportion of green energy in their energy package and therefore contribute, albeit indirectly, to increasing demand by concomitantly encouraging increased use of renewable energy sources in the production of electricity.

AG96 Indeed, art.4(1) of Directive 2001/77 constitutes a clue as to the insignificance of whether the aid is direct or indirect for the purposes of classifying a support scheme, since that provision includes in the definition of a support scheme any mechanism by which a producer of electricity, on the basis of regulations issued by the public authorities, receives support, whether "direct or indirect".

AG97 With regard, secondly, to the question whether the domestic measures at issue in the main proceedings do not go beyond what is necessary in order to attain the objective pursued, it must be observed that the Court has taken into account the fact that the EU legislature has required the various Member States to lay down national objectives in order that the efforts required of them be equitably shared taking account of different starting points, of differences in the opportunities for developing energy from renewable sources and of differences in energy packages; it has thus accepted that support schemes may be accompanied by territorial limitations, since action at national level may be considered to be more appropriate than action at EU level.

AG98 Although I do not subscribe to that approach, I see no fundamental difference between territorial limitations in relation to support schemes based on an obligation to purchase in a particular supply area or on the use of green certificates, and a territorial limitation on a free distribution scheme for green electricity, at issue in the main proceedings, which is intended to assist the Kingdom of Belgium in attaining environmental objectives relating to the reduction of greenhouse gas emissions. Like the green certificates scheme, free distribution was intended, according to the preamble of the Decision of 4 April 2003, to promote the decentralised production of green electricity in local installations.

AG99 Consequently, the answer to the first and second questions is that arts 28 and 30 EC must be interpreted as not precluding national legislation such as that at issue in the main proceedings which, by reserving the benefit of the free distribution of green electricity solely to generating installations directly connected to distribution systems located in the Member State concerned, or in a region of that State, thereby excludes generating installations situated in other Member States.

Conclusion

AG100 Having regard to the foregoing considerations, I am of the view that the answer to the questions referred by the *rechtbank van eerste aanleg te Brussel* (Court of First Instance, Brussels, Belgium) should be that, first, the rules on non-discrimination contained in art.12 EC , Directive 96/92 concerning common rules for the internal market in electricity, Directive 2003/54 concerning common rules for the internal market in electricity and repealing Directive 96/92 , and Directive 2001/77 on the promotion of electricity produced from renewable energy sources in the internal electricity market, and, secondly, arts 28 and 30 EC must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which, by reserving the benefit of the free distribution of ***1350** electricity produced from renewable energy sources solely to generating installations directly connected to the distribution systems located in the Member State concerned, or in a region of that State, thereby excludes generating installations located in other Member States.

Judgment

1 This request for a preliminary ruling concerns the interpretation of arts 12 , 28 and 30 EC , and art.3(1) and (4) of Directive 2003/54 concerning common rules for the internal market in electricity and repealing Directive 96/92 [2003] OJ L176/37.

2 The request has been made in proceedings between Essent Belgium NV and *Vlaams Gewest* (Flemish Region, Belgium) and Others concerning the Flemish Region's non-contractual liability owing to the adoption of successive regional legislation limiting the benefit of free distribution through the distribution systems located in that region, initially solely to electricity produced from renewable energy sources ("green electricity") that is fed directly into those distribution systems by the generating installations connected to them, and, subsequently, solely to green electricity fed directly by generating installations into the distribution systems located throughout the Member State of which that region forms part.

Legal context

EU law

Directive 2001/77

3 Directive 2001/77 on the promotion of electricity produced from renewable energy sources in the internal electricity market [2001] OJ L283/33 was repealed, from 1 January 2012, by Directive 2009/28 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77 and 2003/30 [2009] OJ L140/16. Nevertheless, given the dates of the facts at issue in the main proceedings, the provisions of Directive 2001/77 must be taken into account in the present case.

4 According to recitals 1–3 and 14 of Directive 2001/77 :

> • "(1) The potential for the exploitation of renewable energy sources is underused in the Community at present. The Community recognises the need to promote renewable energy sources as a priority measure given that their exploitation contributes to environmental protection and sustainable development. In addition this can also create local employment, have a positive impact on social cohesion, contribute to security of supply and make it possible to meet Kyoto targets more quickly. It is therefore necessary to ensure that this potential is better exploited within the framework of the internal electricity market.
> • (2) The promotion of electricity produced from renewable energy sources is a high Community priority as outlined in the White Paper on Renewable Energy Sources … for reasons of security and diversification of energy supply, of environmental protection and of social and economic cohesion. … ***1351**
> • (3) The increased use of electricity produced from renewable energy sources constitutes an important part of the package of measures needed to comply with the Kyoto Protocol to the United Nations Framework Convention on Climate Change, and of any policy package to meet further commitments.
> •…
> • (14) Member States operate different mechanisms of support for renewable energy sources at the national level, including green certificates, investment aid, tax exemptions or reductions, tax refunds and direct price support schemes. One important means to achieve the aim of this Directive is to guarantee the proper functioning of these mechanisms, until a

> Community framework is put into operation, in order to maintain investor confidence."

5 Article 1 of Directive 2001/77 provided:

> "The purpose of this Directive is to promote an increase in the contribution of renewable energy sources to electricity production in the internal market for electricity and to create a basis for a future Community framework thereof."

6 Article 3(1) and (2) of that directive provided:

> • "1. Member States shall take appropriate steps to encourage greater consumption of electricity produced from renewable energy sources in conformity with the national indicative targets referred to in paragraph 2. These steps must be in proportion to the objective to be attained.
> • 2. Not later than 27 October 2002 and every five years thereafter, Member States shall adopt and publish a report setting national indicative targets for future consumption of electricity produced from renewable energy sources in terms of a percentage of electricity consumption for the next 10 years. … To set these targets until the year 2010, the Member States shall:
>
> • – take account of the reference values in the Annex,
> • – ensure that the targets are compatible with any national commitments accepted in the context of the climate change commitments accepted by the Community pursuant to the Kyoto Protocol to the United Nations Framework Convention on Climate Change."

7 Paragraph 1 of art.4 of that directive, which is entitled "Support schemes", provided:

> "Without prejudice to Articles 87 and 88 of the [EC] Treaty , the [European] Commission shall evaluate the application of mechanisms used in Member States according to which a producer of electricity, on the basis of regulations issued by the public authorities, receives direct or indirect support, and which could have the effect of restricting trade, on the basis that these contribute to the objectives set out in Articles 6 and 174 of the Treaty."

8 Entitled "Grid system issues", art.7 of Directive 2001/77 stated: ***1352**

> • "1. Without prejudice to the maintenance of the reliability and safety of the grid, Member States shall take the necessary measures to ensure that transmission system operators and distribution system operators in their territory guarantee the transmission and distribution of electricity produced from renewable energy sources. They may also provide for priority access to the grid system of electricity produced from renewable energy sources. When

dispatching generating installations, transmission system operators shall give priority to generating installations using renewable energy sources insofar as the operation of the national electricity system permits.

• 2. Member States shall put into place a legal framework or require transmission system operators and distribution system operators to set up and publish their standard rules relating to the bearing of costs of technical adaptations, such as grid connections and grid reinforcements, which are necessary in order to integrate new producers feeding electricity produced from renewable energy sources into the interconnected grid.

•…

• 3. Where appropriate, Member States may require transmission system operators and distribution system operators to bear, in full or in part, the costs referred to in paragraph 2.

•…

• 6. Member States shall ensure that the charging of transmission and distribution fees does not discriminate against electricity from renewable energy sources, including in particular electricity from renewable energy sources produced in peripheral regions, such as island regions and regions of low population density.Where appropriate, Member States shall put in place a legal framework or require transmission system operators and distribution system operators to ensure that fees charged for the transmission and distribution of electricity from plants using renewable energy sources reflect realisable cost benefits resulting from the plant's connection to the network. Such cost benefits could arise from the direct use of the low-voltage grid.

