Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 8 May 2013 [1]

Case C-195/12

Industrie du bois de Vielsalm & Cie (IBV) SA
v
Région wallonne

(Request for a preliminary ruling from the Cour constitutionnelle (Belgium))

(Environment — Energy policy — Financial support schemes for cogeneration plants — Unequal treatment as between wood and other biomass fuels)

1. For the first time the Court is called upon to interpret Directive 2004/8/EC of the European Parliament and of the Council of 11 February 2004 on the promotion of cogeneration based on a useful heat demand in the internal energy market and amending Directive 92/42/EEC. [2]

2. This request for a preliminary ruling was made in the context of a dispute between Industrie du bois de Vielsalm & Cie (IBV) SA [3] and the Walloon Region.

3. IBV's main business consists in a sawmill operation. It utilises the wood waste resulting from that activity in order to create its own supply of energy using its cogeneration plant (simultaneous generation in one process of thermal energy and electrical and/or mechanical energy). In its implementation of Directive 2004/8, the Kingdom of Belgium opted for the mechanism of green certificates as a cogeneration support scheme. These certificates are granted to producers of 'green' electricity in accordance with allocation rules.

4. In the present case, the Walloon Region refused to grant IBV the additional support of double green certificates, which it reserves to certain plants, on the ground that it failed to fulfil the conditions for the grant of such support, in particular, in so far as concerns the subject-matter of the present dispute, because such support is available only for plants which use biomass other than that derived from wood and wood waste.

5. It was in that context that the Cour constitutionnelle (Belgium) referred two questions to the Court of Justice for a preliminary ruling. It asks, in substance, whether Article 7 of Directive 2004/8 on support schemes, read together, if appropriate, with Articles 2 and 4 of Directive 2001/77/EC [4] and Article 22 of Directive 2009/28/EC, [5] is to be interpreted, in the light of the general principle of equal treatment, of Article 6 TEU and of Articles 20 and 21 of the Charter of Fundamental Rights of the

1 — Original language: French.

2 — OJ 2004 L 52, p. 50.

3 — 'IBV'.

4 — 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 (OJ 2001 L 283, p. 33).

5 — 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).

European Union ('the Charter'), first, as applying only to high-efficiency cogeneration plants and, secondly, as precluding – or otherwise – a regional support measure, such as that at issue in the main proceedings, which excludes from the benefit of double green certificates plants which use biomass derived from wood and/or wood waste. The referring court also asks the Court of Justice whether the answer to that second question would differ according to whether the plant used only wood or, on the other hand, only wood waste.

6. In this Opinion I shall submit that Article 7 of Directive 2004/8 must be interpreted as applying to all cogeneration plants and not solely to high-efficiency cogeneration plants. I shall then state why, in my view, in the light of the principle of equal treatment, that provision does not preclude a regional support measure such as that at issue in the main proceedings which excludes from the benefit of double green certificates plants which use biomass derived from wood, leaving it to the national court to decide, on the basis of the information available to it, whether the measure is appropriate to achieving the objective of preserving wood resources and safeguarding the wood industry. I shall, however, set out the reasons for which, in my view, Article 7 does preclude such a measure with regard to plants using biomass derived from wood waste.

I – **Legal framework**

A – *European Union law*

1. Directive 2004/8

7. Recitals 24 to 26, 31 and 32 in the preamble to Directive 2004/8 are worded as follows:

'(24) Public support should be consistent with the provisions of the Community guidelines on State aid for environmental protection [6] …

(25) Public support schemes for promoting cogeneration should focus mainly on support for cogeneration based on economically justifiable demand for heat and cooling.

(26) Member States operate different mechanisms of support for cogeneration at the national level, including … green certificates …

...

(31) The overall efficiency and sustainability of cogeneration is dependent on many factors, such as technology used, fuel types, load curves, the size of the unit, and also on the properties of the heat. …

(32) In accordance with the principles of subsidiarity and proportionality as set out in Article 5 [TEU], general principles providing a framework for the promotion of cogeneration in the internal energy market should be set at Community level, but the detailed implementation should be left to Member States, thus allowing each Member State to choose the regime, which corresponds best to its particular situation. This Directive confines itself to the minimum required in order to achieve those objectives and does not go beyond what is necessary for that purpose.'

6 — OJ 2001 C 37, p. 3.

8. Article 1 of Directive 2004/8 provides:

‘The purpose of this directive is to increase energy efficiency and improve security of supply by creating a framework for promotion and development of high-efficiency cogeneration of heat and power based on useful heat demand and primary energy savings in the internal energy market, taking into account the specific national circumstances especially concerning climatic and economic conditions.’

9. Article 2 of the directive provides that the directive applies to cogeneration as defined in Article 3 and the cogeneration technologies listed in Annex I.

