Case C-573/12

Summary of reference for a preliminary ruling under Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

6 December 2012

Referring court:

Förvaltningsrätten i Linköping

Date of the decision to refer:

4 December 2012

Applicant:

Ålands Vindkraft AB

Defendant:

Energimyndigheten

Subject-matter of the main proceedings

1 Grant of an electricity certificate under the Swedish 'electricity certificate system'.

Subject-matter and legal basis of the reference

2 Reference for a preliminary ruling under Article 267 TFEU concerning the interpretation of Articles 2(k) and 3(3) of Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, against the background of Article 34 TFEU, in order to clarify whether the restriction of the electricity certificate system to only Swedish producers is compatible with that directive and that provision of the Treaty on the Functioning of the European Union.

Questions referred for a preliminary ruling

3 1. The Swedish electricity certificate system is a national support scheme which requires electricity suppliers and certain electricity users in the Member State to purchase an electricity certificate, corresponding to a certain share of their sales or use, without there being a specific requirement also to purchase electricity from the same source. The electricity certificate is issued by the Swedish State and is proof that a certain amount of renewable electricity has been produced. The producers of electricity obtained from renewable sources receive, by the sale of the electricity certificate, extra revenue as an additional income from its production of electricity. Are Article [2(k)] and Article 3(3) of Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC to be interpreted as meaning that they permit a Member State to apply a national support scheme as above, in which only producers situated in the territory of that country can participate and which has the result that those producers have an economic advantage over producers who cannot be issued with an electricity certificate?

2. Can a system such as that described in question 1 – in the light of Article 34 [TFEU] – be regarded as constituting a quantitative restriction on imports or a measure having equivalent effect?

3. If the answer to question 2 is affirmative, can such a system be compatible with Article 34 [TFEU] as regards the objective of promoting the production of electricity from renewable energy sources?

4. How is the consideration of the above questions affected by the fact that the restriction of the support scheme to include only national producers is not expressly governed in national law?

Provisions of European Union law relied on

4 Articles 2(2) TFEU, 4(2)(a), (e) and (i) TFEU, 34 TFEU, 36 TFEU, 191(1) TFEU, 192(1) TFEU and 193 TFEU.

5 Directive 2009/28, in particular

– Article 3(3), which reads as follows:

‘In order to reach the targets set in paragraphs 1 and 2 of this article Member States may, inter alia, apply the following measures:

(a) support schemes;

(b) measures of cooperation between different Member States and with third countries for achieving their national overall targets in accordance with Articles 5 to 11.

Without prejudice to Articles 87 and 88 of the Treaty, Member States shall have the right to decide, in accordance with Articles 5 to 11 of this Directive, to which extent they support energy from renewable sources which is produced in a different Member State.'

– Article 2(k), which reads as follows:

'"support scheme" means any instrument, scheme or mechanism applied by a Member State or a group of Member States, that promotes the use of energy from renewable sources by reducing the cost of that energy, increasing the price at which it can be sold, or increasing, by means of a renewable energy obligation or otherwise, the volume of such energy purchased. This includes, but is not restricted to, investment aid, tax exemptions or reductions, tax refunds, renewable energy obligation support schemes including those using green certificates, and direct price support schemes including feed-in tariffs and premium payments.'

Provisions of national law relied on and legislative travaux préparatoires

6 At the time of its decision, the Energimyndigheten (Energy Authority) applied lagen (2003:113) om elcertifikat (Law (2003:113) on electrity certificates). That Law was replaced, with effect from 1 January 2012, by lagen (2011:1200) om elcertifikat (Law (2011:1200) on electricity certificates). In accordance with the transitional provisions, the former Law ceased to have effect on that date. The basis under Swedish law is that the legislation in force at the time of the court's examination is applicable to the case. Exceptions from that rule can be laid down in transitional provisions or can arise for example where application of the later rules would cause disadvantage to an individual. Sweden's constitution also prohibits retroactive criminal law and retroactive taxation law.

