Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

11 September 2014*

(References for a preliminary ruling — Regional support scheme providing for the issuance of tradable green certificates for facilities situated in the region concerned producing electricity from renewable energy sources — Obligation for electricity suppliers to surrender annually to the competent authority a certain quota of certificates — Refusal to take account of guarantees of origin originating from other Member States of the European Union and from States which are parties to the EEA Agreement — Administrative fine in the event of failure to surrender certificates — Directive 2001/77/EC — Article 5 — Free movement of goods — Article 28 EC — Articles 11 and 13 of the EEA Agreement — Directive 2003/54/EC — Article 3)

In Joined Cases C-204/12 to C-208/12,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Rechtbank van eerste aanleg te Brussel (Belgium), made by decision of 16 April 2012, received at the Court on 30 April 2012, in the proceedings

Essent Belgium NV

v

Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt,

intervening parties:

Vlaams Gewest,

Vlaamse Gemeenschap (C-204/12, C-206/12 and C-208/12),

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, J. Malenovský and A. Prechal (Rapporteur), Judges,

Advocate General: Y. Bot,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 21 March 2013,

after considering the observations submitted on behalf of:

— Essent Belgium NV, by D. Haverbeke and W. Vandorpe, advocaten,

* Language of the case: Dutch.

— the Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt, the Vlaams Gewest and the Vlaamse Gemeenschap, by S. Vernaillen and B. Goosens, advocaten,

— the Netherlands Government, by B. Koopman, M. Bulterman and C. Wissels, acting as Agents,

— the European Commission, by O. Beynet and K. Herrmann and by E. Manhaeve, acting as Agents,

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

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Articles 18 TFEU, 34 TFEU and 36 TFEU, Articles 4, 11 and 13 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994, L 1, p. 3) ('the EEA Agreement'), Article 5 of Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market (OJ 2001 L 283, p. 33) and of Article 3 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 (OJ 2003 L 176, p. 37).

2 The requests have been made in proceedings between Essent Belgium NV ('Essent') and the Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt (Flemish Regulatory Authority for the Electricity and Gas Market) ('the VREG'), the Vlaams Gewest (Flemish Region) and the Vlaamse Gemeenschap (Flemish Community), concerning administrative fines imposed on Essent by the VREG for failure to surrender green certificates establishing that the quantity of electricity listed therein was produced from renewable energy sources ('green certificates').

Legal context

EU law

Directive 2001/77

3 Directive 2001/77 was repealed as from 1 January 2012 by Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ 2009 L 140, p. 16). Nevertheless, given the date of the facts of the disputes in the main proceedings, regard must be had to the provisions of Directive 2001/77.

4 According to recitals 1 to 3, 10, 11, 14 and 15 in the preamble to Directive 2001/77:

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

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

3. The increased use of electricity produced from renewable energy sources constitutes an important part of the package of measures needed to comply with the Kyoto Protocol to the United Nations Framework Convention on Climate Change, and of any policy package to meet further commitments.

...

10. This Directive does not require Member States to recognise the purchase of a guarantee of origin from other Member States or the corresponding purchase of electricity as a contribution to the fulfilment of a national quota obligation. However, to facilitate trade in electricity produced from renewable energy sources and to increase transparency for the consumer's choice between electricity produced from non-renewable and electricity produced from renewable energy sources, the guarantee of origin of such electricity is necessary. Schemes for the guarantee of origin do not by themselves imply a right to benefit from national support mechanisms established in different Member States. It is important that all forms of electricity produced from renewable energy sources are covered by such guarantees of origin.

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

...

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

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

5 Article 1 of Directive 2001/77 provided:

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

6 According to Article 2 of that directive, entitled 'Definitions':

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

...

(d) "consumption of electricity" shall mean national electricity production, including autoproduction, plus imports, minus exports (gross national electricity consumption).

...'

7 Article 3(1) and (2) of that directive provided:

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

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

— take account of the reference values in the Annex,

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

8 Under the title ‘Support schemes’, Article 4 of that directive was worded as follows:

‘1. Without prejudice to Articles 87 and 88 of the [EC] Treaty, 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 of the Treaty.

2. The Commission shall, not later than 27 October 2005, present a well-documented report on experience gained with the application and coexistence of the different mechanisms referred to in paragraph 1. The report shall assess the success, including cost-effectiveness, of the support systems referred to in paragraph 1 in promoting the consumption of electricity produced from renewable energy sources in conformity with the national indicative targets referred to in Article 3(2). This report shall, if necessary, be accompanied by a proposal for a Community framework with regard to support schemes for electricity produced from renewable energy sources.

...’

9 Under the title ‘Guarantee of origin of electricity produced from renewable energy sources’, Article 5 of Directive 2001/77 provided:

‘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.

...

3. A guarantee of origin shall:

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

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

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

...'

10 As evidenced by the first paragraph therein, the Annex to Directive 2001/77 gives reference values for the fixing of national indicative targets for electricity produced from renewable energy sources, as referred to in Article 3(2) of that directive. The table in that annex and from the appurtenant explanations that those reference values consist, for each Member State in both the 'national production' of (electricity produced from renewable energy sources) in 1997 and the proportion, expressed as a percentage, for the years 1997 and 2010 respectively, of (electricity produced from renewable energy sources) of the electricity consumption, that proportion being 'national production of (electricity produced from renewable energy sources) divided by the gross national electricity consumption'.

11 Directive 2001/77 was integrated into the EEA Agreement by Decision of the EEA Joint Committee No 102/2005 of 8 July 2005 amending Annex IV (Energy) to the EEA Agreement (OJ 2005 L 306, p. 34). That decision entered into force on 1 September 2006.

Directive 2003/54

12 Directive 2003/54 was repealed as from 3 March 2011 by Directive 2009/72/EC 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/EC (OJ 2009 L 211, p. 55). Nevertheless, given the date of the facts of the disputes in the main proceedings, regard must be had to the provisions of Directive 2003/54.

13 Article 3(1) of Directive 2003/54 provided that:

'Member States shall ensure, on the basis of their institutional organisation and with due regard to the principle of subsidiarity, that, without prejudice to paragraph 2, electricity undertakings are operated in accordance with the principles of this Directive with a view to achieving a competitive, secure and environmentally sustainable market in electricity, and shall not discriminate between these undertakings as regards either rights or obligations.'

14 Directive 2003/54 was integrated into the EEA Agreement by Decision of the EEA Joint Committee No 146/2005 of 2 December 2005 amending Annex IV (Energy) to the EEA Agreement (OJ 2006 L 53, p. 43). That decision entered into force on 1 June 2007.

