



Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 13 March 2014¹

Case C-66/13

Green Network SpA

v

Autorità per l'energia elettrica e il gas

(Request for a preliminary ruling from the Consiglio di Stato (Italy))

(Environment — Promotion of renewable sources of energy — Directive 2001/77/EC — Guarantees of origin — Conclusion by a Member State of a bilateral agreement with the Swiss Confederation on the recognition of guarantees of origin — External competence of the European Union)

I – Introduction

1. By its landmark judgment of 31 March 1971, *Commission v Council*, known as *ERTA*,² the Court affirmed the principle that the competence of the European Economic Community to enter into international obligations does not exist only in the situations expressly provided for by the EEC Treaty, but may also stem by implication from competences conferred on the Community at internal level, and also acknowledged that, when the Community has exercised competence at internal level by adopting common rules, its parallel external competence becomes exclusive, so that the Member States lose the right to enter into obligations with non-member States likely to affect those rules or alter their scope.

2. This case affords the Court the opportunity to clarify the conditions that govern implementation of the rule in *ERTA* in the context of the policy of the European Union in regard to the protection of the environment and, in particular, energy generation from renewable sources.³

3. By the questions referred, the Court is principally asked to rule whether the adoption 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 market⁴ entailed removing from Member States their concurrent national competence by depriving them of the right to conclude with third countries agreements relating to recognition of guarantees of origin in order to establish the green origin of electricity imported from those States.

1 — Original language: French.

2 — Case 22/70 [1971] ECR 263.

3 — For ease of reference I shall refer to such energy as 'green energy'.

4 — OJ 2010 L 283, p. 33.

4. The Consiglio di Stato (Italy) also asks whether it makes any difference to the reply to be given that the third country concerned is the Swiss Confederation, which on 22 July 1972 entered into a free trade agreement with the European Economic Community,⁵ and that Article 13(1) of that agreement prohibits quantitative restrictions of imports and measures having equivalent effect unless they are justified on the grounds set out in Article 20 of that agreement.⁶

5. Lastly, the national court asks the Court whether the reply to the foregoing questions is altered by the fact that the national provision makes reference to the prior conclusion of an agreement, not between the Member State and the non-Member State concerned, but between the grid managers of those two States, particularly when such an agreement is tacit in nature, has not been set down in an official document and is merely asserted to exist by the applicant in the main proceedings.

6. In this Opinion, I shall maintain, in the first place, that because the guarantees of origin fall within an area already to a large extent covered by common rules gradually adopted since Directive 2001/77 with a view to a yet more complete harmonisation, the exercise by the Union of its internal competence has given rise to an exclusive external competence which precludes a national provision, such as that at issue in the main proceedings, which provides for the conclusion by the Member State concerned of international agreements with third countries concerning recognition of guarantees of origin.

7. I shall argue, in the second place, that the fact that the third country concerned is the Swiss Confederation, with which the Community has entered into a free trade agreement, has no effect on the reply to be given to the previous question.

8. In the third place, I shall principally submit that it is unnecessary to answer the third and fourth questions or, in the alternative, that the exclusive external competence arising from the exercise by the Union of its internal competence likewise precludes, under the principle of sincere cooperation, a national provision that makes reference to the prior conclusion of an agreement, not between the Member State and the third country concerned, but between the grid managers of those two States, when it is the object or effect of such provision to evade the Member States' lack of authority to enter into international obligations with third countries.

II – Facts and law

9. The relevant facts underlying the questions referred by the Consiglio di Stato are as follows.

10. Under a supply agreement entered into on 2 June 2005 with Aar e Ticino SA di Eletticità, Green Network SpA,⁷ which carries on the business of selling electricity, imported into Italy from Switzerland 873 855 MWh of electricity produced from renewable energy sources.⁸

11. In Italy, the importation of electricity is subject to the observance by the producer of an obligation intended to favour the use of green electricity. It follows from Article 11(1) and (3) of Legislative Decree No 79 on the implementation of Directive 96/92/EC of the European Parliament and of the Council concerning common rules for the internal market in electricity (decreto legislativo n. 79 –

5 – Agreement entered into, approved and confirmed on behalf of the Community by Regulation (EEC) No 2840/72 of the Council of 19 December 1972 (OJ 1972 L 300, p. 188), as amended by Decision No 1/2000 of the EC-Switzerland Joint Committee of 25 October 2000 (OJ 2000 L 51, p. 1, hereinafter 'the Free Trade Agreement').

6 – Under that Article 'the agreement shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, law and order or public security, the protection of life and humans, animals or plants, the protection of national treasures of historic or archaeological value, the protection of industrial and commercial property, or rule relating to gold or silver. Such prohibitions or restrictions must not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between the Contracting Parties'.

7 – 'Green Network'.

8 – 'Green electricity'.

Attuazione della direttiva 96/92/CE recante norme comuni per il mercato interno dell'energia elettrica) of 16 March 1999,⁹ that operators having produced or imported electricity are obliged, the following year, to feed into the national grid a quota of green electricity coming from installations that have entered into service or increased their production since that decree entered into force; they may discharge that obligation, either by presenting a certificate establishing that a quota of green electricity produced or imported has been fed into the national grid, or by purchasing green certificates from the national grid manager designated, as from 1 November 2005, Gestore dei Servizi Energetici – GSE SpA.¹⁰

12. An operator importing green electricity may, however, be relieved of that obligation on conditions that were laid down in Article 4(6) of the Ministerial Decree of 11 November 1999, and then in Article 20(3) of the Legislative Decree No 387 on the implementation of Directive 2001/77 (decreto legislativo n. 387 – Attuazione della direttiva 2001/77),¹¹ of 29 December 2003.