10. Article 3 of Directive 2004/8 defines cogeneration as the simultaneous generation in one process of thermal energy and electrical and/or mechanical energy and high-efficiency cogeneration as cogeneration meeting the criteria of Annex III to the directive. Article 3 states that the relevant definitions in Directive 2003/54/EC[7] and in Directive 2001/77 apply.

11. Annex III to Directive 2004/8, entitled ‘Methodology for determining the efficiency of the cogeneration process’ defines high-efficiency cogeneration as cogeneration that satisfies the following criteria:

— cogeneration production from cogeneration units shall provide primary energy savings of at least 10% compared with the references for separate production of heat and electricity,

— production from small-scale and micro-cogeneration units providing primary energy savings may qualify as high-efficiency cogeneration.

12. Article 7 of the directive, entitled ‘Support schemes’, reads as follows:

‘1. Member States shall ensure that support for cogeneration – existing and future units – is based on the useful heat demand and primary energy savings, in the light of opportunities available for reducing energy demand through other economically feasible or environmental[ly] advantageous measures like other energy efficiency measures.

2. Without prejudice to Articles [107 TFEU] and [108 TFEU], the Commission shall evaluate the application of support mechanisms used in Member States according to which a producer of cogeneration receives, on the basis of regulations issued by public authorities, direct or indirect support, which could have the effect of restricting trade.

The Commission shall consider whether those mechanisms contribute to the pursuit of the objectives set out in Articles [11 TFEU] and [191](1) [TFEU].

3. The Commission shall in the report referred to in Article 11 present a well-documented analysis on experience gained with the application and coexistence of the different support mechanisms referred to in paragraph 2 of this article. The report shall assess the success, including cost-effectiveness, of the support systems in promoting the use of high-efficiency cogeneration in conformity with the national potentials referred to in Article 6. The report shall further review to what extent the support schemes have contributed to the creation of stable conditions for investments in cogeneration.’

7 — 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).

2. Directive 2001/77

13. Article 2 of Directive 2001/77 states:

‘For the purposes of this Directive the following definitions shall apply:

(a) “renewable energy sources” means renewable non-fossil energy sources (wind, solar, geothermal, wave, tidal, hydropower, biomass, landfill gas, sewage treatment plant gas and biogases);

(b) “biomass” means the biodegradable fraction of products, waste and residues from agriculture (including vegetal and animal substances), forestry and related industries, as well as the biodegradable fraction of industrial and municipal waste;

…’

14. Article 4 of that directive, entitled ‘Support schemes’, provides:

‘1. Without prejudice to Articles [107 TFEU] and [108 TFEU], the Commission shall evaluate the application of mechanisms used in Member States according to which a producer of electricity, on the basis of regulations issued by the public authorities, receives direct or indirect support, and which could have the effect of restricting trade, on the basis that these contribute to the objectives set out in Articles [11 TFEU] and [191 TFEU].

2. The Commission shall, not later than 27 October 2005, present a well-documented report on experience gained with the application and coexistence of the different mechanisms referred to in paragraph 1. The report shall assess the success, including cost-effectiveness, of the support systems referred to in paragraph 1 in promoting the consumption of electricity produced from renewable energy sources in conformity with the national indicative targets referred to in Article 3(2). This report shall, if necessary, be accompanied by a proposal for a Community framework with regard to support schemes for electricity produced from renewable energy sources.

Any proposal for a framework should:

(a) contribute to the achievement of the national indicative targets;

(b) be compatible with the principles of the internal electricity market;

(c) take into account the characteristics of different sources of renewable energy, together with the different technologies, and geographical differences;

(d) promote the use of renewable energy sources in an effective way, and be simple and, at the same time, as efficient as possible, particularly in terms of cost;

(e) include sufficient transitional periods for national support systems of at least seven years and maintain investor confidence.’

3. The Community guidelines on State aid for environmental protection

15. As regards State aid, recital 24 in the preamble to Directive 2004/8 refers to the provisions of the Community guidelines on State aid for environmental protection of 2000, which were replaced as from 2 April 2008 by new Community guidelines on State aid for environmental protection. [8]

8 — OJ 2008 C 82, p. 1, ‘the Guidelines’.

16. Point 112 of the Guidelines provides that:

'Environmental investment and operating aid for cogeneration will be considered compatible with the common market within the meaning of Article [107](3)(c) [TFEU], provided that the cogeneration unit satisfies the definition of high-efficiency cogeneration set out in point 70(11) ...'

17. Point 70(11) of the Guidelines defines high-efficiency cogeneration in the following terms: 'cogeneration meeting the criteria of Annex III to Directive 2004/8... and satisfying the harmonised efficiency reference values established by Commission Decision 2007/74/EC of 21 December 2006 establishing harmonised efficiency reference values for separate production of electricity and heat in application of Directive 2004/8 [9]'.