Belgian law

The Flemish Decree on the organisation of the electricity market

15 The Flemish Decree on the organisation of the electricity market (vlaams decreet houdende de organisatie van de elektriciteitmarkt) of 17 July 2000 (*Belgisch Staatsblad*, 22 September 2000, p. 32166) ('the Electricity Decree') had as its purpose inter alia the implementation of Directives 2001/77 and 2003/54. It instituted a scheme to support electricity produced from renewable energy sources ('green electricity'). That decree was repealed by a decree of 8 May 2009.

16 Article 2(17) of the Electricity Decree defined green certificate as 'a transferable intangible good which indicates that a producer, in a year declared therein, has generated a quantity of green energy as declared therein, expressed in kWh'.

17 Article 22 of that decree provided that '[f]or green electricity which the producer demonstrates that it was produced in the Flemish Region ..., the regulatory authority shall issue, on request by the producer, a [green certificate] for each 1 000 kWh generated'.

18 Article 23(1) of that decree provided that '[e]very supplier who supplies electricity to final customers connected to the distribution network or the transmission network is obliged, annually, before 31 March, to surrender to the regulatory authority the number of green certificates determined by the application of paragraph 2.'

19 Under Article 23(2) of that decree, the number of green certificates having to be surrendered was essentially determined by multiplying the total quantity of electricity supplied by the supplier concerned during the preceding year by a coefficient set, for the years 2005 to 2009, at 0.020, 0.025, 0.030, 0.0375 and 0.0450 respectively.

20 According to Article 24 of the Electricity Decree, '[t]he Vlaamse Regering [Flemish Government] shall lay down the detailed implementation rules and procedures for issuing green certificates and shall determine which certificates qualify for fulfilling the obligation referred to in Article 23'.

21 Article 25 of that decree provided that '[n]otwithstanding Article [23], the Flemish Government is authorised, on the advice of the regulatory authority, taking into account the existence of equal or equivalent guarantees regarding the issuing of such certificates, to accept certificates for green energy which were not produced in the Flemish Region'.

22 Article 37(2) of that decree provided that, as from 31 March 2005, the administrative fine incurred for an offence under Article 23(1) thereof was fixed at EUR 125 for each certificate not surrendered.

The Decision of the Vlaamse Regering promoting the production of electricity from renewable energy sources

23 Article 24 of the Electricity Decree is implemented through the Decision of the Vlaamse Regering promoting the production of electricity from renewable energy sources (besluit van de Vlaamse Regering inzake de bevordering van elektriciteitsopwekking uit hernieuwbare energiebronnen) of 5 March 2004 (*Belgisch Staatsblad*, 23 March 2004, p. 16296) ('the Decision of 5 March 2004').

24 In the version thereof as amended by the Decision of the Vlaamse Regering of 25 February 2005 (*Belgisch Staatsblad*, 8 March 2005, p. 9490) ('the Decision of 25 February 2005'), in Case C-204/12, the Decision of 5 March 2004 included inter alia Article 15(1), which listed the sources of energy from which the electricity produced could give rise to the issuance of a green certificate accepted by the VREG.

25 In the version thereof as amended by Decision of the Vlaamse Regering of 8 July 2005 (*Belgisch Staatsblad*, 17 February 2006, p. 8515) ('the Decision of 8 July 2005'), applicable in Cases C-205/12 to C-208/12, the Decision of 5 March 2004 also included the following provisions.

26 That decision defined the 'guarantee of origin' as 'proof confirming that a quantity of electricity supplied to final customers originated from renewable energy sources'.

27 Article 13 of that decision provided:

'(1) Data relating to green certificates issued shall be registered in a database centralised by the VREG. ...

(2) At least the following data shall by registered by green certificate:

...

6. if the green certificate is or is not liable to be accepted in order to fulfil the certificate obligation, as referred to in Article 15;

...

(3) The entry referred to in subparagraph 2(6) is:

1. "acceptable" where the le green certificate fulfils the conditions of Article 15(1) ...

2. "not acceptable" where the green certificate does not fulfil the conditions of Article 15(1) ...

...'

28 Article 15(3) of that decision provided:

'Green certificates which have been used as guarantees of origin in accordance with subsection III may still be used for the purposes of the certificates obligation, provided that the entry referred to in Article 13(2)(6) is "acceptable" ...'

29 Articles 15a and 15c of that decision of 5 March 2004, as amended by the Decision of 8 July 2005, contained under subsection III thereof, entitled '[u]se of green certificates as a guarantee of origin', provided:

'Article 15a. (1) Green certificates are used as a guarantee of origin when they are surrendered as part of a sale of electricity to final customers as [green] electricity.

...

Article 15c. (1) A guarantee of origin from another region or another country may be imported into the Flemish Region in order to be used as a guarantee of origin ...

...

(2) When the guarantee of origin is imported from another region or another country, the data pertaining to it are registered in the central data bank in the form of a green certificate with the following entries:

1. "not acceptable" ...;

...

Green certificates from another region or another country may be registered with the entry "acceptable" in case the Flemish Government decides to accept the certificates concerned by applying Article 25 of [the Electricity Decree].

That registration shall take place after the transfer of the necessary data on guarantee of origin to the VREG by the appropriate department of the other region or country and after the guarantee of origin has been made unusable in that other country or region.

...'

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

30 As a supplier of electricity, between 2003 and 2009 Essent had, under Article 23(1) of the Electricity Decree, an obligation to surrender to the VREG each year a certain number of green certificates ('the quota obligation').

31 In order to discharge its quota obligation by the deadline of 31 March 2005, Essent surrendered to the VREG inter alia guarantees of origin attesting to the production of green electricity in the Netherlands and Norway respectively.

32 Considering that, in the absence of any implementing measures for Article 25 of the Electricity Decree adopted by the Vlaamse Regering, only those green certificates issued pursuant to that decree to producers of green electricity established in the Flemish Region could be accepted for the purpose of fulfilling that quota obligation, the VREG, by a decision of 24 May 2005 adopted on the basis of Article 37(2) of that decree, imposed on Essent an administrative fine of EUR 125 per green certificate not surrendered, giving a total of EUR 542 125.

33 On 30 September 2005, Essent brought proceedings before the Rechtbank van eerste aanleg te Brussel (Court of First Instance, Brussels, Belgium) for a declaration that that decision is unlawful and that, consequently, the fine in question cannot be collected. Essent requests the forthcoming judgment to be declared jointly applicable to the Vlaams Gewest and the Vlaamse Gemeenschap (Case C-204/12).