•…"

Directive 96/92

9 Recitals 3, 15 and 19 of Directive 96/92 concerning common rules for the internal market in electricity [1997] OJ L27/20 provided:

• "(3) Whereas the provisions of this Directive should not affect the full application of the Treaty, in particular the provisions concerning the internal market and competition;

•…

• (15) Whereas the Treaty lays down specific rules with regard to restrictions on the free movement of goods and on competition;

•… ***1353**

• (19) Whereas the Member States, when imposing public service obligations on the undertakings of the electricity sector, must therefore respect the relevant rules of the Treaty as interpreted by the Court of Justice."

10 According to art.1 of that directive:

"This Directive establishes common rules for the generation, transmission and distribution of electricity. It lays down the rules relating to the organisation and functioning of the electricity sector,

access to the market, the criteria and procedures applicable to calls for tender and the granting of authorisations and the operation of systems."

11 Article 2 of that directive provided:

"For the purposes of this Directive:

•…
• (6) 'distribution' shall mean the transport of electricity on medium-voltage and low-voltage distribution systems with a view to its delivery to customers;
•…
• (15) 'system user' shall mean any natural or legal person supplying to, or being supplied by, a transmission or distribution system;
•…"

12 Article 3 of Directive 96/92 provided:

• "1. Member States shall ensure, on the basis of their institutional organisation and with due regard for the principle of subsidiarity, that, without prejudice to paragraph 2, electricity undertakings are operated in accordance with the principles of this Directive, with a view to achieving a competitive market in electricity, and shall not discriminate between these undertakings as regards either rights or obligations. …
• 2. Having full regard to the relevant provisions of the Treaty, in particular Article 90, Member States may impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to security, including security of supply, regularity, quality and price of supplies and to environmental protection. Such obligations must be clearly defined, transparent, non-discriminatory and verifiable; …
• 3. Member States may decide not to apply the provisions of Articles 5, 6, 17, 18 and 21 insofar as the application of these provisions would obstruct the performance, in law or in fact, of the obligations imposed on electricity undertakings in the general economic interest and insofar as the development of trade would not be affected to such an extent as would be contrary to the interests of the Community. The interests of the Community include, inter alia, competition with regard to eligible customers in accordance with this Directive and Article 90 of the Treaty."

13 Article 11(2) and (3) of Directive 96/92 provided: ***1354**

• "2. In any event, [the distribution system operator] must not discriminate between system users or classes of system users, particularly in favour of its subsidiaries or shareholders.
• 3. A Member State may require the distribution system operator, when dispatching generating installations, to give priority to generating installations using renewable

energy sources or waste or producing combined heat and power."

14 Article 16 of that directive provided:

"For the organisation of access to the system, Member States may choose between the procedures referred to in Article 17 and/or in Article 18 . Both sets of procedure shall operate in accordance with objective, transparent and non-discriminatory criteria."

Directive 2003/54

15 Directive 2003/54 was repealed with effect from 3 March 2011 by Directive 2009/72 concerning common rules for the internal market in electricity [2009] OJ L211/55.

16 Recitals 2, 4, 6, 7, 13, 15 and 17 of Directive 2003/54 stated:

• "(2) Experience in implementing this Directive shows the benefits that may result from the internal market in electricity, in terms of efficiency gains, price reductions, higher standards of service and increased competitiveness. However, important shortcomings and possibilities for improving the functioning of the market remain, notably concrete provisions are needed to ensure a level playing field in generation and to reduce the risks of market dominance and predatory behaviour, ensuring non-discriminatory transmission and distribution tariffs, through access to the network on the basis of tariffs published prior to their entry into force …

•…

• (4) The freedoms which the Treaty guarantees European citizens—free movement of goods, freedom to provide services and freedom of establishment—are only possible in a fully open market, which enables all consumers freely to choose their suppliers and all suppliers freely to deliver to their customers.

•…

• (6) For competition to function, network access must be non-discriminatory, transparent and fairly priced.

• (7) In order to complete the internal electricity market, non-discriminatory access to the network of the transmission or the distribution system operator is of paramount importance. …

•…

• (13) Further measures should be taken in order to ensure transparent and non-discriminatory tariffs for access to networks. Those tariffs should be applicable to all system users on a non-discriminatory basis.

•… ***1355**

• (15) The existence of effective regulation, carried out by one or more national regulatory authorities, is an important factor in guaranteeing non-discriminatory access to the network. … Those authorities should have the competence to fix or approve the tariffs, or at least, the methodologies underlying the calculation of transmission and distribution tariffs. In order to avoid uncertainty and

costly and time consuming disputes, these tariffs should be published prior to their entry into force.

•…

• (17) In order to ensure effective market access for all market players, including new entrants, non-discriminatory and cost-reflective balancing mechanisms are necessary. …"

17 Article 1 of Directive 2003/54 , entitled "Scope", provided:

"This Directive establishes common rules for the generation, transmission, distribution and supply of electricity. It lays down the rules relating to the organisation and functioning of the electricity sector, access to the market, the criteria and procedures applicable to calls for tenders and the granting of authorisations and the operation of systems."

18 Article 2 of that directive provided:

"For the purposes of this Directive:

•…

• (5) 'distribution' means the transport of electricity on high-voltage, medium voltage and low voltage distribution systems with a view to its delivery to customers, but not including supply;

•…

• (18) 'system users' means any natural or legal persons supplying to, or being supplied by, a transmission or distribution system;

•…"

19 Article 3 of that directive, entitled "Public service obligations and customer protection", provided:

• "1. Member States shall ensure, on the basis of their institutional organisation and with due regard to the principle of subsidiarity, that, without prejudice to paragraph 2, electricity undertakings are operated in accordance with the principles of this Directive with a view to achieving a competitive, secure and environmentally sustainable market in electricity, and shall not discriminate between these undertakings as regards either rights or obligations.

• 2. Having full regard to the relevant provisions of the Treaty, in particular Article 86 thereof, Member States may impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to security, including security of supply, regularity, quality and price of supplies and environmental protection, including energy efficiency and climate protection. Such obligations shall be clearly defined, transparent, non-discriminatory, verifiable and shall guarantee equality of access for EU electricity companies to national consumers. … ***1356**

•…

• 4. When financial compensation, other forms of compensation and exclusive rights which a Member State grants for the fulfilment of the obligations set out in paragraphs 2 and 3 are

provided, this shall be done in a non-discriminatory and transparent way.

•…

• 8. Member States may decide not to apply the provisions of Articles 6, 7, 20 and 22 insofar as their application would obstruct the performance, in law or in fact, of the obligations imposed on electricity undertakings in the general economic interest and insofar as the development of trade would not be affected to such an extent as would be contrary to the interests of the Community. The interests of the Community include, amongst others, competition with regard to eligible customers in accordance with this Directive and Article 86 of the Treaty.

•…"

20 Article 14 of Directive 2003/54 provided:

•"…

• 2. In any event, [the distribution system operator] must not discriminate between system users or classes of system users, particularly in favour of its related undertakings.

•…

• 4. A Member State may require the distribution system operator, when dispatching generating installations, to give priority to generating installations using renewable energy sources or waste or producing combined heat and power.

•…"

21 According to art.20(1) of that directive:

"Member States shall ensure the implementation of a system of third party access to the transmission and distribution systems based on published tariffs, applicable to all eligible customers and applied objectively and without discrimination between system users. Member States shall ensure that these tariffs, or the methodologies underlying their calculation, are approved prior to their entry into force in accordance with Article 23 and that these tariffs, and the methodologies—where only methodologies are approved—are published prior to their entry into force."

22 Article 23 of that directive provided:

•"…

• 2. The regulatory authorities shall be responsible for fixing or approving, prior to their entry into force, at least the methodologies used to calculate or establish the terms and conditions for:

• (a) connection and access to national networks, including transmission and distribution tariffs.

