Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

7 March 2024*

(Reference for a preliminary ruling – National support scheme providing for the award of tradable green certificates to national producers of electricity from renewable energy sources – Import of electricity produced from renewable energy sources in another Member State – Obligation to purchase green certificates – Penalty – Exemption – Directive 2001/77/EC – Directive 2009/28/EC – Support scheme – Guarantees of origin – Free movement of goods – Articles 18, 28, 30, 34 and 110 TFEU – State aid – Articles 107 and 108 TFEU – State resources – Selective advantage)

In Case C-558/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 16 August 2022, received at the Court on 19 August 2022, in the proceedings

Autorità di Regolazione per Energia Reti e Ambiente (ARERA)

v

Fallimento Esperia SpA,

Gestore dei Servizi Energetici SpA – GSE,

THE COURT (Second Chamber),

composed of A. Prechal (Rapporteur), President of the Chamber, F. Biltgen, N. Wahl, J. Passer and M.L. Arastey Sahún, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Fallimento Esperia SpA, by U. Grella and F.M. Salerno, avvocati,

– Gestore dei Servizi Energetici SpA – GSE, by S. Fidanzia and A. Gigliola, avvocati,

* Language of the case: Italian.

– the Italian Government, by G. Palmieri, acting as Agent, and by D. Del Gaizo and F. Tortora, avvocati dello Stato,

– the European Commission, by B. De Meester, G. Gattinara and F. Tomat, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 18, 28, 30, 34, 107, 108 and 110 TFEU and of Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ 2009 L 140, p. 6).

2 The request has been made in proceedings between, on the one hand, the Autorità di Regolazione per Energia Reti e Ambiente (ARERA) (Italian Regulatory Authority for Energy, Networks and Environment; 'ARERA') and, on the other hand, Fallimento Esperia SpA, an insolvent company, and Gestore dei Servizi Energetici SpA – GSE ('GSE') concerning the imposition of a financial penalty on Fallimento Esperia for failure to fulfil its obligation to purchase certificates attesting to the renewable origin ('green certificates') of the electricity it imported into Italy during 2010.

Legal context

European Union law

Directive 2001/77/EC

3 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) was repealed, with effect from 1 January 2012, by Directive 2009/28. That directive in turn was repealed, with effect from 1 July 2021, by Directive (EU) 2018/2001 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).

4 Recitals 10, 11, 14 and 15 of Directive 2001/77 were worded as follows:

'(10) This Directive does not require Member States to recognise the purchase of a guarantee of origin from other Member States or the corresponding purchase of electricity as a contribution to the fulfilment of a national quota obligation. However, to facilitate trade in electricity produced from renewable energy sources and to increase transparency for the consumer's choice between electricity produced from non-renewable [energy sources] and electricity produced from renewable energy sources, the guarantee of origin of such electricity is necessary. Schemes for the guarantee of origin do not by themselves imply a

right to benefit from national support mechanisms established in different Member States. It is important that all forms of electricity produced from renewable energy sources are covered by such guarantees of origin.

(11) It is important to distinguish guarantees of origin clearly from exchangeable green certificates.

…

(14) Member States operate different mechanisms of support for renewable energy sources at the national level, including green certificates, investment aid, tax exemptions or reductions, tax refunds and direct price support schemes. One important means to achieve the aim of this Directive is to guarantee the proper functioning of these mechanisms, until a Community framework is put into operation, in order to maintain investor confidence.

(15) It is too early to decide on a Community-wide framework regarding support schemes, in view of the limited experience with national schemes and the current relatively low share of price[-]supported electricity produced from renewable energy sources in the Community.'

5 Article 1 of that directive, headed 'Purpose', provided:

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

6 Article 3 of that directive, headed 'National indicative targets', provided, in paragraphs 1 and 2:

'1. Member States shall take appropriate steps to encourage greater consumption of electricity produced from renewable energy sources in conformity with the national indicative targets referred to in paragraph 2. These steps must be in proportion to the objective to be attained.

2. Not later than 27 October 2002 and every five years thereafter, Member States shall adopt and publish a report setting national indicative targets for future consumption of electricity produced from renewable energy sources in terms of a percentage of electricity consumption for the next 10 years. The report shall also outline the measures taken or planned, at national level, to achieve these national indicative targets. To set these targets until the year 2010, the Member States shall:

– take account of the reference values in the Annex,

– ensure that the targets are compatible with any national commitments accepted in the context of the climate change commitments accepted by the Community pursuant to the Kyoto Protocol to the United Nations Framework Convention on Climate Change.'

7 Article 4 of that directive, headed 'Support schemes', provided, in paragraph 1:

'Without prejudice to Articles 87 and 88 of the Treaty [(now Articles 107 and 108 TFEU)], the [European] Commission shall evaluate the application of mechanisms used in Member States according to which a producer of electricity, on the basis of regulations issued by the public authorities, receives direct or indirect support, and which could have the effect of restricting trade, on the basis that these contribute to the objectives set out in Articles 6 and 174 of the Treaty.'

8 Article 5 of Directive 2001/77, headed 'Guarantee of origin of electricity produced from renewable energy sources', provided, in paragraphs 1 to 5:

'1. Member States shall, not later than 27 October 2003, ensure that the origin of electricity produced from renewable energy sources can be guaranteed as such within the meaning of this Directive according to objective, transparent and non-discriminatory criteria laid down by each Member State. They shall ensure that a guarantee of origin is issued to this effect in response to a request.

2. Member States may designate one or more competent bodies, independent of generation and distribution activities, to supervise the issue of such guarantees of origin.

3. A guarantee of origin shall:

– specify the energy source from which the electricity was produced, specifying the dates and places of production, and in the case of hydroelectric installations, indicate the capacity;

– serve to enable producers of electricity from renewable energy sources to demonstrate that the electricity they sell is produced from renewable energy sources within the meaning of this Directive.

4. Such guarantees of origin, issued according to paragraph 2, should be mutually recognised by the Member States, exclusively as proof of the elements referred to in paragraph 3. Any refusal to recognise a guarantee of origin as such proof, in particular for reasons relating to the prevention of fraud, must be based on objective, transparent and non-discriminatory criteria. In the event of refusal to recognise a guarantee of origin, the Commission may compel the refusing party to recognise it, particularly with regard to objective, transparent and non-discriminatory criteria on which such recognition is based.

5. Member States or the competent bodies shall put in place appropriate mechanisms to ensure that guarantees of origin are both accurate and reliable and they shall outline in the report referred to in Article 3(3) the measures taken to ensure the reliability of the guarantee system.'

Directive 2009/28

9 Recitals 25, 52 and 56 of Directive 2009/28 were worded as follows:

'(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, 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. … 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.'

10 Article 1 of that directive, headed 'Subject matter and scope', read as follows:

'This Directive establishes a common framework for the promotion of energy from renewable sources. It sets mandatory national targets for the overall share of energy from renewable sources in gross final consumption of energy and for the share of energy from renewable sources in transport. It lays down rules relating to statistical transfers between Member States, joint projects between Member States and with third countries, guarantees of origin, administrative procedures, information and training, and access to the electricity grid for energy from renewable sources. It establishes sustainability criteria for biofuels and bioliquids.'

11 Article 2 of that directive, headed 'Definitions', provided:

'For the purposes of this Directive, the definitions in Directive 2003/54/EC [of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC (OJ 2003 L 176, p. 37)] apply.

