JUDGMENT OF THE COURT (Second Chamber)

4 October 2018 (*1)

(Reference for a preliminary ruling — Environment — Promotion of the use of energy from renewable sources — Bioliquids used for a thermal energy plant — Directive 2009/28/EC — Article 17 — Sustainability criteria for bioliquids — Article 18 National sustainability certification systems — Implementing Decision 2011/438/EU — Voluntary sustainability certification systems for biofuels and bioliquids approved by the European Commission — National legislation requiring intermediary operators to submit sustainability certificates — Article 34 TFEU — Free movement of goods)

In Case C-242/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 26 January 2017, received at the Court on 8 May 2017, in the proceedings

Legatoria Editoriale Giovanni Olivotto (L.E.G.O.) SpA

v

Gestore dei servizi energetici (GSE) SpA,

Ministero dell'Ambiente e della Tutela del Territorio e del Mare,

Ministero dello Sviluppo Economico,

Ministero delle Politiche Agricole e Forestali,

intervening parties:

ED & F Man Liquid Products Italia Srl,

Unigrà Srl,

Movendi Srl,

THE COURT (Second Chamber),

Composed of M. Ilešič, President of the Chamber, A. Rosas, C. Toader (Rapporteur), A. Prechal and E. Jarašiūnas, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 28 February 2018,

after considering the observations submitted on behalf of:

- Legatoria Editoriale Giovanni Olivotto (L.E.G.O.) SpA, by A. Fantini and G. Scaccia, avvocati,
- Gestore dei servizi energetici (GSE) SpA, by S. Fidanzia and A. Gigliola, avvocati,
- ED & F Man Liquid Products Italia Srl, by C.E. Rossi and F.P. Francica, avvocati,
- the Italian Government, by G. Palmieri, acting as Agent, and by G. Palatiello, avvocato dello Stato,
- the European Commission, by G. Gattinara and K. Talabér-Ritz, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 May 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 18 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 (OJ 2009 L 140, p. 16), read in conjunction with Commission Implementing Decision 2011/438/EU of 19 July 2011 on the recognition of the 'International Sustainability and Carbon Certification' [ISCC] scheme for demonstrating compliance with the sustainability criteria under Directives 2009/28/EC and 2009/30/EC of the European Parliament and of the Council (OJ 2011 L 190, p. 79).

2 The request has been made in the context of proceedings between Legatoria Editoriale Giovanni Olivotto (L.E.G.O.) SpA, Gestore dei servizi energetici (GSE) SpA, the Ministero dell'Ambiente e della Tutela del Mare e del Territorio (Ministry of the Environment and Territorial and Sea Protection, Italy), the Ministero dello Sviluppo Economico (Ministry of Economic Development, Italy) and the Ministero delle Politiche Agricole e Forestali (Ministry of Agricultural and Forestry Policy), concerning the non-submission of sustainability certificates for bioliquids used to operate L.E.G.O.'s thermal energy plant, leading to the disqualification of the plant from the green certificate incentive scheme.

Legal context

EU law

Directive 2009/28

3 Recitals 65, 67, 76 and 79 of Directive 2009/28 state that:

‘(65) Biofuel production should be sustainable. Biofuels used for compliance with the targets laid down in this Directive, and those that benefit from national support schemes, should therefore be required to fulfil sustainability criteria.

…

(67) The introduction of sustainability criteria for biofuels will not achieve its objective if those products that do not fulfil the criteria and would otherwise have been used as biofuels are used, instead, as bioliquids in the heating or electricity sectors. For this reason, the sustainability criteria should also apply to bioliquids in general.

…

(76) Sustainability criteria will be effective only if they lead to changes in the behaviour of market actors. Those changes will occur only if biofuels and bioliquids meeting those criteria command a price premium compared to those that do not. According to the mass balance method of verifying compliance, there is a physical link between the production of biofuels and bioliquids meeting the sustainability criteria and the consumption of biofuels and bioliquids in the [European Union], providing an appropriate balance between supply and demand and ensuring a price premium that is greater than in systems where there is no such link. To ensure that biofuels and bioliquids meeting the sustainability criteria can be sold at a higher price, the mass balance method should therefore be used to verify compliance. This should maintain the integrity of the system while at the same time avoiding the imposition of an unreasonable burden on industry. Other verification methods should, however, be reviewed.

…

(79) It is in the interests of the Community to encourage the development of multilateral and bilateral agreements and voluntary international or national schemes that set standards for the production of sustainable biofuels and bioliquids, and that certify that the production of biofuels and bioliquids meets those standards. For that reason, provision should be made for such agreements or schemes to be recognised as providing reliable evidence and data, provided that they meet adequate standards of reliability, transparency and independent auditing.’