•…

•… ***1357**

• 4. Regulatory authorities shall have the authority to require transmission and distribution system operators, if necessary, to modify the terms and conditions, tariffs, rules, mechanisms and methodologies referred to in

> paragraphs 1, 2 and 3, to ensure that they are proportionate and applied in a non-discriminatory manner.
> •…"

Flemish legislation

The Electricity Decree

23 According to art.2 of the *vlaams decreet houdende de organisatie van de elektriciteitsmarkt* (Flemish Decree of 17 July 2000 on the organisation of the electricity market) (*Belgisch Staatsblad* , 22 September 2000, p.32166; "the Electricity Decree"):

> "For the purposes of this Decree:
>
> > • 1 'distribution' shall mean the transport of electricity on distribution systems with a view to its delivery to customers;
> > • 2 'distribution system' shall mean the totality of connections within a geographically defined area operating at a nominal voltage of no more than 70 kV and the transformer stations, switching stations, distribution stations and electricity substations and other equipment necessary for the transmission of electricity to customers at regional or local level;
> > •…"

24 Article 15, in Ch.III of the Electricity Decree, entitled "Access to the distribution system", provided:

> "The system operator shall perform, free of charge, all tasks necessary for the distribution of green electricity, with the exception of connection to the distribution system.
>
> The Flemish Government may impose restrictions on the arrangement referred to in the first paragraph."

25 Article 15 of the Electricity Decree was repealed by art.61 of the *vlaams decreet houdende bepalingen tot begeleiding van de begroting 2005* (Flemish Decree of 24 December 2004 on measures to accompany the 2005 budget) (*Belgisch Staatsblad* , 31 December 2004, p.87220).

The decisions promoting the production of green electricity

26 In its original version, art.14 of the *besluit van de Vlaamse regering inzake de bevordering van elektriciteitsopwekking uit hernieuwbare energiebronnen* (Decision of 28 September 2001 of the Flemish Government promoting the production of electricity from renewable energy sources) (*Belgisch Staatsblad* , 23 October 2001, p.36778) provided:

> "Each supplier shall report monthly, per customer and per system tariff period, to the system operators concerned the amount of electricity from the renewable energy sources listed in Article 8(1) which is transmitted through their distribution system. ***1358**
>
> The system operator shall perform, free of charge, the tasks referred to in Article 15 of the [Electricity Decree], in accordance with the report specified in the preceding paragraph.
>
> As regards electricity not produced in the Flemish Region, the authority responsible for issuing green-electricity certificates for the generating site concerned shall provide the regulatory authority with a certificate guaranteeing that that electricity was produced from a renewable energy source appearing on the list provided for in

> Article 8(1) and is intended for an end-user in Flanders.
>
> …"

27 As amended by virtue of art.2 of the *besluit van de Vlaamse regering tot wijziging van het besluit van de Vlaamse regering van 28 september 2001* (Decision of 4 April 2003 of the Flemish Government amending the Decision of the Flemish Government of 28 September 2001) (*Belgisch Staatsblad* , 30 April 2003, p.23334; "the Decision of 4 April 2003"), which entered into force on 30 April 2003, art.14 provided:

> • "§ 1. In accordance with the second paragraph of Article 15 of the [Electricity Decree], free distribution, as referred to in the first paragraph of Article 15 of that Decree, is restricted to the feed-in of electricity produced by the generating installations connected to the distribution systems in the Flemish Region.
> • § 2. Suppliers of electricity produced from the renewable energy sources referred to in Article 8 shall not charge in an interim invoice to, or the final account of, the end-user of that electricity any fee for the cost of its distribution, as referred to in the first paragraph of Article 15.
> •…"

28 Having been seised of an action brought by Essent Belgium for annulment of art.2 of the Decision of 4 April 2003, the *Raad van State* (Council of State, Belgium) suspended operation of that provision by a decision of 12 January 2004.

29 The Decision of the Flemish Government promoting the production of electricity from renewable energy sources of 28 September 2001 was repealed and replaced by the *besluit van de Vlaamse regering inzake de bevordering van elektriciteitsopwekking uit hernieuwbare energiebronnen* (Decision of 5 March 2004 of the Flemish Government promoting the production of electricity from renewable energy sources) (*Belgisch Staatsblad* , 23 March 2004, p.16296; "the Decision of 5 March 2004").

30 Article 18 of the Decision of 5 March 2004 provided:

> • "§ 1. In accordance with the second paragraph of Article 15 of the [Electricity Decree], free distribution, as referred to in the first paragraph of Article 15 of that Decree, is restricted to the electricity supplied to end-users connected to a distribution system in the Flemish Region which is produced from a renewable energy source, as provided for in Article 15, in a generating installation which feeds its electricity directly into a distribution system in Belgium. ***1359**
> • § 2. Suppliers of electricity, as referred to in § 1, shall not charge in the final account of the end-users of that electricity any fee for the cost of its distribution, as referred to in the first paragraph of Article 15 of the [Electricity Decree].
> •…"

31 Having been seised of an action brought by Essent Belgium for annulment of art.18 of the Decision of 5 March 2004, the *Raad van State* suspended operation of that provision by a decision of 23 December 2004.

32 Following the repeal of art.15 of the Electricity Decree by the Decree of 24 December 2004 on measures to accompany the 2005 budget, art.18 of the Decision of 5 March 2004 was repealed, with effect from 1 January 2005, by the *besluit van de Vlaamse regering* (Decision of 25 March 2005 of the Flemish

Government) (*Belgisch Staatsblad* , 27 May 2005, p.24763).

The dispute in the main proceedings and the questions referred for a preliminary ruling

33 Essent Belgium supplies to undertakings and private customers in Flanders electricity which it imports mainly from the Netherlands and which, it claims, is green electricity.

34 Having formed the view that it had suffered damage because the green electricity thus imported from another Member State was, as a result of the successive changes to the legislation introduced by the Decisions of 4 April 2003 and 5 March 2004 ("the regional legislation at issue in the main proceedings"), excluded from the scheme for free distribution through the distribution system in Flanders from which it benefited originally, Essent Belgium brought two actions before the *Nederlandstalige rechtbank van eerste aanleg te Brussel* (Dutch-language Court of First Instance, Brussels, Belgium) claiming, in essence, that the Flemish Region should be ordered to pay it compensation for that damage in the amount of €15,958,252.

35 Essent Belgium also brought into the proceedings the *Vlaamse Regulator van de Elektriciteits- en Gasmarkt* ("VREG") (Flemish regulator of the electricity and gas market), the body competent to rule on distribution tariffs, and a number of distribution system operators which had sought payment by Essent Belgium of distribution costs, so as to have the judgments to be delivered declared applicable also to those other parties.

36 In support of those actions, Essent Belgium submitted, inter alia, that, in adopting the regional legislation at issue in the main proceedings, the Flemish Region infringed EU law, in particular, arts 18 and 34 TFEU and arts 3(1) and 11(2) of Directive 96/92 .

37 In those circumstances, the *Nederlandstalige rechtbank van eerste aanleg te Brussel* (Dutch-language Court of First Instance, Brussels) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

"(1) Should Article 28 EC and Article 30 EC be interpreted as precluding a regulation of a Member State—in the present case the [Flemish Electricity Decree], read in conjunction with the Decision of 4 April 2003 … —restricting the free distribution of green electricity to the feed-in of electricity produced ***1360** by the generating installations connected to the distribution systems in the Flemish Region and excluding electricity from generating installations which are not connected to distribution systems in the Flemish Region?

(2) Should Article 28 EC and Article 30 EC be interpreted as precluding a regulation of a Member State—in the present case the [Flemish Electricity Decree], read in conjunction with the Decision of 5 March 2004 …, as applied by the VREG—which restricts the free distribution of green electricity to electricity produced by generating installations which feed directly into a distribution system in Belgium and excludes from free distribution the electricity produced by generating installations which do not feed directly into a distribution system in Belgium?

(3) Is a national rule as referred to in question 1 and question 2 compatible with the principle of equal treatment and the prohibition of discrimination as embodied inter alia in Article 12 EC and Article 3(1) and (4) of the then Directive 2003/54 ?"

Consideration of the questions referred

Admissibility

38 By its third question, the referring court asks, inter alia, whether the provisions of art.3(1) and (4) of Directive 2003/54 must be interpreted as precluding legislation such as the regional legislation at issue in the main proceedings.