The following definitions also apply:

…

(j) "guarantee of origin" means an electronic document which has the sole function of providing proof to a final customer that a given share or quantity of energy was produced from renewable sources as required by Article 3(6) of Directive 2003/54/EC;

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

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

…'

12 Article 3 of the same directive, headed 'Mandatory national overall targets and measures for the use of energy from renewable sources', provided, in paragraphs 1 to 4:

'1. Each Member State shall ensure that the share of energy from renewable sources, calculated in accordance with Articles 5 to 11, in gross final consumption of energy in 2020 is at least its national overall target for the share of energy from renewable sources in that year, as set out in the third column of the table in part A of Annex I. Such mandatory national overall targets are consistent with a target of at least a 20% share of energy from renewable sources in the Community's gross final consumption of energy in 2020. In order to achieve the targets laid down in this Article more easily, each Member State shall promote and encourage energy efficiency and energy saving.

2. Member States shall 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.

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

(a) support schemes;

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

Without prejudice to Articles 87 and 88 of the Treaty [now Articles 107 and 108 TFEU], 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.

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

13 Article 15 of Directive 2009/28, headed 'Guarantees of origin of electricity, heating and cooling produced from renewable energy sources', provided, in paragraphs 1 and 9:

'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.

…

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

14 Article 26 of that directive, headed 'Amendments and repeal', provided:

'1. In Directive 2001/77/EC, Article 2, Article 3(2), and Articles 4 to 8 shall be deleted with effect from 1 April 2010.

…

3. Directives 2001/77/EC and 2003/30/EC [of the European Parliament and of the Council of 8 May 2003 on the promotion of the use of biofuels or other renewable fuels for transport (OJ 2003 L 123, p. 42)] shall be repealed with effect from 1 January 2012.'

15 Pursuant to Article 27(1) of Directive 2009/28:

'Without prejudice to Article 4(1), (2) and (3), Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 5 December 2010.'

Italian law

Legislative Decree No 79/1999

16 In order to encourage the use of electricity produced from renewable energy sources ('green electricity'), the Italian Republic adopted decreto legislativo n. 79 – Attuazione della direttiva 96/92/CE recante norme comuni per il mercato interno dell'energia elettrica (Legislative Decree No 79 on the implementation of Directive 96/92/EC concerning common rules for the internal market in electricity), of 16 March 1999 (GURI No 75 of 31 March 1999, p. 8; 'Legislative Decree No 79/1999').

17 That legislative decree introduced a support scheme for the production of green electricity based notably on the free of charge attribution of green certificates to Italian producers of green electricity in proportion to the green electricity produced.

18 Article 11 of that legislative decree provided as follows:

'1. In order to support the use of renewable energies, energy savings, the reduction of carbon dioxide emissions and the use of national energy resources from 2001 onwards, importers and operators responsible for plants which, each year, import or produce electricity from non-renewable energy sources have the obligation to feed into the national electricity network, during the following year, a quota of electricity produced from renewable energy sources by plants that entered into operation or have increased their production, within the limits of additional production capacity, after the entry into force of the present decree.

2. The obligation laid down in paragraph 1 shall apply to imports and production of electricity – not including co-generation, the power plant's own consumption and exports – of more than 100 GWh; the quota referred to in paragraph 1 shall initially be set at 2% of that energy exceeding 100 GWh.

3. The same operators may also discharge this obligation by acquiring, in whole or in part, the equivalent quota or the rights attaching thereto from other producers, on the condition that they feed energy from renewable sources into the national electricity network, or from [Gestore della rete di trasmissione nazionale (the Italian national transmission network operator), now GSE]. … In order to compensate for annual production fluctuations or insufficient supply, [GSE] may buy or sell rights in respect of production from renewable energy sources, irrespective of the actual availability, with an obligation to compensate, on a triennial basis, any issuance of rights in the absence of availability.'

19 This purchase by GSE of rights in respect of production from renewable energy sources, also called 'green certificates', was effected by using the product of tariff component A3 paid by electricity consumers on their bills.

Legislative Decree No 387/2003

20 According to Article 4 of decreto legislativo n. 387 – Attuazione della direttiva 2001/77/CE relativa alla promozione dell'energia elettrica prodotta da fonti energetiche rinnovabili nel mercato interno dell'elettrica (Legislative Decree No 387 implementing Directive 2001/77/EC on the promotion of electricity produced from renewable energy sources in the internal electricity market), of 29 December 2003 (Ordinary Supplement to GURI No 25 of 31 January 2004; 'Legislative Decree No 387/2003'), it is for the national transmission network operator, now GSE, to ascertain whether the obligation laid down in Article 11 of Legislative Decree No 79/1999 has been fulfilled and to notify any failures to the Autorità per l'energia elettrica, il gas e sistema idrico (Italian Authority for electricity, gas and water), now the ARERA, which, in such a case, had jurisdiction to impose the sanctions provided for by legge n. 481 – Norme per la concorrenza e la regolazione dei servizi di pubblica utilità. Istituzione delle Autorità di regolazione dei servizi di pubblica utilità (Law No 481 on the rules relating to competition and the regulation of public utility services. Establishment of regulatory authorities for public utility services), of 14 November 1995 (GURI No 270 of 18 November 1995, Ordinary Supplement No 136).

21 Article 11(6) of Legislative Decree No 387/2003 was worded as follows:

'The guarantee of origin indicates the location of the installation, the source of renewable energy from which the electricity was produced, the technology used, the nominal power of the installation, the net production of electricity or, in the case of hybrid plants, the attributable production for each calendar year. …'

22 Article 20(3) of that legislative decree stated:

'Operators that import electricity produced in other Member States of the European Union and are subject to the obligation under Article 11 of [Legislative Decree No 79/1999] may request from the network operator, in respect of the portion of the imported electricity that is produced from renewable energy sources, an exemption from that obligation. The request shall be, at least, accompanied by a certified copy of the guarantee of origin issued, in accordance with Article 5 of Directive 2001/77, in the State in which the production installation is located. …'

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

23 Esperia SpA was a company that imported electricity into Italy with the aim of it being sold at wholesale or retail level.

24 By decision of 28 June 2016, the ARERA imposed on it a financial penalty in the amount of EUR 2 803 500 for failing to purchase 17 753 green certificates in respect of the electricity that it had imported into Italy during 2010.

25 Esperia disputed that penalty before the Tribunale Amministrativo Regionale per la Lombardia (Regional Administrative Court, Lombardy, Italy). After the action was brought, that company was declared insolvent and has since been called Fallimento Esperia. The insolvency administrator did however maintain that action before that court.

26 By a judgment of 8 August 2018, the Tribunale Amministrativo Regionale per la Lombardia (Regional Administrative Court, Lombardy), upheld Fallimento Esperia's action in part, finding that the amount of the penalty that had been imposed on it was excessive. The ARERA and Fallimento Esperia appealed against that judgment before the Consiglio di Stato (Council of State, Italy), the referring court.

27 The proceedings before the referring court were stayed when, on 3 September 2019, that court made a request for a preliminary ruling from the Court of Justice in the case *Axpo Trading*, which was also a case before the referring court. That request was entered in the Registry of the Court of Justice under reference C-705/19.

28 Following the delivery, on 3 December 2020, of the Opinion of Advocate General Campos Sánchez-Bordona in *Axpo Trading* (C-705/19, EU:C:2020:989), Axpo Trading withdrew its action before the referring court and the case was removed from the register by order of 9 September 2021, *Axpo Trading* (C-705/19, EU:C:2021:755).

