OPINION OF ADVOCATE GENERAL MISCHO

delivered on 8 May 2001 [1]

1. Two questions for a preliminary ruling have been referred to the Court by the Verfassungsgerichtshof (Austria) (Constitutional Court, hereinafter the 'VGH') concerning energy taxes on the consumption of electricity and natural gas and rebates of those taxes.

2. Under tax reforms within the framework of the Strukturanpassungsgesetz (Structural Adjustment Law) 1996, the Republic of Austria adopted, published and brought into force three laws simultaneously, namely:

— the Elektrizitätsabgabegesetz (Law on the tax on electricity, hereinafter the 'EAG');

— the Erdgasabgabegesetz (Law on the tax on natural gas, hereinafter the 'EGAG');

— the Energieabgabenvergütungsgesetz (Law on the rebate of energy taxes, hereinafter the 'EAVG').

3. The EAG provides for a tax of EUR 0.00726728 per kWh of electricity consumed. Pursuant to Article 1(1) of the EAG, the following are subject to electricity tax:

— the supply of electricity other than electricity supplied to electricity supply undertakings, and

— the consumption of electricity by electricity supply undertakings and the consumption of electricity produced by the consumer himself, or imported into the territory covered by the tax.

4. By virtue of Article 6(3) of the EAG, the electricity supplier must pass on the tax to

1 — Original language: French.

the customer regardless of whether it be an undertaking or a household.

5. For natural gas, similar rules provide for a tax of EUR 0.04360368 per m^3.

6. Finally, the EAVG provides for a rebate of energy taxes on natural gas and electricity. Under Article 1(1) of that law, energy taxes on natural gas and electricity are to be reimbursed on application in so far as they exceed, in total, 0.35% of the net production value. The rebate is paid after deduction of a maximum amount of ATS 5 000.

7. However, pursuant to Article 2(1) of the EAVG, the provision at the centre of the dispute in the main proceedings, only undertakings whose activity is shown to consist primarily in the manufacture of goods are entitled to a rebate of energy taxes.

8. The main proceedings raise for the VGH the question whether the provisions of the EAVG constitute State aid within the meaning of Article 92(1) of the EC Treaty (now, after amendment, Article 87(1) EC). Since there was no notification of those provisions, it is material for the VGH, first of all, to know whether application of the EAVG is precluded by the suspensory effect of Article 93(3) of the EC Treaty (now Article 88(3) EC) in regard to aid which has not been notified.

9. Article 92(1) of the Treaty provides:

'Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market'.

10. Article 93(3) of the Treaty provides:

'The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 92, it shall without

delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision'.

11. The VGH assumes provisionally that failure to comply with that procedure has such an effect on the national implementation of an aid scheme that a law enacted without following that procedure is of no effect.

12. The VGH therefore referred to the Court of Justice of the European Communities the following questions for a preliminary ruling:

'1. Are legislative measures of a Member State which provide for a rebate of energy taxes on natural gas and electricity, but grant that rebate only to undertakings whose activity is shown to consist primarily in the manufacture of goods, to be regarded as State aid within the meaning of Article 92 of the EC Treaty?

2. If the answer to Question 1 is affirmative, is such a legislative measure to be regarded as State aid within the meaning of Article 92 of the EC Treaty even if it applies to all undertakings, regardless of whether their activity is shown to consist primarily in the manufacture of goods?'

On the admissibility of the questions for a preliminary ruling

13. The Austrian Government questions the relevance of the reference for a preliminary ruling for the purposes of the proceedings before the VGH, having regard to the organisation of the Austrian courts.

14. It explains that, under the Austrian constitution, judicial review of administrative decisions is divided between the Verwaltungsgerichtshof (Administrative Court) and the VGH. The VGH may hear cases alleging infringement of the constitution only if there has been a sufficiently serious and therefore manifest infringement. On the other hand, if the infringements are not obvious, the VGH must allow the Verwaltungsgerichtshof to exercise review.

