Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 28 January 2014 [1]

Case C-573/12

Ålands Vindkraft AB
v
Energimyndigheten

(Request for a preliminary ruling from the förvaltningsrätten i Linköping (Sweden))

(Free movement of goods — Measures having equivalent effect to a quantitative restriction — Directive 2009/28/EC — National support schemes for renewable energies — Green certificates awarded to the production of electricity from renewable energy sources — Award reserved to producers located in Sweden or in a Member State with which the Kingdom of Sweden has concluded a cooperation agreement)

1. This case presents the Court with a fresh opportunity to rule on the consistency with EU law of national support schemes for energies produced from renewable sources [2] under which the support is reserved to electricity producers located on the national territory.

2. The question, which reflects the tension between the principle of the free movement of goods, on the one hand, and the requirements of environmental protection, on the other, has already been asked in *Essent Belgium* (C-204/12 to C-208/12), currently pending before the Court, in which I delivered my Opinion on 8 May 2013. In that Opinion, I addressed both the principle of the free movement of goods and Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market. [3]

3. Whilst the present case is similar as regards the facts, its legal context is different, inasmuch as, in the light of the explanations provided by the förvaltningsrätten i Linköping (Administrative Court, Linköping, Sweden; or 'the referring court'), the Swedish scheme at issue must be assessed by reference to Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC. [4]

1 — Original language: French.

2 — For ease of reference, I shall refer to such energy as 'green energy'.

3 — OJ 2001 L 283, p. 33.

4 — OJ 2009 L 140, p. 16.

4. This leads me to wonder whether Directive 2009/28 permits the establishment of a national support scheme for electricity produced from renewable energy sources [5] under which producers of green electricity are awarded electricity certificates of which electricity suppliers and certain users must then compulsorily purchase a certain quota according to the total volume of energy that they supply or consume, where that scheme reserves the award of those certificates exclusively to green electricity producers located in the Member State in question.

5. If that question is answered in the affirmative, the further question will arise as to whether the territorial restrictions on access to support schemes for green energy are consistent with the requirements of the principle of the free movement of goods or, in other words, whether Directive 2009/28 is valid in the light of Article 34 TFEU.

6. In this Opinion I shall submit first of all that, while Directive 2009/28 permits such territorial restrictions, Article 34 TFEU, on the other hand, does not.

7. I shall then argue that Article 3(3) of Directive 2009/28 is invalid to the extent that it confers upon Member States power to prohibit, or to restrict, access to their support schemes on the part of producers whose green electricity production sites are located in another Member State.

8. Lastly, I shall propose, for reasons of legal certainty, that the temporal effects of a declaration of invalidity in that regard be limited.

I – Legal framework

A – *EU law*

9. Directive 2009/28, which entered into force on 25 June 2009 and was to be transposed by 5 December 2010 at the latest, repealed Directive 2001/77 with effect from 1 January 2012.

10. Recitals 1, 13, 14, 15, 25, 36, 52 and 56 in the preamble to Directive 2009/28 state:

‘(1) The control of European energy consumption and the increased use of [green] energy ..., together with energy savings and increased energy efficiency, constitute important parts of the package of measures needed to reduce greenhouse gas emissions and comply with the Kyoto Protocol to the United Nations Framework Convention on Climate Change, and with further Community and international greenhouse gas emission reduction commitments beyond 2012. Those factors also have an important part to play in promoting the security of energy supply, promoting technological development and innovation and providing opportunities for employment and regional development, especially in rural and isolated areas.

...

(13) … [I]t is appropriate to establish mandatory national targets consistent with a 20% share of [green] energy ... in Community energy consumption by 2020.

(14) The main purpose of mandatory national targets is to provide certainty for investors and to encourage continuous development of technologies which generate energy from all types of renewable sources. …

5 — ‘Green electricity’.

(15) The starting point, the [green] energy potential and the energy mix of each Member State vary. It is therefore necessary to translate the Community 20% target into individual targets for each Member State, with due regard to a fair and adequate allocation taking account of Member States' different starting points and potentials, including the existing level of [green] energy ... and the energy mix. ...

...

(25) Member States have different renewable energy potentials and operate different schemes of support for [green] energy ... at the national level. The majority of Member States apply support schemes that grant benefits solely to [green] energy ... that is produced on their territory. For the proper functioning of national support schemes it is vital that Member States can control the effect and costs of their national support schemes according to their different potentials. ... This Directive aims at facilitating cross-border support of [green] energy ... without affecting national support schemes. It introduces optional cooperation mechanisms between Member States which allow them to agree on the extent to which one Member State supports the energy production in another and on the extent to which the [green] energy production ... should count towards the national overall target of one or the other. In order to ensure the effectiveness of both measures of target compliance, i.e. national support schemes and cooperation mechanisms, it is essential that Member States are able to determine if and to what extent their national support schemes apply to [green] energy ... produced in other Member States and to agree on this by applying the cooperation mechanisms provided for in this Directive.

...

(36) To create opportunities for reducing the cost of achieving the targets laid down in this Directive, it is appropriate both to facilitate the consumption in Member States of [green] energy produced ... in other Member States, and to enable Member States to count [green] energy ... consumed in other Member States towards their own national targets. For this reason, flexibility measures are required, but they remain under Member States' control in order not to affect their ability to reach their national targets. Those flexibility measures take the form of statistical transfers, joint projects between Member States or joint support schemes.

...

(52) Guarantees of origin issued for the purpose of this Directive have the sole function of proving to a final customer that a given share or quantity of energy was produced from renewable sources. ... It is important to distinguish between green certificates used for support schemes and guarantees of origin.

...

(56) Guarantees of origin do not by themselves confer a right to benefit from national support schemes.'

11. Article 1 of Directive 2009/28, entitled 'Subject matter and scope', states:

'This Directive establishes a common framework for the promotion of [green] energy ... It sets mandatory national targets for the overall share of [green] energy ... in gross final consumption of energy ...'