4 The second paragraph of Article 2 of Directive 2009/28 defines the concepts of ‘biomass’, ‘bioliquids’ and ‘biofuels’ as follows:

‘…

e) “biomass” means the biodegradable fraction of products, waste and residues from biological origin from agriculture (including vegetal and animal substances), forestry and related industries including fisheries and aquaculture, as well as the biodegradable fraction of industrial and municipal waste;

…

h) “bioliquids” means liquid fuel for energy purposes other than for transport, including electricity and heating and cooling, produced from biomass;

i) “biofuels” means liquid or gaseous fuel for transport produced from biomass’.

5 Article 17 of that directive, entitled ‘Sustainability criteria for biofuels and bioliquids’, provides, in paragraph 1:

‘Irrespective of whether the raw materials were cultivated inside or outside the territory of the [European Union], energy from biofuels and bioliquids shall be taken into account for the purposes referred to in points (a), (b) and (c) only if they fulfil the sustainability criteria set out in paragraphs 2 to 6:

(a) measuring compliance with the requirements of this Directive concerning national targets;

(b) measuring compliance with renewable energy obligations;

(c) eligibility for financial support for the consumption of biofuels and bioliquids.

…’

6 Article 17(2) to (6) of that directive defines the sustainability criteria for the production of biofuels and bioliquids.

7 Article 17(8) of the same directive provides as follows:

‘For the purposes referred to in points (a), (b) and (c) of paragraph 1, Member States shall not refuse to take into account, on other sustainability grounds, biofuels and bioliquids obtained in compliance with this Article.’

8 Article 18 of Directive 2009/28, entitled ‘Verification of compliance with the sustainability criteria for biofuels and bioliquids’, provides as follows:

‘1. Where biofuels and bioliquids are to be taken into account for the purposes referred to in points (a), (b) and (c) of Article 17(1), Member States shall require economic operators to show that the sustainability criteria set out in Article 17(2) to (5) have been fulfilled. For that purpose they shall require economic operators to use a mass balance system which:

(a) allows consignments of raw material or biofuel with differing sustainability characteristics to be mixed;

(b) requires information about the sustainability characteristics and sizes of the consignments referred to in point (a) to remain assigned to the mixture; and

(c) provides for the sum of all consignments withdrawn from the mixture to be described as having the same sustainability characteristics, in the same quantities, as the sum of all consignments added to the mixture.

…

3. Member States shall take measures to ensure that economic operators submit reliable information and make available to the Member State, on request, the data that were used to develop the information. Member States shall require economic operators to arrange for an adequate standard of independent auditing of the information submitted, and to provide evidence that this has been done. The auditing shall verify that the systems used by economic operators are accurate, reliable and protected against fraud. It shall evaluate the frequency and methodology of sampling and the robustness of the data.

The information referred to in the first subparagraph shall include in particular information on compliance with the sustainability criteria set out in Article 17(2) to (5), appropriate and relevant information on measures taken for soil, water and air protection, the restoration of degraded land, the avoidance of excessive water consumption in areas where water is scarce and appropriate and relevant information concerning measures taken in order to take into account the issues referred to in the second subparagraph of Article 17(7).

…

The obligations laid down in this paragraph shall apply whether the biofuels or bioliquids are produced within the [European Union] or imported.

4. …

The Commission may decide that voluntary national or international schemes setting standards for the production of biomass products contain accurate data for the purposes of Article 17(2) or demonstrate that consignments of biofuel comply with the sustainability criteria set out in Article 17(3) to (5). The Commission may decide that those schemes contain accurate data for the purposes of information on measures taken for the conservation of areas that provide, in critical situations, basic ecosystem services (such as watershed protection and erosion control), for soil, water and air protection, the restoration of degraded land, the avoidance of excessive water consumption in areas where water is scarce and on the issues referred to in the second subparagraph of Article 17(7). …

…

5. The Commission shall adopt decisions under paragraph 4 only if the agreement or scheme in question meets adequate standards of reliability, transparency and independent auditing. In the case of schemes to measure greenhouse gas emission saving, such schemes shall also comply with the methodological requirements in Annex V. …

…

7. When an economic operator provides proof or data obtained in accordance with an agreement or scheme that has been the subject of a decision pursuant to paragraph 4, to the extent covered by that decision, a Member State shall not require the supplier to provide further evidence of compliance with the sustainability criteria set out in Article 17(2) to (5) nor information on measures referred to in the second subparagraph of paragraph 3 of this Article.

…’

Implementing Decision 2011/438

9 In accordance with Article 2 thereof, Implementing Decision 2011/438 was valid for 5 years from the date of its entry into force, that is, until 9 August 2016. Nevertheless, given the date of the facts giving rise to the main proceedings, regard must be had to that implementing decision.

10 Recitals 4 and 6 to 8 of that implementing decision stated as follows:

‘(4) The Commission may decide that a voluntary national or international scheme demonstrates that consignments of biofuels comply with the sustainability criteria set out in Article 17(3) to (5) of [Directive 2009/28] or that a voluntary national or international scheme to measure greenhouse gas emission savings contains accurate data for the purposes of Article 17(2) of this Directive.