34 During the subsequent years, on similar grounds, the VREG imposed on Essent fines totalling, respectively, EUR 234 750 by decision of 13 July 2006, EUR 166 125 by decision of 4 July 2007, and EUR 281 250 and EUR 302 375 by two decisions of 18 May 2009, the first relating to 2008 and the second to 2009.

35 The decisions of 13 July 2006 and 4 July 2007 followed the refusal by the VREG to take account of guarantees of origin attesting to the production of green electricity in Denmark (and/or in Sweden) and in Norway, and those of 18 May 2009 the refusal to take account of guarantees of origin attesting to the production of green electricity in Norway.

36 On 16 July 2010, Essent brought proceedings before the Rechtbank van eerste aanleg te Brussel against those four decisions (Cases C-205/12 to C-208/12).

37 In support of each of the five aforementioned actions, Essent relies on an initial plea alleging infringement of Article 34 TFEU and of Article 11 of the EEA Agreement.

38 In that regard the Rechtbank van eerste aanleg te Brussel considers that, as electricity suppliers are required to purchase green certificates issued by the VREG, they are prevented from covering part of their certificate requirements by turning to operators situated abroad, with the result that there would

on the face of it appear to be a restrictive measure having an equivalent effect to a quantitative restriction of the import of such certificates within the meaning of Article 34 TFEU and Article 11 of the EEA Agreement.

39 The referring court also observes that the VREG has stated by way of defence that the guarantees of origin at issue in the cases before it are not green certificates and that under Article 5 of Directive 2001/77, read in the light of recital 10 in the preamble thereto, such guarantees do not confer any entitlement to benefit from national support mechanisms for green energy.

40 The second plea put forward by Essent in support of its actions alleges infringement of the principle of non-discrimination laid down in Article 18 TFEU, Article 4 of the EEA Agreement, Article 5 of Directive 2001/77 and Article 3 of Directive 2003/54. Regarding Article 3 of Directive 2003/54, the referring court states that, in its actions, Essent submits that Article 3(1) requires the Member States to refrain from engaging in discrimination in the institutional organisation of the electricity market.

41 In Essent's submission, the various provisions of EU law relied upon have been disregarded because the national rules in question protect local electricity producers, thereby undermining the achievement of the internal market and because, in refusing to accept guarantees of origin issued in other countries, the VREG treats identical situations differently.

42 In those circumstances the Rechtbank van eerste aanleg te Brussel decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling, worded in essentially similar terms in the five cases before it:

'1. Is a national rule, such as that embodied in the [Electricity Decree], as implemented by the Decision [of 5 March 2004], as amended by the Decision [of 25 February 2005] and by [the Decision of 8 July 2005] [the reference to the Decision of 8 July 2005 is not included in the question referred in Case C-204/12], where:

— an obligation is imposed on the suppliers of electricity to final customers connected to the distribution network or the transmission network, to surrender a certain number of green certificates annually to the Regulatory Authority (Article 23 of the [Electricity Decree]);

— an administrative fine is imposed by the [VREG] on the suppliers of electricity to final customers connected to the distribution network or the transmission network when the supplier has not surrendered a sufficient number of green certificates to fulfil a quota obligation which has been imposed in respect of green certificates (Article 37(2) of the [Electricity Decree]);

— it is expressly provided that guarantees of origin from other countries may be surrendered under certain conditions in order to fulfil the quota obligation (Article 15c(2) of the Decision [of 5 March 2004 as amended by the Decision of 8 July 2005]) [(this indent is not included in the question referred in Case C-204/12)];

— the [VREG] cannot or will not take into account any guarantees of origin originating from Norway [and the Netherlands (remark specific to the question referred in Case C-204/12)] [and Denmark (remark specific to the question referred in Case C-205/12)] [and Denmark/Sweden (remark specific to the question referred in Case C-206/12)], and that being in the absence of implementing measures on the part of the Flemish Government, which has acknowledged the equality or equivalence of those certificates (Article 25 of the [Electricity Decree] and [(i) in respect of Case C-204/12] Article 15(1) of the Decision [of 5 March 2004, as amended by the Decision of 25 February 2005], [(ii) in respect of Cases C-205/12

to C-208/12], Article 15c(2) of the Decision [of 5 March 2004, as amended by the Decision of 8 July 2005]), without that equality or equivalence being investigated by [the VREG] in concrete terms;

— in fact, during the whole time that the [Electricity Decree] was in force, only certificates for the production of green energy generated in the Flemish Region were taken into account when ascertaining whether the quota obligation had been fulfilled, whereas for the suppliers of electricity to final customers connected to the distribution network or transmission network there was no possibility whatsoever of demonstrating that the guarantees of origin from other Member States of the European Union [this specific point is not in the question referred in Case C-204/12], met the condition of the existence of equal or equivalent guarantees regarding the granting of such certificates;

compatible with Article 34 TFEU and Article 11 of the EEA Agreement and/or Article 36 TFEU and Article 13 of the EEA Agreement [(in Cases C-207/12 and C-208/12 the question referred concerns only Articles 11 and 13 of the EEA Agreement)]?

2. Is a national rule as referred to in question 1 above compatible with Article 5 of Directive [2001/77] [(in Cases C-207/12 and C-208/12 the question is asked only "in so far as that provision is relevant for the EEA")]?

3. Is a national rule as referred to in question 1 above compatible with the principle of equal treatment and the prohibition of discrimination as embodied inter alia in Article 18 TFEU [(Cases C-204/12 to C-206/12)], Article 4 of the EEA Agreement [(Cases C-207/12 and C-208/12)] and Article 3 of Directive [2003/54] [(in Cases C-207/12 and C-208/12 the question referred concerns Article 3 only "in so far as that provision is relevant for the EEA")]?'

Procedure before the Court

43 By order of the President of the Court of 20 June 2012 (order in *Essent Belgium*, C-204/12 to C-208/12, EU:C:2012:363), Cases C-204/12 to 208/12 were joined for the purposes of the written and oral procedure and the judgment.

44 Following the Opinion of the Advocate General, by document lodged at the Court Registry on 30 May 2013 the VREG, the Vlaams gewest and the Vlaamse Gemeenschap ('the VREG and Others') requested that the oral part of the procedure be reopened, arguing, in essence, that a number of factual clarifications were necessary in order for the Court to be able to give an accurate answer to the questions referred. The VREG and Others also wish to express a view on the need to limit the temporal effects of the forthcoming judgment, should the Court find that EU law must be interpreted as precluding rules such as those at issue in the main proceedings.