15. Accordingly, even if the contested rule were to be regarded as a State aid within the meaning of Article 92(1) of the EC Treaty — which, according to the Austrian Government, is not the case — it would be irrelevant to the procedure before the VGH. In adopting the contested decision,

the authority would not have committed any manifest infringement of Community provisions relating to State aid. The VGH itself, as may be inferred from the grounds of the order for reference, has some doubts in that respect.

16. However, I am of the opinion that the above argument is not one to cause the Court to conclude that it should not reply to the questions referred to it.

17. The Court has consistently held that it is for national courts before which the dispute has been brought to determine both the need for a preliminary ruling in order to enable them to deliver a ruling and the relevance of the questions they submit to the Court.

18. The Court cannot reject a question referred by a national court unless it is quite obvious that the interpretation of Community law sought by that court bears no relation to the facts or the subject of the main action. [2]

19. However, that is not the case here, since the national court has before it a dispute relating to national provisions providing for energy tax rebates and asks whether such reimbursement constitutes aid within the meaning of Article 92 of the Treaty.

20. It should be noted that Adria-Wien Pipeline GmbH (hereinafter 'Adria-Wien'), the appellant in the main proceedings, also presents its case in such a way that it could be concluded that the questions referred are not necessary.

21. It contends that rebate of the taxes at issue is not a State aid, but that to limit such reimbursement to certain undertakings is incompatible with the Austrian constitution. However, the VGH could remedy that breach of the constitution without recourse to Community law.

22. It adds that, if the rebate mechanism had to be regarded as an aid, that could only be because of its selective nature, which the VGH ought to alter in any case because of the requirements of the Austrian constitution.

23. However, I consider that that argument in no way alters the fact that, as we have seen, it is for the national court to determine the need for a preliminary ruling.

2 — See, for example, Case C-379/98 *PreussenElektra* [2001] ECR I-2099.

24. It follows that the Court is obliged to reply to the questions referred by the VGH.

25. I will therefore now consider those questions. In my opinion, the reply to the first question is easier if the second question is taken first.

The second question

26. By its second question, the VGH asks the Court in essence whether a legislative measure providing for a rebate of taxes on electricity and natural gas, in accordance with the abovementioned rules, should be regarded as State aid within the meaning of Article 92 of the Treaty if such a rebate is granted to all undertakings.

27. I consider that, in such a case, the scheme in question would have the effect of imposing on every undertaking established in Austria a tax amounting to 0.35% of net production value.

28. There is not, as far as I am aware, any provision of Community law which prohibits Member States from imposing a new tax on all their undertakings,[3] even if achieved by means of a complex mechanism comprising, in the first stage, a tax on energy consumption and, in the second stage, merely on application and on the basis of objective criteria, obligatory rebate of part of the amount levied.

29. All parties who have expressed a view on this matter have reached the conclusion that, if all undertakings were to benefit from a rebate, the condition under which a measure must be selective would not be fulfilled and it would thus not constitute State aid within the meaning of the Treaty.

30. Moreover, it cannot be contested that, by imposing a new charge on all its undertakings, a Member State does not thereby obtain for them any advantage likely to bring about a distortion of competition in their favour. On the contrary, it reduces their competitiveness.

31. I therefore conclude that a legislative measure whereby, on mere application, a rebate of taxes on electricity and natural gas is granted to all undertakings, provided

3 — Community law has introduced limits on the autonomy of Member States in respect of indirect taxes on capital accumulations, excises and VAT, but these are not in question here.

that those taxes have exceeded a total of 0.35% of the undertaking's net production value in the course of a calendar year, should not be regarded as a State aid within the meaning of Article 92 of the Treaty.

As regards the first question

32. The first question asks, in essence, whether a rebate granted only to undertakings whose activity is shown to consist primarily in the manufacture of goods is to be regarded as State aid within the meaning of Article 92(1) of the Treaty.

