JUDGMENT OF THE COURT (Fourth Chamber)

26 November 2014 (*)

(Reference for a preliminary ruling – National support scheme for the consumption of electricity produced from renewable energy sources – Obligation of electricity producers and importers to feed into the national grid a certain quantity of electricity produced from renewable energy sources or, failing that, to purchase 'green certificates' from the competent authority – Evidence of such feeding into the grid requiring certificates to be submitted demonstrating the green origin of electricity produced or imported – Acceptance of certificates issued in a third State subject to the conclusion of a bilateral agreement between that third State and the Member State concerned or an agreement between the national grid manager and an equivalent authority of that third State – Directive 2001/77/EC – External competence of the Community – Cooperation in good faith)

In Case C-66/13,

REQUEST for a preliminary ruling under Article 267 TFUE, from the Consiglio di Stato (Italy), made by decision of 16 October 2012, received at the Court on 8 February 2013, in the proceedings

Green Network SpA

v

Autorità per l'energia elettrica e il gas,

intervener:

Gestore dei Servizi Energetici SpA – GSE,

THE COURT (Fourth Chamber),

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

Advocate General: Y. Bot,

Registrar: A. **Impellizzeri**, Administrator,

having regard to the written procedure and further to the hearing on 8 January 2014,

after considering the observations submitted on behalf of:

– Green Network SpA, by V. Cerulli Irelli, avvocato,

– Gestore dei Servizi Energetici SpA – GSE, by G. Roberti, I. Perego and M. Serpone, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and P. Gentili, avvocato dello Stato,

– the European Commission, by K. Herrmann, E. White, L. Pignataro-Nolin and A. Aresu, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 March 2014,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 3(2) TFEU and 216 TFEU, read in conjunction with 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 the Agreement between the European Economic Community and the Swiss Confederation (OJ, English Special Edition 1972 (I), p. 191), as adapted by Decision No 1/2000 of the EC-Switzerland Joint Committee of 25 October 2000 (OJ 2001 L 51, p. 1) ('the Free Trade Agreement').

2 The request has been made in proceedings between Green Network SpA ('Green Network') and the Autorità per l'energia elettrica e il gas ('the AEEG') concerning an administrative fine imposed by the latter on Green Network for its refusal to purchase green certificates in an amount corresponding to the quantity of electricity which that company imported into Italy from Switzerland.

Legal context

EU law

The Free Trade Agreement

3 The Free Trade Agreement was concluded by the European Economic Community on the basis of Article 113 of the EEC Treaty relating to the common commercial policy, which became Article 113 of the EC Treaty, which in turn became, after amendment, Article 133 EC. The provisions of the latter article now appear in Article 207 TFEU. According to Article 1 thereof, that agreement seeks, inter alia, to promote through the expansion of reciprocal trade the harmonious development of economic relations between the Community and the Swiss Confederation, to provide fair conditions of competition for trade between the Contracting Parties, and to contribute in that way, by the removal of barriers to trade, to the harmonious development and expansion of world trade.

Directive 2001/77

4 Directive 2001/77 was repealed, 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, considering the date of the facts of the dispute in the main proceedings, Directive 2001/77 is the directive applicable *ratione temporis*.

5 According to recitals 1 to 3, 10, 11 and 14 to 16 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.

(16) It is, however, necessary to adapt, after a sufficient transitional period, support schemes to the developing internal electricity market. It is therefore appropriate that the [European] Commission monitor the situation and present a report on experience gained with the application of national schemes. If necessary, the Commission should, in the light of the conclusions of this report, make a proposal for a Community framework with regard to support schemes for electricity produced from renewable energy sources. …'

6 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.'

7 Article 2 of that directive, titled 'Definitions', provided:

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

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

…

(c) “electricity produced from renewable energy sources” shall mean electricity produced by plants using only renewable energy sources, as well as the proportion of electricity produced from renewable energy sources in hybrid plants also using conventional energy sources and including renewable electricity used for filling storage systems, and excluding electricity produced as a result of storage systems;

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

…’

8 Article 3 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. …

(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. … To set these targets until the year 2010, the Member States shall:

– take account of the reference values in the Annex,

…

(4) On the basis of the Member States’ reports referred to in paragraphs 2 and 3, the Commission shall assess to what extent:

– Member States have made progress towards achieving their national indicative targets,

– the national indicative targets are consistent with the global indicative target of 12% of gross national energy consumption by 2010 and in particular with the 22.1% indicative share of electricity produced from renewable energy sources in total Community electricity consumption by 2010.

