Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

22 June 2017*

(Reference for a preliminary ruling — Promotion of energy from renewable sources — Biofuels for transport — Directive 2009/28/EC — Article 18(1) — 'Mass balance' system to ensure that biogas meets the prescribed sustainability criteria — Validity — Articles 34 and 114 TFEU — National rules requiring the mass balance to be achieved within a location with a clear boundary — Practice of the competent national authority to accept that that condition may be satisfied where sustainable biogas is transported using the national gas network — Order of that authority stating that that condition cannot be satisfied where sustainable biogas is imported from other Member States via interconnected national gas networks — Free movement of goods)

In Case C-549/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Förvaltningsrätten i Linköping (Administrative Court, Linköping, Sweden), made by decision of 19 October 2015, received at the Court on 22 October 2015, in the proceedings

E.ON Biofor Sverige AB

v

Statens energimyndighet

THE COURT (Second Chamber),

composed of M. Ilešič, President of the Chamber, A. Prechal (Rapporteur), A. Rosas, C. Toader and E. Jarašiūnas, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 26 October 2016,

after considering the observations submitted on behalf of:

— E.ON Biofor Sverige AB, by A. Johansson, S. Perván Lindeborg and T. Pettersson, advokater,

— Statens energimyndighet, by F. Forsberg, J. Holgersson and E. Jozsa, acting as Agents, and by K. Forsbacka, advokat,

— the Estonian Government, by K. Kraavi-Käerdi, acting as Agent,

* Language of the case: Swedish.

— the Netherlands Government, by M. Bulterman and M. de Ree, acting as Agents,

— the European Parliament, by A. Neergaard and P. Schonard, acting as Agents,

— the Council of the European Union, by A. Norberg and J. Herrmann, acting as Agents,

— the European Commission, by K. Talabér-Ritz and E. Manhaeve, acting as Agents, and by M. Johansson, advokat,

after hearing the Opinion of the Advocate General at the sitting on 18 January 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 18(1) 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 (OJ 2009 L 140, p. 16).

2 The request has been made in proceedings between E.ON Biofor Sverige AB ('E.ON') and Statens energimyndighet (National Energy Agency, Sweden; 'the SE') concerning an order sent by it to E.ON as regards the biogas sustainability verification system put into place by the SE.

Legal context

EU law

3 Recitals 1, 12, 65, 76 and 94 of Directive 2009/28 state:

'(1) The control of European energy consumption and the increased use of energy from renewable sources, 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. …

…

(12) The use of agricultural material such as manure, slurry and other animal and organic waste for biogas production has, in view of the high greenhouse gas emission saving potential, significant environmental advantages in terms of heat and power production and its use as biofuel. Biogas installations can, as a result of their decentralised nature and the regional investment structure, contribute significantly to sustainable development in rural areas and offer farmers new income opportunities.

…

(65) Biofuel production should be sustainable. Biofuels used for compliance with the targets laid down in this Directive, and those that benefit from national support schemes, should therefore be required to fulfil sustainability criteria.

…

(76) Sustainability criteria will be effective only if they lead to changes in the behaviour of market actors. Those changes will occur only if biofuels and bioliquids meeting those criteria command a price premium compared to those that do not. According to the mass balance method of verifying compliance, there is a physical link between the production of biofuels and bioliquids meeting the sustainability criteria and the consumption of biofuels and bioliquids in the Community, providing an appropriate balance between supply and demand and ensuring a price premium that is greater than in systems where there is no such link. To ensure that biofuels and bioliquids meeting the sustainability criteria can be sold at a higher price, the mass balance method should therefore be used to verify compliance. This should maintain the integrity of the system while at the same time avoiding the imposition of an unreasonable burden on industry. Other verification methods should, however, be reviewed.

…

(94) Since the measures provided for in Articles 17 to 19 also have an effect on the functioning of the internal market by harmonising the sustainability criteria for biofuels and bioliquids for the target accounting purposes under this Directive, and thus facilitate, in accordance with Article 17(8), trade between Member States in biofuels and bioliquids which comply with those conditions, they are based on Article 95 of the Treaty.'

4 In accordance with Article 1 of Directive 2009/28, entitled 'Subject matter and scope', that directive 'establishes a common framework for the promotion of energy from renewable sources. It sets mandatory national targets for the overall share of energy from renewable sources in gross final consumption of energy and for the share of energy from renewable sources in transport. … It establishes sustainability criteria for biofuels and bioliquids'.

5 Points (a), (e) and (i) of the second paragraph of Article 2 of Directive 2009/28 lay down the following definitions:

'(a) "energy from renewable sources" means energy from renewable non-fossil sources, namely wind, solar, aerothermal, geothermal, hydrothermal and ocean energy, hydropower, biomass, landfill gas, sewage treatment plant gas and biogases;

…

(e) "biomass" means the biodegradable fraction of products, waste and residues from biological origin from agriculture (including vegetal and animal substances), forestry and related industries including fisheries and aquaculture, as well as the biodegradable fraction of industrial and municipal waste;

…

(i) "biofuels" means liquid or gaseous fuel for transport produced from biomass'.

6 Article 3 of Directive 2009/28 provides:

'1. Each Member State shall ensure that the share of energy from renewable sources, 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 energy from renewable sources in that year, as set out in the third column of the table in part A of Annex I. …

…

4. Each Member State shall ensure that the share of energy from renewable sources in all forms of transport in 2020 is at least 10% of the final consumption of energy in transport in that Member State.

…'

7 Entitled 'Calculation of the share of energy from renewable sources', Article 5 of that directive states, in paragraph 1:

'The gross final consumption of energy from renewable sources in each Member State shall be calculated as the sum of:

(a) gross final consumption of electricity from renewable energy sources;

(b) gross final consumption of energy from renewable sources for heating and cooling; and

(c) final consumption of energy from renewable sources in transport.

Gas, electricity and hydrogen from renewable energy sources shall be considered only once in point (a), (b), or (c) of the first subparagraph, for calculating the share of gross final consumption of energy from renewable sources.

… biofuels and bioliquids that do not fulfil the sustainability criteria set out in Article 17(2) to (6) shall not be taken into account.'

8 Entitled 'Sustainability criteria for biofuels and bioliquids', Article 17 of that directive provides:

'1. Irrespective of whether the raw materials were cultivated inside or outside the territory of the Community, energy from biofuels and bioliquids shall be taken into account for the purposes referred to in points (a), (b) and (c) only if they fulfil the sustainability criteria set out in paragraphs 2 to 6:

(a) measuring compliance with the requirements of this directive concerning national targets;

(b) measuring compliance with renewable energy obligations;

(c) eligibility for financial support for the consumption of biofuels and bioliquids.

…

2. The greenhouse gas emission saving from the use of biofuels and bioliquids taken into account for the purposes referred to in points (a), (b) and (c) of paragraph 1 shall be at least 35%.