33. Adria-Wien and the Austrian, Danish and Finnish Governments consider that it is not the case.

34. The Commission, however, adopts the opposite view. It contends that it amounts to an advantage or preferential treatment attributable to the State. It is granted only to a limited number of undertakings and therefore is not a general economic policy measure. Furthermore, that measure is not justified by the nature or general scheme of the system.

A — *Does the scheme at issue amount to a derogation from the standard application of a general system?*

35. In support of its argument, the Commission refers to the judgment in *Italy* v *Commission*[4] which states that 'a measure whereby the pubic authorities grant to certain undertakings a tax exemption which, although not involving a transfer of state resources, places the persons to whom the exemption applies in a more favourable financial position than other taxpayers constitutes State aid within the meaning of Article 92(1) of the Treaty'.

36. That case concerned a tax credit in the form of a bonus which Italian road hauliers were able to deduct, at their choice, from the sums they owed by way of income tax on natural persons, income tax on legal persons, municipal income tax and value added tax, and from sums deducted at source from the incomes of employees and compensatory payments for self-employed work (paragraph 3 of the judgment).

37. Clearly nobody could contest that, given the absolutely unique nature of that

4 — Case C-6/97 *Italy* v *Commission* [1999] ECR I-2981, paragraph 16.

privilege, road hauliers were placed in a 'more favourable financial position than other taxpayers'!

38. However, the importance of that judgment does not lie in that statement, which can essentially be explained by the circumstances of the case, but in paragraph 15 where the Court stated 'the Court has consistently held that the concept of aid embraces not only positive benefits, such as subsidies, but also measures which, in various forms, mitigate the *charges which are normally included in* [5] the budget of an undertaking and which, therefore, without being subsidies in the strict sense of the word, are similar in character and have the same effect (Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* [1961] ECR I, 19, and Case C-200/97 *Ecotrade* v *AFS* [1998] ECR I-7907, paragraph 34)'.

39. Moreover, the Court used substantially identical wording in *Italy* v *Commission* [6] concerning the exemption granted to employers in the Italian textile industry from the financial charges arising from the normal application of the general social security system, and in *Belgium* v *Commission* (the 'Maribel *bis/ter* scheme') ('*Maribel bis/ter*') [7] concerning an 'increased reduction of social security contributions' granted to a wide range of sectors in Belgium.

40. But is the situation in the present case identical?

41. I do not think so, as it is extremely doubtful that in the present case there is a derogation from a 'normal rule'.

42. From the overall context in which that legislation was introduced I rather take the view that we are dealing here with a new general system of ecology taxes which *from the moment of its conception* was based on the principle that the primary and secondary sectors of the national economy could not reasonably be taxed proportionately to the *whole* of their electricity and gas consumption.

43. In that respect, I agree in particular with the following observations of the Danish Government:

'The Austrian tax, which is general in scope, is based on objective criteria, which is a characteristic of general measures.

5 — Emphasis added.

6 — Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 15.

7 — Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, paragraph 33.

Moreover, the conditions governing rebates are determined directly by the legislature and the rules do not allow the competent authorities to exercise any discretion as to the choice of undertakings eligible to that rebate or to alter its scope, matters which could otherwise deprive the system of its general character.

The Austrian rules governing the electricity tax rebate... are also an integral part of the overall system of energy taxation.

That is to say, in other words, that the general system of taxation is the "normal legal situation" so that the rebate rules *cannot be regarded as an "exception"* [8] to the general scheme of the system, which is one of the reasons why the system is said to have lost its general character... .

The credit scheme merely "corrects" the payment of a tax about which there has never been any question that it would ultimately be paid by the consumer'.

44. The Austrian and Finnish Governments also contend that the present case is concerned with a general measure based on the right of Member States to pursue the economic policy which seems most appropriate to them and, in particular, to apportion the tax burden as they wish between the various factors of production.