B – *Law of the Walloon Region*

18. The Decree of the Walloon Regional Parliament of 12 April 2001 on the organisation of the regional electricity market,[10] as amended by the Decree of the Walloon Regional Parliament of 4 October 2007,[11] partially transposed Directives 2001/77, 2003/54 and 2004/8.

19. The 2001 Decree states in Article 37 that '[t]o encourage the development of electricity production from renewable energy sources and/or high-quality cogeneration, the Government shall introduce a system of green certificates'.

20. The management of this mechanism was entrusted to the Commission wallonne pour l'Énergie (Walloon Energy Commission, 'CWaPE'). From a practical point of view, the system works as follows: the Walloon Government sets the quotas of green certificates to be applied each year. Electricity providers and network managers must submit these certificates to CWaPE every quarter, failing which they receive a fine (of EUR 100 for each missing certificate). Each quarter CWaPE grants the certificates to producers of green electricity in proportion to the net quantity of electricity they produce and by reference to the estimated additional production cost in the sector and the measured environmental performance (carbon dioxide saving) of the cogeneration plant in comparison with classic production in reference plants. The green certificates are then sold by the producers to suppliers or the network managers, thus enabling them to meet their quota obligations.

21. Article 38 of the 2001 Decree provides:

'§ 1. Further to an opinion from CWaPE, the Government shall establish the award conditions and lay down the practical arrangements and procedures for granting the green certificates allocated to green electricity produced in the Walloon Region, in accordance with the following provisions.

§ 2. A green certificate shall be granted for a number of kWh produced corresponding to 1 MWh divided by the rate of saving of carbon dioxide.

The rate of saving of carbon dioxide shall be determined by dividing the carbon dioxide saving achieved by the system in question by the carbon dioxide emissions of the classic electricity production system, whose emissions are defined and published annually by the CWaPE. That rate of saving of carbon dioxide is limited to 1 for the production generated per plant above 5 MW. Below that threshold it is limited to 2.

9 — OJ 2007 L 32, p. 183.

10 — *Moniteur belge*, 1 May 2001, p. 14118.

11 — *Moniteur belge*, 26 October 2007, p. 55517, 'the 2001 Decree'.

3. However, where a plant using principally biomass, other than wood, derived from industrial activities carried on at the site of the production plant implements a particularly innovative process and acts with a view to sustainable development, the Government may, after obtaining the opinion of the CWaPE on the particularly innovative nature of the process used, decide to limit to 2 the rate of saving of carbon dioxide for the entire production of the plant, adding together the power generated at the same production site, with an upper limit of 20 MW.

…'

22. Article 57 of the Decree of the Regional Walloon Parliament of 17 July 2008 amending the 2001 Decree on the organisation of the regional electricity market[12] provides that 'Article 38(3) [of the 2001 Decree] is to be interpreted as meaning that the exclusion of plants using wood from the scheme for which it provides refers to plants using any lignocellulosic material obtained from trees, hardwood and softwood without exception (including short or very short rotation coppice), before and/or after any type of processing'.

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

23. On 23 June 2008 IBV requested the grant in respect of its plant of double green certificates pursuant to Article 38(3) of the 2001 Decree, which, it will be recalled, reserves the additional support of such double certificates to plants which fulfil three conditions, namely that they principally utilise biomass other than wood and wood waste, that they contribute to sustainable development and that they are particularly innovative.

24. By decision of 18 June 2009 the Walloon Government found that IBV satisfied none of the three conditions for the grant of such support.

25. The Conseil d'État, before which IBV brought an action for the annulment of that decision, took the view that it did indeed fulfil the latter two conditions. Entertaining doubts as to the constitutionality of the support mechanism in so far as concerns the first condition, it resolved to refer the following question to the Cour constitutionnelle:

'Does Article 38(3) of the [2001] Decree ... infringe Articles 10 and 11 of the constitution by introducing a difference in treatment between plants principally using biomass, in that it excludes from the benefit of the support mechanism of double green certificates biomass cogeneration plants using wood or wood waste while including biomass cogeneration plants using all other kinds of waste?'

III – **The questions referred**

26. Having been asked that question by the Conseil d'État, la Cour constitutionnelle, before deciding on its substantive answer, in turn referred the following questions to the Court of Justice:

'1. Must Article 7 of Directive 2004/8 ... in conjunction if appropriate with Articles 2 and 4 of Directive 2001/77 ... and with Article 22 of Directive 2009/28 ... be interpreted, in the light of the general principle of equal treatment, of Article 6 [TEU] and Articles 20 and 21 of the Charter ...:

(a) as applying only to high-efficiency cogeneration plants, within the meaning of Annex III to Directive [2004/8];

12 — *Moniteur belge*, 7 August 2008, p. 41321.

