



## Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

26 September 2013\*

(Directive 2004/8/EC — Scope — Cogeneration and high efficiency cogeneration — Article 7 — Regional support scheme providing for the grant of ‘green certificates’ to cogeneration plants — Grant of a larger number of green certificates to cogeneration plants processing principally forms of biomass other than wood or wood waste — Principle of equality and non-discrimination — Articles 20 and 21 of the Charter of Fundamental Rights of the European Union)

In Case C-195/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour constitutionnelle (Belgium), made by decision of 19 April 2012, received at the Court on 26 April 2012, in the proceedings

**Industrie du bois de Vielsalm & Cie (IBV) SA**

v

**Région wallonne,**

THE COURT (Fourth Chamber),

composed of: L. Bay Larsen, President of the Chamber, J. Malenovský, U. Lõhmus, M. Safjan and A. Prechal (Rapporteur), Judges,

Advocate General: Y. Bot,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 13 March 2013,

after considering the observations submitted on behalf of:

- Industrie du bois de Vielsalm & Cie (IBV) SA, by E. Lemmens and E. Kiehl, avocats,
- the Belgian Government, by M. Jacobs and C. Pochet, acting as Agents, and L. Depré, avocat,
- the Polish Government, by M. Szpunar and B. Majczyna, acting as Agents,
- the European Parliament, by J. Rodrigues and A. Tamás, acting as Agents,
- the European Commission, by O. Beynet and K. Herrmann, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 May 2013,

\* Language of the case: French.

gives the following

### Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 7 of Directive 2004/8/EC of the European Parliament and of the Council of 11 February 2004 on the promotion of cogeneration based on a useful heat demand in the internal energy market and amending Directive 92/42/EEC (OJ 2004 L 52, p. 50), read in conjunction with Articles 2 and 4 of 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) and with Article 22 of Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ 2009 L 140, p. 16).
- 2 The request has been made in proceedings between Industrie du bois de Vielsalm & Cie SA ('IBV') and Région wallonne (Walloon Region) concerning the refusal by Région wallonne to allow it to benefit from an enhanced support scheme providing for the grant of additional 'green certificates'.

### Legal context

#### *European Union law*

#### Directive 2004/8

- 3 Directive 2004/8 was adopted as part of the European Union's environment policy on the basis of Article 175(1) EC.
- 4 Recitals 1, 5, 24, 26, 31 and 32 in the preamble to Directive 2004/8 state:
  - (1) The potential for use of cogeneration as a measure to save energy is underused in the Community at present. Promotion of high-efficiency cogeneration based on a useful heat demand is a Community priority given the potential benefits of cogeneration with regard to saving primary energy, avoiding network losses and reducing emissions, in particular of greenhouse gases. In addition, efficient use of energy by cogeneration can also contribute positively to the security of energy supply and to the competitive situation of the European Union and its Member States. It is therefore necessary to take measures to ensure that the potential is better exploited within the framework of the internal energy market.
  - ...
  - (5) The increased use of cogeneration geared towards making primary energy savings could constitute an important part of the package of measures needed to comply with the Kyoto Protocol to the United Nations Framework Convention on Climate Change ["the Kyoto Protocol"] ...
  - ...
  - (24) Public support should be consistent with the provisions of the Community guidelines on State aid for environmental protection [OJ 2001 C 37, p. 3, "the Community guidelines"], including as regards the non-cumulation of aid. These guidelines currently allow certain types of public support if it can be shown that the support measures are beneficial in terms of protection of the environment because the conversion efficiency is particularly high, because the measures will

allow energy consumption to be reduced or because the production process will be less damaging to the environment. Such support will in some cases be necessary to further exploit the potential for cogeneration, in particular to take account of the need to internalise external costs.

...

- (26) Member States operate different mechanisms of support for cogeneration at the national level, including investment aid, tax exemptions or reductions, green certificates 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 harmonised Community framework is put into operation, in order to maintain investor confidence. The Commission intends to monitor the situation and report on experiences gained with the application of national support schemes.

...

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

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

- 5 As stated in Article 1 of Directive 2004/8, the purpose of the directive is 'to increase energy efficiency and improve security of supply by creating a framework for promotion and development of high efficiency cogeneration of heat and power based on useful heat demand and primary energy savings in the internal energy market, taking into account the specific national circumstances especially concerning climatic and economic conditions'.

