Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 3 December 2020 [1]

Case C-705/19

Axpo Trading Ag
v
Gestore dei Servizi Energetici SpA – GSE

(Request for a preliminary ruling
from the Consiglio di Stato (Council of State, Italy))

(Reference for a preliminary ruling – Free movement of goods – Promoting the use of energy produced from renewable sources – Imports of electricity from Switzerland – National provision on the obligation to purchase green certificates – Charge having an effect equivalent to a customs duty – Discriminatory internal tax – Measure having an effect equivalent to a quantitative restriction on imports – State aid – Transfer of State resources – Selectivity of the aid – Treaty between the European Union and Switzerland)

1. Directive 2009/28/CE, [2] which will be replaced from 1 July 2021 by Directive (EU) 2018/2001, [3] has given a major boost to the use of energy from renewable sources. One of the mechanisms or 'support systems' for which it provides as a means of incentivising the production of this type of energy is the green certificate system. [4]

2. When it evaluated mechanisms to support electricity generated from renewable energy sources ('RES-E') in 2005, the Commission summarised as follows the green certificate system used by, among other Member States, Italy: 'under the green certificate system … RES-E is sold at conventional power-market prices. In order to finance the additional cost of producing green electricity, and to ensure that the desired green electricity is generated, all consumers (or, in some countries, producers) are obliged to purchase a certain number of green certificates from RES-E producers according to a fixed percentage, or quota, of their total electricity consumption/production …'. [5]

1 Original language: Spanish.

2 Directive 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).

3 Directive of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (OJ 2018 L 328, p. 82). It recasts Directive 2009/28, which it repeals with effect from 1 July 2021. It is therefore inapplicable *ratione temporis* in this case.

4 Other potential support systems include feed-in tariffs, tendering systems and tax incentives.

5 COM(2005) 627 final, Communication from the Commission of 7 December 2005 on the support of electricity from renewable energy sources.

3. The Court has already ruled on the green certificate system, in particular from the point of view of the free movement of goods. [6] This reference for a preliminary ruling will enable it to build on its case-law by addressing the compatibility of the Italian green certificate legislation with EU law.

I. Legal framework

A. EU law

1. EEC-Switzerland Free Trade Agreement [7]

4. Article 2 provides:

'This Agreement shall apply to products originating in the Community or Switzerland:

(i) which fall within Chapters 25 to 97 of the Harmonised Commodity Description and Coding System, excluding the products listed in Annex I;

(ii) which are specified in Annex II;

(iii) which are specified in Protocol 2, with due regard to the arrangements provided for in that Protocol'.

5. Article 6(1) states:

'No new charge having an effect equivalent to a customs duty on imports shall be introduced in trade between the Community and Switzerland'.

6. Article 13(1) provides:

'No new quantitative restriction on imports or measures having equivalent effect shall be introduced in trade between the Community and Switzerland'.

2. Directive 2009/28

7. Recitals 15, 25, 52 and 56 read:

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

6 In particular, in the judgments of 1 July 2014, *Ålands Vindkraft* (C-573/12, EU:C:2014:2037); 'judgment in *Ålands Vindkraft*'; of 11 September 2014, *Essent Belgium* (C-204/12 to C-208/12, EU:C:2014:2192); and of 26 November 2014, *Green Network* (C-66/13, EU:C:2014:2399); 'judgment in *Green Network*'.

7 Agreement between the European Economic Community and the Swiss Confederation (OJ, English Special Edition, 1972 L 300, p. 191; 'the EEC-Switzerland Agreement'), as amended by Decision No 1/2000 of the EC-Switzerland Joint Committee of 25 October 2000 amending the Agreement between the European Economic Community and the Swiss Confederation consequent upon the introduction of the Harmonised Commodity Description and Coding System (OJ 2001 L 51, p. 1).

…

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

…

(52) Guarantees of origin issued for the purpose of this Directive have the sole function of proving to a final customer that a given share or quantity of energy was produced from renewable sources. A guarantee of origin can be transferred, independently of the energy to which it relates, from one holder to another. However, with a view to ensuring that a unit of electricity from renewable energy sources is disclosed to a customer only once, double counting and double disclosure of guarantees of origin should be avoided. Energy from renewable sources in relation to which the accompanying guarantee of origin has been sold separately by the producer should not be disclosed or sold to the final customer as energy from renewable sources. It is important to distinguish between green certificates used for support schemes and guarantees of origin.

…

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

8. According to Article 1 thereof, Directive 2009/28 establishes a common framework for the promotion of energy from renewable sources in gross final consumption of energy and for the share of energy from renewable sources in transport.

9. Article 3(1) and (3) concerns the national overall target for the share of energy from renewable sources and measures for compliance with that share.

10. Article 3(3) states:

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

(a) support schemes;

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

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

11. Article 7(1) provides:

'Two or more Member States may cooperate on all types of joint projects relating to the production of electricity, heating or cooling from renewable energy sources. That cooperation may involve private operators'.

12. Article 9(1) states:

'One or more Member States may cooperate with one or more third countries on all types of joint projects regarding the production of electricity from renewable energy sources. Such cooperation may involve private operators'.

13. Article 15 states:

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

2. To that end, Member States shall ensure that a guarantee of origin is issued in response to a request from a producer of electricity from renewable energy sources. …

…

The guarantee of origin shall have no function in terms of a Member State's compliance with Article 3. …

…

9. Member States shall recognise guarantees of origin issued by other Member States in accordance with this Directive exclusively as proof of the elements referred to in paragraphs 1 and 6(a) to (f). A Member State may refuse to recognise a guarantee of origin only when it has well-founded doubts about its accuracy, reliability or veracity. The Member State shall notify the Commission of such a refusal and its justification.

…’

B. Italian law

1. Rules prior to 2011

14. The relevant paragraphs of the judgment in *Green Network* describe as follows the green certificate scheme in force in Italy prior to the 2011 reform:

‘12 Article 11(1) of Legislative Decree No 79 on the implementation of Directive 96/92/EC [of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (OJ 1997 L 27, p. 20)] (“Legislative Decree No 79/1999”) requires operators having produced or imported electricity to feed into the national grid, during the following year, a quota of electricity produced from renewable energy sources (“green electricity”) from installations that entered into service or increased their production after the entry into force of that decree. Pursuant to Article 11(3) of the same decree, this requirement may be discharged by, inter alia, purchasing all or part of that quota from other producers, provided that the electricity fed into the national grid is green, or by purchasing green certificates from the designated national grid manager, Gestore servizi energetici SpA (“GSE”), since 1 November 2005. To that end, the producers and importers concerned must either submit certificates showing that a quota of electricity produced or imported has been produced from renewable energy sources or buy green certificates.

13 Article 4(6) of the Ministerial Decree laying down rules for the implementation of standards on electricity produced from renewable energy sources under Article 11(1), (2) and (3) of Legislative Decree No 79 of 16 March 1999 ([…] “Ministerial Decree of 11 November 1999”), provides:

“The obligation in Article 11(1) and (2) of Legislative Decree [No 79/1999] may be performed by importing, wholly or in part, electricity generated in installations that entered into service after 1 April 1999, drawing on renewable energy sources, provided that those installations are situated in foreign countries that adopt analogous instruments for the promotion and encouragement of renewable energy based on market mechanisms affording the same opportunity to installations situated in Italy. In that case, the application mentioned in paragraph 3 is submitted by the holder of the obligation at the same time as the contract for the purchase of the electricity generated by the installation and the authorisation for the feeding of that electricity into the national grid. All data shall be certified by the authority designated under Article 20(3) of Directive [96/92], in the country in which the installation is situated. In the case of countries which are not members of the European Union, acceptance of the application is subject to the conclusion of an agreement between the national grid manager and the equivalent local authority determining the arrangements for the necessary verifications”.

14 Pursuant to Article 20(3) of Legislative Decree No 387 on the implementation of Directive [2001/77] on the promotion of electricity produced from renewable energy sources in the internal electricity market ([…]; “Legislative Decree No 387/2003”), operators which import electricity produced in other Member States of the European Union may request exemption of GSE from the obligation to purchase green certificates under Article 11 of Legislative Decree No 79/1999 for the proportion of electricity imported, by presenting it a certified

copy of the guarantee of origin issued in accordance with Article 5 of Directive 2001/77. In the case of import of electricity produced in a third State, the same Article 20(3) makes that exemption conditional on the conclusion, between the Italian Republic and the third State concerned, of an agreement requiring the electricity concerned to be produced from renewable energy sources and guaranteed as such according to the same arrangements as those provided for in Article 5 of Directive 2001/77.

15 Such an agreement was concluded on 6 March 2007 between the competent Italian ministries and the Federal Environment, Transport, Energy and Communications Department of the Swiss Confederation. That agreement provides for the mutual recognition of guarantees of origin of electricity imported from 2006, the year in which the Swiss Confederation enacted legislation in conformity with Directive 2001/77.

16 By virtue of Article 4 of Legislative Decree No 387/2003, GSE is responsible for monitoring compliance with the obligation under Legislative Decree No 79/1999 and for reporting cases of breach to the AEEG (Autorità per l'energia elettrica e il gas, Electricity and Gas Authority) which has the power, in such cases, to impose the penalties provided for by Law No 481 on the rules relating to competition and the regulation of public utility services – Establishment of regulatory authorities for public utility services …'.

2. Legislative Decree No 28/2011 [8]

15. Article 25(2) provides that 'electricity imported as from 1 January 2012 shall not be subject to the obligation laid down in Article 11(1) and (2) of Legislative Decree [No 79/1999] exclusively in the event that it contributes towards the attainment of the national targets laid down in Article 3'.

16. Article 25(11)(a) provided for the repeal of Article 20(3) of Legislative Decree No 378/2003 as from 1 January 2012. Thereafter, importers of electricity from other Member States could not apply to GSE for an exemption from the obligation to purchase green certificates.

II. Facts, main proceedings and the question referred for a preliminary ruling

17. Axpo Trading AG ('Axpo') [9] is a Swiss company operating in the electricity sector. It imports into Italy energy produced in Switzerland (and, to a lesser extent, France) from renewable energy sources and fossil fuels.

18. GSE adopted two decisions, of 8 April 2014 and 10 July 2016, finding that, in 2012 and 2014, Axpo had imported into Italy electricity produced from renewable sources without acquiring the corresponding green certificates, thus infringing Legislative Decree No 79/1999, as amended by Legislative Decree No 28/2011, and, on that basis, requiring Axpo to acquire the green certificates within a period of 30 days.

19. Axpo challenged GSE's decisions before the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court for Lazio).

8 Decreto legislativo 3 marzo 2011, n. 28 – Attuazione della direttiva 2009/28/CE sulla promozione dell'uso dell'energia da fonti rinnovabili (Legislative Decree No 28 of 3 March 2011 transposing Directive 2009/28/EC on the promotion of the use of energy from renewable sources, 'Legislative Decree No 28/2011').