(b) as requiring, permitting or prohibiting the availability of a support measure of the kind contained in Article 38(3) of the [2001] Decree ... to all cogeneration plants principally using biomass and meeting the conditions laid down by that article, with the exception of cogeneration plants principally using wood or wood waste?

2. Would the answer be different if the cogeneration plant principally uses only wood or, on the contrary, only wood waste?'

IV – **Analysis**

A – *Preliminary observations*

27. The Cour constitutionnelle is seeking an interpretation of Article 7 of Directive 2004/8 read together, if appropriate, with Articles 2 and 4 of Directive 2001/77 and Article 22 of Directive 2009/28. The last of those directives, however, entered into force on 25 June 2009, that is to say, after the date on which the Walloon Government adopted its decision holding that IBV satisfied none of the requisite conditions for benefiting from the support mechanism laid down by Article 38(3) of the 2001 Decree. Consequently, that directive should not be taken into account in the Court's examination of the questions submitted to it.

28. Turning to the questions referred, I shall begin by examining part (a) of the first question and then address part (b) of the first question and the second question together, since they are connected.

B – *The questions referred*

1. The first question, part (a)

29. By part (a) of its first question, the referring court asks the Court of Justice whether, in the light of the principle of equal treatment, Article 7 of Directive 2004/8 is to be interpreted as applying only to high-efficiency cogeneration plants as defined in Annex III to that directive. [13]

30. Just as IBV and the Commission submit, I am of the view that Article 7 of Directive 2004/8 applies to all cogeneration plants and not merely to high-efficiency cogeneration plants as defined in Annex III to the directive.

31. The European Union legislature was careful, in Article 3 of the directive, to define 'cogeneration' and 'high-efficiency cogeneration' separately. It was therefore in a position to employ one or other of those terms for specific ends and purposes.

32. The wording of Article 7 of Directive 2004/8, which relates to the support schemes used by the Member States, does not specify that such schemes are to be created solely for high-efficiency cogeneration plants.

13 — It will be recalled that, for the purposes of that annex, high-efficiency cogeneration must fulfil the following conditions, namely that cogeneration production from cogeneration units must provide primary energy savings of at least 10% compared with the references for separate production of heat and electricity, and production from small-scale and micro-cogeneration units providing primary energy savings may qualify as high-efficiency cogeneration.

33. Article 7(1) of the directive provides that the Member States must ensure that support for *cogeneration* [14] – for existing and future units – is based on the useful heat demand [15] and primary energy savings. [16] The European Union legislature uses the term 'cogeneration'. It does not distinguish between units, whether they are small-scale or micro-cogeneration units, and does not give any indication as to the scale of the primary energy savings.

34. Equally, Article 7(2) of Directive 2004/8 gives no further indication in that regard.

35. The Belgian Government submits, however, that, in the light of Article 7(2) of Directive 2004/8, recital 24 in the preamble to that directive and the Guidelines, it is clear that support schemes must be only for the benefit of high-efficiency cogeneration plants.

36. It infers from those provisions that the compatibility of support measures with the TFEU provisions on State aid, and thus the scope of Article 7 of the directive, is linked to the conformity of the plants to the criteria for high-efficiency cogeneration established in Annex III to Directive 2004/8. It maintains that that does not amount to a difference in treatment as between cogeneration plants and high-efficiency cogeneration plants because the framework principles governing State aid themselves contemplate it. [17]

37. I am unable to reach the same conclusion as the Belgian Government.

38. Admittedly, Article 7(2) of Directive 2004/8 mentions the competition rules with which the Member States must comply. The provision concerns the Commission's evaluation of the application of the support mechanisms used by the Member States. As part of its assessment, the Commission has to ascertain, in particular, whether those mechanisms comply with the competition rules. Indeed, that assessment is to be made '[w]ithout prejudice to Articles [107 TFEU] and [108 TFEU]'.

39. It is only where the support scheme constitutes State aid that the cogeneration plant must fulfil the criterion of high efficiency in order to be compatible with the internal market, according to points 112 and 70(11) of the Guidelines.

40. However, it is entirely possible for a support scheme not to constitute State aid under the TFEU, in which case the support scheme may be applied to any cogeneration plant.

41. I am thus unable to subscribe to the Belgian Government's conclusion that the plants benefiting from a support scheme may only be high-efficiency cogeneration plants, as defined in Annex III to Directive 2004/8.

42. Moreover, Article 7(3) of Directive 2004/8 supports my analysis.

43. Read together with Articles 6, 10 and 11 of that directive, Article 7(3) concerns the Commission's report evaluating the success of the support schemes in promoting the use of high-efficiency cogeneration.

14 — Emphasis added.