…

(6) When an economic operator provides proof or data obtained in accordance with a scheme that has been recognised by the Commission, to the extent covered by that recognition decision, a Member State shall not require the supplier to provide further evidence of compliance with the sustainability criteria.

(7) The “International Sustainability and Carbon Certification” (hereinafter “ISCC”) scheme was submitted on 18 March 2011 to the Commission with the request for recognition. The scheme has a global scope and can cover a wide range of different biofuels. The recognised scheme will be made available at the transparency platform established under [Directive 2009/28]. The Commission will take into account considerations of commercial sensitivity and may decide to only partially publish the scheme.

(8) Assessment of the ISCC scheme found it to adequately cover the sustainability criteria of [Directive 2009/28], as well as applying a mass balance methodology in line with the requirements of Article 18(1) of [Directive 2009/28].’

11 Under Article 1 of the same implementing decision:

‘The [ISCC scheme] for which the request for recognition was submitted to the Commission on 18 March 2011 demonstrates that consignments of biofuels comply with the sustainability criteria as laid down in Article 17(3)(a), (b) and (c) and Article 17(4) and (5) of [Directive 2009/28] … The scheme also contains accurate data for purposes of Article 17(2) of [Directive 2009/28] and Article 7b(2) of Directive 98/70/EC [of the European Parliament and of the Council of 13 October 1998 relating to the quality of petrol and diesel fuels and amending Council Directive 93/12/EEC (OJ 1998 L 350, p. 58)].

Furthermore, it may be used for demonstrating compliance with Article 18(1) of [Directive 2009/28] and Article 7c(1) of [Directive 98/70].’

Italian law

12 Article 2(2)(i) and (p) and (3) of the decreto interministeriale che istituisce il 'Sistema di certificazione nazionale della sostenibilità dei biocarburanti e dei bioliquidi' (interministerial decree on the 'National certification scheme for biofuels and bioliquids') of 23 January 2012 (GURI No 31 of 7 February 2012) ('the interministerial decree of 23 January 2012'), sets out the following definitions:

'2. …

(i) sustainability certificate: a statement issued by the last operator in the supply chain, by way of self-certification, … together with any subsequent amendments thereto, containing the information necessary to establish that the consignment of biofuels or bioliquids is sustainable.

…

(p) supply chain or control chain: the methodology allowing a connection to be established between the information or declarations about the raw materials or intermediate products and the finished products. This methodology shall include all stages from the production of the raw materials to the supply of biofuels or bioliquids for consumption.

…

3. An economic operator … is:

(a) any natural or legal person established in the [European Union] or in a third country who offers or makes available to third parties, whether or not in return for payment, biofuels and bioliquids intended for the [domestic] market, or any natural or legal person established in the European Union who produces biofuels or bioliquids and subsequently uses them on its own account within the national territory; or

(b) any natural or legal person established in the [European Union] or in a third country who offers or makes available to third parties, whether or not in return for payment, raw materials, intermediate products, waste, by-products or mixtures thereof for the production of biofuels and bioliquids intended for the [domestic] market.'

13 Article 8 of the interministerial decree of 23 January 2012 deals with the situation of operators who do not belong to the national certification scheme and provides as follows:

'1. In relation only to matters covered by a voluntary scheme that is the subject of a decision adopted under the second subparagraph of Article 7c(4) of [Directive 98/70] …, economic operators who sign up to such voluntary schemes must demonstrate the accuracy of the information and declarations supplied to the next economic operator in the supply chain, that is to say, to the supplier or user, by providing the proof or data relating to the consignment required under those schemes. That evidence or data shall be self-certified …

…

4. If the voluntary schemes referred to in the first paragraph and the agreements referred to in the second paragraph do not include an audit of all the sustainability criteria and the use of a mass balance methodology, the economic operators in the supply chain belonging to the scheme must in any event complete the audit, to the extent that it is not covered by the voluntary schemes or agreements, through the national certification scheme.

…'

14 Under Article 12 of the interministerial decree of 23 January 2012:

'1. For the purposes of this decree, by way of exception to the provisions of Article 8(1), economic operators in the bioliquids supply chain may sign up to voluntary schemes that are the subject of a decision adopted under the second subparagraph of Article 7c(4) of [Directive 98/70] in relation to biofuels insofar as they fulfil the requirements in paragraph 2.

2. The operators in the bioliquids supply chain referred to in paragraph 1 must include in the declaration or on the certificate accompanying the consignments for the entirety of the supply chain the information provided for in Article 7(5), (6), (7) and (8) …'

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

15 L.E.G.O. is a company incorporated under Italian law which owns a printing plant. Within the printing plant, the company commissioned a thermal energy plant with an average annual power rating of 0.840 megawatts, powered by crude palm oil, a bioliquid.

16 On 20 May 2011, the energy plant was recognised by GSE, a public company incorporated under Italian law responsible for the payment of grants for renewable energy production, as being powered from renewable sources. L.E.G.O. was therefore able to participate in the green certificate (GC) incentive scheme for the period 2012-2014, in respect of 14698 GCs worth EUR 1 610 421.58.

