OPINION OF ADVOCATE GENERAL TIZZANO
delivered on 30 March 2006 [1]

I — Introduction

1. By decision of 14 December 2004, the French Cour de Cassation (Court of Cassation), pursuant to Article 234 EC, submitted to the Court for a preliminary ruling two questions on the interpretation of Article 88(3) EC and the general principles of Community law regarding proof.

2. These questions were referred in the context of an appeal brought by Laboratoires Boiron SA (hereinafter 'Boiron') seeking repayment of the sum which it had paid to the *Agence centrale des organismes de sécurité sociale* (Central Agency for Social Security Bodies) (hereinafter 'ACOSS') by way of a national tax on direct sales of medicines.

1 — Original language: Italian.

II — Relevant law

Community law

3. For the purposes of the case in question, we should first of all refer to Article 87(1) EC which, saving the derogations provided by the Treaty, provides that aid granted by a Member State or through State resources which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods and affects trade between Member States, shall be incompatible with the common market.

4. Mention should also be made of Article 88(3) EC which, so far as applies here, provides that:

'The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid.'

National law

5. The provisions of national law of relevance to the present case are the same as those described earlier in my opinion in *Ferring* [2] and I refer to that for further details. For present purposes, therefore, I shall only note the essential points.

6. In France, medicines are supplied to pharmacies in one of two ways, either by wholesale distributors ('grossistes répartiteurs') or by pharmaceutical laboratories selling directly.

7. Article R. 5124-2 of the Public Health Code (hereinafter, the 'CSP') defines a wholesale distributor as '[a]ny undertaking that purchases and stocks medicines other than those intended for testing on humans, for the purpose of their wholesale distribution in their unaltered state'.

8. In carrying on their business, wholesale distributors must discharge certain public service obligations which are imposed by the French authorities in order to ensure an adequate supply of medicines in France. [3]

9. It should be emphasised that these public service obligations are imposed only on wholesale distributors and do not apply to pharmaceutical laboratories that decide to market their own products by way of direct sales made either autonomously (by an internal division or by a branch) or through appointed agents.

10. For the purposes of the present case, we should refer also to the law on social security funding for 1998 ('*Loi de financement de la sécurité sociale pour 1998*', No 97-1164 of 19 December 1997, [4] hereinafter the 'Law of 19 December 1997'), which introduced a special tax on medicines sold directly by pharmaceutical laboratories to pharmacies. In particular, Article 12 of the law inserted into the Social Security Code Article L. 245-6-1 which provides:

'A contribution calculated from the pre-tax turnover achieved in France from wholesale sales to general pharmacies, mutual pharma-

2 — Opinion in Case C-53/00 *Ferring* [2001] ECR I-9067.

3 — Until February 1998, these obligations were governed by a decree of 3 October 1962 (JORF of 12 October 1962, page 9999). Those rules were subsequently amended by decrees No 98-79 of 11 February 1998 (JORF of 13 February 1998, page 2287) and No 99-144 of 4 March 1999 (JORF of 5 March 1999, page 3294).

4 — JORF of 23 December 1997, page 18635.

cies and pharmacies serving mines of medicinal products included in the list mentioned in Article L. 162-17, with the exception of generic medicinal products defined in Article L. 601-6 of the Public Health Code, shall be payable by undertakings dealing in one or more medicinal products within the meaning of Article L. 596 of the Public Health Code.

The rate of that contribution shall be 2.5%.'

11. The tax in question, introduced to finance the National Sickness Insurance Fund, was purposely designed to apply only to direct sales by pharmaceutical laboratories (thereby excluding sales made by wholesale distributors), with the aim of restoring the balance of competition between the different medicine distribution channels.

12. That is quite clear from the report accompanying the draft Law of 19 December 1997, which states:

'The volume of direct sales has increased sharply over recent years, threatening to throw the distribution system for reimbursable medicinal preparations out of balance. The aim of the present provision is to restore equivalence of treatment between distribution channels permitting an a posteriori recovery of part of the wholesaler's margin from pharmacies. ...

The tax, paid quarterly, is calculated by reference to turnover in the preceding quarter and is collected and controlled by the Central Agency for Social Security Bodies. Lastly, receipts are payable to the National Sickness Insurance Fund for Employees (CNAMTS).'