9 In September 2008, Axpo Trading AG changed its name to Axpo Solutions AG.

20. That court, by judgment of 18 September 2017, dismissed Axpo's action, referring in particular to the judgment in *Ålands Vindkraft*. It held that the Italian legislation did not constitute a charge having an effect equivalent to State aid, inasmuch as it was not selective and did not distort competition, and that it was compatible with Directive 2009/28.

21. As well as taking legal action, Axpo had, on 29 October 2014, submitted a complaint to the Commission's Directorate-General for Competition (DG COMP).

22. By letter of 21 December 2017, DG COMP noted that Axpo had appealed against the judgment at first instance and asked the appeal court to make a reference for a preliminary ruling. It also stated that the Italian green certificate scheme had not been notified to it and explained the reasoning which it had employed in its previous decisions when analysing green certificate schemes operated by other Member States. [10]

23. On 2 February 2015, Axpo lodged a complaint with the Commission's Directorate-General for Taxation and Customs Union (DG TAXUD). The latter replied by saying that it would consider the possibility of opening infringement proceedings against the Italian Republic.

24. Axpo has appealed the judgment of 18 September 2017 to the Consiglio di Stato (Council of State, Italy), requesting that the Italian legislation at issue be disapplied. In support of its claim, it argues, in essence, that the obligation to purchase green certificates in order to be able to import RES-E infringes the rules of the TFEU concerning State aid, the customs union, the free movement of goods and equal treatment, as well as the EEC-Switzerland Agreement.

25. The Commission took part in the proceedings before the Consiglio di Stato (Council of State), stating that, in the judgment in *Ålands Vindkraft*, the Court of Justice had ruled only on the incompatibility of the Swedish rules with the prohibition of measures having an effect equivalent to quantitative restrictions on imports. It further argued that, although the national court can rule out the existence of State aid, it is not competent, if it finds that State aid is present, to assess the compatibility of that aid with EU law, which is the exclusive prerogative of the Commission.

26. In its order for reference, the Consiglio di Stato (Council of State, Italy) takes the view that the Italian legislation complies with the rules of the TFEU, with Directive 2009/28 and with the EEC-Switzerland Agreement. In particular, it considers that the national green certificate scheme:

– Is consistent with the rules of the TFEU concerning State aid because there has been no mobilisation of public resources. Even if State resources were involved, the legislation would be in keeping with Directive 2009/28, which promotes State measures to incentivise the production of green energy, and with environmental protection. In any event, the measure could not be classified as selective because the mechanism provided for in Directive 2009/28 is itself selective, since it favours RES-E producers in each Member State.

– Does not constitute a charge or a measure having an effect equivalent to quantitative restrictions on imports, given the objective pursued by Directive 2009/28.

[10] After citing, by way of example, the decisions in cases SA.37177 (Romania), SA.37345 (Poland) and SA.45867 (Belgium), the Commission maintained that 'the Member States in question had in those cases issued green certificates to [RES-E] producers free of charge, while at the same time creating a market for the trade in those certificates. [RES-E] producers were able to make a profit from selling those certificates. In those cases, the State made available to [RES-E] producers intangible assets which it could itself have sold or auctioned. In acting in this way, the State was foregoing public resources'. It went on to say that, in those decisions, the Commission had relied on the judgment of the Court of Justice of 8 September 2011, *Commission* v *Netherlands* (C-279/08 P, EU:C:2011:551).

– Is compatible with Article 18 and 110 TFEU because it affords the same treatment to all operators in the electricity sector that feed RES-E into the Italian national grid.

27. The Consiglio di Stato (Council of State) nonetheless considered it necessary to refer the following question to the Court of Justice:

'Do the following provisions:

– Article 18 TFEU, in so far as it prohibits any discrimination on grounds of nationality within the scope of application of the Treaties;

– Articles 28 and 30 TFEU and Article 6 of the EEC-Switzerland Free Trade Agreement, in so far as they provide for the abolition of customs duties on imports and measures having equivalent effect;

– Article 110 TFUE, in so far as it prohibits [taxes] on imports in excess of those imposed directly or indirectly on similar domestic products;

– Article 34 TFEU and Article 13 of the EEC-Switzerland Free Trade Agreement, in so far as they prohibit the adoption of measures having equivalent effect to quantitative restrictions on imports;

– Articles 107 and 108 TFEU, in so far as they prohibit the implementation of a State aid measure not notified to the Commission and incompatible with the internal market; and

– Directive 2009/28, in so far as it seeks to promote intra-Community trade in green electricity, thus promoting, moreover, the production capacity of individual Member States,

preclude national legislation such as the one described above, which imposes on importers of green electricity a financial burden that does not apply to domestic producers of the same product?'

III. Procedure before the Court

28. The reference for a preliminary ruling was received at the Court Registry on 23 September 2019.

29. Written observations have been lodged by Axpo, GSE, Fallimento Esperia ('Esperia'),[11] the Italian Government and the Commission. With the exception of GSE, all of the foregoing parties attended the hearing held on 23 September 2020.

IV. Assessment

30. I shall begin by summarising the Italian green certificate scheme and then turn to examining its conformity with Directive 2009/28. Thereafter I shall address the issues which that scheme raises from the point of view of EU primary law and the EEC-Switzerland Agreement.

[11] Esperia intervened in support of the form of order sought by Axpo, being itself a party to another similar dispute, proceedings which before the referring court have been stayed pending a ruling from the Court of Justice in that case.

A. The Italian green certificate scheme

31. Italy introduced the green certificate scheme by Legislative Decree No 79/1999. It thereby sought, as I have already explained,[12] to incentivise the development of RES-E by granting RES-E producers certificates (green certificates) which they could trade on the market by selling them to operators producing electricity from non-renewable sources.[13]

32. Green certificates were allocated free of charge to any RES-E producer which requested them from GSE, in proportion to the electricity generated by the producer, in return for the provision of proof of its production.[14]

33. By selling the green certificates allocated to them, RES-E producers could 'finance 'the additional cost of producing green electricity, and ensure that the desired green electricity [was] generated'.[15]

34. Legislative Decree No 79/1999 and the rules implementing it compelled all producers or importers of electricity, in order to meet their targets, either to feed a percentage of RES-E (which they could produce themselves or buy from an Italian producer) into the national grid, or to buy green certificates.

35. Producers and importers of electricity were thus required to present certificates showing: (a) that a proportion of their electricity (whether produced or imported by them) had been generated from renewable sources; or (b), alternatively, that they had purchased the corresponding green certificates.

36. A producer or importer of conventional electricity deciding to achieve its percentage of RES-E by buying green certificates was obliged to submit to GSE an annual declaration of the electricity produced and the number of green certificates required in proportion to its share.

37. After verifying them, GSE cancelled the green certificates which that producer or importer had submitted to it.[16] If the number submitted was lower than that corresponding to the producer's or importer's share, the producer or importer was required to make up the difference by purchasing the outstanding green certificates and sending them to GSE.[17]

12 See point 2 of this Opinion.

13 Green certificates could be traded on an exchange platform managed by a company formed by GSE under the name of Gestore dei Mercati Energetici SpA ('GME'). GSE had the power to buy back green certificates offered for sale on the exchange platform. From 2008, it could withdraw surplus green certificates not in demand from conventional electricity producers and determine their withdrawal price.

14 In reply to questions from the Court, Axpo explained that the fact that green certificates were issued free of charge was due to the Decree of the Ministry of Economic Development of 18 December 2008, Article 11 of which provided that, at the request of the producer, GSE was to issue green certificates without consideration to any applicant informing it of its production of RES-E. Axpo went on to say that, as the owner of a wind farm in Italy, it received green certificates free of charge.

15 The Communication from the Commission cited in point 2 of this Opinion, p. 5.

16 Article 13 of the Ministerial Decree of 18 December 2008.

17 GSE notified any failure to do so to the competent authority with a view to the imposition of the corresponding penalties.

38. Those obligations were waived, however, if it could be shown that the electricity imported into Italy was from renewable sources. Thus, pursuant to Article 20(3) of Legislative Decree No 387/2003:

– Importers of RES-E generated in other EU Member States could apply to GSE for an exemption from the obligation to purchase green certificates for the share of electricity imported provided they attached to their application a copy of the guarantee as to the electricity's origin.

– In the case of imports of RES-E produced in a third State, on the other hand, the exemption was conditional upon the signature between Italy and that State of an agreement establishing that the electricity was generated from renewable energy sources and guaranteed to be so.

39. As is apparent from the judgment in *Green Network*,[18] on 6 March 2007, Italy and the Swiss Confederation reached an agreement to that effect. This included the reciprocal recognition of guarantees of origin of electricity imported from 2006, the year in which the Swiss Confederation enacted legislation compatible with Directive 2001/77, which was later replaced by Directive 2009/28.

40. In the judgment in *Green Network*, the Court held that Member States could not enter into such agreements because their conclusion fell within the exclusive competence of the European Union. It also found that EU law was not compatible with the Italian legislation permitting exemptions from the obligation to purchase green certificates for electricity imported from third countries.[19]

41. Legislative Decree No 28/2011 amended the rules on the promotion of RES-E which had been laid down in Legislative Decree No 79/1999 by gradually abandoning the green certificate scheme and replacing it with another support system. In addition, as I have already recalled, it removed the option, with effect from 1 January 2012, for importers of RES-E to be exempt from the obligation to purchase Italian green certificates.[20]

42. It is that very legislative amendment of 2011 which has given rise to the dispute at the origin of the present reference for a preliminary ruling.

B. Compatibility of the Italian scheme with Directive 2009/28

43. Axpo considers that that scheme infringes Directive 2009/28, since it penalises imports of RES-E by imposing on importers the obligation to support national production, whereas that directive provides for cooperation mechanisms.

44. The referring court, GSE, Italy and the Commission, on the other hand, submit that that scheme is compliant with Directive 2009/28.

18 Judgment in *Green Network*, paragraph 15.

19 Judgment in *Green Network*, paragraph 1 of the operative part: EU law 'preclude[s] a provision of national law, such as that at issue in the main proceedings, which provides for the grant of exemption from the obligation to purchase green certificates owing to the introduction, onto the national consumer market, of electricity imported from a third State, by means of the prior conclusion, between the Member State and third State concerned, of an agreement under which the electricity thus imported is guaranteed as having been produced from renewable energy sources, according to arrangements identical to those set out in Article 5 of that directive [2001/77]'.

20 Article 25(2) of Legislative Decree No 28/2011 nonetheless maintained the option of exempting electricity imported as from 1 January 2011 from that obligation, 'exclusively in the case where it contributes towards the attainment of the national targets provided for in Article 3'. According to Axpo, that option was effectively excluded, since Article 35(1)(a) of that Legislative Decree postponed until 2016 the conclusion of agreements between States on the transfer of RES-E (Axpo's written observations, paragraph 7).