29 The proceedings before the referring court in the case in the main proceedings then resumed.

30 Before the referring court, Fallimento Esperia expressed its doubts as to the compatibility with EU law of the Italian legislation imposing on undertakings that import electricity without submitting guarantees of origin the obligation to buy green electricity or green certificates, since that obligation does not apply to national producers of the same energy. According to that company, that legislation could be regarded as constituting (i) State aid in favour of producers of green energy active in Italy, (ii) a charge having an equivalent effect to a customs duty, and (iii) a measure having an effect equivalent to a quantitative restriction on imports. For its part, GSE is of the view that the Italian legislation at issue in the main proceedings complies with Directive 2001/77.

31 The referring court makes reference to the Opinion of Advocate General Campos Sánchez-Bordona in *Axpo Trading* (C-705/19, EU:C:2020:989) and its own request for a preliminary ruling in that case.

32 In that request, the referring court explained, notably, that the Italian support scheme for green electricity appeared to it to be compatible with the rules of the FEU Treaty on State aid. Indeed, no State resources were involved in the scheme. There was no direct or indirect transfer of public resources to green energy producers operating in Italy. In any event, that scheme complied, first,

with Directive 2009/28, which set national green energy objectives and promoted Member State measures that exclusively supported producers of clean energy established on their territory and, second, with the environmental protection objective. Similarly, the support measure at issue could not be considered to be selective, because the reference system established by Directive 2009/28 was inherently and voluntarily selective since it aimed at favouring the production of green energy in each Member State.

33 Moreover, according to the referring court, in view of that aim of Directive 2009/28, that scheme established neither a charge having an effect equivalent to a customs duty nor a measure having an effect equivalent to a quantitative restriction by requiring importers of energy produced abroad to purchase green certificates. That scheme reserved for entities operating in Italy the benefit of support with the view to achieving the mandatory national targets for the share of energy from renewable sources in final consumption set by Directive 2009/28, without importers of clean energy produced in another Member State being subject to any obligation or facing any barriers.

34 Lastly, the referring court is of the view that that scheme complies with Articles 18 and 110 TFEU since it affords the same treatment to all operators in the electricity sector that feed into the national grid energy not produced from an Italian renewable source.

35 Nevertheless, the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Do the following provisions:

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

– Articles 28 and 30 TFEU, in so far as they provide for the abolition of customs duties on imports and measures having equivalent effect;

– Article 110 TFEU, in so far as it prohibits taxation on imports in excess of those imposed directly or indirectly on similar domestic products;

– Article 34 TFEU, in so far as it prohibits 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 [in the request for a preliminary ruling], which imposes on importers of green electricity a financial burden that does not apply to domestic producers of the same product?’

Consideration of the question referred

Preliminary observations

36 First, it should be noted that the Italian law applicable to the facts of the case in the main proceedings provided, under Article 11 of Legislative Decree No 79/1999, for a measure requiring importers of electricity from another Member State that did not demonstrate that the imported electricity was green electricity by submitting guarantees of origin, to buy green electricity or green certificates from national producers relative to the amount of electricity they imported, failing which a penalty would be imposed on them.

37 Second, that measure, to which this question refers, is part of a national scheme supporting the production of green electricity that requires importers and operators responsible for plants that import or produce electricity from non-renewable energy sources to feed a quota of green electricity into the national grid each year. In order to fulfil this obligation, that scheme provides that those importers and operators may either produce green electricity themselves or buy green electricity or green certificates from national producers. In addition, under that scheme, the national authorities issue green certificates free of charge to the national producers of green electricity relative to the quantity of green electricity that they produce so that they may resell them to the producers and importers subject to that obligation.

38 Third, it should also be noted that the imports of electricity that are the subject matter of the dispute in the main proceedings occurred during 2010, with the result that they may be governed both by Directive 2001/77 and Directive 2009/28. Indeed, as is apparent from Article 26 of Directive 2009/28, Article 2, Article 3(2) and Articles 4 to 8 of Directive 2001/77 were deleted with effect from 1 April 2010, the other provisions of that directive having been deleted by the repeal of that directive, which took effect on 1 January 2012. In addition, in accordance with Article 27(1) thereof, Directive 2009/28 was to be transposed by 5 December 2010.

39 Fourth, it is apparent from the settled case-law of the Court that Article 18 TFEU, which sets out a general prohibition of all discrimination on grounds of nationality, is intended to apply independently only to situations governed by EU law in respect of which the FEU Treaty lays down no specific prohibition of discrimination (judgment of 10 October 2019, *Krah*, C-703/17, EU:C:2019:850, paragraph 19 and the case-law cited). Yet, in the area of the free movement of goods, the principle of non-discrimination is laid down by Articles 28, 30, 34 and 110 TFEU. Moreover, the Court has already held that electricity constitutes a product for the purposes of the provisions of the FEU Treaty (judgment of 17 July 2008, *Essent Netwerk Noord and Others*, C-206/06, EU:C:2008:413, paragraph 43 and the case-law cited). Accordingly, it is not necessary to apply Article 18 TFEU in the context of a measure such as the one at issue in the main proceedings.

40 In the light of the foregoing, the referring court's question should be understood as seeking to ascertain, in essence, whether Directives 2001/77 and 2009/28 and Articles 28, 30, 34, 107, 108 and 110 TFEU must be interpreted as precluding a national measure that, first, requires importers of electricity from another Member State that do not demonstrate that the imported electricity is produced from renewable sources by submitting guarantees of origin, to buy from national producers either green certificates or green electricity in proportion to the amount of electricity that they import and, second, provides for penalties to be imposed in the event that that obligation is not complied with, whereas national producers of green energy are not bound by such a purchase obligation.

Directives 2001/77 and 2009/28

Directive 2001/77

41 As regards the question whether Directive 2001/77 must be interpreted as precluding a measure such as the one at issue in the main proceedings, it is important to note that the purpose of that directive, as is apparent from Article 1 thereof, is to promote an increase in the contribution of renewable energy sources to electricity production in the internal market for electricity and to create a basis for a future Community framework thereof.

42 Moreover, it is apparent from Article 4 of that directive, read in combination with recital 14 thereof, that an important means of achieving the objective pursued by that directive, until a Community framework is put into operation, is to ensure the proper functioning of the various support mechanisms for renewable energy sources at national level, which include the green certificate mechanism.

43 As regards those support mechanisms, the Court has already held, having regard to Article 4(1) of Directive 2001/77, that that directive allowed Member States considerable latitude for the purposes of the adoption and implementation of such support mechanisms for producers of green electricity (judgment of 29 September 2016, *Essent Belgium*, C-492/14, EU:C:2016:732, paragraph 60 and the case-law cited).

44 However, as is apparent from Article 3(1) and (2) of Directive 2001/77, those mechanisms must be appropriate to support the achievement by the Member States of the national indicative targets for future consumption of green electricity. They must, therefore, in principle, lead to an increase in national production of green electricity (see, to that effect, judgment of 29 September 2016, *Essent Belgium*, C-492/14, EU:C:2016:732, paragraph 62 and the case-law cited). In addition, according to the same Article 3(1), those mechanisms must be proportionate to the objective to be attained.

45 Moreover, the Court has ruled, in the light of recitals 10 and 11 and Article 5(3) and (4) of that directive, that 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 (see, to that effect, judgment of 11 September 2014, *Essent Belgium*, C-204/12 to C-208/12, EU:C:2014:2192, paragraph 66).