45. For its part, the Commission argues that the measures favour certain undertakings or certain goods.

46. In that respect, it relies essentially on *Maribel bis/ter* cited above. It contends that the reduction in social security contributions referred to in that case benefited numerous sectors, namely the extraction of non-energy products, the chemical industry, the metallurgy and metalwork industries, the manufacture of precision and optical instruments and other processing industries, numerous international transport sectors including air and sea transport, horticulture, silviculture and the forestry industry. Accordingly, the Commission states that 'since this programme was also directed at undertakings in the tertiary sector, the Commission considers that it involved a part of the economy just as important as that covered by the EAVG'.

8 — Original emphasis.

47. The Commission then cites paragraph 32 of that judgment as follows:

'Neither the high number of benefiting undertakings nor the diversity and importance of the industrial sectors to which those undertakings belong warrant the conclusion that the Maribel *bis/ter* scheme constitutes a general measure of economic policy, as the Belgian Government claims'.

48. However, it should not be forgotten that Article 92 uses the expression 'certain goods'. Accordingly, a measure geared towards a large number of types of goods, listed individually, is not necessarily the same as a measure geared towards the whole primary and secondary sector of a national economy. It should also be remembered that the Court has held that 'it follows from the wording of Article 92(1) of the Treaty that general measures which do *not favour only* [9] certain undertakings or the production of only certain goods do not fall within this provision'. [10]

49. However, I recognise that on that point the arguments for and against are more or less evenly balanced. Nevertheless, the important point in my opinion is that the treatment reserved for the primary and secondary sectors does not constitute a derogation from the normal application of a general system.

50. The objection may perhaps be raised that, by accepting that argument, the doors are opened wide to all kinds of abuse. Consequently, tomorrow, a Member State could raise the general level of its social charges with impunity and increase them even more in the services sector.

51. My reply to that, if it were to happen, is that it would be necessary to determine what is the normal rule in such a system, whether different treatment were justified by the nature or general scheme of the system and whether it resulted in distortions of competition in intra-Community trade.

52. As always, the Court will deliver its ruling in the present case 'having regard to the circumstances of the case'.

53. The Austrian Government also observes that in the 33rd recital of 'the proposal for a Council Directive 97/C 139/07 restructuring the Community

9 — Emphasis added.

10 — Case C-256/97 *DM Transport* [1999] ECR I-3913, paragraph 27.

framework for the taxation of energy products' [11] based on Article 99 of the EC Treaty (now Article 93 EC), not yet adopted by the Council, the Commission itself considered that '... Member States should be authorised to grant tax refunds to firms incurring investment expenditure aimed at improving energy efficiency and those whose energy costs represent a substantial proportion of the value of their sales'.

54. Accordingly, the Commission proposed an Article 15(2) in the following terms:

'Member States may refund some or all of the amount of tax paid by a firm on any part of its non-transport-related energy costs which exceeds 10% of its total production costs.

However, when the part of non-transport-related energy costs of a firm exceeds 20% of its total production costs, Member States shall reimburse the whole of the tax paid by the firm on the part of its non-transport-related costs which exceeds 10% of its total production costs.

The net amount of tax paid by a firm following the refunds provided for in the two preceding subparagraphs shall not be less than 1% of the value of its sales'.

55. Even if the Commission, in that proposal, does not accept that a scheme such as that implemented by Austria does not constitute aid, it nevertheless accepts that an ecology tax does not necessarily have to be applied at the same rate to all undertakings and that the method of a rebate of tax paid at the first stage is admissible as such.

56. It is true that the criterion adopted by the Commission in its proposal has the advantage of applying directly to the energy consumption of each individual undertaking and not solely to undertakings that manufacture goods. Accordingly, it can cover undertakings in the service sector which could also, albeit in rather rare cases, be major energy consumers. However, that does not mean that that is the only acceptable criterion.

57. I shall examine below the Austrian Government's concern not to jeopardise excessively the competitiveness of undertakings manufacturing goods.

11 — OJ 1997 C 139, p. 14.