17 By decision of 29 September 2014, GSE found, on the basis of documentation supplied by L.E.G.O., that the company did not meet the eligibility criteria under the support scheme and demanded the full return of the amounts granted for the period 2012-2014.

18 The reason given by GSE for its decision was chiefly that no sustainability certificates had been submitted by the company that had installed the thermal energy plant, Movendi Srl. Movendi also operates as an intermediary for the purchase of the bioliquids used to fuel the plant, from ED & F Man Liquid Products Italia Srl and Unigrà Srl. Although the bioliquids were directly sold and delivered to L.E.G.O., GSE claimed that Movendi should be regarded as an 'economic operator' within the meaning of the interministerial decree of 23 January 2012 and had to submit sustainability certificates, even where certificates had already been supplied by ED & F Man Liquid Products Italia and Unigrà. In addition, the sustainability certificates issued by those two suppliers were allegedly dated after the effective date of transport, whereas, according to GSE, they should have been issued to accompany each consignment of bioliquids.

19 L.E.G.O. brought an action against that decision before the Tribunale Regionale Amministrativo per il Lazio (Regional Administrative Court for Lazio, Italy) which, in its judgment of 29 January 2016, held that GSE had been correct to regard Movendi as an economic operator within the meaning of Italian law and that Movendi was therefore obliged to supply its own sustainability certificate for the bioliquids in question.

20 According to the Tribunale Regionale Amministrativo per il Lazio (Regional Administrative Court for Lazio), although Directive 2009/28 does not in fact specify who can be regarded as an economic operator, it nonetheless allows Member States to determine the necessary information and the persons subject to compliance with the sustainability criteria. Therefore, any person involved in the supply chain should be regarded as an 'economic operator', including intermediaries such as Movendi, who do not take physical possession of the bioliquids concerned.

21 On 13 May 2016, L.E.G.O. brought an appeal against that judgment before the referring court, the Consiglio di Stato (Council of State, Italy).

22 The referring court considers it essential to clarify the scope of EU law in order to establish whether it precludes domestic law, in particular Articles 8 and 12 of the interministerial decree of 23 January 2012, which oblige operators who have signed up to a voluntary certification scheme to complete, where applicable, the audit under that scheme through the national certification scheme and to include in the declaration or on the certificates accompanying consignments for the entirety of the supply chain the information referred to in Article 17(2) to (5) of Directive 2009/28.

23 In that regard, the referring court notes that L.E.G.O. submits in its appeal that the suppliers ED & F Man Liquid Products Italia and Unigrà had signed up to the voluntary ISCC scheme, recognised by Implementing Decision 2011/438, and that the national scheme cannot impose requirements over and above the voluntary scheme, such as the requirement for intermediaries to supply sustainability certificates.

24 The referring court therefore explains that its request for a preliminary ruling concerns, first, the ability to compel economic operators who generally sign up to voluntary schemes that are the subject of decisions of the Commission to comply with further checks imposed by the national certification system and, secondly, the ability to compel economic operators who form part of the supply chain to complete declarations or accompanying certificates with the required information. In that regard, the referring court states that, since the purpose of the domestic legislation is to ensure the traceability of the product and its sustainability throughout the entirety of the supply chain, intermediaries, such as Movendi, should not be excluded from that obligation.

25 In those circumstances, the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Does EU law, and more specifically Article 18(7) of [Directive 2009/28], in conjunction with [Implementing Decision 2011/438], preclude national provisions, such as the [interministerial decree of 23 January 2012], and in particular Articles 8 and 12 thereof, which impose specific requirements that are both different from and more extensive than the requirements which are satisfied by signing up to a voluntary scheme which is the subject of a decision of the European Commission adopted in accordance with Article 18(4) of [Directive 2009/28]?

(2) If the answer to Question [1] is in the negative, must economic operators which are involved in the product supply chain, even though their role is merely that of a trader or intermediary and they do not possess physical availability of the product in question, be held to be subject to the provisions of EU law cited in Question [1]?’

Consideration of the questions referred

The first question

26 By its first question, the referring court asks, in essence, whether Article 18(7) of Directive 2009/28, read in conjunction with Implementing Decision 2011/438, must be interpreted as precluding national provisions, such as those at issue in the case in the main proceedings, which impose on economic operators specific requirements that are both different from and more extensive than the requirements under a voluntary sustainability certification scheme, such as the ISCC scheme, recognised by that implementing decision, adopted by the Commission pursuant to Article 18(4) of that directive.

27 As a preliminary point, it should be noted that Article 17(2) to (5) of Directive 2009/28 sets out the sustainability criteria that must be fulfilled in order for biofuels and bioliquids to be regarded as a source of renewable energy.