…

3. Biofuels and bioliquids taken into account for the purposes referred to in points (a), (b) and (c) of paragraph 1 shall not be made from raw material obtained from land with high biodiversity value …

4. ... shall not be made from raw material obtained from land with high carbon stock …

5. ... shall not be made from raw material obtained from land that was peatland in January 2008 …

6. Agricultural raw materials cultivated in the Community and used for the production of biofuels and bioliquids taken into account for the purposes referred to in points (a), (b) and (c) of paragraph 1 shall be obtained in accordance with the requirements and standards under the provisions referred to under

the heading 'Environment' in part A and in point 9 of Annex II to Council Regulation (EC) No 73/2009 of 19 January 2009 establishing common rules for direct support schemes for farmers under the common agricultural policy and establishing certain support schemes for farmers [(OJ 2009 L 30, p. 16)] and in accordance with the minimum requirements for good agricultural and environmental condition defined pursuant to Article 6(1) of that regulation.

…

8. For the purposes referred to in points (a), (b) and (c) of paragraph 1, Member States shall not refuse to take into account, on other sustainability grounds, biofuels and bioliquids obtained in compliance with this article.

…'

9 Entitled 'Verification of compliance with the sustainability criteria for biofuels and bioliquids', Article 18 of Directive 2009/28 provides:

'1. Where biofuels and bioliquids are to be taken into account for the purposes referred to in points (a), (b) and (c) of Article 17(1), Member States shall require economic operators to show that the sustainability criteria set out in Article 17(2) to (5) have been fulfilled. For that purpose they shall require economic operators to use a mass balance system which:

(a) allows consignments of raw material or biofuel with differing sustainability characteristics to be mixed;

(b) requires information about the sustainability characteristics and sizes of the consignments referred to in point (a) to remain assigned to the mixture; and

(c) provides for the sum of all consignments withdrawn from the mixture to be described as having the same sustainability characteristics, in the same quantities, as the sum of all consignments added to the mixture.

2. The Commission shall report to the European Parliament and the Council in 2010 and 2012 on the operation of the mass balance verification method described in paragraph 1 and on the potential for allowing for other verification methods in relation to some or all types of raw material, biofuel or bioliquids. In its assessment, the Commission shall consider those verification methods in which information about sustainability characteristics need not remain physically assigned to particular consignments or mixtures. The assessment shall take into account the need to maintain the integrity and effectiveness of the verification system while avoiding the imposition of an unreasonable burden on industry. The report shall be accompanied, where appropriate, by proposals to the European Parliament and the Council, concerning the use of other verification methods.

3. Member States shall take measures to ensure that economic operators submit reliable information and make available to the Member State, on request, the data that were used to develop the information. Member States shall require economic operators to arrange for an adequate standard of independent auditing of the information submitted, and to provide evidence that this has been done. The auditing shall verify that the systems used by economic operators are accurate, reliable and protected against fraud. It shall evaluate the frequency and methodology of sampling and the robustness of the data.

The information referred to in the first subparagraph shall include in particular information on compliance with the sustainability criteria set out in Article 17(2) to (5), appropriate and relevant information on measures taken for soil, water and air protection, the restoration of degraded land, the

avoidance of excessive water consumption in areas where water is scarce and appropriate and relevant information concerning measures taken in order to take into account the issues referred to in the second subparagraph of Article 17(7).

…

4. ...

The Commission may decide that voluntary national or international schemes setting standards for the production of biomass products contain accurate data for the purposes of Article 17(2) or demonstrate that consignments of biofuel comply with the sustainability criteria set out in Article 17(3), (4) and (5).
…

…

5. The Commission shall adopt decisions under paragraph 4 only if the [...] scheme in question meets adequate standards of reliability, transparency and independent auditing. …

…

7. When an economic operator provides proof or data obtained in accordance with [... a] scheme that has been the subject of a decision pursuant to paragraph 4, to the extent covered by that decision, a Member State shall not require the supplier to provide further evidence of compliance with the sustainability criteria set out in Article 17(2) to (5) nor information on measures referred to in the second subparagraph of paragraph 3 of this article.

…'

10 Entitled 'Mass balance system', point 2.2.3 of the Communication from the Commission on voluntary schemes and default values in the EU biofuels and bioliquids sustainability scheme (OJ 2010 C 160, p. 1) states inter alia:

'…

The method by which a connection is made between information or claims concerning raw materials or intermediate products and claims concerning final products is known as the chain of custody. The chain of custody would normally include all the stages from the feedstock production up until the release of the fuels for consumption. The method laid down in the Directive for the chain of custody is the mass balance method …

The voluntary scheme should require verification of the mass balance system to be performed simultaneously with verification of correctness in respecting the scheme's criteria … This should include the verification of any evidence or systems used for the purpose of complying with the requirements of the mass balance system.

The mass balance system means … a system in which "sustainability characteristics" remain assigned to "consignments".

…

When consignments with different (or no) sustainability characteristics are mixed, … the separate sizes … and sustainability characteristics of each consignment remain assigned to the mixture … If a mixture is split up, any consignment taken out of it can be assigned any of the sets of sustainability characteristics … (accompanied with sizes) as long as the combination of all consignments taken out

of the mixture has the same sizes for each of the sets of sustainability characteristics that were in the mixture. A "mixture" can have any form where consignments would normally be in contact, such as in a container, processing or logistical facility or site (defined as a geographical location with precise boundaries within which products can be mixed).

…'

Swedish law

Lagen (2010:598) om hållbarhetskriterier för biodrivmedel och flytande biobränslen

11 Lagen (2010:598) om hållbarhetskriterier för biodrivmedel och flytande biobränslen (Law (2010:598) on sustainability criteria for biofuels and bioliquids; 'the HBL') implements certain provisions of Directive 2009/28.

12 Chapter 1, Paragraph 3, of the HBL provides:

'Only energy from biofuels and bioliquids which fulfils the sustainability criteria in Chapter 2, Paragraphs 1 to 5, may be taken into account for the purposes of meeting the requirement for the part of the energy produced from renewable sources in the final consumption of energy under Article 3(1), (2) and (4) of Directive 2009/28. ...'

13 Chapter 3, Paragraph 1 of that law provides:

'The reportable person shall be:

(a) the person who, under Chapter 4 of the lagen (1994:1776) om skatt på energi [Law (1994:1776) on taxation of energy], is liable to pay duty on fuel which is wholly or in part made up of biofuel or bioliquid, or

…'

14 Chapter 3, Paragraph 1a of the HBL provides:

'The reportable person shall guarantee, by a verification system, that the biofuel and bioliquid to be declared can be considered sustainable.

The reportable person shall guarantee, by agreements, direct or indirect, concluded with all the operators in the entire chain of production and by samples taken on the premises of those operators, that the requirement set out in the first subparagraph is satisfied.