15 — Useful heat is heat produced in a *cogeneration* process to satisfy an economically justifiable demand for heat or cooling (Article 3(b) of Directive 2004/8). Economically justifiable demand is demand that does not exceed the needs for heat or cooling and which would otherwise be satisfied at market conditions by energy generation processes other than *cogeneration* (Article 3(c) of that directive).

16 — See also recital 25 in the preamble to Directive 2004/8, which states that public support schemes for promoting cogeneration should focus mainly on support for *cogeneration* based on economically justifiable demand for heat and cooling.

17 — See paragraph 67 of the Belgian Government's observations.

44. Under Articles 6 and 10 of the directive, the Member States must establish an analysis of the national potential for the application of high-efficiency cogeneration and must evaluate progress towards increasing the share of high-efficiency cogeneration. On the basis of that analysis, which is reported to the Commission, the Commission must, pursuant to Article 11 of the directive, 'examine the experiences gained with the application and coexistence of different support mechanisms for *cogeneration*'. [18]

45. Nor does a combined reading of the provisions just mentioned suggest that only high-efficiency cogeneration plants may benefit from the support schemes. Admittedly, the purpose of Directive 2004/8, as stated in Article 1 of the directive, is to increase energy efficiency and improve security of supply by creating a framework for the promotion and development of high efficiency cogeneration, but my understanding is that high efficiency is the ultimate goal of the directive and I fail to see why 'less efficient' cogeneration plants should be excluded from any support scheme, since they too contribute to achieving the goal of energy efficiency and improving security of supply.

46. In the light of the foregoing, I propose that the Court answer that, in the light of the principle of equal treatment, Article 7 of Directive 2004/8 must be interpreted as applying to all cogeneration plants and not only to high-efficiency cogeneration plants as defined in Annex III to that directive.

2. The first question, part (b), and the second question

47. By part (b) of its first question, and its second question, the referring court is in fact questioning whether Article 7 of Directive 2004/8, read in the light of the principle of equal treatment, is to be interpreted as precluding a support measure, such as that at issue in the main proceedings, which excludes from the benefit of double green certificates cogeneration plants using biomass derived from wood and/or wood waste.

48. In other words, it wishes to establish what margin of discretion the Member States have in the implementation of a cogeneration support scheme.

49. Directive 2004/8 was adopted on the basis of Article 175(1) EC, which falls within the title relating to the environment, in order to achieve the objectives referred to in Article 174 EC, in particular that of preserving the quality of the environment.

50. European Union rules do not seek to effect complete harmonisation in the area of the environment. [19]

51. In an area of shared competences, such as that of environmental protection, [20] it is for the European Union legislature to determine the measures which it considers necessary to achieve the intended objectives, while observing the principles of subsidiarity and proportionality enshrined in Article 5 TEU. [21]

18 — Emphasis added.

19 — Case C-318/98 *Fornasar and Others* [2000] ECR I-4785, paragraph 46, and Case C-6/03 *Deponiezweckverband Eiterköpfe* [2005] ECR I-2753, paragraph 27.

20 — Article 4(2) TFEU.

21 — See, to that effect, Case C-505/09 P *Commission* v *Estonia* [2012] ECR, paragraph 81.

52. Thus, recital 32 in the preamble to Directive 2004/8 states that, in accordance with the principles of subsidiarity and proportionality, general principles providing a framework for the promotion of cogeneration in the internal energy market should be set at European Union level, but the detailed implementation should be left to Member States, thus allowing each Member State to choose the regime which corresponds best to its particular situation. The recital goes on to say that the directive confines itself to the minimum required in order to achieve those objectives and does not go beyond what is necessary.

53. Moreover, it is clear from the wording of Article 7 that the directive in no way specifies what type of cogeneration support scheme the Member States are encouraged to adopt. Article 7 merely states that Member States must ensure that support for cogeneration, for existing and future units, is based on the useful heat demand and primary energy savings and that the mechanisms must not distort competition and must be consistent with the objectives defined in Articles 11 TFEU and 191(1) TFEU relating to environmental protection.

54. It is only recital 26 in the preamble to Directive 2004/8 that mentions the form which the support scheme may take. The recital states that the Member States are to operate different mechanisms of support for cogeneration at national level, *including*[22] investment aid, tax exemptions or reductions, green certificates and direct price support schemes. It is clear that the list of the various support mechanisms is non-exhaustive; it therefore leaves other support mechanism options open to the Member States.

55. The Member States thus have a broad margin of discretion as regards the form that the cogeneration support scheme is to take.

56. Moreover there is nothing in Article 7 of Directive 2004/8 or in the remainder of the text of the directive to indicate that, in providing support to cogeneration, the Member States may not favour one type of fuel over another. In this connection, recital 31 in the preamble to the directive mentions that the efficiency and sustainability of cogeneration is dependent on many factors, such as fuel types.