Law (2011:1200) on electricity certificates

7 It is clear from Chapter 1, Paragraph 1, that the Law seeks to promote the production of renewable electricity.

8 Chapter 1, Paragraph 2, reads as follows:

'For the purposes of this Law:

1. *renewable electricity* shall mean electricity produced from renewable energy sources or peat,

2. *renewable energy sources* shall mean biofuels, geothermic energy, solar energy, water power, wind power and wave energy,

…

4. *electricity certificate* shall mean a certificate which has been prepared in accordance with that Law or by another State in accordance with an international agreement such as that referred to in Paragraph 5, and which confirms that renewable electricity has been produced,

5. *quota obligation* shall mean the duty to hold and annul an electricity certificate in connection with the sale or use of electricity,

…'

9 It is apparent from Chapter 2, paragraph 1, that the supervisory authority, if the requirements under that chapter are met, is to decide to approve the plant for issue of the electricity certificate and at the same time lay down the period within which the electricity certificate is to be issued.

10 Chapter 2, Paragraph 2, states that a plant must be able to produce renewable electricity and put into service in order to obtain an electricity certificate.

11 Chapter 4, Paragraphs 1 and 4, state who is subject to the quota obligations, when they apply, when they cease and how they are calculated.

12 A new provision was also introduced by Chapter 1, Paragraph 5, which did not appear in Law (2003:113) on electricity certificates:

'Electricity certificates which have been issued for the production of renewable electricity in another State may be used to fulfil a quota obligation under this Law, if the Swedish electricity certificate system has been coordinated with the electricity certificate system in the other State by an international agreement.

…'

13 The electricity certificate system was modified by the new Laws with regard to cooperation with Norway. However, under the new legislation it is still not possible to issue an electricity certificate to Ålands Vindkraft AB, since no cooperation with Finland in that regard has been established. The national restrictions for issue of electricity certificates therefore still remain as regards producers of renewable electricity in countries other than Sweden and Norway.

Legislative travaux préparatoires

14 The travaux préparatoires for Law (2011:1200) on electricity certificates state that the purpose is to improve the structure and transparency of the legislation without changing the aim and operation of the electricity certificate system. Certain

provisions have been edited, others have been transferred unchanged to the new Law. With regard to Directive 2009/28, the following is also stated in the travaux préparatoires.

> ‘The electricity certificate system is now a Swedish national market-based support scheme which seeks to increase the production of renewable electricity in Sweden. The electricity certificate system is nevertheless a support scheme which can be coordinated with other countries’ support schemes under [Directive 2009/28]. An international trade in electricity certificates would contribute to a market which functions better and has greater liquidity and increased turnover. However, in that way there would be greater efficiency and increased competition for renewable electricity production. The Government therefore considers that the electricity certificate system should be opened up to cooperation with other countries. It is suggested that the actual cooperation should be organised in such a way that a common market in electricity certificates is established in which electricity certificates which have been issued for the production of renewable electricity in another country may be used to fulfil the quota obligation in Sweden. The quota obligation thus continues to be national but it will become possible to fulfil it with electricity certificates from other countries. A requirement for common support schemes is that there be an international agreement on cooperation between the countries which are to establish a common market.’

15 Since the electricity certificate system has not been significantly changed as regards, materially, the question in the present case, the travaux préparatoires for the former Law on electricity certificates (2003:113) remain relevant, in the view of the förvaltningsrätten, to the present decision. Those travaux préparatoires state, inter alia, as follows.

> ‘The advantages of a certificate system can be properly appreciated particularly since an international trade is made possible. That is also noted by many commentators. Looked at from a European perspective as regards the European Union’s objective for the production of electricity from renewable energy sources, it is irrelevant where the electricity production plants based on renewable energy sources are constructed. In an international market, renewable production of electricity can be sited in those countries or regions where the conditions for it are best. That encourages competitiveness over time for renewable electricity production, results in a harmonisation of the levels of support in the European Union and costs for the final consumer do not become higher than necessary. The Government considers that trade in certificates between different countries is desirable and does not see any obstacle to, for example, electricity certificates being sold abroad or exchanged for RECS certificates (Renewable Energy Certificate System; a voluntary certificate system between European electricity companies) subsequently to be sold abroad. Electricity certificate studies point to a number of questions which should be highlighted before any international trade.