46 It follows from the foregoing that Directive 2001/77 did not fully harmonise the field that it governed, with the result that the national support schemes for the production of green electricity referred to in Article 4 of that directive must satisfy the requirements arising under Articles 34 and 36 TFEU (see, to that effect, judgment of 29 September 2016, *Essent Belgium*, C-492/14, EU:C:2016:732, paragraph 64 and the case-law cited).

47 In the present case and subject to the assessment of the referring court, the measure at issue in the main proceedings, inasmuch as it imposes on importers of electricity that have not demonstrated, by submitting guarantees of origin, that the imported electricity was green, the obligation to buy green electricity or green certificates from national electricity producers, appears to contribute to the achievement of the objective of Directive 2001/77. Indeed, such an obligation is capable of stimulating national production of green electricity either by increasing demand for such electricity or by allowing national producers of green electricity to benefit from additional income from the sale of green certificates.

48 The measure at issue in the main proceedings thus appears to be appropriate to encourage greater consumption of green electricity since it requires the injection of a quota of such electricity into the national grid. As regards the proportionate nature of that measure, it is for the referring court to take into account the assessments, set out in paragraphs 110 to 122 of the present judgment, regarding compliance with the principle of proportionality in the context of the interpretation of Articles 34 and 36 TFEU.

49 In the light of the foregoing and subject to that assessment by the referring court, Directive 2001/77 must be interpreted as not precluding a measure such as the one at issue in the main proceedings.

Directive 2009/28

50 As regards the question whether Directive 2009/28 must be interpreted as precluding a measure such as the one at issue in the main proceedings, it must be noted that 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, inter alia, mandatory national targets for the overall share of energy from renewable sources in gross final consumption of energy.

51 Thus, under Article 3(1) and (2) of Directive 2009/28, Member States have an obligation, first, 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, as set out in Part A of Annex I to that directive and, second, to introduce measures to ensure that the share of energy from renewable resources equals or exceeds that shown in the 'indicative trajectory' set out in Part B of Annex I to that directive.

52 The Court has, in addition, stated that it was apparent from recital 25 of Directive 2009/28, as well as from Article 1, from point (k) of the second paragraph of Article 2 and from Article 3(3) of that directive, that the EU legislature did not seek to bring about exhaustive harmonisation of national support schemes for the production of green energy in that directive (see, to that effect, judgment of 1 July 2014, *Ålands Vindkraft*, C-573/12, EU:C:2014:2037, paragraphs 59 to 63).

53 On the contrary, as the Court has held, it is apparent from the very wording of Article 3(3) of Directive 2009/28, according to which Member States 'may' apply, inter alia, support schemes, that those Member States have a broad discretion as to the measures they may adopt in order to achieve the targets set in Article 3(1) and (2) of that directive (see, to that effect, judgment of 3 March 2021, *Promociones Oliva Park*, C-220/19, EU:C:2021:163, paragraph 68 and the case-law cited). In particular, in the context of that discretion, Member States may chose support schemes based on the obligation to buy green electricity or green certificates. Points (k) and (l) of the second paragraph of Article 2 of that directive define the concept of 'support scheme' with reference specifically to national renewable energy obligation support schemes, including those using green certificates.

54 Directive 2009/28 does not preclude a support scheme exclusively favouring national production of green electricity either. Indeed, having regard to recitals 25, 52 and 56 and Articles 2, 3 and 15 of that directive, the Court has already held that the EU legislature did not intend to require Member States that opted for a support scheme using green certificates to extend that scheme to cover green electricity produced on the territory of another Member State (see, to that effect, judgment of 1 July 2014, *Ålands Vindkraft*, C-573/12, EU:C:2014:2037, paragraphs 49 to 53).

55 In the present case, for the same reasons as those set out in paragraph 47 above, the measure at issue in the main proceedings seems to contribute to the attainment of the objective pursued by Directive 2009/28 and appears in principle appropriate to encourage greater consumption of green electricity.

56 However, where Member States adopt measures by which they implement EU law, they are required to respect the general principles of EU law, which include the principle of proportionality (see, to that effect, judgment of 11 July 2019, *Agrenergy and Fusignano Due*, C-180/18, C-286/18 and C-287/18, EU:C:2019:605, paragraph 28). It is therefore for the referring court to assess the compatibility of the measure at issue in the main proceedings with that principle while taking into account the assessments, set out in paragraphs 110 to 122 of the present judgment, regarding compliance with the principle of proportionality in the context of the interpretation of Articles 34 and 36 TFEU.

57 Accordingly, subject to that assessment by the referring court, Directive 2009/28 must be interpreted as not precluding a measure such as the one at issue in the main proceedings.

58 Moreover, since, as is apparent from paragraphs 46 and 52 above, neither Directive 2001/77 nor Directive 2009/28 exhaustively harmonise the field which they govern, it is necessary to examine the scope of the primary law invoked by the referring court (see, to that effect, judgment of 1 July 2014, *Ålands Vindkraft*, C-573/12, EU:C:2014:2037, paragraph 57 and the case-law cited).

State aid rules

59 As regards the provisions of primary law invoked by the referring court, it is important to assess, in the first place, whether the measure at issue in the main proceedings may come within the scope of Articles 107 and 108 TFEU.

60 Under the system established by those provisions for the supervision of State aid, both the national courts or tribunals and the Commission have jurisdiction to find that there is an aid scheme or aid measure within the meaning of Article 107(1) TFEU. Since the Court has jurisdiction to give the national courts or tribunals full guidance on the interpretation of EU law in order to enable them to determine the issue of compatibility of a national scheme or measure with that law for the purposes of deciding the cases before them, it may provide them with guidance on interpretation in order to enable them to determine whether a national scheme or measure may be classified as 'State aid' under EU law. However, the assessment of the compatibility of that scheme or measure with the internal market falls within the exclusive competence of the Commission, subject to review by the Court (see, to that effect, judgment of 27 January 2022, *Fondul Proprietatea*, C-179/20, EU:C:2022:58, paragraphs 83 and 84 and the case-law cited).

61 It follows that, where a national court or tribunal finds that there is a State aid scheme, it does not have jurisdiction to assess whether the arrangements of that scheme comply with the provisions of the FEU Treaty which have direct effect, other than those relating to State aid, if those arrangements are indissolubly linked to the object of the aid (see, to that effect, judgment of 2 May 2019, *A-Fonds*, C-598/17, EU:C:2019:352, paragraphs 46 to 49 and the case-law cited).

62 As regards the possible classification by the referring court of the measure at issue in the main proceedings as 'State aid', within the meaning of Article 107(1) TFEU, it follows from the settled case-law of the Court that such a classification requires all of the following conditions to be

fulfilled. First, there must be an intervention by the State or through State resources. Second, that intervention must be liable to affect trade between Member States. Third, it must confer a selective advantage on the beneficiary. Fourth, it must distort or threaten to distort competition (judgment of 27 January 2022, *Fondul Proprietatea*, C-179/20, EU:C:2022:58, paragraph 86 and the case-law cited).

63 Before providing the referring court with guidance on the interpretation of each of those four conditions, it is important to note that the scheme at issue in the main proceedings, as described in paragraph 37 above, is, in principle, liable to confer two economic advantages on Italian producers of green electricity, namely the advantage of being able to sell their electricity without having to buy green electricity or green certificates, and the advantage of being able to sell the green certificates that they received free of charge in proportion to the green electricity that they produced to producers or importers of electricity produced from non-renewable sources.