13. The first of those two provisions states as follows:

'The obligation in Article 11 (1) ... of Legislative Decree No 79 may be performed by importing, wholly or in part, electricity generated in installations that entered into service after 1 April 1999, drawing on renewable sources, provided that those installations are situated in foreign countries that adopt analogous instruments for the promotion and encouragement of renewable energy based on market mechanisms that offer the same opportunity to installations situated in Italy. In that case, the application mentioned in paragraph 3 shall be submitted by the holder of the obligation at the same time as the contract for the purchase of the electricity generated by the installation and the authorisation for feeding of that electricity into the national grid. All data must be certified by the authority designated under Article 20(3) of Directive 96/92/EC of the European Parliament and the Council of 19 December 1996 on common rules for the internal market in electricity¹² in the country in which the installation is situated. In the case of countries not members of the European Union, acceptance of the application shall be subject to the conclusion of an agreement between the national grid manager and the analogous third-country authority determining the detailed arrangements for the necessary checks.'

14. Article 20(3) of Legislative Decree No 387 made exemption from the obligation to purchase green certificates subject to different conditions, while maintaining the distinction drawn depending on whether the import is made from a Member State or a third country.

15. When the electricity is imported from a Member State, the exemption may be obtained by the importer provided that it presents a certified copy of the guarantee of origin issued in accordance with Article 5 of Directive 2001/77, which provides:

'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. They shall ensure that a guarantee of origin is issued to this effect in response to a request.

...

9 — GURI No 75, of 31 March 1999, 'Legislative Decree No 79'.

10 — 'GSE'.

11 — Ordinary supplement to GURI No 25, of 31 January 2004, 'Legislative Decree No 387'.

12 — OJ 1997 L 27, p. 20.

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. ...

5. Member States or the competent bodies shall put in place appropriate mechanisms to ensure that guarantees of origin are both accurate and reliable ...

...'

16. When the electricity is imported from a third country, the operators' right to obtain an exemption is subject to the conclusion of an agreement on the recognition of guarantees of origin between the Ministry of Production and the Ministry for the Environment and Protection of the Territory, on the one hand, and the competent ministries of that third country, on the other.

17. One such agreement, entitled 'memorandum of understanding', was entered into on 6 March 2007 between those Italian ministries and the Federal Environment, Transport, Energy and Communications Department of the Swiss Confederation. That agreement provides for the mutual recognition of guarantees of origin relating to electricity imported as from 2006, the year in which the Swiss Confederation enacted legislation in conformity with the provisions of Directive 2001/77.

18. It was on the basis of the abovementioned provisions, and of Article 20(3) of Legislative Decree No 387 in particular, that Green Network requested from GSE exemption for the year 2006 from the obligation under Article 11 of Legislative Decree No 79 to purchase green certificates for the quantity of electricity imported in 2005.

19. By decision of 7 July 2006, GSE rejected that request on the ground that in 2005 the Italian Republic and the Swiss Confederation had not yet entered into an agreement such as that referred to in Article 20(3). In addition, GSE required Green Network to purchase 378 green certificates for an overall amount of EUR 2 367 792.

20. Green Network having failed to fulfil its obligation, by decision of 21 January 2011, l'Autorità per l'energia elettrica e il gas imposed on it an administrative fine of EUR 2 466 450, against which Green Network brought an action before the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court).

21. Green Network appealed against the dismissal of that action before the Consiglio di Stato, which was uncertain whether it was permissible for Member States to enter into international obligations on the recognition of guarantees of origin when internal measures have been adopted by the Union.

III – The questions referred for a preliminary ruling

22. It was in that context, and in order to dispel those doubts, that the Consiglio di Stato decided to stay the proceedings and to refer to the Court the following questions for a preliminary ruling:

- (1) Is it inconsistent with the correct application of Articles 3(2) TFEU and 216 TFEU, under which the Union has exclusive competence for the conclusion of an international agreement when that conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope, with the twofold consequence that, first, the power to conclude with non-member States agreements that affect common rules or alter their operation, or [affect] a sector completely governed by EU law and for which the Union has exclusive competence, is centralised within the European Union itself and that, secondly, such authority no longer resides individually or collectively with the Member States, and of Article 5 of Directive 2001/77/EC, for a national provision ([Article] 20(3) of Legislative Decree No 387 of 2003) to make the recognition of the guarantees of origin issued by third States subject to the conclusion of an appropriate international agreement between the Italian State and the third State in question?
- (2) Are the national rules at issue inconsistent with the correct application of the abovementioned EU rules, when the non-member State is the Swiss Confederation, linked to the European Union by a free trade agreement ...?
- (3) Is it inconsistent with the correct application of the EU rules referred to in question (i) for the provision of national law, contained in Article 4(6) of the Ministerial Decree of 11 November 1999, to lay down that, when electricity is imported from non-Member States of the European Union, acceptance of the application is conditional upon the conclusion of an agreement between the National Grid Manager and an equivalent local authority determining the detailed rules for the necessary checks?
- (4) In particular, is it inconsistent with the proper application of the EU rules at issue for the agreement under Article 4(6) of the Ministerial Decree of 11 November 1999 to consist of a merely tacit agreement, never set out in official documents and the subject of a mere statement by the appellant [in the main proceedings], which is unable to provide details of its essential elements?’

IV – My analysis

A – Preliminary considerations

23. Before examining each of the four questions raised by the national court, it is appropriate, first, to question their admissibility and, secondly, to dispel the uncertainty engendered by the wording of the first question in regard to determination of the provisions of European Union (‘EU’) law applicable *ratione temporis*.

1. Admissibility of the questions

24. I have doubts as to the admissibility of the questions, inasmuch as it is apparent from comparison of the questions that the Consiglio di Stato based its decision on two hypothetical situations, both considered possible, concerning the national law applicable to the dispute in the main proceedings which, let it be recalled, relates to imports during 2005 for which the corresponding purchase of

green certificates ought to have been made in 2006. Whereas the two first questions are based on the provisions of Legislative Decree No 387 transposing Directive 2001/77, the two last questions presuppose, on the contrary, that the provisions of the Ministerial Decree of 11 November 1999 remained applicable.