There are choices to be made, for example, as to how foreign certificates are to be dealt with in the certificate system and whether they should be given the same value as domestic certificates. The Government has carefully studied the rules and experiences of other countries with a certificate system. In so doing, the Government has found a number of reasons for limiting the electricity certificate system initially to Sweden. One of those reasons is that currently there are no provisions governing the way in which electricity certificates from other countries are to be credited to meeting the national objectives for electricity from renewable energy sources. Nor are there any guarantees that the electricity from those sources will not be credited in both the country where the electricity is produced and the country where the certificate is used. Nor is there a system in place to ensure that electricity certificates from other countries can be guaranteed to come from energy sources such as those defined as renewable. An unlimited possibility of importing electricity certificates to meet the quota could result in the Swedish quota being met or largely met by certificates from existing plants across Europe. In order to ensure that increased electricity production based on renewable energy sources is achieved as a result of the certificate system, it is necessary to the countries which participate in the system have quotas, or a similar mechanism, against which the certificates are counted. Thus, selling certificates from one country to another leads somewhere to a reduced access to electricity certificates which of itself increases the price of certificates to create an incentive for new electricity production. Either a common framework in the European Union or bilateral agreements between Sweden and another country or other countries are therefore necessary for an international trade in electricity certificates in order to have a common market. In the absence of such bilateral agreements or framework within the European Union, the Government considers that the quota obligation is initially to be met by electricity certificates issued in accordance with the provisions of the proposed law, that is to say on the basis of electricity production within Sweden.'

The Förvaltningsrätten's description of the Swedish electricity certificate system

16 The electricity certificate system is a market-based support scheme for the development of electricity production from renewable energy sources and peat in Sweden. The aim is to increase production of electricity from renewable energy sources by 25 TWh from the 2002 level by 2020. Electricity certificates are a means of proving that one megawatt-hour of renewable electricity has been produced. Those electricity producers whose electricity production meets the legal requirements for an electricity certificate receive a certificate for each MWh of renewable electricity which they produce. Those are then sold on a market open to competition and the price is therefore driven by the interaction between supply and demand. The demand for electricity certificates is created by a quota obligation being placed on electricity suppliers and certain electricity users, which means that they are required by law to buy electricity certificates corresponding to

a specific share (quota) of their sale or use of electricity. The amount of electricity certificates which can be bought is changed from year to year as the quota is changed, which carries with it an increased demand for electricity certificates. The quota obligation is regulated by law and for 2010 – 2012 means that those who are legally subject to the quota obligation on 1 April after the assessment year are to hold 0.179 electricity certificates in respect of their sale or use of electricity for the assessment year. In accordance with the travaux préparatoires of Law (2003:113) on electricity certificates, the quota obligation includes in principle all consumption of electricity in the country. It is the electricity suppliers which buy the electricity certificates, but it is the electricity customers which bear the cost of the system since the price of the certificates is included in the price of electricity. On 1 April each year the electricity suppliers hand in the number of electricity certificates needed to meet the quota obligation to the State and the electricity certificates are then cancelled. Consequently, electricity suppliers must buy new electricity certificates in order to meet the quota obligation for the following years. The producers of electricity from renewable energy sources gain, by selling electricity certificates, extra revenue as an additional income for its electricity production. The electricity certificate system thus stimulates the development of electricity production from renewable energy sources. The electricity certificate system is to support the development of new plants for the production of electricity from renewable energy sources and peat. The incentive for the production of renewable electricity is provided through management of the demand.