12. Points (j), (k) and (l) of the second paragraph of Article 2 of Directive 2009/28 lay down the following definitions:

‘(j) “guarantee of origin” means an electronic document which has the sole function of providing proof to a final customer that a given share or quantity of energy was produced from renewable sources …;

(k) “support scheme” means any instrument, scheme or mechanism applied by a Member State or a group of Member States, that promotes the use of [green] energy by reducing the cost of that energy, increasing the price at which it can be sold, or increasing, by means of a [green] energy obligation or otherwise, the volume of such energy purchased. This includes, but is not restricted to, investment aid, tax exemptions or reductions, tax refunds, [green] energy obligation support schemes including those using green certificates, and direct price support schemes including feed-in tariffs and premium payments;

(l) “[green] energy obligation” means a national support scheme requiring energy producers to include a given proportion of [green] energy ... in their production, requiring energy suppliers to include a given proportion of [green] energy ... in their supply, or requiring energy consumers to include a given proportion of [green] energy ... in their consumption. This includes schemes under which such requirements may be fulfilled by using green certificates.’

13. Under Article 3(1), (2) and (3) of Directive 2009/28:

‘1. Each Member State shall ensure that the share of [green] energy ..., calculated in accordance with Articles 5 to 11, in gross final consumption of energy in 2020 is at least its national overall target for the share of [green] energy ... in that year, as set out in the third column of the table in part A of Annex I. ...

2. Member States shall introduce measures effectively designed to ensure that the share of [green] energy ... equals or exceeds that shown in the indicative trajectory set out in part B of Annex I.

3. In order to reach the targets set in paragraphs 1 and 2 of this Article Member States may, inter alia, apply the following measures:

(a) support schemes;

(b) measures of cooperation between different Member States and with third countries for achieving their national overall targets in accordance with Articles 5 to 11.

Without prejudice to Articles 87 and 88 of the Treaty, Member States shall have the right to decide, in accordance with Articles 5 to 11 of this Directive, to which extent they support [green] energy ... which is produced in a different Member State.’

14. Article 5 of Directive 2009/28 provides:

‘1. The gross final consumption of [green] energy ... in each Member State shall be calculated as the sum of:

(a) gross final consumption of [green] electricity ...;

...

3. For the purposes of paragraph 1(a), gross final consumption of [green] electricity ... shall be calculated as the quantity of electricity produced in a Member State from renewable energy sources, excluding the production of electricity in pumped storage units from water that has previously been pumped uphill.

...'

15. Paragraph 1 of Article 11 of Directive 2009/28, entitled 'Joint support schemes', provides:

'Without prejudice to the obligations of Member States under Article 3, two or more Member States may decide, on a voluntary basis, to join or partly coordinate their national support schemes. In such cases, a certain amount of [green] energy ... produced in the territory of one participating Member State may count towards the national overall target of another participating Member State ...'

16. Article 15 of Directive 2009/28, entitled 'Guarantees of origin of electricity, heating and cooling produced from renewable energy sources', provides:

'1. For the purposes of proving to final customers the share or quantity of [green] energy ... in an energy supplier's energy mix in accordance with Article 3(6) of Directive 2003/54/EC, [6] Member States shall ensure that the origin of [green] electricity ... can be guaranteed as such within the meaning of this Directive, in accordance with objective, transparent and non-discriminatory criteria.

2. … The guarantee of origin shall have no function in terms of a Member State's compliance with Article 3. Transfers of guarantees of origin ... shall have no effect ... on the calculation of the gross final consumption of [green] energy ... in accordance with Article 5.

...

9. Member States shall recognise guarantees of origin issued by other Member States in accordance with this Directive exclusively as proof of the elements referred to in paragraph 1 and paragraph 6(a) to (f). ...

...'

B – *Swedish law*

17. The Swedish support scheme for green electricity production was introduced by Law No 113 of 2003 on electricity certificates (lagen (2003:113) om elcertifikat), [7] which was replaced with effect from 1 January 2012 by Law No 1200 of 2011 on electricity certificates (lagen (2011:1200) om elcertifikat), [8] one of the purposes of which was to transpose Directive 2009/28 into Swedish law.

18. The referring court emphasises that, although the Energimyndigheten's decision of 9 June 2010, at issue in the main proceedings, was adopted under the Law of 2003, Swedish law requires in principle that disputes be resolved in accordance with the law applicable at the time when they are examined by a court and, in consequence, the legislation applicable in the present case is the Law of 2011.

6 — Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC (OJ 2003 L 176, p. 37).

7 — 'The Law of 2003'.

8 — 'The Law of 2011'.

19. The support scheme established by the Swedish legislation is based on the award of green certificates to producers of green electricity and on the correlative obligation incumbent upon electricity suppliers and certain users to purchase a certain number of certificates, corresponding to a proportion of the total volume of electricity supplied or consumed.

20. The green certificates, each of which attests to the production of one megawatt hour of green electricity, may be freely traded on a market which is competitive and on which prices are determined by the interplay of supply and demand. The cost of the certificates is ultimately passed on to electricity consumers. The number of certificates that suppliers and consumers are obliged to purchase varies according to the green electricity production target that must be achieved. For the years 2010 to 2012, 0.179 of a certificate had to be purchased for every megawatt hour sold or consumed.

21. The referring court observes that, although there is no mention of any such restriction in the wording of the Law of 2011, it is apparent from the preparatory work for the Law of 2003 and for the Law of 2011 that the award of green certificates is reserved to green electricity production installations located in Sweden.

22. The referring court goes on to state that, in Chapter 1 of the Law of 2011, Article 5 lays down the following new provision:

'Electricity certificates which have been awarded for the production of renewable electricity in another State may be used to fulfil a quota obligation under the present Law, provided that the Swedish electricity certificate scheme has been coordinated with the electricity certificate scheme of that other State by an international agreement.'

23. On 29 June 2011, the Kingdom of Sweden concluded one such agreement with the Kingdom of Norway.[9] On the other hand, there is no such agreement with the Republic of Finland.

II – **The dispute in the main proceedings**

24. On 30 November 2009, Ålands Vindkraft AB,[10] which operates a wind farm located in Finland, in the archipelago of the Åland Islands, but connected — according to the pleas put forward by Ålands Vindkraft and referred to in the order for reference — to the Swedish electricity distribution system, sought approval from the Energimyndigheten with a view to being awarded green certificates under the Swedish rules.

25. That application was refused by the Energimyndigheten by decision of 9 June 2010, on the ground that the green certificates scheme is open solely to electricity production installations located in Sweden.