The verification system put into place by the reportable person shall be reviewed by an independent reviewer. The reviewer shall check that the verification system is accurate, reliable and protected against fraud. The review shall also include an evaluation of the sampling method which must be used in the verification system and the sampling frequency.

The review shall include, in addition, an evaluation of the information which the reportable person has provided concerning its verification system.

The independent reviewer shall, in a certificate, provide an opinion on the verification system.

The government, or the authority designated by the government, may adopt supplementary measures concerning the verification system and the review of that system.'

Förordning (2011:1088) om hållbarhetskriterier för biodrivmedel och flytande biobränslen

15 Paragraph 14 of the Förordning (2011:1088) om hållbarhetskriterier för biodrivmedel och flytande biobränslen (Regulation (2011:1088) on sustainability criteria for biofuels and bioliquids; 'the hållbarhetsförordningen') states:

'The verification system referred to in Chapter 3, Paragraph 1a of [the HBL] shall include procedures for ensuring that, in the various stages of a chain of production, a mass balance system is used which

1. allows consignments of raw material or biofuel with differing sustainability characteristics to be mixed;

2. requires information about the sustainability characteristics and sizes of the consignments referred to in subparagraph (1) to remain assigned to the mixture; and

3. establishes that the sum of all consignments withdrawn from the mixture shall be described as having the same sustainability characteristics, in the same quantities, as the sum of all consignments added to the mixture.

…

[The SE] may adopt additional measures concerning verification systems and the monitoring of those systems.'

Statens energimyndighets föreskrifter om hållbarhetskriterier för biodrivmedel och flytande biobränslen

16 Chapter 3, Paragraphs 2 to 4 of Statens energimyndighets föreskrifter om hållbarhetskriterier för biodrivmedel och flytande biobränslen (National Energy Agency rules on sustainability criteria for biofuels and bioliquids; 'the 2011 SE rules') provide as follows:

'Paragraph 2

The reportable person must guarantee, by its verification system provided for in accordance with Paragraph 14 of the hållbarhetsförordningen, that sustainable biofuel and bioliquid can be traced from the place where the raw materials were grown, produced or collected up to the point at which the fuel is used or duty becomes payable thereon under Chapter 5 of Law (1994:1776) on taxation of energy.

Paragraph 3

Under Paragraph 14, first section, point 3, of the hållbarhetsförordningen, the mass balance shall be achieved within a location with a clear boundary and shall be satisfied within a period suited to the chain of production.

A reportable person's entire tax warehouse under Law (1994:1776) on taxation of energy can constitute a location under the first paragraph.

Paragraph 4

Consignments which are normally in physical contact with each other shall constitute a mixture within the meaning of the first section of Paragraph 14 of the hållbarhetsförordningen. ...'

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

17 E.ON, a company established in Sweden, has shown before the referring court that it purchases, from a sister company established in Germany, consignments of sustainable biogas produced by the latter in that Member State. E.ON then transports those consignments to Sweden via the German and Danish gas networks, that biogas remaining, at each stage of the transport, the property of companies in the group. That sister company adds those consignments to the German gas distribution network at a clearly identified point. They are then taken by E.ON at the border point between the German distribution network and the Danish distribution network and remain at all times covered by an REDCert DE sustainability certificate issued in accordance with the German national mass balance verification system and passed directly by that sister company to E.ON. The sustainability of the consignments in question and the fact that they have not been sold elsewhere in Germany are thus both guaranteed since those certificates can be withdrawn only once from the certification system and each entry into and removal from a national gas network is the responsibility of a single operator holding a delivery or purchase contract at the border point.

18 On 3 September 2013, the SE ordered E.ON to modify its verification system as regards the sustainability of biogas in order to ensure that the mass balance was achieved 'within a location with a clear boundary' as laid down in Chapter 3, Paragraph 3, of the 2011 SE rules ('the contested order'). Compliance with that order has the consequence that the biogas produced in Germany which E.ON imports into Sweden via the German and Danish gas networks cannot be included in that verification system because those networks cannot constitute such a location with a clear boundary nor, accordingly, be classified as 'sustainable' for the purpose of the HBL and Directive 2009/28.

19 E.ON brought an action before the Förvaltningsrätten i Linköping (Administrative Court, Linköping, Sweden) seeking the annulment of the contested order.

20 Arguing that that order means that it is deprived of significant reductions in carbon dioxide taxes and in those on energy using sustainable biogas under Law (1994:1776) on taxation of energy, E.ON submits that the restriction of the mass balance system to within a location with a clear boundary and to the Swedish border which follows from that order breaches both Directive 2009/28 and Article 34 TFEU.

21 With regard to Article 34 TFEU, E.ON argues, in particular, that, as regards sustainable biogas added directly to the Swedish gas network, the SE accepts that that gas may be sold as sustainable biogas while, however, there is no difference, in terms of traceability of the sustainability of the biogas, between that situation and that at issue in the main proceedings, so that, in the present case, there is a discriminatory obstacle to the import of sustainable biogas from other Member States.

22 For its part, the SE argues that the mass balance system requires that the information on the sustainability characteristics remain physically assigned to the 'consignments' when they are added to a 'mixture' within the meaning of Article 18(1) of Directive 2009/28, that is to say, under point 2.2.3 of the Commission Communication referred to in paragraph 10 of this judgment, a concept defined as being applicable 'within' a 'geographical location with precise boundaries'.

23 Although the Kingdom of Sweden has, indeed, accepted, like the Federal Republic of Germany and the Kingdom of the Netherlands, but unlike the other Member States, that the mass balance may be achieved within the national gas network, as a location with precise boundaries, there is no such location as regards the biogas imported from Germany by E.ON nor, accordingly, a mass balance verification system. Such a system requires, for the location in question, there to be one operator which checks that the same volume of sustainable biofuel was added then removed from that location and there is no such global European operator as regards the European gas network.

24 Since the contested order thus complies with Article 18(1) of Directive 2009/28, there is no need to examine it in the light of Article 34 TFEU.

25 It is in that context that the Förvaltningsrätten i Linköping (Administrative Court, Linköping) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Are the terms “mass balance” and “mixture” in Article 18(1) of Directive 2009/28 to be interpreted as meaning that the Member States have an obligation to accept trade in biogas between Member States via an interconnected gas network?

(2) If the answer to question 1 is in the negative, in that case is [that provision] compatible with Article 34 TFEU, despite the fact that application thereof is likely to have the effect of restricting trade?’

Consideration of the questions referred

The first question

26 As a preliminary point, it must be stated that, as is apparent from both the facts of the main proceedings and the wording of Article 18(1) of Directive 2009/28 which concerns the verification of compliance with the sustainability criteria set out in Article 17(2) to (5) of that directive, by referring, in its questions referred, to ‘biogas’, the referring court clearly intends to refer only to biogas fulfilling those sustainability criteria and intended to be used as biofuel (‘the sustainable biogas’).