The facts and procedure in the case before the national court

17 On 30 November 2009, Ålands Vindkraft AB applied for approval of the Oskar wind farm for allocation of electricity certificates. The plant is located in the municipality of Sottunga in Finland.

18 By a decision of 9 June 2010, the Energimyndigheten (Swedish Energy Agency) rejected Ålands Vindkraft AB's application. The reasons given for the decision were that the aim of the provisions is to promote the production of renewable electricity so that its use in Sweden is increased. There is also a national objective as regards the increase in production of renewable electricity in Sweden. Having regard thereto, only plants which are located within Sweden's borders can be considered for approval for allocation of electricity certificates. The Energimyndigheten refers in the decision to Law (2003:113) on electricity certificates.

19 Ålands Vindkraft AB appealed against the decision to the Förvaltningsrätten i Linköping (Administrative Court, Linköping). The company claims that the decision should be repealed and approval should be granted to the Oskar wind farm for allocation of electricity certificates. The company also claims that the

förvaltningsrätten should stay the proceedings and refer the case to the Court of Justice of the European Union for a preliminary ruling under Article 267 TFEU.

20 The Energimyndigheten maintains its decision and claims that the förvaltningsrätten should dismiss the company's appeal. It further submits that there is no reason to seek a preliminary ruling from the Court of Justice of the European Union.

The essential arguments of the parties in the main proceedings

Ålands Vindkraft AB ('the company')

21 The Oskar plant is connected to the Swedish high tension network via an interconnecting line. Åland is not connected to the Finnish transmission and distribution system but only to the Swedish network. The electricity which is produced by the Oskar plant comes with a 'guarantee of origin', that is to say a certificate showing that the electricity comes from renewable sources, and amounts to around 1 600 MWh per year. Electricity from renewable energy sources is sold principally on the same market as standard electricity with those guarantees of origin.

22 Law (2003:113) on electricity certificates does not lay down any requirement that a plant for the production of renewable electricity must be located within Sweden's borders. The Oskar plant meets the requirements laid down in the Law to be allocated electricity certificates; the plant produces electricity from a renewable source – wind power, in this case, the plant is connected to the Swedish electricity network and its production is measured by the hour. The fact that the company and the Oskar plant meet those requirements is supported also by the fact that the only ground given for the rejection decision was that the plant is located outside Sweden. Nor does it appear to be the purpose of the legislation, to which the Energimyndigheten refers and as is apparent from the travaux préparatoires to Law (2003:113) on electricity certificates, that a requirement for location within Sweden can be made. There is also reference in the Law to Swedish *consumption* and not *production* of renewable electricity.

23 The decision is in conflict with European Union law and the basic principle of the right to free movement of goods under Article 34 TFEU, which is part of the Swedish legal system and overrides Swedish law. Article 34 TFEU also has direct effect, which creates individual rights for foreign producers of renewable electricity, such as the company in the present case, to participate in the Swedish electricity certificate system. The national authorities have an obligation to protect those rights under Article 4 TEU. The Law on electricity certificates should therefore be waived and the decision annulled on the basis of Article 34 TFEU.

24 Article 34 TFEU prohibits restrictions on trade within the European Union, insofar as the restrictions cannot be justified on the basis of particular

circumstances. Practically, application of the Swedish rules restricts the import of renewable electricity into Sweden as a consequence of the practice of the Energimyndigheten to exclude foreign companies from allocation of electricity certificates. At present electricity certificates can be allocated only to domestic producers, which means that the *quota obligation* (the commitment to buy electricity certificates corresponding to around 18 percent of the consumers' total electricity requirements) can be achieved with the help only of Swedish producers. Thus the system excludes a significant part of the Swedish requirements from being covered by imports and reserves it (around 18 percent) for producers in Sweden. Thus the amount of electricity from renewable sources which can be imported into Sweden is restricted. That affects in part the Swedish suppliers of electricity and large customers which are not able to import renewable electricity to cover a significant part of their requirements, and in part producers located outside Sweden which lose the opportunity to export part of their production of renewable electricity and thus suffer a reduction in income. In addition, the risk of large fines deters Swedish customers from importing electricity from renewable sources beyond 82 percent of their requirements. That is the amount of electricity which may be imported, since the quota obligation system reserves the remaining 18 percent for Swedish-produced renewable electricity.