26. Ålands Vindkraft brought proceedings for the annulment of that decision before the förvaltningsrätten i Linköping, alleging, inter alia, infringement of Article 34 TFEU, in that the effect of the scheme at issue is to reserve the possibility of meeting the electricity requirements of approximately 18% of Swedish consumers to green electricity producers located in Sweden, to the detriment of electricity imports from other Member States.

9 — Directive 2009/28 has been integrated into the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3), as adjusted by the Protocol adjusting the Agreement on the European Economic Area (OJ 1994 L 1, p. 572), and amended by the Decision of the EEA Joint Committee No 162/2011 of 19 December 2011 amending Annex IV (Energy) to the EEA Agreement (OJ 2012 L 76, p. 49, and corrigendum OJ 2012 L 247, p. 16).

10 — 'Ålands Vindkraft'.

III – **The questions referred for a preliminary ruling**

27. Since it was uncertain as to the interpretation of Directive 2009/28 and the implications of Article 34 TFEU, the förvaltningsrätten i Linköping decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) The Swedish electricity certificate scheme is a national support scheme which requires electricity suppliers and certain electricity users of that Member State to purchase electricity certificates corresponding, respectively, to a share of their supplies or use, without there being a specific requirement also to purchase electricity from the same source. The electricity certificates are awarded by the Kingdom of Sweden and are proof that a certain volume of electricity has been produced from renewable energy sources. The producers of [green] electricity receive, through the sale of those certificates, income additional to that derived from the sale of electricity. Are point (k) [of the second paragraph] of Article 2 of [Directive 2009/28] and Article 3(3) [thereof] to be interpreted as permitting a Member State to implement a national support scheme, such as that described above, from which only producers located in the territory of that State may benefit, the result of which is that those producers have an economic advantage over producers who are not eligible for electricity certificates?

(2) In the light of Article 34 TFEU, can a system such as that described in Question 1 be regarded as constituting a quantitative restriction on imports or a measure having equivalent effect?

(3) If the answer to Question 2 is affirmative, can such a scheme be regarded as compatible with Article 34 TFEU in the light of its objective of promoting the production of [green] electricity?

(4) Does the fact that there is no express provision in national law requiring the support scheme to be confined to national producers have any bearing on the answers to the above questions?’

IV – **Analysis**

A – *Question 1*

28. By its first question, which falls into two parts, the referring court asks, first, whether a scheme such as that at issue in the main proceedings is a support scheme within the meaning of point (k) of the second paragraph of Article 2 of Directive 2009/28 and, secondly, in the event that that question is answered in the affirmative, whether Directive 2009/28 is to be interpreted as prohibiting any restriction whereby access to such a scheme is reserved to producers whose installations are located in the Member State concerned.

1. The first part of Question 1

29. Is a green certificate scheme such as the scheme at issue in the main proceedings a support scheme within the meaning of point (k) of the second paragraph of Article 2 of Directive 2009/28?

30. Ålands Vindkraft argues that Directive 2009/28 applies to schemes to support the use of green electricity and not to support the production of such electricity, whereas the Energimyndigheten, in common with all the governments that have submitted observations argue, as does the European Commission, that a scheme to support the production of green electricity must be categorised as a ‘support scheme’ within the meaning of that directive.

31. I unhesitatingly agree with the latter view, which is the clear implication of the definitions laid down in points (k) and (l) of the second paragraph of Article 2 of Directive 2009/28, for the following reasons.

32. First, it is clear from the wording of those definitions that support schemes designed to promote the use of green energy include those which require energy producers or energy suppliers to include a proportion of green energy in their production or supply of electricity. The use of green energy must, therefore, be understood as including the production of green energy, and it would be contrary to the wording of Directive 2009/28 to treat those expressions as distinct and to regard one as excluding the other.

33. Secondly, the use of the adjective 'any' and of the terms 'instrument', 'scheme' and 'mechanism', which are treated as equivalents, as well as the non-exhaustive nature of the examples listed in point (k) of the second paragraph of Article 2 of Directive 2009/28 reveal the intention of the EU legislature to have the concept of support scheme construed broadly.

34. Thirdly, it must be observed that points (k) and (l) of the second paragraph of Article 2 of Directive 2009/28 expressly include within support schemes not only feed-in tariffs and premium payments but also green certificate schemes. [11]

35. In my view, there can be no doubt, therefore, that a green certificate scheme such as the scheme at issue in the main proceedings is a support scheme within the meaning of Directive 2009/28.

36. It remains to be ascertained whether Directive 2009/28 precludes rules under which access to a support scheme is reserved to producers whose installations are located within the Member State in question.

2. The second part of Question 1

37. Directive 2009/28 gives rise to divergent interpretations on the part of the main parties and the interveners.

38. According to one such reading — that argued for by Ålands Vindkraft — whilst Directive 2009/28 aims to promote the use of green energy so that Member States can meet their mandatory targets, it *does not permit* the introduction of discriminatory support schemes, since these would give rise to unlawful restrictions on trade.

39. A radically different reading is proposed by the Energimyndigheten and by the Swedish, German and Norwegian Governments, all of which argue that Directive 2009/28 expressly *permits* — and indeed *presupposes* — restriction of access to national support schemes to green energy produced on the national territory.

40. That reading is, they contend, consistent with the very wording of Directive 2009/28, inasmuch as recital 25 to that directive and Article 3(3) thereof state that Member States are free to decide whether — and if so, to what extent — they wish to support the production of green energy in other Member States, and list the cooperation measures, which are optional in nature, to which Member States may have recourse in such cases.

11 — Such schemes are also mentioned in the last sentence of recital 52 to Directive 2009/28.

41. That reading is, they submit, borne out by the general structure of Directive 2009/28. The approach adopted in the directive is directed toward the Member States individually, setting specific targets for each of them. Moreover, the directive identifies national support schemes as the principal instrument for achieving those specific targets, leaving it open to the Member States to control the effect and costs of such schemes according to their different potentials, and that presupposes that the support schemes are restricted to the territory of each Member State.