25. I am of the view that it was for the national court, after considering the alternatives, to determine the provision in force at the time of the facts in the main proceedings, having regard to the principles governing the temporal application of the law under its national law; the fact that it did not make that choice before it made the reference to the Court may be considered to render the questions hypothetical.

26. However, at the hearing the Italian Government stated, without being contradicted on this point, that under Article 11 (13) of Legislative Decree No 387 the new system for guarantees of origin introduced by that Decree had wholly replaced the previous system established by Ministerial Decree of 11 November 1999 and that, in addition, that Ministerial Decree had been expressly repealed by a decree of 24 October 2005.

27. I am of the view, consequently, that the first two questions must be answered but that there is no need to answer the two others, based on inapplicable provisions.

28. Therefore, it is only in the alternative that in my reasoning below I shall examine the answer to be given to the third question. The fourth question, which in fact concerns, not the interpretation of EU law, but the proof of the existence of a contract under national law, appears to me, on any view, manifestly inadmissible.

2. EU law applicable

29. The facts giving rise to the main proceedings having occurred in the course of 2005, the provisions of the TFEU referred to by the national court are inapplicable.

30. The reference to provisions of EU law that did not become applicable until later does not, however, entail the inadmissibility of those questions, which it is for the Court to reformulate.

31. According to settled case-law, in order to provide a satisfactory answer to the national court which has referred a question to it, the Court of Justice may deem it necessary to consider provisions of Community law to which the national court has not referred in its question.¹³

32. Under that case-law, the Court has accepted that it was empowered to answer a question referring to provisions inapplicable to the facts underlying the original dispute, having regard to the provisions in force at the material time.¹⁴

33. Accordingly, I consider that the fact that the national court referred to Articles 3(2) TFEU and 216 TFEU, which entered into force only after the date of the facts giving rise to the dispute in the main proceedings, has no effect on the admissibility of the questions, which will therefore have to be reformulated in so far as is necessary. That conclusion is all the more compelling because the relevant provisions merely codify, albeit in part, the earlier case-law on the international competence of the Union resulting from, inter alia, the judgment in *ERTA*.

13 — See, inter alia, Case C-19/12 *Efir* [2013] ECR, paragraphs 26 and 27 and case-law cited, and C-212/11 *Jyske Bank Gibraltar* [2013] ECR, paragraph 38 and case-law cited.

14 — Case C-157/10 *Banco Bilbao Vizcaya Argentaria* [2011] ECR I-13023, paragraphs 17 to 21.

B – *The first question*

34. By its first question, the national court asks in essence whether Article 5 of Directive 2001/77 conferred on the Union exclusive competence to conclude with third countries an agreement on the recognition of guarantees of origin, and whether that exclusive competence precludes a national provision, such as that at issue in the main proceedings, which under a national scheme to support green energies provides that, with regard to green electricity imported from a non-Member State, exemption of electricity suppliers from the obligation to acquire green certificates is subject to the prior conclusion of an agreement between the Member State and the third country concerned on the recognition of guarantees of origin.

1. The principles applicable

35. In order to answer the first question, it should be noted that environmental protection falls within the competence shared or concurrent between the Union and the Member States.

36. That rule, today expressly affirmed in Article 4(2)(e) TFEU, previously existed under the legislation in force on the date of the facts underlying the dispute in the main proceedings.¹⁵ Although Article 175 EC, read in conjunction with Article 174(2) EC, conferred on the Union an express external competence in environmental matters,¹⁶ the second paragraph of Article 174(2) EC provided for the inclusion in the harmonising measures of a safeguard clause allowing the Member States to take provisional measures for non-economic environmental reasons. With regard to the environment, Article 176 EC empowered the Member States to maintain or introduce more stringent protective measures, provided that such measures were compatible with the Treaty and were notified to the Commission.

37. Inasmuch as the Union enjoys, in principle, shared competence in regard to the protection of the environment, it is to be ascertained whether Directive 2001/77, in the sector it covers, did not make that competence exclusive by applying the principles laid down in *ERTA*, pre-emptively depriving the Member States of any legislative power.

38. As the Court held in that judgment, the competence of the Community to conclude international agreements may arise not only from an express grant by the Treaty but may also flow by implication from other provisions of the Treaty and from measures adopted by the Community institutions under those provisions.¹⁷ The Court held, in particular, that ‘each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, *whatever form these may take*, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which *affect* those rules.’¹⁸ It added: ‘As and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system’.¹⁹

39. The principle of parallelism of external and internal competences affirmed in *ERTA* is subject, therefore, to the prior exercise of Union competence through the adoption of common rules, in areas falling outside common policies included,²⁰ and to the common rules being affected by State action.

15 — See Case C-370/07 *Commission v Council* [2009] ECR I-8917, paragraph 49; Case C-378/08 *ERG and Others* [2010] ECR I-1919, paragraph 55; Case C-240/09 *Lesoochránárske zoskupenie* [2011] ECR I-1255, paragraph 31; Case C-504/09 P *Commission v Poland* [2012] ECR, paragraph 79; and Case C-505/09 P *Commission v Estonia* [2012], paragraph 81.

16 — See *Lesoochránárske zoskupenie*, paragraph 35.

17 — *ERTA*, paragraph 16.

18 — *Ibid.*, paragraph 17. Emphasis added.

19 — *Ibid.*, paragraph 18.

20 — See Opinion 2/91 [1993] ECR I-1061, paragraph 11.

40. The idea of common rules being affected, which is at the heart of the decision in *ERTA*, has subsequently been elucidated in the Court's judgments and opinions.

