OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 30 March 2006 [1]

I — Introduction

1. By two separate decisions, the Cour d'appel (Court of Appeal), Liège ('the Cour d'appel') and the Tribunal de première instance (Court of First Instance), Liège ('the Tribunal de première instance') have referred to the Court of Justice, pursuant to Article 234 EC, a number of questions for a preliminary ruling regarding both the compatibility with Articles 25 EC, 87 EC and 90 EC of a measure granting exemption from local taxes on motive force — that exemption being accorded solely in respect of motors used in natural gas stations — and the consequences were that measure indeed declared to be incompatible.

1 — Original language: Italian.

II — Legislative framework

Community law

2. For the purposes of this case, reference must primarily be had to Article 87(1) EC which, as we know, provides that, save as otherwise provided in the 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 is incompatible with the common market, in so far as it affects trade between Member States.

3. It is also appropriate to cite here Article 88(3) EC which provides, in so far as is relevant to this case, that:

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

4. Also material to our purposes is Article 25 EC, according to which:

'Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature'.

5. I should, finally, cite Article 90 EC, which provides as follows:

'No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.

Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products'.

The national law

In Case C-393/04

6. On 13 December 1999, the municipal council of Seraing adopted a regulation introducing a tax on motive force ('the municipal regulation'). Under that regulation, industrial, commercial, financial or agricultural undertakings established in the territory of the municipality are required to pay an annual tax on motors used for activities pursued in the establishments or plants linked to them, whatever the substance or energy source used to operate those motors. The rate of the tax is proportionate to the power of the motor used.

7. However, Article 3 of the municipal regulation provides for exemption from the tax in certain circumstances. In particular, and of relevance to this case, Article 3(9) provides that 'motors used in natural gas compression stations to drive the compressors which create the level of pressure needed in the supply pipes' are not subject to the tax on motive force.

In Case C-41/05

8. On 30 October 1998 and 29 October 1999, the provincial council of Liège adopted a regulation ('the provincial regulation') introducing an annual tax on motive force.

9. That regulation is identical in scope to the abovementioned regulation adopted by the ville de Seraing and, like the latter regulation, exempts from the tax the use of motors in natural gas compression stations.

11. Air Liquide transports natural gas, through a network of very high pressure underground pipes, from its various production facilities located in Belgium to its own customers established in Belgium, France and the Netherlands.

12. As part of that activity, Air Liquide operates an industrial gas production unit in the territory of the ville de Seraing, situated in the Province de Liège. That unit includes a gas compression station which is needed to propel the gas into the appropriate pipes so that it can be transported.

Case C-393/04

III — Facts and procedure

Introduction

10. Air Liquide is an industrial group which specialises in the production and transport of industrial and medicinal gases. Air Liquide Industries Belgium SA ('Air Liquide') is part of that group.

13. On 28 June 2000, Air Liquide received from the ville de Seraing a demand for payment of the sum of BEF 41 275 757 (equivalent to EUR 1 023 199.20) by way of tax on motive force for the year 1999.

14. By letter of 22 September 2000, Air Liquide applied to the municipal council of Seraing seeking to have that demand withdrawn. Its application was, however, rejected by a decision of 15 March 2001.

15. The applicant then brought an action before the Tribunal de première instance, Liège, seeking to have that decision annulled and claiming, among other things, that the tax in question was discriminatory, since it applied to undertakings producing and transporting industrial gas but not to undertakings transporting natural gas.

16. By a decision of 28 November 2002, the Tribunal de première instance, Liège, declared the application to be admissible but unfounded. Air Liquide then appealed to the Cour d'appel which, by decision of 15 September 2004, decided to stay proceedings and refer to the Court of Justice the following question for a preliminary ruling:

'Must exemption from a municipal tax on motive force granted solely in respect of motors used in natural gas stations, to the exclusion of motors used for other industrial gases, be regarded as State aid within the meaning of Article 87 of the Consolidated Version of the Treaty establishing the European Community?'

Case C-41/05

17. On 20 April 2000 and 9 May 2001, the provincial Council of Liège served on Air Liquide two demands for payment relating to the tax on motive force for the 1999 (activities carried out in 1998) and 2000 (activities carried out in 1999) financial years, amounting to BEF 4 744 980 (equivalent to EUR 117 624.98) and BEF 2 403 360 (equivalent to EUR 59 577.74) respectively.