The effect on trade between Member States and on competition

64 In accordance with the Court's settled case-law, for the purpose of categorising a national measure as 'State aid', it is not necessary to establish that the aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition (judgment of 27 January 2022, *Fondul Proprietatea*, C-179/20, EU:C:2022:58, paragraph 100 and the case-law cited).

65 In the present case, the importers and producers of electricity operate on a market which, following its liberalisation, is open to competition. The grant of the advantages referred to in paragraph 63 above to national producers of green electricity is therefore liable to affect competition between those national producers and importers of electricity that have not obtained exemption from the obligation to purchase green electricity or green certificates. Moreover, since that purchase obligation is imposed on importers of electricity that have not obtained exemption, it is liable to affect trade between Member States.

66 Therefore, a measure such as that at issue in the main proceedings is liable to affect trade between Member States and to distort competition.

Whether there is an intervention by the State or through State resources

67 It is apparent from settled case-law that, in order for it to be possible to categorise advantages as 'State aid' within the meaning of Article 107(1) TFEU, they must, first, be granted directly or indirectly through State resources and, second, be attributable to the State (see, to that effect, judgment of 12 January 2023, *DOBELES HES*, C-702/20 and C-17/21, EU:C:2023:1, paragraph 32 and the case-law cited).

68 In order to assess, in the first place, whether a measure may be attributed to the State, it is necessary to examine whether the public authorities were involved, in one way or another, in the adoption of that measure (judgment of 21 October 2020, *Eco TLC*, C-556/19, EU:C:2020:844, paragraph 23 and the case-law cited).

69 In the present case, both the measure at issue in the main proceedings and the support scheme to which it belongs were introduced by legislative texts, namely Legislative Decree No 79/1999 and Legislative Decree No 387/2003. That measure and that scheme must therefore be regarded as attributable to the State, within the meaning of the case-law cited in the previous paragraph.

70 In the second place, in order to determine whether the aid was granted directly or indirectly through State resources, it is important to bear in mind that the distinction made in Article 107(1) TFEU between aid granted 'by a Member State' and aid granted 'through State resources' does not mean that all advantages granted by a Member State, whether financed through State resources or not, constitute aid. That distinction simply seeks to prevent the rules of the FEU Treaty relating to State aid being circumvented merely through the creation of autonomous institutions charged with allocating State aid (see, to that effect, judgment of 28 March 2019, *Germany* v *Commission*, C-405/16 P, EU:C:2019:268, paragraphs 53 and 54 and the case-law cited).

71 Accordingly, the resources covered by the prohibition laid down in Article 107(1) TFEU include 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 (see, to that effect, judgment of 28 March 2019, *Germany* v *Commission*, C-405/16 P, EU:C:2019:268, paragraph 57 and the case-law cited).

72 They include, first, those which are directly under the control of the State, that is to say, all the means which are assets of the State and, second, those which are indirectly so, inter alia because they form part of the assets of public or private bodies established or designated by the State to administer aid (see, to that effect, judgment of 15 May 2019, *Achema and Others*, C-706/17, EU:C:2019:407, paragraph 50 and the case-law cited). Thus, resources of public undertakings may be regarded as State resources where the State is capable, by exercising its dominant influence over such undertakings, of directing the use of their resources in order to finance advantages to the benefit of other undertakings (judgment of 13 September 2017, *ENEA*, C-329/15, EU:C:2017:671, paragraph 31 and the case-law cited). Similarly, where entities distinct from the public authority manage and apportion, in accordance with State legislation, funds financed through compulsory charges imposed by that legislation, those funds may be regarded as State resources where such entities are appointed by the State to manage those resources and are not merely bound by an obligation to purchase by means of their own resources (see, to that effect, judgments of 28 March 2019, *Germany* v *Commission*, C-405/16 P, EU:C:2019:268, paragraphs 58 and 59, and of 15 May 2019, *Achema and Others*, C-706/17, EU:C:2019:407, paragraphs 54 and 55 and the case-law cited).

73 It should however be noted that the requirement that the aid be granted directly or indirectly through State resources implies that the granting of the aid must affect those resources. There must therefore be a sufficiently direct link between, on the one hand, the advantage conferred by that aid and, on the other hand, a reduction of those resources, or a sufficiently concrete economic risk of burdens being placed on those resources (see, to that effect, judgment of 28 March 2019, *Germany* v *Commission*, C-405/16 P, EU:C:2019:268, paragraph 60 and the case-law cited). The Court accordingly held that, in a case where the allocation of State resources in respect of a measure requiring private electricity supply undertakings to purchase electricity produced from renewable energy sources at fixed minimum prices consisted solely in a reduction in the State's tax revenue on account of the negative repercussions of that obligation on the economic results of the undertakings subject to it, such a link was lacking (see, to that effect, judgment of 13 March 2001, *PreussenElektra*, C-379/98, EU:C:2001:160, paragraph 62).

74 It is in the light of the foregoing case-law that the referring court must assess, in particular, first, whether the free of charge provision of green certificates to national producers of green electricity is liable to mobilise State resources. In that regard, it must be noted, first of all, that that provision does not appear to entail a transfer of resources controlled by the State to Italian producers of green electricity. Indeed, it is not apparent from the documents before the Court that that provision entails any economic exploitation on the part of bodies that can be assimilated to the State. Those green certificates appear to have an economic value only because of the legal obligation on certain producers and importers to buy them. However, when those producers and importers comply with that obligation by purchasing them from producers of green electricity, the sums received by the latter do not appear to be under the control of the State within the meaning of the case-law referred to in paragraphs 71 and 72 above, since the financial redistribution at issue in the main proceedings appears to take place between two private entities, without any further intervention by the State. The advantage represented by the awarding of these certificates to national green electricity producers thus appears to be financed solely by resources from the producers or importers obliged to purchase those certificates, without there being any State control over those resources.

75 Second, it will be for the referring court to assess whether the mechanism provided for by the scheme at issue in the main proceedings in order to ensure that green certificates have a certain value involves State resources. In that regard, it appears that that scheme does not only require conventional electricity producers and importers to purchase those certificates when they do not produce or purchase green electricity in order to meet the quota of green electricity that they have to feed into the national grid. It also appears to follow from Article 11(3) of Legislative Decree No 79/1999 and from the information provided by the referring court and by the parties to the main proceedings that that scheme ensures, for the benefit of Italian producers of green electricity, that those green certificates retain a minimum economic value. Indeed, that provision seems to require GSE, an entity controlled by the Italian Ministry of Economic Affairs, to buy green certificates where they exceed the number required by the operators obliged to purchase them. This possible intervention by GSE thus prevents an oversupply of green certificates from undermining support for national green electricity producers.

76 It is apparent from the documents before the Court that the resources available to GSE for the purchase of surplus green certificates derive from the revenue obtained under the A3 tariff component, a pecuniary charge imposed by Italian legislation on Italian electricity consumers that is paid into GSE's accounts in order to enable it to make that purchase. Accordingly, a reduction of the resources under the control of the State as a result of the purchase by GSE of surplus green certificates appears to be sufficiently directly linked to the advantage constituted by the free of charge award of those green certificates to national producers of green electricity so that they can resell them on the market.

77 As a result, and subject to verification by the referring court, the purchase of surplus green certificates appears to be carried out by an entity that can be assimilated to the State, on the basis of the mandate conferred on it by the Italian legislation, using the revenue from a tariff component paid by consumers for that purpose.