- 6 Article 2 of Directive 2004/8, 'Scope', provides that the directive is to 'apply to cogeneration as defined in Article 3 and cogeneration technologies listed in Annex I'.

- 7 In accordance with Article 3 of Directive 2004/8:

'For the purpose of this Directive, the following definitions shall apply:

- (a) "cogeneration" shall mean the simultaneous generation in one process of thermal energy and electrical and/or mechanical energy;
- (b) "useful heat" shall mean heat produced in a cogeneration process to satisfy an economically justifiable demand for heat or cooling;

...

- (i) "high efficiency cogeneration" shall mean cogeneration meeting the criteria of Annex III;

...

- (l) "cogeneration unit" shall mean a unit that can operate in cogeneration mode;

...

In addition, the relevant definitions in Directive 2003/54/EC, and in Directive 2001/77/EC shall apply.’

8 Article 7 of Directive 2004/8, ‘Support schemes’, provides in paragraphs 1 and 2:

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

2. Without prejudice to Articles 87 [EC] and 88 [EC], the Commission shall evaluate the application of support mechanisms used in Member States according to which a producer of cogeneration receives, on the basis of regulations issued by public authorities, direct or indirect support, which could have the effect of restricting trade.

The Commission shall consider whether those mechanisms contribute to the pursuit of the objectives set out in Articles 6 [EC] and 174(1) [EC].’

9 Annex III to Directive 2004/8 provides inter alia:

‘(a) *High-efficiency cogeneration*

For the purpose of this Directive high-efficiency cogeneration shall fulfil the following criteria:

— cogeneration production from cogeneration units shall provide primary energy savings calculated according to point (b) of at least 10% compared with the references for separate production of heat and electricity,

...’.

Directive 2001/77

10 Directive 2001/77 was repealed by Directive 2009/28 with effect from 1 January 2012. However, Articles 2 and 4 were repealed with effect from 1 April 2010, in accordance with Article 26(1) of Directive 2009/28.

11 Directive 2001/77 was adopted on the basis of Article 175(1) EC.

12 Recitals 1, 2, 8, 14, 15 and 19 in the preamble to Directive 2001/77 stated:

‘(1) The potential for the exploitation of renewable energy sources is underused in the Community at present. The Community recognises the need to promote renewable energy sources as a priority measure given that their exploitation contributes to environmental protection and sustainable development. In addition this can also create local employment, have a positive impact on social cohesion, contribute to security of supply and make it possible to meet Kyoto targets more quickly. It is therefore necessary to ensure that this potential is better exploited within the framework of the internal electricity market.

(2) The promotion of electricity produced from renewable energy sources is a high Community priority ... for reasons of security and diversification of energy supply, of environmental protection and of social and economic cohesion. ...

...

(8) Where they use waste as an energy source, Member States must comply with current Community legislation on waste management. ... Support for renewable energy sources should be consistent with other Community objectives, in particular respect for the waste treatment hierarchy. ...

...

(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 ...

...

(19) When favouring the development of a market for renewable energy sources, it is necessary to take into account the positive impact on regional and local development opportunities, export prospects, social cohesion and employment opportunities, especially as concerns small and medium-sized undertakings as well as independent power producers.'

13 According to Article 1 of Directive 2001/77, the purpose of the directive was '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'.

14 Article 2 of Directive 2001/77 provided:

'For the purposes of this Directive, the following definitions shall apply:

(a) "*renewable energy sources*" shall mean renewable non-fossil energy sources (wind, solar, geothermal, wave, tidal, hydropower, biomass, landfill gas, sewage treatment plant gas and biogases);

(b) "*biomass*" shall mean the biodegradable fraction of products, waste and residues from agriculture (including vegetal and animal substances), forestry and related industries, as well as the biodegradable fraction of industrial and municipal waste;

...'

15 Article 3(1) of Directive 2001/77 provided:

'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.'

16 Article 4 of Directive 2001/77, 'Support schemes', provided:

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

2. The Commission shall, not later than 27 October 2005, present a well-documented report on experience gained with the application and coexistence of the different mechanisms referred to in paragraph 1. ... This report shall, if necessary, be accompanied by a proposal for a Community framework with regard to support schemes for electricity produced from renewable energy sources.