…’

9 Under the heading ‘Support schemes’, Article 4 of the same directive was drafted in the following terms:

‘(1) Without prejudice to Articles 87 and 88 of the 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.

Any proposal for a framework should:

(a) contribute to the achievement of the national indicative targets;

(b) be compatible with the principles of the internal electricity market;

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

(d) promote the use of renewable energy sources in an effective way, and be simple and, at the same time, as efficient as possible, particularly in terms of cost;

(e) include sufficient transitional periods for national support systems of at least seven years and maintain investor confidence.'

10 Article 5 of Directive 2001/77, under the title 'Guarantee of origin of electricity produced from renewable energy sources', 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.

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

(3) A guarantee of origin shall:

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

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

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

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

(6) After having consulted the Member States, the Commission shall, in the report referred to in Article 8, consider the form and methods that Member States could follow in order to guarantee the origin of electricity produced from renewable energy sources. If necessary, the Commission shall propose to the European Parliament and the Council the adoption of common rules in this respect.'

11 As is apparent from its first paragraph, the Annex to Directive 2001/77 provides reference values for the setting 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 the explanations relating to it show that those reference values are linked, for every Member State, first, to the 'national production' of electricity produced from renewable energy sources in 1997 and, secondly, to the proportion, as a percentage, for the years 1997 and 2010 respectively, of the electricity produced from renewable energy sources in the consumption of electricity, that proportion being 'based on the national production of [electricity produced from renewable energy sources] divided by the gross national electricity consumption'.

Italian law

12 Article 11(1) of Legislative Decree No 79 on the implementation of Directive 96/92/EC concerning common rules for the internal market in electricity (decreto legislativo n. 79 – Attuazione della direttiva 96/92/CE recante norme comuni per il mercato interno dell'energia elettrica) of 16 March 1999 (GURI No 75 of 31 March 1999, p. 8) ('Legislative Decree No 79/1999') requires operators having produced or imported electricity to feed into the national grid, during the following year, a quota of electricity produced from renewable energy sources ('green electricity') from installations that entered into service or increased their production after the entry into force of that decree. Pursuant to Article 11(3) of the same decree, this requirement may be discharged by, inter alia, purchasing all or part of that quota from other producers, provided that the electricity fed into the national grid is green, or by purchasing green certificates from the designated national grid manager, Gestore servizi energetici GSE SpA ('GSE'), since 1 November 2005. To that end, the producers and importers concerned must either submit certificates showing that a quota of electricity produced or imported has been produced from renewable energy sources, or buy green certificates.

13 Article 4(6) of the Ministerial Decree laying down rules for the implementation of standards on electricity produced from renewable energy sources under Article 11(1), (2) and (3) of Legislative Decree No 79 of 16 March 1999 (decreto ministeriale – Direttive per l'attuazione delle norme in materia di energia elettrica da fonti rinnovabili di cui ai commi 1, 2 e 3 dell'articolo 11 del decreto legislativo 16 marzo 1999, n. 79), of 11 November 1999 (GURI No 292 of 14 December 1999, p. 26) (Ministerial Decree of 11 November 1999), provides:

'The obligation in Article 11(1) and (2) of Legislative Decree [No – 79/1999] may be performed by importing, wholly or in part, electricity generated in installations that entered into service after 1 April 1999, drawing on renewable energy sources, provided that those installations are situated in foreign countries that adopt analogous instruments for the promotion and encouragement of renewable energy based on market mechanisms affording the same opportunity to installations situated in Italy. In that case, the application mentioned in paragraph 3 is submitted by the holder of the obligation at the same time as the contract for the purchase of the electricity generated by the installation and the authorisation for the feeding of that electricity into the national grid. All data shall be certified by the authority designated under Article 20(3) of 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 (OJ 1997 L 27, p. 20)], in the country in which the installation is situated. In the case of countries which are not members of the European Union, acceptance of the application is subject to the conclusion of an agreement between the national grid manager and the equivalent local authority determining the arrangements for the necessary verifications'.