42. The Swedish and Norwegian Governments submit that further evidence of the validity of that reading is to be found in the preparatory work for Directive 2009/28, which suggests that Member States have a wide discretion when it comes to implementing the policies they select as a means of meeting their obligations under the directive, which does no more than lay down a common framework. [12]

43. The Commission advocates a middle path. It points out that, by contrast with Directive 2001/77, Directive 2009/28 is silent as regards restrictions on trade and that Article 3(3) confers a right on Member States to introduce support schemes, to put in place cooperation measures and to decide on the extent to which they are going to support the production of green energy in another Member State. Accordingly, Directive 2009/28 must be construed as *not precluding* Member States from setting up national support schemes which are open only to producers located on their national territory.

44. For my part, I believe that Directive 2009/28 does permit territorial restrictions on schemes to support green energy and that the truth of this is demonstrated both by a literal interpretation of the directive and by its general structure and objectives.

a) The wording of the second subparagraph of Article 3(3) of Directive 2009/28

45. Recital 25 to Directive 2009/28 expressly states that restrictions exist in most national support schemes and that Member States, which have different potentials, have a discretion in determining whether — and if so, to what extent — those support schemes are to apply to green energy produced in other Member States. That discretion is reflected, in the second subparagraph of Article 3(3) of the directive, by the affirmation of the principle that the Member States have 'the right to decide' to what extent they are going to support the importation of green energy, 'in accordance with Articles 5 to 11' of the directive, subject only to compliance with Articles 107 TFEU and 108 TFEU. It is thus clear that Directive 2009/28 confers competence on the Member States to decide whether to support imported green energy and to determine the scope of any such support and, where appropriate, to conclude agreements with other Member States.

b) The general structure of Directive 2009/28

46. Two arguments based on the general structure of Directive 2009/28 provide clear guidance on the question whether a Member State which implements a support scheme is required to ensure that it is open to green electricity production installations located in other Member States.

47. The first argument concerns the optional nature of the flexibility mechanisms governed by Articles 6 to 11 of Directive 2009/28. Whilst the EU legislature intended to support cross-border exchanges of green energy by facilitating the consumption in Member States of green energy produced in other Member States, and by enabling Member States to count green energy consumed

12 — The Swedish Government refers to paragraph 3.1 on page 8 of the Commission staff working document accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — Renewable energy: a major player in the European energy market (SWD(2012) 164 final). The document is available in English only.

in other Member States towards their own national targets,[13] the 'flexibility measures'[14] (which are also called 'cooperation mechanisms')[15] introduced for that purpose, which may take the form of 'statistical transfers',[16] or 'joint projects between Member States',[17] or even 'joint support schemes'[18] are expressly framed as optional mechanisms[19] that are conditional upon the prior conclusion of an agreement between Member States. Consequently, even where a Member State is minded to apply its support scheme unilaterally to green energy produced in another Member State, that energy may not be taken into account with a view to the achievement of national targets unless the second Member State agrees and concludes a cooperation agreement with the first Member State.

48. The second argument concerns the limited effects attributed to guarantees of origin. Although Directive 2009/28 lays down an obligation of mutual recognition in respect of such guarantees, it expressly limits the effect of guarantees issued by other Member States, specifying that they serve merely as an instrument of proof,[20] without conferring any right to benefit from national support schemes.[21] It is accordingly clear that a Member State may refuse access to its support scheme to a green electricity producer located abroad, even if the fact that the electricity that it produces is green electricity is affirmed by a guarantee of origin that meets the requirements of Directive 2009/28.

49. The aims of Directive 2009/28 confirm that the Member States retain that measure of discretion.

c) The aims of Directive 2009/28

50. By contrast with Directive 2001/77, which merely identified indicative targets for Member States, Directive 2009/28 sets mandatory national overall targets[22] for the consumption of green electricity, which should make it possible to achieve the overall target of at least a 20% share of green energy production in the European Union, while leaving it to the Member States to select the appropriate means of achieving those targets. Moreover, whilst, under Directive 2001/77, the national indicative targets for 'consumption' could be met with account being taken of imported green electricity,[23] Directive 2009/28 defines the consumption of green electricity as the volume of electricity 'produced in a Member State ... excluding the production of electricity in pumped storage units from water that has previously been pumped uphill'.[24] The fact that national targets are set for promoting green energy use and the emphasis on production arguably make it quite legitimate for Member States to reserve their support exclusively to national production, which is what will enable them to meet their targets.

13 — See recital 36 to the directive.

14 — Idem.

15 — Recital 25 to Directive 2009/28.

16 — Article 6 of the directive.

17 — Article 7 of the directive. The directive also permits joint projects between Member States and third countries (Article 9 of the directive).

18 — Article 11 of Directive 2009/28.

19 — The sixth sentence of recital 25 to the directive.

20 — Article 15(9) of the directive.

21 — See, to that effect, recital 56 to Directive 2009/28, which states that '[g]uarantees of origin do not by themselves confer a right to benefit from national support schemes'. Whilst the use of the conditional mood in the French version ('[l]es garanties d'origine ne conféreraient pas, par elles-mêmes, le droit de bénéficier de régimes d'aide nationaux') is perplexing in that it seems to leave room for doubt, it must be observed that several other linguistic versions use the present indicative (see, in particular, the German version ('Herkunftsnachweise begründen nicht an sich ein Recht auf Inanspruchnahme nationaler Förderregelungen') and the Spanish version ('Las garantías de origen no confieren de por sí el derecho a acogerse a sistemas de apoyo nacionales').

22 — See the title of Article 3 of the directive.

23 — See points 107 to 109 of my Opinion in *Essent Belgium*.

24 — Article 5(3), first subparagraph, of the directive.

51. It is for those reasons that I propose that, in answer to Question 1, it be stated that point (k) of the second paragraph of Article 2 and Article 3(3) of Directive 2009/28 are to be interpreted as meaning that:

— national legislation under which producers of green electricity are awarded green certificates of which electricity suppliers and certain users must compulsorily purchase a certain quota according to the total volume of energy that they supply or consume is a support scheme within the meaning of that directive;

— where a Member State introduces such a scheme, it may reserve the award of green certificates exclusively to green electricity production installations located on its territory.

B – *Questions 2 and 3*

52. By its second and third questions, the referring court asks, in substance, whether Article 34 TFEU precludes the territorial restriction which is a feature of the scheme at issue.