Any proposal for a framework should:

...

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

...'

Community Guidelines on State aid for environmental protection

17 With effect from 2 April 2008, the Community Guidelines on State aid for environmental protection (OJ 2008 C 82, p. 1, 'the Guidelines') replace, in accordance with point 202, the Community guidelines referred to in recital 24 in the preamble to Directive 2004/8.

18 In section 3.1.7 of the Guidelines, 'Aid for cogeneration', point 112 states in particular as follows:

'Environmental investment and operating aid for cogeneration will be considered compatible with the common market within the meaning of Article 87(3)(c) [EC], provided that the cogeneration unit satisfies the definition of high-efficiency cogeneration set out in point 70(11) ...'.

19 Point 70 of the Guidelines reads as follows:

'For the purpose of these Guidelines the following definitions shall apply:

...

(11) *high-efficiency cogeneration* means cogeneration meeting the criteria of Annex III to Directive 2004/8/EC ...'.

*Law of the Walloon Region*

20 Article 2(7), (9), (11) and (14) of the Decree of the Walloon Region of 12 April 2001 on the organisation of the regional electricity market (Décret de la Région wallonne relatif à l'organisation du marché régional de l'électricité, *Moniteur belge*, 1 May 2001, p. 14118), as amended by the Decree of 4 October 2007 (*Moniteur belge*, 26 October 2007, p. 55517), ('the 2001 Decree') contain the following definitions:

'(7) "high quality cogeneration": combined production of heat and electricity, in accordance with the customer's heat or cooling requirements, which produces energy savings compared with separate production of the same quantities of heat, electricity and, if appropriate, cooling in modern reference plants whose annual operating efficiency is defined and published annually by the Commission wallonne pour l'énergie (Walloon Energy Commission) (CWaPE);

...

(9) “renewable energy sources”: any source of energy other than fossil fuels and fissile materials, the consumption of which does not limit its future use, in particular water, wind, solar and geothermal energy and biomass;

...

(11) “green electricity”: electricity produced from renewable energy sources or high quality cogeneration, the production of which produces a minimum rate of saving of carbon dioxide of 10% compared with the carbon dioxide emissions, defined and published annually by the CWaPE, of classic production in modern reference plants as referred to in Article 2(7);

...

(14) “green certificate”: transferable certificate granted to producers of green electricity pursuant to Article 38 and intended, by means of the obligations imposed on suppliers and managers of networks, to support the development of plants producing green electricity’.

21 In Chapter X of the 2001 Decree, ‘Promotion of renewable energy sources and high quality cogeneration’, Article 37 provides:

‘To encourage the development of electricity production from renewable energy sources and/or high quality cogeneration, the Government shall introduce a system of green certificates.’

22 Article 38(2) and (3) of the 2001 Decree provides:

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

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

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

...’

23 Article 57 of the Decree of 17 July 2008 amending the Decree of 12 April 2001 on the organisation of the regional electricity market provides:

‘Article 38(3) of [the 2001 Decree] is to be interpreted as meaning that the exclusion of plants using wood from the scheme for which it provides refers to plants using any lignocellulosic material obtained from trees, hardwood and softwood without exception (including short or very short rotation coppice), before and/or after any type of processing.’