14 Pursuant to Article 20(3) of Legislative Decree No 387 on the implementation of Directive 2001/77/EC on the promotion of electricity produced from renewable energy sources in the internal electricity market (decreto legislativo n. 387 – Attuazione della direttiva 2001/77/CE relativa alla promozione dell'energia elettrica prodotta da fonti energetiche rinnovabili nel mercato interno dell'elettricità) of 29 December 2003 (ordinary supplement to GURI No 25 of 31 January 2004) ('Legislative Decree No 387/2003'), operators which import electricity produced in other Member States of the European Union may request exemption of GSE from the obligation to purchase green certificates under Article 11 of Legislative Decree No 79/1999 for the proportion of electricity imported, by presenting it a certified copy of the guarantee of origin issued in accordance with Article 5 of Directive 2001/77. In case of import of electricity produced in a third State, the same Article 20(3) makes that exemption conditional on the conclusion, between the Italian Republic and the third State concerned, of an agreement requiring the electricity concerned to be produced from renewable energy sources and guaranteed as such according to the same arrangements as those provided for in Article 5 of Directive 2001/77.

15 Such an agreement was concluded on 6 March 2007 between the competent Italian ministries and the Federal Environment, Transport, Energy and Communications Department of the Swiss Confederation. That agreement provides for the mutual recognition of guarantees of origin of electricity imported from 2006, the year in which the Swiss Confederation enacted legislation in conformity with the provisions of Directive 2001/77.

16 By virtue of Article 4 of Legislative Decree No 387/2003, GSE is responsible for monitoring compliance with the obligation under Legislative Decree No 79/1999 and for reporting cases of breach to the AEEG which has the power, in such cases, to impose the penalties provided for by Law No 481 on the rules relating to competition and the regulation of public utility services – Establishment of regulatory authorities for public utility services (legge n. 481 – Norme per la concorrenza e la regolazione dei servizi di pubblica utilità. Istituzione delle Autorità di regolazione dei servizi di pubblica utilità) of 14 November 1995 (ordinary supplement to GURI No 270 of 18 November 1995).

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

17 During the year 2005, Green Network imported into Italy 873 855 MWh of electricity from Switzerland under a supply contract concluded with the Swiss company Aar e Ticino SA di Elettricità. According to the latter company's written statements, that electricity had been produced in Switzerland from renewable sources.

18 Pursuant to Article 20(3) of Legislative Decree No 387/2003, Green Network applied to GSE for exemption, for the year 2006, from the obligation to purchase green certificates under Article 11 of Legislative Decree No 79/1999, in respect of the quantities of electricity thus imported from Switzerland.

19 By decision of 7 July 2006, GSE rejected that request on the ground that, during the year 2005, the Italian Republic and the Swiss Confederation had not yet concluded the agreement referred to in that Article 20(3). Consequently, GSE directed Green Network to purchase 378 green certificates, for a total of EUR 2 367 792. Since Green Network did not do so, the AEEG imposed, by decision of 21 January 2011, an administrative fine of EUR 2 466 450.

20 The appeal lodged by Green Network against that decision having been dismissed by the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court for Lombardy), that company brought an appeal against the decision of that court before the Consiglio di Stato (Council of State). In support of that appeal, Green Network reiterates, in particular, the arguments

it set out at first instance, namely, that Article 20(3) of Legislative Decree No 387/2003 is incompatible with Articles 3(2) TFEU and 216 TFEU, inasmuch as the European Union has exclusive external competence for concluding an agreement such as that envisaged by that provision of national law.

21 Green Network also argues that, given that incompatibility, Article 4(6) of Ministerial Decree of 11 November 1999 should apply, as it did in the past. In that context, Green Network claims that the agreement between grid operators on the reciprocal recognition of certificates required by the latter provision was indeed implicitly concluded between Gestore della Rete di Trasmissione Nazionale (GRTN), the national grid operator that was succeeded by GSE, and the equivalent Swiss operator.

22 The national court indicates in that regard that, should the Court find, in answer to the first and second questions referred for a preliminary ruling, that a provision such as Article 20(3) of Legislative Decree No 387/2003 fails to have regard to the exclusive external competence of the Union, the present case would actually be covered by Article 4(6) of Ministerial Decree of 11 November 1999. In that respect, the referring court also considers it necessary to refer to the Court third and fourth questions which relate to that latter provision of national law.