78 On that basis and in so far as, as Fallimento Esperia alleges in its written observations, such purchases by GSE actually took place in 2010, it must be held that the support scheme of which the measure at issue in the main proceedings forms part involves a transfer of State resources within the meaning of Article 107(1) TFEU.

79 As a result, that measure appears to be imputable to the Italian State and the advantages it confers appear to be granted indirectly through State resources.

The selectivity of the advantage

80 As regards the condition relating to the grant of a selective advantage, it follows from the settled case-law of the Court that the assessment of that condition requires a determination as to whether, under a particular legal regime, a national measure is such as to favour 'certain undertakings or the production of certain goods' over others which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation and which are accordingly subject to different treatment that can, in essence, be classified as discriminatory (judgments of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraph 41, and of 15 May 2019, *Achema and Others*, C-706/17, EU:C:2019:407, paragraph 84 and the case-law cited).

81 Since the examination of a selective advantage must be carried out within the context of 'a particular legal regime', that examination in principle requires prior definition of the reference framework within which the measure concerned fits, it being noted that that method is not limited solely to the examination of tax measures (see, to that effect, judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraphs 54 and 55).

82 The reference framework stems from the national law of the Member State concerned. It must consist of legal rules in a domain which has not been the subject of exhaustive harmonisation at the level of EU law and those rules must pursue an objective compatible with EU law (see, to that effect, judgment of 16 March 2021, *Commission* v *Hungary*, C-596/19 P, EU:C:2021:202, paragraph 44).

83 In addition, that reference framework must not itself be incompatible with EU law on State aid, which aims to ensure the proper functioning of the European Union's internal market by guaranteeing that measures taken by Member States in support of undertakings do not distort competition on that market (see, to that effect, judgment of 6 March 2018, *Commission* v *FIH Holding and FIH Erhvervsbank*, C-579/16 P, EU:C:2018:159, paragraph 45 and the case-law cited).

84 The determination of that reference framework must follow from an objective examination of the content, the structure and the specific effects of the applicable rules under the national law of the Member State concerned (judgment of 8 November 2022, *Fiat Chrysler Finance Europe* v *Commission*, C-885/19 P and C-898/19 P, EU:C:2022:859, paragraph 72 and the case-law cited). Following that examination, the reference framework identified must have its own legal logic and specific objective and cannot form part of a consistent body of rules external to that measure. Where a measure is clearly severable from a general system, it cannot be ruled out that the reference framework to be taken into account may be more limited, or even that it may equate to the measure itself, where the latter appears as a rule having its own legal logic and it is not possible to identify a consistent body of rules external to that measure (see, to that effect, judgment of 6 October 2021, *Banco Santander and Others* v *Commission*, C-53/19 P and C-65/19 P, EU:C:2021:795, paragraph 63).

85 The determination of that reference framework is carried out, in principle, without regard to the objective pursued by the national authority when adopting the measure under examination as regards the applicable State aid rules. In addition, the regulatory technique used by the national

legislature for that determination is not decisive. Lastly, that determination cannot result in a reference framework consisting of some provisions that have been artificially taken from a broader legislative framework (see, to that effect, judgment of 6 October 2021, *Banco Santander and Others* v *Commission*, C-53/19 P and C-65/19 P, EU:C:2021:795, paragraphs 62, 65 and 94 and the case-law cited).

86 It is also settled case-law that the concept of 'State aid' does not refer to State measures which differentiate between undertakings and which are, therefore, prima facie selective, where that differentiation arises from the nature or the overall structure of the system of which they form part (judgments of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraph 41, and of 26 April 2018, *ANGED*, C-234/16 and C-235/16, EU:C:2018:281, paragraph 35 and the case-law cited).

87 However, the Court has also held on numerous occasions that the objective pursued by State measures is not sufficient to exclude those measures outright from classification as 'aid' for the purposes of Article 107 TFEU (judgment of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraph 84). In particular it held that, even if environmental protection constitutes one of the essential objectives of the European Union, the need to take that objective into account does not justify the exclusion of selective measures from the scope of Article 107(1) TFEU (judgment of 8 September 2011, *Commission* v *Netherlands*, C-279/08 P, EU:C:2011:551, paragraph 75). Moreover, it ruled out the possibility of that derogation applying to a measure differentiating between undertakings which, despite being based on an objective criterion, is inconsistent with the system of which it forms part and, accordingly, cannot be justified by the nature and general structure of the latter (see, to that effect, judgment of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, C-143/99, EU:C:2001:598, paragraphs 48 to 55).

88 In the present case, as is apparent from the interpretation of Directives 2001/77 and 2009/28 set out in paragraphs 41 to 58 above, the rules laid down in Legislative Decrees No 79/1999 and No 387/2003 concern an area which has not been harmonised at the level of EU law and pursue the legitimate objective as regards that law of supporting the production and use of renewable energy.

89 However, in order to constitute a reference framework, the referring court must assess whether those rules are capable of constituting a consistent and autonomous body of rules. In that regard, it is necessary to note that those rules concern the production and placing on the market of green electricity in order to promote the consumption of energy from renewable sources. It must therefore be determined whether those rules can be linked to all those governing the production, distribution and marketing of electricity, the objective of which is to create and ensure the proper functioning of a competitive electricity market.

90 If the referring court were to conclude that the reference framework in question in the main proceedings is the general system regulating the production, marketing and consumption of electricity in Italy, it would have to be held that the measure at issue in the main proceedings confers in principle a selective advantage on national producers of green electricity. Indeed, with regard to the objective pursued by that regulatory framework, namely to create and ensure the functioning of a competitive electricity market, those producers are in a legal and factual situation comparable to that of importers of electricity that have not demonstrated that the

electricity they import is green, since each of those operators offers electricity for sale on the Italian electricity market. They thus contribute to achieving the objective of having an electricity market in Italy governed by the law of supply and demand.

91 However, as is apparent from paragraph 86 above, prima facie selective measures do not constitute State aid where the differentiation between undertakings introduced by State measures results from the nature or the overall structure of the system of which they form part.

92 In the present case, if it appears that, in the absence of the support scheme at issue in the main proceedings, there may not be any supply of green electricity on the Italian electricity market, the differentiation between producers of green electricity and producers and importers of electricity from non-renewable sources may be justified by the nature and general scheme of the general system regulating the production, marketing and consumption of electricity in Italy. Indeed, the proper functioning of a competitive electricity market in Italy pursued by that general system may require that there be a competitive supply of green electricity on that market. The adequacy of the functioning of the market may indeed be defined by the Italian legislature taking into account the need to ensure protection of the environment.

93 Yet, if the higher production cost of green electricity compared with that of electricity from non-renewable sources hinders the competitive supply of that commodity on the market, the difference in treatment between producers of green electricity and producers and importers of electricity produced from non-renewable sources created by the scheme at issue in the main proceedings could be justified by the need to overcome that market failure. Such justification is possible, however, only if the support conferred by that scheme is strictly limited to what is necessary to overcome that market failure and is allocated in a manner that is entirely consistent with the general system at issue in the main proceedings.

94 Moreover, if the measure at issue in the main proceedings could not be justified in the light of the nature and general structure of the reference system of which it forms part, the failure to notify that measure and its implementation before the Commission took a decision as to its compatibility would constitute an infringement of Article 108 TFEU. In such a case it would be for the referring court to draw all the necessary inferences from the infringement of that article and remedy the implementation of the aid (see, to that effect, judgment of 19 December 2019, *Arriva Italia and Others*, C-385/18, EU:C:2019:1121, paragraph 84 and the case-law cited). Moreover, the unlawful nature of the aid scheme at issue would render unlawful the penalty prescribed to ensure the implementation of that scheme (see, to that effect, order of 11 January 2024, *Prezes Urzędu Regulacji Energetyki*, C-220/23, EU:C:2024:34, paragraphs 31 and 32 and the case-law cited).