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

- 24 IBV operates a sawmill and runs a cogeneration plant in which it makes use of the waste deriving primarily from the sawmill for the purpose of ensuring its own energy supply.
- 25 On 23 June 2008 IBV applied for the additional green certificates referred to in Article 38(3) of the 2001 Decree. The Walloon Government refused the application by decision of 18 June 2009, on the ground that IBV's plant did not satisfy three of the conditions required by that provision as, first, it used wood for cogeneration, secondly, it did not make use of a particularly innovative process and, thirdly, it did not act with a view to sustainable development.
- 26 The Conseil d'État (Council of State) (Belgium), before which IBV brought an action for the annulment of that decision, held that the Walloon Government had been wrong to consider that the conditions relating to the innovative character of the process used and the position of the plant in the context of sustainable development were not satisfied in this case.
- 27 As regards the exclusion of IBV's plant from the scope of the additional support scheme at issue because of the fact that the plant used wood, the Conseil d'État, which entertains doubts as to the constitutionality of that exclusion, decided to stay the proceedings and refer the following question to the Cour constitutionnelle (Constitutional Court) (Belgium) for a ruling:
- 'Does Article 38(3) of [the 2001 Decree] infringe Articles 10 and 11 of the Constitution by introducing a difference in treatment between plants principally using biomass, in that it excludes from the benefit of the support mechanism [at issue] biomass cogeneration plants using wood or wood waste while including biomass cogeneration plants using all other kinds of waste?'
- 28 The Cour constitutionnelle points out that the legislative history of the additional support measure in Article 38(3) of the 2001 Decree shows that the original proposal for that measure was accompanied by the following explanations. By raising to 20 MW the limit previously set at 5 MW by Article 38(2) of the 2001 Decree, the measure was intended to take into account that some leading projects making use of innovative technologies might require additional support. However, to avoid in particular the perverse consequences of such a measure for the wood sector of industry, which was already subject to competition from the wood-energy sector, it was proposed to reserve the additional support to biomass other than wood. It was stated, moreover, in this respect that this was not an isolated case, in so far as the support mechanisms for the production of electricity from renewable energy sources were often, in the various Member States, differentiated according to sectors.
- 29 In an opinion of 5 April 2007 the CWaPE took the view *inter alia* that differentiated access to the support scheme depending on the nature of the biomass used could prove discriminatory.
- 30 The Walloon Government nevertheless decided to adopt the support mechanism at issue in the main proceedings, observing, first, that the system in force until then was sufficient to ensure the development of numerous wood cogeneration projects, which was not the case for other innovative projects, and, secondly, that the fact that different support was granted depending on the sector concerned, the fuel used or the power of the plant was inherent in the system of green certificates.
- 31 The Cour constitutionnelle points out, moreover, that by adopting Article 38 of the 2001 Decree the Walloon legislature partially implemented Directives 2001/77 and 2004/8.
- 32 In this respect, after observing that, before the Conseil d'État, the parties disagree as to whether the cogeneration plant operated by IBV may be regarded as a high efficiency cogeneration plant within the meaning of Directive 2004/8, the Cour constitutionnelle wishes to know, first, whether Article 7 of that directive applies only to cogeneration plants of that kind.



- 33 The Cour constitutionnelle considers, secondly, that it needs clarification as to whether Article 7 of that directive must be interpreted, having regard in particular to the principle of equal treatment in European Union law, as requiring, permitting or prohibiting a difference of treatment such as that following from Article 38(3) of the 2001 Decree.
- 34 In those circumstances, the Cour constitutionnelle decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
1. Must Article 7 of Directive [2004/8], in conjunction if appropriate with Articles 2 and 4 of Directive [2001/77] and with Article 22 of Directive [2009/28], be interpreted, in the light of the general principle of equal treatment, of Article 6 of the Treaty on European Union and of Articles 20 and 21 of the Charter of Fundamental Rights of the European Union [(“the Charter”)],
    - (a) as applying only to high efficiency cogeneration plants, within the meaning of Annex III to [Directive 2004/8];
    - (b) as requiring, permitting or prohibiting the availability of a support measure such as that in Article 38(3) of the [2001 Decree] to all cogeneration plants principally using biomass and meeting the conditions laid down by that article, with the exception of cogeneration plants principally using wood or wood waste?
  2. Would the answer be different if the cogeneration plant principally uses only wood or, on the contrary, only wood waste?’

### **Consideration of the questions referred**

#### *First part of Question 1*

- 35 By the first part of its first question, the referring court asks essentially whether Article 7 of Directive 2004/8 must be interpreted as meaning that its scope is limited solely to cogeneration plants which are high efficiency cogeneration plants within the meaning of that directive.
- 36 It must be noted, to begin with, that, as follows from Article 3(a) and (i) of Directive 2004/8, the European Union legislature took care to define the respective concepts of ‘cogeneration’ and ‘high efficiency cogeneration’ for the purposes of the directive.
- 37 Article 2 of Directive 2004/8, whose purpose, as indicated by its heading, is to define the ‘scope’ of the directive, states that the directive is to apply to ‘cogeneration as defined in Article 3’. It must be deduced from that statement that the European Union legislature did not intend to limit that scope solely to high efficiency cogeneration within the meaning of Article 3(i).
- 38 In that context, it must be concluded that, since Article 7 of Directive 2004/8, relating to national support schemes, refers, as the very wording of Article 7(1) shows, to support for ‘cogeneration’, that article cannot be interpreted as having a scope limited solely to ‘high efficiency’ cogeneration.
- 39 Contrary to the submissions of the Belgian Government, that interpretation cannot be invalidated by the reference in Article 7(2) of Directive 2004/8 to the Treaty provisions on State aid, nor by the fact that recital 24 in the preamble to that directive states that public support should be consistent with the provisions of the Community guidelines, which have since been replaced by the Guidelines, points 70 and 112 of which provide that aid for cogeneration is compatible with the common market if it relates to high efficiency cogeneration units within the meaning of Annex III to that directive.