39 It must be borne in mind in that regard that, under art.94(c) of the Rules of Procedure of the Court of Justice, a request for a preliminary ruling must contain a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation of a provision of EU law, and the relationship between that provision and the national legislation applicable to the main proceedings.

40 In the present case, however, the order for reference contains no explanation as to the reasons that prompted the referring court to inquire about the interpretation of art.3(4) of Directive 2003/54 . Nor, moreover, is it possible to establish from the description in that order of the national factual and legislative context how that provision of EU law might be capable of having any influence on the dispute in the main proceedings.

41 Thus, although art.3(4) of Directive 2003/54 provides that, when financial compensation, other forms of compensation or exclusive rights are provided by a Member State for the fulfilment of a public service obligation, these must be granted in a non-discriminatory and transparent way, the referring court does not refer to any form of compensation or exclusive rights which, under the regional legislation at issue in the main proceedings, might be granted to electricity distributors in order to compensate them for their obligation to distribute green electricity free of charge. Nor is it apparent from that order that the dispute in the main proceedings relates to such compensation or exclusive rights.

42 In those circumstances, the third question must be declared inadmissible insofar as it relates to the interpretation of art.3(4) of Directive 2003/54 . ***1361**

Substance

Preliminary observations

43 The fact that a national court has, formally speaking, worded its request for a preliminary ruling with reference to certain provisions of EU law does not preclude the Court of Justice from providing to the national court all the elements of interpretation which may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to them in its questions. It is for the Court to extract from all the information provided by the national court, in particular from the grounds of the order for reference, the points of EU law which require interpretation, having regard to the subject matter of the dispute (see, in particular, Land Oberösterreich v ČEZ as (C-115/08) [2009] E.C.R. I-10265 at [81] and the case law cited).

44 In the present case, it is apparent from the order for reference that, by the actions it has brought in the main proceedings, Essent Belgium is, in essence, seeking compensation for the damage it claims to have suffered because it is no longer able to benefit from the scheme for the free distribution of green electricity imposed by Flemish regional legislation on distribution system operators in Flanders, for the distribution to which it used, in that region, green electricity imported from a Member State other than the Kingdom of Belgium. Essent Belgium thus claims to have been deprived of the benefit of that scheme during (1) the period from 30 April 2003, when the Decision of 4 April 2003 entered into force, to 12 January 2004, the date from which that decision was suspended by the *Raad van State* , and (2) the period from 23 March 2004, when the Decision of 5 March 2004 entered into force, to 31 December 2004, the date on which art.15 of the Electricity Decree was repealed.

45 In the light both of the subject matter of the dispute in the main proceedings thus described and its timeframe, it must be noted that, for the purposes of answering the questions raised by the referring court, it is appropriate to take into consideration, so far as concerns EU secondary law, not art.3(1) of Directive 2003/54 but other provisions of that directive, as well as provisions contained in Directive 96/92 and Directive 2001/77 , respectively.

46 As regards, in the first place, Directive 96/92 and Directive 2003/54 establishing common rules for the internal market in electricity, it is clear, first of all, from arts 29–31 of Directive 2003/54 that that directive did not enter into force until 4 August 2003 and was

required to be transposed not later than 1 July 2004, the date on which Directive 96/92 was repealed. The latter, therefore, to which the Flemish Region and the VREG in particular referred in their observations to the Court, and which Essent Belgium, in support of its action in the main proceedings, notably claimed had been infringed, is applicable, *ratione temporis* , with regard to part of the period at issue in the main proceedings.

47 Secondly, and from an aspect *ratione materiae* , it should be noted, in the light of the subject matter of the dispute in the main proceedings outlined at [44] of the present judgment, that, although the referring court refers in its third question to art.3(1) of Directive 2003/54 , which prohibits any discrimination as regards either rights or obligations of electricity undertakings, that directive includes a provision, art.20(1) , which deals more specifically with the obligation of Member States to ensure that there is no discrimination in relation to access to distribution systems ***1362** and to the conditions, in particular the tariff conditions, governing such access. It is thus appropriate, in the context of the present case, to take the latter provision into consideration.

48 As regards Directive 96/92 , it is, for similar reasons, appropriate to take into consideration not art.3(1) thereof, the content of which essentially corresponds to that of art.3(1) of Directive 2003/54 , but rather art.16 , which also deals with the conditions for non-discriminatory access to distribution systems.

49 Furthermore, given that distribution system operators in Flanders are required, under the regional legislation at issue in the main proceedings, to distribute free of charge green electricity fed directly into those systems or into the distribution systems in Belgium, regard must also be had to art.3(2) and (8) of Directive 2003/54 concerning the public service obligations which the Member States can impose on undertakings in the electricity sector and which relate, in particular, to environmental protection, including climate protection. The same applies to the corresponding provisions in art.3(2) and (3) of Directive 96/92 .

50 In the second place, given the subject matter of the dispute in the main proceedings, as outlined at [44] of the present judgment, it is also important, in view of the objectives of promoting the production of green electricity pursued by the regional legislation at issue in the main proceedings, to take into account arts 3, 4 and 7 of Directive 2001/77 , the purpose of which is precisely to promote an increase in such production in the internal market for electricity.

51 In view of all the foregoing, it must be concluded that, by its questions, which it is appropriate to examine together, the referring court asks, in essence, whether the provisions of arts 12 , 28 and 30 EC , and of art.3(2) and (8) and art.20(1) of Directive 2003/54 , art.3(2) and (3) and art.16 of Directive 96/92 and arts 3, 4 and 7 of Directive 2001/77 must be interpreted as precluding legislation such as the regional legislation at issue in the main proceedings which imposes a scheme for the free distribution of green electricity through the distribution systems in the region concerned, while limiting the benefit of that scheme, in the case of the first piece of legislation, solely to green electricity fed directly into those distribution systems by the generating installations and, in the case of the second piece of legislation, solely to green electricity fed directly by such installations into the distribution systems in the Member State to which that region belongs, thereby excluding from that benefit green electricity imported from other Member States.

Directive 2001/77

52 The regional legislation at issue in the main proceedings, which is designed, through the establishment of a scheme for the free distribution of green electricity, to promote the production of such electricity, must be considered, first of all, in the light of the provisions of Directive 2001/77 .

53 As is apparent from arts 1 , 3, 4 and 7 of that directive, the purpose of the directive is specifically to promote an increase in the contribution of renewable energy sources to electricity production in the internal market for electricity and, on that basis, it includes provisions relating to national support mechanisms for the production of green electricity and to the conditions governing the access of green electricity to the distribution systems.

54 It must be noted in that regard, in the first place, that, according to recitals 1–3 of that directive, such promotion of renewable energy sources, which is a high ***1363** priority for the EU, is justified in particular because the exploitation of those energy sources contributes to environmental protection and sustainable development, and can also contribute to security and

diversification of energy supply and make it possible to meet the Kyoto Protocol targets more quickly (see, to that effect, Industrie du bois de Vielsalm & Cie (IBV) SA v Région wallonne (C-195/12) EU:C:2013:598; [2014] 1 C.M.L.R. 43 at [56]).

55 As is apparent from recital 14 of Directive 2001/77 , the EU legislature took the view, when adopting the directive, that guaranteeing the proper functioning of the various mechanisms of support for renewable energy sources at the national level operated by Member States is an important means to achieve the aim of that directive, so as to maintain investor confidence until a Community framework is put into operation.

56 Article 4(1) of that directive states that such mechanisms are capable of contributing to attaining the objectives set out in art.6 EC and art.174(1) EC , the latter listing the objectives of EU policy on the environment (see, to that effect, IBV [2014] 1 C.M.L.R. 43 at [59] and [60]).

57 Article 174(1) EC refers to preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems (IBV [2014] 1 C.M.L.R. 43 at [60]).