95 It follows that, if the referring court concludes that the advantage conferred on producers of green electricity by the measure at issue in the main proceedings is justified by the nature and general scheme of the reference system of which it forms part, Articles 107 and 108 TFEU must be interpreted as not precluding such a measure.

Rules relating to the free movement of goods

96 As is apparent from paragraph 61 above, if the referring court reaches the conclusion that the measure at issue in the main proceedings does not fall within the scope of a State aid scheme or that it is severable from the other provisions of that scheme, it will still be for that court to assess the compatibility of that measure with the EU rules on customs union and the free movement of goods.

97 In that regard, it will be for that court to assess, first of all, whether that measure is capable of infringing Articles 28, 30 and 110 TFEU and, next, whether it may be contrary to Article 34 TFEU. The scope of Article 34 TFEU does not extend to the obstacles to trade covered by other specific provisions and obstacles of a fiscal nature or having an effect equivalent to customs duties, which are covered by Articles 28, 30 and 110 TFEU, do not come within the prohibition laid down in Article 34 TFEU (see, to that effect, judgment of 18 January 2007, *Brzeziński*, C-313/05, EU:C:2007:33, paragraph 50 and the case-law cited).

The prohibition on imposing customs duties and charges having equivalent effect

98 Articles 28 and 30 TFEU prohibit the imposition of customs duties on imports and exports and charges having equivalent effect between Member States. A customs duty within the meaning of those provisions is a charge which a Member State levies on goods when they cross its border. In addition, pursuant the Court's settled 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 border, and which is not a customs duty in the strict sense, constitutes a charge having equivalent effect to a customs duty (judgment of 6 December 2018, *FENS*, C-305/17, EU:C:2018:986, paragraph 29 and the case-law cited).

99 A measure such as that at issue in the main proceedings, requiring operators importing electricity to purchase green certificates, cannot be classified as a customs duty because it is neither a charge levied by the national authorities nor a levy collected when the electricity produced abroad crosses the national border. Nor does such an obligation appear to be a charge having equivalent effect to a customs duty since it does not appear to be imposed on electricity by reason of the fact that it crosses a national border.

100 It follows that Articles 28 and 30 TFEU do not preclude a measure such as that at issue in the main proceedings.

The prohibition on adopting discriminatory internal taxation

101 As regards the prohibition on Member States imposing discriminatory internal taxation laid down in Article 110 TFEU, 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 come within the scope of that article (judgment of 6 December 2018, *FENS*, C-305/17, EU:C:2018:986, paragraph 29 and the case-law cited).

102 In the present case, the obligation to purchase green certificates or green electricity imposed by the measure at issue in the main proceedings does not appear to be a pecuniary charge resulting from a general system of internal taxation. Indeed, subject to verification by the referring court, that obligation is not of a fiscal or parafiscal nature and is not therefore subject to the prohibition laid down in Article 110 TFEU.

103 Article 110 TFEU must therefore be interpreted as not precluding a measure such as that at issue in the main proceedings.

The prohibition on adopting quantitative restrictions on imports

104 The free movement of goods between Member States is a fundamental principle of the FEU Treaty which finds its expression in Article 34 TFEU (judgment of 1 July 2014, *Ålands Vindkraft*, C-573/12, EU:C:2014:2037, paragraph 65 and the case-law cited), which prohibits Member States from adopting between themselves quantitative restrictions on imports and any measures having equivalent effect.

105 It is settled case-law that that provision covers any national measure capable of hindering, directly or indirectly, actually or potentially, trade within the European Union (judgment of 1 July 2014, *Ålands Vindkraft*, C-573/12, EU:C:2014:2037, paragraph 66 and the case-law cited).

106 In the present case, the measure at issue in the main proceedings is capable of creating an obstacle to imports of electricity into Italy in two ways. First, it creates an obstacle to imports by imposing on importers wishing to benefit from an exemption the obligation to apply for it and to submit guarantees of origin to that end. In that regard, it should be borne in mind that a national measure does not fall outside the scope of the prohibition laid down in Article 34 TFEU merely because the hindrance to imports which it creates is slight and because it is possible for imported products to be marketed in other ways (judgment of 29 September 2016, *Essent Belgium*, C-492/14, EU:C:2016:732, paragraph 99 and the case-law cited). Second, it creates an obstacle to imports by requiring importers that do not apply for an exemption to purchase green certificates or green electricity on pain of having a penalty imposed on them.

107 However, national legislation or a national practice that constitutes a measure having equivalent effect to quantitative restrictions may be justified on one of the public interest grounds listed in Article 36 TFEU or, according to the settled case-law of the Court, by overriding requirements. In either case, the national provision must comply with the principle of proportionality, according to which the measure must be appropriate for ensuring attainment of the objective pursued and must not go beyond what is necessary for that purpose (see, to that effect, judgments of 1 July 2014, *Ålands Vindkraft*, C-573/12, EU:C:2014:2037, paragraph 76, and of 17 December 2020, *Onofrei*, C-218/19, EU:C:2020:1034, paragraph 32 and the case-law cited).

108 In that regard, the Court has already held that national measures that are capable of hindering trade within the European Union may be justified by overriding requirements relating to protection of the environment and notably by the concern to promote an increase in the use of renewable energy sources for the production of electricity, which is useful for such protection and which is also designed to protect the health and life of humans, animals and plants, which are among the public interest grounds listed in Article 36 TFEU (see, to that effect, judgments of 29 September 2016, *Essent Belgium*, C-492/14, EU:C:2016:732, paragraph 101, and of 4 October 2018, *L.E.G.O.*, C-242/17, EU:C:2018:804, paragraphs 64 and 65 and the case-law cited).

109 In the present case, both the obligation on importers to purchase green certificates or green electricity in order to be able to import their electricity and the obligation to provide guarantees of origin in order to benefit from an exemption from that purchase obligation when imported electricity is green can be justified by the promotion of the production of electricity from renewable energy sources. The fact that the support scheme at issue in the main proceedings is designed to favour directly the production of green electricity, rather than solely its consumption, can be explained, in particular, by the fact that the green nature of the electricity relates only to its method of production and that, accordingly, it is primarily at the production stage that the environmental objectives in terms of the reduction of greenhouse gases can actually be pursued (see, by analogy, judgment of 29 September 2016, *Essent Belgium*, C-492/14, EU:C:2016:732, paragraph 105 and the case-law cited).

110 It remains, however, for the referring court to determine whether those restrictions comply with the principle of proportionality.

111 As regards the obligation to apply for an exemption and to submit guarantees of origin to that end, it must be noted that once green electricity has been allowed into the transmission or distribution system, it is difficult to determine its origin and in particular to identify the source of energy from which it was produced (judgment of 20 April 2023, *EEW Energy from Waste*, C-580/21, EU:C:2023:304, paragraph 52 and the case-law cited). In view of that difficulty, Article 5 of Directive 2001/77 and then Article 15 of Directive 2009/28 required Member States to establish and supervise a system of guarantees of origin so that producers of electricity using renewable energy sources could establish that the electricity they sold was produced from renewable energy sources.