45. I think it appropriate to refer first and foremost to paragraphs 26 to 29 of the judgment in *Elecdey Carcelen and Others*,[21] in which the Court made the following points in relation to Directive 2009/28:

'26 … the purpose of Directive 2009/28, as set out in Article 1 thereof, is to lay down a common framework for the promotion of energy from renewable sources by setting mandatory national targets for the overall share of energy from renewable sources in gross final consumption of energy.

27 Accordingly, under Article 3(1) of Directive 2009/28, Member States have an obligation to ensure that the share of energy from renewable sources in gross final consumption of energy in 2020 is at least its national overall target, such as set out in part A of Annex I to that directive, which must be consistent with the target of reaching a share of energy from renewable resources of at least 20%.

28 Moreover, in accordance with Article 3(2) of that directive, Member States are required to introduce measures effectively designed to ensure that the share of energy from renewable sources equals or exceeds that shown in the indicative trajectory set out in part B of Annex I to that directive.

29 In order to reach those targets, Member States may, according to Article 3(3) of Directive 2009/28, apply the 'support schemes' within the meaning of subparagraph (k) of the second subparagraph of Article 2 thereof, and therefore, inter alia, investment aid, tax exemptions or reductions, tax refunds or even impose renewable energy support schemes.'

46. Now, the Italian green certificate mechanism is a *support scheme* which comfortably complies with Directive 2009/28. It is also similar to that which formed the subject of the judgment in *Ålands Vindkraft*, which expressly stated that 'points (k) and (l) of the second paragraph of Article 2 of Directive 2009/28 also refer specifically to national support schemes which use 'green certificates'.[22]

47. The judgment in *Ålands Vindkraft* endorsed the Swedish support scheme imposing on electricity suppliers and certain consumers the obligation to use green certificates 'for the purposes of meeting their respective obligations to include a given proportion of green electricity in their supply or to include a given proportion of green electricity in their consumption'.[23]

48. Directive 2009/28 does not contain a uniform framework, applicable throughout the European Union, for national support schemes for RES-E support schemes, but, rather, confers on Member States a broad margin of discretion in the regulation of such schemes.

49. The Court has emphasised that, 'as is apparent from the very wording of Article 3(3) of Directive 2009/28, and in particular the word "may", Member States are not obliged, in order to promote the use of energy from renewable sources, the adoption of support schemes or, a fortiori, if they choose to adopt such schemes, to design such schemes in the form of tax exemptions or reductions'.[24]

21 Judgment of 20 September 2017 (C-215/16, C-216/16, C-220/16 and C-221/16, 'judgment in *Elecdey Carcelen and Others*', EU:C:2017:705).

22 Judgment in *Ålands Vindkraft*, paragraphs 41 and 42.

23 *Ibidem*, paragraph 46. Under the Italian scheme, the obligation is incumbent on producers and importers.

24 Judgment in *Elecday Carcelen and Others*, paragraph 31.

50. Member States have an obligation only to 'achieve the mandatory overall national targets set out in Article 3(1) and (2) of Directive 2009/28, read in conjunction with Annex I to that directive'.[25] According to information provided by the Commission, the Italian Republic achieved its overall national target for the use of green energy for 2020.

51. The margin of discretion which Directive 2009/28 confers on Member States to structure their RES-E support schemes allows those schemes to follow a purely national design that is geared towards the – likewise national – production of RES-E and excludes electricity imported from other Member States or third countries.[26]

52. The Court expressed this very clearly: 'the EU legislature did not intend to require Member States who opted for a support scheme using green certificates to extend that scheme to cover green electricity produced on the territory of another Member State'.[27]

53. Member States are therefore authorised to determine whether or not their national support schemes apply to RES-E generated in other Member States (*a fortiori* in third countries). If they opt to provide for this possibility, they may still prescribe to what extent this will be the case.

54. It is true that Directive 2009/28 contains mechanisms for cooperation between Member States other than guarantees of origin issued under that directive (guarantees which do not in themselves confer the right to use national support schemes).[28] However, since those mechanisms are optional rather than compulsory, States may proceed directly to restrict their support schemes to RES-E generated within their borders.

55. To the extent that the Italian legislation chose, with effect from 2012, to incentivise the production only of RSE-E generated in Italy, it is not at odds with Directive 2009/28.

C. The Italian green certificate scheme and the rules of the TFEU on the customs union and the free movement of goods.

56. 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'.[29]

25 *Ibidem*, paragraph 32. See, to the same effect, in relation to Directive 2001/77, the judgments of 26 September 2013, *IBV & Cie* (C-195/12, EU:C:2013:598, paragraph 80); and *Green Network*, paragraph 54.

26 Judgment in *Ålands Vindkraft*, paragraph 49: 'With regard […] to the referring court's doubts concerning the fact that the support scheme at issue in the main proceedings provides for the award of electricity certificates solely in respect of green electricity produced in the national territory, it is clear that, in adopting Directive 2009/28, the EU legislature left open the possibility of such a territorial limitation'.

27 *Ibidem*, paragraph 53. The same judgment cites recital 25 of Directive 2009/28, which states that the majority of Member States apply support schemes that grant benefits solely to the production of green energy in their territory: 'it is essential, in order to ensure the proper functioning of the national support schemes, that Member States be able to "control the effect and costs of their national support schemes according to their different potentials" […]' (paragraph 99).

28 These cooperation mechanisms allow Member States to agree the extent to which one will support the energy production of another and the extent to which the production of RES-E will count towards national overall targets.

29 Judgments in *Ålands Vindkraft*, paragraph 57; and of 14 December 2004, *Radlberger Getränkegesellschaft and S. Spitz* (C-309/02, EU:C:2004:799, paragraph 53).

57. Directive 2009/28 did not exhaustively harmonise the support mechanisms for energy produced from renewable sources. The judgment in *Ålands Vindkraft*[30] sets out the arguments confirming the non-exhaustive nature of the harmonisation carried out by Directive 2009/28, which I do not consider it necessary to reproduce here.

58. On that premiss, the compatibility of national support schemes with EU law must be analysed in the light of Directive 2009/28 and primary law.

59. The referring court asks in particular about the compatibility of the Italian green certificate scheme with the prohibition on charges having an effect equivalent to customs duties on imports (Article 30 TFEU), discriminatory internal taxation (Article 110 TFEU) and measures having an effect equivalent to quantitative restrictions on imports (Article 34 TFEU).

60. It will not be necessary to analyse the Italian legislation in the light of Article 18 TFEU because this applies only in the event that there are no more specific provisions that reflect the principle of non-discrimination.[31] This is [not] the case in the context of the free movement of goods (which includes electricity imports), since Articles 30, 34 and 110 TFEU refer specifically to the principle of non-discrimination, which Article 18 TFEU establishes generically.

61. Since the prohibition on measures having an effect equivalent to quantitative restrictions on imports is of a residual nature in relation to the other prohibitions laid down in the TFEU in connection with the free movement of goods,[32] it is appropriate to look first at the compatibility of the Italian scheme with the prohibition of charges having an effect equivalent effect to customs duties on imports and the prohibition on discriminatory internal taxation.

1. Prohibition of charges having an effect equivalent to customs duties on imports (Articles 28 and 30 TFUE)

62. A customs duty is an indirect tax levied on imports of goods from third countries (and, exceptionally, on exports) in accordance with the rates of duty laid down in the EU customs tariff.

63. In so far as it affects imports of RES-E into Italy, the green certificate scheme is not, in the light of its characteristics, in the nature of a customs duty (not to mention the fact that it applies to imports not only from third countries but also from other Member States).

64. The fact that Axpo nonetheless submits that that scheme may be classified as a charge having an effect equivalent to a customs duty on imports calls for a more detailed examination.

65. Although primary law does not offer a definition of charges of this kind, the Court has developed one in its case-law: 'any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense, constitutes a charge having

30 Judgment in *Ålands Vindkraft*, paragraphs 59 to 62.

31 'Article 18 TFEU, which enshrines the general principle of non-discrimination on grounds of nationality, is intended to apply independently only to situations governed by EU law in respect of which the Treaty lays down no specific prohibition of discrimination' [judgments of 18 July 2017, *Erzberger* (C-566/15, EU:C:2017:562, paragraph 25); and of 10 October 2019, *Krah* (C-703/17, EU:C:2019:850, paragraph 19))].
'The principle of non-discrimination on the grounds of nationality has been given effect, in particular, in the area of the free movement of goods, in Article 34 TFEU, read together with Article 36 TFEU' [see, to that effect, the judgments of 8 June 2017, *Medisanus* (C-296/15, EU:C:2017:431, paragraph 65); and of 18 June 2019, *Austria* v *Germany* (C-591/17, EU:C:2019:504, paragraph 40)].

32 Judgment of 18 January 2007, *Brzeziński* (C-313/05, EU:C:2007:33, paragraph 50 and the case-law cited).

equivalent effect to a customs duty.[33] This is the case even if the charge is not levied for the benefit of the State, has no discriminatory or protectionist effect, and the taxed product is not in competition with national production.[34]

66. The prohibition on charges having an effect equivalent to a customs duty is absolute and primary law does not provide for any restrictions. The Court has nonetheless established three limitations on that prohibition which do not apply to:

– pecuniary charges levied, in certain circumstances, by reason of inspections carried out in order to comply with obligations imposed by EU law.[35]

– Pecuniary charges which represent payment for a service actually provided to an operator which the latter is required to pay in an amount in proportion to that service.[36]

– Tax regimes which effectively tax only imports.[37]

67. In the light of the Court's case-law, I consider that the Italian green certificate scheme as applied to importers of RES-E is not a charge having an effect equivalent to a customs duty either.

68. I can accept that the obligation to buy Italian green certificates brings to bear on electricity importers in Italy consequences similar to those of a pecuniary charge unilaterally imposed by the Italian State. I do not believe, however, that that obligation is comparable to that arising from a fiscal or parafiscal charge, a state of affairs that must be present in order for a pecuniary charge to be caught by the prohibition laid down in Articles 28 and 30 TFEU.

69. Furthermore, the obligation to buy green certificates is not linked to the crossing of the Italian border: it is imposed not in response to the importation of electricity but in order to comply with the national RES-E support scheme.

70. Under that same scheme, the exemption which allowed importers to prove the green provenance of their electricity in the State of origin was abolished with effect from 2012. As I have already explained, this compelled importers to buy Italian green certificates and the Italian State thereby incentivised the production of national RES-E alone and stopped encouraging imported RES-E.

71. In modifying in this way the rules of law governing its national scheme to support the use of renewable energy, the Italian State did not in fact impose a charge linked to the act of importation (that is to say, the crossing of the border) but made amendments to its domestic scheme, as is its right under Directive 2009/28.[38]

33 Judgments of 6 December 2018, *FENS* (C-305/17, EU:C:2018:986, paragraph 29); and of 14 June 2018, *Lubrizol France* (C-39/17, EU:C:2018:438, paragraph 24 and the case-law cited).