28 It is apparent from Article 17 of Directive 2009/28, read in the light of recitals 65 and 67 thereof, that the EU legislature intended, by taking as its basis Article 114 TFEU, in particular, to harmonise the sustainability criteria which it is mandatory for biofuels and bioliquids to fulfil in order for the energy produced from them to be taken into account, within each Member State, for three purposes set out in Article 17(1)(a), (b) and (c) respectively. Those purposes are measuring the Member States’ compliance with their national targets referred to in Article 3 of that directive; measuring their compliance with renewable energy obligations; and eligibility for national financial support for the consumption of biofuels and bioliquids (see, to that effect, judgment of 22 June 2017, E.ON Biofor Sverige, C-549/15, EU:C:2017:490, paragraph 28).

29 Harmonisation of those sustainability criteria is exhaustive, since Article 17(8) of Directive 2009/28 states that Member States may not, for those same three purposes, refuse to take into account, on other sustainability grounds, biofuels and bioliquids which fulfil the sustainability criteria set out in that article (see, to that effect, judgment of 22 June 2017, E.ON Biofor Sverige, C-549/15, EU:C:2017:490, paragraph 32).

30 As for verifying compliance of biofuels and bioliquids with the sustainability criteria, it is clear from the first sentence of Article 18(1) of Directive 2009/28 that where biofuels and bioliquids are to be taken into account for the three purposes referred to in Article 17(1) of that directive, Member States shall require economic operators to show that the sustainability criteria set out in Article 17(2) to (5) have been fulfilled.

31 For that purpose, Member States are obliged, as is clear from the second sentence of Article 18(1) of Directive 2009/28, to require economic operators to use a mass balance system which, as set out in points (a) to (c) of that provision, first, allows consignments of raw material or biofuel with differing sustainability characteristics to be mixed; secondly, requires information about the sustainability characteristics and sizes of those consignments to remain assigned to the mixture; and, thirdly, provides for the sum of all consignments withdrawn from the mixture to be described as having the same sustainability characteristics, in the same quantities, as the sum of all consignments added to the mixture.

32 In that context, the mass balance system may be implemented, as noted by the Advocate General in point 42 of his Opinion, by a national system provided for by the competent authority of each Member State, pursuant to Article 18(3) of Directive 2009/28, or by national or international voluntary schemes recognised by the Commission, such as the ISCC scheme, in accordance with the requirements of Article 18(4) and (5) of that directive.

33 In that regard, Article 18(7) of that directive provides that, when an economic operator provides proof or data obtained in accordance with an agreement or scheme that has been the subject of a decision adopted by the Commission on the basis of Article 18(4) of Directive 2009/28, to the extent covered by that decision, a Member State cannot require the supplier to provide further evidence of compliance with the sustainability criteria set out in Article 17(2) to (5) of that directive.

34 However, where the Commission has not adopted a decision in relation to a certain certification scheme, or where that decision specifies that the scheme does not cover all the sustainability criteria laid down in Article 17(2) to (5) of Directive 2009/28, Member States are free to require economic operators, to that extent, to comply with national provisions the aim of which is to ensure that fulfilment of those criteria is monitored.

35 Therefore, in order to answer the first question, it is necessary to determine the scope of Implementing Decision No 2011/438, adopted by the Commission on the basis of Article 18(4) of Directive 2009/28, concerning the certification system at issue in the main proceedings.

36 In that regard, it should be noted that the recognition accorded by that implementing decision to the ISCC scheme for a period of 5 years applies only to establishing the sustainability of biofuels and not that of bioliquids, as is clear from the first paragraph of Article 1 of the implementing decision. Accordingly, to the extent that the ISCC scheme that is the subject of Implementing Decision 2011/438 uses mass balance methodology to prove the sustainability of biofuels, it does not appear to limit the ability of Member States, under Article 18(1) and (3) of Directive 2009/28, to determine the procedures for verifying compliance with the sustainability criteria set out in Article 17(2) to (5) of Directive 2009/28 in relation to bioliquids.

37 Article 18(4) of Directive 2009/28, permitting the Commission to decide that a voluntary national or international scheme demonstrates compliance with the sustainability criteria set out in Article 17(2) to (5) of the directive, applied only to biofuels until the adoption of Directive (EU) 2015/1513 of the European Parliament and of the Council of 9 September 2015 amending Directive 98/70 and amending Directive 2009/28 (OJ 2015 L 239, p. 1), which came into force on 15 October 2015 and which introduced the possibility of certifying the sustainability of bioliquids through voluntary schemes.

38 In that regard, it should be noted from points (h) and (i) of the second paragraph of Article 2 of Directive 2009/28 that bioliquids and biofuels are distinct concepts, in that biofuels refers only to liquid fuel used for transport purposes while bioliquids are liquid fuels for energy purposes other than for transport.

39 In the present case, L.E.G.O. benefited from the GC incentive scheme for the period 2012-2014, for a thermal energy plant fuelled by renewable energy sources through the use of a bioliquid, namely palm oil. By a decision of 29 September 2014, the competent authority demanded the return of the amount granted, owing to a failure to comply with the obligations under the national certification scheme to prove the sustainability of the bioliquids.