25 Although the objective of the electricity certificate system is to promote the domestic production of electricity from renewable energy sources, the system also indirectly promotes the demand for Swedish-produced renewable electricity, since it is the consumption of such electricity which is counted towards achievement of the Swedish target of 49 percent. Since the electricity certificates show that a certain amount of renewable electricity has been produced, one consequence of the system is that purchasers of electricity must buy part of the renewable electricity from national producers. By buying electricity certificates, the purchasers thus pay part of the price of nationally produced renewable electricity. In addition, the quota obligation can mean that electricity purchasers are bound to buy the electricity from the same (national) producers in order to avoid having to agree to buy electricity and electricity certificates from different producers. Only domestic producers of renewable electricity can offer contracts which combine the sale of both renewable electricity and electricity certificates for a package price. Thus the purchase of renewable electricity entails extra costs which means that purchasers refrain from meeting their requirements for electricity from renewable sources with such electricity from producers outside Sweden.

26 The Energimyndigheten's interpretation and application of the Law on electricity certificates mean that a requirement is laid down that the renewable electricity be produced in Sweden and thus constitute a restriction on cross-border trade and discriminate against producers of renewable electricity which are located outside Sweden's borders. That restriction constitutes, in the view of the company, a disproportionate and unjustified restriction which is therefore prohibited under European Union law. The environmental protection aspects to which the Energimyndigheten refers are, in the company's view, not sufficient alone to

justify a restriction of a fundamental rule of European Union law such as Article 34 TFEU. That has also been held in the case-law of the Court of Justice of the European Union (cf Case C-379/98 *PreussenElektra AG* v *Schleswag AG* [2001] ECR I-2099, and Case C-320/03 *Commission* v *Austria* [2005] ECR I-9871, paragraph 89). The restriction is, in the prevailing circumstances, not necessary to ensure protection of the environment. The company argues that the consumption of renewable electricity should be promoted even if producers outside Sweden are permitted to participate. Nor is the restriction necessary having regard to the fact that the Swedish network capacity has been increased to enable Sweden to achieve the target of 49 percent consumption of renewable electricity by 2020 in accordance with Directive 2009/28. In the PreussenElektra case, an exception was made for the German support scheme having regard to the special characteristics of the German market and to the applicable European Union law. The Swedish system is materially different from the German system examined by the Court of Justice in the PreussenElektra case. The European Union law presently applicable reflects more than ten years of development in the area and many important measures have been adopted to harmonise the rules in the area and reinforce the internal market. Cross-border trade is now possible and reliable due to the introduction of the'guarantees of origin'. Those guarantees are, in any event, to be found in the Nordic countries, where a deregulation of the market was implemented much earlier than in the rest of Europe. In the Nordic countries there is already a significant cross-border trade on a common market, in particular between Finland and Sweden.

Energimyndigheten

27 The company's wind farm does not meet the requirements laid down for allocation of electricity certificates in the Swedish legislation.

28 The question in the case concerns approval of a plant for allocation of electricity certificates under the Swedish domestic legislation. The question should therefore be decided by Swedish courts and in accordance with national provisions.

29 In the travaux préparatoires for Law (2003:113) on electricity certificates, it is made clear that the electricity certificate system is restricted to Sweden. Since there was no common framework in the European Union nor bilateral agreements with other countries, achievement of the quota obligation was limited to the production of electricity in Sweden. That is also confirmed by the fact that, at the European Union level, binding national objectives are set, to which Member States may count their domestic production of energy from renewable energy sources. In order to be able to include production of electricity from renewable energy sources from another Member State, there must be an agreement between the States pursuant to the voluntary cooperation mechanisms governed by Directive 2009/28. The electricity certificate system is a national support scheme with the aim of meeting Sweden's binding national objective under that directive.