- 40 Where a national support scheme for cogeneration also constitutes State aid, it must indeed, in view of being so classified, also be assessed from the point of view of the provisions of European Union law on State aid, the application of which is moreover fully preserved by Directive 2004/8, as stated by Article 7(2) of the directive in particular. However, that circumstance cannot, on the other hand, have the consequence of affecting the determination of the scope of Article 7 which follows from the examination in paragraphs 36 to 38 above.
- 41 In the light of all the foregoing, the answer to the first part of Question 1 is that Article 7 of Directive 2004/8 must be interpreted as meaning that its scope is not limited solely to cogeneration plants which are high efficiency cogeneration plants within the meaning of that directive.

*Second part of Question 1 and Question 2*

- 42 By the second part of its first question and by its second question, which should be considered together, the referring court essentially asks whether Article 7 of Directive 2004/8, read in conjunction with Articles 2 and 4 of Directive 2001/77 and Article 22 of Directive 2009/28, and having regard to the principle of equal treatment and non-discrimination laid down in particular in Articles 20 and 21 of the Charter, must be interpreted as requiring, permitting or prohibiting an enhanced support measure such as that at issue in the main proceedings in so far as it is capable of benefiting all cogeneration plants principally using biomass with the exclusion of cogeneration plants principally using wood and/or wood waste.
- 43 It should be noted, as a preliminary point, that the fact that those questions refer at the same time to the provisions of Article 7 of Directive 2004/8 and to those of Articles 2 and 4 of Directive 2001/77 and Article 22 of Directive 2009/28 may be explained in substance by the fact, pointed out in the order for reference, that provisions of those various directives were implemented together for the Walloon Region by the 2001 Decree.
- 44 With respect more particularly to Article 38 of the 2001 Decree, on the basis of which the measure at issue in the main proceedings was taken, it must be observed that the system of green certificates granted pursuant to that article was introduced, as stated in Article 37 of the decree, in order to encourage both electricity production from renewable energy sources and cogeneration.
- 45 While enabling the production of electricity, within the meaning of Article 2(a) and (b) of Directive 2001/77, from a renewable energy source, in this case wood-based biomass, the plant at issue in the main proceedings is also a cogeneration unit within the meaning of Article 3(l) of Directive 2004/8.
- 46 It follows that, for the purpose of answering the referring court's questions, both the provisions of Directive 2004/8, in particular Article 7 dealing with national measures of support for cogeneration, and those of Directive 2001/77, in particular Article 4 referring to national measures of support for renewable energy sources, must be taken into consideration.
- 47 On the other hand, since the decision refusing to allow IBV to benefit from the additional support scheme provided for in Article 38(3) of the 2001 Decree was made on 18 June 2009, before the date of entry into force of Directive 2009/28, it does not appear that there is any need to take account of the provisions of that directive in the present case.
- 48 Moreover, it should be recalled that the principle of equal treatment and non-discrimination enshrined in Articles 20 and 21 of the Charter in particular is addressed to the Member States when they are implementing European Union law, as follows especially from Article 51(1) of the Charter.