57. The type of fuel to be used may depend on the particular features of the region and its availability in the region. Indeed the European Union legislature took that factor into consideration, since Article 1 of Directive 2004/8 states that the directive's purpose is to be achieved *taking into account the specific national circumstances especially concerning climatic and economic conditions*.[23]

58. Similarly, in its Opinion,[24] the European Economic and Social Committee stressed the need to take account of specific circumstances and respect the subsidiarity principle in an area where national climatic and economic conditions are crucial.

59. In the exercise of the broad discretion which it was thus allowed, the Walloon Government chose, in its partial transposition of Directive 2004/8, to use the system of green certificates, and was entitled to promote additional support for plants using biomass over and above the support for plants using other types of fuel.

60. It follows from the foregoing that Article 7 of Directive 2004/8 must, in my view, be interpreted as not, in principle, precluding a regional support scheme such as that at issue in the main proceedings.

22 — Emphasis added.

23 — Emphasis added.

24 — Opinion on the Proposal for a directive of the European Parliament and of the Council on the promotion of cogeneration based on a useful heat demand in the internal energy market (OJ 2003 C 95, p. 12).

61. Nevertheless, in implementing Directive 2004/8, the Member States are required, under Article 51(1) of the Charter, to observe the principle of equal treatment enshrined in Article 20 thereof. [25]

62. In the present case IBV takes issue, in light of that principle, with its exclusion from the benefit of double green certificates, arguing that it is being placed at a disadvantage by comparison with cogeneration plants which use biomass other than that derived from wood and/or wood waste.

63. It is therefore necessary now to examine whether, in adopting Article 38(3) of the 2001 Decree, the Walloon Region observed the principle of equal treatment.

64. It is settled case-law that the principle of equal treatment requires that comparable situations must not be treated differently and different situations not treated alike unless such treatment is objectively justified. [26]

65. In the present case, it must therefore be determined whether undertakings within the wood sector, such as IBV, are in a comparable situation to that of undertakings in other sectors which, by contrast, benefit from double green certificates in accordance with Article 38(3) of the 2001 Decree.

66. On this point I do not agree with the analyses of the Polish Government [27] and the Commission, [28] which consider that the various categories of biomass are not in comparable situations and that biomass derived from wood presents particular characteristics, in particular as regards its availability and cost-effectiveness.

67. In my view, and as we shall subsequently see, [29] those criteria of availability and cost-effectiveness are factors which must, in fact, be taken into account when considering the justification for different treatment of comparable situations.

68. In so far as concerns determining whether the situations at issue in the main proceedings are comparable, I think that the comparison between the wood sector and other sectors must be carried out in the light of the subject-matter and purpose of the legislation in question. [30]

69. The system of green certificates was introduced by the Walloon authorities in accordance with the provisions of Directive 2004/8. It is designed to promote the development of electricity production from renewable sources and/or high-quality cogeneration. The measures adopted by the Member States on the basis of Directive 2004/8 contribute to environmental protection and, in particular, to observance of the objectives of the Kyoto Protocol to the United Nations Framework Convention on Climate Change, [31] which is one of the priority objectives of the European Union.

70. The Union's 'climate change' package laid down a so-called '3 x 20' target for the Member States to achieve by 2020, that is to say, a 20% energy saving, a 20% reduction in greenhouse gas emissions and 20% of renewable energies in energy production. Directive 2004/8 is one of the manifestations of that.

25 — See Case C-401/11 *Soukupová* [2013] ECR, paragraph 28.

26 — Ibid., paragraph 29 and the case-law cited.

27 — See paragraph 37 of the Polish Government's observations.

28 — See paragraph 50 of the Commission's observations.

29 — See point 81 below.

30 — See, to that effect, Case C-127/07 *Arcelor Atlantique et Lorraine and Others* [2008] ECR I-9895, paragraph 26 and the case-law cited.

31 — The Protocol entered into force on 16 February 2005.

71. This directive therefore makes the promotion of cogeneration a Community priority by reason of its contribution to security and diversification of the energy supply, to environmental protection, in particular the reduction of greenhouse gas emissions, and to sustainable development.

72. Biomass is defined in Article 2 of Directive 2001/77 [32] as the biodegradable fraction of products, waste and residues from agriculture (including vegetal and animal substances), forestry and related industries, as well as the biodegradable fraction of industrial and municipal waste.

73. It plays a part in combating greenhouse gas emissions and contributes to the increase in energy efficiency, which is regarded as the most cost-effective and swiftest means of improving security of supply. As such, it fulfils in the same way the objectives of Directive 2004/8, which was adopted to that same end.

74. Biomass, whether it is derived from agriculture, forestry or related industries, is a source of renewable energy and constitutes a sector of energy production. Biomass resources are extremely heterogeneous. However, whether biomass is constituted by wood pellets, wood chips and sawdust, household waste, sewage sludge, plants, waste from the agro-food industry or even algae, it is nevertheless in all cases an organic matter capable of constituting a fuel from which energy may be produced.