45 After receiving from the Court Registry a letter of 16 July 2014 informing it that the forthcoming judgment in the present cases will be delivered on 11 September 2014, Essent, by document lodged at the Court Registry on 28 July 2014, also requested that the oral part of the procedure be reopened.

46 In that request, Essent argues in essence that the parties should be allowed to submit pleadings on certain assessments contained in the judgment in *Ålands Vindkraft*, C-573/12, EU:C:2014:2037, delivered on 1 July 2014. Essent observes, in that regard, that both the facts and the legal framework of that case differ from the present cases.

47 Pursuant to Article 83 of the Rules of Procedure, the Court may, after hearing the Advocate General, order the reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a

new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union.

48 In the present case, the Court considers, after hearing the Advocate General, that it has all the information necessary to give a ruling. The Court further notes that the requests that the oral part of the procedure be reopened do not refer to any new facts which are such as to influence the forthcoming decision. Moreover, the cases do not have to be decided on the basis of arguments which have not been debated between the parties.

49 In those circumstances, there is no need to reopen the oral phase of the proceedings.

Consideration of the questions referred

Admissibility of the questions

50 According to the VREG and Others, the questions referred are inadmissible on two counts. First of all, the Court of Justice does not have jurisdiction to rule on the compatibility of the national law of a Member State with EU law. Secondly, the questions are irrelevant for the purpose of ruling on the disputes in the main proceedings because they are based on an incorrect interpretation of domestic law. The referring court found, incorrectly, that Article 25 of the Electricity Decree and the second subparagraph of Article 15c(2) of the Decision of 5 March 2004 provided for the possibility of taking account of not only green certificates originating from other countries, but also guarantees of origin from other countries as well.

51 In that regard it must be borne in mind that, although the Court does not, in a reference for a preliminary ruling, have jurisdiction to give a ruling on the compatibility of a national measure with EU law, it does have jurisdiction to supply the national court with a ruling on the interpretation of EU law so as to enable that court to determine whether such compatibility exists in order to decide the case before it (see, inter alia, *Azienda Agro-Zootecnica Franchini and Eolica di Altamura*, C-2/10, EU:C:2011:502, paragraph 35 and the case-law cited).

52 On the other hand, it is not for the Court to rule on the interpretation of national provisions, as such an interpretation falls within the exclusive jurisdiction of the national courts. Thus, the Court, when a question is referred to it by a national court, must base itself on the interpretation of national law as described to it by that court (see, inter alia, *ČEZ*, C-115/08, EU:C:2009:660, paragraph 57 and the case-law cited).

53 It is also settled case-law that, in proceedings under Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is, in principle, bound to give a ruling (see, inter alia, *Carmen Media Group*, C-46/08, EU:C:2010:505, paragraph 75 and the case-law cited).

54 The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite clear that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does

not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, *Carmen Media Group*, EU:C:2010:505, paragraph 76 and the case-law cited).

55 It is clear in that regard that the interpretations of the provisions of EU law sought by the referring court are clearly related to the purpose of the disputes in the main proceedings, as they are aimed in essence at ascertaining whether those provisions must be interpreted as precluding the application effected in the present case of the domestic law provisions at issue in the main proceedings in respect of Essent; those interpretations are thus liable to influence the outcome of those disputes.

56 It follows from the foregoing considerations that the objections put forward by the VREG and Others must be rejected and the requests for preliminary rulings must be held to be admissible.

The second question

57 By its second question, which it is appropriate to consider first, the referring court asks, in essence, whether Article 5 of Directive 2001/77 must be interpreted as precluding a national support scheme, such as that at issue in the main proceedings, which provides for the issuance, by the competent regional regulatory authority, of tradable certificates in respect of green electricity produced on the territory of the region concerned and which places electricity suppliers under an obligation, subject to an administrative fine, to surrender annually to that authority a certain number of those certificates corresponding to a proportion of the total volume of the electricity that they have supplied in that region, without those suppliers being allowed to fulfil that obligation by using guarantees of origin originating from other Member States of the European Union or non-member States which are parties to the EEA Agreement.

58 As a preliminary point, regarding the referring court's question concerning Cases C-207/12 and C-208/12 specifically, the question whether Article 5 of Directive 2001/77 is relevant in regard to the European Economic Area, it was noted in paragraph 11 above that the Decision of the EEA Joint Committee No 102/2005, which integrated that directive into the EEA Agreement, entered into force on 1 September 2006. In those circumstances, and given that both those cases concern decisions of the VREG dated 18 May 2009 concerning fines imposed for 2008 and 2009, it must be held that Article 5 is applicable *ratione temporis* to those cases.

59 As regards the material scope of Article 5, it must be remembered that the purpose of that provision, as evidenced by its title and first paragraph, is, in essence to achieve a situation where the origin of green electricity may be established through a guarantee of origin.

60 The national support schemes by which producers of green electricity receive direct or indirect aid and which, as evidenced by recital 14 in the preamble to Directive 2001/77, may, as in the case of the support scheme at issue in the main proceedings, use the green certificates mechanism, are covered by a separate provision in that directive, namely Article 4.

61 Yet there is nothing in the wording of Articles 4 and 5 or in the recitals in the preamble to Directive 2001/77 to suggest that the EU legislature intended to establish a link between the guarantees of origin and national support schemes for the production of green energy.

62 First of all, it must be borne in mind in that regard that, as evidenced by recitals 14 and 15 in the preamble to and Article 4 of Directive 2001/77, its purpose is not to establish a Community-wide framework regarding national support schemes, but rather to guarantee the proper functioning of existing schemes in order to maintain investor confidence until such as time as a Community framework is put into operation.

63 Next, recital 10 in the preamble to Directive 2001/77 states that schemes for the guarantee of origin do not by themselves imply a right to benefit from national support mechanisms established in different Member States. Regarding more specifically support mechanisms using tradable green certificates, recital 11 in the preamble to that directive states that it is important to distinguish guarantees of origin clearly from those certificates.

64 As to the purpose of the guarantees of origin, recital 10 in the preamble to Directive 2001/77 states that they are necessary in order to facilitate trade in green electricity and to increase transparency for the consumer's choice between green electricity and electricity produced from non-renewable sources, whilst the second indent of Article 5(3) of that directive states that such guarantees of origin serve to enable producers of electricity to demonstrate that the electricity they sell is produced from renewable energy sources.

65 Moreover, under Article 5(4), guarantees of origin are to be mutually recognised by the Member States exclusively as proof of the elements referred to in Article 5(3).