- 49 It follows that, where, as in the case in the main proceedings, a Member State adopts measures of support for cogeneration and renewable energy sources within a framework such as that laid down, first, by Directive 2004/8, in particular Article 7, and, secondly, by Directive 2001/77, in particular Article 4, and thus implements European Union law, it must observe the principle of equal treatment and non-discrimination laid down in particular in Articles 20 and 21 of the Charter (see, to that effect, Case C-401/11 *Soukupová* [2013] ECR, paragraph 28).
- 50 According to settled case-law of the Court, the principle of equal treatment and non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see, inter alia, Case C-127/07 *Arcelor Atlantique et Lorraine and Others* [2008] ECR I-9895, paragraph 23; Case C-176/09 *Luxembourg v Parliament and Council* [2011] ECR I-3727, paragraph 31; and Case C-21/10 *Nagy* [2011] ECR I-6769, paragraph 47).
- 51 A breach of the principle of equal treatment as a result of different treatment thus presupposes that the situations concerned are comparable, having regard to all the elements which characterise them (see, inter alia, *Arcelor Atlantique et Lorraine and Others*, paragraph 25). In their observations, the Polish Government and the Commission submitted that that condition was not satisfied in the present case.
- 52 It must be recalled that the elements which characterise different situations, and hence their comparability, must in particular be determined and assessed in the light of the subject-matter and purpose of the European Union act which makes the distinction in question. The principles and objectives of the field to which the act relates must also be taken into account (see, inter alia, *Arcelor Atlantique et Lorraine and Others*, paragraph 26, and *Luxembourg v Parliament and Council*, paragraph 32 and the case-law cited).
- 53 That approach must also prevail *mutatis mutandis* in an examination of the compliance with the principle of equal treatment of national measures implementing European Union law.
- 54 First, as regards the subject-matter and purposes of the European Union acts which form the context of the legislation at issue in the main proceedings, the purpose of Directive 2004/8, as stated in Article 1 of the directive, is to increase energy efficiency and improve security of supply by creating a framework for the promotion and development of high efficiency cogeneration of heat and power. Recitals 1 and 5 in the preamble to the directive state for their part that such promotion is a European Union priority, given the potential benefits of cogeneration with regard to saving primary energy, avoiding network losses and reducing emissions, in particular of greenhouse gases, which contributes to environment protection and, in particular, to compliance with the Kyoto Protocol targets and to security of the energy supply.
- 55 The purpose of Directive 2001/77, for its part, as stated in Article 1, 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.
- 56 According to recitals 1 and 2 in the preamble to that directive, such promotion of renewable energy sources, which is a high priority for the European Union, is justified in particular because the exploitation of those energy sources contributes to environmental protection and sustainable development, and can also contribute to security and diversification of energy supply and make it possible to meet the Kyoto Protocol targets more quickly.

- 57 In addition, with respect more precisely to the national mechanisms of support for cogeneration and electricity production from renewable energy sources referred to in Article 7 of Directive 2004/8 and Article 4 of Directive 2001/77, recital 26 in the preamble to Directive 2004/8 and recital 14 in the preamble to Directive 2001/77 expressly state that guaranteeing the proper functioning of those mechanisms is an important means of achieving the aim of those directives.
- 58 Secondly, as regards the principles and objectives governing the field to which Directives 2004/8 and 2001/77 relate, it must be noted that both those directives were adopted on the basis of Article 175(1) EC, that is, European Union policy on the environment.
- 59 Both the second subparagraph of Article 7(2) of Directive 2004/8 and Article 4(1) of Directive 2001/77 further state that the national support mechanisms provided for by those provisions are capable of contributing to attaining the objectives set out in Articles 6 EC and 174(1) EC.
- 60 Article 174(1) EC, which lists the objectives of European Union policy on the environment, refers to preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems.
- 61 Thirdly, as regards more specifically the choices to be made when drawing up the national support schemes for cogeneration and electricity production from renewable energy sources which Directives 2004/8 and 2001/77 aim to promote, it is clear from those directives that the Member States retain a broad margin of discretion in that respect.
- 62 It may be seen, to begin with, from recital 32 in the preamble to Directive 2004/8 that the directive aims to determine at European Union level the general principles providing a framework for the promotion of cogeneration in the internal energy market, while leaving the detailed implementation to the Member States, thus allowing each Member State to choose the regime which corresponds best to its particular situation, taking account in this respect, in accordance with Article 1 of the directive, of the specific national circumstances especially concerning climatic and economic conditions.
- 63 Moreover, while the Member States are encouraged, as is apparent from Articles 3(1) and 4 of Directive 2001/77, to take appropriate steps to encourage greater consumption of electricity produced from renewable energy sources, those steps including the support schemes adopted at national level, recital 15 in the preamble to that directive shows that the directive does not lay down a Community-wide framework for those schemes.
- 64 Next, as regards the form that may be taken by support schemes, recital 26 in the preamble to Directive 2004/8 and recital 14 in the preamble to Directive 2001/77 confine themselves to listing the various forms which the Member States generally have recourse to in that connection, namely green certificates, investment aid, tax exemptions or reductions, tax refunds and direct price support schemes.
- 65 Finally, as regards the content of cogeneration support schemes, Article 7(1) of Directive 2004/8 is limited to specifying that the Member States are to ensure that the support they grant is based on the useful heat demand and primary energy savings, in the light of opportunities available for reducing energy demand through other economically feasible or environmentally advantageous measures such as other energy efficiency measures. As for Article 4(1) of Directive 2001/77, it does not contain any specific indication as regards the measures of support for renewable energy whose adoption is encouraged, apart from the reference, noted in paragraph 59 above, to the contribution of such measures to attaining the objectives set out in Article 174 EC.