23 It was in those circumstances that the Consiglio di Stato decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Is it inconsistent with the correct application of Articles 3(2) TFEU and 216 TFEU – according to which the Union has exclusive competence for the conclusion of an international agreement when that conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope, with the twofold consequence that, first, the power to conclude with non-member States agreements that affect common rules or alter their operation, or [affect] a sector completely governed by Community law and for which the Union has exclusive competence, is centralised within the European Union itself and, secondly, that such authority no longer resides individually or collectively with the Member States – and of Article 5 of Directive 2001/77/EC, for a national provision ([Article] 20(3) of Legislative Decree No 387 of 2003) to make the recognition of the guarantees of origin issued by third States subject to the conclusion of an appropriate international agreement between the Italian Republic and the third State in question?

(2) Are the national rules at issue inconsistent with the correct application of the abovementioned Community rules, when the non-Member State is the Swiss Confederation, linked to the European Union by a free trade agreement concluded on 22 July 1972 and entered into force on 1 January 1973?

(3) Is it inconsistent with the correct application of the Community rules referred to in question (i) for the provision of national law, contained in Article 4(6) of the Ministerial Decree of 11 November 1999, to lay down that, when electricity is imported from non-Member States of the European Union, acceptance of the application is conditional upon the conclusion of an agreement between the national grid manager and an equivalent local authority determining the arrangements for the necessary verifications?

(4) In particular, is it inconsistent with the proper application of the Community rules at issue for the agreement under Article 4(6) of the Ministerial Decree of November 1999 to consist of a merely tacit agreement, never set out in official documents and the subject of a mere statement by the appellant, which is unable to provide details of its essential elements?’

Consideration of the questions referred for a preliminary ruling

Preliminary remarks

24 As is clear from their wording, the questions referred for a preliminary ruling concern in substance the interpretation of Articles 3(2) TFEU and 216 TFEU.

25 It is, nevertheless, important to note that the case in the main proceedings relates to the challenging of a decision of the AEEG imposing an administrative fine on Green Network on the ground that that company had not fulfilled an obligation to purchase green certificates in respect of the year 2006. In those circumstances, and having regard to the fact that the Lisbon Treaty did not enter into force until 1 December 2009, it is appropriate, in order to address the concerns raised by the questions asked, to take into consideration not the provisions of the TFEU cited by the referring court but rather, as argued by, in particular, GSE, the Italian Government and the Commission, the rules on the exclusive external competence of the Community as laid down in the EC Treaty.

26 In that regard, it should be stated that, among the various situations of exclusive external competence of the Union now specified in Article 3(2) TFEU, only that referred to in the last clause of that provision, namely, the situation in which the conclusion of an international agreement 'may affect common rules or alter their scope', appears as the basis of the referring court's questions and proves relevant in the context of the present case.

27 The words used in that last clause correspond to those by which the Court, in paragraph 22 of the judgment in *Commission* v *Council* ('*ERTA*', 22/70, EU:C:1971:32), defined the nature of the international obligations which Member States may not enter into outside the framework of the Community institutions, when common rules have been promulgated by the Community for the attainment of the objectives of the Treaty (see judgment in *Commission* v *Council*, C-114/12, EU:C:2014:2151, paragraph 66).

28 Consequently, the questions referred for a preliminary ruling must, in this instance, be understood as relating to the exclusive external competence of the Community within the meaning of the case-law begun in the judgment in *ERTA* (EU:C:1971:32) and developed therefrom ('exclusive external competence within the meaning of the *ERTA* case-law').

29 According to that case-law, there is a risk that common Community rules might be adversely affected by international commitments undertaken by Member States, or that the scope of those rules might be altered, which is such as to justify an exclusive external competence of the Community, when those commitments fall within the scope of those rules (see, inter alia, judgment in *Commission* v *Council*, EU:C:2014:2151, paragraph 68 and the case-law cited, and Opinion 1/13, EU:C:2014:2303, point 71).