58 In the second place, as regards the form that mechanisms of support for renewable energy sources at the national level may take, it must be noted that recital 14 of Directive 2001/77 does no more than list the various kinds of measures to which the Member States generally have recourse in that connection, namely, green certificates, investment aid, tax exemptions or reductions, tax refunds and direct price support schemes (Green Network SpA v Autorità per l'energia elettrica e il gas (C-66/13) EU:C:2014:2399; [2015] 2 C.M.L.R. 3 at [52] and the case law cited).

59 Article 4(1) of that directive merely indicates that the national support mechanisms whose adoption is thus encouraged by the EU legislature are intended to enable green electricity producers to receive direct or indirect support.

60 It follows, in particular, that Directive 2001/77 allows Member States considerable latitude for the purposes of the adoption and implementation of such support schemes for green electricity producers (Green Network [2015] 2 C.M.L.R. 3 at [54] and the case law cited).

61 In the present case, the free distribution provided for by the regional legislation at issue in the main proceedings constitutes neither an advantage nor direct support to green electricity producers, since that free distribution primarily benefits suppliers and therefore, in principle, the consumer. Free access to the distribution systems could only indirectly therefore, if at all, also prove to be a source of support for those producers and to that extent fall within the scope of art.4(1) of Directive 2001/77 .

62 However, it is important also to take into account, in that context, the fact that art.3(1) and (2) of Directive 2001/77 makes clear that national support mechanisms for producers of electricity as referred to in art.4 of Directive 2001/77 , which are used inter alia to help Member States achieve their respective national indicative targets under art.3 , must in principle lead to an increase in national production of green electricity (see, to that effect, Green Network [2015] 2 C.M.L.R. 3 at [56] and [57] and the case law cited). ***1364**

63 Furthermore, and as art.3(1) of Directive 2001/77 makes clear, such mechanisms must, like all other measures adopted by the Member States in order to achieve those national indicative targets, be in proportion to the objective to be attained.

64 It must also be borne in mind that it is apparent from the case law of the Court that the national support schemes for the production of green electricity referred to in art.4 of Directive 2001/77 must satisfy the requirements arising under arts 28 and 30 EC (in that respect, see, in particular, Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt (C-204–208/12) EU:C:2014:2192).

65 In those circumstances, insofar in particular as the assessment of the regional legislation at issue in the main proceedings in the light of those provisions of the Treaty which will be considered below may require that that legislation be examined from the aspect of the principle of proportionality already mentioned at [63] of the present judgment, it is appropriate to defer consideration of the requirements likely to arise under that principle to a later stage of the analysis.

66 In the third place, as regards the provisions of art.7

of Directive 2001/77 , concerning various issues relating to the grid, it must be noted, first, that, contrary to what was claimed in that regard by the Flemish Region and the VREG in their observations, art.7(3) and the second subparagraph of art.7(6) are not capable of justifying measures under which distribution is selectively free of charge, such as those provided for by the regional legislation at issue in the main proceedings.

67 Article 7(3) of that directive deals not with the costs of distribution but with the costs associated with technical adaptations, such as the grid connections and grid reinforcements which are necessary in order to integrate new producers of green electricity. As to the second subparagraph of art.7(6) , this merely provides for account to be taken, in fixing the costs of distributing green electricity, of realisable cost benefits resulting from the connection to the network of plants using renewable energy sources. Yet it has been neither established nor even claimed that that is the purpose of the regional legislation at issue in the main proceedings, which provides, purely and simply, for the free distribution of green electricity in order to promote growth in the production of such electricity.

68 As regards, secondly, the first subparagraph of art.7(6) of Directive 2001/77 , to which the Advocate General notably referred at AG57, AG62 and AG74 of his Opinion, it must indeed be noted that that provision requires the Member States to ensure that the charging of distribution fees does not discriminate against green electricity.

69 However, there is no need to determine whether that provision must, insofar as it prohibits discrimination against green electricity, be interpreted as referring also to differences in treatment that might be observed between various forms of green electricity depending, inter alia, on their respective origin, it being appropriate to note instead that art.16 of Directive 96/92 and art.20(1) of Directive 2003/54 , to be considered below, contain provisions dealing specifically with suppliers' access to the distribution systems, on terms that are non-discriminatory, in particular, from the aspect of tariffs. Since there is no doubt about the applicability of those provisions in the context of the case in the main proceedings, it will suffice in this case to take those provisions into consideration. ***1365**

Directives 96/92 and 2003/54

70 Since the dispute in the main proceedings concerns the distribution fees which Essent Belgium was charged for its use, as supplier, of the distribution systems as referred to in art.2(6) of Directive 96/92 and art.2(5) of Directive 2003/54 , fees which Essent Belgium claims are discriminatory on the ground that, unlike suppliers marketing green electricity of domestic origin, it is no longer able to benefit from the scheme for the free distribution of green electricity imposed on distributors by the regional legislation at issue in the main proceedings, certain provisions of those directives must also be taken into consideration, as has been noted at [47]–[49] of the present judgment.

—Article 16 of Directive 96/92 and article 20(1) of Directive 2003/54, concerning non-discriminatory access to the distribution systems

71 Article 20(1) of Directive 2003/54 provides, in particular, that Member States are to ensure the implementation of "a system of third party access to the transmission and distribution systems …, applicable to all eligible customers", and that that system is to be "based on published tariffs" and "applied objectively and without discrimination between system users."

72 As regards, first, the concept of "access to the system" within the meaning of that provision, the Court has made clear that that includes not the connection which corresponds to physical connection to the system, but the right to use electricity systems (see, to that effect, Sabatauskas v Lietuvos Respublikos Seimas (C-239/07) [2008] E.C.R. I-7523 at [42]).

73 The term "access" is thus linked to the supply of electricity, including the cost of the service. Recitals 2, 6, 13, 15 and 17 of Directive 2003/54 state in particular that such access must be fairly priced and use non-discriminatory tariffs in order to ensure effective market access for all market players (see, to that effect, Sabatauskas [2008] E.C.R. I-7523 at [40]).

74 Secondly, as regards the concept of "third party" within the meaning of art.20(1) of Directive 2003/54 , it must be borne in mind that the text of that provision itself explains that term by also using the term "system users", defined in art.2(18) of the directive as meaning

any natural or legal persons supplying to, or being supplied by, a transmission or distribution system (see Sabatauskas [2008] E.C.R. I-7523 at [44]).

75 Those users include suppliers of electricity, the Court having stated, inter alia, that, in order for eligible customers to be able, as stated in recital 4 of Directive 2003/54 , freely to choose their suppliers, it is necessary that suppliers should have the right to access the distribution systems which carry electricity to customers (see, to that effect, Sabatauskas [2008] E.C.R. I-7523 at [32], [33] and [43]).

76 Lastly, it must be borne in mind that open third party access to transmission and distribution systems established in particular by art.20 of Directive 2003/54 constitutes one of the essential measures which the Member States are required to implement in order to bring about completion of the internal market in electricity (see Sabatauskas [2008] E.C.R. I-7523 at [33] and the case law cited).

77 As regards Directive 96/92 , it will be recalled that, as provided by art.16 thereof, although, for the organisation of access to the electricity distribution system, Member States remained free to choose between the "access to the system" procedure or the single buyer procedure, referred to respectively in arts 17 and 18 of that directive, ***1366** both procedures had to be operated in accordance with objective, transparent and non-discriminatory criteria.

78 Article 16 thus prohibits Member States from organising access to the distribution system in a discriminatory manner, this prohibition relating generally to all discrimination, including, therefore, any discrimination in terms of the cost of using the distribution system (see, to that effect, AEM SpA v Autorità per l'energia Elettrica e per il Gas (C-128/03 & C-129/03) [2005] E.C.R. I-2861; [2005] 2 C.M.L.R. 60 at [59], and Vereniging voor Energie Milieu en Water v Directeur van de Dienst Uitvoering en Toezicht Energie (C-17/03) [2005] E.C.R. I-4983; [2005] 5 C.M.L.R. 8 at [36], [45] and [46]).

79 As to whether regional legislation such as that at issue in the main proceedings entails discrimination contrary to art.16 of Directive 96/92 and art.20(1) of Directive 2003/54 , it must be noted that those provisions which require that the action of the State in creating access to the system should not be discriminatory are specific expressions of the general principle of equality (see, with regard to art.16 of Directive 96/92 , VEMW [2005] 5 C.M.L.R. 8 at [47] and the case law cited).

