



Reports of Cases

OPINION OF ADVOCATE GENERAL

BOT

delivered on 14 April 2016*

Case C-492/14

Essent Belgium NV

v

Vlaams Gewest,

Inter Energa and Others,

Vlaamse Regulator van de Elektriciteits- en Gasmarkt (VREG)

(Request for a preliminary ruling from the rechtbank van eerste aanleg te Brussel (Court of First Instance, Brussels, Belgium))

(Reference for a preliminary ruling — Schemes for the free distribution of green electricity fed directly into distribution systems — Refusal to take account of green electricity produced outside the Member State concerned — Free movement of goods — Article 28 EC))

I – Introduction

1. This request for a preliminary ruling concerns the interpretation of Articles 12, 28 and 30 EC, and of Article 3(1) and (4) of Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC.**

2. The request has been made in proceedings between Essent Belgium NV*** and, inter alia, Vlaams Gewest (Flemish Region) raising the issue of the non-contractual liability of that region owing to its adoption of successive rules reserving the benefit of the free distribution of electricity produced from renewable sources of energy**** to green electricity fed directly into the distribution systems, initially, in the Flemish Region and, thereafter, throughout the Member State of which that region forms part.

3. In its judgments of 1 July 2014, *Ålands Vindkraft*,***** and of 11 September 2014, *Essent Belgium*,***** the Court allowed the benefit of national support schemes for the production of green electricity using tradable certificates to be limited solely to the production of green electricity in the Member State concerned.

* Original language: French.

** OJ 2003 L 176, p. 37.

*** 'Essent.'

**** 'Green electricity.'

***** C-573/12, EU:C:2014:2037.

***** C-204/12 to C-208/12, EU:C:2014:2192.

4. Having already had the opportunity to set out the reasons why such territorial limitations on support schemes do not seem to me to be compatible with the requirements of the free movement of goods, ***** I shall not mount a rearguard action, although I do not find the Court's reasoning in those judgments to be persuasive.

5. I shall, in this Opinion, confine myself to determining whether the Court's reasoning may be transposed to a scheme for the free distribution of green electricity such as those at issue in the main proceedings.

6. I shall answer this question in the affirmative, on the basis of the principle of non-discrimination which is set out in, inter alia, Article 12 EC and Directives 96/92/EC, ***** 2003/54 and 2001/77/EC, ***** as well as in Articles 28 and 30 EC, which must be interpreted as not precluding national legislation such as that at issue in the main proceedings, which, in reserving the benefit of the free distribution of green electricity solely to generating installations directly connected to the distribution systems in the Member State concerned or in a region of that State, thereby excludes generating installations located in other Member States.

II – Legal context

A – EU law

1. Legislation on the internal electricity market

7. The gradual completion of the internal electricity market has entailed the adoption of several successive directives, including Directives 96/92 and 2003/54.

(a) Directive 96/92

8. Recital 4 of Directive 96/92 emphasised the importance of establishing the internal market in electricity in order to increase efficiency in the production, transmission and distribution of electricity, while reinforcing security of supply and the competitiveness of the European economy and respecting environmental protection.

9. Recital 28 of that directive stated that, for reasons of environmental protection, priority could be given to the production of green electricity.

10. Article 11(2) and (3) of that directive provided:

‘2. In any event, [the electricity distribution system operator] must not discriminate between system users or classes of system users, particularly in favour of its subsidiaries or shareholders.

3. A Member State may require the distribution system operator, when dispatching generating installations, to give priority to generating installations using renewable energy sources or waste or producing combined heat and power.’

***** See my Opinions in *Ålands Vindkraft* (C-573/12, EU:C:2014:37) and in Joined Cases *Essent Belgium* (C-204/12 to C-208/12, EU:C:2013:294).

***** Directive of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (OJ 1997 L 27, p. 20).

***** Directive 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).

11. Article 16 of Directive 96/92 provided:

‘For the organisation of access to the system, Member States may choose between the procedures referred to in Article 17 and/or in Article 18. Both sets of procedure shall operate in accordance with objective, transparent and non-discriminatory criteria.’

(b) Directive 2003/54

12. Directive 2003/54, which came into force on 4 August 2003, was repealed by Directive 2009/72/EC. *****

13. Recital 26 of Directive 2003/54 stated that ‘the respect of the public service requirements is a fundamental requirement of this Directive, and it is important that common minimum standards, respected by all Member States, are specified in this Directive, which take into account the objectives of common protection, security of supply, environmental protection and equivalent levels of competition in all Member States. It is important that the public service requirements can be interpreted on a national basis, taking into account national circumstances and subject to the respect of Community law’.

14. Article 2(3) and (5) of that directive respectively defined ‘transmission’ as ‘the transport of electricity on the extra high-voltage and high-voltage interconnected system with a view to its delivery to final customers or to distributors’ and ‘distribution’ as ‘the transport of electricity on high-voltage, medium voltage and low voltage distribution systems with a view to its delivery to customers’.

15. Article 3 of that directive, which is found in Chapter II, entitled ‘General rules for the organisation of the sector’, set out in paragraph 1 the principles of free competition and non-discrimination between electricity undertakings.