66 The clarifications set out in paragraphs 63 to 65 of this judgment further confirm that the EU legislature did not intend to require Member States who opted for a support scheme using green certificates to extend that scheme to cover green electricity produced on the territory of another Member State (see, by analogy, *Ålands Vindkraft*, EU:C:2014:2037, paragraphs 53 and 54).

67 Lastly, it must also be borne in mind in that regard that, as evidenced by Article 3(1) and (2) of Directive 2001/77, read in conjunction with the Annex thereto, Member States must inter alia fix national indicative targets for future consumption of green electricity, taking account, as reference values, of both 'national production' of green electricity in 1997 and the proportion, expressed as a percentage for 1997 and 2010 respectively, of green electricity in gross electricity consumption, that proportion being calculated on the basis of the 'national production' of green electricity divided by the gross national electricity consumption.

68 It follows that national support mechanisms for producers of electricity as referred to in Article 4 of Directive 2001/77, which are used inter alia to help Member States achieve their respective national indicative targets, must in principle lead to an increase in national production of green electricity. In that regard, recital 10 in the preamble to that directive states inter alia that Member States are not required to recognise the purchase of a guarantee of origin from other Member States or the corresponding purchase of electricity as a contribution to the fulfilment of a national quota obligation.

69 In the light of all the foregoing considerations, the answer to the second question is that Article 5 of Directive 2001/77 must be interpreted as not precluding a national support scheme, such as that at issue in the main proceedings, which provides for the issuance, by the competent regional regulatory authority, of tradable certificates in respect of green electricity produced on the territory of the region concerned and which places electricity suppliers under an obligation, subject to an administrative fine, to surrender annually to that authority a certain number of those certificates corresponding to a proportion of the total volume of the electricity that they have supplied in that region, without those suppliers being allowed to fulfil that obligation by using guarantees of origin originating from other Member States of the European Union or non-member States which are parties to the EEA Agreement.

The first question

70 As a preliminary point, it should be remembered that the cases at issue in the main proceedings relate to decisions of the VREG which, between 15 April 2005 and 28 May 2009, imposed administrative fines on Essent on the ground that Essent had failed to fulfil its obligations to surrender green certificates annually. In those circumstances, and given that the Lisbon Treaty entered into force only

on 1 December 2009, it is appropriate, for the purpose of answering the query put by the first question, to consider Articles 28 EC and 30 EC rather than Articles 34 TFEU and 36 TFEU cited by the referring court.

71 Thus, it must be deemed that, by its first question, the referring court asks, in essence, whether Articles 28 EC and 30 EC and also Articles 11 and 13 of the EEA Agreement must be interpreted as precluding a national support scheme, such as that at issue in the main proceedings, which provides for the issuance, by the competent regional regulatory authority, of tradable certificates in respect of green electricity produced on the territory of the region concerned and which places electricity suppliers under an obligation, subject to an administrative fine, to surrender annually to that authority a certain number of those certificates corresponding to a proportion of the total volume of the electricity that they have supplied in that region, without those suppliers being allowed to fulfil that obligation by using guarantees of origin originating from other Member States of the European Union or non-member States which are parties to the EEA Agreement.

72 Moreover, it must be borne in mind that Articles 11 and 13 of the EEA Agreement are worded in terms almost identical to those of Articles 28 EC and 30 EC, with the result that, according to the Court's settled case-law, they must be interpreted in a similar fashion (see, to that effect, inter alia, *Bellio F.lli*, C-286/02, EU:C:2004:212, paragraphs 34 and 35, and *Commission* v *Portugal*, C-265/06, EU:C:2008:210, paragraph 30). The considerations set out below concerning Articles 28 EC and 30 EC must accordingly be construed as applying *mutatis mutandis* to Articles 11 and 13 of the EEA Agreement.

The existence of a restriction on the free movement of goods

– Arguments of the parties

73 The VREG and Others and the Commission submit, firstly, that guarantees of origin are not goods within the meaning of Articles 28 EC and 30 EC,whilst the Commission adds that the sole function of guarantees of origin is to establish that the electricity to which they relate is 'green', so that they are merely incidental to it and are not separate goods.

74 The VREG and Others submit that the fact that, in practice, such guarantees are sometimes traded commercially in transactions which are distinct from the electricity-related transactions does not cast doubt on their incidental nature. Even if that were so, the only function of the guarantees would be to allow for the sale of a certain quantity of electricity to a customer as green electricity. Moreover, the intangible nature of the guarantees of origin also prevents their categorisation as 'goods' within the meaning of Article 28 EC.

75 Essent, by contrast, takes the view that since in reality guarantees of origin are traded for consideration, they must be regarded as being goods.

76 Essent and the Commission further submit that, irrespective of the question whether or not guarantees of origin should be held to be goods within the meaning of Article 28 EC, the legislation at issue in the main proceedings in any event gives rise to a measure having equivalent effect to a restriction on the very imports of electricity.

– Findings of the Court

77 According to the Court's settled case-law, Article 28 EC, in prohibiting all measures having equivalent effect to quantitative restrictions on imports, covers any national measure which is capable of hindering, directly or indirectly, actually or potentially, intra-Community trade (see, inter alia, *Dassonville*, 8/74, EU:C:1974:82, paragraph 5, and *PreussenElektra*, C-379/98, EU:C:2001:160, paragraph 69).

78 As regards, first of all, the questions whether guarantees of origin such as those at issue in the main proceedings may be categorised as 'goods' within the meaning of Articles 23 EC and 28 EC and whether the free movement thereof was in this case restricted by a support scheme such as that at issue in the main proceedings, it should be observed at the outset that such guarantees are instruments the very existence, content, scope and functions of which are defined by Directive 2001/77.

79 In that regard, it is apparent from paragraphs 63 to 65 of this judgment that, under that directive, the purpose of such instruments is to allow producers of electricity to establish that the electricity sold by them has been produced from renewable energy sources, to facilitate trade in such electricity and to increase transparency for the consumer's choice between green electricity and electricity produced from non-renewable sources. They do not, however, by themselves imply a right to benefit from national support mechanisms established in different Member States, as those guarantees of origin must in that respect inter alia be distinguished from tradable green certificates used in the context of those mechanisms.

80 It thus appears, firstly, that the guarantees of origin are designed to be incidental to, first of all, the green electricity produced by a producer, and, next, to the electricity sold by a supplier to consumers. Secondly, the free movement of such instruments between the Member States, at least for the purposes inherently attached to them under Directive 2001/77, is not restricted by the fact that a national support scheme for the production of green energy which uses green certificates does not provide for the taking into account of those instruments.