- 66 It follows from paragraphs 62 to 65 above that, although the Member States are invited, when introducing support mechanisms for cogeneration and electricity production from renewable energy sources, to contribute to attaining the objectives pursued by Directives 2004/8 and 2001/77 and, more generally, European Union objectives in the field of the environment, European Union law as it stands leaves the Member States great freedom of choice as regards the introduction of those mechanisms.
- 67 In the context described in paragraphs 54 to 66 above, there is nothing that allows it to be deduced, from the mere fact that Article 2(b) of Directive 2001/77 contains a definition of the term ‘biomass’ which encompasses the biodegradable fraction of products, waste and residues from agriculture, whether vegetal or animal substances, the biodegradable fraction of products, waste and residues of forestry and related industries, and the biodegradable fraction of industrial and municipal waste, that the various categories of substances enumerated are to be treated in a similar way when drawing up national support measures for cogeneration and electricity production from renewable energy sources.
- 68 Indeed, several indications in Directives 2004/8 and 2001/77, and also the objectives to which those support measures are intended to contribute in that context, suggest that it is, on the contrary, inherent in the framework established by those directives that the various categories of substances thus listed in Article 2(b) of Directive 2001/77 may be assessed differently, on the basis of very diverse criteria, by the Member State concerned.
- 69 In the first place, as regards the indications in Directives 2004/8 and 2001/77, it is stated in recital 31 in the preamble to Directive 2004/8 that the overall efficiency and sustainability of cogeneration is dependent on many factors, among which are ‘fuel types’.
- 70 As noted in paragraph 62 above, it follows, moreover, from Article 1 of Directive 2004/8 and recital 32 in its preamble that the detailed implementation of the directive is left to the Member States, thus allowing each Member State to choose the scheme which ‘corresponds best to its particular situation’, taking into account ‘specific national circumstances especially concerning climatic and economic conditions’.
- 71 Recital 19 in the preamble to Directive 2001/77 states that, when favouring the development of a market for renewable energy sources, it is necessary to take into account the positive impact on ‘regional and local development opportunities, export prospects, social cohesion and employment opportunities, especially as concerns small and medium-sized undertakings as well as independent power producers’.
- 72 Article 4(2) of that directive, which concerns the proposal for a Community framework with regard to support schemes for electricity produced from renewable energy sources which the Commission might be required to draw up at a later stage, indicates that any such proposal for a framework should in particular ‘take into account the characteristics of different sources of renewable energy, together with the different technologies, and geographical differences’.
- 73 In the second place, all the objectives pursued by Directives 2004/8 and 2001/77 and, more generally, the aims of the European Union in the field of the environment also suggest that the various categories of substances covered by the term ‘biomass’ in Article 2(b) of Directive 2001/77 must be capable of being assessed differently.
- 74 Thus, in particular, even at the level of the renewable nature of the resource, and hence from the point of view of its availability, as also from the point of view of sustainable development, prudent and rational utilisation of natural resources, and security of supply, wood, which is a resource whose renewal requires a long period, may be distinguished from agricultural products or household and industrial waste, whose production takes place in a much shorter space of time.