16. However, Article 3(2) of Directive 2003/54 authorised the Member States to impose on electricity undertakings, in the general economic interest, public service obligations which could relate to security, including security of supply, regularity, quality and price of supplies and environmental protection, including energy efficiency and climate protection, provided that those obligations ‘[are] clearly defined, transparent, non-discriminatory, verifiable’, and ‘guarantee equality of access for EU electricity companies to national consumers’. Article 3(4) of the directive stated that if the Member State granted compensation or exclusive rights for the fulfilment of those obligations, it had to be done ‘in a non-discriminatory and transparent way’.

17. Moreover, Article 3(7) of the directive permitted the Member States to ‘implement appropriate measures to achieve the objectives of social and economic cohesion, environmental protection, which may include energy efficiency/demand-side management measures and means to combat climate change, and security of supply’. Such measures might include ‘the provision of adequate economic incentives, using, where appropriate, all existing national and Community tools, for the maintenance and construction of the necessary network infrastructure, including interconnection capacity’.

18. Article 14 of Directive 2003/54, which appears in Chapter V, entitled ‘Distribution System Operation’, provided in paragraph 2 that, ‘in any event, [the distribution system operator] must not discriminate between system users or classes of system users, particularly in favour of its related undertakings’. Article 14(4) of that directive expressly permitted the Member States to ‘require the distribution system operator, when dispatching generating installations, to give priority to generating installations using renewable energy sources or waste or producing combined heat and power’.

***** Directive of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54 (OJ 2009 L 211, p. 55).

19. Article 20(1) of that directive left it to the Member States to take the necessary measures to implement a system of third party access to the transmission and distribution systems based on published tariffs and ‘applied objectively and without discrimination between system users’.

20. Article 23 of Directive 2003/54 required the Member States to designate regulatory authorities at least responsible for ensuring non-discrimination, effective competition and the efficient functioning of the market and for fixing or approving, prior to their entry into force, at least the methodologies used to calculate or establish in particular the terms and conditions for connection and access to national networks, including transmission and distribution tariffs. Those authorities had the authority to require transmission and distribution system operators, if necessary, to modify the terms and conditions, tariffs, rules, mechanisms and methodologies referred to in paragraphs 1, 2 and 3 of Article 23 to ensure that they were proportionate and applied in a non-discriminatory manner.

2. Legislation on the promotion of green electricity

21. The legislation applicable *ratione temporis* to the main proceedings is Directive 2001/77, which was repealed by Directive 2009/28/EC. *****

22. Recital 1 of Directive 2001/77 recognised the need to promote renewable energy sources as a priority measure, while recital 2 stated that the promotion of green electricity was a high Community priority.

23. Recital 14 of that directive mentioned the importance of guaranteeing the proper functioning of the mechanisms of support for renewable energy sources at the national level, until a Community framework was put into operation, while recital 15 stated that it was too early to adopt such a framework.

24. Recital 19 of Directive 2001/77 referred to the necessity of taking into account, when favouring the development of a market for renewable energy sources, the positive impact on regional and local development opportunities, export prospects, social cohesion and employment opportunities, especially as regards small and medium-sized undertakings as well as independent power producers.

25. Pursuant to Article 1 of Directive 2001/77, the purpose of the directive is ‘to promote an increase in the contribution of renewable energy sources to electricity production in the internal market for electricity and to create a basis for a future Community framework thereof’.

26. Article 4 of that directive, entitled ‘Support schemes’, provided at paragraph 1:

‘Without prejudice to Articles 87 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 and 174 [EC].’

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

27. Article 7 of the directive, entitled ‘Grid system issues’, provided as follows:

‘1. Without prejudice to the maintenance of the reliability and safety of the grid, Member States shall take the necessary measures to ensure that transmission system operators and distribution system operators in their territory guarantee the transmission and distribution of [green electricity]. They may also provide for priority access to the grid system of [green electricity]. When dispatching generating installations, transmission system operators shall give priority to generating installations using renewable energy sources in so far as the operation of the national electricity system permits.

2. Member States shall put into place a legal framework or require transmission system operators and distribution system operators to set up and publish their standard rules relating to the bearing of costs of technical adaptations, such as grid connections and grid reinforcements, which are necessary in order to integrate new producers feeding [green electricity] into the interconnected grid.

These rules shall be based on objective, transparent and non-discriminatory criteria taking particular account of all the costs and benefits associated with the connection of these producers to the grid. The rules may provide for different types of connection.

3. Where appropriate, Member States may require transmission system operators and distribution system operators to bear, in full or in part, the costs referred to in paragraph 2.

...

6. Member States shall ensure that the charging of transmission and distribution fees does not discriminate against [green electricity], including in particular electricity from renewable energy sources produced in peripheral regions, such as island regions and regions of low population density.

Where appropriate, Member States shall put in place a legal framework or require transmission system operators and distribution system operators to ensure that fees charged for the transmission and distribution of electricity from plants using renewable energy sources reflect realisable cost benefits resulting from the plant’s connection to the network. Such cost benefits could arise from the direct use of the low-voltage grid.