41. That idea has always rested on a neutral or objective conception, in that the case-law does not require there to be a contradiction between the common rules and international obligations.²¹

42. That idea has, nevertheless, been developed in three main stages.

43. In the first stage, the Court appeared to authorise a broad interpretation, by recognising the existence of an exclusive implied external competence of the Community entailing the obligation for the Member States to refrain from acting when examination of the respective spheres covered by the common rules and international obligations appear to correspond, even incompletely.

44. Thus, the Court stated in *ERTA* that the matter under consideration '*[fell] within the scope of Regulation [(EEC)] No 543/69 [22]*'²³ and the Community competence resulting therefrom 'exclude[d] the possibility of concurrent powers on the part of Member States, since *any* steps taken outside the framework of the Community institutions would be incompatible with the unity of the common market and the uniform application of Community law'.²⁴

45. Extending this case-law, the Court noted in Opinion 2/91 that '[w]hile there is no contradiction between these provisions of Convention [No 170 of the International Labour Organisation concerning safety in the use of chemicals at work] and those of the directives mentioned [in Part III of that convention], it must nevertheless be accepted that Part III of Convention No 170 is concerned with an area which is *already covered to a large extent* by Community rules progressively adopted since 1967 with a view to achieving an ever greater degree of harmonisation and designed, on the one hand, to remove barriers to trade resulting from differences in legislation from one Member State to another and, on the other hand, to provide, at the same time, protection for human health and the environment'.²⁵

46. In the second stage, the Court seems to have moved towards a stricter view of the concept of the effect on common rules, by making the setting in motion of parallelism between internal and external competences subject to three specific criteria. Thus, in its Opinion 1/94 of 15 November 1994²⁶ on the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights, the Court, having observed that 'the Community's exclusive external competence does not automatically flow from its power to lay down rules at internal level'²⁷ and that '[o]nly in so far as common rules have been established at internal level does the external competence of the Community become exclusive',²⁸ and having found that 'not *all* transport matters are already

21 — See Case C-433/03 *Commission v Germany* [2005] ECR I-6985, paragraph 45 and case-law therein cited.

22 — Regulation No 543/69 of the Council of 25 March 1969 on the harmonisation of certain social legislation relating to road transport (OJ, English Special Edition 1969(I), p. 170).

23 — Paragraph 30. Emphasis added.

24 — Paragraph 31. Emphasis added.

25 — Paragraph 25. Emphasis added. The expression 'area already covered to a large extent by Community or common rules' has since been used on several occasions by the Court (see Opinion 1/03 [2006] ECR I-1145, paragraph 126, and judgments in Case C-475/98 *Commission v Austria* [2002] ECR I-9797, paragraph 97; Case C-266/03 *Commission v Luxembourg* [2005] ECR I-4805, paragraph 43, and *Commission v Germany*, paragraph 45).

26 — ECR I-5267.

27 — Paragraph 77.

28 — *Ibid.*

covered by common rules’,²⁹ considered that the Community acquires exclusive external competence when it ‘has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries,’³⁰ or ‘has achieved *complete* harmonisation’.³¹

47. Because it is not sufficient that a significant enough overlap should be established between the area covered by the common rules and that covered by the international agreement envisaged, the stricter approach referred to above was confirmed, and broadened in the ‘Open Sky’ judgments of 5 November 2002.³²

48. In a third stage, initiated by Opinion 1/03 on the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,³³ the Court in reviewing its case-law seems to have reverted to a more flexible view of the way common rules may be affected. It stressed in particular that the three situations set forth in both Opinion 1/94 and the ‘Open Skies’ judgments were only ‘examples’³⁴ formulated in the light of their particular contexts. ‘[R]uling in much more general terms’,³⁵ the Court found there to be exclusive Community competence when the conclusion of an agreement by the Member States is incompatible with the unity of the common market and the uniform application of Community law³⁶ and noted that it was not necessary for the areas covered by the international agreement and the Community legislation to coincide fully.³⁷

49. The Court has also provided the analytical method of determining whether the test of ‘an area which is already covered to a large extent by Community rules’ was satisfied, by stating that the decision had to be based, not only on the *scope* of the rules in question, but also on their *nature* and *content*, bearing in mind that account must be taken not only of Community law as it now stands in the area in question but also of its future development, insofar as that is foreseeable at the time of that analysis.³⁸

50. Lastly, it observed that it was essential to ensure a uniform, consistent application of the Community rules and the proper functioning of the system they establish in order for the full effectiveness of Community law to be preserved.³⁹

51. It is in the light of the conditions thus laid down governing the acquisition by the Union of its external competence by exercising its internal competence that it is to be determined, by making use of the analytical method adopted by the Court, whether and, if so, to what extent the Union has adopted common rules on guarantees of origin and whether the adoption by the Italian Republic of provisions providing for the conclusion with the Swiss Confederation of an agreement on recognition of guarantees of origin is liable to affect those rules.

29 — Ibid. Emphasis added.

30 — Paragraph 95.

31 — Paragraph 96. Emphasis added.

32 — Case C-466/98 *Commission v United Kingdom* [2002] ECR I-9427; Case C-467/98 *Commission v Denmark* [2002] ECR I-9519; Case C-468/98 *Commission v Sweden* [2002] ECR I-9575; Case C-469/98 *Commission v Finland* [2002] ECR I-9627; Case C-471/98 *Commission v Belgium* [2002] ECR I-9681; Case C-472/98 *Commission v Luxembourg* [2002] ECR I-9741; *Commission v Austria*; and Case C-476/98 *Commission v Germany* [2002] ECR I-9855.

33 — Convention signed on 30 October 2007, approved on behalf of the Community by Council Decision 2009/430/EC of 27 November 2008 (OJ 2009 L 147, p. 1).

34 — Opinion 1/03 (paragraph 121).

35 — Ibid. (paragraph 122).