80 In accordance with settled case law, the prohibition of discrimination requires that comparable situations are not treated differently unless such difference in treatment is objectively justified (see, in particular, VEMW [2005] 5 C.M.L.R. 8 at [48]).

81 On that last point, it must be borne in mind that a difference in treatment is justified if it is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment (see, in particular, Société Arcelor Atlantique et Lorraine v Premier Ministre (C-127/07) [2008] E.C.R. I-9895 at [47] and the case law cited).

82 In the present case, although the regional legislation at issue in the main proceedings applies in the same way to all electricity suppliers using a distribution system that is located in the region concerned, it nevertheless does not lead to any exemption from the fees for the distribution of electricity delivered by those suppliers except where that electricity is green electricity fed directly into such a system or into a distribution system located in the Member State to which that region belongs, and therefore results in electricity suppliers being treated differently, depending in particular, as Essent Belgium complains in the main proceedings, on the origin of the green electricity being marketed by those suppliers.

83 As regards any possible justification for such a difference in treatment, it must be noted at the outset that, contrary to what is contended by the Flemish Region and the VREG, art.11(3) of Directive 96/92 or art.14(4) of Directive 2003/54 cannot in themselves be invoked in order to justify it. Those provisions do not deal with the charging of distribution costs; they merely provide that the system operators may be required by a Member State to give priority, when dispatching generating installations, inter alia to generating installations producing green electricity.

84 That being the case, the legitimacy of the objective of the regional legislation at issue in the main proceedings, namely promoting the production of green electricity, is not in doubt. It should be noted in particular that the use of renewable energy sources for

the production of electricity is useful for the protection of the environment inasmuch as it contributes to the reduction in greenhouse gas emissions, which are amongst the main causes of climate change that the EU and ***1367** its Member States have pledged to combat (see Essent Belgium EU:C:2014:2192 at [91] and the case law cited).

85 The question which arises therefore is whether that objective is capable of justifying the difference in treatment referred to above, that is to say, in essence, whether it is based on an objective and reasonable criterion that is proportionate to the aim pursued.

86 However, in view, on the one hand, of the many provisions of EU law and, therefore, parameters within which the proportionality of the regional legislation at issue in the main proceedings will, as has already been noted at [65] of the present judgment, have to be examined, and, on the other, of the need to take account also, in that context, of other provisions of Directive 96/92 and Directive 2003/54 , to be considered below, that examination of proportionality will have to be deferred to a later stage of the analysis.

—Article 3(2) and (3) of Directive 96/92 and article 3(2) and (8) of Directive 2003/54, concerning public service obligations

87 Both art.3(2) of Directive 96/92 and art.3(2) of Directive 2003/54 authorise Member States to impose on undertakings in the electricity sector public service obligations relating, inter alia, to environmental protection, including climate protection.

88 As the Commission has submitted, that appears to be the case with regard to the regional legislation at issue in the main proceedings, in that it imposes on all operators of distribution systems in Flanders an obligation to distribute free of charge green electricity that is fed by producers directly into those systems or into distribution systems in Belgium, and is thus designed to promote growth in the production of green electricity.

89 However, it must also be emphasised in that regard, first, that, as is apparent from the provisions mentioned at [87] of the present judgment, the public service obligations established under those provisions must not be discriminatory. Article 3(2) of Directive 2003/54 adds, moreover, that those obligations must guarantee equality of access for EU electricity companies to national consumers.

90 While it appears that all distribution system operators are subject to the regional legislation at issue in the main proceedings, so that no difference in treatment between them can apparently be observed, it has already been pointed out at [82] of the present judgment that that legislation nevertheless does not lead to any exemption from the fees for the distribution of electricity delivered by suppliers except where that electricity is green electricity fed directly into a system that is in the region concerned or into a distribution system in the Member State to which that region belongs, and therefore results in electricity suppliers being treated differently, depending in particular on the origin of the green electricity being marketed by them. That difference in treatment is therefore liable in particular to affect equality of access for EU electricity companies to national consumers within the meaning of art.3(2) of Directive 2003/54 .

91 It is, moreover, admittedly apparent from art.3(8) of Directive 2003/54 that, unlike the rule which applied under Directive 96/92 with regard to art.3(3) and art.16 thereof (see, in that regard, VEMW [2005] 5 C.M.L.R. 8 at [65]), Member States are permitted not to apply the provisions of art.20 of Directive 2003/54 providing for non-discriminatory third party access to the transmission and distribution systems insofar as the application of art.20 would obstruct the ***1368** performance, in law or in fact, of the public service obligations thus imposed on electricity undertakings. However, the Court has already held that, in order to be able to derogate in this way from the requirements of art.20 of Directive 2003/54 , Member States must, inter alia, ascertain whether the performance by the system operators of their public service obligations cannot be achieved by other means which do not impact adversely on the right of access to the systems, which is one of the rights enshrined in Directive 2003/54 (Citiworks AG v Sächsisches Staatsministerium für Wirtschaft und Arbeit als Landesregulierungsbehörde (C-439/06) [2008] E.C.R. I-3913 at [60]).

92 Secondly, it must also be noted that the public service obligations established under Directive 96/92 and Directive 2003/54 must be so established, as is apparent from art.3(2) of each of those directives, having full regard to the relevant provisions of the Treaty, which include not only art.90 of the EC Treaty (now art.86 EC), to which art.3(2) of each of those

directives refers, but also arts 30 of the EC Treaty (now art.28 EC) and 36 of the EC Treaty (now, after amendment, art.30 EC), enshrining the free movement of goods, as is apparent in particular from recitals 3, 15 and 19 of Directive 96/92 .

93 As regards art.86 EC , the Court has already held that, although art.3(2) of Directive 2003/54 , read in conjunction with that provision of the Treaty, allows obligations to be imposed on undertakings responsible for operating a public service as regards, inter alia, setting prices for the supply of electricity, national legislation imposing such obligations must be capable of securing the objective which it pursues and must not go beyond what is necessary in order to attain it, so as to be consistent with the principle of proportionality (see Enel Produzione SpA v Autoritaper l'energia elettrica e il gas (C-242/10), judgment of 21 December 2011 , not yet reported, at [55]).

94 As regards the examination of the proportionality of the regional measures at issue in the main proceedings, it has already been noted at [65] and [86] of the present judgment that, in view of the various provisions of EU law in the light of which that examination will have to be conducted in the present case, that examination must be temporarily deferred.

95 As to arts 28 and 30 EC , with which the public service obligations established under art.3(2) of each of Directive 96/92 and Directive 2003/54 must also comply, these will be considered below.

Articles 28 and 30 EC

96 As is apparent from the Court's settled case law, art.28 EC , in prohibiting all measures having equivalent effect to quantitative restrictions on imports, covers any national measure which is capable of hindering, directly or indirectly, actually or potentially, intra-Community trade (see, in particular, Procureur du Roi v Dassonville (8/74) [1974] E.C.R. 837; [1974] 2 C.M.L.R. 436 at [5]; Ålands Vindkraft AB v Energimyndigheten (C-573/12) EU:C:2014:2037; [2015] 1 C.M.L.R. 10 at [66]; and Essent Belgium EU:C:2014:2192 at [77]).

97 It must be noted that legislation such as the regional legislation at issue in the main proceedings is capable of hindering—at least indirectly and potentially—imports of electricity, especially green electricity, from other Member States. ***1369**

98 Encouraging, as it does, operators, particularly electricity suppliers, to buy green electricity produced in the particular region or in the Member State to which that region belongs, owing to the economic advantage arising from the fact that the distribution of that electricity is free of charge, such legislation must be regarded as a measure having an effect equivalent to a quantitative restriction as referred to in art.28 EC (see, by analogy, Commission of the European Communities v Italy (103/84) [1986] E.C.R. 1759 at [2] and [24] and the case law cited).