13. It should be noted that Article L. 245-6-1 of the Social Security Code has been repealed, with effect from 1 January 2003, by Article 16 of Law No 2002-1487 of 20 December 2002. [5]

III — Facts and procedure

14. Boiron is a pharmaceutical laboratory specialising in the production of homeopathic medicines which it distributes in France through a system of direct sales or through wholesale distributors.

5 — *Loi de financement de la sécurité sociale pour 2003* (JORF of 24 December 2002, page 21482)

15. As such, for the purpose of payment in respect of 1998 and 1999 of the contribution introduced in the Law of 19 December 1997 (hereinafter, the 'disputed tax'), Boiron declared to ACOSS its turnover from direct sales to pharmacies but not that achieved through wholesale distributors.

16. ACOSS took the view that this latter turnover also should be counted in calculating the tax, and made an adjustment.

17. Boiron paid the amount claimed but, disputing that it was lawful, submitted an administrative appeal to the board of ACOSS.

18. Not receiving any response from the board, Boiron brought proceedings before the *Tribunal des affaires de sécurité sociale* (Social Security Tribunal), *Lyon*, to obtain repayment of the amount paid, claiming that to exempt the wholesale distributors from the disputed tax was unlawful State aid, within the meaning of Article 92 EC (now Article 87 EC).

19. On 3 June 2000, the Tribunal ordered ACOSS to repay Boiron the amount paid but the agency appealed to the *Cour d'appel* (Court of Appeal), *Lyon*, which annulled that judgment.

20. Boiron then appealed to the *Cour de Cassation*; that court had doubts as to the implications of the Community case-law regarding State aid and, by a decision of 14 December 2004, stayed the proceedings before it and referred the following questions to the Court for a preliminary ruling:

'(1) Must Community law be interpreted as meaning that a pharmaceutical laboratory liable to pay a contribution such as that under Article 12 of Law No 97-1164 of 19 December 1997 on social security funding for 1998 is, in order to obtain its repayment, entitled to plead that the fact that wholesale distributors are not liable for that contribution constitutes State aid?

(2) If the answer to Question 1 is in the affirmative and since the success of the claim for repayment may depend solely on evidence produced by the claimant, must Community law be interpreted as meaning that rules of national law which make that repayment subject to proof by the claimant that the advantage received by the wholesale distributors exceeds the costs which they bear in discharging the public service obligations imposed on them by the national legislation or that the conditions laid

down by the Court of Justice in *Altmark* are not satisfied constitute rules of evidence which have the effect of making it practically impossible or excessively difficult to secure repayment of a mandatory contribution, such as that under Article 245-6-1 of the Social Security Code, which has been claimed before the competent authority, on the ground that the exemption from the contribution to which those wholesale distributors are entitled constitutes State aid which has not been notified to the Commission of the European Communities?'

21. It should be noted that, in the course of the proceedings, the Union de Recouvrement des cotisations de la Sécurité Sociale et d'Allocations Familiales (Union for Recovery of Social-Security and Family-Allowance Contributions) (hereinafter, 'URSSAF') assumed the rights and obligations of ACOSS.

22. In the proceedings brought, written observations were submitted by Boiron, URSSAF, the French Government and the Commission, all of whom took part in the hearing of 13 October 2005.

IV — Legal analysis

The first question

Premiss

23. I must recall, as a preliminary point, that the nature of the tax in question in the main proceedings has already been considered in *Ferring*, where the Court stated that this charge, falling exclusively on the direct sales of medicines by pharmaceutical laboratories, was a State aid to the wholesale distributors in so far as the advantage which they derived from not being liable to the charge on direct sales of medicines was greater than the additional costs borne in discharging public service obligations. [6]

24. It is also appropriate to recall that France abolished the charge in a law of 20 December 2002.

25. The problem raised in connection with the present proceedings therefore relates only to any anti-competitive effects pro-

6 — *Ferring*, paragraphs 14 to 29.

duced by imposition of the charge in the years preceding its abolition. In the first question, the *Cour de Cassation* is asking whether undertakings which have paid that charge may seek repayment in the courts, where it has been shown to be aid.