58. At the hearing, the Austrian Government placed particular emphasis on something which it had mentioned rather incidentally in its written observations, namely that the Austrian legislature had in fact attempted to promote energy savings where it was realistic to do so. However, it considered that, as a result of competitive pressures and high energy prices, the goods-manufacturing sector had already done everything that was realistically possible.

59. In that respect, it might be asked whether major consumers in the service sector had not themselves already made considerable savings and whether, therefore, the principle of equal treatment of undertakings in an identical or comparable position had not been infringed by the legislation in question.

60. That principle seems already to have been referred to in the main proceedings and it is obviously for the national court to deliver a ruling in that respect.

61. Nevertheless, in my opinion, the Austrian scheme has not created a derogation from the 'normal system' of taxation which favours certain undertakings or certain goods and therefore does not constitute an aid scheme within the meaning of Article 92 of the Treaty which must be notified.

62. For the sake of completeness, I would add that, once it is accepted that the system implemented by Austria automatically makes provision for lower taxation on the undertakings in question, one may also question whether the amounts 'rebated' ever really belonged to the State. Once the amount of tax paid exceeds 0.35% of net production value, that amount belongs as of right to the undertaking that paid it at the first stage, as the State cannot refuse to reimburse that amount. It has no discretion as regards the amount to be paid or the undertakings to which payment is due.

63. Accordingly, it is difficult to fault the claim of the Austrian Government and Adria-Wien that the procedure involving the payment of taxes to the supplier of electricity or gas, who pays them to the State, and the subsequent 'rebate' by the State, is only an administrative mechanism intended to avoid more complicated methods. Moreover, according to the explanations given by Adria-Wien, suppliers are obliged by law to note separately in each invoice the delivery price and the amount of the ecology tax.

64. Since I am able to conclude, in light of the above, that this is not an aid scheme within the meaning of Article 92(1) of the Treaty, I will now examine, merely in the alternative, whether the scheme in question affects trade between Member States and is likely to distort competition.

B — *Is trade between Member States affected and competition distorted?*

65. In Case 173/73 *Italy* v *Commission* the Court held that '*the aim* [12] of Article 92 is to prevent trade between Member States being affected by advantages granted by the public authorities which, under various forms, distort or threaten to distort competition by favouring certain undertakings or goods' (paragraph 13).

66. In its judgment in *Philip Morris* v *Commission*, [13] cited by the Austrian Government, the Court stated that it was necessary to consider whether the contested measure 'strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade', that is to say if it would threaten 'to distort competition between undertakings established in different Member States'.

67. As regards the reduction of the social charges introduced by Italy, the Court held that 'it is necessary to start from the competitive situation existing in the common market before the contested measure was taken'. [14] It is therefore a question of examining whether the production costs of the undertaking or undertakings concerned in the Member State where the measure has been introduced are lower as a result. [15]

68. However, as noted above in relation to the reply to the second question, which I have taken first, even where the two taxes have a ceiling of 0.35% of net production value, the production costs of Austrian undertakings are taxed more heavily than they would be if those taxes did not exist and their competitiveness compared with similar undertakings in other Member States is reduced.

69. Unless the undertakings in question have reduced their profit margin, they have had to increase the price of goods they export to other Member States. Identical products manufactured in other Member States and imported into Austria have become more competitive.

12 — Emphasis added. See footnote 6.

13 — Case 730/79 *Philip Morris* [1980] ECR 2671, paragraphs 11 and 12.

14 — Case 173/73, cited above, footnote 6, paragraph 36.

15 — Ibid., paragraphs 43 to 45.

70. The situation is *therefore not* at all the same as that referred to by the Court in paragraph 47 of its judgment in *Maribel bis/ter*, cited above, where it held that 'where a Member State grants aid to an undertaking, domestic production may for that reason be maintained or increased, with the result that the undertakings established in other Member States have less chance of exporting their products to the market in that Member State'. However, that is the passage the Commission cites in its attempt to show that trade and cross-border competition are affected.