18. After the Liège provincial authorities rejected Air Liquide's application to have the tax demands withdrawn, Air Liquide brought an action before the Tribunal de première instance, seeking both to have the decision rejecting its application annulled and, at the same time, to have the taxes already paid totalling BEF 30 788 100 (equivalent to EUR 763 217.06) reimbursed.

19. Since the applicant had cited the incompatibility of the tax on motive force with Articles 25 EC, 87 EC and 90 EC, by a decision of 24 January 2005, the Tribunal de première instance decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'1. Must exemption from a provincial tax on motive force granted solely in respect of motors used in natural gas stations, to the exclusion of motors used for other industrial gases, be regarded as State aid within the meaning of Article 87 of the consolidated version of the Treaty establishing the European Community?

2. If the answer to the preceding question is "yes", must the national court, before which an action is brought by a taxpayer who has not enjoyed exemption from the provincial tax on motive force, order the public authority which levied that tax to repay it to that taxpayer if it finds that, in law or in fact, it is not possible for the public authority which levied that tax to claim it from the taxpayer who enjoyed exemption from the tax on motive force?

3. Must a tax on motive force levied on motors used for transporting industrial gas through very high pressure pipes, which requires the use of compression stations, be regarded as a charge having equivalent effect prohibited by Article 25 et seq. of the consolidated version of the Treaty, if it is apparent that, de facto, it is levied by a province or a municipality on the transport of industrial gas outside its territorial limits, when in the same conditions the transport of natural gas is exempt from such a tax?

4. Must a tax on motive force levied on motors used for transporting industrial gas through very high pressure pipes, which requires the use of compression stations, be regarded as internal taxation, prohibited by Article 90 et seq of the Treaty, if it is apparent that the transport of natural gas is exempt from that tax?

5. If the answer to the questions above is "yes", is a taxpayer who has paid the tax on motive force justified in seeking the reimbursement of that tax from 16 July 1992, the date on which the *Legros* judgment was given?' [2]

Procedure before the Court

20. By order of the President of the Court of 21 July 2005, Cases C-393/04 and C-41/05 were joined for the purposes of the oral procedure and judgment.

21. Written observations were submitted in both of the cases by the applicant, the Province de Liège, the ville de Seraing, the Belgian Government and the Commission, all of which then intervened at the hearing of 13 October 2005.

2 — Case C-163/90 *Administration des douanes et droits indirects v Legros and Others* [1992] ECR I-4625.

IV — Legal analysis

The first question referred (Cases C-393/04 and C-41/05)

22. By the only question referred by the Cour d'appel and the first question submitted by the Tribunal de première instance, the national courts are essentially asking the Court of Justice whether the tax exemptions (from a municipal tax in Case C-393/04 and a provincial tax in Case C-41/05) in relation to motive force provided for solely in relation to motors used in natural gas pressure stations ('the contested measures') constitute State aid within the meaning of the Treaty.

The jurisdiction of the Court of Justice

23. As a preliminary point, however, the ville de Seraing, the Province de Liège, the Belgian Government ('the Belgian authorities') and the Commission challenge the admissibility of this question, objecting that, in both sets of national proceedings, Air Liquide has applied to the national court not for the recovery of what it alleges to be unlawful State aid from the recipients of that aid, but for the reimbursement of payments Air Liquide has made by way of taxes which are in themselves lawful.

24. In their opinion, recovery of that nature is precluded by a specific ruling of the Court of Justice according to which '[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'. [3] Therefore, since the national courts are unable to meet the applicant's requests, in the view of the Belgian authorities and the Commission, any finding by the Court of Justice that the contested measures were in the nature of State aid would simply be without effect on the outcome of the main proceedings.

25. Moreover, for that very reason, in a series of cases concerning requests for the reimbursement of taxes similar to those at issue, the Court itself has declared that it lacks jurisdiction to rule on questions concerning the classification of the contested measure as aid. [4]

26. Let me begin by pointing out that, according to the Court's well-known and settled case-law, in proceedings for a preliminary ruling, it is solely for the national court to determine, in the light of the specific circumstances of the case, both the need for

3 — Case C-390/98 *Banks* [2001] ECR I-6117, paragraph 80, a principle confirmed by the judgment in Joined Cases C-430/99 and C-431/99 *Sea-Land Service and Nedlloyd Lijnen* [2002] ECR I-5235, paragraph 47.