75. I therefore consider that, in the light of the subject-matter and purpose of Directive 2004/8, plants using wood and/or wood waste and those which use other sources of biomass are in a comparable situation.

76. It must now be considered whether the Walloon Government's different treatment of these two categories is justified.

77. It is settled case-law that a difference in treatment is justified if it is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment. [33]

78. It is necessary to consider, in particular, whether, in the case in the main proceedings, the exclusion of plants utilising biomass derived from wood and/or wood waste is appropriate to securing the attainment of one or more of the legitimate objectives relied on by the Walloon Government and whether it does not go beyond what is necessary in order to attain it. National legislation is, moreover, appropriate to ensuring the attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner.

79. In considering the justification of the differential treatment I shall make a distinction between plants using biomass derived from wood and plants using biomass derived from wood waste, since it appears to me that what is at stake is not the same from the point of view of the relevant environmental demands.

80. In the present case, the Walloon Government has put forward a number of arguments in support of its justification of the exclusion of plants using wood and/or wood waste from the double green certificate mechanism provided for in Article 38(3) of the 2001 Decree. Those arguments have all been disputed by IBV.

32 — Article 3 of Directive 2004/8 provides that the relevant definitions in Directives 2003/54 and 2001/77 are to apply.

33 — See, to that effect, *Arcelor Atlantique et Lorraine and Others*, paragraph 47 and the case-law cited.

81. In particular, it refers to the necessity of preserving wood resources and reserving them to the wood industry, which uses them as material.[34] In support of that argument it relies upon studies according to which the wood processing industry has a significant deficit in the Walloon Region and has to rely upon imports. The Walloon Government maintains that granting double green certificates to the wood energy production sector could bring about a sharp increase in the price of raw materials.

82. The argument which the Walloon Government puts forward appears to me to be legitimate in so far as its purpose is the preservation of forests and wood raw material. It therefore appears to be justified by the general interest in a high level of environmental protection,[35] which Article 191 TFEU and Article 37 of the Charter[36] raise to the status of a European Union target.[37]

83. It is for the national court to determine, on the basis of the information available to it, whether the measure at issue is appropriate to attaining the objective of preserving wood resources and safeguarding the wood industry.

84. On the assumption that the measure at issue does accord with that objective, it is necessary to consider the proportionality of the measure.

85. In my view, the measure is proportionate, in that plants which use biomass derived from wood are not totally excluded from the support scheme, as they nevertheless benefit from 'single' green certificates under Article 38(2) of the 2001 Decree.

86. Having regard to the foregoing, Article 7 of Directive 2004/8, read in the light of the principle of equal treatment, must be interpreted as not precluding a regional support measure, such as that at issue in the main proceedings, which excludes from the benefit of double green certificates plants using biomass derived from wood, subject to the national court's determination, on the basis of the information available to it, of whether the measure is appropriate to attaining the objective of preserving wood resources and safeguarding the wood industry.

87. Now it is necessary to consider whether the measure is justified in the case of plants utilising biomass derived from wood waste, such as IBV.

88. While the measure at issue is justified as regards plants which use biomass derived from wood by the need to safeguard the wood industry, I do not, on the other hand, find that justification to be legitimate from the point of view of environmental protection aims in the case of plants using biomass derived from wood waste.

89. Like IBV,[38] I am of the view that wood waste is not likely to be used in the wood industry.

90. Directive 2008/98/EC[39] defines waste, in Article 3(1), as 'any substance or object which the holder discards or intends or is required to discard'. Wood waste is the residue from wood which has already been used; it is what remains of the material and is of no further use.

34 — The preparatory work for the 2001 Decree justified the decision to reserve the advantage of double green certificates to biomass other than that derived from wood by reference to the need to avoid the unintended effects of such a measure on the wood industry, which is already subject to competition from the dendroenergy sector (paragraph 10 of the order for reference).

35 — See Joined Cases C-379/08 and C-380/08 *ERG and Others* [2010] ECR I-2007, paragraph 81 and the case-law cited.

36 — Article 37 of the Charter states that '[a] high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development'.

37 — See also Article 11 TFEU.

38 — Paragraph 54 of IBV's observations.

39 — Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain directives (OJ 2008 L 312, p. 3).

91. As the Polish Government rightly points out, the utilisation of wood waste has no direct effect on either the protection of forests or the competitiveness of the wood industry.[40]

92. While the primary concern of environmental policies has for years been the treatment, disposal, processing and prevention of waste, the utilisation of waste has now become a major objective of European and national authorities. Against that background, the development of procedures such as cogeneration using biomass derived from wood waste would appear to be responsive to environmental demands.