27 The first question must therefore be understood as asking, in essence, whether Article 18(1) of Directive 2009/28 must be interpreted as placing an obligation on the Member States to authorise imports, via their interconnected national gas networks, of sustainable biogas.

28 In that regard, it must be pointed out that, as is apparent from Article 17 of Directive 2009/28, read in the light of recitals 65 and 94 of that directive, the EU legislature intended, by taking as its basis Article 95 EC, now Article 114 TFEU, in particular, to harmonise the sustainability criteria which it is mandatory for biofuels to fulfil in order for the energy produced from them to be taken into account, within each Member State, for three purposes set out in Article 17(1)(a), (b) and (c) respectively. Those purposes are measuring the Member States’ compliance with their national targets referred to in Article 3 of Directive 2009/28, on the one hand, and with renewable energy obligations, on the other, and possible eligibility for national financial support for the consumption of biofuels.

29 It must be borne in mind that Article 114(1) TFEU establishes that the Parliament and the Council are to adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

30 By the expression ‘measures for the approximation’ in that provision, the authors of the FEU Treaty intended to confer on the EU legislature a discretion, depending on the general context and the specific circumstances of the matter to be harmonised, as regards the method of approximation most appropriate for achieving the desired result, in particular in fields with complex technical features. It was thus open to the EU legislature, in the exercise of that discretion, to proceed towards harmonisation only in stages and to require only the gradual abolition of unilateral measures adopted by the Member States (see, inter alia, judgment of 4 May 2016, *Philip Morris Brands and Others*, C-547/14, EU:C:2016:325, paragraph 63 and the case-law cited).

31 Depending on the circumstances, the measures referred to in Article 114(1) TFEU may thus consist in requiring all the Member States to authorise the marketing of the product or products concerned, subjecting such an obligation of authorisation to certain conditions, or even provisionally or definitively prohibiting the marketing of a product or products (see, to that effect, judgment of 4 May 2016, *Philip Morris Brands and Others*, C-547/14, EU:C:2016:325, paragraph 64 and the case-law cited).

32 In the present case, the harmonisation provided for in Article 17 of Directive 2009/28 is very specific, in that it deals only with the biofuels defined in the second paragraph, (i), of Article 2 of that directive as being all liquid or gaseous fuel for transport produced from biomass and in that it merely states which sustainability criteria such biofuels must fulfil in order that the energy produced from them may be taken into account by the Member States for the three specific purposes set out in Article 17(1) of that directive and referred to in paragraph 28 of this judgment. In the context thus drawn, that harmonisation is, furthermore, exhaustive, since Article 17(8) of Directive 2009/28 states that Member States may not, for those same three purposes, refuse to take into account, on other sustainability grounds, biofuels which fulfil the sustainability criteria set out in that article.

33 Article 17 of Directive 2009/28 thus seeks, first, to ensure, with a view to guaranteeing the high level of protection of the environment referred to in Article 95(3) EC, now Article 114(3) TFEU, that biofuels may be taken into account by the Member States, for the three environmental purposes set out in Article 17(1) of that directive, only provided that they fulfil the sustainability criteria in that article laid down by the EU legislature.

34 Secondly, Article 17 seeks, as is apparent in particular from recital 94 of Directive 2009/28, to facilitate trade in sustainable biofuels between the Member States. That facilitation lies primarily in the fact that, as pointed out in paragraph 32 of this judgment, when biofuels, including those coming from other Member States, satisfy the sustainability criteria set out in Article 17 of Directive 2009/28, paragraph 8 of that article prohibits the Member States from refusing to take those sustainable biofuels into account, for the three purposes set out in Article 17(1) of that directive, 'on other sustainability grounds' than those set out in that article.

35 Although Article 17 of Directive 2009/28 allows, by that measure, inter alia, trade in sustainable biogas to be facilitated, it may not, however, be inferred from the foregoing that the aim of that article is to regulate imports of sustainable biofuels between Member States nor, particularly, to require them unconditionally to authorise such imports. As has just been stated, the aim of that article is merely, by their harmonisation, to regulate the conditions relating to sustainability which must be fulfilled by biofuels in order for them to be taken into account by a Member State for the three specific purposes set out in Article 17(1) of that directive. As the Advocate General noted in point 57 of his Opinion, Directive 2009/28 does not, moreover, contain a clause providing for unconditional movement of sustainable biogas between the Member States.

36 As regards the first sentence of Article 18(1) of Directive 2009/28, it merely provides that, where biofuels are to be taken into account for the three purposes referred to in Article 17(1) of that directive, Member States are to require economic operators to show that the sustainability criteria set out in Article 17(2) to (5) have been fulfilled.

37 For that purpose, the Member States must, in particular, as is clear from the second sentence of Article 18(1) of Directive 2009/28, require those economic operators to use a 'mass balance' system which must have certain characteristics, which are set out in points (a) to (c) of that provision. In accordance with those points, such a system must therefore, first, allow consignments of raw material or biofuel with differing sustainability characteristics to be mixed, secondly, require information about the sustainability characteristics and sizes of those consignments to remain assigned to the mixture

and, thirdly, provide for the sum of all consignments withdrawn from the mixture to be described as having the same sustainability characteristics, in the same quantities, as the sum of all consignments added to the mixture.

38 Such a provision cannot be interpreted as meaning that it gives rise to an obligation on the Member States to authorise imports of sustainable biogas via their interconnected gas networks.

39 First, Article 18(1) of Directive 2009/28, which has the sole aim of instituting verification mechanisms intended to ensure the correct application of Article 17 of that directive, cannot, having regard to the link thus existing between those two provisions, any more than Article 17, be interpreted as having the aim of unconditionally requiring the Member States to authorise imports of sustainable biogas from other Member States.

40 Secondly, and as the Advocate General noted, in essence, in point 57 of his Opinion, having regard to the generality of the terms in which the criteria listed in points (a) to (c) of Article 18(1) of Directive 2009/28 are stated, the view cannot be taken either that that provision fully harmonises the verification method connected with the mass balance system. On the contrary, it follows from those points that the Member States retain a discretion and latitude when they are required to determine, more precisely, the specific conditions which the mass balance systems to be put into place by the economic operators must fulfil. Accordingly, nor is such a provision, viewed thusly, such as to lead, automatically, to a guarantee of free movement of sustainable biogas over a cross-border gas network once that biogas has lawfully been designated sustainable in the Member State of production.

41 For the rest, it must also be recalled that, as the Advocate General noted in point 48 of his Opinion, the verification systems for the sustainability criteria as appropriate imposed on the economic operators by the Member States in accordance with Article 18(1) and (3) of Directive 2009/28 constitute only one of the methods permitting such verification under that directive. As is clear from Article 18(4) and (5) of that directive, so-called 'voluntary' national or international systems which also include, in particular, provisions relating to the mass balance system may also be approved by the Commission, Article 18(7) providing, in that regard, that, when proof or data obtained in accordance with such a system is provided, a Member State is not to require the supplier to provide further evidence of compliance with the sustainability criteria set out in Article 17 of Directive 2009/28.