53. In order to answer that question, I shall follow the same three-stage reasoning that I employed in my Opinion in *Essent Belgium*, determining successively whether Article 34 TFEU is applicable; whether the legislation at issue constitutes a trade restriction; and, if so, whether that restriction can be justified.

1. Whether Article 34 TFEU is applicable

54. Does the adoption of Directive 2009/28 preclude any examination as to whether national support schemes are compatible with Article 34 TFEU?

55. The parties which have lodged observations before the Court take divergent positions in that regard.

56. Ålands Vindkraft submits that Directive 2009/28 did not harmonise national support schemes and that, consequently, the national measures adopted following the transposition of that directive into national law must be consistent with primary law, whether or not they are consistent with the directive.

57. By contrast, the Energimyndigheten contends that there is no possibility of conflict between the territorial restriction at issue and Article 34 TFEU, since primary law is applicable only to the extent that no applicable secondary law exists. [25]

58. While recognising that Directive 2009/28 did not fully harmonise national support schemes, the German Government submits that the extent to which the legality of legislation may be reviewed in the light of Article 34 TFEU must reflect the fact that the EU legislature was in full awareness of the facts when it accepted possible restrictions on the free movement of goods as being necessary for the proper functioning of national support schemes.

59. Lastly, the Commission infers from the fact that Directive 2009/28 allowed Member States to maintain their national support schemes with a view to meeting their national targets that the Swedish green certificate scheme must be presumed to be consistent with Article 34 TFEU.

25 — The Energimyndigheten refers to paragraph 53 of the judgment in Case C-309/02 *Radlberger Getränkegesellschaft and S. Spitz* [2004] ECR I-11763.

60. In my view, the entry into force of Directive 2009/28 does not remove the obligation to consider the matter in the light of Article 34 TFEU.

61. While it is clear from case-law that any national measure in a sphere which has been the subject of exhaustive harmonisation at EU level must be assessed in the light of that harmonisation measure and not in the light of primary law,[26] that case-law does not apply here since it is established that Directive 2009/28 did not harmonise the material content of support schemes designed to promote the use of green energy.

62. The difficulty in fact lies not in the existence of a system of regulation by EU law that exhaustively harmonises the measures needed to ensure the protection of the environment in the trade in green energy between Member States, but in the affirmation, in Directive 2009/28, of the competence of the Member States to determine whether or not their support schemes are to apply to green energy imported from another Member State.

63. That being so, the assessment of the Swedish support scheme must be carried out with account being taken of the principle that primary law prevails over other sources of EU law, from which two consequences ensue.

64. The first of these relates to the interpretation of the secondary law, which must be in a sense which renders it consistent with primary law and the general principles of the European Union. It is appropriate to recall in this connection the settled case-law according to which, where a provision of secondary law is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with the Treaties rather than the interpretation which leads to its being found incompatible with them.[27]

65. The second consequence relates to the validity of the secondary law, which must be assessed by reference to the rules of primary law relating to freedom of movement. It follows from the case-law of the Court that the prohibition, laid down in Article 34 TFEU, of quantitative restrictions and of measures having equivalent effect 'applies not only to national measures but also to measures adopted by the institutions of the European Union',[28] which 'themselves must also have due regard to freedom of trade [between Member States], which is a fundamental principle of the common market'.[29]

66. In the particular context of the instrument of cooperation between the Court of Justice and national courts established by Article 267 TFEU, it is important to recall that, even where a reference to the Court for a preliminary ruling relates solely to the interpretation of EU law, the Court may, in certain specific circumstances, find it necessary to examine the validity of provisions of secondary law.

67. It should be borne in mind in this connection that the Court has held that '[i]f it appears that the real purpose of the questions submitted by a national court is concerned rather with the validity of [EU] measures than with their interpretation, it is appropriate for the Court to inform the national court at once of its view without compelling the national court to comply with purely formal requirements which would uselessly prolong the procedure under Article [267 TFEU] and would be contrary to its very nature'.[30]

26 — See, most recently, Case C-216/11 *Commission* v *France* [2013] ECR, paragraph 27 and the case-law cited.

27 — See, inter alia, Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 28. See also Case C-19/12 *Efir* [2013] ECR, paragraph 34.

28 — Case C-59/11 *Association Kokopelli* [2012] ECR, paragraph 80 and the case-law cited. See, by analogy, in relation to the freedom to provide services, Case C-97/09 *Schmelz* [2010] ECR I-10465, paragraph 50.

29 — Case 37/83 *Rewe-Zentrale* [1984] ECR 1229, paragraph 18.

30 — Case 16/65 *Schwarze* [1965] ECR 877.

68. Accordingly, on a number of occasions, the Court has of its own motion declared invalid an act in relation to which it had been asked only for interpretation. [31]

69. It appears to me that the flexibility inherent in the preliminary ruling mechanism as an instrument of cooperation enables the Court to rule on the validity of a provision of secondary law in cases, such as that before the referring court, where the national court refers questions for a preliminary ruling on the interpretation of both secondary law and primary law. Where, in such cases, the interpretation of secondary law reveals an inconsistency with primary law, it is necessary, in order to preserve the effectiveness of the Court's cooperation with national courts, for it to spell out the inferences that should be drawn from such a finding in so far as concerns the validity of the provision of secondary law in question.

70. Clearly, it is important not to lose sight of the fact that the information provided in orders for reference not only enables the Court to give useful answers but also to ensure that the governments of the Member States and other interested parties are given an opportunity to submit observations in accordance with Article 23 of the Statute of the Court of Justice of the European Union. It is therefore the Court's duty to ensure that that opportunity is safeguarded, given that, under that provision, only the orders for reference are notified to the interested parties, accompanied by a translation in the official language of each Member State, excluding any case-file that may be sent to the Court by the national court. [32]

71. In the present case, it is apparent from the order for reference that, although in formal terms the subject-matter of the questions is the interpretation of point (k) of the second paragraph of Article 2 and Article 3(3) of Directive 2009/28 and of Article 34 TFEU, the fact that the förvaltningsrätten i Linköping does not rule out the possibility that the characteristics of the scheme at issue in the main proceedings may be consistent with Directive 2009/28 and at the same time questions the compatibility of the scheme with the principle of the free movement of goods, is an indirect expression of its doubts as to the validity of the directive, and consequently the subject-matter of the questions requires an assessment of validity to be made.