4 — The Belgian authorities and the Commission refer in particular to Case C-437/97 *EKW and Wein & Co.* [2000] ECR I-1157, paragraphs 53 to 54, and Case C-36/99 *Idéal tourisme* [2000] ECR I-6049, paragraphs 26 to 29.

a preliminary ruling and the relevance of the questions which it submits to the Court. Only exceptionally may the Court decline jurisdiction, namely 'where it is quite obvious that the ruling sought ... on the interpretation or validity of Community law bears no relation to the actual facts of the main action or its purpose'. [5]

27. It is therefore necessary to consider whether those conditions are met in this case and, more particularly, whether the question of whether or not the contested measures are in the nature of aid is *obviously* irrelevant for the outcome of the case pending before the national courts.

28. It seems to me that the answer to this question should be 'no', just as I said in response to the same objection of inadmissibility raised in *Ferring*, on that occasion by the French Government (an objection which the Court too subsequently rejected). [6]

29. As in that case, in fact, I would point out that here too the national courts are focusing exclusively (in Case C-393/04) or principally (in Case C-41/05) on the question whether the contested measures are in the nature of aid and that, consequently, a ruling by the Court on that point could in itself help the national courts in arriving at their decision.

30. But, that aside, I believe that it would still be useful even were it to be concluded — as the Belgian authorities and the Commission are proposing, and as I agree (see points 58 to 76 below) — that it is not possible to accept a request for reimbursement of the kind Air Liquide has made.

31. I would in fact point out that 'the validity of measures giving effect to aid is affected if national authorities act in breach of the last sentence of Article [88(3)] of the Treaty. National courts *must* offer the individuals in a position to rely on such breach the certain prospect that *all the necessary inferences* will be drawn, in accordance with their national law, as regards the validity of the measures giving effect to the aid, the recovery of

5 — *Idéal tourisme*, paragraph 20. To that same effect, see, inter alia, Case C-350/03 *Schulte* [2005] ECR I-9215, paragraph 43; Case C-125/94 *Aprile* [1995] ECR I-2919, paragraphs 16 to 17, and Case C-415/93 *Bosman and Others* [1995] ECR I-4921, paragraph 59.

6 — Opinion in Case C-53/00 *Ferring* [2001] ECR I-9067, points 22 to 23. To that same effect, see also Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365; Case C-308/01 *GIL Insurance and Others* [2004] ECR I-4777; Joined Cases C-128/03 and C-129/03 *AEM* [2005] ECR I-2861. To the opposite effect, see the judgments cited in footnote 4 above.

financial support granted in disregard of that provision and possible interim measures'. [7]

32. This means that if it is established that the contested measures are in the nature of aid, the national courts must take all the steps necessary to protect the parties which suffer harm as a result of the granting of the tax exemption. It also means that if, as in this case, those courts are not able to grant the specific measure which has been requested, they are still under an obligation to secure the other forms of protection which the domestic law may still afford (for example, the adoption of interim measures ordering the application of unlawful exemptions to be suspended).

33. It has also to be borne in mind that it could be in the applicant's interest to obtain a judgment which, though merely declaratory, finds that the measure is in the nature of unlawful aid, because that would enable it, among other things, to ask the Commission to order the recovery of the aid or — provided, of course, that the conditions are met — to bring before the national court an action for unfair competition in relation to the undertakings which have received the aid, or an action for damages against the State for breach of its obligations under Community law. [8]

34. It therefore seems to me that the question raised by the national courts cannot be deemed to be *obviously* unrelated to the main proceedings and that, consequently, the objections of inadmissibility raised by the Commission and the Belgian authorities must be rejected.

Merits

35. I shall now move on to examine whether the contested measures constitute State aid which benefits the undertakings exempted from the taxes on motive force, within the meaning of Article 87(1) EC.

36. Air Liquide answers that question in the affirmative, maintaining that, in this case, the conditions generally required for a finding of that nature are met. In point of fact, the tax

7 — Case C-354/90 *Fédération nationale du commerce extérieur des produits alimentaires et Syndicat national des négociants et transformateurs de saumon* ('*Saumon*') [1991] ECR I-5505, paragraph 12; my emphasis. To the same effect, see, for example, Joined Cases C-34/01 and C-38/01 *Enirisorse* [2003] ECR I-14243, paragraph 42; Case C-71/04 *Xunta de Galicia* [2005] ECR I-7419, paragraphs 49 to 50.