42 Having regard to all the foregoing, the answer to the first question is that Article 18(1) of Directive 2009/28 must be interpreted as not being intended to place an obligation on the Member States to authorise imports, via their interconnected national gas networks, of sustainable biogas.

The second question

43 By its second question, the referring court asks whether Article 18(1) of Directive 2009/28 is valid in the light of Article 34 TFEU, since the application of that provision can have the effect of restricting trade in sustainable biogas.

The validity of Article 18(1) of Directive 2009/28

44 As a preliminary point, it must be borne in mind that Article 34 TFEU, 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, inter alia, judgment of 1 July 2014, *Ålands Vindkraft*, C-573/12, EU:C:2014:2037, paragraph 66 and the case-law cited).

45 That prohibition applies not only to national measures but also to measures adopted by the institutions of the European Union (see, inter alia, judgments of 29 February 1984, *Rewe-Zentrale*, 37/83, EU:C:1984:89, paragraph 18; of 14 December 2004, *Swedish Match*, C-210/03, EU:C:2004:802, paragraph 59; and of 12 July 2005, *Alliance for Natural Health and Others*, C-154/04 and C-155/04, EU:C:2005:449, paragraph 47).

46 In accordance with settled case-law, Article 34 TFEU nonetheless does not preclude prohibitions or restrictions justified on one of the public interest grounds listed in Article 36 TFEU or by overriding requirements, including, inter alia, the protection of the environment. 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, to that effect, inter alia, judgments of 12 July 2005, *Alliance for Natural Health and Others*, C-154/04 and C-155/04, EU:C:2005:449, paragraphs 48 and 51, and of 1 July 2014, *Ålands Vindkraft*, C-573/12, EU:C:2014:2037, paragraphs 76 and 77).

47 In addition, it must be pointed out that, as has already been noted in paragraph 28 of this judgment, Articles 17 to 19 of Directive 2009/28 were adopted on the basis of Article 95 EC, now Article 114 TFEU.

48 It must be recalled, in that regard, that Article 11 TFEU provides that environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development (see, inter alia, Opinion 2/15 of 16 May 2017, EU:C:2017:376, paragraph 146) and that Article 114(3) TFEU expressly requires that, in achieving harmonisation, a high level of protection of the environment should be guaranteed (see, by analogy, with regard to the protection of health, judgment of 4 May 2016, *Philip Morris Brands and Others*, C-547/14, EU:C:2016:325, paragraph 61 and the case-law cited).

49 Thus, when there are obstacles to trade, or it is likely that such obstacles will emerge in the future, because the Member States have taken, or are about to take, divergent measures with respect to a product or a class of products such as to bring about different levels of protection, Article 114 TFEU authorises the EU legislature to intervene by adopting appropriate measures, in compliance with Article 114(3) TFEU and with the legal principles referred to in the FEU Treaty or identified in the case-law, in particular the principle of proportionality (see, to that effect, judgment of 4 May 2016, *Philip Morris Brands and Others*, C-547/14, EU:C:2016:325, paragraph 62 and the case-law cited).

50 Moreover, with regard to judicial review of the conditions referred to in the previous paragraph, it must also be borne in mind that the EU legislature must be allowed a broad discretion when it is called upon to legislate in an area which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. The lawfulness of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate in relation to the objective which the competent institutions are seeking to pursue (see, to that effect, in the sphere of the protection of health, judgments of 14 December 2004, *Swedish Match*, C-210/03, EU:C:2004:802, paragraph 48, and of 12 July 2005, *Alliance for Natural Health and Others*, C-154/04 and C-155/04, EU:C:2005:449, paragraph 52; see also, to that effect, with regard to EU environmental policy, judgments of 15 December 2005, *Greece* v *Commission*, C-86/03, EU:C:2005:769, paragraphs 87 and 88, and of 21 December 2016, *Associazione Italia Nostra Onlus*, C-444/15, EU:C:2016:978, paragraph 46).

51 As regards Article 18(1) of Directive 2009/28, it must be pointed out, first, that, as the Parliament and Council have submitted, having regard to the generality of the terms in which the criteria are drafted in points (a) to (c) of that provision, which criteria must be satisfied by the mass balance system to be introduced by the Member States, they are not, a priori, such as to exclude the application of such a system to the transport, within a national gas network or interconnected national gas networks, of consignments of sustainable biogas.

52 In fact, there appears to be nothing to preclude Member States from requiring economic operators to use a verification system enabling a 'mixture', within the meaning of Article 18(1)(a) of Directive 2009/28, of various consignments of gas 'with differing sustainability characteristics', some of which satisfy the sustainability criteria set out in Article 17 of that directive and others which do not, to be made within such a national network or interconnected national networks.

53 Nor is there anything which appears to require the exclusion, in that context, of a requirement that that system meet conditions appropriate to ensure that information relative to the sustainability characteristics and the volume of the consignments at issue remain assigned to that mixture as long as it lasts, as provided for in Article 18(1)(b) of Directive 2009/28.

54 Finally, it does not appear either that it is impossible for the Member States to require of those operators that the characteristics of the verification system at issue be such as to ensure that the sum of the consignments withdrawn, by an operator, from the mixture thus previously made in a national gas network or in interconnected national networks, which are assigned the sustainability characteristics referred to in Article 17 of Directive 2009/28, does not exceed, in volume, the sum of the consignments having such characteristics previously added by that operator into that mixture.

55 In that regard, it must, furthermore, be noted that the SE has expressly admitted, before both the referring court and the Court of Justice, that, by virtue of the Swedish legislation, the addition, in the Swedish national gas network, of consignments of biogas which satisfy the sustainability characteristics set out in Article 17 of Directive 2009/28 and their mixture, in that network, with other gas, does not at all preclude those consignments, once withdrawn from that network, from being reassigned, in corresponding volumes, those sustainability characteristics, in particular for one of the purposes set out in Article 17(1) thereof, namely their eligibility for financial support for their consumption.

56 It follows from the foregoing that the view cannot be taken that Article 18(1) of Directive 2009/28 makes it impossible, as such, in a situation of movement of sustainable biogas between the Member States via interconnected national gas networks, for the sustainability of that gas to be recognised in the Member State of import for the purposes set out in Article 17(1) of that directive, nor, therefore, that Article 18(1) thereof thus constitutes an obstacle to the free movement of goods guaranteed under Article 34 TFEU.

57 Secondly, it is also appropriate, as the referring court asks in its question, to address the fact that, as is apparent from the answer given to the first question, Article 18(1) of Directive 2009/28 does not, however, have the effect either of requiring the Member States to authorise the import of sustainable biogas via their interconnected gas networks.