26. The court making the reference has held that the Court's case-law on this point is not entirely clear: in *Banks*, it appears that the Court has, in principle, rejected the possibility of persons liable to pay an obligatory contribution being able to rely on the argument that the exemption enjoyed by other persons constitutes State aid in order to avoid payment of that contribution or to obtain its repayment. [7] That approach seems to have been confirmed subsequently, in *Sea-Land*. [8]

27. However, the court making the reference also notes that, in *Ferring* and in *GEMO*, [9] cases which raised problems that it considered similar to those encountered in *Banks* and *Sea-Land*, the Court had not expressly rejected that possibility and, in any event, in *Van Calster* the Court had accepted that, in certain circumstances, national courts may order repayment of taxes or contributions that are an integral part of an aid measure. [10]

Assessment

28. I think it hardly necessary to recall, firstly, that Community monitoring of aids is intended to avoid the distorting effects which certain national measures may have on competition among undertakings of one and the same sector. Thus, having established that a national measure is an incompatible aid, the distorting effects produced by that measure must be removed and the previously existing situation re-established. [11] Generally, that situation is re-established by requiring the recipients to repay the unlawful aid to the body which distributes the aid and the Court has consistently held that recovery of the aid logically follows from establishing that it is unlawful. [12]

7 — Case C-390/98 *Banks* [2001] ECR I-6117, paragraph 80.

8 — Joined Cases C-430/99 and C-431/99 *Sea-Land Service and Nedlloyd Lijnen* [2002] ECR I-5235, paragraph 47.

9 — Case C-126/01 *GEMO* [2003] ECR I-13769.

10 — Joined Cases C-261/01 and C-262/01 *Van Calster and Cleeren* [2003] ECR I-12249, paragraphs 53 and 54.

11 — See, among many other judgments, Case C-348/93 *Commission* v *Italy* [1995] ECR I-673, paragraph 26, and Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 75.

12 — See, inter alia, Case 142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 66, and *Commission* v *Italy*, paragraphs 26 and 27.

29. In the present case, the alleged aid consisted of an asymmetrical imposition of the disputed charge only on pharmaceutical laboratories, so giving an advantage to wholesale distributors (who were not liable) and, therefore, a competitive position can be restored by the latter paying amounts corresponding to those on which they received substantial tax relief.

30. However, as I have described above, Boiron did not pursue that path but took action with what one might call the opposite intention: rather than asking the wholesale distributors also to pay sums corresponding to the charge, it brought proceedings in the national court claiming repayment of the sums which it had itself paid, unduly as it believed. Thus we have to establish whether, in a case such as that in question, such a remedy can be allowed for the purpose of eliminating the distorting effects of any aid and of re-establishing the previously existing situation.

31. On this point the parties have submitted entirely divergent arguments. Boiron maintains that in the present case repayment of the contributions paid by undertakings liable to the contested tax is the most appropriate means of eliminating the alleged distortions of competition. That, the applicant continues, is because here the origin of the aid is characterised less by wholesale distributors being made liable to the charge than by pharmaceutical laboratories being subjected to a tax introduced solely to bring about a disparity in tax treatment as between two categories of undertakings, allegedly to restore balance.

32. But the Commission, the URSSAF and the French Government maintain that such a remedy cannot be allowed since it does not make it possible to remove any anti-competitive effects of the measure and, indeed, would accentuate the points in which Community law is infringed, because it widens the spectrum of those exempted from paying the charge and, thus, of recipients of the aid. In the Commission's view, therefore, the path that Boiron should have taken was an action seeking for the State to be ordered to recover the aid unlawfully granted to the wholesale distributors.

33. For my part, I would note firstly that the Court of Justice has already had occasion to rule on requests for repayment which, at first sight, might appear similar to the case at issue.

34. As I have noted above, the Court has explained that, where aid is granted by means of exemptions of tax, '[p]ersons liable to pay an obligatory contribution *cannot* rely on the argument that the exemption enjoyed

by other persons constitutes State aid in order to avoid payment of that contribution' [13] or 'in order to obtain repayment thereof'. [14]

35. That is because in such cases it is not the tax measure itself which constitutes a measure of aid which might infringe the Community rules on aid — for that in any event is a part of the legitimate exercise of the Member States' powers on taxation — but the exemption which is granted to certain taxpayers. [15]

36. And it is precisely that exemption, and that aspect only of the tax measure, which the applicants must contest in complaining of the existence of aid. The Court has thus explained that, in such cases, distortions of competition must always be eliminated by recovery of the aid granted, and has set out the terms of such recovery: 'the ... authorities [will] merely have to take measures ordering the undertakings which have received the aid to pay sums corresponding to the amount of the tax exemption unlawfully granted to them'. [16]

37. However, the present case differs from that described above.

38. The national legislation establishing the charge on direct sales does not appear to be a (lawfully introduced) general tax accompanied (unlawfully) by exemption for specified undertakings. This is a charge imposed 'asymmetrically', meaning a charge imposed only upon some economic operators (pharmaceutical laboratories) but not on others who are in competition with the former (wholesale distributors), in order to offset costs alleged to be borne by the latter.