...’

B – *Belgian law*

28. In order to promote the production of green electricity, the Flemish Government instituted a scheme for the free use of the distribution system for the benefit of producers of green electricity.

29. According to Article 15 of the vlaams decreet houdende de organisatie van de elektriciteitsmarkt (Flemish Decree on the organisation of the electricity market) of 17 July 2000: *****

‘The system operator shall perform, free of charge, all tasks necessary for the distribution of green electricity, with the exception of connection to the distribution system.

The Flemish Government may impose restrictions on the arrangement referred to in the first paragraph.’

***** *Belgisch Staatsblad*, 22 September 2000, p. 32166, the ‘Electricity Decree’.

30. Article 15 of the Electricity Decree was repealed with effect from 1 January 2005 by Article 61 of the vlaams decreet houdende bepalingen tot begeleiding van de begroting 2005 (Flemish Decree on measures to accompany the 2005 budget) of 24 December 2004. *****

31. Before that provision was repealed, the detailed rules for the application of the free distribution scheme underwent significant changes, as evidenced by the successive adoption of three decisions.

32. First of all, the besluit van de vlaamse regering inzake de bevordering van elektriciteitsopwekking uit hernieuwbare energiebronnen (Decision of the Flemish Government promoting the production of electricity from renewable energy sources) of 28 September 2001 ***** made free distribution available in respect of electricity produced in a region other than the Flemish Region or abroad. According to Article 14 of that decision:

‘ ...

The system operator shall perform, free of charge, the tasks referred to in Article 15 of the [Electricity Decree] ...

As regards electricity not produced in the Flemish Region, the authority responsible for issuing green-electricity certificates for the generating site concerned shall provide the regulatory authority with a certificate guaranteeing that that electricity was produced from a renewable energy source ... and is intended for an end-user in Flanders.

...’

33. Next, as amended by the Decision of 4 April 2003, ***** which came into force on 30 April 2003, Article 14 of the Decision of 28 September 2001 limited the benefit of free distribution solely to generating installations located in the Flemish Region. Article 14 was worded as follows:

‘§ 1 In accordance with the second paragraph of Article 15 of the [Electricity Decree], free distribution, as referred to in the first paragraph of Article 15 of that Decree, is restricted to the feed-in of electricity produced by the generating installations connected to the distribution systems in the Flemish Region.

§ 2 Suppliers of [green electricity] shall not charge, in an interim invoice to, or the final account of, the end-user of that electricity any fee for the cost for its distribution ...

...’

34. Having been seised of an action brought by Essent for annulment of Article 2 of the Decision of 4 April 2003, the Raad van State (Council of State, Belgium) suspended operation of that provision by a judgment of 12 January 2004.

35. Subsequent to that suspension, there followed, thirdly, the adoption of the besluit van de vlaamse regering inzake de bevordering van elektriciteitsopwekking uit hernieuwbare energiebronnen (Decision of the Flemish Government promoting the production of electricity from renewable energy sources) of 5 March 2004, ***** which repealed and replaced the Decision of 28 September 2001 with effect from 23 March 2004.

***** *Belgisch Staatsblad*, 31 December 2004, p. 87220.

***** *Belgisch Staatsblad*, 23 October 2001, p. 36778, the ‘Decision of 28 September 2001’.

***** *Belgisch Staatsblad*, 30 April 2003, p. 23334, the ‘Decision of 4 April 2003’.

***** *Belgisch Staatsblad*, 23 March 2004, p. 16296, the ‘Decision of 5 March 2004’.

36. Article 18 of the Decision of 5 March 2004 provided:

‘§ 1 In accordance with the second paragraph of Article 15 of the [Electricity Decree], free distribution, as referred to in the first paragraph of Article 15 of that Decree, is restricted to the electricity supplied to end-users connected to a distribution system in the Flemish Region which is produced from a renewable energy source, as provided for in Article 15, in a generating installation which feeds its electricity directly into a distribution system in Belgium.

§ 2 Suppliers of [green electricity] shall not charge in the final account of the end-users of that electricity any fee for the cost of its distribution ...

...’

37. Having been seised of an action brought by Essent for annulment of Article 18 of the Decision of 5 March 2004, the Raad van State (Council of State) suspended operation of that provision by a judgment of 23 December 2004, before dismissing the action by a judgment of 13 November 2012.

38. Following the repeal of Article 15 of the Electricity Decree by the Flemish Decree on measures to accompany the 2005 budget of 24 December 2004, Article 18 of the Decision of 5 March 2004 was repealed, with effect from 1 January 2005, by the Decision of the Flemish Government of 25 March 2005. *****

III – The dispute in the main proceedings and the questions referred for a preliminary ruling

39. Since 2003, Essent has been providing customers residing in the Flemish Region with electricity which it imports from the Netherlands and which, it claims, is green electricity.