36 — Ibid.

37 — Ibid, paragraph 126.

38 — Ibid.

39 — Ibid., paragraph 128.

2. The existence of common rules

52. In order to grasp the precise extent of the exercise by the Union of its internal competence and the extent of the ground occupied by it as a result, it is essential to take account, not only of Directive 2001/77, but also of Directive 2009/28/EC⁴⁰ and of foreseeable changes in EU law.

a) Directive 2001/77

53. As is apparent from its title, preamble and first article, Directive 2001/77 is intended to promote green electricity in the internal market for electricity by fixing quantified targets for increasing the contribution of renewable energy sources in the energy supply mix of each of the Member States.

54. That directive displays two essential features.

55. The first is that, in regard to guarantees of origin, it is a harmonising directive providing for mutual recognition.

56. One of the measures provided for by Directive 2001/77 in order to attain the objective of promoting green electricity generation is the introduction of the guarantee of origin. Far from merely introducing minimum standards, the Union legislature made several aspects of this area subject to harmonisation, hand in hand with the principle of mutual recognition. In particular, it established a definition, uniform throughout the Union, of the guarantee of origin,⁴¹ also conferring on it scope⁴² uniform at EU level. That directive also indicates precisely the information that the guarantee of origin must include⁴³ and furthermore lays down common rules on the renewable sources of energy eligible for that guarantee.⁴⁴ It requires the Member States to lay down objective, transparent, non-discriminatory criteria for the issue thereof⁴⁵ and calls upon them to designate bodies independent of generation and distribution activities, responsible for supervising the issue of such guarantees of origin.⁴⁶ The Member States must also ensure both the accuracy and the reliability of guarantees of origin.⁴⁷ Lastly, the directive requires them to recognise the guarantees of origin issued in another Member State and provides for review by the Commission of any refusal to recognise such guarantees.⁴⁸

57. The second characteristic of Directive 2001/77 is that it is, by its nature, provisional.

58. The objective of that directive is, as is apparent from Article 1, also ‘to *create a basis* for a future Community framework thereof’.⁴⁹ It provides that the Commission is, not later than 27 October 2005, to present a report on experience gained with the application and coexistence of the different mechanisms for the support of green energies, accompanied, if necessary, by a proposal for a Community framework with regard to support schemes,⁵⁰ and a summary report on the implementation of Directive 2001/77, no later than 31 December 2005, together with any additional

40 — Directive of the European Parliament and of the Council of 23 April 2009 on the promotion of electricity produced from renewable energy sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ 2009 L 140, p. 16).

41 — Article 5 of Directive 2001/77.

42 — Article 5(3), second indent and 5(4) of that directive.

43 — Article 5(3), first indent, of Directive 2001/77. The guarantee of origin shall mention 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.

44 — Under Article 2(a), read with Article 5(1), of that directive, the renewable sources of energy for which the guarantee of origin must be issued are wind energy, solar energy, geothermal, wave, tidal, hydropower energy, biomass, landfill gas, sewage treatment plant gas and biogases.

45 — Article 5(1), first sentence, of Directive 2001/77.

46 — Article 5(2) of Directive 2001/77.

47 — Article 5(5) of Directive 2001/77.

48 — Article 5(4) of Directive 2001/77.

49 — Emphasis added.

50 — Article 4(2) of Directive 2001/77.

proposals addressed to the European Parliament and to the Council of the European Union.⁵¹ The transitional nature of that directive demands a dynamic interpretation of its provisions that takes into account the long-term objectives of the legislation on green energy promotion and developments that have occurred since its adoption. It is therefore essential to view the area covered by the common rules in the light of Directive 2009/28.

b) Directive 2009/28

59. Directive 2001/77 was repealed in its entirety, from 1 January 2012, by Directive 2009/28 which, as is made clear in recital 13 in the preamble to and in Article 3 of the latter, fixes mandatory national targets concerning the share of green energy in total energy consumption.

60. In that connection, Article 3 cites the objective of a minimum 20% share of green energy in gross final consumption of energy by 2020.

61. That is the context in which Article 3(3)(b) of Directive 2009/28 mentions, among the measures that Member States may apply in order to achieve their targets, measures of cooperation with third countries. Unlike Directive 2001/77, Directive 2009/28 includes, therefore, an additional element relating to international relations by authorising the Member States to cooperate with third countries on all types of common projects concerning the generation of green electricity and providing, on the conditions set out in Articles 9 and 10 thereof, that electricity imported from a third country may be taken into account in appraising compliance with overall national targets. Rather surprisingly, that directive even provides, after authorisation by the Commission, for electricity to be taken into consideration that is generated and consumed in a third country in the specific context of the construction, with very long completion dates, of an interconnection to be used to export electricity to the Union. According to Article 39 of that directive, that provision is justified by the high European interest in projects being carried out in third countries, such as the Mediterranean solar plan.

62. In addition, Directive 2009/28 made certain amendments to the guarantee of origin scheme, in particular by adding further details as to its form and content. Nevertheless, it is still intended to be exclusively a means of proof.

c) Foreseeable changes in EU law

63. As regards the objective of developing the share of green energies, it is to be observed that the promotion of green energy production in the Union is considered to be an essential objective recognised at Union level. Thus, in the Commission's communication of 22 January 2014,⁵² the increase in the minimum share of green energies to 27% in 2030 is cited as one of the principal objectives agreed at Union level, the attainment of which is to be guaranteed by a new system of governance based on the implementation of national energy plans. It is interesting to note that the setting of a mandatory target at Union level indicates a new more collective, coherent and coordinated approach to the promotion of green energy.

64. In short, analysis both of Directive 2001/77 and of Directive 2009/28 and foreseeable developments in EU law supports the finding that the sphere of guarantees of origin, considered as a whole to be one of the key instruments for the promotion of green energy in the Union, is already amply regulated in EU law.