81 In order to answer this question, however, it is not necessary to rule definitively on the questions referred to in paragraph 78 of this judgment. It is sufficient to find that, even if it were accepted that guarantees of origin such as those at issue in the main proceedings constitute 'goods' within the meaning of Articles 23 EC and 28 EC, and that a support scheme such as that at issue in the main proceedings does constitute a restriction on the free movement of goods within the meaning of the latter provision, the fact remains, in any event, that that restriction is then justified, in the light of the considerations set out in paragraphs 89 to 103 of this judgment.

82 As regards, secondly, the issue whether there are any restrictions on electricity imports, it should be noted that, although there is nothing in the order for reference on the point of whether the guarantees of origin at issue in the disputes in the main proceedings were purchased by Essent in connection with an actual purchase and import of electricity, it may be supposed that this was the case.

83 In those circumstances, it must be held that legislation such as that at issue in the main proceedings is capable, in various ways, of hindering — at least indirectly and potentially — imports of electricity, especially green electricity, from other Member States (see, to that effect, *Ålands Vindkraft*, EU:C:2014:2037, paragraphs 67 to 75).

84 In the first place, it follows from that legislation that electricity suppliers such as Essent are required to hold on the annual due date a certain number of green certificates for the purposes of fulfilling their quota obligation, which is contingent on the total volume of electricity that they supply.

85 Moreover, only green certificates awarded under that legislation can be used to fulfil that obligation. Accordingly, those suppliers and consumers are as a rule required, on the basis of the electricity that they import, to purchase such certificates, failing which they have to pay an administrative fine. Such legislation is thus capable of impeding electricity imports from other Member States (see, to that effect, *Ålands Vindkraft*, EU:C:2014:2037, paragraphs 69 and 70 and the case-law cited).

86 Secondly, the fact that producers of green electricity have the possibility of selling their green certificates together with the electricity they produce seems capable in practice of facilitating the opening of negotiations and the establishment of contractual relationships — in some cases, on a long-term basis — concerning the supply of national electricity by those producers to suppliers, the latter being able to obtain, in that way, both the electricity and the green certificates that they need in order to fulfil their quota obligation.

87 It follows that, to that extent also, the effect of a support scheme such as that at issue in the main proceedings is, at least potentially, to curb electricity imports from other Member States (see, to that effect, *Ålands Vindkraft*, EU:C:2014:2037, paragraphs 72 and 73 and the case-law cited).

88 It follows from the foregoing that legislation such as that at issue in the main proceedings is capable of impeding imports of electricity, especially green electricity, from other Member States and that, in consequence, it constitutes a measure having equivalent effect to quantitative restrictions on imports, in principle incompatible with the obligations under EU law resulting from Article 28 EC, unless that legislation can be objectively justified (see, to that effect, inter alia, *Ålands Vindkraft*, EU:C:2014:2037, paragraph 75 and the case-law cited).

Possible grounds of justification

89 The Court has consistently held that national legislation or a national practice that constitutes a measure having equivalent effect to quantitative restrictions may be justified on one of the public interest grounds listed in Article 30 EC or by overriding requirements. In either case, the national provision must, in accordance with the principle of proportionality, be appropriate for ensuring attainment of the objective pursued and must not go beyond what is necessary in order to attain that objective (see, inter alia, *Ålands Vindkraft*, EU:C:2014:2037, paragraph 76 and the case-law cited).

– The objective of promoting the use of renewable energy sources

90 According to settled case-law, national measures that are capable of hindering intra-Community trade may inter alia be justified by overriding requirements relating to protection of the environment (see, inter alia, *Ålands Vindkraft*, EU:C:2014:2037, paragraph 77 and the case-law cited).

91 In that regard, it should be noted that the use of renewable energy sources for the production of electricity, which legislation such as that at issue in the main proceedings seeks to promote, is useful for the protection of the environment inasmuch as it contributes to the reduction in greenhouse gas emissions, which are amongst the main causes of climate change that the European Union and its Member States have pledged to combat (see *Ålands Vindkraft*, EU:C:2014:2037, paragraph 78 and the case-law cited).

92 Therefore, and according to recitals 1 to 3 in the preamble to Directive 2001/77, increased use of renewable energy sources, which is a high priority for the European Union, is an important part of the set of measures required to comply with the Kyoto Protocol and make it possible to meet its targets more quickly (see, to that effect, inter alia *IBV & Cie*, C-195/12, EU:C:2013:598, paragraph 56).

93 As the Court has pointed out, such an increase is also designed to protect the health and life of humans, animals and plants, which are among the public interest grounds listed in Article 30 EC (see *Ålands Vindkraft*, EU:C:2014:2037, paragraph 80 and the case-law cited).

94 As stated inter alia in Article 4(1) of Directive 2001/77, the national support mechanisms provided for by those provisions are capable of contributing to attaining the objectives set out in Articles 6 EC and 174(1) EC (see, to that effect, *IBV & Cie*, EU:C:2013:598, paragraph 59).

95 In the light of the foregoing considerations, it must be acknowledged that the objective of promoting the use of renewable energy sources for the production of electricity, such as the objective pursued by the legislation at issue in the main proceedings, is in principle capable of justifying barriers to the free movement of goods.

– Proportionality

96 As observed in paragraph 89 of this judgment, in order for the legislation at issue to be capable of being justified, it must nevertheless satisfy the requirements arising under the principle of proportionality, that is to say, it must be suitable for attaining the legitimate objective it pursues and be necessary for that purpose.

97 As regards, first of all, the fact that only green certificates granted under that legislation in respect of green electricity produced in the regional territory concerned and not guarantees of origin relating to green electricity produced in other Member States may be used in order to fulfil the quota obligation, it must be acknowledged that since, inter alia, EU law has not harmonised the national support schemes for green electricity, such a territorial limitation may in itself be regarded as necessary in order to attain the legitimate objective pursued in the circumstances, which is to promote increased use of renewable energy sources in the production of electricity (see, to that effect, *Ålands Vindkraft*, EU:C:2014:2037, paragraphs 92 to 94).

98 Firstly, the fact that a national support scheme is designed to favour directly the production of green electricity, rather than solely its consumption, can be explained, in particular, by the fact that the green nature of the electricity relates only to its method of production and that, accordingly, it is primarily at the production stage that the environmental objectives in terms of the reduction of greenhouse gases can actually be pursued (see *Ålands Vindkraft*, EU:C:2014:2037, paragraph 95).

99 It must also be borne in mind that, contrary to Essent's assertions and as observed in paragraphs 67 and 68 of this judgment, it follows from Article 3(1) and (2) of Directive 2001/77, read in conjunction with the Annex thereto, that the EU legislature allowed the various Member States to fix national indicative targets on the basis of national production of green electricity.