40. Being of the opinion that it had suffered damage in losing the benefit of free distribution on the distribution system in the Flemish Region as a result of the legislative changes introduced by the Decision of 4 April 2003, and then by the Decision of 5 March 2004, Essent brought an action for liability before the rechtbank van eerste aanleg te Brussel (Court of First Instance, Brussels) against, inter alia, the Flemish Region, requesting that the judgment to be delivered be declared enforceable against, inter alia, the Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt (Flemish regulator of the gas and electricity market), ***** the body competent to rule on electricity distribution tariffs and any free distribution, and against various private and public distribution system operators which had claimed payment of distribution costs from Essent.

41. In support of those claims, Essent argued, inter alia, that the provisions excluding green electricity from other Member States from the benefit of free distribution were contrary to Articles 12 and 28 EC, as well as to Article 3(1) and Article 11(2) of Directive 96/92.

42. It is in that context that the rechtbank van eerste aanleg te Brussel (Court of First Instance, Brussels) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Should Article 28 and Article 30 EC be interpreted as precluding a regulation of a Member State — in the present case the Electricity Decree, read in conjunction with the Decision of 4 April 2003 — restricting the free distribution of green electricity to the feed-in of electricity

***** *Belgisch Staatsblad*, 27 May 2005, p. 24763.

***** Now the Vlaamse Regulator van de Elektriciteits- en Gasmarkt (VREG).

produced by the generating installations connected to the distribution systems in the Flemish Region and excluding electricity from generating installations which are not connected to distribution systems in the Flemish Region?

- (2) Should Article 28 and Article 30 EC be interpreted as precluding a regulation of a Member State — in the present case the Electricity Decree, read in conjunction with the Decision of 5 March 2004 as applied by [the regulator] — which restricts the free distribution of green electricity to electricity produced by generating installations which feed directly into a distribution system in Belgium and excludes from free distribution the electricity produced by generating installations which do not feed directly into a distribution system in Belgium?
- (3) Is a national rule as referred to in question 1 and question 2 compatible with the principle of equal treatment and the prohibition of discrimination as embodied inter alia in Article 12 EC and Article 3(1) and (4) of the then Directive 2003/54?

IV – My assessment

A – Preliminary observations

43. First of all, it is necessary to determine which provisions of EU law are relevant in order to reply to the request for a preliminary ruling.

44. In this connection, it must be observed, with regard in the first place to the provisions applicable *ratione temporis*, that, notwithstanding the fact that the national court did not refer to Directive 96/92, having regard to the fact that the Decision of 28 September 2001 was adopted before the entry into force of Directive 2003/54, the request for a preliminary ruling must be examined in the light not only of the rules set out in that directive but also of those set out in Directive 96/92.

45. It must be observed, with regard in the second place to the provisions applicable *ratione materiae*, that, although the national court referred exclusively to Article 3(1) and (4) of Directive 2003/54 in affirming the principle of non-discrimination in secondary law, that directive contains other provisions which are relevant in so far as they constitute particular expressions of that principle in the implementation of access to transmission and distribution systems.

46. What is more, it must be noted that Directive 2001/77 contains, inter alia, in Article 7, specific provisions relating to the conditions for the connection and distribution of green electricity.

47. In accordance with settled case-law, ***** I shall reply to the request for a preliminary ruling in the light of all the provisions of Directive 2003/54 and Directive 2001/77 that may be relevant to the issues raised.

48. I shall consider this request, first of all, from the perspective of non-discrimination, before going on to examine it from the perspective of the free movement of goods. *****

***** See, inter alia, judgment of 29 October 2015, *Nagy* (C-583/14, EU:C:2015:737, paragraph 20 and the case-law cited).

***** As the national court is not asking the Court whether a free distribution scheme such as those at issue in the main proceedings constitutes a State aid scheme, I shall not examine the scheme in the light of the provisions on State aid.

B – *The third question*

49. By its third question, the national court asks, in essence, whether the rules of non-discrimination contained in Article 12 EC and in Directives 96/92, 2003/54 and 2001/77 preclude national legislation such as that at issue in the main proceedings which, by reserving the benefit of free distribution of green electricity solely to generating installations directly connected to the distribution systems located in the Member State concerned or in a region of that State, thereby excludes generating installations located in other Member States.

50. I observe that the relevant directives contain various provisions which are similarly specific expressions of the principle of non-discrimination, even though they appear to address differing concerns.

51. Among the relevant provisions of secondary law, there are some which enshrine, in a general way, the principle of non-discrimination in the electricity sector, while others relate more specifically to the prohibition of any discrimination against green electricity. Finally, others seem to enshrine a principle of positive discrimination in favour of green electricity.

52. A first series of provisions establishes, in a general way, the principle of non-discrimination in relation to access to transmission and distribution systems.

53. Thus, Articles 3(1) and 14(2) of Directive 2003/54, which are respectively drafted in terms which are more or less identical to those of Articles 3(1) and 11(2) of Directive 96/92, require that the actions of the State and of system operators in implementing access to the system be non-discriminatory. That prohibition must be compared with that set out in Article 16 of Directive 96/92, which prohibits the Member States from organising access to the systems in a discriminatory manner, whether they choose the procedure for negotiated access to the system or the single buyer procedure, and with that set out in Article 20(1) of Directive 2003/54, which provides that the Member States must ensure the implementation of a system of third party access to the transmission and distribution systems based on published tariffs applicable to all eligible customers and ‘applied objectively and without discrimination between system users’.