39. The case in question thus relates to an entirely special situation in which, as the Court also noted in *Ferring* (and nobody disputed the point), the principal aim in introducing the contested charge was, by means of a difference in tax treatment, to compensate an alleged imbalance between two groups of undertakings.

40. The preparatory documents for the Law of 19 December 1997 show clearly (as also does a ruling from the French *Conseil Constitutionnel*) that the charge was imposed only on direct sales by pharmaceutical laboratories precisely for the purpose of introducing a tax regime favouring wholesale

13 — *Banks*, paragraph 80. My italics. In the same sense, see Case C-437/97 *EKW and Wein & Co.* [2000] ECR I-1157, paragraph 52, and Case C-36/99 *Idéal Tourisme* [2000] ECR I-6049, paragraph 20.

14 — Joined Cases C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04 *Nazairdis and Others* [2005] ECR I-9481, paragraph 44.

15 — On this point see, in particular, the Opinion of Advocate General Stix-Hackl in *Nazairdis and Others*, at point 38.

16 — Case C-183/91 *Commission* v *Greece* [1993] ECR I-3131, paragraph 17.

distributors and so compensating the competitive disadvantage which, according to the French legislature, resulted from imposing public service obligations upon them. [17]

41. In the present case, therefore, we do not have an initial requirement, lawfully bringing in a charge, and a second requirement unlawfully granting certain exemptions from it. What is necessarily unlawful in fact is the requirement imposing the charge, since that is intended to give a competitive advantage to certain undertakings which are not liable to the charge. Consequently if there is aid, it is produced by the asymmetrical imposition of the charge upon (only) one category of undertakings.

42. In that situation, it appears that in principle there is nothing to prevent such undertakings from being able to dispute the lawfulness of the charge in the competent national courts and to seek its repayment.

43. At first view, there appears to be indirect confirmation of that approach in the case-law on imposition of 'parafiscal' charges, or on instances where the unlawful State aid takes the form of distribution, by way of subsidies to certain individuals, of the funds collected as a charge introduced specifically for that purpose (so, a parafiscal charge). In such cases, the contributions paid by undertakings by way of that charge are the means of financing the public support measure.

44. On this I would note that, in *Van Calster*, invoked also by the applicant, the Court ruled that 'where an aid measure for which the manner of financing is an *integral part* of that measure has been implemented in breach of the requirement for notification, the national courts are required, in principle, to *order repayment* of the taxes or contributions collected specifically to finance that aid'. [18] Only thus, according to the Court, is it possible to restore the pre-existing situation as regards the undertakings which have improperly received the aid and also those which have had to finance an unlawful aid. [19]

45. Thus, as happens with parafiscal charges, so in the case in question I believe that a convincing and necessary link (if not complete identity) can be perceived between the

17 — *Ferring*, paragraph 19. See also above at point 12.

18 — *Van Calster*, paragraphs 53 and 54. My italics.

19 — On this, see Joined Cases C-34/01 and C-38/01 *Enirisorse* [2003] ECR I-14243, paragraphs 44 and 45.

charge and the fiscal advantage.[20] Indeed, the advantage that may in theory be given selectively to wholesale distributors arises, as I have pointed out, from the asymmetry of the contribution introduction by the law of 19 December 1997, since it is the asymmetrical imposition of that contribution only upon certain undertakings which, again in theory, brings about a position of relative advantage for the undertakings not liable to it.

46. In other words, the imposition of the charge on pharmaceutical laboratories and the non-liability of wholesale distributors are the two inseparable aspects of the French measure brought about by the charge.