112 The obligation to apply for an exemption by submitting green certificates appears to be appropriate for ensuring that imported electricity is indeed green and therefore contributes to the use of renewable energy sources with a view to protecting the environment and the health and life of humans and animals and preserving plants. In addition, it seems necessary since, given the fungible nature of green electricity, it would not be possible at a later stage of distribution or consumption to determine the energy source from which it was produced and guarantees of origin form part of a uniform mechanism for establishing that the electricity has been produced from renewable sources.

113 Therefore, the obligation on importers of green electricity to provide guarantees of origin when importing such electricity in order to be exempt from the obligation to purchase green certificates or green electricity does not contravene Article 34 TFEU.

114 As regards the obligation on importers of electricity to purchase green certificates or green electricity where they do not provide guarantees of origin for the electricity that they import, it should be noted that the Court has already ruled, with regard to national support schemes for the production of green energy having recourse to the ‘green certificate’ mechanism, that the obligation on electricity suppliers to obtain a quota of such certificates from green electricity producers was designed in particular to guarantee those producers a demand for the certificates they have been awarded and in that way to facilitate the sale of the green energy that they produce at a price higher than the market price for conventional energy (judgment of 29 September 2016, *Essent Belgium*, C-492/14, EU:C:2016:732, paragraph 109).

115 The Court also pointed out in that regard that the effect of that scheme in terms of offering an incentive for electricity producers in general to increase their production of green electricity did not appear to be open to doubt; nor, consequently, did it appear possible to call into question the ability of that scheme to attain the legitimate objective pursued to promote the use of renewable energy sources with a view to protecting the environment and the health and life of humans and animals and preserving plants. Such support schemes for green energy, the production costs of which seem to be still quite high as compared with the costs of electricity produced from non-renewable energy sources, are inherently designed in particular to foster, from a long-term perspective, investment in new installations, by giving producers certain guarantees about the future marketing of their green electricity (judgment of 29 September 2016, *Essent Belgium*, C-492/14, EU:C:2016:732, paragraphs 109 and 110 and the case-law cited).

116 Accordingly, it has already been held by the Court that a Member State does not go beyond the bounds of its discretion in pursuing the legitimate object of increasing the production of green energy by adopting a national support scheme that uses, as the one at issue in the main proceedings does, green certificates in order 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 (see, to that effect, judgment of 1 July 2014, *Ålands Vindkraft*, C-573/12, EU:C:2014:2037, paragraphs 109 to 110).

117 However the proper functioning of such a scheme requires that mechanisms be established which ensure the creation of a genuine market for green 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 (judgment of 1 July 2014, *Ålands Vindkraft*, C-573/12, EU:C:2014:2037, paragraph 114).

118 It follows from the foregoing that the measure at issue in the main proceedings, in so far as it requires importers of electricity to purchase green certificates or green electricity, appears appropriate for the purpose of promoting the use of renewable energy sources with a view to protecting the environment and the health and life of humans and animals and preserving plants. Furthermore, subject to verification by the national court, there appears to be a genuine market for green certificates on which importers can obtain supplies and the effectiveness of which appears to be guaranteed by the intervention of GSE. It appears from Article 11(3) of Legislative Decree No 79/1999 that GSE is under an obligation to place green certificates on the market in the event of a shortage or to purchase them on the market in the event of oversupply, which guarantees both producers of green electricity and operators required to purchase them a green certificate market.

119 Moreover, the measure at issue in the main proceedings appears to be necessary to the scheme to which it relates. Indeed, if the importers of electricity that is not demonstrated to be green were to escape the obligation to purchase green certificates or green electricity, the effectiveness of the system of support for national production and the consumption of green electricity would be undermined. In that regard, it is important to bear in mind that, as is apparent from paragraphs 41 to 58 above, Member States are required, through their support mechanisms, to achieve the national objectives laid down by Directives 2001/77 and 2009/28 and that EU law has not harmonised national support schemes for green electricity, with the result that Member States are, in principle, permitted to limit the benefit of such schemes to the production of green electricity on their territory (see, to that effect, judgment of 29 September 2016, *Essent Belgium*, C-492/14, EU:C:2016:732, paragraphs 106 and 107 and the case-law cited).

120 In the light of the foregoing, the support scheme of which the measure at issue in the main proceedings forms part appears appropriate for ensuring, in a consistent and systematic manner, the promotion of the use of renewable energy sources, a use which, in turn, contributes to the protection of the environment, health and the life of humans, animals and plants. It does not appear, in principle, to go beyond what is necessary to attain those objectives.

121 Lastly, in so far as it imposes a penalty on importers of electricity that do not submit guarantees of origin and do not purchase green electricity or green certificates in proportion to their imports, the legislation at issue in the main proceedings appears appropriate, by virtue of its deterrent effect, to promote the use of renewable energy sources. Furthermore, it may be regarded as necessary in so far as that penalty is required to ensure the effectiveness of the green certificate system put in place. However, the detailed rules for determining that penalty and the nature of that penalty cannot go beyond what is required in order to ensure that effectiveness. It will be for the referring court to assess those elements.

122 As a result, in so far as the obligation on importers of electricity that do not submit guarantees of origin to purchase green certificates is required in order to guarantee the effectiveness of the legislation at issue in the main proceedings and in so far as it is apparent that there is indeed a market for green certificates, that regulation cannot be considered as going beyond what is necessary to achieve the objective of increasing the production of green electricity.

123 Accordingly, subject to the verifications to be made by the referring court, Article 34 TFEU must be interpreted as not precluding a measure such as the one at issue in the main proceedings.

124 In the light of all the foregoing considerations, the answer to the question referred is as follows:

– Articles 28, 30 and 110 TFEU must be interpreted as not precluding a national measure that, first, requires importers of electricity from another Member State that do not demonstrate that the imported electricity is produced from renewable sources by submitting guarantees of origin, to buy from national producers either green certificates or green electricity in proportion to the amount of electricity that they import and, second, provides for penalties to be imposed in the event that that obligation is not complied with, whereas national producers of green energy are not bound by such a purchase obligation;

– Article 34 TFEU and Directives 2001/77 and 2009/28 must be interpreted as not precluding that national measure if it is established that it does not go beyond what is necessary to achieve the objective of increasing the production of green electricity;

– Articles 107 and 108 TFEU must be interpreted as not precluding that national measure in so far as the difference in treatment between national producers of green electricity and importers of electricity that do not submit guarantees of origin is justified by the nature and general scheme of the reference system of which it forms part.

Costs

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

On those grounds, the Court (Second Chamber) hereby rules:

1. **Articles 28, 30 and 110 TFEU**

   must be interpreted as not precluding a national measure that, first, requires importers of electricity from another Member State that do not demonstrate that the imported electricity is produced from renewable sources by submitting guarantees of origin, to buy from national producers either certificates attesting to renewable origin or electricity produced from renewable sources in proportion to the amount of electricity that they import and, second, provides for penalties to be imposed in the event that that obligation is not complied with, whereas national producers of energy from renewable sources are not bound by such a purchase obligation.

2. **Article 34 TFEU and Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market, and 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 and 2003/30/EC,**

   must be interpreted as not precluding that national measure if it is established that it does not go beyond what is necessary to achieve the objective of increasing the production of electricity from renewable sources.

3. **Articles 107 and 108 TFEU**

   must be interpreted as not precluding that national measure in so far as the difference in treatment between national producers of electricity from renewable sources and importers of electricity that do not submit guarantees of origin is justified by the nature and general scheme of the reference system of which it forms part.

[Signatures]