⁵¹ — Article 8 of that directive.

⁵² — Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A policy framework for climate and energy for the period from 2020 to 2030 (COM(2014) 15 final).

65. It remains to be determined whether the common rules existing in this field are affected by the unilateral action of the Italian Republic.

3. The effect of State action on the common rules

66. It is undeniable that, by making the exemption from the obligation to purchase green certificates for electricity imported from a non-member State dependent on the conclusion with that State of an agreement, the purpose of which is to guarantee the origin of the ‘green electricity imported for the purposes of Article 5 of directive 2001/77’, Article 20(3) of Legislative Decree No 387 gives that agreement a scope *ratione materiae* that coincides exactly with the scope of that directive. Clearly, moreover, the overlapping of the respective areas of the agreement concerned and that directive is evidenced by the express reference made by the provisions of national law to the provisions of Article 5 of that directive.

67. It is true that, by referring purely and simply to the guarantee of origin as provided for under EU law, that legislation does not apparently give rise to any incompatibility between Directive 2001/77 and the proposed agreements, so that the Italian Republic, bound by both acts, could observe the provisions of one without breach of the obligations under the other. However, when, as in the present case, the international agreements concerned fall within the ambit of the common rules or, at all events, within an area already to a large extent covered by such rules, the Member States lose their external competence even if there is no contradiction between those rules and those agreements.⁵³ That neutrality of the effect on the common rules for the purposes of the judgment in *ERTA* is attributable to the necessity of ensuring the unity and efficacy of EU law, which could be compromised by measures adopted piecemeal by the Member States.⁵⁴

68. What is more, the *renvoi* made by the Italian legislation to Article 5 of Directive 2001/77 does not appear to me to preclude all risk that the obligations entered into by the Italian Republic with regard to third countries might be incompatible with EU legislation. In particular, there is nothing to ensure that the agreement would authorise the issue of guarantees of origin only for green electricity meeting the definition in Article 2 of that directive.⁵⁵

69. Moreover, in my view, the conclusion by a Member State of an agreement with a third country concerning the recognition of guarantees of origin is inconsistent with the objectives of EU policy with regard to the development of green energies and is liable to compromise the effectiveness of EU legislation. In that connection, it is to be stressed that the purpose of introducing guarantees of origin intended to establish the green origin of the electricity generated was to facilitate trade in green energy within the internal market in electricity and to promote competition between producers, in particular by enabling final customers to be informed about the origin of the electricity they purchase.

70. Attainment of the objectives underpinning the environmental and energy policies of the Union, such as correcting, in priority at source, damage to the environment, reducing greenhouse gases, increasing green energy production throughout the Union, enhancing prospects of growth and employment in the Member States and also promoting security of supplies and reducing dependency on energy imports, is inextricably linked to how imports of green energy originating in third countries are to be treated.

53 — See point 41 of this Opinion

54 — See in that connection point 71 of the Opinion of Advocate General Tizzano in the Open Skies cases.

55 — See footnote 44.

71. The conclusion by the Member States of international agreements with third countries is liable to imperil the attainment of those objectives, because the action of the Union in favour of environmental protection would manifestly lose its practical effect if every Member State could freely determine whether, and if so to what extent, it intended to support imports of green electricity from third countries. As the Commission emphasised in its written and oral observations, by providing for the conclusion of international agreements for the purpose of the recognition of advantages linked to importing green electricity from third countries, the national legislation at issue in the main proceedings is liable to favour imports of green energy from those States to the detriment of green energy produced in the Member States. In addition, although the GSE asserted at the hearing that green energy imported from Switzerland had not been taken into account in respect of the attainment of national targets, the conclusion of an international agreement between a Member State and a third country affords no guarantee in this respect. Moreover, Article 20(4) of Legislative Decree No 387, which appears in the national file lodged at the Court Registry, appears to authorise, for the purpose of attaining the national target, taking into account of imported green energy, even if imported from a third country, subject to the conclusion of an agreement between the competent ministries of the Italian Republic and of the third country concerned. Finally, Directive 2009/28 governs this matter henceforth, coordinating the action of the Member States with regard to third countries.⁵⁶

72. In short, the necessary effect, in accordance with the judgment in *ERTA*, of the common rules adopted by the Union in the sphere of guarantees of origin overlaps with the effectiveness of the provisions of the Treaties relating to environmental protection conferring on the Union exclusive competence to conclude with third countries any agreements relating to the subject-matter governed by Directive 2001/77 and, consequently, withdraws from Member States any right to enter into obligations relating to recognition of guarantees of origin, inasmuch as they are liable to affect the provisions of that directive or to alter its scope.

73. None the less, I see that three objections can be raised to that solution.

74. The first, set out by the Italian Government, has to do with the role conferred by Directive 2001/77 on the Member States in the organisation of the guarantee of origin system. By conferring on them the tasks of defining objective, transparent and non-discriminatory criteria in order to guarantee the origin of green electricity, of designating the bodies responsible for supervising the issue of guarantees of origin and of putting in place the appropriate mechanisms to ensure the accuracy and reliability of the guarantees, that directive may be said to uphold the ‘regulatory contribution’ of the Member States, that is to say, their parallel competence.

75. That first objection can easily be set aside. As the Court has repeatedly held, a directive can be regarded as a common rule from which recognition of an exclusive external competence may stem.⁵⁷ In that situation, the degree to which the Member States lose competence varies depending on the normative force of the directive and the leeway left them for determining the procedure for transposition in the context of a circumscribed implementing power.⁵⁸ The fact that the EU legislature left to the Member States certain tasks relating to the issue of guarantees of origin does not prevent recognition that the area of those guarantees has already to a large extent been harmonised by EU law.

⁵⁶ — See point 64 of this Opinion.