99 As regards the assertion by the Flemish Region and the VREG that any possible hindrance to the free movement of electricity remains of relatively limited significance in the present case, notably insofar as, at the material time, the proportion of green electricity produced in Flanders was still quite small, suffice it to note that even if that did prove to be so, it would still be the case that a national measure does not fall outside the scope of the prohibition laid down in art.28 EC merely because the hindrance to imports which it creates is slight and because it is possible for imported products to be marketed in other ways (see, in particular, Commission v Italy [1986] E.C.R. 1759 at [18] and the case law cited).

100 Moreover, the Court has consistently held that national legislation which constitutes a measure having equivalent effect to quantitative restrictions may nonetheless be justified on one of the public interest grounds listed in art.30 EC or by overriding requirements. In either case, the national provision must, in accordance with the principle of proportionality, be appropriate for ensuring attainment of the objective pursued and must not go beyond what is necessary in order to attain that objective (see, in particular, Ålands Vindkraft [2015] 1 C.M.L.R. 10 at [76] and the case law cited).

101 National measures that are capable of hindering intra-Community trade may thus, inter alia, be justified by overriding requirements relating to protection of the environment and notably by the concern to promote an increase in the use of renewable energy sources for the production of electricity, which, as has already been pointed out at [84] of the present judgment, is useful for such protection and which is also designed to protect the health and life of humans, animals and plants, which are among the public interest grounds

listed in art.30 EC (see, to that effect, in particular, Ålands Vindkraft [2015] 1 C.M.L.R. 10 at [77]–[80] and the case law cited).

102 In those circumstances, it remains to be determined whether regional legislation such as that at issue in the main proceedings is consistent with the principle of proportionality.

The principle of proportionality

103 As is evident from [63], [85], [93] and [100] of the present judgment, the conformity of regional legislation such as that at issue in the main proceedings with the provisions of art.3(1) and art.4 of Directive 2001/77 , art.3(2) and art.16 of Directive 96/92 , art.3(2) and (8) and art.20(1) of Directive 2003/54 and arts 28 and 30 EC depends in the present case on whether that legislation satisfies the requirements arising under the principle of proportionality.

104 As has been noted at [100] of the present judgment, for that to be the case, the regional legislation must be appropriate for ensuring attainment of the objective pursued—the lawfulness of which has, in this instance, already been established at [54], [84] and [101] of the present judgment—namely, the promotion of an ***1370** increase in the production of green electricity, and must, at the same time, be necessary for that purpose.

105 It must first of all be pointed out in that regard that, as the Court has already stated, the fact that a national support scheme is designed to favour directly the production of green electricity, rather than solely its consumption, can be explained, in particular, by the fact that the green nature of the electricity relates only to its method of production and that, accordingly, it is primarily at the production stage that the environmental objectives in terms of the reduction of greenhouse gases can actually be pursued (see Essent Belgium EU:C:2014:2192 at [98] and the case law cited).

106 Similarly, it should be pointed out that, as has already been noted at [62] of the present judgment, it follows from a reading of art.3(1) and (2) in conjunction with art.4 of Directive 2001/77 that national support mechanisms for producers of electricity as referred to in the latter article, which are used inter alia to help Member States achieve the respective national indicative targets imposed on them by that directive, must in principle lead to an increase in national production of green electricity (see Green Network [2015] 2 C.M.L.R. 3 at [57] and the case law cited).

107 That circumstance, combined in particular with the fact that EU law has not harmonised the national support schemes for green electricity, means that it is possible in principle for Member States to limit access to such schemes to green electricity production located in their territory (see, by analogy, in relation to Directive 2009/28 , Ålands Vindkraft [2015] 1 C.M.L.R. 10 at [94] and [97]–[99]).

108 As regards the ability of national support schemes for the production of green electricity to achieve the objective of increasing such production, the Court has notably held that an obligation to purchase green electricity at minimum prices was capable of conferring a certain economic advantage on producers of that type of electricity, since it guarantees them, with no risk, higher profits than they would make in its absence (PreussenElektra AG v Schleswag AG (C-379/98) [2001] E.C.R. I-2099; [2001] 2 C.M.L.R. 36 at [54]).

109 Similarly, commenting on national support schemes that use the mechanism of what are known as "green certificates", the Court observed that the obligation for electricity suppliers to obtain a quota of such certificates from green electricity producers was designed in particular to guarantee those producers a demand for the certificates they have been awarded and in that way to facilitate the sale of the green energy that they produce at a price higher than the market price for conventional energy. The Court also pointed out in that regard that the effect of that scheme in terms of offering an incentive for electricity producers in general to increase their production of green electricity did not appear to be open to doubt; nor, consequently, did it appear possible to call in question the ability of that scheme to attain the legitimate objective pursued in the circumstances of the case (see Essent Belgium EU:C:2014:2192 at [109] and [110] and the case law cited).

110 Such green energy support schemes, whose production costs seem to be still quite high as compared with the costs of electricity produced from non-renewable energy sources, are inherently designed in particular to foster, from a long-term perspective, investment in new installations, by giving producers certain guarantees about the future marketing of their

green electricity (see Ålands Vindkraft [2015] 1 C.M.L.R. 10 at [103]).

111 In the present case, with regard to the scheme for the free distribution of green electricity established by the regional legislation at issue in the main proceedings, ***1371** it must be noted at the outset that, unlike the national support schemes for green electricity in the form of purchase obligations or green certificates referred to in the preceding paragraphs of the present judgment, it is not the purpose of that scheme to give direct support to producers of green electricity.

112 As has already been observed at [61] of the present judgment, the free distribution of green electricity constitutes a financial advantage conferred primarily on the supplier of such electricity, which may, in certain circumstances, depending notably on the sale price which the consumer is charged by the supplier for his electricity, to a certain extent and indirectly also benefit the consumer.

113 By contrast, such a support mechanism offers no certainty that the economic advantage thus obtained for suppliers will ultimately actually and essentially be required to benefit producers of green electricity, particularly the smallest local generating installations which the Flemish Region claims to have wanted to support, which are not both producers and suppliers.

114 The benefit that such green electricity producers may derive from that economic advantage will depend on various factors specific to the markets, such as, for example, electricity prices on the market, supply and demand, or the balance of power between the operators involved and the extent to which suppliers will be prepared to allow producers to benefit from that advantage.

115 In view of what is thus the indirect, uncertain and risky nature of any support that might flow for the green electricity producer himself from the free distribution scheme at issue in the main proceedings, it must be concluded that the genuine ability of that scheme to achieve the legitimate objective pursued in the present case, which is to create an effective incentive for operators to produce more green electricity notwithstanding the additional costs of production, thus contributing to the Member States' achievement of the indicative production targets imposed on them under art.3 of Directive 2001/77 , has not been established.

116 On account of that indirect, uncertain and risky nature, and given that there were, moreover, other methods—such as, for example, the grant of green certificates—which do contribute in a certain and effective way to the pursuit of the objective of increasing green electricity production, notably without undermining the introduction of third-party free access to distribution systems on terms that are non-discriminatory, as provided for, inter alia, in art.20(1) of Directive 2003/54 , that being one of the measures that is essential to bringing about completion of the internal market in electricity, it must be concluded that regional legislation such as that at issue in the main proceedings does not satisfy the requirements arising under the principle of proportionality, and that the interference with that free access and with the free movement of goods which it entails cannot, therefore, be justified by that objective.

117 In the light of the foregoing, it must be held that, failing as it does to satisfy the requirements arising under the principle of proportionality, regional legislation such as that at issue in the main proceedings infringes the provisions of arts 28 and 30 EC , art.3(2) and art.16 of Directive 96/92 , art.3(2) and (8) and art.20(1) of Directive 2003/54 , and arts 3 and 4 of Directive 2001/77 .

Article 12 EC

118 In view of the finding in the preceding paragraph of the present judgment, from which it is apparent that regional legislation such as that at issue in the main ***1372** proceedings infringes, inter alia, arts 28 and 30 EC , and in the absence, moreover, of any explanation by the referring court as to why it considers that that legislation gives rise to discrimination on grounds of nationality within the meaning of art.12 EC , it is not necessary for the Court to examine the latter provision in the context of the present case.