34 Judgments of 14 September 1995, *Simitzi* (C-485/93 and C-486/93, EU:C:1995:281, paragraphs 14 to 16); of 9 November 1983, *Commission* v *Denmark* (158/82, EU:C:1983:317, paragraph 18); and of 1 July 1969, *Commission* v *Italy* (24/68, EU:C:1969:29, paragraphs 7 and 9).

35 Judgment of 6 December 2018, *FENS* (C-305/17, EU:C:2018:986, paragraph 31).

36 Judgment of 14 June 2018, *Lubrizol France* (C-39/17, EU:C:2018:438, paragraph 26 and the case-law cited).

37 *Ibidem*, paragraph 46. According to settled case-law, a tax levied on national and imported products on the basis of identical criteria may nonetheless be prohibited by the Treaty where the proceeds of such a levy are intended to finance activities which are of particular benefit to taxed national products. If the advantages enjoyed by those products offset the tax in full, the effects of the tax are felt only in connection with imported products and the tax constitutes a charge having an effect equivalent [to a customs duty on imports].

38 I would recall once again that this directive authorises Member States to determine whether or not their national support schemes apply to RES-E generated outside their borders and, if so, to what extent.

72. A national rule of this kind does not therefore entail a charge having an effect equivalent to a customs duty. [39]

2. Prohibition of discriminatory internal taxation

73. The Court has held that, 'pecuniary charges resulting from a general system of internal taxation applied systematically, in accordance with the same objective criteria, to categories of products irrespective of their origin or destination fall within Article 110 TFEU, which prohibits discriminatory internal taxation'. [40]

74. As I have already explained, the obligation to purchase Italian green certificates is not of a fiscal or parafiscal nature and is not therefore subject to the prohibition contained in Article 110 TFEU.

75. I agree with the Commission that a measure such as this does not constitute a tax, which is to say that it does not entail a charge of a fiscal nature, an assertion which is not precluded by the fact that that measure (like so many other similar obligations) was established by domestic legislation.

3. Prohibition of measures having an effect equivalent to quantitative restrictions on imports (Article 34 TFEU)

76. 'In prohibiting between Member States measures having equivalent effect to quantitative restrictions on imports, Article 34 covers any national measure capable of hindering, directly or indirectly, actually or potentially, intra-Community trade'. [41]

77. The obligation to buy green certificates which Italy imposed in relation to imports of RES-E until 2016, is a measure having equivalent effect which is caught by the prohibition contained in Article 34 TFEU.

78. This is a measure which applies only to imports of RES-E and not to national RES-E production. Green certificates are issued free of charge to national producers of RES-E, whereas importers of the self-same electricity are required to acquire them (by buying them from national producers or on the digital platform managed by GME) in an amount determined by the electricity they import into Italy.

79. That situation, which hinders imports, came into being 1 January 2012, by reason of Legislative Decree No 28/2011, and lasted, as I have said before, until 2016. [42] During that period, those importing RES-E in order to feed it into the Italian grid were required to acquire green certificates even if they were able to guarantee the origin of that electricity.

[39] Since such a rule does not fall within the concept of a charge having an effect equivalent to a customs duty, there is no longer any need to consider whether the obligation incumbent on electricity importers to buy Italian green certificates is caught by one of the limitations on that prohibition.

[40] Judgment of 6 December 2018, *FENS* (C-305/17, EU:C:2018:986, paragraph 29).

[41] Judgments in *Ålands Vindkraft*, paragraph 66; and of 4 October 2018, *L.E.G.O.* (C-242/17, EU:C:2018:804, paragraph 58).

[42] In 2016, green certificates were replaced by an aid scheme based on feed-in tariffs, since Italy had exceeded the targets for renewable energy use laid down in Directive 2009/28.

80. The Court held that the Swedish green certificate scheme, which was similar to the Italian one, was a measure having an effect equivalent to a quantitative restriction on imports. [43] It also found that that scheme was *justified*, in the light of its objective, [44] on the grounds summarised in paragraph 82 of the judgment in *Ålands Vindkraft*: 'the objective of promoting the use of renewable energy for the production of electricity […] is in principle capable of justifying barriers to the free movement of goods'.

81. By the same token, the Italian green certificate scheme is suitable for the purposes of protecting identical objectives, inasmuch as it too promotes the production of RES-E. [45]

82. The direct link between the green certificates and the production of RES-E is apparent in, inter alia, Article 11(3) of Legislative Decree No 79/1999, inasmuch as this provides that green certificates are to be issued on the basis of the electricity generated from renewable sources. [46]

83. What is more, the purely national nature of the Italian scheme to support the production of RES-E does not prevent that mechanism from being able to help safeguard the general interests of preserving the environment and protecting the health and life of humans, animals and plants.

84. So far as concerns its *proportionality*, the Court held that the Swedish green certificate scheme 'is designed in particular to have the additional cost of producing green electricity borne directly by the market, that is to say by the suppliers and users of electricity, who are required to meet the quota obligation, and, ultimately, by the consumers. […] In choosing to do this, a Member State does not exceed the bounds of the discretion to which it remains entitled in the pursuit of the legitimate objective of increasing the production of green electricity. [47]

85. The Court went on to note, however, that:

'Such a scheme requires for its proper functioning market mechanisms that are capable of enabling traders – who are subject to the quota obligation and who do not yet possess the certificates required to discharge that obligation – to obtain certificates effectively and under fair terms. […] It is therefore important that mechanisms be established which ensure the creation of a genuine market for certificates in which supply can match demand, reaching some kind of balance, so that it is actually possible for the relevant suppliers and users to obtain certificates under fair terms'. [48]

43 Judgments in *Ålands Vindkraft*, paragraph 75; and of 11 September 2014, *Essent Belgium NV* (C-204/12 to C-208/12, EU:C:2014:2192, paragraph 88).

44 Judgment in *Ålands Vindkraft*, paragraphs 76 to 82.

45 Paragraphs 9.2 and 9.3 of the order for reference states that the Italian scheme 'is intended to achieve the national target imposed by EU law […] by incentivising the production of green energy in national territory, the burden of such production being borne either by consumers (who assume the economic cost of GSE's power to purchase any unsold certificates) or by operators, who, under either arrangement, feed into the national grid energy from renewable sources not produced in Italy'.

46 See, to this effect, the judgment in *Ålands Vindkraft*, paragraphs 95 and 96. According to that judgment, the 'green' nature of electricity can be established only at the production stage: 'once the green electricity has been allowed into the transmission or distribution system, it is difficult to determine its specific origin and, accordingly, its systematic identification at the consumption stage as green electricity is difficult to put into practice'.

47 *Ibidem*, paragraphs 109 and 110.

48 *Ibidem*, paragraphs 113 and 114.

86. Now, those same criteria and conditions are present in the case of the Italian green certificates:

– First, that scheme was set up in pursuit of the very same objective as the Swedish mechanism forming the subject of the judgment in *Ålands Vindkraft*.

– Secondly, those importing electricity into Italy can discharge their obligation by obtaining green certificates directly from producers established in that country or on the certificates market (the digital platform managed by GME).

87. In short, even though the Italian green certificate scheme can be classified as a measure having an effect equivalent to a quantitative restriction on imports, it is justified by the general objectives of preserving the environment and protecting the health and life of humans, animals and plants.

D. The Italian green certificate scheme and Articles 107 and 108 TFEU

88. According to Axpo and Esperia, the Italian scheme entails State aid in favour of Italian producers of RES-E. As it was not notified to the Commission, it infringes Article 108 TFEU.

89. GSE and the Italian Government, on the other hand, take the view that that scheme does not entail State aid because there is no transfer of State resources and it is not selective.

90. According to the Commission, 'the mere fact of imposing on energy-importing operators the obligation to purchase green certificates does not appear to constitute in itself State aid financed from State resources, since such operators have to purchase green certificates using their own financial resources'. Given the nature of GSE and the functions it performs in managing the green certificate scheme, it would have to be determined to what extent that scheme is the subject of State intervention and control. On the basis of the evidence adduced, however, 'the conditions necessary for there to be a use of State resources do not appear to be present in this case'. [49]

91. The Commission goes on to say that, as the explanations contained in the order for reference are not sufficient to form the basis of a definitive view as to whether the scheme at issue is in the nature of State aid, 'an analysis of the green certificate scheme *as a whole* does not appear to be relevant for the purposes of the dispute pending before the referring court'. [50]

92. If the Commission's proposition were to be endorsed, that part of the order for reference which concerns the classification of the Italian green certificate scheme in its entirety as a State aid measure would have to be declared inadmissible on the ground that that order lacks material capable of forming the basis of an adjudication. [51]

[49] Commission's written observations, paragraph 36.

[50] *Ibidem*, paragraph 37. No emphasis in the original.

[51] In its recent judgment of 17 September 2020, *Burgo Group* (C-92/19, EU:C:2020:733, paragraphs 41 to 44), the Court declared two questions from another request for a preliminary ruling from the Consiglio di Stato (Council of State) to be inadmissible because the order for reference did not contain the material necessary to make it possible to determine whether 'Article 107 TFEU […] preclude[s] a provision of national law which allows cogeneration plants which are not high-efficiency cogeneration plants within the meaning of […] Directive [2004/8] to continue to be eligible, even after 31 December 2010, for a cogeneration support scheme under which they are, inter alia, exempt from the obligation to purchase green certificates'.

93. I nonetheless take the view that the Court is in a position to provide the Consiglio di Stato (Council of State) with a useful answer, in the light of the additional information which the parties have furnished in this regard in the written and oral argument they have presented to the Court in the absence of more extensive information in the request for a preliminary ruling.

94. That answer will in any event be subject to the determination by the referring court of whether the green certificate scheme exhibits the characteristics to which I shall directly refer.

1. General proposition

95. Article 107(1) declares any aid granted by a Member State or through State resources which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods to be incompatible with the internal market, in so far as it affects trade between Member States.

96. There are therefore four conditions that must be met in order for aid to be classified as State aid incompatible with the internal market: (a) there must be an intervention by the State or through State resources; (b) that intervention must be liable to affect trade between Member States; (c) the aid must confer a selective advantage on its beneficiary; and (d) it must distort or threaten to distort competition. [52]

97. The question of whether the scheme at issue fulfils the second condition (affects trade between Member States) and the fourth condition (distorts or threatens to distort competition) is not in dispute. The other two conditions, on the other hand, *are* in dispute and it is therefore necessary to clarify whether that scheme confers a selective advantage on beneficiary undertakings and, in particular, whether that measure is attributable to the State and involves the use of State resources.

2. State intervention and transfer of State resources

98. It is the Court's case-law that, in order for a selective advantage to be capable of being classified as 'aid' within the meaning of Article 107(1) TFEU, it must, first, be granted directly or indirectly through State resources and, secondly, be attributable to the State. [53] These two conditions are cumulative, [54] although they are usually considered together when a measure is assessed under that provision.