The quota levels in the system have been set in order to meet the binding Swedish national objective set in the directive of a share of 49 percent of renewable energy.

30 In addition, the application of parts of the legislation concerning, for example, the duty to make a declaration and supervision, stipulate that only plants located on Swedish territory are covered by the Swedish electricity certificate system.

31 There is no common framework for the production of renewable energy within the European Union. The possibility of including electricity production from another Member State by way of cooperation mechanisms in the form of bilateral agreements has indeed been introduced by Directive 2009/28. Such agreements require, however, a common view of the electricity certificate market with a mutual acceptance of electricity certificates and a corresponding quota obligation as regards the use of electricity by the cooperation partner.

32 Guarantees of origin under the directive do not give the right to support from the electricity certificate system. The Swedish electricity certificates constitute environmental certificates and there is a distinction to be drawn between them and the guarantees of origin under the directive. The only function of the guarantees of origin under Directive 2009/28 is to show the final consumer that a certain share or amount of energy has been produced from renewable energy sources. Schemes for the guarantee of origin do not by themselves imply a right to benefit from national support mechanisms established in different Member States.

33 The Swedish electricity certificate system is compatible with European Union law. By Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market and Directive 2009/28, a common framework for the promotion of energy from renewable energy sources has been established. The directives have not, however, brought about any complete harmonisation of the national electricity markets.

34 It is apparent from both Directive 2001/77 and Directive 2009/28 that national support schemes to promote the production of renewable energy are permitted. In recital 25 in the preamble to Directive 2009/28 it is stressed that public support is necessary to attain the Community's objectives regarding the development of electricity from renewable energy sources. For the proper functioning of support schemes it is vital that Member States can control the effect and costs of their national support schemes according to their different potentials. Under the directive it is possible, through voluntary mechanisms, for Member States to agree to cooperate as regards the extent to which one Member State supports energy production in another Member State.

35 The Swedish electricity certificate system has been examined by the European Commission on two previous occasions. The system was examined on notification of the provisions to the European Commission in 2002 (see Commission Decision

of 5 February 2003 in State aid Case N 789/2002 – Swedish Electricity Certificate System), when the European Commission decided that the system in its form at that time in part did not constitute aid and in part constituted aid compatible with the EU Treaty. In the decision, the European Commission stated, inter alia, that the benefit granted to producers of green electricity by the sale of electricity certificates on the market does not constitute State aid. The system was also examined in a proceeding concerning complaints about the support scheme for electricity production from renewable energy sources (European Commission reference 439/09/TREN). After replies from the Näringsdepartementet (Ministry of Enterprise, Energy and Communications), the European Commission closed the case on 26 October 2010, since there was no evidence of infringement of European Union law.

36 The Swedish electricity certificate system is compatible with Article 34 TFEU and does not in any event place any unjustified restriction on imports between the European Union's Member States. Under the electricity certificate system there is no obligation to buy electricity from a particular source or from particular suppliers. Electricity produced in another Member State has access to the Swedish electricity market and can, for example, be sold as electricity with a mark of origin by use of the guarantees of origin. The electricity certificate system has no bearing on the trade in electricity at all but provides support to the production of renewable electricity, which is expressly permitted under Directive 2009/28. There are no direct or indirect, material or legal obstacles to trade related to the electricity certificate system. Electricity can be freely imported from Åland to Sweden for as long as it is technically possible. The electricity certificate system does not involve any liabilities which could affect the electricity suppliers' propensity to purchase. The system does not contain any elements giving electricity suppliers any reason to buy electricity from any particular producer.

Summary statement of the reasons for the request for a preliminary ruling

The Swedish electricity certificate system

37 It is apparent from the text of the Law that there is no requirement for an electricity supplier actually to buy electricity when buying electricity certificates. However, it is difficult, in the light of the nature of electricity, to determine how large a part of the electricity for which the purchaser pays actually comes from renewable sources.