30 A finding that there is such a risk does not presuppose that the areas covered by the international commitments and those covered by the Community rules coincide fully (judgment in *Commission* v *Council*, EU:C:2014:2151, paragraph 69 and the case-law cited, and Opinion 1/13, EU:C:2014:2303, point 72).

31 In particular, the scope of Community rules may be affected or altered by such commitments where the latter fall within an area already largely covered by such rules (judgment in *Commission* v *Council*, EU:C:2014:2151, paragraph 70 and the case-law cited, and Opinion 1/13, EU:C:2014:2303, point 73).

32 In addition, the Member States may not, outside the framework of the Community institutions, enter into such commitments, even when there is no possible contradiction between those

commitments and the common Community rules (judgment in *Commission* v *Council*, EU:C:2014:2151, paragraph 71 and the case-law cited).

33 That said, only conferred powers being vested in the Community, any competence, especially exclusive competence, must have its basis in conclusions drawn from a comprehensive and detailed analysis of the relationship between the international agreement envisaged and the Community law in force. That analysis must take into account the areas covered by the Community rules and by the provisions of the agreement envisaged, respectively, their foreseeable future development and the nature and content of those rules and those provisions, in order to determine whether the agreement is capable of undermining the uniform and consistent application of the Community rules and the proper functioning of the system which they establish (see Opinion 1/13, EU:C:2014:2303, point 74 and the case-law cited).

The first question

34 By its first question, the referring court asks, in essence, whether, having regard to the existence of Directive 2001/77 and, in particular, to Article 5 thereof, the EC Treaty must be interpreted as meaning that the Community enjoys exclusive external competence within the meaning of the *ERTA* case-law that precludes a provision of national law, such as that at issue in the main proceedings, which provides for the grant of exemption from the obligation to acquire green certificates owing to the introduction, onto the national consumer market, of electricity imported from a third State, by means of the prior conclusion, between the Member State and the third State concerned, of an agreement under which the electricity thus imported is guaranteed to be green, according to arrangements identical to those set out in that Article 5 (‘the first contested provision of national law’).

35 As a preliminary point, it should be recalled that Directive 2001/77 was adopted on the basis of Article 175 EC, whose provisions were reproduced in Article 192 TFEU, concerning Community environmental policy, which provided for powers shared between the Community and its Member States (see, inter alia, judgment in *Commission* v *Council*, C-370/07, EU:C:2009:590, paragraph 49).

36 In that context, and as is clear in particular from the case-law recalled in paragraphs 29 to 33 of this judgment, whether the Community possesses exclusive external competence that precludes a rule such as the first contested provision of national law depends, in this case, on whether an agreement of the kind whose conclusion is envisaged by that provision is liable to affect the common provisions contained in Directive 2001/77 or to alter the scope of those provisions.

37 In that regard, it should be noted that the mere fact that, at the time of the facts in the main proceedings, no agreement of that kind had yet been actually concluded between the Italian Republic and the Swiss Confederation is not such as to exclude the existence of any failure to have regard to the exclusive external competence of the Community.

38 By making the benefit of the advantage it confers on electricity importers subject to the prior conclusion of such an international agreement, a provision such as the first contested provision of national law sets in motion a process that could lead to such a conclusion actually being realised, which, as the Advocate General noted at points 83 to 85 of his Opinion, would be sufficient to affect the exclusive external competence of the Community, assuming it to have been established (see, to that effect, judgment in *Commission* v *Greece*, C-45/07, EU:C:2009:81, paragraphs 21 to 23).

39 With regard to the area covered by the agreements whose conclusion is thus envisaged by the first contested provision of national law and to their content, too, it must be recalled that those agreements essentially seek to determine on what conditions and under what arrangements

electricity produced in a third State and imported into a Member State must be certified as green electricity by the authorities of that third State in order for it to be recognised as such in the internal consumer electricity market of that Member State, in particular, in connection with the implementation of a national support scheme for the consumption of green energy established by that Member State.

40 As regards the area covered by the relevant provisions contained in Directive 2001/77 in that respect and the content of those provisions, it is appropriate to take into consideration, in particular, Articles 3 to 5 of that directive.

41 On the one hand, and concerning Article 5 of that directive, expressly referred to in the questions referred for a preliminary ruling, it is, admittedly, to be observed that, as is apparent both from the wording and from the structure of that article, the guarantees of origin intended to show that the electricity has been produced from renewable energy sources, whose issue by the competent Member State authorities is provided for by that article, concern exclusively electricity produced in sites under their jurisdiction and not electricity produced in third States.