40 In those circumstances and given that Implementing Decision 2011/438 led to the recognition of the ISCC scheme only in respect of biofuels, the additional requirements imposed by Italian legislation in relation to sustainability monitoring of bioliquids does not fall within the scope of the prohibition in Article 18(7) of Directive 2009/28.

41 In the light of the foregoing, the answer to the first question is that Article 18(7) of Directive 2009/28, read in conjunction with Implementing Decision 2011/438, must be interpreted as meaning that it does not preclude national provisions, such as that at issue in the main proceedings, which impose on economic operators specific requirements which, for the certification of the sustainability of bioliquids, are different from and more extensive than the requirements under a voluntary sustainability certification system, such as the ISCC scheme, recognised by that implementing decision, adopted by the European Commission pursuant to Article 18(4) of that directive, in so far as that scheme was approved only in respect of biofuels and in so far as those requirements concern only bioliquids.

The second question

42 The second question, which is raised only in the event of a negative answer to the first, seeks, in essence, to ascertain whether EU law, in particular, Article 18(1) and (3) of Directive 2009/28, must be interpreted as meaning that it does not preclude national provisions, such as those at issue in the main proceedings, which impose a national sustainability verification scheme for bioliquids under which all the economic operators involved in the supply chain of the product in question, even when they are intermediaries who do not take physical possession of the consignments of bioliquids, are bound by certain requirements relating to certification, communication and the provision of information under that scheme.

43 It is clear from the settled case-law of the Court that the fact that a national court has, formally speaking, worded a question referred for a preliminary ruling with reference to certain provisions of EU law does not preclude the Court from providing the national court with all the elements of interpretation that may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to them in its questions. In that regard, it is for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision referring the questions, the points of EU law which require interpretation, having regard to the subject matter of the dispute (judgment of 22 June 2017, E.ON Biofor Sverige, C-549/15, EU:C:2017:490, paragraph 72 and the case-law cited).

44 In the present case, although the referring court has not formally asked the Court about the interpretation of provisions affecting the free movement of goods, it is appropriate, as recommended by the Advocate General in point 87 of his Opinion, to also examine whether Article 34 TFEU precludes national provisions such as those at issue in the main proceedings.

The interpretation of Directive 2009/28

45 In the first place, it must be noted that, while Directive 2009/28 uses the concept of an ‘economic operator’, it does not define it. Bearing in mind the general way in which the criteria set out in Article 18(1)(a) to (c) of the directive are worded, the Court has already held that that provision has not fully harmonised the verification system connected with the mass balance system. Provided there is compliance with the general requirements set out in Article 18(1)(a) to (c), Member States therefore retain a wide discretion when they must determine, more precisely, the specific conditions under which the economic operators concerned will use such a system (see, to that effect, judgment of 22 June 2017, E.ON Biofor Sverige, C-549/15, EU:C:2017:490, paragraphs 40 and 77).

46 In the second place, as can be seen from recital 76 of Directive 2009/28, the mass balance method referred to in Article 18(1) thereof is based on a physical link between the production and the consumption of bioliquids within the European Union for the purposes of verifying compliance, while at the same time avoiding the imposition of an unreasonable burden on industry.

47 In the present case, it follows from the wording of Article 12(2) of the interministerial decree of 23 January 2012, read in the light of Article 2(1)(i)f of the legislative decree No 66/2005 and of Article 2(3)(a) of the aforementioned interministerial decree, that those provisions impose on all economic operators involved in the supply chain of bioliquids, including intermediaries who do not take physical possession of the products, an obligation to enter on the declaration or certificate accompanying the consignments of bioliquids the information enabling their sustainability to be determined.

48 It is apparent from the order for reference that the purpose of classifying intermediaries as ‘economic operators’ is to ensure the traceability of consignments of bioliquids throughout the entirety of the supply chain, in accordance with the requirements of Article 18(3) of Directive 2009/28, and thus enable better monitoring of their production and marketing in order to reduce the risk of fraud.

49 In that respect, it should be noted that, under Article 18(3) of Directive 2009/28, Member States shall take measures to ensure that economic operators submit reliable information and make available to the Member State, on request, the data that were used to develop the information about the sustainability characteristics of the product in question. Member States shall also require economic operators to arrange for an adequate standard of independent auditing of the information submitted, and to provide evidence that this has been done, consisting of verifying that the systems used by economic operators are accurate, reliable and protected against fraud.

50 Given that the concept of ‘economic operators’ is not defined by Directive 2009/28, and given the current state of harmonisation by the EU legislature as to the details of the verification method connected with the mass balance system, Member States must be regarded as having a margin of discretion in determining, in accordance with EU law, which economic operators have an obligation to provide evidence of compliance with the sustainability criteria set out in Article 17(2) to (5) of that directive.