93. In its Communication of 7 December 2005 on the Biomass action plan,[41] the Commission encourages Member States to harness the potential of all cost-effective forms of biomass electricity generation. It points out that the Member States have committed themselves to targets for electricity production from renewable energy sources, and it would appear impossible, in most cases, for them to achieve those targets without using more biomass.[42] As regards cogeneration plants more specifically, the Commission encourages the Member States to harness the potential of all cost-effective forms of biomass electricity generation.[43] Furthermore, as regards waste, the Commission considers it to be an underused source of energy and encourages investment in energy-efficient techniques for the use of waste as fuel.[44]

94. Therefore, not to promote the use of wood waste to produce energy would appear to be inconsistent with the environmental policy aims pursued by the European Union and would even appear to run counter to those objectives.

95. The Walloon Government states that the measure at issue is entirely consistent with the waste management hierarchy referred to in Article 4 of Directive 2008/98, which provides that recycling is to be preferred over energy recovery. That argument seems to me to be a dubious one, given what I have already said and given that Article 4(2) specifically states that, '[w]hen applying the waste hierarchy referred to in paragraph 1, Member States shall take measures to encourage the options that deliver the best overall environmental outcome. This may require specific waste streams departing from the hierarchy where this is justified by life-cycle thinking on the overall impacts of the generation and management of such waste.' Recital 8 of the preamble to Directive 2008/98 even states that 'the recovery of waste ... should be encouraged'.

96. That is all the more justified where the utilisation of wood waste takes place *in situ*, as in the present case, since IBV utilises the wood residues resulting from its primary sawmill operation directly at its site. Transport is thereby avoided, and thus also the negative effects of pollution. The utilisation of wood waste thus contributes to the environmental protection aims laid down in Articles 11 TFEU and 191(1) TFEU and to compliance with Article 37 of the Charter.

97. Moreover, as the Polish Government emphasises, in its Communication of 15 June 2006 to the Council and the European Parliament on an EU Forest Action Plan,[45] the Commission recommends the use of wood other than wood that is fully usable and will facilitate investigation into and the dissemination of experience on mobilisation of low-value timber, small-sized wood and wood residues for energy production.[46]

40 — See paragraph 40 of the Polish Government's observations.
41 — COM(2005) 628 final.
42 — Ibid., p. 9.
43 — Ibid., p. 10.
44 — Ibid., p. 14.
45 — COM(2006) 302 final.
46 — Ibid., p. 5.

98. I also share the Polish Government's view that efforts must be made to exploit by-products of logging [47] and to harness this unused potential for energy production. [48]

99. Wood waste has a 'dormant' potential which should be managed in the most effective way and in the manner most consistent with environmental policy. It has the potential to satisfy two objectives of that policy simultaneously, namely the continual improvement of waste management and the production of renewable energy.

100. It follows from the foregoing that the exclusion of plants using biomass derived from wood waste from the benefit of the double green certificate mechanism provided for in Article 38(3) of the 2001 Decree has not been objectively justified by the Walloon Government.

101. Therefore, Article 7 of Directive 2004/8, read in the light of the principle of equal treatment, must be interpreted as precluding a regional support measure, such as that at issue in the main proceedings, which excludes from the benefit of double green certificates plants using biomass derived from wood waste.

102. Having regard to all the foregoing considerations, I am of the opinion that Article 7 of Directive 2004/8, read in the light of the principle of equal treatment, must be interpreted as not precluding a regional support measure, such as that at issue in the main proceedings, which excludes from the benefit of double green certificates plants using biomass derived from wood, subject to the national court's determination, on the basis of the information available to it, of whether the measure is appropriate to attaining the objective of preserving wood resources and safeguarding the wood industry. It does, on the other hand, preclude such a measure with respect to plants using biomass derived from wood waste.

V – **Conclusion**

103. In the light of all the foregoing, I propose that the Court answer the Cour constitutionnelle as follows:

Article 7 of Directive 2004/8/EC of the European Parliament and of the Council of 11 February 2004 on the promotion of cogeneration based on a useful heat demand in the internal energy market and amending Directive 92/42/EEC, read in the light of the principle of equal treatment, must be interpreted as:

— applying to all cogeneration plants and not only to high-efficiency cogeneration plants as defined in Annex III to Directive 2004/8;

— not precluding a regional support measure, such as that at issue in the main proceedings, which excludes from the benefit of double green certificates plants using biomass derived from wood, subject to the national court's determination, on the basis of the information available to it, of whether the measure is appropriate to attaining the objective of preserving wood resources and safeguarding the wood industry. It does, on the other hand, preclude such a measure with respect to plants using biomass derived from wood waste.

47 — Such as wood pellets made by cutting wood that cannot be used by the wood industry into small pieces.

48 — Opinion of the European Economic and Social Committee on Wood as an energy source in the enlarging Europe (OJ 2006 C 110, p. 60).