99. Axpo argues that the Italian scheme entails the transfer of State resources, in consequence of the fact that the green certificates are issued free of charge to Italian producers of RES-E, the fact that surplus green certificates are bought back by GSE, and the fact that the State exercises control over GME's revenue.

[52] Judgments of 19 December 2013, *Association Vent De Colère! and Others* (C-262/12, EU:C:2013:851, paragraph 15); of 16 April 2015, *Trapeza Eurobank Ergasias* (C-690/13, EU:C:2015:235, paragraph 17); of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971, paragraph 40); of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraph 38); of 13 September 2017, *ENEA* (C-329/15, EU:C:2017:671, paragraph 17); and of 29 July 2019, *Azienda Napoletana Mobilità* (C-659/17, EU:C:2019:633, paragraph 20).

[53] Judgment of 13 September 2017, *ENEA* (C-329/15, EU:C:2017:671, paragraph 20).

[54] Judgment of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294, paragraph 24).

100. According to Axpo, Italian producers receive green certificates, free of charge, in proportion to the quantity of RES-E produced by them, and are able to sell them to Italian producers of conventional electricity and to importers of any kind of electricity. What is more, GSE ensures the existence of a market in green certificates by placing more certificates on the market when demand is high and taking certificates off the market when demand is too low.

101. The Italian Government, GSE and the referring court, on the other hand, take the view that the green certificates do not mobilise State resources. Purchases of green certificates are financed by the undertakings obliged to obtain them and buy-backs of surplus green certificates by GSE are financed by final consumers, the resources in question being beyond the control of the State.

102. The Commission comments only on the obligation to purchase green certificates, which it does not consider to be aid financed from State resources. [55]

(a) Whether the measure is attributable to the State

103. In order to assess whether a measure is attributable to the State, it is necessary to analyse whether the public authorities were involved in its adoption.

104. This is clearly the case where the selective advantages enjoyed by a category of undertakings have been established by law. [56] This is true of the Italian green certificate scheme, which is governed by rules, some having the status of law, adopted by the Italian State.

105. GSE, on the other hand, claims, in opposition to the measure's attributability to the Italian State, that that State is not in control of *all* of the elements that make up the statutory green certificate scheme, and submits, in particular, that it is GSE, a company governed by private law, which buys back the green certificates.

106. Intervention by the State or through State resources includes both aid granted directly by the State and aid granted by public or private bodies established or designated by the State with a view to administering the aid. [57] EU law cannot permit the rules on State aid to be circumvented merely through the creation of autonomous institutions charged with allocating aid. [58]

107. The fact that GSE is a company governed by private law does not mean that the creation of the green certificate scheme and the rules of law that govern it, by which that company is bound, cannot be attributed to the State.

108. It is after all Italian legislation, together with the provisions implementing it, which entrusts GSE with the tasks of issuing green certificates to Italian producers of RES-E, withdrawing surplus certificates depending on demand and determining a reference price for supplying green certificates. GSE does not appear to have any discretion to stop performing those tasks.

55 See point 90 of this Opinion.

56 Judgment of 28 March 2019, *Germany* v *Commission* (C-405/16 P, EU:C:2019:268, paragraph 49).

57 Judgments of 22 March 1977, *Steinike & Weinlig* (78/76, EU:C:1977:52, paragraph 21); of 13 March 2001, *PreussenElektra* (C-379/98, EU:C:2001:160, paragraph 58); and of 13 September 2017, *ENEA* (C-329/15, EU:C:2017:671, paragraph 23).

58 Judgment of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294, paragraph 23).

109. What is more, GSE, although having the form of a company governed by private law, is fully controlled by the Italian Government and performs functions of a public nature in the energy sector.

110. Consequently, the measure at issue is attributable to the Italian State.

(b) Transfer of State resources

111. In my Opinion in *Georgsmarienhütte and Others*,[59] I set out the position in case-law with respect to the classification as State aid of certain schemes to support RES-E, which I shall reiterate here.[60]

112. As well as being attributable to the State, the measure in question must involve the transfer of State resources to the beneficiary undertakings in order to be regarded as State aid.

113. The Court has adopted a broad interpretation of the concept of State resources which includes not only funds from the public sector in a strict sense but also, in certain circumstances, funds held by certain private bodies.

114. The indirect reduction of State revenue brought about by the adoption of national rules or measures does not constitute a transfer of State resources if that repercussion is inherent in those rules or measures.[61]

115. The biggest difficulty in ascertaining whether or not there has been a transfer of State resources arises where States adopt mechanisms for intervening in economic affairs as a result of which certain undertakings may obtain a selective advantage. In particular, the *grey area* is made up of cases where the State's intervention, although more extensive than the mere adoption of a set of general rules to regulate the sector, do not actually amount to a direct transfer of resources. The present reference for a preliminary ruling is concerned with just such a situation, the resolution of which calls for account to be taken first of all of the Court's complex (and not always linear) case-law in this regard.

116. A State measure favouring certain undertakings or certain products does not lose the character of a gratuitous advantage by the fact that it is wholly or partially financed by contributions imposed by the public authority and levied on the undertakings concerned.[62]

117. After all, Article 107(1) TFEU covers all the financial means by which the public authorities may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector. Even if the sums corresponding to the measure are not permanently held by the Treasury, the fact that they constantly remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as 'State resources'.[63]

59 Opinion of 27 February 2018, *Georgsmarienhütte and Others* (C-135/16, EU:C:2018:120), points 104 to 121.

60 Points 112 to 127 below reproduce the corresponding points of that Opinion.

61 PreussenElektra judgment, paragraph 62).

62 Judgment of 22 March 1977, *Steinike & Weinlig* (78/76, EU:C:1977:52, paragraph 22).

63 Judgments of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294, paragraph 37); of 17 July 2008, *Essent Netwerk Noord and Others* (C-206/06, EU:C:2008:413, paragraph 70); of 19 December 2013, *Association Vent De Colère! and Others* (C-262/12, EU:C:2013:851, paragraph 21); and of 13 September 2017, *ENEA* (C-329/15, EU:C:2017:671, paragraph 25).

118. So far as concerns the electricity sector, in the judgment of 19 December 2013, *Association Vent De Colère! and Others*, the Court held that 'funds financed through compulsory charges imposed by the legislation of the Member State, managed and apportioned in accordance with the provisions of that legislation, may be regarded as State resources within the meaning of Article 107(1) TFEU even if they are managed by entities separate from the public authorities'. [64]

119. It follows from that case-law that the decisive criterion in determining whether the resources at issue are State resources within the meaning of Article 107(1) TFEU is the extent to which the public authorities intervene and exercise control in relation to them.

120. The absence of any control on the part of the public authorities explains why the Court does not regard as aid, for example, cases where funds contributed by the members of a trade association are intended to finance a specific activity in the interests of those members, which is decided upon by a private organisation and serves purely commercial purposes, and the State acts merely as a vehicle for making the contributions introduced by the commercial organisations compulsory. Examples of such cases can be found in *Pearle and Others* [65] and *Doux Élevage and Coopérative agricole UKL-ARREE*. [66]

121. The absence of State control over transfers of resources also explains why the Court does not consider aid to be present in cases involving regulations giving rise to financial redistribution from one private entity to another without further State intervention. In principle, there is no transfer of State resources where the money moves directly from one private entity to another without passing through a public or private body appointed by the State to manage the transfer. [67]

122. Neither will there be a transfer of State resources where undertakings, private for the most part, have not been entrusted by the Member State with the task of managing a State resource but simply have an obligation to purchase using their own financial resources. [68] That is the situation in the judgment in *PreussenElektra*, according to which an obligation imposed by a Member State on private suppliers to purchase electricity produced from renewable energy sources at fixed minimum prices does not involve any direct or indirect transfer of State resources to undertakings which produce that type of electricity, that position being unaffected by the fact that the reduced revenue of the undertakings subject to that obligation will probably lead to a diminution of tax receipts because that consequence is inherent in the measure. [69] In that

64 Judgment of 19 December 2013, *Association Vent De Colère! and Others* (C-262/12, EU:C:2013:851, paragraph 25); and of 2 July 1974, *Italy* v *Commission* (173/73, EU:C:1974:71, paragraph 35).

65 Judgment of 15 July 2004 (C-345/02, EU:C:2004:448, paragraph 41). In that case, concerning the funding of an advertising campaign for the benefit of opticians, the funds to pay for the advertising were raised from private undertakings through a trade association governed by public law. The Court rejected the proposition that these were 'State resources' because the trade association '[had] never had the power to dispose […] freely' of levies 'compulsorily earmarked for the funding of [that] [advertising] campaign'.

66 Judgment of 30 May 2013 (C-677/11, EU:C:2013:348, paragraph 36). In that case, concerning a decree which extended to all traders an agreement concluded within a trade organisation (agricultural industry of turkey farming and production) which had introduced a levy to finance common activities decided on by that organisation, State resources were found not to be present. The national authorities could not actually use the resources generated by those contributions to support certain undertakings, the use of those resources having been decided upon by the inter-trade organisation in pursuit of objectives determined by that organisation. Such resources were not constantly under public control or available to the State authorities.

67 Judgment of 24 January 1978, *Van Tiggele* (82/77, EU:C:1978:10, paragraphs 25 and 26).

68 Judgments of 17 July 2008, *Essent Netwerk Noord and Others* (C-206/06, EU:C:2008:413, paragraph 74); of 19 December 2013, *Association Vent De Colère! and Others* (C-262/12, EU:C:2013:851, paragraph 35); and of 13 September 2017, *ENEA* (C-329/15, EU:C:2017:671, paragraph 26).

69 PreussenElektra judgment, paragraphs 59 to 62). See also the judgment of 5 March 2009, *UTECA* (C-222/07, EU:C:2009:124, paragraphs 43 to 47), concerning the imposition on broadcasters for the benefit of film production compulsory contributions which do not entail a transfer of State resources.

case, the undertakings affected (that is to say, private electricity suppliers) were bound by an obligation to purchase a specific type of electricity using their own financial resources, but had not been appointed by the State to administer a scheme of aid.