54. The general principle of non-discrimination in system access also finds particular expression in the tasks conferred on the regulatory authorities by Article 23(1)(f) and (4) of Directive 2003/54, which provides that they are responsible for ‘ensuring non-discrimination’ and ‘effective competition’, in particular with regard to the terms, conditions and tariffs for connecting new producers of electricity ‘to guarantee that these are objective, transparent and non-discriminatory’. Those guarantees must be obtained taking account in particular of ‘the costs and benefits of the various renewable energy sources technologies’.

55. A second series of provisions relates more specifically to the prohibition of discrimination against green electricity.

56. Thus, Article 7(2) of Directive 2001/77 provides that the standard rules relating to the bearing of costs of technical adaptations which are necessary in order to integrate new producers feeding green electricity into the interconnected grid must be based on ‘objective, transparent and non-discriminatory criteria’ taking particular account of all the costs and benefits associated with the connection of those producers to the grid.

57. Following the same logic, Article 7(6) of that directive requires the Member States to ensure that the charging of transmission and distribution fees does not discriminate against green electricity, ‘including in particular electricity from renewable energy sources produced in peripheral regions, such as island regions and regions of low population density’. The provision states that, where appropriate,

the Member States are to put in place a legal framework or require transmission system operators and distribution system operators to ensure that fees charged for the transmission and distribution of green electricity reflect realisable cost benefits resulting from the plant's connection to the network, and those reductions in cost may 'arise from the direct use of the low-voltage grid'.

58. A third series of provisions establishes the possibility of positive discrimination justified by the objective of environmental protection.

59. I place in that category Article 3(2) of Directive 2003/54, which essentially repeats the wording of Article 3(2) of Directive 96/92, allowing the Member States to impose on undertakings operating in the electricity sector public service obligations, which may relate, inter alia, to 'environmental protection', 'including energy efficiency and climate protection', ***** provided that those obligations are 'clearly defined, transparent, non-discriminatory and verifiable' and 'guarantee equality of access for EU electricity companies to national consumers'. *****

60. Article 11(3) of Directive 96/92, Article 14(4) of Directive 2003/54 and Article 7(1) of Directive 2001/77, which gave green electricity priority access to the grid system, must also be included in that category.

61. Does the prohibition of any discrimination, in particular in the area of tariffs, between system users preclude a Member State from adopting measures, such as those at issue in the main proceedings, which provide for free distribution only in respect of green electricity fed directly into the distribution systems?

62. In the first analysis, the answer seems clear, inasmuch as the measure providing for distribution to be free of charge seems to constitute twofold discrimination, first, as between green electricity and electricity not produced from renewable energy sources and, secondly, as between electricity fed directly into the distribution systems and electricity, such as imported electricity, which is first fed into the transmission systems. Moreover, the latter discrimination seems directly to contradict the rule set out in the first subparagraph of Article 7(6) of Directive 2001/77, which prohibits discrimination by reference to the geographical origin of green electricity.

63. However, it remains to be seen whether such discrimination can be justified by invoking the aim of promoting the use of renewable energy sources.

64. Although the Court has not expressly named the possibility of invoking environmental protection as a justification for discriminatory measures, which would have permitted useful clarification of case-law that has been described as 'confusing', ***** several of its judgments can nevertheless only be understood if it is assumed that such an objective is acceptable as justification for measures whose discriminatory character has been established previously.

65. A phenomenon whereby the discrimination is concealed emerges clearly from the case-law, although the process that is at play in reaching that result is shrouded in a certain degree of mystery.

***** This part of the sentence was added by Directive 2003/54.

***** Idem.

***** See Rigaux, A., *Revue Europe* No 2, February 2012, comm. 75. That description was repeated by Le Baut-Ferrarese, B., *Revue Environnement et Développement durable* No 11, November 2014, comm. 75. See also, for a critical analysis of the Court's approach, Michel, V., 'Marché intérieur et politiques de l'Union: brèves réflexions sur une quête d'unité', *L'identité du droit de l'Union européenne — Mélanges en l'honneur de Claude Blumann*, 2015, p. 229.

66. I recall that, in its judgment of 9 July 1992, *Commission v Belgium*,^{*****} concerning the case referred to as ‘Walloon waste’, the Court, while stating that imperative requirements can be taken into account only in the case of measures which apply without distinction to both domestic and imported products, nonetheless accepted, on the basis of the principle that environmental damage should as a matter of priority be remedied at source, and of the principles of self-sufficiency and proximity, that, ‘having regard to the differences between waste produced in different places and to the connection of the waste with its place of production’, the contested measures which prohibited the importing of waste into the region concerned could not be regarded as discriminatory.^{*****}

67. It was therefore by applying the case-law according to which the principle of equal treatment requires that comparable situations are not treated differently and that different situations are not treated in the same way that the Court avoided a finding of discrimination, and the fact that the situation was different owing to the ‘particular nature of waste’ justified different treatment.