71. In its judgment of 19 May 1999 in Case C-6/97 *Italy* v *Commission*, cited above, concerning Italian road hauliers the Court held that 'it therefore falls to be considered whether the tax credit has adverse effects on the recipients' competitors, namely road hauliers established in other Member States' (paragraph 21).

72. However, in the present case, the fact that the new tax on Austrian undertakings manufacturing goods only amounts to 0.35% of net production, whereas it would be higher if that ceiling did not exist, does not entail any negative effects for similar undertakings established in other Member States.

73. Moreover, it should be borne in mind that as a result of the fact that undertakings in the service sector are hit even harder by the two taxes than undertakings manufacturing goods, the competitiveness of the latter is reduced even further in so far as they have recourse, in their manufacturing, transport or sales procedures, to services performed by undertakings in the tertiary sector.

74. Consequently, the mineral oils piped by Adria-Wien and used by manufacturers of goods have become more expensive as a result of the electricity tax which affects the pumping of those oils. Likewise, the costs of insurance companies and undertakings carrying out machine and building maintenance or repair work have increased.

75. Finally, the Austrian Government cannot be criticised for introducing partial reimbursement so as to avoid, as Austria itself points out, overburdening manufacturing sector undertakings and thereby excessively restricting their competitiveness. [16]

76. On the contrary, I am convinced that a Member State which introduces ecology taxes, without being obliged to do so by a

16 — Observations of the Austrian Government, p. 8.

Community provision, has a perfect right to proceed in a cautious manner. Different problems will arise when harmonised taxes are introduced throughout the Community.

77. Second, the Court has consistently held that 'Article 92 does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects'. [17] However, as noted above, a tax of 0.35% does not distort competition.

78. Third, I cannot accept the argument that a higher tax on undertakings in the tertiary sector creates an 'inverse' advantage for undertakings in the primary and secondary sectors, as those undertakings are not in competition. (Taxing dental surgeons at a higher rate does not provide any advantage for bicycle manufacturers). Moreover, a large proportion of undertakings in the tertiary sector are also exposed to international competition. That is the case for insurance companies that provide services outside their national territory, air or road transport undertakings and, above all, the hotel sector. Has the Court not held that a tourist is a recipient of services and that the Treaty applies to tourists?

79. In short, I cannot support an argument predicated on:

— abandoning established case-law whereby State measures are to be assessed according to their effects; or

— giving the concept of effect a completely new scope in the sense that the Court would cease to compare the situation of the undertakings concerned with their own prior situation (whether or not charges have been reduced) or with their foreign competitors (whether or not competitiveness has been increased) and compare them only with undertakings established in the same Member State with which they are not in competition.

80. I point out once more that all passages from the Court's case-law cited in the course of the present procedure in support of the contrary view concerned situations in

17 — See Case 173/73, cited above, footnote 6, paragraph 13 and Case C-75/97, cited above, footnote 7, paragraph 25.

which, by way of derogation from a general scheme that was indisputably a 'standard scheme', tax reductions, tax credits or reductions in social charges were granted to mitigate the charges previously imposed on certain undertakings and which undeniably distorted competition in intra-Community trade.

81. I therefore share the opinion of the Austrian, Danish and Finnish Governments and Adria-Wien that, in the present case, intra-Community trade is not affected and competition is not distorted. Since the intended aim of Article 92(1) is not called in question, there is therefore no aid within the meaning of that article.

Conclusion

82. In light of the above considerations, I propose that the Court should reply to the questions referred for a preliminary ruling by the Verfassungsgerichtshof as follows:

(1) Legislative measures of a Member State which provide a ceiling on the effect of newly introduced taxes on the consumption of electricity and natural gas, obtained by means of a rebate of those taxes awarded on mere application and on the basis of objective criteria, but which grant the rebate only to undertakings whose activity is shown to consist primarily in the production of goods, are not to be regarded as State aid within the meaning of Article 92(1) of the EC Treaty (now, after amendment, Article 87(1) EC).

(2) In view of the reply to the first question, it is not necessary to reply to the second question.