47. That is not all. It should also be noted that, albeit indirectly, the contribution paid by the pharmaceutical laboratories also influences the amount of the aid received by the wholesale distributors: the benefit which these latter receive from their competitors being liable to the contested measure necessarily depends on the amount of the charge at issue and, clearly, the higher the charge, the greater the competitive advantage accruing to the competitor undertakings which are not liable.

48. Therefore, in contrast to the assertions of the Commission and URSSAF, the charge in question must be regarded as an integral and irremovable part of the aid measure because, I would repeat again, it was in fact the introduction of this asymmetrical charge in 1997 which created a competitive advantage for the wholesale distributors and so provoked the distortions of competition in the sector.

49. But, if that is the case, then it seems to me that the remedy cited by the applicant, which is to eliminate its effects (by reimbursement of the contributions paid by the undertakings which are liable), might be a particularly effective way of re-establishing the pre-existing situation.[21]

50. Eliminating the effects of the charge would, indeed, be but to revert to the position obtaining before the charge was introduced, that is to a position where the wholesale distributors and the laboratories were not subjected to different tax treatment.

51. Furthermore, if asymmetrical imposition of the charge represents the unlawful aid measure, Boiron's contention seems convin-

20 — On the fundamental importance of a link between the charge and the aid measure, see Case C-174/02 *Streekgewest* [2005] ECR I-85, paragraph 22 et seq.

21 — I would note that I have held out this possibility before, in the Opinion in *Ferring*, points 22 and 23.

cing to me, arguing that the acts whereby the French authority collected the contributions unlawfully imposed (only) on the pharmaceutical laboratories were invalid.

52. I would note here that the Court has consistently held that '[n]ational courts *must* afford individuals in a position to rely on such breach [by the national authorities of Article 88(3) EC] the certain prospect that all the necessary inferences will be drawn, in accordance with their national law, as regards *the validity of measures giving effect to the aid*, the recovery of financial support granted in disregard of that provision and possible interim measures'. [22]

53. This power/duty of the national court to act to safeguard the rights of such individuals stems from the direct effect of Article 88(3) EC. [23] As the passage quoted shows clearly, it requires the court to make use of all legal instruments allowed by its internal law in order to protect applicants.

54. In the light of that, I see no reason why, where there are entirely special circumstances such as those of the case in question, the national court may not give protection to undertakings adversely affected by the unlawful aid by proceeding with a request for repayment as was submitted by Boiron.

55. And, in contrast to the assertion of the French Government, URSSAF and the Commission, it seems to me that that solution would not have the effect of aggravating the unlawful act by increasing the number of those benefiting from the measure to the prejudice of the undertakings which are liable to the disputed charge. Indeed, I feel that the opposite is the case: that solution would reduce the number of undertakings adversely affected by the alleged aid and so would reduce the asymmetrical scope of the charge and, hence, the anti-competitive effects of the charge.

56. I would observe further that a ruling by the Court to allow repayment of the contested charge would, very probably, also give a sign to the other pharmaceutical laboratories which believe themselves to be adversely affected by the grant of aid in question: any shrewd economic operator might — as Boiron has done — take action to obtain repayment of an amount unduly paid by way of the charge.

22 — Case C-354/90 *Saumon* [1991] ECR I-5505, paragraph 12. My italics. See also Case C-39/94 *SFEI* [1996] ECR I-3547, paragraph 40.

23 — See Case 120/73 *Lorenz* [1973] ECR 1471, paragraph 7.

57. Lastly, such a solution seems preferable for reasons of procedural efficiency, because that would make it less expensive to safeguard the rights of individuals suffering from unlawful measures of support such as that at issue. The other solution — supported by the Commission — would mean dismissing Boiron's request for repayment and that company needing to bring a new action in the national courts for an order to the competent national authorities to make a retrospective extension of the contested contribution to the undertakings which originally had not been liable. But it is difficult to argue that that solution would not make it rather more complicated, costly and uncertain to eliminate the anti-competitive effects of the contested charge. All the more so if one considers that the French authorities decided to end that charge, in a law of 20 December 2002, instead of extending it to wholesale distributors.

58. That being said, I think it important to note that, if the national court does take the position suggested here, it must not order the repayment of all contributions paid by Boiron but only that part which exceeds the 'additional costs'. As the Court ruled in *Ferring*, the unlawful advantage which the wholesale distributors may have received is not the entire amount of contributions that the State has waived but only the amount which exceeds the additional costs that those undertakings had to bear in discharging the public service obligations imposed upon them. [24]

59. It would therefore be only that part of the contributions paid and corresponding to the alleged over-compensation for public service obligations which count as a fiscal cost not due from pharmaceutical laboratories and an unlawful benefit for wholesale distributors.