123. Neither did the Court consider there to have been any State control (or, therefore, a transfer of State resources) in the case of the Polish mechanism imposing on suppliers an obligation to sell a quota of electricity produced by cogeneration accounting for 15% of their annual sales to end users. [70]

124. However, State control reappears and there will be a transfer of State resources where the sums paid by individuals pass through a public or private entity appointed to channel them to the beneficiaries. This was the situation in *Essent Netwerk Noord*, where a private entity was entrusted by law with the task of levying on behalf of the State a surcharge on the price (tariff) for electricity the proceeds from which it was required to channel to beneficiaries but was not authorised to use for purposes other than those indicated by law. The fact that that surcharge (which the Court classified as a tax) was entirely under public control was sufficient for it to be categorised as a State resource. [71]

125. The Court also found State control to be present in *Vent de Colère! and Others*, concerning a mechanism, financed by all final consumers, for offsetting in full the additional costs incurred by undertakings subject to an obligation to purchase wind-generated electricity (at a price higher than the market price). There was intervention in the form of State resources even where that mechanism was based in part on a direct transfer of resources between private entities. [72]

126. Running along the same lines is the order of the Court in *Elcogás*, which concerned 'whether amounts allocated to a private electricity producer which are financed by all end consumers of electricity established in national territory constitute intervention by the State or through State resources'. [73]

127. The Court's answer was that the mechanism for offsetting additional costs from which that undertaking benefited (and which was financed by the final electricity tariff payable by all Spanish consumers and users of the transmission and distribution networks in national territory) was to be construed as intervention by the State or through State resources within the meaning of Article 107(1) TFEU. In that regard, it was 'immaterial […] that the sums intended to offset the additional costs do not come from a specific supplement to the electricity tariff and that the financing mechanism at issue does not strictly fall within the category of a tax, fiscal levy or parafiscal charge under national law'. [74]

70 Judgment of 13 September 2017, *ENEA* (C-329/15, EU:C:2017:671, paragraphs 27 to 30). The competent Polish authority approved the maximum prices for the sale of electricity to end users, with the result that undertakings could not systematically pass on to them the financial burden associated with that obligation to purchase. As a result, in some circumstances, electricity suppliers purchased electricity produced by cogeneration at a price higher than that charged for sale to end users, which gave rise to extra costs for the suppliers. The fact that those extra costs could not be passed on entirely to end users and were not financed by a compulsory contribution imposed by the State or by a full offset mechanism prompted the Court to find that the supplier undertakings were not entrusted by the State with the task of managing a State resource, but were funding the obligation to purchase incumbent on them by recourse to their own resources.

71 Judgment of 17 July 2008, *Essent Netwerk Noord* (C-206/06, EU:C:2008:413, paragraphs 69 to 75).

72 Judgment of 19 December 2013, *Association Vent de Colère! and Others* (C-262/12, EU:C:2013:851, paragraphs 25 and 26).

73 Order of 22 October 2014 (C-275/13, not published, EU:C:2014:2314, paragraph 20).

74 *Ibidem*, paragraphs 30 and 31.

128. Prominent among the Court's judgments concerning RES-E support schemes which were delivered after the Opinion in *Georgsmarienhütte and Others* are the judgment of 28 March 2019, *Germany* v *Commission*,[75] and the judgment of 15 May 2019, *Achema and Others*,[76] which lay emphasis in particular on the State control exercised over the sums from which the electricity undertakings benefit.

129. In the first of those judgments, the Court set aside the judgment of the General Court of 10 May 2016, *Germany* v *Commission*,[77] and annulled the Commission decision, concerning the German RES-E support scheme, which had been confirmed in the judgment of the General Court.[78]

130. In the view of the Court of Justice, the Commission had failed to 'establish that the advantages provided for by the EEG [Law establishing new rules on the legal framework for the promotion of electricity generated from renewable energy] 2012, namely the scheme supporting the production of electricity from renewable energy sources and mine gas financed by the EEG surcharge and the special compensation scheme reducing that surcharge for energy-intensive users, involved State resources and therefore constituted State aid within the meaning of Article 107(1) TFEU'.[79]

131. In that judgment, the Court of Justice took into account, inter alia, the following arguments:

– '… the fact that the funds resulting from the EEG surcharge are allocated exclusively to the financing of the support and compensation schemes, by virtue of the provisions of the EEG 2012, does not mean that the State may dispose of them, within the meaning of the case-law cited […]. That legal principle of exclusive allocation of the funds resulting from the EEG surcharge tends rather to show, in the absence of any other evidence to the contrary, that the State was specifically not entitled to dispose of those funds, that is to say to decide on an allocation which differs from that laid down in the EEG 2012'.

– The TSOs (interregional operators of high and very high voltage transmission systems), responsible for managing the scheme of aid for the production of EEG electricity [electricity produced from renewable energy sources and mining gas], were not constantly under public control, and indeed were not subject to public control at all. It is true that the TSOs could not use the funds generated by the EEG surcharge for purposes other than those laid down by the legislature, that they were under an obligation to administer the aforementioned funds in a specific account and compliance with that obligation was subject to control by the public authorities in accordance with Paragraph 61 of the EEG 2012, and that the State bodies and institutions carried out strict monitoring at various levels of the activities of the TSOs, checking, inter alia, that EEG electricity was sold in accordance with Paragraph 37 of the EEG 2012.

– However, the Court held that those 'factors […] permit the conclusion that the public authorities monitor the proper implementation of the EEG 2012, [but] they cannot, by

75 Case C-405/16 P, EU:C:2019:268.

76 Case C-706/17, EU:C:2019/407.

77 Case T-47/15, EU:T:2016:281.

78 Commission Decision (EU) 2015/1585 of 25 November 2014 on the aid scheme SA.33995 (2013/C) (ex 2013/NN) (implemented by Germany for the support of renewable electricity and of energy-intensive users) (OJ 2015 L 250, p. 122).

79 Judgment of 28 March 2019, *Germany* v *Commission* (C-405/16 P, EU:C:2019:268, paragraph 90).

contrast, permit the conclusion that there is public control over the funds generated by the EEG surcharge themselves'. [80]

132. In the judgment in *Achema and Others* the Court confirmed its previous case-law, stating that '… a measure consisting, inter alia, of an obligation to purchase energy may come within the concept of "aid", even though it does not involve a transfer of State resources […]' and that, 'even if sums corresponding to the aid measure in question are not permanently held by the Treasury, the fact that they constantly remain under public control, and are therefore available to the competent national authorities, is sufficient for them to be categorised as "State resources". [81]

133. In that same judgment, the Court reiterated that the decisive factor was that entities other than the public authorities are 'appointed by the State to administer a State resource and *are not merely bound by an obligation to purchase by means of their own financial resources*'. [82]

134. Applying that case-law to the present dispute, I shall examine, in the first place, the scheme for purchasing green certificates depending on the position of the beneficiaries and of those obliged to purchase them, and, in the second place, the degree of control exercised by GSE over the green certificate mechanism.

(1) Obligation to purchase green certificates

135. The beneficiaries (the Italian producers of RES-E) receive funds not from the State but from those who import electricity into Italy, or from other national electricity producers, who must purchase the green certificates issued to beneficiaries.

136. Now, a transfer of funds from one individual to another, albeit in pursuance of a statutory requirement, assumes in principle that the amount transferred (in this case, the price of a purchase and sale between private economic operators) does not emanate from the State. The obligation to purchase by recourse to private individuals' own resources falls, as a rule, outside the scope of Article 107(1) TFEU.

137. This, in essence, was the approach that prevailed in the judgment in *PreussenElektra*, in the judgment in *Uteca* [83] and, more recently, in the judgment of 28 March 2019, *Germany* v *Commission*. [84]

138. Those obliged to purchase green certificates (that is to say, the other party to the purchase and sale transaction) pay for those certificates, as I have already said, from their own funds.

80 *Ibidem*, paragraphs 76 to 80.

81 Judgment of 15 May 2019, *Achema and Others* (C-706/17, EU:C:2019/407, paragraphs 52 to 54).

82 *Ibidem*, paragraph 55 (no emphasis in the original). The judgment in *Achema and Others* stated that there was a transfer of State resources in the Lithuanian scheme for the collection of funds to finance a scheme for the provision of public interest services in the electricity sector.

83 Judgment of 5 March 2009 (C-222/07, EU:C:2009:124). In that case, Spanish law imposed on television operators, whether public or private, an obligation to earmark a percentage of their revenue for the film industry in that Member State (through the pre-funding of cinematographic films and films made for television). The Court, in determining whether the resources involved were State resources, held that 'the advantage given by way of a measure adopted by a Member State […] to the cinematographic industry of a Member State constitutes an advantage granted directly by the State or by a public or private body designated or established by the State' (paragraph 44).

84 Case C-405/16 P, EU:C:2019:268. Paragraph 75 of that judgment states that, 'although it is true that the factors thus accepted indicate the legal origin of the support for EEG electricity implemented by the EEG 2012, they are, however, not sufficient to conclude that the State nevertheless held a power of disposal over the funds managed and administered by the TSOs'.

139. Is it appropriate to say that the State foregoes [85] the receipt of public resources in issuing green certificates free of charge to producers of E-RES established in Italy?

140. Support for an affirmative answer to that question has been sought in the judgment of 8 September 2011, *Commission* v *Netherlands*, since, there, the free issue of certain emission allowances was considered to be an indication that the corresponding resources emanated from the State. [86] Following that judgment, the Commission changed its position, having previously not regarded the resources connected with green certificates as State resources. [87]

141. In my view, however, such an extrapolation is misplaced. It is in the very nature of green certificates that they should be issued free of charge to producers of RES-E so that the latter can sell them on the market and profit from the proceeds of such sales. If green certificates were no longer free and producers of RES-E had to pay a certain amount (directly to GSE or at auction) in order to obtain them, the very meaning of this incentive would be lost.

142. Green certificates came about as a means of financing the *additional costs* which producers incur in connection with the generation of RES-E. That financing would disappear (and the green certificates would be useless) if producers of RES-E that receive green certificates had to pay for them. In those circumstances, those additional costs would be compounded by the cost of the green certificates themselves, and, as a result, this mechanism would not serve to promote the production of RES-E. It was the very fact that RES-E entailed higher production costs (at that time, at least) than conventional electricity [88] that was the driver behind the free issue of the incentive in the first place. [89]

143. As the Court held, 'a national support scheme which […] uses green certificates is designed in particular to have the additional cost of producing green electricity borne directly by the market, that is to say, by the suppliers and users of electricity, […], and, ultimately, by the consumers'. [90]

144. To my mind, the foregoing assertions show that it is the market, not the State authorities, which assumes the additional RES-E production costs that are reflected in the green certificates, the latter being tradable securities with a value ensured by the existence of purchasers under an obligation imposed by law.

85 If that is the case, the Italian State foregoes receipts which it could have obtained by selling green certificates at auction or by issuing them for valuable consideration.

86 Case C-279/08 P, EU:C:2011:551. Paragraph 107 of this judgment reads: 'the Member State, by conferring on those [nitrogen oxide] emission allowances the character of tradable intangible assets and by making them available to the undertaking concerned free of charge instead of selling those allowances or putting them up for auction, foregoes public resources'.