58 In that regard, however, it must be recalled, as has been noted in paragraph 34 of this judgment and as is apparent, in particular, from Article 17(8) and recital 94 of Directive 2009/28, Articles 17 to 19 thereof facilitate the trade in sustainable biogas between the Member States, on the one hand, by harmonising the sustainability characteristics which the biogas must meet for the three purposes set out in Article 17(1) of that directive and, on the other, by permitting, thanks to the rules on control which Article 18 of that directive contains, those characteristics to remain, for those purposes, assigned to the biogas, despite its mixture with other gas.

59 In that respect, the scheme thus instituted by Articles 17 to 19 of Directive 2009/28 therefore favours rather than restricts the free movement of goods (see, by analogy, judgments of 29 February 1984, *Rewe-Zentrale*, 37/83, EU:C:1984:89, paragraph 19, and of 12 July 2012, *Association Kokopelli*, C-59/11, EU:C:2012:447, paragraph 81).

60 Although Articles 17 and 18 of Directive 2009/28 are not, as such, intended to guarantee that sustainable biogas will be able, without conditions, to be imported from one Member State to another while retaining its sustainability characteristics, that fact is the inevitable consequence of the method of harmonisation chosen by the EU legislature which, as has been recalled in paragraphs 30 and 31 of this judgment, has a discretion, in particular with regard to the possibility of proceeding towards harmonisation only in stages and requiring only the gradual abolition of unilateral measures adopted by the Member States (see, by analogy, judgment of 4 May 2016, *Philip Morris Brands and Others*, C-547/14, EU:C:2016:325, paragraphs 79 and 80).

61 Thirdly, and as the Advocate General noted in point 63 of his Opinion, the very fact of the imposition of the mass balance system, as laid down in Article 18(1) of Directive 2009/28, on economic operators wishing to take advantage of the sustainable nature of the biogas which they market, in particular in other Member States to which that biogas has been exported, is of itself such as to make that export and marketing both more complex and more onerous because of the additional administrative and financial burdens to which such a system gives rise.

62 With regard to the choice thus made by the EU legislature, which is, more specifically, one which favours the so-called 'mass balance' verification system over two other methods a priori available, namely, first, the 'identity preservation' technique and, secondly, the 'book and claim' method, the following must, nonetheless, be noted.

63 First, it is not in dispute that the 'identity preservation' method, by excluding any possibility of mixing a consignment of sustainable biogas with a consignment of gas which does not have such sustainability characteristics, does not contribute to the same extent to trade in sustainable biogas between the Member States, since such a method would, inter alia, automatically mean, in practice, that sustainable biogas could never be added to a gas network and, accordingly, transported and exported using such an infrastructure, while retaining its sustainability characteristics for the three purposes set out in Article 17(1) of Directive 2009/28.

64 Secondly, and as regards the fact of having favoured the mass balance system over the 'book and claim' system which does not require the information concerning the sustainability characteristics to remain physically assigned to consignments or mixed consignments, it is clear, on the one hand, from recital 76 of Directive 2009/28, that the EU legislature made such a choice in order to ensure that, between the moment of production of sustainable biofuel and that of its consumption, such a physical link remains in place. In accordance with that recital, such a physical link has been favoured as being able to create a balance between supply and demand and ensure a price premium for sustainable biofuel that is sufficiently greater to bring about, in the conduct of actors on the market, the necessary changes, and so to ensure the very usefulness of the sustainability criteria. In that recital 76, the EU legislature has, furthermore, also pointed out that the application of the mass balance system to verify compliance should maintain the integrity of the system while at the same time avoiding the imposition of an unreasonable burden on industry.

65 On the other hand, it must be noted that the EU legislature nevertheless pointed out in recital 76 that other verification methods should, however, continue to be reviewed. Article 18(2) of Directive 2009/28 thus provides that the Commission is to report on the operation of the mass balance verification method and on the potential for allowing for other verification methods, particularly those in which information about characteristics need not remain physically assigned to particular consignments or mixtures, taking into account the need to maintain the integrity and effectiveness of the verification system while avoiding the imposition of an unreasonable burden on undertakings. In that regard, the Commission concluded that it was appropriate to maintain the mass balance method (see, in particular, Commission Staff Working Document: Report on the operation of the mass balance verification method for the biofuels and bioliquids sustainability scheme in accordance with Article 18(2) of Directive 2009/28/EC (SEC/2010/0129 final)).

66 There is nothing to support the view that, by having decided to favour, in the pursuit of the objective set in Article 114(3) TFEU of ensuring a high level of protection of the environment and for the purposes more specifically set out in recital 76 of Directive 2009/28, the installation of a verification system for sustainability criteria which is both integrated and effective and intended to ensure that there is a physical link between the production of sustainable biofuels and their consumption in the EU, while at the same time more effectively influencing the conduct of the actors on the market, the EU legislature exceeded its wide discretion, referred to in paragraph 50 of this judgment, or failed to have regard to the requirements flowing from the principle of proportionality.

67 As the Advocate General noted in point 70 of his Opinion, the specific area in which the EU legislature was called upon in the present situation to legislate clearly requires it to make choices which were at once political, scientific and economic and in so doing to make clearly complex assessments, particularly of economic and technical factors.

68 In this situation, the EU legislature was entitled to take the view, without exceeding its discretion, that, having regard, first, to the form of traceability which it institutes and the conditions intended to ensure the effectiveness and integrated nature which accompanies it in accordance with the provisions of Article 18 of Directive 2009/28 and, secondly, to the influence which, in so doing, it seeks to exercise on the prices of sustainable biofuels and on the actors on the market, while reducing the risk of fraud, the verification system using the mass balance technique appeared suitable for achieving a high level of protection of the environment.

69 Similarly, the EU legislature was entitled to take the view, in that regard, without exceeding its discretion, that such a verification system was necessary and that, in particular, there was no alternative measure which would enable the legitimate objectives pursued in these circumstances to be achieved as effectively while subjecting the economic operators to less stringent economic and administrative constraints. In particular, the legislature was entitled, without making a manifest error of assessment, to dismiss the book and claim system, taking the view that it did not ensure the existence of a physical link between the consignment of sustainable biogas produced and the consignment of gas subsequently consumed and that it gave lower guarantees in terms of effectiveness and integration, particularly in the light of the objective of ensuring that only sustainable biogas satisfying the strict requirements set out in Article 17 of Directive 2009/28 may be taken into consideration for the three purposes set out in paragraph 1 of that article.

70 For the same reasons, the restriction on the free movement of goods referred to in paragraph 61 of this judgment which is thus, in compliance with the principle of proportionality, justified on grounds of the protection of the environment, cannot, as follows from the case-law referred to in paragraph 46 of this judgment, be regarded as infringing the provisions of Article 34 TFEU (see, by analogy, judgment of 14 December 2004, *Swedish Match*, C-210/03, EU:C:2004:802, paragraph 61).