60. It will of course be for the national court, firstly, to establish that there is an element of aid in the remission granted to wholesale distributors and, if there is, then to find the precise amount. Here I will only recall that, in *Altmark*, the Court ruled that, where the undertakings which are to discharge public service obligations have not been selected by a public procurement procedure, the level of compensation needed must be determined

24 — And provided that the other conditions referred to in *Ferring* and *Altmark* have been satisfied. I would note that, in Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraphs 89 to 93, the Court has set out the conditions which must obtain for compensation awarded to an undertaking required to discharge public service obligations to escape classification as State aid: (1) the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined; (2) the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner; (3) the compensation must not exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit; (4) where selection is not effected by a public procurement procedure, the level of compensation must be determined on the basis of an analysis of the costs which a typical, well-run undertaking would have incurred in discharging the public service obligations.

on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations. [25]

61. In the light of the foregoing considerations, I propose that the Court reply to the first question submitted by the *Cour de Cassation* that Community law does not preclude a pharmaceutical laboratory liable to pay a contribution such as that under Article 12 of Law No 97-1164 of 19 December 1997 from pleading that the fact that wholesale distributors are not liable for that contribution constitutes State aid, in order to obtain repayment of the part of the amount paid which corresponds to the economic benefit unlawfully received by the wholesale distributors.

The second question

Premiss

62. If the answer to the first question is in the affirmative, the court making the reference essentially asks this Court whether Community law precludes national rules that require a claimant invoking the fact that compensation granted to undertakings for the performance of public services (in the present case, the remission granted to wholesale distributors) amounts to aid to prove that such compensation exceeds the costs arising from the public service obligations imposed upon the latter.

63. In formulating this question, the court refers first of all to Article 1315 of the French Civil Code which provides that 'any person who claims that an obligation should be performed shall provide evidence thereof' and points out in addition that, under the terms of Article 9 of the new Code of Civil Procedure, it is for each party to prove, according to law, the facts necessary to establish his case.

64. Pursuant to those provisions — the *Cour de Cassation* continues — it is the party bringing an action against a public measure who has to show that the measure amounts to State aid under the Treaty. In a case relating to public measures of support to persons charged with a public service, it is thus for the claimant to show that the conditions which preclude the existence of

25 — *Altmark*, paragraph 93.

aid (in particular, those required in *Altmark*) [26] have not been satisfied.

65. For the sake of completeness the court making the reference notes lastly that Article 10 of the new Code of Civil Procedure allows the court adjudicating on the substance to order of its own motion all lawful measures of inquiry. It points out, however, that the provision only empowers the national court to act and does not require it to make good any shortcoming of information held by the claimant.

66. That is why the *Cour de Cassation* asks the Court whether, in the present case, national rules worded like those mentioned must be regarded as incompatible with Community law as being rules of evidence which would have the effect of making it practically impossible or excessively difficult to secure protection of one's entitlement.

Assessment

67. I would note first of all that it is consistent case-law that, in the absence of Community rules, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are not less favourable than those governing similar domestic actions and, second, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law. [27]

68. Moving on to consider the national procedural provisions referred to by the national court, I would observe that those rules are simply provisions which, following an established general legal principle, require a person seeking to rely upon a right in an action to prove the facts on which that right is based, a rule often expressed in the well-known Latin tag *ei incumbit probatio qui dicit, non qui negat* ('the proof lies upon him who affirms, not upon him who denies'). [28]

26 — See above, in footnote 24.

27 — Among many cases, see Cases 33/76 *REWE* v *Landwirtschaftskammer für das Saarland* [1976] ECR 1989, paragraph 5; 199/82 *Amministrazione delle Finanze dello Stato* v *San Giorgio* [1983] ECR 3595, paragraph 12; C-255/00 *Grundig Italiana* [2002] ECR I-8003, paragraph 33. As regards aid, see *Saumon*, paragraph 12 and Case 94/87 *Commission* v *Germany* [1989] ECR 175, paragraph 12.