72. That is also how the request for a preliminary ruling has been understood by the governments of the Member States and the main parties, as is demonstrated, in particular, by the observations of the Energimyndigheten, according to which it would be 'inconsistent' with Directive 2009/28 to prohibit the territorial restrictions on the basis of Article 34 TFEU. [33]

73. Accordingly, it is appropriate to consider whether Article 34 TFEU is to be interpreted as precluding a territorial restriction such as that at issue in the main proceedings and, if appropriate, to draw the necessary inferences as to the validity of Directive 2009/28 in the light of that provision.

2. The existence of a restriction on the free movement of goods

74. As I pointed out in my Opinion in *Essent Belgium*, [34] it is clear from firmly established case-law that any trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, trade within the European Union are measures having an effect equivalent to quantitative restrictions for the purposes of Article 34 TFEU.

31 — See, inter alia, Case 62/76 *Strehl* [1977] ECR 211, paragraphs 10 to 17; Case 145/79 *Roquette Frères* [1980] ECR 2917, paragraph 6; and Case C-457/05 *Schutzverband der Spirituosen-Industrie* [2007] ECR I-8075, paragraphs 32 to 39.

32 — See, inter alia, Case C-370/12 *Pringle* [2012] ECR, paragraph 85 and the case-law cited.

33 — See the penultimate paragraph of p. 28 of the French version of the observations.

34 — Point 78.

75. The restriction may result not only from the less favourable treatment of imported products as compared with domestically produced products, but also, conversely, from the grant of an advantage to nationally produced goods by contrast with imported goods,[35] or even from legislation which, although not reserving any advantage to nationally produced goods, lays down additional conditions for the grant of the advantage to imported goods.[36]

76. Although the Swedish green certificate scheme does not prohibit the importation of electricity, it indisputably confers an economic advantage which may favour producers of green electricity located in Sweden as compared with producers located in other Member States, since, whereas the former benefit from additional income from the sale of green certificates, which is in effect a production premium, the income of the latter is derived solely from the sale of green electricity.

77. The fact that it is impossible for electricity producers located in other Member States to have access to the green certificate scheme when they export green electricity therefore constitutes a discriminatory restriction on the free movement of goods, which, as such, is prohibited by Article 34 TFEU.

78. Nevertheless, it is appropriate to determine whether that restriction may be justified.

3. The justification for the restriction on the free movement of goods

79. I take the view — for the reasons which I set out in *Essent Belgium*, which need not be revisited here — that national legislation constituting a measure having equivalent effect to quantitative restrictions may be justified by the objective of environmental protection even if it is discriminatory, provided, however, that it undergoes a particularly rigorous proportionality test, one which I have referred to as 'reinforced'.

80. It is therefore necessary to ascertain whether the national legislation at issue in the main proceedings is appropriate for ensuring that the objective of environmental protection is achieved and whether or not it goes beyond what is necessary in order to achieve that objective.

81. The Energimyndigheten refers, as do all the governments that have submitted observations, to the judgment in *PreussenElektra*,[37] arguing that the justifications upheld in that case apply equally to the legislation at issue in the main proceedings.

82. I do not share that view and consider that the developments in the regulatory framework render it necessary to review the terms of the debate.

83. Two new factors call for particular attention, namely the liberalisation of the electricity market and the implementation of a system for the mutual recognition of guarantees of origin.

84. First of all, the European Union has been engaged since 1999 in the progressive liberalisation of the internal energy market, which has resulted in the adoption of a new regulatory framework known as the 'Third Energy Package'. Comprising, in particular, Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003[38] and Directive

35 — See, inter alia, Case 103/84 *Commission* v *Italy* [1986] ECR 1759, in which financial aid granted to public transport undertakings on condition that they purchased vehicles produced in Italy was held to be a measure having equivalent effect to a quantitative restriction.

36 — Case C-443/10 *Bonnarde* [2011] ECR I-9327, which concerned French legislation under which the award of an environmental subsidy was conditional upon the first registration document of an imported demonstration vehicle bearing the words 'demonstration vehicle'.

37 — Case C-379/98 *PreussenElektra* [2001] ECR I-2099.

38 — OJ 2009 L 211, p. 15.

2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC,[39] the new framework introduces competition between electricity producers and intensifies cross-border exchanges of electricity by fostering network interconnection.

85. It must be observed that, by contrast with Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity,[40] which merely marked 'a further phase in the liberalisation of the electricity market and [left] some obstacles to trade in electricity between Member States in place',[41] the objective of Directive 2009/72, as is clear from recital 62 thereto, is the creation of a fully operational internal electricity market facilitating the sale of electricity on equal terms through an interconnected system.

86. It is also important to emphasise that, as is confirmed in the Conclusions of the European Council of 4 February 2011[42] and of 18 and 19 October 2012,[43] the Member States have agreed to complete the internal electricity market by 2014 so as to allow electricity to flow freely. Therefore, contrary to the German Government's contention, the completion of the internal electricity market by 2014 is not only an ambition cherished by the Commission. It is a 'need'[44] and an objective of the European Union.

87. Moreover, the integration of green energies into the internal electricity market is one of the principal objectives of Directive 2009/28, which is intended, in particular, to develop the interconnection of the electricity grids of the Member States so as to promote cross-border exchanges of green electricity, which are intermittent by nature, by providing producers of green electricity with priority access or guaranteed access to the transmission and distribution systems.[45]

88. Secondly, the justification purportedly to be found in the fact that it is impossible to determine the green origins of electricity produced in another Member State can no longer validly be put forward, that is to say, not since the introduction by Directive 2001/77 of 'guarantees of origin', which are intended precisely to establish that electricity sold has been produced from renewable sources.

89. A possible objection to that view might be that, in Directive 2009/28, guarantees of origin are intended merely to serve as an instrument of proof enabling a supplier to demonstrate to its customers that its energy mix includes a given proportion or volume of green energy,[46] that they have no function in the attainment of mandatory national targets[47] and that they do not by themselves confer any right to benefit from national support schemes.[48]

90. However, any such objection seems to me to be irrelevant in the light of the Court's reasoning, which is based solely on the absence of any instrument of proof that could make it possible to determine the origin of the electricity produced. Moreover, such an objection would in effect be an attempt to justify infringement of the rules of the FEU Treaty relating to the free movement of goods by reference to the wording of a lower-ranking rule of law.