51 In the light of the foregoing, Article 18(1) and (3) of Directive 2009/28 must be interpreted as meaning that it does not preclude national provisions, such as those at issue in the main proceedings, which impose a national sustainability verification scheme for bioliquids under which all the economic operators involved in the supply chain of the product in question, even when they are intermediaries who do not take physical possession of the consignments of bioliquids, are bound by certain requirements relating to certification, communication and the provision of information imposed by that scheme.

The interpretation of Article 34 TFEU

52 It should be recalled, from the outset, that, where a matter has been the subject of exhaustive harmonisation at EU level, any national measure relating thereto must be assessed in the light of the provisions of that harmonising measure and not in the light of primary law (judgment of 1 July 2014, Ålands Vindkraft, C-573/12, EU:C:2014:2037, paragraph 57).

53 Far from seeking to bring about exhaustive harmonisation of national support schemes for green energy production, the EU legislature — as is apparent, inter alia, from recital 25 to Directive 2009/28 — based its approach on the finding that Member States apply different support schemes and on the principle that it is important to ensure the proper functioning of those schemes in order to maintain investor confidence and to enable those States to define effective national measures in order to achieve their mandatory national overall targets under the directive (judgment of 1 July 2014, Ålands Vindkraft, C-573/12, EU:C:2014:2037, paragraph 59).

54 Furthermore, as is clear from paragraph 45 of the present judgment, Article 18 of Directive 2009/28 has not achieved exhaustive harmonisation for the verification system connected with the mass balance system, so that Member States retain a wide discretion when they implement that article. In doing so, they must still comply with Article 34 TFEU (see to that effect, judgment of 22 June 2017, E.ON Biofor Sverige, C-549/15, EU:C:2017:490, paragraph 78).

55 It is therefore appropriate to proceed to interpret the Treaty provisions relating to the free movement of goods in order to determine whether Article 34 TFEU precludes national provisions, such as those at issue in the main proceedings, which provide for the economic operators involved in the supply chain for the product, even when they are intermediaries who do not take physical possession of the consignments of bioliquids, to be bound by certain requirements in relation to certification, communication and the provision of information under a national sustainability verification scheme.

56 In the present case, as is apparent from the file submitted to the Court and from the information supplied by ED & F Man Liquid Products Italia at the hearing, the bioliquid at issue in the main proceedings, palm oil, is produced in Indonesia, imported into the European Union, put into free circulation and stored in France before being transported to Italy to be sold to L.E.G.O.

57 Under Article 28(2) TFEU, the prohibition on quantitative restrictions on imports between Member States, provided for in Articles 34 to 37 TFEU, applies equally to products originating in Member States and to products coming from third countries which are in free circulation in Member States.

58 It is settled case-law that, in prohibiting between Member States measures having equivalent effect to quantitative restrictions on imports, Article 34 covers any national measure capable of hindering, directly or indirectly, actually or potentially, intra-Community trade (judgment of 1 July 2014, Ålands Vindkraft, C-573/12, EU:C:2014:2037, paragraph 66 and the case-law cited).

59 Obstacles to the free movement of goods resulting, in the absence of harmonisation of national legislations, from the application by a Member State to goods coming from other Member States, in which they are lawfully manufactured and marketed, of rules relating to conditions with which those goods must comply, even if those rules apply without distinction to all products, must constitute measures having equivalent effect to quantitative restrictions on imports within the meaning of Article 34 TFEU (see, to that effect, judgment of 22 September 2016, Commission v Czech Republic, C-525/14, EU:C:2016:714, paragraph 35).

60 In the present case, it should be noted that the obligation to submit sustainability certificates, imposed by national legislation such as that at issue in the main proceedings on intermediaries who do not take physical possession of the bioliquids which are the subject of the transaction in which they are involved, is liable to hinder the import of goods from other Member State, at least indirectly and potentially.

61 The effect of such an obligation is to make the import of bioliquids more difficult in that mere intermediaries, who have no such certification obligation under Article 18 of Directive 2009/28, must nonetheless, when they are importing a bioliquid into Italy, carry out that certification and are therefore subject to administrative obligations and the costs associated therewith.

62 Accordingly, national legislation constitutes a measure having equivalent effect to quantitative restrictions on imports and is thus in principle incompatible with Article 34 TFEU, unless that legislation can be objectively justified (see, by analogy, judgment of 1 July 2014, Ålands Vindkraft, C-573/12, EU:C:2014:2037, paragraph 75).

Potential justification

63 National legislation or a national practice that constitutes a measure having equivalent effect to quantitative restrictions may be justified on one of the public interest grounds listed in Article 36 TFEU or by overriding requirements. In either case, the national provision must, in accordance with the principle of proportionality, be appropriate for ensuring attainment of the objective pursued and must not go beyond what is necessary in order to attain that objective (judgment of 1 July 2014, Ålands Vindkraft, C-573/12, EU:C:2014:2037, paragraph 76).