100 Secondly, and in relation to the fact that the support scheme at issue in the main proceedings is not designed to benefit also the production of green electricity situated in the territory of other Member States inter alia through taking into account guarantees of origin in respect of that electricity, it should be observed that the starting points, the renewable energy potential and the energy mix of each Member State vary (see, to that effect, *Ålands Vindkraft*, EU:C:2014:2037, paragraph 98).

101 Moreover, and as highlighted by the EU legislature in recital 14 in the preamble to Directive 2001/77, one important means of achieving the aim of that directive is to guarantee the proper functioning of support mechanisms for renewable energy sources at national level (see, to that effect, *IBV & Cie*, EU:C:2013:598, paragraph 57).

102 Furthermore, it is essential that Member States be able to control the effect and costs of their national support schemes according to their potential, whilst maintaining investor confidence (see, to that effect, *Ålands Vindkraft*, EU:C:2014:2037, paragraph 99).

103 In the light of all the foregoing, it does not appear that, merely by reserving a support scheme using green certificates, such as that at issue in the main proceedings, exclusively to green electricity produced in the regional territory and by refusing to take account of guarantees of origin in respect of electricity produced in other Member States in order to fulfil the quota obligation, there has been infringement of the principle of proportionality (see, by analogy, *Ålands Vindkraft*, EU:C:2014:2037, paragraph 104).

104 However, it is also necessary to consider whether, viewed together with the restriction just discussed, the other features of the legislation at issue in the main proceedings cited by the referring court lead to the conclusion that, viewed as a whole, that legislation satisfies the requirements of the principle of proportionality.

105 It must be borne in mind that it is apparent from the order for reference that a particular feature of that legislation is an obligation for suppliers to hold and surrender each year to the competent regulatory authority a certain number of green certificates corresponding to a proportion of the electricity that they have supplied, subject to having to pay an administrative fine.

106 It thus follows under that legislation that, in the case of imports of green electricity originating from other Member States, the marketing or consumption of that electricity will, as a rule, require the suppliers concerned to purchase green certificates according to the quantity of electricity thus imported.

107 In those respects, it should be noted first that a national support scheme which, like the one at issue in the main proceedings, uses green certificates, is designed in particular to have the additional cost of producing green electricity borne directly by the market, that is to say, by the suppliers of electricity who are required to fulfil the quota obligation, and, ultimately, by the consumers.

108 In making such a choice, a Member State does not go beyond the margin of discretion which it retains to pursue the legitimate objective of increasing the production of green electricity (see, to that effect, *Ålands Vindkraft*, EU:C:2014:2037, paragraphs 109 and 110).

109 Secondly, it must be noted that, unlike, for example, investment aid, the purpose of this type of scheme is to support the operation of installations producing green electricity once they become active. In that regard, the quota obligation is designed in particular to guarantee green electricity producers a demand for the certificates they have been awarded and in that way to facilitate the sale of the green energy that they produce at a price higher than the market price for conventional energy.

110 The effect of that scheme in terms of offering an incentive for electricity producers in general — including, in particular, those who are both producers, on the one hand, and suppliers or consumers, on the other — to increase their production of green electricity does not appear to be open to doubt; nor, consequently, does it appear possible to call in question the ability of that scheme to attain the legitimate objective pursued in the circumstances of this case (see, to that effect, *Ålands Vindkraft*, EU:C:2014:2037, paragraphs 111 and 112).

111 However, it should be noted, thirdly, that, by its very nature, such a scheme requires for its proper functioning market mechanisms that are capable of enabling traders — who are subject to the quota obligation and who do not yet possess the certificates required to discharge that obligation — to obtain certificates effectively and under fair terms (see, to that effect, *Ålands Vindkraft*, EU:C:2014:2037, paragraph 113).

112 It is therefore important that mechanisms be established which ensure the creation of a genuine market for certificates in which supply can match demand, reaching some kind of balance, so that it is actually possible for the relevant suppliers to obtain certificates under fair terms (see, to that effect, *Ålands Vindkraft*, EU:C:2014:2037, paragraph 114).

113 As regards the fact that suppliers which do not fulfil their quota obligation must, like Essent in the cases at issue in the main proceedings, pay an administrative fine, it is appropriate to state the following.

114 While the imposition of such a fine may admittedly be considered necessary as an incentive, on the one hand, to producers to increase their production of green electricity, and on the other, to traders subject to a quota obligation to take steps to acquire the requisite certificates, it is none the less necessary that neither the method for determining that fine nor the amount of that fine go beyond what is necessary for the purposes of providing such an incentive; in particular, it is necessary in that connection that no excessive penalties be imposed on the traders concerned (see, to that effect, *Ålands Vindkraft*, EU:C:2014:2037, paragraph 116). It will be for the national court to verify, if necessary, whether that is the case as regards the administrative fines at issue in the cases in the main proceedings.

115 Lastly, it should be noted, fourthly, that, provided that there is a market for green certificates which meets the conditions set out in paragraphs 111 and 112 of this judgment and on which traders who have imported electricity from other Member States are genuinely able to obtain green certificates under fair terms, the fact that the national legislation at issue in the main proceedings allows producers of green electricity to sell to traders under the quota obligation both the electricity and the green certificates does not mean that the detailed rules of the quota scheme go beyond what is necessary to attain the objective of increasing the production of green electricity. The fact that such a possibility remains open appears to be an additional incentive for producers to increase their production of green electricity (see, to that effect, *Ålands Vindkraft*, EU:C:2014:2037, paragraph 118).

116 In the light of all the foregoing considerations, the answer to the first question is that Articles 28 EC and 30 EC and also Articles 11 and 13 of the EEA Agreement must be interpreted as not precluding a national support scheme, such as that at issue in the main proceedings, which provides for the issuance, by the competent regional regulatory authority, of tradable certificates in respect of green electricity produced on the territory of the region concerned and which places electricity suppliers under an obligation, subject to an administrative fine, to surrender annually to that authority a certain number of those certificates corresponding to a proportion of the total volume of the electricity that they have supplied in that region, without those suppliers being allowed to fulfil that obligation by using guarantees of origin originating from other Member States of the European Union or non-member States which are parties to the EEA Agreement, provided that:

— mechanisms are established which ensure the creation of a genuine market for certificates in which supply can match demand, reaching some kind of balance, so that it is actually possible for the relevant suppliers to obtain certificates under fair terms;

— the method of calculation and amount of the administrative fine to be paid by suppliers who have not fulfilled that obligation are fixed in such a way as not to exceed what is necessary to encourage producers actually to increase their production of green electricity and suppliers subject to that obligation actually to purchase the required certificates, by avoiding in particular penalising those suppliers in an excessive manner.