38 It is not necessary to hold electricity certificates in order to sell renewable energy in Sweden. Under Swedish law, however, it is not possible to grant access to the electricity certificate system to plants producing renewable electricity which are located outside the country's borders. That restriction does not follow directly from the text of the Law but from the travaux préparatoires for that Law.

Jurisdiction of the Court of Justice of the European Union

39 Pursuant to Article 4(2) TFEU, the area of energy is one for which the European Union and the Member States share legislative competence, meaning that the Member States may exercise their powers to legislate in the area to the extent that the European Union has not exercised its powers. Since the European Union has used its legislative powers by introducing, inter alia, Directive 2009/28, the Swedish rules in that area must not infringe those rules. That is the case of both the rules intended expressly to implement Directive 2009/28 and other rules applicable to the same area (see Case C-2/10 *Azienda Agro-Zootecnica Franchini sarl and Eolica di Altamura Srl* v *Regione Puglia* [2011] ECR I-0000, paragraph 70). It also follows from the principle of European Union law's primacy over national law and the obligations of sincere cooperation laid down in Article 4(3) TEU that national courts have a responsibility to apply the national law in such a way as is compatible with European Union law and which does not jeopardise its uniform interpretation within the European Union.

40 It follows therefrom that the rules which a Member State adopts in the area of energy must be compatible with European Union law, in particular with the primary law of the Union.

41 Trade in electricity from renewable energy sources has extensive cross-border aspects and is included in the (exercised) legislative powers under European Union law. In addition, the subject-matter of the dispute concerns a cross-border relationship with a foreign producer of renewable electricity which has been refused access to the Swedish electricity certificate system on the ground that the plant is not located in Sweden. In light of such a relationship and having regard to the details set out above, the förvaltningsrätten is of the opinion that the subject-matter of the dispute falls within the scope of European Union law and consequently is within the jurisdiction of the Court of Justice of the European Union.

Interpretation of Directive 2009/28

42 The European Union has, as regards renewable energy sources, adopted Directive 2001/77 which, with effect from 1 January 2012, is replaced in its entirety by Directive 2009/28.

43 The transposition in Sweden of Directive 2009/28 was dealt with by way of travaux préparatoires for a Law, in which the Government took the view that the main parts of the directive's provisions had already been implemented in Sweden's legislation. The development of the electricity certificate system is a central part of Sweden's national action plan for renewable energy in the electricity sector in accordance with Article 4 of Directive 2009/28.

44 Directive 2009/28 establishes binding national objectives for the various Member States as regards the share of the final energy use which is energy from renewable

energy sources. For Sweden that share is set in Annex I, Part A, to the directive as 49 percent. Article 3(3) of Directive 2009/28 lays down in particular the possibility of a support scheme to enable Member States to reach the objectives in the directive.

45 The förvaltningsrätten is called upon to rule on whether the Swedish support scheme for electricity from renewable energy sources, which covers only producers of such electricity which are located within Sweden's borders, is a scheme such as that referred to in Article 3(3) of Directive 2009/28. However, the förvaltningsrätten is unable to discern from the definition of such a support scheme in Article 2(k) of that directive whether the Swedish scheme's characteristics are those referred to in Directive 2009/28. The Swedish scheme's stated aim is to promote the production of renewable electricity, but it is possible that indirectly, the use of such electricity will also be promoted. It is not, however, clearer from the directive's definition exactly how support schemes with quotas and green certificates may be designed.

46 Nor has the interpretation of the term'support scheme' in the directive, so far as the förvaltningsrätten is aware, been examined by the Court of Justice of the European Union. The first question which is relevant is therefore whether the Swedish electricity certificate system is compatible with the rules of Directive 2009/28.