42 That circumstance does not, however, alter the fact that it is the purpose of that article to harmonise the conditions on, and mechanisms under, which electricity may and must be certified, in Member States and within the Community, as being green electricity, and be recognised as such in the internal consumer electricity market.

43 Thus, Article 5(1) of Directive 2001/77 requires Member States to ensure that the origin of green electricity, as defined in Article 2 of that directive, can be guaranteed as such in accordance with objective, transparent and non-discriminatory criteria laid down by each Member State, and to ensure that guarantees of origin are issued to that effect in response to a request.

44 The first indent of Article 5(3) of that directive provides, inter alia, that guarantees of origin are to specify the energy source from which the electricity has been produced and the dates and places of production, too. Pursuant to Article 5(5) of that directive, Member States or the competent bodies they designate must put in place appropriate mechanisms to ensure that guarantees of origin are both accurate and reliable.

45 As regards the purpose of those guarantees of origin, recital 10 in the preamble to Directive 2001/77 states that they are required for facilitating trade in green electricity and increasing transparency for the consumer’s choice between such electricity and that produced from non-renewable energy sources. The second indent of Article 5(3) of that directive stipulates that those guarantees of origin have the objective of enabling producers of electricity from renewable energy sources to prove that the electricity they sell is produced from renewable energy sources.

46 Pursuant to Article 5(4) of Directive 2001/77, the guarantees of origin should be mutually recognised by the Member States, exclusively as proof of the elements referred to in Article 5(3) of the same directive.

47 In that regard, it should be recalled that agreements such as those whose conclusion between the Italian Republic and a third State is provided for by the first contested provision of national law are specifically intended to ensure that guarantees of origin issued by the authorities of that third State will, like the guarantees of origin issued in Member States pursuant to Article 5 of Directive 2001/77 and provided that conditions equivalent to those laid down by those provisions are satisfied, be recognised, on the consumer market of that Member State, as evidence of the green nature, for the purposes of that directive, of electricity imported from that third State.

48 Accordingly, such an agreement may extend the scope of its harmonised certification mechanism

established by Article 5 of Directive 2001/77 for guarantees of origin issued in the Member States, by allowing, in particular, guarantees of origin issued in third States to enjoy, on the internal consumer electricity market of the Member State concerned, a status equivalent to that enjoyed, particularly for the specific purpose of facilitating trade and increasing transparency in respect of the consumers referred to in paragraph 45 of this judgment, by guarantees of origin issued in the Member States.

49 It follows that an agreement of that kind is liable to alter the scope of the common rules contained in Article 5 of Directive 2001/77.

50 On the other hand, with regard to the fact that the guarantees of origin issued by the authorities of a third State, in accordance with an agreement such as that whose conclusion is provided for by the first contested provision of national law, are intended in particular to be recognised in the context of a national support scheme for the consumption of green electricity, by allowing their holder to be exempted from the obligation to acquire green certificates, the following observations should be made.

51 It is true that Article 4 of Directive 2001/77 and recital 15 in the preamble to that directive make it clear that, while encouraging Member States to adopt such support schemes, that directive does not lay down a Community-wide framework for them (see judgment in *IBV & Cie*, C-195/12, EU:C:2013:598, paragraph 63).

52 Accordingly, as regards the form that support schemes may take, recital 14 in the preamble to Directive 2001/77 does no more than list the various kinds of measures to which the Member States generally have recourse in that connection, namely, green certificates, investment aid, tax exemptions or reductions, tax refunds and direct price support schemes (see judgment in *IBV & Cie*, EU:C:2013:598, paragraph 64).

53 Nor does Article 4 of that directive contain any specific indications as regards the content of the measures of support for renewable energy whose adoption is thus encouraged, apart from the indications that such measures are to contribute to attaining the objectives set out in Articles 6 EC and 174(1) EC (see judgment in *IBV & Cie*, EU:C:2013:598, paragraph 65).

54 It follows that Directive 2001/77 allows Member States considerable latitude for the purposes of the adoption and implementation of such support schemes (see, to that effect, judgment in *IBV & Cie*, EU:C:2013:598, paragraph 80).