64 In that regard, according to settled case-law of the Court, national measures that are capable of hindering intra-EU trade may inter alia be justified by overriding requirements relating to protection of the environment. The use of renewable energy sources for the production of electricity, which legislation such as that at issue in the main proceedings seeks to promote, is useful for the protection of the environment inasmuch as it contributes to the reduction in greenhouse gas emissions, which are amongst the main causes of climate change that the European Union and its Member States have pledged to combat (see, to that effect, judgment of 13 March 2001, PreussenElektra, C-379/98, EU:C:2001:160, paragraph 73; of 1 July 2014, Ålands Vindkraft, C-573/12, EU:C:2014:2037, paragraphs 77, 78 and 82; and of 22 June 2017, E.ON Biofor Sverige, C-549/15, EU:C:2017:490, paragraphs 85 to 88).

65 As a consequence, national provisions such as those at issue, which promote the use of renewable energy sources, also contribute to the protection of the health and life of humans, animals and plants, which are among the public interest grounds listed in Article 36 TFEU (see, to that effect, judgment of 22 June 2017, E.ON Biofor Sverige, C-549/15, EU:C:2017:490, paragraph 89).

66 In addition, as the Advocate General observed in point 97 of his Opinion, to the extent that national provisions, such as those in the main proceedings, oblige all the operators involved in the production and distribution of sustainable bioliquids, including intermediaries, to provide sustainability certificates, they contribute to combatting fraud in the bioliquid supply chain.

67 According to settled case-law of the Court, national measures capable of hindering intra-Community trade may be justified by the objective of protection of the environment and combating fraud provided that the measures in question are proportionate to the aim pursued (judgment of 6 October 2011, Bonnarde, C-443/10, EU:C:2011:641, paragraph 34).

68 As is clear from paragraph 63 of the present judgment, it is therefore necessary to be sure whether national legislation, such as that in the main proceedings, meets the requirements flowing from the principle of proportionality, that is to say, whether it is appropriate for securing the attainment of the legitimate objective pursued and whether it is necessary for those purposes (see, to that effect, judgment of 1 July 2014, Ålands Vindkraft, C-573/12, EU:C:2014:2037, paragraph 83).

69 In that regard, it should be noted that a national provision such as Article 12(2) of the interministerial decree of 23 January 2012 ensures the traceability of the product in the production and transportation chain and the sustainability of the product in order to avoid the risk of the palm oil being altered or counterfeited. An intermediary, such as Movendi, who buys the bioliquid at issue in the main proceedings and retains legal ownership of it together with all the relevant documentation would have the ability, prior to its sale to the end user, to modify its properties, make it available to third parties or mix it with other liquids or uncertified bioliquids. Therefore, by targeting all operators in the bioliquids supply chain, the national provision in question helps to prevent fraud in connection with the sustainability of the bioliquid. Accordingly, it is a measure that is appropriate for securing the attainment of the legitimate objective pursued.

70 Thus, the national legislation at issue in the main proceedings may also contribute to the protection of the health and life of humans, animals and plants, as referred to in paragraphs 63 to 66 of this judgment.

71 As to the necessity of such legislation, it should be noted that, even though an intermediary, such as Movendi in the main proceedings, does not take physical possession of the bioliquids that are the subject of the transaction in which it is involved, it nonetheless has legal ownership of them for a time and, in principle, therefore, has the ability to relocate them, alter the substance of them, or falsify the documentation relating to them. Therefore, it must be accepted that the Italian Republic was entitled to form the view that, by preventing those risks, the measure in question was necessary in order to attain the objectives pursued.

72 It follows from all the foregoing considerations that the answer to the second question is that EU law, in particular Article 34 TFEU and Article 18(1) and (3) of Directive 2009/28, must be interpreted as meaning that it does not preclude national legislation, such as that at issue in the main proceedings, which imposes a national sustainability verification system for bioliquids under which all the economic operators involved in the supply chain of the product, even when they are intermediaries who do not take physical possession of the bioliquids, are bound by certain requirements relating to certification, communication and the provision of information imposed by that system.

Costs

73 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 (Second Chamber) hereby rules:

1. **Article 18(7) 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, read in conjunction with Commission Implementing Decision 2011/438/EU of 19 July 2011 on the recognition of the ISCC (International Sustainability and Carbon Certification) system for demonstrating compliance with the sustainability criteria under Directives 2009/28/EC and 2009/30/EC of the European Parliament and of the Council, must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which imposes requirements on economic operators which, for the certification of the sustainability of bioliquids, are specific, different and more extensive than those imposed by a voluntary sustainability certification system, such as the ISCC system, recognised by that implementing decision, adopted by the European Commission in accordance with Article 18(4) of that directive, in so far as that system was approved only in respect of biofuels and in so far as those conditions concern only bioliquids.**

2. **EU law, in particular Article 34 TFEU and Article 18(1) and (3) of Directive 2009/28, must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which imposes a national sustainability verification system for bioliquids under which all the economic operators involved in the supply chain of the product, even when they are intermediaries which do not take physical possession of the batches of bioliquids, are bound by certain requirements relating to certification, communication and the provision of information imposed by that system.**

[Signatures]

(*1) Language of the case: Italian.