68. In its judgment of 13 March 2001, *PreussenElektra*,^{*****} the Court, without attaching importance to whether a national rule requiring electricity suppliers to buy green electricity produced in their supply area at minimum prices was discriminatory or not, found that that rule was not incompatible with the free movement of goods, on the grounds, inter alia, that the measure was useful for environmental protection and was ‘also’ designed to protect the health and life of humans, animals and plants, which constitute public interest grounds as defined by Article 30 EC.

69. Finally, I note that in its judgment of 11 September 2014, *Essent Belgium*,^{*****} on the question relating to possible infringement of the rules of non-discrimination, the Court stated, in particular, that ‘the referring court [had] not explain[ed] how [the green certificate] scheme ... [was] liable to give rise to differential treatment constituting discrimination on grounds of nationality, nor how such differential treatment, if it did occur, should be distinguished from that relating to the guarantees of origin and imports of electricity originating from other Member States, which [was] already covered by the first question referred’,^{*****} which invited the Court to examine that national measure in the light of the free movement of goods.

70. The question of discrimination is thus absorbed into a general examination of the question whether there is any obstacle and the possible justification for it.

71. Even though the basis for the solution seems to have changed and it is, furthermore, difficult to determine whether it is to be found in the abandonment of the rule that only a measure which applies without distinction may be justified by one of the imperative requirements enshrined in the case-law of the Court, or in the linking of the promotion of renewable sources of energy to some of the public interest grounds set out in Article 30 EC, it is possible to infer from those precedents that the Court accepts that discriminatory national measures may be justified by the objective of environmental protection, subject to the condition that they comply with the principle of proportionality.^{*****}

^{*****} C-2/90, EU:C:1992:310.

^{*****} Paragraphs 34 to 36.

^{*****} C-379/98, EU:C:2001:160.

^{*****} C-204/12 to C-208/12, EU:C:2014:2192.

^{*****} Paragraph 119.

^{*****} See inter alia, to that effect, López Escudero, M., ‘Régimes nationaux d’aide à l’énergie verte face à la libre circulation des marchandises dans l’Union européenne’, *Revue des affaires européennes*, 2014/3, p. 593, particularly p. 599, and Le Baut-Ferrarese, B., op. cit.

72. I cannot see why the position should be any different where the national measure is to be examined in the light not of the general principle of non-discrimination but of the particular enactments of that principle contained in provisions of secondary law.

73. In my view, those rules on non-discrimination would preclude reliance on the environmental protection justification only if they prohibited or harmonised national legislation on the restrictions which may be applied to imports of green electricity for the purpose of promoting renewable energy sources. In other words, it would only be if a provision of secondary law prohibited all obstacles to the import of green electricity, or stated expressly in what cases restrictions may be accepted in order to ensure the promotion of green electricity, that the Member States would no longer have any leeway authorising them to rely on such grounds to justify a restriction.

74. Yet I find no such provisions either in Directives 96/92 and 2003/54, or in Directive 2001/77, given that Article 7(6) of the latter, which is intended to prohibit discrimination against green electricity generating installations based on a geographical criterion, in particular where they are situated in peripheral regions which are subject to difficulties connecting to the main European electricity grids, cannot be interpreted as excluding any difference in treatment based on a national criterion and justified, according to the Court's reasoning, by the highlighting of an objective situational difference between the production of domestic green electricity and the production of green electricity in other Member States.

75. Those are the reasons why I propose to reply to the third question that the rules on non-discrimination in Article 12 EC and Directives 96/92, 2003/54 and 2001/77 do not preclude national legislation such as that at issue in the main proceedings which, by reserving the benefit of free distribution of green electricity solely to generating installations directly connected to the distribution systems situated in the Member State concerned, or in a region of that State, thereby excludes generating installations situated in other Member States, provided that that national legislation complies with the principle of proportionality inasmuch as it is appropriate to the aim in view and does not go beyond what is necessary in order for that aim to be attained.

76. I shall analyse the proportionality of the schemes at issue in the main proceedings from the perspective of the free movement of goods.

C – The first and second questions

77. By its first and second questions, which must be considered together, the national court asks, in essence, whether Articles 28 and 30 EC must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, by reserving the benefit of free distribution of green electricity solely to those generating installations directly connected to distribution systems situated in the Member State concerned, or in a region of that State, thereby excludes generating installations situated in other Member States.

78. The question referred is therefore whether the schemes at issue in the main proceedings are liable to impede imports of electricity, in particular green electricity, from other Member States and so constitute measures having equivalent effect to a quantitative restriction on imports, which are in principle prohibited by Article 28 EC unless the rules can be objectively justified.

79. Since that question clearly calls to mind those to which the Court replied in its two recent judgments of 1 July 2014, *Ålands Vindkraft*, ***** and of 11 September 2014, *Essent Belgium*, ***** on the consistency with EU law of national schemes to support the production of green electricity, the starting point for the reasoning to be followed is to determine whether the nature of the solutions arrived at in those two cases can simply be transposed to this case or whether, on the contrary, this case involves particular factors that would justify a departure from them.