87 See footnote 10 to this Opinion. In its written observations (paragraph 40 of the Italian version), GSE recalls that, in evaluating the Belgian green certificate scheme in its decision of 25 July 2001 [State aid N 550/2000, SG (2001) D/290545], the Commission explained: 'L'État procure gratuitement les certificats verts (B) aux producteurs d'électricité verte. Ceux-ci doivent prouver qu'ils ont produit une certaine quantité d'électricité verte, en échange de quoi ils reçoivent une quantité correspondante de certificats verts. Ils peuvent vendre ces certificats aux distributeurs sur le (futur) marché des certificats verts. L'État leur offre donc des biens incorporels. On ne peut cependant considérer qu'il accepte un manque à gagner en procurant les certificats verts gratuitement […] En conséquence, *la fourniture de certificats verts par l'État aux producteurs ne met pas en jeu des ressources d'État*' (no emphasis in the original).

88 2008 Community guidelines on State aid for environmental protection (OJ 2008 C 82, p. 1): 'State aid may be justified if the cost of production of renewable energy is higher than the cost of production based on less environmentally friendly sources …'.

89 Judgment in *Ålands Vindkraft*, paragraph 103.

90 *Ibidem*, paragraph 109.

145. By the same token, the Italian State budget is not adversely affected by the free issue of green certificates, which, as I have already said, does not in itself entail a transfer of State resources. [91]

146. The Consiglio di Stato (Council of State) expresses the same view when it says that, 'no State resources are involved in this case, since there does not appear to be any transfer, direct or indirect, of public resources to green energy producers operating in Italy'. [92]

147. Consequently, the State budget does not lose out on revenue because the green certificates are issued free of charge, a fact which, as I have already said, is inherent in the nature of the incentive scheme.

148. An acceptance, for the sake of argument, of the proposition that the free issue of green certificates entails an indirect loss to the Italian State would not necessarily support the conclusion as to the presence of State aid: in the Court's view, the indirect reduction of revenue brought about by the adoption of national rules or measures does not represent a transfer of State resources if such an effect is inherent in those rules or measures. [93]

(2) State control over the resources earmarked for buying back green certificates

149. If the dispute giving rise to the reference for a preliminary ruling were confined to Axpo's obligation to buy green certificates in its capacity as an importer of RES-E into Italy, the foregoing conclusion with respect to the non-existence of State resources would be sufficient for the purposes of answering the referring court's question, and, indeed, that is the purport of the proposal put forward by the Commission in its observations.

150. Such an approach might not be exhaustive, however, as it would fail to analyse the State's control over other elements of the green certificate scheme and its implementation. In particular, the State might exercise its control over the financial resources earmarked for green certificates outside the context of the private transfers between producers of RES-E and importers and producers of conventional electricity.

151. As I have already explained, the Italian legislature introduced a mechanism for maintaining the value of the market in green certificates. It is true that green certificates may be the subject of *direct* transactions between producers of RES-E and importers and national producers of conventional electricity. However, the Italian rules also introduced a digital platform for exchanging green certificates which is managed by GME, a subsidiary of GSE.

152. The order for reference contains no evidence, and none was adduced at the hearing, to show that GME uses its resources in such a way as to transfer State resources to national producers of RES-E. In principle, it would seem that GME confines itself to managing the digital platform by mediating between buyers and sellers of green certificates. It nonetheless falls to the referring court to verify that that is the case.

91 The Italian Government argued at the hearing that Italy does not forego any public resources because there have in fact never been any such resources. The green certificate certifies the quantity of RES-E generated by an Italian producer and it is only logical that the profit from that green certificate should revert to the producer itself.

92 Order for reference, paragraph 8.

93 PreussenElektra Judgment, paragraph 62.

153. By contrast, there is another element of the Italian green certificate scheme which may entail the mobilisation of public resources (for the benefit of producers of RES-E), that is to say GSE's intervention on the market to buy back surplus green certificates in order to maintain their price.

154. The resources available to GSE for buying back surplus green certificates comes from the revenue obtained by way of tariff component A3, which Italian consumers pay via their electricity bill. The amount of the A3 component is fixed by the Autorità di regolazione per energia, reti e ambiente (Regulatory Authority for Energy, Networks and the Environment). [94]

155. Tariff component A3 forms part of the so-called general electricity charges, [95] the amounts of which were laid down in Article 39(3) of Decree-Law No 83/2012. Entities using the services of the electricity network are obliged by law to pay those amounts into the Electricity Industry Equalisation Compensation Fund [96] and to pass them on to final consumers (who, as I have said, pay them via their bills).

156. The amounts collected to cover general electricity charges are intended to finance objectives in the general interest, in accordance with the allocation criteria laid down by the public authorities. One of those objectives is to promote renewable energy sources and energy efficiency, which tariff component A3 is intended to help attain. [97]

157. The sums collected to cover general electricity charges are not assigned to the State budget but are paid into the management accounts of an economic public body (the Electricity Industry Equalisation Fund), which redistributes them to certain categories of operators to be used for specific purposes. The exception to that rule is tariff component A3, 98% of the proceeds of which was paid into GSE's accounts. [98]

158. Tariff component A3 is therefore a pecuniary charge imposed by the Italian legislation to finance the general-interest objective of promoting the production of RES-E. The measures for which that legislation provides with a view to attaining that objective include the buy-back of green certificates by GSE.

159. The revenue from tariff component A3, although not included in the State budget, could be regarded as State resources which are under the indirect control of the Italian authorities because GSE, as a company wholly owned by the Italian Ministry of Economic and Financial Affairs, receives from that ministry and from the Ministry of Economic Development the guidelines which it must follow. [99]

94 In this regard, Axpo cites GSE's 2016 activity report, according to which 'GSE, in conjunction with CESA [Cassa per i Servizi Energetici e Ambientali (Fund for Energy and Environmental Services)], evaluates the economic need for component A3 on an annual basis. Depending on what that need is, the AEEGSI [now the ARERA] determines the revenue required to replenish the account earmarked for new facilities for the production of electricity from renewable and similar sources and inputs into the quarterly updating of the values of component tariff A3, which is paid by consumers via their electricity bills'.

95 For a more detailed explanation of the general costs of the electricity system in Italy, I refer to the judgment of 18 January 2017, *IRCCS – Fondazione Santa Lucia* (C-189/15, EU:C:2017:17, paragraphs 31 to 35), and my Opinion in that case (C-189/15, EU:C:2016:287).

96 Cassa per i Servizi Elettrici e Ambientali, known until 2015 as Cassa Conguaglio per il Settore Elettrico.

97 Other public interest objectives covered were nuclear safety and local compensation, special tariff schemes for the national railway company, compensation for small undertakings in the electricity sector and funds to cover the 'electricity voucher' and the advantages granted to electro-intensive users.

98 For a detailed explanation of this mechanism, see Commission Decision of 23 May 2017, SA.38635 (2014/NN) – Italy – Reductions of the renewable and cogeneration surcharge for electro-intensive users in Italy (C(2017) 3406 final), paragraphs 6 to 13.

99 This is the Commission's assessment in its Decision of 23 May 2017, SA.38635 (2014/NN) – Italy – Reductions of the renewable and cogeneration surcharge for electro-intensive users in Italy (C(2017) 3406 final), paragraph 91.

160. In short, the resources from component A3 which are earmarked by GSE for the buy-back of green certificates might be regarded as State resources, in so far as: (a) they originate from a pecuniary charge imposed by the Italian legislation; (b) they are paid by final electricity consumers; and (c) they are administered by a public company (GSE) which operates under the direction of the Italian State and is responsible for allocating them to Italian producers of RES-E, buying back green certificates on the exchange platform managed by GSE when their price drops. [100]

161. Tariff component A3 would thus appear to generate revenue classifiable as State resources which is indirectly allocated to Italian producers of RES-E through the buy-back of green certificates by GSE, a State-owned body in the form of a company. [101] On that basis, there would appear to be a transfer of State resources constituting State aid. [102]

162. In any event, it will be for the referring court, which has all of the relevant information, to: (a) analyse GSE's intervention in buying back green certificates using resources obtained from tariff component A3; (b) determine whether that intervention gives rise to a transfer of State resources to Italian producers of RES-E; and (c) establish what degree of control the State exercises in practice over the resources which GSE uses to buy back green certificates.

3. Selectivity of the advantage

163. Producers of RES-E established in Italy obtain an *advantage*, within the meaning of Article 107 TFEU, in receiving green certificates, inasmuch as those certificates are issued to them free of charge and producers are then able to sell them, directly or on the digital platform managed by GME, at a price which GME is responsible for maintaining at a reasonable level. [103]

164. That advantage is afforded only to national producers of RES-E, which would appear to receive more favourable treatment than importers of electricity (be it RES-E or conventional power) and than national producers of conventional electricity. At first sight, then, this would appear to be a *selective advantage*. [104]

165. In the view of the Court, an assessment of the requirement as to the selectivity of the advantage must determine whether, under a particular statutory scheme, the national measure is such as to favour 'certain undertakings or the production of certain goods' over others which are

100 Axpo stated at the hearing that, in practice, GSE purchases most green certificates on the digital exchange platform managed by GME.

101 In the context of an aid mechanism different from, and subsequent to, the green certificate scheme, the Commission took the view that an intervention similar to that of GSE entails a transfer of public resources [Decision of 14 June 2019, SA.53347 (2019/N) – Italy – Support to electricity from renewable sources 2019-2021].

102 Judgment of 19 December 2013, *Association Vent De Colère! and Others* (C-262/12, EU:C:2013:851, paragraph 25); order of 22 October 2014, *Elcogás* (C-275/13, not published, EU:C:2014:2314, paragraph 30); and judgment of 15 May 2019, *Achema and Others* (C-706/17, EU:C:2019/407), paragraph 68.

103 Communication from the Commission – Guidelines on State aid for environmental protection and energy 2014-2020 (OJ 2014 C 200, p. 1). Those guidelines recognise that 'Member States may grant support for renewable energy sources by using market mechanisms such as green certificates. These market mechanisms [which may, for example, require electricity suppliers to obtain a certain proportion of their supplies from renewable sources] allow all renewable energy producers to *benefit indirectly from guaranteed demand for their energy, at a price above the market price for conventional power*. The price of these green certificates is not fixed in advance, but depends on market supply and demand' (paragraph 135). No emphasis in the original.

104 In recent years, disputes over the *selective* nature of State aid (in particular, that granted through tax provisions) have been on the increase, becoming so complex on some occasions that economic operators and legal practitioners have struggled to be sure, in principle, about what the rules are.

in a comparable legal and factual situation, in the light of the objective pursued by that scheme, and which therefore receive differentiated treatment that is, in essence, capable of being classified as discriminatory. [105]

166. In the case of a [general] scheme of aid, but not individual aid, it falls to be determined whether that national scheme, notwithstanding that it confers an advantage of general application, does so to the exclusive benefit of certain undertakings or certain sectors of activity. [106]

167. According to the method commonly adopted by the Court in its case-law in this regard, the analysis of whether a measure is selective is usually carried out in three stages. The Court: (a) identifies the statutory regime to be used for reference; (b) compares the factual and legal situation of the operators that benefit from the measure in question; and (c) examines whether there is any justification for the favourable treatment in the nature or in the general scheme of the regime to be used for reference. [107]

168. As regards *identifying the statutory regime to be used for reference*, at the hearing, the parties presented entirely different approaches: some said that the reference regime is to be understood as being the general rules governing electricity in Italy; others, that it should be the rules governing the production of RES-E.