55 Nevertheless, it is also important to consider that, as Article 1 of Directive 2001/77 makes clear, that directive seeks to promote an increase in the contribution of renewable energy sources to electricity production in the internal market for electricity. Recital 1 in the preamble to that directive emphasises that the potential for the exploitation of renewable energy sources is presently underused in the Community and it recognises the need to promote renewable energy sources as a priority measure, given that their exploitation contributes to environmental protection and sustainable development and can, in addition, 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.

56 Furthermore, Article 3(1) and (2) of Directive 2001/77, read in conjunction with the Annex thereto, make clear that 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 (see judgment in *Essent Belgium*, C-204/12 to C-208/12, EU:C:2014:2192, paragraph 67).

57 It follows, in particular, 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 (judgment in *Essent Belgium*, EU:C:2014:2192, paragraph 68).

58 Moreover, it is clear from the second indent of Article 3(4) of Directive 2001/77, read in conjunction with the Annex thereto, that the national indicative targets must be consistent with the global indicative target at the level of the Community itself.

59 As the Commission argues in that respect, the fact that a Member State concludes an agreement with a third State for the purpose of making it possible, in the operation of a national support scheme, for account to be taken of the green nature of the electricity produced in that third State could interfere, on the one hand, with the objectives of Directive 2001/77, set out in paragraph 55 of this judgment, and, on the other hand, with the Member States' obligation to increase their production of green electricity so as to contribute to achieving the national indicative targets allocated to them pursuant to Article 3 of that directive and thus to participate in pursuing the global indicative target at the level of the Community itself.

60 The conclusion of such agreements by Member States, when Directive 2001/77 in no way authorises this, is therefore liable to affect the proper functioning of the system established by that directive and the objectives it pursues as well.

61 In addition, as is apparent from the case-law cited in paragraph 33 of this judgment, assessing whether an area is already largely covered by Community rules requires, in particular, account to be taken, not only of Community law as it now stands in the sphere concerned, but also of its future development, in so far as that is foreseeable at the time of that analysis.

62 It must in that regard be emphasised that, even though Directive 2001/77 does not, as has just been observed, lay down a Community-wide framework regarding national support schemes for electricity produced from renewable energy sources, the Community legislature nevertheless expressly provided, in recital 15 in the preamble to that directive and in Article 4(2) thereof, that the Commission was required to present, not later than 27 October 2005, a report on experience gained with the application and coexistence of the different national support mechanisms, accompanied, if necessary, by a proposal for a Community framework with regard to those support schemes for electricity produced from renewable energy, specifying in that respect various criteria such a framework should meet.

63 The first contested provision of national law was in fact adopted during the period in which the Commission was thus required to examine that experience with a view to the presentation of such a report and the ultimate adoption, by the Community legislature, of such a Community framework.

64 It should also be noted in that context that, as the referring court states, unlike the situation that prevailed under Directive 2001/77, and as is apparent both from recitals 37 and 38 in the preamble to Directive 2009/28 and from Articles 9 and 10 of the latter directive, which replaced Directive 2001/77, the Community legislature, in the framework of that new directive, inter alia undertook to specify the conditions on which green electricity produced in a third State and imported into a Member State may, in the cooperation established between those States, be taken into account, should the case arise, by that Member State in order to achieve the binding target concerning the proportion of green energy in final energy consumption imposed on it by that directive.

65 Having regard to all the foregoing considerations, the answer to the first question is that the EC Treaty must be interpreted as meaning that, having regard to the provisions of Directive 2001/77, the Community has exclusive external competence that precludes a provision such as the first contested provision of national law.

The second question

66 As is clear from its wording, the second question, like the first, involves the interpretation of Articles 3(2) TFEU and 216 TFEU. Therefore, and as follows from the recitals set out in paragraphs 24 to 28 of this judgment, that question must, given that wording, be understood to relate to whether, owing to the existence of the Free Trade Agreement, the Community has exclusive external competence, within the meaning of the *ERTA* case-law, that precludes a provision such as the first contested provision of national law.

67 It no longer appears necessary to rule on the second question referred by the national court, for it follows from the answer to the first question that the Community has, owing to the existence of Directive 2001/77, exclusive external competence that precludes such a provision of national law.