Interpretation of Article 34 TFEU

47 Article 34 EC prohibits quantitative restrictions on imports and all measures having equivalent effect between Member States. The Swedish electricity certificate system, since it is designed as a national support scheme, distinguishes between electricity from renewable energy sources produced inside and outside Sweden's borders. Through that system, Swedish producers gain an advantage in the form of extra revenue in addition to the revenue from sales of electricity. That means that domestic producers of renewable electricity have economic advantages over foreign producers of the same product. Although the sale of electricity certificates and the sale of electricity are not formally linked to each other, the förvaltningsrätten is of the opinion that the system can indirectly favour the sale of nationally produced electricity to the detriment of imported electricity of the same type, since the incentive to buy renewable electricity from suppliers other than those which also hold electricity certificates is reduced when both electricity and electricity certificates are easily available from one and the same producer.

48 The aim of the electricity certificate system is to promote the production of electricity from renewable energy sources, which in the long term is an important measure for the climate change process at a national level. The underlying aim is environmental protection and concern for the environment; production of electricity using renewable energy sources is more environmentally friendly than

production using, for example, fossil fuels and nuclear power (see the travaux préparatoires to Law (2003:113) on electricity certificates).

49 The förvaltningsrätten takes the view that it cannot be excluded that the system constitutes an obstacle to trade between the Member States of the European Union and is therefore prohibited under Article 34 TFEU. Since the application of the system makes a clear distinction between domestic and foreign producers, the förvaltningsrätten, against the background of the case-law of the Court of Justice of the European Union, regards it as unclear whether that can be justified on overriding grounds of environmental protection.

50 The Court of Justice of the European Union has, inter alia in the PreussenElektra case, examined the validity of a system which placed an obligation on electricity supply undertakings to purchase the electricity produced in their area of supply from renewable energy sources at a fixed minimum price (paragraph 6). The Swedish electricity certificate system does not, however, lay down any formal requirement for electricity suppliers and users subject to the quota obligation to purchase their electricity as well from electricity producers approved to hold electricity certificates, which means that the system is different to such an extent that the förvaltningsrätten is doubtful whether application of the findings in the PreussenElektra case will provide an answer to the question of the Swedish system's compatibility with European Union law.

51 Since the ruling of the Court of Justice of the European Union in the PreussenElektra case, new legal instruments have been adopted within the European Union, inter alia Directives 2001/77 and 2009/28, which affect the assessment of the compatibility with European Union law of the system at issue in the present case.

The form of the rules

52 The restriction of the electricity certificate system to include only producers of renewable electricity which are located within Sweden is not expressly stated in the legal texts, whether the old (2003:113) or new (2011:1200) Law on electricity certificates. The consequence thereof is that the travaux préparatoires of the legislation de facto restrict the scope of the Law. The förvaltningsrätten asks whether a restriction which excludes producers of renewable electricity in other Member States ought not to follow directly from the Law.

53 Since the system can potentially constitute an obstacle to trade and having regard to the principles of legal certainty and predictability, there are even stronger grounds for the restriction to be enshrined in law.

The Förvaltningsrätten's assessment and questions

54 In order that the förvaltningsrätten may rule in the case, it must decide whether the restriction of the electricity certificate system to only Swedish producers is

compatible with Directive 2009/28 and Article 34 TFEU and it is therefore necessary to obtain answers to the questions referred in the present request for a preliminary ruling.

55 Pursuant to Sweden's commitments as part of its membership of the European Union, national rules which have a bearing on areas which fall within the competence of the European Union are not to apply if they do not comply with provisions of European Union law. Since the förvaltningsrätten is of the opinion that a requirement to be located within a particular country, as is the question in the present case, can potentially affect cross-border trade in electricity from renewable energy sources within the European Union, the compatibility of that requirement with the relevant provisions of European Union law must be examined.

56 The förvaltningsrätten is of the opinion that seeking an interpretation of the European Union law material to the present case from the Court of Justice of the European Union is the most suitable solution, having regard to the interest in having a uniform interpretation of European Union law.