169. In my opinion, the statutory regime to be used for reference in this case is one of those established by Directive 2009/28 itself. I agree with the Consiglio di Stato (Council of State) when it says that that regime is 'inherently, expressly and voluntarily selective, inasmuch as it serves to favour, in each Member State, the production of green energy […]. [108]

170. I therefore share the referring court's view that a national scheme of support for RES-E such as the green certificate scheme (the application of which the Directive envisages and seeks to ensure) does not constitute a derogation from the *reference regime* but, rather, forms part of it. [109]

171. If, on the other hand, the statutory regime to be used for reference were to be regarded as being that consisting of the rules generally applicable, in Italy, to the electricity market (to which the green certificate scheme would be an exception), it would be necessary to examine the *comparability* of the respective situations of the economic operators concerned in order to determine the effects of that support scheme. [110]

105 Judgments of 4 June 2015, *Commission* v *MOL* (C-15/14 P, EU:C:2015:362, paragraph 59); of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 54); and judgment of 15 May 2019, *Achema and Others* (C-706/17, EU:C:2019:407), paragraph 84.

106 Judgments of 30 June 2016, *Belgium* v *Commission* (C-270/15 P, EU:C:2016:489, paragraphs 49 and 50); of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 55); and of 4 May 2015, *Commission* v *MOL* (C-14/15 P, ECLI:EU:C:2015:362, paragraph 60).

107 The generalised application of that method is not without its critics, who point up its unsuitability for the purpose of classifying certain aid schemes.

108 Order for reference, paragraph 8.8.

109 Order for reference, paragraph 8.6: 'since it is inherent in national support schemes for the production of green energy […] that they should provide for special treatment, in a strictly legal sense, for green energy producers […], the inference might be drawn that […], far from creating a derogation from the "reference regime" and, as such, potentially comprising State aid, they inform, favour and permit the specific implementation of that regime'.

110 Article 107(1) TFEU does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects and thus independently of the techniques used (judgments of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraph 48; and of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 87).

172. Through the green certificate scheme, the Italian State wishes to promote the production of RES-E and the unique nature of that type of energy means that the situations of those in Italy who generate electricity from renewable sources are not intrinsically comparable with the situations of those who obtain electricity from fossil or conventional sources. The different costs which they incur prevent their respective situations from being classified as *comparable*.

173. In order to achieve that goal, however, it would seem to be immaterial, in principle, where the RES-E is produced, all that matters, as I have said, being that it is generated from renewable sources. Viewed from that perspective, the situation of Italian producers of RES-E and that of those who import RES-E from other Member States or from third countries would appear to be similar. The latter would thus seem to be discriminated against by comparison with the former, in which case the advantage enjoyed by producers of RES-E who are established in Italy would be selective.

174. It must not be forgotten here that Directive 2009/28, as interpreted by the Court in the judgment in *Ålands Vindkraft*, specifically authorises support schemes for the production of RES-E to be structured on a national basis.

175. In order for that support to be present, the sale price of green certificates must not be inflated, which is to say that it must not exceed the equivalent maximum cost to RES-E producers of this mode of electricity generation. If the price of green certificates were to be raised above the cost of RES-E production, the selectivity of the measure (and the absence of any objective justification for it) could not be denied.

176. Speaking of the *justification* for the measure, it is my view that the nature or the general scheme of the green certificate regime [111] lend it the support required in this regard. Any endorsement of the support scheme by Directive 2009/28 serves to promote the protection of the environment and of the health of humans, animals and plants. In so far as it complies with the requirements of that directive, therefore, the aid may be regarded as being compatible with Article 107(3) TFEU.

177. However, the analysis of whether the aid is compatible with the internal market falls to be carried out not by the national courts but by the Commission, on a case-by-case basis, after having been notified of the aid by the Member State concerned, [112] and in accordance with the guidelines which it has laid down for itself. [113]

[111] Judgments of 9 October 2014, *Ministerio de Defensa and Navantia* (C-522/13, EU:C:2014:2262, paragraphs 42 and 43); of 18 July 2013, *P* (C-6/12, EU:C:2013:525, paragraph 19); and of 8 September 2011, *Commission* v *Netherlands* (C-279/08 P, EU:C:2011:551, paragraph 62); and of 8 September 2011, *Paint Graphos and Others* (C-78/08 to C-80/08, EU:C:2011:550, paragraph 49 et seq.).

[112] The Republic of Italy has notified the Commission of other support schemes: see, inter alia, those cited in footnotes 98, 99 and 101 of this Opinion, as well as the Commission Decision of 28 April 2016, SA.43756 (2015/N) – Italy – Support to electricity from renewable sources in Italy (C(2016) 2726 final).

[113] 2008 Community guidelines on State aid for environmental protection (OJ 2008 C 82, p. 1); and Guidelines on State aid for environmental protection and energy 2014-2020 (OJ 2014 C 200, p. 1).

E. The EEC-Switzerland Agreement

178. The EEC-Switzerland Agreement is in principle applicable to imports of electricity between Switzerland and the Member States of the European Union.[114] In Axpo's view, the obligation to buy Italian green certificates in cases where RES-E is imported from Switzerland into Italy would infringe Articles 6 and 13 thereof.

179. Reliance on those provisions of the Agreement would, first and foremost, require Axpo to demonstrate that the electricity it imports into Italy from Switzerland has been produced from renewable sources. In order for that to be possible, the European Union and Switzerland would have to agree a mechanism for guaranteeing and certifying its origin as such.

180. According to the information provided by the Commission, which was corroborated at the hearing, the European Union has not concluded with Switzerland any agreement on the harmonisation of guarantees as to the origin of RES-E, in line with the provisions of Article 15 of Directive 2009/28. The negotiations initiated in that sphere were interrupted.

181. It is true that, on 6 March 2007, Italy and Switzerland concluded an agreement which provided for the reciprocal recognition of guarantees as to the origin of electricity imported from 2006.[115] Nevertheless, that bilateral agreement does not apply to the reciprocal recognition of guarantees as to the origin of RES-E, as I explained earlier.[116]

182. Even if Axpo could demonstrate the renewable origin of the electricity which it imports from Switzerland, it is my view that Articles 6 and 13 of the EEC-Switzerland Agreement[117] would not preclude the Italian green certificate purchasing scheme which is imposed on importers.

183. As regards Article 6(1) (which prohibits charges having an effect equivalent to a customs duty on imports in trade between the Community and Switzerland, in a manner similar to Articles 28 and 30 TFEU), I have already noted[118] that the obligation in question is not of a fiscal or parafiscal nature and, for that reason, cannot be classified as a charge having an effect equivalent to a customs duty.

184. So far as concerns Article 13(1) (which prohibits quantitative restrictions and measures having equivalent effect in trade between the Community and Switzerland), that prohibition is similar to the one contained in Article 34 TFUE. As I have also explained,[119] the Italian green scheme mechanism, even though it constitutes a measure having an effect equivalent to a

114 Article 2 provides that the agreement 'shall apply to products originating in the Community or Switzerland: […] which fall within Chapters 25 to 97 of the Harmonised Commodity Description and Coding System excluding the products listed in Annex I'. Electrical energy comes under Chapter 27 of the Harmonised System (code 2716).

115 Points 39 and 40 of this Opinion, with reference to the judgment in *Green Network*. At the hearing, the Italian Government indicated that a conflict of public international law might have been triggered because the application of the bilateral agreement was impossible following the adoption of Legislative Decree No 28 of 2011. Between 1 January 2012 and 26 November 2014, the date of the judgment in *Green Network*, the reciprocal recognition of guarantees of origin under that bilateral agreement did not allow imports of Swiss RES-E into Italy to escape the obligation to buy Italian green certificates.

116 The case-law in Green Network may be extrapolated to Directive 2009/28, since it was drawn up in relation to Directive 2001/77, predecessor to Directive 2009/28, the content of which is similar in this regard.

117 Although the referring court does not raise the issue and takes the point as read, I am of the view that Articles 6 and 13 of the Agreement may be directly effective and capable of being relied on directly by the persons concerned before the national courts. These are provisions which contain clear, precise and unconditional prohibitions and the Agreement is by its nature such that its provisions may be relied on directly, in accordance with the judgments of 26 October 1982, *Kupferberg* (C-104/81, EU:C:1982:362, paragraphs 22 and 23); and of 16 July 2015, *ClientEarth* v *Commission* (C-612/13 P, EU:C:2015:486, paragraph 35 and the case-law cited).

118 Point 68 of this Opinion.

119 Points 76 to 87 of this Opinion.

quantitative restriction on imports, is justified by the need to preserve the environment and protect the health and life of humans, animals and plants, and, for that reason, does not infringe the prohibition contained in Article 34 TFEU. The same reasoning can be extrapolated to the prohibition contained in Article 13 of the EEC-Switzerland Agreement.

V. Conclusion

185. In the light of the foregoing, I suggest that the Court's answer to the Consiglio di Stato (Council of State, Italy) should be as follows:

(1) 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 does not preclude legislation under which a Member State decides not to exempt importers of electricity generated from renewable sources in other Member States, or in third countries, from the obligation to purchase green certificates linked exclusively to the national production of that type of electricity.

(2) A system of support via green certificates such as that at issue in this dispute is not a customs duty on imports or a charge having equivalent effect contrary to Articles 28 and 30 TFEU, nor a discriminatory internal tax contrary to Article 110 TFEU. That system does, however, constitute a measure having an effect equivalent to a quantitative restriction on imports which is contrary in principle to the prohibition contained in Article 34 TFEU, but justified by the overriding requirement to preserve the environment and the need in the general interest to protect the life and health of humans, animals and plants, as permitted by Article 36 TFEU.

(3) The obligation to buy green certificates which is imposed by the Italian State on importers of electricity, and the issue of those certificates free of charge to national producers of electricity generated from renewable sources do not amount to the transfer of State resources within the meaning of Article 107(1) TFEU. The obligation on the publicly owned company Gestore servizi energetici (Energy Services Management) to buy back surplus green certificates using the proceeds from tariff component A3 might entail a transfer of public resources, a question which falls to be determined by the referring court. Such a transfer would not be capable of being classified as State aid incompatible with Article 107(1) TFUE in so far as it does not confer a selective advantage on Italian producers of electricity obtained from renewable sources.

(4) An obligation to purchase green certificates of national origin which is imposed by domestic legislation on importers of electricity produced from renewable sources in a third country such as Switzerland is not contrary to Articles 6(1) and 13(1) of the Agreement between the European Economic Community and the Swiss Confederation of 1972'.