The third question

68 By its third question, the referring court essentially asks whether, having regard to the existence of Directive 2001/77 and, in particular, Article 5 thereof, the EC Treaty must be interpreted as meaning that the Community has exclusive external competence, within the meaning of the *ERTA* case-law, that precludes the adoption of a provision of national law, such as that at issue in the main proceedings, which provides for the grant of exemption from the obligation to acquire green certificates owing to the introduction, onto the national consumer market, of electricity imported from a third State, by means of the prior conclusion, between the national grid manager and an equivalent local authority of that third State, of an agreement determining the verification arrangements necessary for certifying that the electricity thus imported is green electricity (‘the second contested provision of national law’).

69 In that regard, it is, admittedly, to be noted that, in the light of the information available to the Court, there is nothing to suggest, a priori, that an agreement such as that thus envisaged and concluded between agencies such as a national grid manager and an equivalent agency within a third State could constitute an agreement by which a Member State would, within the meaning of the *ERTA* case-law, enter into ‘international commitments’ in respect of that third State that could affect common rules of the Community or alter their operation. Having regard to those aspects, it is in particular not apparent that such an agreement would be such as to express the intention of the States concerned to commit themselves under international law (see, to that effect, inter alia, Opinion 1/13, EU:C:2014:2303, point 39).

70 In the context of this case, it is nevertheless important to recall that the referring court states that, were it to be confirmed, in the light of the answer to the first question referred, that, on the ground that it disregards the exclusive external competence of the Community, the first contested provision of national law must not be applied, the second contested provision of national law should apply in the case in the main proceedings.

71 It is to be noted, in that regard, that the purpose of the second contested provision of national law is similar to that of the first contested provision of national law. The second contested provision of national law essentially seeks, like the first, to establish cross-border mechanisms for certifying the green nature of the electricity imported from a third State and placed on the Italian consumer market.

72 While the relevant mechanisms are no longer, as in the context of the first contested provision of national law, the direct result of an international agreement concluded between two subjects of international law and governed by that agreement, the fact remains that, under the authority to make rules conferred by the second contested provision of national law on the national grid manager, they are created for the purpose of negotiating them with an equivalent local authority in the third State concerned.

73 As the Advocate General also stated in point 103 of his Opinion, it is contrary to the principle of cooperation in good faith, affirmed in Article 10 EC, whose provisions were reproduced, after amendment, in Article 4(3) TFEU, when a provision such as the first contested provision of national law has been found to be incompatible with Community law and has, in consequence, been disapplied by a national court, for a provision of national law to be applied, by way of substitution, when, like the second contested provision of national law, it is in substance similar to the provision so disapplied.

74 Having regard to the foregoing considerations, the answer to the third question is that, when a provision such as the first contested provision of national law has been disapplied by a national court because it is incompatible with EU law, it is contrary to EU law for that court to apply, by way of substitution, a provision of national law in substance similar to the first, such as the second contested provision of national law.

The fourth question

75 In the light of the answer to the third question, it is not necessary to answer the fourth.

Costs

76 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. **On a proper construction of the EC Treaty, having regard to the provisions 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, the European Community enjoys exclusive external competence precluding a provision of national law, such as that at issue in the main proceedings, which provides for the grant of exemption from the obligation to purchase green certificates owing to the introduction, onto the national consumer market, of electricity imported from a third State, by means of the prior conclusion, between the Member State and third State concerned, of an agreement under which the electricity thus imported is guaranteed as having been produced from renewable energy sources, according to arrangements identical to those set out in Article 5 of that directive.**

2. **When a provision such as that referred to in paragraph 1 of the operative part of this judgment has been disapplied by a national court because it is incompatible with EU law, it is contrary to EU law for that court to apply, by way of substitution, an earlier provision of national law in substance similar to that disapplied, which provides for the grant of exemption from the obligation to purchase green certificates owing to the introduction, onto the national consumer market, of electricity imported from a third**

State, by means of the prior conclusion, between the national grid manager and an equivalent local authority of that third State, of an agreement determining the verification arrangements necessary for the purpose of certifying that the electricity thus imported is electricity produced from renewable energy sources.

[Signatures]

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* Language of the case: Italian.