119 Having regard to all the foregoing considerations, the answer to the questions referred is that the provisions of arts 28 and 30 EC , and of art.3(2) and (8) and art.20(1) of Directive 2003/54 , art.3(2) and (3) and art.16 of Directive 96/92 and arts 3 and 4 of Directive 2001/77 , read together, must be interpreted as precluding legislation such as the regional legislation at issue in the main proceedings which imposes a scheme

for the free distribution of green electricity through the distribution systems in the region concerned, while limiting the benefit of that scheme, in the case of the first piece of regional legislation, solely to green electricity fed directly into those distribution systems by the generating installations and, in the case of the second piece of regional legislation, solely to green electricity fed directly by such installations into the distribution systems in the Member State to which that region belongs.

Costs

120 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) HEREBY RULES:

•The provisions of arts 28 and 30 EC , and of art.3(2) and (8) and art.20(1) of Directive 2003/54 concerning common rules for the internal market in electricity and repealing Directive 96/92 , art.3(2) and (3) and art.16 of Directive 96/92 concerning common rules for the internal market in electricity, and arts 3 and 4 of Directive 2001/77 on the promotion of electricity produced from renewable energy sources in the internal electricity market, read together, must be interpreted as precluding legislation such as the *besluit van de Vlaamse regering tot wijziging van het besluit van de Vlaamse regering van 28 september 2001* (Decision of 4 April 2003 of the Flemish Government amending the Decision of the Flemish Government of 28 September 2001), and the *besluit van de Vlaamse regering inzake de bevordering van elektriciteitsopwekking uit hernieuwbare energiebronnen* (Decision of 5 March 2004 of the Flemish Government promoting the production of electricity from renewable energy sources), which imposes a scheme for the free distribution of green electricity through the distribution systems in the region concerned, while limiting the benefit of that scheme, in the case of the first decision, solely to green electricity fed directly into those distribution systems by the generating installations and, in the case of the second decision, solely to green electricity fed directly by such installations into the distribution systems in the Member State to which that region belongs. ***1373**

Footnotes

1 Opinion of AG Bot, delivered on 14 April 2016. Original language: French.

2 Directive 2003/54 concerning common rules for the internal market in electricity and repealing Directive 96/92 [2003] OJ L176/37.

3 “Essent”.

4 “Green electricity”.

5 Ålands Vindkraft AB v Energimyndigheten (C-573/12) EU:C:2014:2037; [2015] 1 C.M.L.R. 10 .

6 Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt (C-204–208/12) EU:C:2014:2192 .

7 See my Opinions in Ålands Vindkraft AB v Energimyndigheten (C-573/12) EU:C:2014:37; [2015] 1 C.M.L.R. 10 and in Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt (C-204–208/12) EU:C:2013:294 .

8 Directives 96/92 concerning common rules for the internal market in electricity [1997] OJ L27/20.

9 Directive 2001/77 on the promotion of electricity produced from renewable energy sources in the internal electricity market [2001] OJ L283/33.

10 Directive 2009/72 concerning common rules for the internal market in electricity and repealing Directive 2003/54 [2009] OJ L211/55.

11 Directive 2009/28 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77 and 2003/30 [2009] OJ L140/16.

12 Belgisch Staatsblad , 22 September 2000, p.32166, the “Electricity Decree”.

13 Belgisch Staatsblad , 31 December 2004, p.87220.

14 Belgisch Staatsblad , 23 October 2001, p.36778, the “Decision of 28 September 2001”.

15 Belgisch Staatsblad , 30 April 2003, p.23334, the “Decision of 4 April 2003”.

16 Belgisch Staatsblad , 23 March 2004, p.16296, the “Decision of 5 March 2004”.

17 Belgisch Staatsblad , 27 May 2005, p.24763.

18 Now the Vlaamse Regulator van de Elektriciteits- en Gasmarkt (“VREG”).

19 See, inter alia, Nagy v Vas Megyei Rendőr-főkapitányság (C-583/14) EU:C:2015:737 at [20] and the case law cited.

20 As the national court is not asking the Court whether a free distribution scheme such as those at issue in the main proceedings constitutes a State aid scheme, I shall not examine the scheme in the light of the provisions on State aid.

21 This part of the sentence was added by Directive 2003/54 .

22 Directive 2003/54 .

23 See A. Rigaux, Revue Europe No 2, February 2012, comm.75. That description was repeated by B. Le Baut-Ferrarese, Revue Environnement et Développement durable No 11, November 2014, comm.75. See also, for a critical analysis of the Court’s approach, V. Michel, “Marché intérieur et politiques de l’Union: brèves réflexions sur une quête d’unité” in L’identité du droit de l’Union européenne—Mélanges en l’honneur de Claude Blumann (2015), p.229.

24 Commission of the European Communities v Belgium (C-2/90) [1992] E.C.R. I-4431; [1993] 1 C.M.L.R. 365 .

25 Commission v Belgium [1993] 1 C.M.L.R. 365 at [34]–[36].

26 PreussenElektra AG v Schleswag AG (C-379/98) [2001] E.C.R. I-2099; [2001] 2 C.M.L.R. 36 .

27 Essent Belgium EU:C:2014:2192 .

28 Essent Belgium EU:C:2014:2192 at [119].

29 See inter alia, to that effect, M. López Escudero, “Régimes nationaux d’aide à l’énergie verte face à la libre circulation des marchandises dans l’Union européenne” (2014) 3 Revues des affaires européennes 593, particularly 599, and Le Baut-Ferrarese, Revue Environnement et Développement durable No 11, November 2014, comm.75.

30 Ålands Vindkraft [2015] 1 C.M.L.R. 10 .

31 Essent Belgium EU:C:2014:2192 .

32 Ålands Vindkraft [2015] 1 C.M.L.R. 10 .

33 Essent Belgium EU:C:2014:2192 .

34 Ålands Vindkraft [2015] 1 C.M.L.R. 10 .

35 Essent Belgium EU:C:2014:2192 .

36 Procureur du Roi v Dassonville (8/74) [1974] E.C.R. 837; [1974] 2 C.M.L.R. 436 .

37 Dassonville [1974] 2 C.M.L.R. 436 at [5]. See also Ålands Vindkraft [2015] 1 C.M.L.R. 10 at [66], and Essent Belgium EU:C:2014:2192 at [77].

38 I should point out that the Court, which, in Commission of the European Communities v Italy (7/68) [1968] E.C.R. 423; [1969] C.M.L.R. 1 , adopted a wide definition of the concept of “goods” as including all “products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions” (p.428) (see also, to that effect, Vlaamse Dierenartsenvereniging VZW v Belgische Staat (C-42/10, C-45/10 & C-57/10), judgment of 14 April 2011 , not yet reported, at [68] and the case law cited, explicitly recognised that electricity constitutes a product (see Essent Netwerk Noord BV v Aluminium Delfzijl BV (C-206/06) [2008] E.C.R. I-5497; [2008] 3 C.M.L.R. 32 at [43] and the case law cited).

39 See, to that effect, EI Du Pont de Nemours Italiana SpA v Unità Sanitaria Locale No.2 di Carrara (C-21/88) [1990] E.C.R. I-889; [1991] 3 C.M.L.R. 25 at [13], and Commission of the European Communities v Italy (C-263/85) [1991] E.C.R. I-2457 .

40 Ålands Vindkraft [2015] 1 C.M.L.R. 10 .

41 Essent Belgium EU:C:2014:2192 .

42 See Ålands Vindkraft [2015] 1 C.M.L.R. 10 at [76] and Essent Belgium EU:C:2014:2192 at [89] respectively.

43 Ålands Vindkraft [2015] 1 C.M.L.R. 10 .

44 Essent Belgium EU:C:2014:2192 .

45 See Ålands Vindkraft [2015] 1 C.M.L.R. 10 at [95] and Essent Belgium EU:C:2014:2192 at [98] respectively.

[2017] 1 C.M.L.R. 39

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