80. Indeed the interested parties who presented observations to the Court were not wrong in this respect.

81. On the one hand, the Flemish Region, the Greek Government and the Commission argue, reasoning by analogy, that the territorial limitations to the schemes for the free distribution of green electricity must be regarded as justified since, like the legislation at issue in the cases which gave rise to the judgments of 1 July 2014, *Ålands Vindkraft*, ***** and of 11 September 2014, *Essent Belgium*, ***** they pursue the legitimate objective of encouraging the use of renewable sources of energy in the production of electricity. However, there is a notable difference between the position of the Flemish Region on the one hand, and that of the Greek Government and the Commission on the other, which is worthy of mention. According to the Flemish Region, the limitation on the free distribution of green electricity does not constitute a measure having equivalent effect to a quantitative restriction on imports in so far as, relating as it does exclusively to electricity fed directly into the distribution systems, it does not have the effect of limiting the cross-border exchange of electricity, which can occur only on transmission systems, not on distribution systems. The Greek Government and the Commission, on the other hand, take the view that the rules in question constitute measures having equivalent effect, but that these are justified by the objective of environmental protection, subject, according to the Commission, to a more detailed examination of their proportionality which it is for the national court to undertake, taking account of the cumulative effect of any other mechanisms for supporting the production of green electricity.

82. Essent, taking the opposite view, argues that there are differences which in its view preclude any transposition of the earlier case-law. It maintains, inter alia, that, although the green certificate system constitutes a mechanism for supporting the production of green electricity guaranteeing, via the regulatory authority, an advantage to the producer before market forces take over, by permitting certificates to be negotiated on a specific market under equitable conditions, the scheme for the free distribution of green electricity relates exclusively to the distribution and consumption of electricity, unilaterally favours suppliers and has a far more significant financial impact, since distribution costs during the period concerned represented up to 37% of the final electricity account.

83. However questionable the reasoning in the judgments of 1 July 2014, *Ålands Vindkraft*, ***** and of 11 September 2014, *Essent Belgium*, ***** may in my view be, it is not now, in this Opinion, possible to propose that the solution which they contain be abandoned, since such a reversal of the case-law presupposes a significant development in the legal framework which this case is not; on the contrary it relates to a long-standing and much-deliberated legal situation. I shall therefore examine the compatibility of national legislation such as that at issue in the main proceedings with the provisions of the EC Treaty on the free movement of goods following the form of analysis set out in those judgments.

***** C-573/12, EU:C:2014:2037.

***** C-204/12 to C-208/12, EU:C:2014:2192.

***** C-573/12, EU:C:2014:2037.

***** C-204/12 to C-208/12, EU:C:2014:2192.

***** C-573/12, EU:C:2014:2037.

***** C-204/12 to C-208/12, EU:C:2014:2192.

84. Therefore, once I have determined whether the schemes at issue in the main proceedings constitute obstacles to the free movement of goods, I shall consider whether those obstacles, if such they are, may be justified by the objective of promoting the use of renewable energy sources.

1. Obstacle to the free movement of goods

85. Initially the formula was to be found in the judgment of 11 July 1974, *Dassonville*,^{*****} which states that all national measures which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be regarded as measures having an effect equivalent to quantitative restrictions.^{*****}

86. In this regard it must be noted that the legislation at issue in the main proceedings is indeed capable of hindering — at least indirectly and potentially — imports of electricity,^{*****} especially green electricity, from other Member States.

87. In so far as it is common ground that imported electricity is necessarily transmitted by the intermediary of the transmission network, and cannot be fed directly into the distribution systems situated in the Flemish Region or Belgium, the limitation of free distribution to green electricity produced by generating installations directly connected to those distribution systems particularly advantages green electricity produced in the Flemish Region or Belgium and disadvantages imported electricity.

88. Since only electricity generating installations situated in the Flemish Region or Belgium can benefit from the advantage conferred, it matters little that such a preferential scheme might also have a restrictive effect on the Flemish or Belgian installations which are directly connected not to the distribution network but to the transmission network.^{*****}

89. National legislation such as that at issue in the main proceedings therefore constitutes a measure having equivalent effect to a quantitative restriction on imports incompatible with Article 28 EC unless it is objectively justified.

2. Possible justification

90. Referring to settled case-law, in its judgments of 1 July 2014, *Ålands Vindkraft*,^{*****} and of 11 September 2014, *Essent Belgium*,^{*****} the Court stated that national legislation or a national practice that constitutes a measure having equivalent effect to quantitative restrictions may be

^{*****} 8/74, EU:C:1974:82.

^{*****} Paragraph 5. See also judgments of 1 July 2014, *Ålands Vindkraft* (C-573/12, EU:C:2014:2037, paragraph 66), and of 11 September 2014, *Essent Belgium* (C-204/12 to C-208/12, EU:C:2014:2192, paragraph 77).