28 — For explicit acknowledgement that the principle applies also in Community proceedings, see Case T-117/89 *Sens* v *Commission* [1990] ECR II-185, paragraph 20. See also Case 3/86 *Commission* v *Italy* [1988] ECR 3369, paragraph 13 and Case 290/87 *Commission* v *Netherlands* [1989] ECR 3083, paragraphs 11 and 20.

69. We must therefore ask whether that fundamental principle may, in the particular case, create excessive difficulty for a claimant in proceedings such as those under consideration.

70. We may certainly agree with Boiron and the Commission that it might perhaps be difficult for a competitor of the undertaking alleged to be the recipient of aid to show that the compensation exceeds the additional costs arising from discharge of the public service obligations: the information on business management costs are normally strictly confidential.

71. However, an examination of the relevant provisions of the new French Code of Civil Procedure shows that the national court has been left wide powers to adopt any measures of inquiry of use in obtaining the evidence needed for a ruling on the substance of the case.

72. The court which made the reference has indicated that Article 10 of the new Code of Civil Procedure allows the national court, where it considers it proper, to order all lawful measures of inquiry of its own motion.

73. Furthermore, as pointed out by the URSSAF in its written observations, Articles 143 to 146 of the new Code of Civil Procedure allow the court, with or without a request from a party, to order measures of inquiry at any stage of the proceedings, if it considers that it does not have sufficient evidence to decide in the dispute. Such measures may include an order from the court to a party or other person to produce any act or document (Article 138 of the new Code of Civil Procedure).

74. I believe therefore, on the basis of those rules, that there is a realistic possibility for the national court to intervene by ordering the measures of inquiry needed, either upon a request from a party or of its own motion, in order to deal with any difficulties experienced by a party in producing certain types of proof (for example, proof regarding a competitor's management costs).

75. I would further recall that the conditions indicated by the Court in *Altmark*, [29] to hold that there was no aid in the circumstances in question, are cumulative. Thus, if a claimant

29 — See above in footnote 24.

shows that any one of those conditions has not been satisfied, that suffices for the national court to have to find that such compensation is State aid within the meaning of the Treaty. Although it might be difficult for a claimant to prove that the compensation paid to the service provider exceeds the costs arising from the public service, I do not think that such difficulties of proof are evident when seeking to prove that none of the other three conditions set in *Altmark* obtains.

76. For example, I would note that the fourth condition requires the compensation to be quantified on the basis of an analysis of the costs which a typical undertaking would have incurred in discharging those services. I do not think that consideration of that requirement demands access to confidential data available only to the recipient undertaking or the State. Indeed, the data needed for such an analysis are typically details that should be known to an undertaking which operates, or intends to operate, on the market in question.

77. Lastly, I would add that I am not persuaded by the Commission's argument describing the proof in question as 'proving the negative', which it would therefore be natural to require from the Member State or the alleged recipient of the aid. That argument seems to be focused on a mere point of terminology. But I do feel that all of the facts to be proved by Boiron to the court making the reference can also be described as positive facts: excessive compensation compared with the costs incurred for the public service, existence of an economic advantage for the service provider, and so on.

78. In the light of the above, it does not seem to me that, where general provisions of national law relating to the burden of proof are worded like those mentioned by the court making the reference, they are such as to render it 'practically impossible or excessively difficult' to safeguard the rights which individuals derive from Community law on State aid.

79. I therefore propose that the Court reply to the second question that Community law does not preclude national provisions which require a claimant pleading that compensation granted to undertakings for the performance of public services amounts to aid to produce proof that such compensation exceeds the cost arising from the public service obligations imposed on those undertakings.

V — Conclusion

80. In the light of the foregoing considerations, I propose that the Court reply to the questions referred by the *Cour de Cassation* for a preliminary ruling as follows:

(1) Community law does not preclude a pharmaceutical laboratory liable to pay a contribution such as that under Article 12 of Law No 97-1164 of 19 December 1997 from pleading that the fact that wholesale distributors are not liable for that contribution constitutes State aid, in order to obtain repayment of the part of the amount paid which corresponds to the economic benefit unlawfully received by the wholesale distributors.

(2) Community law does not preclude national provisions which require a claimant pleading that compensation granted to undertakings for the performance of public services amounts to aid to produce proof that such compensation exceeds the cost arising from the public service obligations imposed on those undertakings.