39 — OJ 2009 L 211, p. 55.
40 — OJ 1997 L 27, p. 20.
41 — *PreussenElektra*, paragraph 78.
42 — EUCO 2/1/11.
43 — EUCO 156/12.
44 — See section 2(c) of the Conclusions of the European Council of 18 and 19 October 2012.
45 — Article 16(2)(b) of the directive.
46 — Article 15(7) of the directive.
47 — Article 15(2), fourth subparagraph, of the directive.
48 — Recital 56 to Directive 2009/28. See also point 20 of this Opinion.

91. In conclusion, the twofold development in the regulatory framework for trade in electricity, characterised by the liberalisation of the market and mutual recognition, seems to me to make it difficult to maintain the line of authority devolving from *PreussenElektra*, even though I unreservedly endorse the proposition that the use of green energies, which the national support schemes seek to promote, contributes to the protection of the environment, in particular by reducing emissions of greenhouse gases. [49]

92. I do remain sceptical, however, of the assertion that it would necessarily run counter to that objective if green electricity producers located in one Member State were able to benefit from the support scheme applied by another Member State. On this point, it seems to me that there is a degree of confusion between the purposes of support schemes in general and those of territorial restrictions in particular.

93. This question calls for particularly careful consideration since, whilst it is easy to accept that green certificate schemes contribute to environmental protection by stimulating the production of green energy, it would, on the other hand, appear somewhat paradoxical to assert that the importation of green energy from other Member States might undermine environmental protection.

94. It seems to me to be important, therefore, to examine in greater detail each of the justifications put forward to explain the decision that green energy production imported from other Member States may not be taken into account in national support schemes.

95. Although those justifications are grouped together under a general reference to environmental protection, they are in reality quite distinct. In order properly to evaluate the weight of each, it is therefore appropriate to consider — in the expectation of refuting them — each of the principal arguments put forward by the Energimyndigheten and the governments which have submitted observations. [50]

96. The first argument is based on the need to ensure the proper functioning of the support schemes and not to compromise the ability of the Member States to meet their national targets for increasing the production of green electricity, to which end they must be able to control the effect and cost of their support schemes according to their respective potentials.

97. That first argument is not convincing inasmuch as the risk that national green certificate schemes would be destabilised if they were made accessible to producers located in other Member States does not appear to me to have been demonstrated.

98. In addition to the fact that the continuing technical obstacles to cross-border trade in electricity — pertaining, in particular, to the difficulty of gaining access to the grid and the lack of interconnections — limit, to varying degrees in the different Member States, the risk of any sudden, massive influx of foreign producers of green energy, the support schemes are generally accompanied by regulatory mechanisms which would make it possible, where appropriate, to attenuate the risk of a reduction in the price of green certificates in the event that the number of certificates in circulation increased as a consequence of their being issued to foreign producers. Under a scheme such as that at issue in the main proceedings, which is based on the imposition of incremental quotas on suppliers and certain users, any increase in the number of certificates on the green certificates market could, in fact, be offset by a corresponding increase in quota requirements, which could only be to the good.

49 — See *PreussenElektra*, paragraph 73.

50 — As regards the arguments based on the principle that environmental damage should, as a priority, be rectified at source and on the security of energy supply, I would refer to points 105 and 106 of my Opinion in *Essent Belgium*.

99. The second argument is that cross-border trade in electricity requires the prior conclusion of a cooperation agreement between the Member States concerned in order to settle various questions relating, inter alia, to the conditions for issuing green certificates, the coordination of information and the appointment of the authorities responsible for approving installations.

100. That argument does not convince me either.

101. First of all, as the German Government recognises, the purpose of the cooperation mechanisms between Member States provided for in Directive 2009/28 is not to guarantee access to national support schemes for green electricity produced abroad, but to enable Member States to meet their national overall targets with help from other Member States. In my view, far from hindering the signature of cooperation agreements, making national support schemes accessible to installations located abroad could, on the contrary, make this more likely, by encouraging Member States to coordinate their support schemes.

102. Secondly, it appears to me to be significant that, although one of the objectives of Directive 2009/28 is the development of trade in green energies between the Member States, only one cooperation agreement has been signed since its entry into force, namely, the agreement signed by the Kingdom of Sweden and the Kingdom of Norway on 29 June 2011. Moreover, I note with interest that, in its Communication of 5 November 2013, entitled 'Delivering the internal electricity market and making the most of public intervention',[51] the Commission states that it regrets that no use has been made of cooperation mechanisms, with the exception of the abovementioned agreement, and that developing green energies in cross-border support schemes 'can reduce the costs of compliance with Directive 2009/28 ... [and] also help remove possible distortions to the single market arising from different *national* approaches'.[52]

103. The third argument is that any prohibition on territorial restrictions would cause the Member States to lose control over their energy mix.

104. That argument does not seem to me to be any more valid than the previous arguments. Whilst it is clear from the second subparagraph of Article 194(2) TFEU that the European Union's energy policy is intended to preserve freedom of choice as regards national energy mixes, without prejudice to Article 192(2)(c) TFEU,[53] such energy policy decisions may nevertheless be affected by measures adopted by the European Union in the context of its environmental policy, as is demonstrated by Directive 2009/28 itself, which, by laying down mandatory targets for green energy consumption in each Member State, necessarily exerts an influence on the composition of their respective energy mixes.

105. The fourth argument is that electricity producers located in other Member States would be free to select the support scheme that was most favourable to them and that this would pave the way for '*à la carte*' support and even make it possible to obtain support from two national schemes.

106. However, I consider that the fact that Member States are free to coordinate their support schemes by means of the various cooperation mechanisms provided for in Directive 2009/28 is sufficient answer to that objection.

51 — COM C(2013) 7243 final.

52 — Pages 18 and 19.

53 — This provision empowers the European Union to adopt, in the context of its environmental policy, 'measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply'.

107. The fifth argument put forward in support of territorial restrictions is that making support schemes accessible to foreign electricity production would have the consequence of forcing national consumers to finance green energy production installations located in other Member States. However, I would question the relationship between that argument, which was raised by the Energimyndigheten at the hearing, and the objective of environmental protection, which, on the contrary, justifies the financing, through the use of national support schemes, by consumers of one Member State of green energy imported from another Member State, rather than the financing of national energy production from fossil fuels.