71 It follows from all the above considerations that examination of the second question has not disclosed any factor such as to affect the validity of Article 18(1) of Directive 2009/28.

The interpretation of Article 34 TFEU

72 It is clear from the settled case-law of the Court that the fact that a national court has, formally speaking, worded a question referred for a preliminary ruling with reference to certain provisions of EU law does not preclude this Court from providing the national court with all the elements of interpretation that may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to them in its questions. In that regard, it is for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision

referring the questions, the points of EU law which require interpretation, having regard to the subject matter of the dispute (see, inter alia, judgment of 27 October 2009, *ČEZ*, C-115/08, EU:C:2009:660, paragraph 81 and the case-law cited).

73 In the present case, although, by its second question, the referring court formally asked the Court only for a ruling on the conformity with Article 34 TFEU of Article 18(1) of Directive 2009/28, it is appropriate, as both the Council and E.ON proposed and as the Advocate General recommended in point 73 of his Opinion, also to examine whether Article 34 TFEU must, if appropriate, be interpreted as precluding an order such as the contested order.

74 As has been set out in paragraphs 18 to 20 of this judgment, it is apparent from the order for reference that, by its action in the main proceedings, E.ON is seeking the annulment of the contested order, that order having had the consequence that the sustainable biogas produced in Germany and intended for transport which E.ON imports into Sweden via the German and Danish gas networks cannot be included in the verification system relating to the sustainability of the biogas nor, accordingly, be classified as 'sustainable' within the meaning of the HBL and Directive 2009/28 and benefit from certain reductions as regards CO_2 and energy taxes.

75 The condition thus requiring that the mass balance be achieved 'within a location with a clear boundary', which the SE took as its basis in this case, is not found in Article 18(1) of Directive 2009/28, but flows from the domestic Swedish provisions adopted in order to transpose that provision. Paragraph 14 of the hållbarhetsförordningen, intended to provide such a transposition, reproduces, on the one hand, the three general criteria set out in Article 18(1)(a), (b) and (c) and provides, on the other, that the SE may adopt additional provisions as regards the verification system and the monitoring thereof. Chapter 3, Paragraph 3, of the 2011 SE rules, where it is stated that the mass balance must be achieved 'within a location with a clear boundary', was adopted on the basis of that entitlement.

76 In that regard, it should be noted that the Court has consistently held that, where a matter has been the subject of exhaustive harmonisation at EU level, any national measure relating thereto must be assessed in the light of the provisions of that harmonising measure and not in the light of primary law (see, inter alia, judgment of 1 July 2014, *Ålands Vindkraft*, C-573/12, EU:C:2014:2037, paragraph 57 and the case-law cited).

77 Nonetheless, as has already been noted in paragraph 38 of this judgment, Article 18(1) of Directive 2009/28 did not exhaustively harmonise the verification method linked to the mass balance system so that, provided there is compliance with the general requirements set out in Article 18(1)(a) to (c), the Member States retain a wide discretion when they must determine, more precisely, the specific conditions under which the economic operators concerned will use such a system.

78 It follows therefrom, as the Advocate General noted in point 72 of his Opinion, that when the Member States implement Article 18(1) of Directive 2009/28, they must, inter alia, comply with Article 34 TFEU.

79 With regard, first, to the existence of an obstacle to trade within the meaning of Article 34 TFEU, it must be noted that the contested order is likely to hinder, at the very least indirectly and potentially, imports of sustainable biogas into Sweden from other Member States, within the meaning of the case-law referred to in paragraph 44 of this judgment.

80 In fact, as the Advocate General noted in points 75, 76 and 78 of his Opinion, that order has the effect of preventing the achievement of the mass balance of sustainable biogas imported over interconnected national gas networks and, accordingly, of making it impossible for that biogas, once thus imported into Sweden, to retain the sustainability characteristics allowing it to be covered by a favourable tax scheme applicable in that Member State to the consumption of sustainable biofuels.

81 It must be pointed out, in that regard, that the SE has, both in its written observations and at the hearing, confirmed that sustainable biogas from other Member States was eligible for that tax advantage in Sweden, in particular when it was brought to that Member State using transport methods, such as road transport, which did not mean that that sustainable biogas was mixed with other consignments of gas. It therefore follows that it is only the fact that the contested order and Chapter 3, Paragraph 3, of the 2011 SE rules make it impossible to achieve a mass balance on import via interconnected national gas networks that, in this situation, prevents sustainable biogas imported in that manner from being entitled to that tax advantage.

82 As regards the possibility of using other means of transport, it must be noted that it is not in dispute that transport via the interconnected national gas networks constitutes, as a general rule and because of its cost, the only means of cross-border transport which is truly competitive for the economic operators concerned.

83 Finally, with regard to the fact that the SE states that it is prepared to accept that biogas imported into Sweden via the interconnected gas networks is sustainable, provided that that import is made in the context of international voluntary systems approved by the Commission in accordance with Article 18(4) of Directive 2009/28, clearly that statement is extremely vague. The SE has done nothing to establish before the Court how the systems thus approved to which it refers are, specifically, such as to enable E.ON to mix sustainable biogas in such networks in compliance with the requirements inherent in the mass balance system. Furthermore, and as the Advocate General noted in point 79 of his Opinion, E.ON submitted, at the hearing, without being contradicted on that point by the SE, that if it were to use such an approved voluntary system, it would incur additional costs.

84 Since the obstacle to trade has been shown to exist, it is necessary, secondly, to ascertain, in accordance with the case-law referred to in paragraph 46 of this judgment, whether the national measure behind that obstacle may nonetheless be justified by one of the public interest grounds listed in Article 36 TFEU or by accepted overriding requirements, such as the protection of the environment, and whether that measure satisfies the requirements flowing from the principle of proportionality.

85 In that regard, it must be borne in mind, first, that the use of renewable energy sources for the production of biogas which national legislation such as that of which Chapter 3, Paragraph 3, of the 2011 SE rules forms part seeks ultimately to promote is, in principle, useful for the protection of the environment. Such legislation is intended, following on from the objectives pursued in that regard by Directive 2009/28, in particular Articles 17 and 18 thereof, the actual implementation of which it seeks to ensure, to contribute to the reduction in greenhouse gas emissions, which are amongst the main causes of climate change that the European Union and its Member States have pledged to combat (see, by analogy, judgment of 1 July 2014, *Ålands Vindkraft*, C-573/12, EU:C:2014:2037, paragraph 78 and the case-law cited).

86 With regard, specifically, to the sustainability criteria harmonised in Article 17 of Directive 2009/28, compliance with which a measure such as that at issue in the main proceedings seeks, in principle, to ensure, recital 65 of that directive points out that those criteria seek to guarantee that the biofuels used to achieve the objectives laid down in that directive are truly sustainable.