- 75 Furthermore, it is common ground that the overall environmental impact produced by the increased use of biomass for energy production likely to follow from support measures differs according to the particular characteristics of the type of biomass used.
- 76 As regards the environmental impact that could follow from enhanced support measures for the use of wood and/or wood waste for energy production, it may thus prove necessary to take into account that any excessive or premature deforestation which may be encouraged by such support measures is liable to contribute to an increased presence of carbon dioxide in the atmosphere and adverse effects on biodiversity or water quality.
- 77 Increased development of agricultural products intended for energy production is liable for its part to increase various forms of pollution specifically linked with agricultural activities, in particular with the use of fertilisers and pesticides, such as adverse effects on the water supply.
- 78 It should also be noted that the various categories of biomass listed in Article 2(b) of Directive 2001/77 include various kinds of waste. Recital 8 in the preamble to Directive 2001/77 states, moreover, that the support granted by Member States for renewable energy sources should be consistent with other European Union objectives, in particular with respect to the waste treatment hierarchy. It is common ground, for example, that as regards that hierarchy, as most recently defined by Article 4 of Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (OJ 2008 L 312, p. 3), substances such as the biodegradable fraction of industrial and municipal waste, which are essentially intended either for disposal or for energy recovery, in particular by cogeneration, cannot be regarded as comparable either to wood capable of being used as a raw material or to wood waste, in so far as wood waste can be re-used or recycled in the relevant industrial sectors and such treatment may, in the context of that hierarchy, have to be given priority over energy recovery.
- 79 Finally, factors such as the quantities in which the various renewable energy sources are present in the territory of the Member State concerned, or the level of development that may already have been achieved there as regards recourse to one or other renewable energy source for cogeneration or electricity production, are also capable of influencing the choices to be made with respect to the renewable energy sources to be promoted in that Member State for the purposes of environmental protection and security and diversification of the energy supply.
- 80 Having regard to all the foregoing, it must be considered that, in the light in particular of the objectives pursued by Directives 2001/77 and 2004/8 and the aims of the European Union in the field of the environment, and of the broad margin of discretion allowed to the Member States by those directives for the adoption and implementation of support schemes intended to promote cogeneration and electricity production from renewable energy sources, and having regard to the individual characteristics of the various categories of biomass capable of use in a cogeneration process, those categories must not be regarded in the context of such support schemes as being in a comparable situation for the purposes of the possible application of the principle of equal treatment, observance of which is ensured by European Union law.
- 81 The need to be able to treat those various categories of biomass differently and, in particular, in the light of various environmental considerations, to make choices as to the types of substances to benefit from support and to draw distinctions as regards the specific details of that support, including the amount of the support, must on the contrary be regarded as inherent in that context, without it being possible to consider, in the present state of European Union law, that by taking the view that those various categories of biomass are not in the same situation the Member States manifestly exceeded the limits of their broad discretion in the matter (see, by analogy, *Luxembourg v Parliament and Council*, paragraphs 50 and 51).

82 Having regard to the above considerations, the answer to the second part of Question 1 and Question 2 is that, in the present state of European Union law, the principle of equal treatment and non-discrimination laid down in particular in Articles 20 and 21 of the Charter does not preclude the Member States, when introducing national support schemes for cogeneration and electricity production from renewable energy sources, such as those referred to in Article 7 of Directive 2004/8 and Article 4 of Directive 2001/77, from providing for an enhanced support measure such as that at issue in the main proceedings capable of benefiting all cogeneration plants principally using biomass with the exclusion of cogeneration plants principally using wood and/or wood waste.

### **Costs**

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

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

- 1. Article 7 of Directive 2004/8/EC of the European Parliament and of the Council of 11 February 2004 on the promotion of cogeneration based on a useful heat demand in the internal energy market and amending Directive 92/42/EEC must be interpreted as meaning that its scope is not limited solely to cogeneration plants which are high efficiency cogeneration plants within the meaning of that directive.**
- 2. In the present state of European Union law, the principle of equal treatment and non-discrimination laid down in particular in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union does not preclude the Member States, when introducing national support schemes for cogeneration and electricity production from renewable energy sources, such as those referred to in Article 7 of Directive 2004/8 and Article 4 of 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, from providing for an enhanced support measure such as that at issue in the main proceedings capable of benefiting all cogeneration plants principally using biomass with the exclusion of cogeneration plants principally using wood and/or wood waste.**

[Signatures]