The third question

117 By its third question, the referring court asks, in essence, whether the rules on non-discrimination laid down in Article 18 TFEU, Article 4 of the EEA Agreement and Article 3 of Directive 2003/54 respectively must be interpreted as precluding a national support scheme, such as that at issue in the main proceedings, which provides for the issuance, by the competent regional regulatory authority, of tradable certificates in respect of green electricity produced on the territory of the region concerned and which places electricity suppliers under an obligation, subject to an administrative fine, to surrender annually to that authority a certain number of those certificates corresponding to a proportion of the total volume of the electricity that they have supplied in that region, without those suppliers being allowed to fulfil that obligation by using guarantees of origin originating from other Member States of the European Union or non-member States which are parties to the EEA Agreement.

118 Article 18 TFEU, first of all, provides that, within the scope of application of the treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality is to be prohibited.

119 It should be noted that, in its request for a preliminary ruling, the referring court does not explain how a scheme such as that at issue in the main proceedings is 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 is already covered by the first question referred.

120 It must also be borne in mind, in relation to the cases at issue in the main proceedings, that Essent is challenging the fact that it was not permitted, in its capacity as a supplier of electricity, to use guarantees of origin originating from other Member States of the EU and the EEA in order to discharge its quota obligation under the national legislation at issue in the main proceedings.

121 It is clear in that regard that the quota obligation at issue in the main proceedings applies to all electricity suppliers operating in the Flemish Region, irrespective of their nationality. Similarly, the fact that those suppliers may not use guarantees of origin in the place and stead of the green certificates applies to all of them, irrespective of their nationality.

122 As regards producers of electricity, apart from the fact that they are not subject to the quota obligation, it must be borne in mind that the fact that electricity produced by parties established in other Member States may potentially be subjected to differential treatment and be restricted upon import into the Flemish Region comes within the scope of Article 34 TFEU, thereby being fully caught by that provision in the context of the examination of the first question.

123 Next, as regards Article 4 of the EEA Agreement, the wording of which is virtually identical to that of Article 18 TFEU, it follows from the case-law referred to in paragraph 72 of this judgment that an analysis identical to the one just conducted in respect of Article 18 must also hold true here, with the result that nor is Article 4 applicable to situations such as those at issue in the disputes in the main proceedings.

124 Lastly, as regards Article 3 of Directive 2003/54 and, first of all, the query put by the third question referred in Cases C-207/12 and C-208/12 as to whether and to what extent that provision is relevant as regards the EEA, it must be borne in mind that, as observed in paragraph 14 of this judgment, Decision No 146/2005, which integrated that directive into the EEA Agreement, entered into force on 1 June 2007. In those circumstances, and given that both those cases concern decisions of the VREG dated 18 May 2009 concerning fines imposed for 2008 and 2009, it must be held that Article 3 is applicable *ratione temporis* to those cases.

125 Secondly, it should be noted that although the question asked by the referring court mentions Article 3 of Directive 2003/54, it is apparent from the clarification in the order for reference, as reproduced in the second sentence of paragraph 40 of this judgment, that that question must be construed as referring to Article 3(1).

126 Thirdly, it must be borne in mind that Article 3(1) of Directive 2003/54 provides inter alia that Member States may not discriminate between electricity undertakings as regards either rights or obligations.

127 In the present case, however, the referring court has not provided any explanation as to which elements of the cases at hand might, in its view, constitute discrimination within the meaning of that provision.

128 It should be borne in mind, however, that, according to the Court's settled case-law, national courts must state the specific reasons which have led them to question the interpretation of certain provisions of EU law and to deem it necessary to refer a question to the Court of Justice (see, inter alia, order in *BVBA De Backer*, C-234/05, EU:C:2005:662, paragraph 9 and the case-law cited).

129 In those circumstances, the Court is not in a position to give the referring court any guidance beyond what is already set out in paragraphs 120 and 121 of this judgment, namely that it is not clear how, in the cases in the main proceedings, Essent was discriminated against as regards either its rights or obligations as a supplier on the electricity market.

130 In the light of all the foregoing considerations, the answer to the third question is that the rules on non-discrimination laid down in Article 18 TFEU, Article 4 of the EEA Agreement and Article 3(1) of Directive 2003/54 respectively must be interpreted as not precluding a national support scheme, such as that at issue in the main proceedings, which provides for the issuance, by the competent regional regulatory authority, of tradable certificates in respect of green electricity produced on the territory of the region concerned and which places electricity suppliers under an obligation, subject to an administrative fine, to surrender annually to that authority a certain number of those certificates corresponding to a proportion of the total volume of the electricity that they have supplied in that region, without those suppliers being allowed to fulfil that obligation by using guarantees of origin originating from other Member States of the European Union or non-member States which are parties to the EEA Agreement.

Costs

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

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

1. **Article 5 of Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market must be interpreted as not precluding a national support scheme, such as that at issue in the main proceedings, which provides for the issuance, by the competent regional regulatory authority, of tradable certificates in respect of green electricity produced on the territory of the region concerned and which places electricity suppliers under an obligation, subject to an administrative fine, to surrender annually to that authority a certain number of those certificates corresponding to a proportion of the total volume of the electricity that they have supplied in that region,**

without those suppliers being allowed to fulfil that obligation by using guarantees of origin originating from other Member States of the European Union or non-member States which are parties to the EEA Agreement.

2. **Articles 28 EC and 30 EC and Articles 11 and 13 of the Agreement on the European Economic Area of 2 May 1992, must be interpreted as not precluding a national support scheme as described in paragraph 1 of the present operative part, provided that:**

   — **mechanisms are established which ensure the creation of a genuine market for certificates in which supply can match demand, reaching some kind of balance, so that it is actually possible for the relevant suppliers to obtain certificates under fair terms;**

   — **the method of calculation and amount of the administrative fine to be paid by suppliers who have not fulfilled that obligation are fixed in such a way as not to exceed what is necessary to encourage producers actually to increase their production of green electricity and suppliers subject to that obligation actually to purchase the required certificates, by avoiding in particular penalising those suppliers in an excessive manner.**

3. **The rules on non-discrimination contained in Article 18 TFEU, Article 4 of the Agreement on the European Economic Area of 2 May 1992 and Article 3(1) 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 respectively, must be interpreted as not precluding a national support scheme as described in paragraph 1 of the present operative part.**

[Signatures]