87 As is pointed out more generally in recital 12 of Directive 2009/28, the use of agricultural material such as manure, slurry and other animal and organic waste for biogas production has, in view of the high greenhouse gas emission saving potential, significant environmental advantages in terms of heat and power production and its use as biofuel.

88 That being so, the increase in the use of renewable energy sources constitutes — as is explained, in particular, in recital 1 of Directive 2009/28 — one of the important components of the package of measures needed to reduce greenhouse gas emissions and to comply with the Kyoto Protocol to the

United Nations Framework Convention on Climate Change, and with other EU and international greenhouse gas emission reduction commitments beyond the year 2012 (see, to that effect, judgment of 1 July 2014, *Ålands Vindkraft*, C-573/12, EU:C:2014:2037, paragraph 79 and the case-law cited).

89 As the Court has previously pointed out, such an increase is also designed to protect the health and life of humans, animals and plants, which are among the public interest grounds listed in Article 36 TFEU (see judgment of 1 July 2014, *Ålands Vindkraft*, C-573/12, EU:C:2014:2037, paragraph 80 and the case-law cited).

90 Secondly, it must be borne in mind that, in accordance with settled case-law, the national authorities must show that an exception to the principle of the free movement of goods which they institute is necessary in order to attain the objectives concerned and that it is in conformity with the principle of proportionality. Thus, it is for those authorities, when claiming to have a reason justifying a restriction on the free movement of goods, to demonstrate specifically the existence of a reason relating to the public interest and the proportionality of that measure in relation to the objective pursued (see, to that effect, judgment of 8 May 2003, *ATRAL*, C-14/02, EU:C:2003:265, paragraphs 67 to 69 and the case-law cited).

91 In the present case, it must be noted that the SE has failed to establish before the Court that a measure such as the contested order, adopted on the basis of Chapter 3, Paragraph 3, of the 2011 SE rules, satisfies those requirements.

92 In that regard, it is appropriate to bear in mind that Paragraph 3 thereof specifies that the mass balance must be achieved 'within a location with a clear boundary' and that, when adopting the contested order, the SE took the view that interconnected national gas networks such as those linking Germany, Denmark and Sweden did not constitute such a location with a clear boundary.

93 As is apparent from the order for reference and as the SE confirmed before the Court, that agency's interpretative practice involves, however, taking the view that when sustainable biogas is added to the Sweden national gas network, that fact does not preclude a mass balance being carried out in respect of that biogas.

94 Clearly the SE remained unable to explain, objectively, how the view could be taken, on the one hand, that the Swedish national gas network in which different types of biogas are mixed constituted a 'location with a clear boundary', for the purposes of Chapter 3, Paragraph 3, of the 2011 SE rules and, on the other, that when gas networks of other Member States or interconnected national networks are involved, such national networks, looked at individually or together, do not constitute such a 'location with a clear boundary'.

95 Moreover, the SE has also asserted, on a number of occasions, in its written observations and at the hearing, that when sustainable biogas imported via interconnected national gas networks was so imported under national or international voluntary systems approved by the Commission by virtue of Article 18(4) of Directive 2009/28, the SE did not object to accepting the sustainable character of biogas thus imported from other Member States, appearing thereby to accept that the fact that sustainable biogas is mixed in such networks does not preclude the implementation of a mass balance in connection with the mixture thus achieved.

96 As regard the explanation also put forward by the SE to justify the adoption of the contested order, concerning the lack of any European authority in a position to monitor the area formed by the interconnected national gas networks, it must be pointed out, first, that such an explanation departs from the legal basis expressly given by the SE to the contested order, alleging the absence of a 'location with a clear boundary' for the purpose of Chapter 3, Paragraph 3, of the 2011 SE rules.

97 Secondly, independently of the inconsistency which has just been pointed out, such an explanation is unconvincing. As is apparent from Chapter 3, Paragraph 1a of the HBL, the economic operators claiming that the biogas which they market is sustainable must guarantee, in particular by direct and indirect agreements concluded with all the operators in the entire chain of production and by the putting into place of a verification system which is itself reviewed by an independent reviewer who is to satisfy himself that that verification system is accurate, reliable and protected against fraud, that the biogas in respect of which they seek a tax advantage actually satisfies the sustainability criteria laid down in Article 17 of Directive 2009/28.

98 As the Advocate General noted in points 89 and 90 of his Opinion, it does not appear, and the SE has failed to show, that it would be impossible for the SE to ensure that biogas imported from other Member States via interconnected national gas networks is sustainable by requiring the economic operators concerned to produce the evidence thus required under national law while taking account, in that regard, of any information and documents issued under the mass balance system in place in the Member States from which the consignment of sustainable biogas concerned came and while satisfying itself that that consignment is deemed, for the purposes specified in Article 17(1) of Directive 2009/28, to have been removed only once from the mixture or mixtures, as required by the mass balance system instituted in Article 18(1) of that directive.

99 It follows from the foregoing that the SE has not established that the contested order, adopted on the basis of Chapter 3, Paragraph 3, of the 2011 SE rules, is necessary to guarantee the sustainable character of the biogas imported from other Member States for the purposes referred to in Article 17(1) of Directive 2009/28, such that that measure does not have regard to the principle of proportionality and accordingly cannot be justified.

100 Having regard to all the foregoing, the referring court must be informed that Article 34 TFEU must be interpreted as precluding an order, such as the order at issue in the main proceedings, by which a national authority seeks to exclude the possibility that an economic operator may implement a mass balance system, within the meaning of Article 18(1) of Directive 2009/28, in respect of sustainable biogas transported in interconnected national gas networks, by virtue of a provision adopted by that authority under which such a mass balance must be achieved ‘within a location with a clear boundary’, when that authority accepts, on the basis of that provision, that a mass balance system may be implemented in respect of sustainable biogas transported within the national gas network of the Member State of that authority.

Costs

101 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:

1. **Article 18(1) 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 must be interpreted as meaning that it is not intended to place an obligation on the Member States to authorise imports, via their interconnected national gas networks, of biogas satisfying the sustainability criteria set out in Article 17 of that directive and intended for use as biofuel.**

2. **Examination of the second question has not disclosed any factor such as to affect the validity of Article 18(1) of Directive 2009/28.**

3. **Article 34 TFEU must be interpreted as precluding an order, such as the order at issue in the main proceedings, by which a national authority seeks to exclude the possibility that an economic operator may implement a mass balance system, within the meaning of Article 18(1) of Directive 2009/28, in respect of sustainable biogas transported in interconnected national gas networks, by virtue of a provision adopted by that authority under which such a mass balance must be achieved 'within a location with a clear boundary', when that authority accepts, on the basis of that provision, that a mass balance system may be implemented in respect of sustainable biogas transported within the national gas network of the Member State of that authority.**

[Signatures]