108. In conclusion, I consider that none of the arguments relied on is capable of demonstrating that territorial restrictions such as those in issue in the main proceedings are appropriate for securing the attainment of the objective of environmental protection.

109. It is important to point out in this connection that one of the four elements of the European Union's environmental policy, set out in Article 191(1) TFEU, is 'prudent and *rational* utilisation of natural resources'.[54] The development of cross-border trade in green electricity which would result from making national support schemes accessible to foreign electricity producers would contribute to the attainment of that objective by facilitating the optimal distribution of production between the Member States according to their respective potentials.

110. It is my conviction, therefore, that territorial restrictions such as those at issue in the main proceedings are inconsistent with the principle of the free movement of goods.

111. Given that Directive 2009/28 can only — it seems to me — be construed as permitting such restrictions, I consider that it must be regarded as invalid in that regard.

112. It thus remains to be ascertained what temporal effects ensue from that invalidity.

113. The reference for a preliminary ruling on the validity of an EU act and the action for annulment are the two complementary mechanisms for reviewing the legality of acts of the European Union, and the Court is to determine the consequences of a declaration of invalidity by analogy with judgments on annulment actions, the temporal effects of which are mentioned in Article 264 TFEU.

114. Thus, in accordance with the first paragraph of Article 264 TFEU, a declaration of invalidity has, in principle, the same retroactive effect as an annulment.

115. However, on the basis of the derogation provided for in the second paragraph of Article 264 TFEU, the Court accepts that, where justified by overriding considerations, it is possible, exceptionally, to derogate from the principle that a declaration of invalidity has retroactive effect.

116. Accordingly, in three judgments of 15 October 1980, in *Providence agricole de la Champagne*,[55] *Maïseries de Beauce*,[56] and *Roquette Frères*, after finding the regulations in question invalid, the Court held that that invalidity did not enable the charging or payment of monetary compensatory amounts by the national authorities on the basis of those regulations to be challenged in respect of the period preceding its judgment.

54 — My italics.

55 — Case 4/79 *Providence agricole de la Champagne* [1980] ECR 2823.

56 — Case 109/79 *Maïseries de Beauce* [1980] ECR 2883.

117. Subsequently, the Court has on a number of occasions used the possibility of limiting the temporal effects of a declaration that an EU measure is invalid where that is required by overriding considerations of legal certainty involving all the interests at stake. [57]

118. In deciding whether such a limitation should apply, the Court considers, first, whether those concerned have acted in good faith and, secondly, whether its judgment could cause serious difficulties with respect to legal situations that have already arisen.

119. I take the view that the use of that power to vary the temporal effects of declarations of invalidity is justified with respect to the case before the referring court, in which a number of special circumstances are present.

120. The development of green energies requires costly, long-term investments and the retroactive amendment of support schemes could bring about a crisis of confidence among investors and cause investment in the sector to decline, in particular, investment in emerging technologies.

121. That being so, I specifically propose that the Court should defer the effects of its judgment for a period of 24 months from the date of delivery in order for the necessary amendments to Directive 2009/28 to be made.

C – *Question 4*

122. By its fourth question, the referring court asks, in substance, whether the fact that the restriction of the scope of a support scheme, such as that at issue in the main proceedings, to national producers is not expressly stated in the national law has any bearing on the answers to the preceding questions.

123. The order for reference expressly states that, although the restriction 'is not stated in the text of the law, but in the preparatory work', [58] '[u]nder Swedish law it is ... impossible to grant access to the [green] certificates scheme to [green] electricity production installations located outside national borders'. [59]

124. The referring court, which alone has jurisdiction to identify and interpret national law, thus considers, on the basis of the preparatory work for the law in question, that the territorial restriction reflects the current state of national positive law. Indeed, if that were not the case, its first three questions would be purely hypothetical.

125. By its last question, the referring court is therefore seeking validation of the method of teleological interpretation which it used in order to establish the content of Swedish positive law.

126. However, within the framework of the duties conferred upon it by Article 267 TFEU, the Court has no jurisdiction to rule on the interpretation of national law; [60] nor has it jurisdiction to review the method used by a national court to construe the law in question.

127. I therefore take the view that it is not appropriate to answer that question, which lies outside the Court's jurisdiction.

57 — See Case C-228/99 *Silos* [2001] ECR I-8401, paragraphs 35 and 36; Case C-333/07 *Régie Networks* [2008] ECR I-10807, paragraphs 121 and 122; and Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert* [2010] ECR I-11063, paragraphs 93 and 94.

58 — See paragraph 46 of the order for reference.

59 — Idem. See also paragraph 24 of the order for reference, which states that 'the new wording of the law still does not permit the issue of [green] certificates to the applicant in the main proceedings in the absence of a cooperation agreement with the Republic of Finland', and paragraph 23 of the order for reference, which describes the preparatory work.

60 — See, inter alia, Case C-212/10 *Logstor ROR Polska* [2011] ECR I-5453, paragraph 30.

V – **Conclusion**

128. Having regard to the foregoing considerations, I am of the opinion that the questions referred by the förvaltningsrätten i Linköping should be answered as follows:

(1) Point (k) of the second paragraph of Article 2 and Article 3(3) of Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC are to be interpreted as meaning that:

— national legislation under which producers of green electricity are awarded green certificates of which electricity suppliers and certain users must compulsorily purchase a certain quota according to the total volume of energy that they supply or consume is a support scheme within the meaning of that directive;

— where a Member State introduces such a scheme, it may reserve the award of green certificates exclusively to green electricity production installations located on its territory.

(2) Article 34 TFEU precludes national legislation under which producers of electricity from renewable energy sources are awarded green certificates of which electricity suppliers and certain users must compulsorily purchase a certain quota according to the total volume of energy that they supply or consume, to the extent that it precludes from access to that support scheme producers whose production sites are located in the territory of another Member State.

(3) Article 3(3) of Directive 2009/28 is invalid in that it confers on Member States the power to prohibit, or to restrict, access to their support schemes on the part of producers whose sites for the production of electricity from renewable energy sources are located in another Member State.

(4) That invalidity will take effect two years after the delivery of the judgment.