⁵⁷ — See, in that connection, *ERTA*, according to which common rules may be adopted ‘under whatever form they may take’. See also Opinions 1/94 and 2/91

⁵⁸ — See to that effect, Neframi, E., ‘Les accords mixtes de la Communauté européenne: aspects communautaires et internationaux’, Bruylant, 2007, who observes that ‘by applying a directive the member states do not reserve an autonomous residual competence but a linked competence. They lose the power to decide on the principle of their action whilst remaining masters of its modalities’ (p. 50). A parallel may be drawn with the loss of competence following the adoption of harmonising directives in the internal order. After exercise by the Union of its internal competence the Member States are no longer competent unilaterally to modify the content of harmonised national rules (see in that connection Case 28/84 *Commission v Germany* [1985] ECR 3097, paragraph 28, and Case 29/87 *Dansk Denkvit* [1988] ECR 2965, paragraph 16.

76. The second objection, which is perhaps the strongest, is based on the distinction drawn by Directive 2001/77 between guarantees of origin and green certificates and on the power left to the Member States to determine whether electricity whose green origin is established by a guarantee of origin may or may not benefit from support mechanisms. According to the Italian Government and the GSE, the system at issue in the main proceedings, which is an aid scheme within the meaning of that directive, comes within the terms of the particular rights conferred on the Member States by that directive.

77. I find that objection unpersuasive for the three following reasons.

78. First, on a reading of the order for reference it is apparent that the scope of the international agreements whose conclusion is envisaged under Legislative Decree No 387 goes further than mere support schemes, for those agreements are intended to cover, more generally, the recognition of guarantees of origin, whether or not the latter are used in the context of an aid scheme.

79. Secondly, under the overall system, by nature transitional, of measures to support green energies under Directive 2001/77 in order to meet objectives for 2010 before a truly Community framework is established as provided for, it seems to me that the residual competence conferred on the Member States to take action by way of national provisions in a particular situation that the Union has temporarily renounced regulating by laying down common rules must be interpreted as constituting, not a reservation of competence in their favour, but a precarious authorisation conferred on them by the EU legislature in connection with the implementation of EU law. In my view, the Union manifestly intended to exercise its competence over the whole sphere concerned, which includes the determination of the operation of the guarantees of origin under the national aid schemes even if, provisionally, it had delegated that issue to them.

80. In that connection, it may be pointed out by analogy that, in its Opinion 1/03, the Court, on the basis of the ‘uniform and coherent’⁵⁹ system of rules on conflicts of jurisdiction in Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,⁶⁰ interpreted a provision of that regulation which made a *renvoi* to the legislation of the Member States⁶¹ as implementing EU law.

81. Thirdly, the power conferred on the Member States is limited solely to determining the support afforded to green energy originating from another Member State and does not, therefore, seem to me to be grounds for competence to enter into an international agreement with a third country. I set out in my Opinions in Joined Cases C-204/12 to C-208/12 *Essent Belgium* and Case C-573/12 *Ålands Vindkraft*, currently pending before the Court, the reasons why I consider that such a power is not compatible with primary law.

82. The third objection consists of calling in question whether the effect on common rules is real and actual, having regard to the circumstance that, at the time of the facts giving rise to the case in the main proceedings, the Italian Republic and the Swiss Confederation had not yet entered into an agreement on recognition of guarantees of origin. In other words, can a national provision that does no more than *envisage* the conclusion of an international agreement be capable of affecting common rules?

59 — Point 148.

60 — OJ 2001 L 12, p. 1.

61 — Under Article 4(1) of Regulation No 44/2001, ‘if the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall ... be determined by the law of that Member State’.

83. To my mind, the answer to that question must be affirmative. On the one hand, the adoption of a national provision envisaging the conclusion of an international agreement immediately entails a theoretical effect on common rules, counteracting the loss of competence by the Member States as a result of the exercise, by the Union, of its internal competence. On the other hand, a national provision such as that at issue in the main proceedings creates the risk of a potential affecting the common rules if the agreement should actually be concluded, which is enough to justify the application of the *ERTA* decision.

84. This extensive view of the concept of the effect on common rules seems to me to be borne out in the case-law. Thus, in *Commission v Greece*,⁶² the Court considered, in an action for failure to fulfil obligations brought by the Commission against the Hellenic Republic, that a mere initiative taken within an international organisation by a Member State might be 'likely'⁶³ to affect Union legislation when that initiative set in motion a process that could lead to the adoption of new rules having an effect on that legislation.⁶⁴

85. That reasoning may be extended, by analogy, to any action taken by a Member State liable to lead to the adoption of international norms capable of affecting the common rules adopted by the Union.⁶⁵

86. Such is the case of the provision at issue in the main proceedings.

87. Having dismissed those various objections, I propose that the Court should reply to the first question by declaring that, because guarantees of origin fall within an area already largely covered by the common rules, adopted step by step since Directive 2001/77 with a view to a yet more complete harmonisation, the exercise by the Union of its internal competence has given rise to an exclusive external competence which precludes a national provision, such as that at issue in the main proceedings, which provides for the Member State concerned to conclude international agreements with third countries relating to recognition of guarantees of origin.

C – *The second question*

88. By its second question, the national court asks, essentially, whether the exercise by the Union of its internal competence, in consequence of the adoption of Directive 2001/77, deprives the Member States of their competence to enter into agreements with third countries, this including the case in which the third country concerned in the Swiss Confederation, which is bound to the Union by a free trade agreement.

89. If I abide by the terms in which the question is couched, a relevant reply can easily be found. The fact that the Swiss Confederation entered into the free trade agreement has no effect on the rules governing the division of powers between the Union and its Member States. Consequently, so construed, the question calls for a negative reply.