^{*****} I should point out that the Court, which, in its judgment of 10 December 1968, *Commission v Italy* (7/68, EU:C:1968:51), adopted a wide definition of the concept of ‘goods’ as including all ‘products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions’ (p. 428) (see also, to that effect, judgment of 14 April 2011, *Vlaamse Dierenartsenvereniging and Janssens*, C-42/10, C-45/10 and C-57/10, EU:C:2011:253, paragraph 68 and the case-law cited), explicitly recognised that electricity constitutes a product (see judgment of 17 July 2008, *Essent Netwerk Noord and Others*, C-206/06, EU:C:2008:413, paragraph 43 and the case-law cited).

^{*****} See, to that effect, judgments of 20 March 1990, *Du Pont de Nemours Italiana* (C-21/88, EU:C:1990:121, paragraph 13), and of 16 May 1991, *Commission v Italy* (C-263/85, EU:C:1991:212).

^{*****} C-573/12, EU:C:2014:2037.

^{*****} C-204/12 to C-208/12, EU:C:2014:2192.

justified on one of the public interest grounds listed in Article 30 EC, or by overriding requirements; in either case, the national provision must be appropriate for ensuring attainment of the objective pursued and must not go beyond what is necessary in order to attain that objective.*****

91. Next, linking the objective of promoting the use of renewable energy sources for the production of electricity to the case-law concept of overriding requirements and public-interest grounds set out in Article 30 EC, the Court considered that objective to be capable in principle of justifying barriers to the free movement of goods.

92. Having accepted that principle, the Court went on to examine the proportionality of the barrier to free movement resulting from national aid schemes for green electricity.

93. It is necessary to conduct a similar assessment of the proportionality of the domestic measures at issue in the main proceedings, in order to determine whether those measures are necessary and appropriate for securing the attainment of the objective of promoting the use of renewable energy sources.

94. With regard, first of all, to the appropriateness of the domestic measures at issue in the main proceedings for securing attainment of the objective pursued, it is necessary to point out that, unlike the support schemes examined in the context of the cases which gave rise to the judgments of 1 July 2014, *Ålands Vindkraft*,***** and of 11 September 2014, *Essent Belgium*,***** which are intended to favour directly the production of green electricity,***** the measures for free distribution of green electricity at issue in the main proceedings do not directly favour producers since they principally benefit suppliers, and possibly consumers, provided that suppliers pass the benefit they derive from free distribution on to them.

95. However, those measures seem appropriate for ensuring attainment of the objective pursued in so far as, by eliminating the cost of distribution, they encourage suppliers to increase the proportion of green energy in their energy package and therefore contribute, albeit indirectly, to increasing demand by concomitantly encouraging increased use of renewable energy sources in the production of electricity.

96. Indeed, Article 4(1) of Directive 2001/77 constitutes a clue as to the insignificance of whether the aid is direct or indirect for the purposes of classifying a support scheme, since that provision includes in the definition of a support scheme any mechanism by which a producer of electricity, on the basis of regulations issued by the public authorities, receives support, whether ‘direct or indirect’.

97. With regard, secondly, to the question whether the domestic measures at issue in the main proceedings do not go beyond what is necessary in order to attain the objective pursued, it must be observed that the Court has taken into account the fact that the EU legislature has required the various Member States to lay down national objectives in order that the efforts required of them be equitably shared taking account of different starting points, of differences in the opportunities for developing energy from renewable sources and of differences in energy packages; it has thus accepted that support schemes may be accompanied by territorial limitations, since action at national level may be considered to be more appropriate than action at EU level.

***** See paragraph 76 and paragraph 89 respectively.

***** C-573/12, EU:C:2014:2037.

***** C-204/12 to C-208/12, EU:C:2014:2192.

***** See paragraphs 95 and 98 respectively.

98. Although I do not subscribe to that approach, I see no fundamental difference between territorial limitations in relation to support schemes based on an obligation to purchase in a particular supply area or on the use of green certificates, and a territorial limitation on a free distribution scheme for green electricity, at issue in the main proceedings, which is intended to assist the Kingdom of Belgium in attaining environmental objectives relating to the reduction of greenhouse gas emissions. Like the green certificates scheme, free distribution was intended, according to the preamble of the Decision of 4 April 2003, to promote the decentralised production of green electricity in local installations.

99. Consequently, the answer to the first and second questions is that Articles 28 and 30 EC must be interpreted as not precluding national legislation such as that at issue in the main proceedings which, by reserving the benefit of the free distribution of green electricity solely to generating installations directly connected to distribution systems located in the Member State concerned, or in a region of that State, thereby excludes generating installations situated in other Member States.

V – Conclusion

100. Having regard to the foregoing considerations, I am of the view that the answer to the questions referred by the rechtbank van eerste aanleg te Brussel (Court of First Instance, Brussels, Belgium) should be that, first, the rules on non-discrimination contained in Article 12 EC, Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, and Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market, and, secondly, Articles 28 and 30 EC must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which, by reserving the benefit of the free distribution of electricity produced from renewable energy sources solely to generating installations directly connected to the distribution systems located in the Member State concerned, or in a region of that State, thereby excludes generating installations located in other Member States.