90. It is true that the question could be construed more widely, as asking whether a national provision, such as that at issue in the main proceedings under which, in the absence of an agreement between the Italian Republic and the Swiss Confederation, an importer of green electricity from Switzerland is obliged to purchase green certificates corresponding to a certain quota of imported green electricity if it is not to incur a penalty, is compatible with the principle of the free movement of goods and the prohibition of measures having equivalent effect to quantitative restrictions of imports.

62 — C-45/07 [2009] ECR I -701.

63 — Paragraphs 19 and 23.

64 — Paragraph 21.

65 — See on this, Neframi, E., 'Renforcement des obligations des États membres dans le domaine des relations extérieures', *Revue trimestrielle de droit européen*, 2009, p. 601.

91. However, as is clear from the wording of the various questions, the national court sought only to obtain clarification in regard to the exclusivity of the external competence of the Union.

92. Accordingly, I doubt that the information provided by the national court was sufficient to enable the interested parties referred to in Article 23 of the Statute of the Court of Justice to submit their observations on the question as reformulated above.

93. None the less, in order to provide a useful reply to the national Court, I shall give certain indications as to the parameters to be taken into consideration.

94. I have mentioned in other contexts⁶⁶ the reasons that led me to state that national restrictions of imports of green electricity from another Member State constitute discriminatory obstacles to trade between the Member States that cannot be justified on the grounds of overriding requirements relating to environmental protection.

95. Conversely, I consider that those requirements fully justify the restrictions of imports of green electricity from a third country, such as the Swiss Confederation, and in particular that every single justification in *PreussenElektra*⁶⁷ is fully applicable.

96. In that connection it should be pointed out that, when there is no system of mutual recognition of guarantees of origin, the green origin of electricity produced in a third country cannot be guaranteed, as in the case of electricity produced in another Member State and that the Swiss Confederation, which has for several years been negotiating a bilateral agreement on electricity with the Union,⁶⁸ participates neither in Union policy in the field of the environment⁶⁹ nor in attaining the internal market on energy.

97. Thus, the barrier to trade liable to be caused by the obligation to purchase green certificates seems to me to be justified under Article 20 of the free-trade agreement.

D – *The third question*

98. By its third question, the national court essentially asks whether recognition in favour of the Union of an exclusive external competence precludes a national provision which makes recognition of guarantees of origin issued by third countries subject to the conclusion of an agreement, not between the Member State and the third state concerned, but between the national grid manager of the Member State and the analogous authority of the third country.

99. I have already stated the reasons why I consider these questions to be inadmissible.⁷⁰ I shall therefore examine them only in the alternative.

100. Article 4(6) of the Ministerial Decree of 11 November 1999 refers to the conclusion of an agreement between the manager of the Italian grid and the analogous authority of a third country determining the detailed arrangements for the necessary checks.

66 — See my Opinion in *Essent Belgium* and *Ålands Vindkraft*.

67 — C-379/98 [2001] ECR I-2099.

68 — As far as it is possible to tell, according to European Agency No 11016 of 12 February 2014, the pursuit of negotiations between the Union and the Swiss Confederation could be compromised by the referendum of 9 February 2014 on the initiative entitled ‘Against mass immigration’.

69 — With the exception of its participation in the European Environment Agency and the European Environment Information and Observation Network. See, on this matter, the Agreement between the European Community and the Swiss Confederation concerning the participation of Switzerland in the European Environment Agency and the European Environment Information and Observation Network (OJ 2006 L 90, p. 37). Agreement concluded and approved on behalf of the Community by Decision 2006/235/EC of the Council of 27 February 2006 (OJ 2006 L 90, p. 36).

70 — In this regard, see above, points 24 to 27 of this Opinion.

101. The agreement whose conclusion is envisaged is therefore not an international agreement for the purpose of public international law but a contract, whether under public law or private law, entered into between electricity grid managers.

102. The chief consequence of the gradual loss of competence by the Member States in the international order in step with the exercise by the Union of its internal competence is to deprive those States of their competence to enter into international agreements relating to the subject-matter covered by EU legislation.

103. More generally, however, the Member States are bound to observe the principle of sincere cooperation in the exercise of competences and the requirement of unity in the international representation of the Union which constitutes the expression of that principle. They may not, therefore, circumvent the exclusivity of Union competence by delegating authority to public or private bodies under their control to conclude an agreement with a comparable body of a third country.

104. I take the view, therefore, like the Commission, that the reasoning set out in reply to the first question may be applied to the national legislation at issue.

105. In consequence, the reply to the third question must be that exclusive external competence arising from the exercise by the Union of its internal competence likewise precludes, in the light of the principle of sincere cooperation, a national provision which makes reference to the conclusion of an agreement, not between the Member State and the third country concerned, but between the national grid managers of those two States, when it is the object or effect of that provision to evade the Member States' lack of authority to enter into international obligations with third countries.

V – Conclusion

106. For the foregoing reasons, I propose that the Court should answer the questions submitted by the Consiglio di Stato as follows:

- (1) Because guarantees of origin fall within an area already largely covered by the common rules, adopted step by step since 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 with a view to a yet more complete harmonisation, the exercise by the Union of its internal competence has given rise to an exclusive external competence which precludes a national provision, such as that at issue in the main proceedings, which provides for the Member State concerned to conclude international agreements with third countries relating to recognition of guarantees of origin.
- (2) The fact that the third country concerned is the Swiss Confederation, with which the European Community concluded a free trade agreement on 22 July 1972, an agreement concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2840/72 of 19 December 1972 as amended by Decision No 1/2000 of the EC-Switzerland Joint Committee of 25 October 2000, has no effect on that reply.
- (3) The exclusive external competence arising from the exercise by the European Union of its internal competence likewise precludes, in the light of the principle of sincere cooperation, a national provision which makes reference to the conclusion of an agreement, not between the Member State and the third country concerned, but between the national grid managers of those two States, when it is the object or effect of that provision to evade the Member States' lack of authority to enter into international obligations with third countries.