8 — To that effect, see *Banks*, paragraph 80. See also the Opinion of Advocate General Tesauro of 19 September 1989 in Case 142/87 *Belgium* v *Commission* [1990] ECR I-959, point 7, and the Opinion of Advocate General Jacobs of 29 November 2005 in Case C-368/04 *Transalpine Ölleitung in Österreich* (case stillpending), paragraph 86.

exemptions at issue are both financed from public funds and apt to confer a selective economic advantage on the recipient undertakings (in that connection, the applicant explains that only two undertakings are able to benefit from the exemptions at issue: SA Fluxys from the provincial tax and SA Distrigaz from the municipal tax). In addition, Air Liquide argues that those exemptions are likely to result in distortions of competition and affect intra-Community trade because, as a result of the liberalisation of the energy sector, the market in the production, transport and distribution of natural gas is characterised by significant levels of cross-border trade, with the result that aid granted to certain undertakings active in the sector would be bound to have such consequences.

37. However, the ville de Seraing and the Province de Liège as well as the Belgian Government, which have set out largely similar arguments, maintain that these measures do not constitute State aid within the meaning of the Treaty. They contend that the measures are not such as to distort competition or to affect trade between Member States. The undertakings which are active in the gas sector at local level in Belgium in fact always operate as monopolies, so that there is no real competition between them.

38. For my part, I must first point out that according to the Court's settled case-law, in order to assess whether a measure of a public body constitutes State aid, it is necessary to ascertain whether four conditions are cumulatively met: (i) the measure must confer a selective advantage on certain undertakings or the production of certain goods; (ii) the advantage must be accorded directly or indirectly from State resources; (iii) the measure must distort or threaten to distort competition, and (iv) it must be capable of affecting trade between Member States. [9]

39. (i) Taking the first condition, it seems to me to be clear that the contested measures secure an advantage for the undertakings which benefit from the exemptions at issue. It is settled case-law 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 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'. [10]

9 — See, for example, Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 20, Case C-482/99 *France* v *Commission* [2002] ECR I-4397, paragraph 68, and Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraph 74.

10 — Case C-6/97 *Italy* v *Commission* [1999] ECR I-2981, paragraphs 16 and 17. See also Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 14, and Case C-200/97 *Ecotrade* [1998] ECR I-7907, paragraph 34.

40. That applies, in particular, to measures which, as in this case, although not involving the transfer of State resources, place 'the persons to whom the exemption applies in a more favourable financial position than other taxpayers'. [11]

41. It is also a selective advantage in so far as the exemptions apply solely to undertakings which operate in the natural gas sector.

42. In that connection, I do not see the applicability of the case-law — which was not, moreover, cited by the defendant authorities — according to which, although differing treatment actually favours certain undertakings or areas of activity, it is 'justified by the nature or general scheme of the system of which it is part' [12] and is, consequently, not selective in nature (thus falling outside the concept of aid within the meaning of Article 87 EC). That category may in fact include differences in fiscal treatment but only provided they are dictated by requirements pertaining to the rationale of the tax system, [13] and not merely the general aims and objectives pursued by the State in adopting the measure in question. [14]

43. In this case, the contested measures are based on considerations which it is hard to relate to reasons inherent in the tax system. As explicitly stated by the Belgian Government at the hearing, these are measures introduced from the early 1970s (that is in the wake of the oil crises) solely in order to promote alternative energy sources to oil, by according undertakings which operate in the natural gas sector more favourable fiscal treatment.

44. (ii) It then seems to me to be just as clear that the advantage at issue is financed from public resources. In that connection, it is sufficient to point out that as a result of the exemptions at issue, the Belgian authorities have in practice refrained from recovering tax revenue which they would otherwise have collected. The measures therefore placed an additional burden on the State.

11 — Ibidem.

12 — *Adria-Wien Pipeline*, paragraph 42. See also, to that effect, Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 33, and Case C-351/98 *Spain* v *Commission* [2002] ECR I-8031, paragraph 42.

13 — See, in particular, *GIL Insurance*, in which the Court held to be 'justified by the nature of the national system of taxation of insurance' a measure the aim of which was 'to counteract the practice of taking advantage of the difference between the standard rate of [insurance premium tax] and that of VAT by manipulating the prices of rental or sale of appliances and of the associated insurance' (paragraph 74).

14 — See, for example, Case C-351/98, cited above, in which the Court rejected the arguments of the Spanish Government, according to which a measure designed to facilitate the replacement of commercial vehicles could escape classification as State aid because it pursued the objectives of protecting the environment and road safety (paragraph 43).

45. (iii) More complicated, in my view, is, however, the argument concerning fulfilment of the conditions pertaining to the anti-competitive effects of the contested measures.

46. In principle, the answer should be in the affirmative, particularly if we work on the premiss that the Court takes a fairly broad approach to this issue. According to settled case-law, in fact, in principle measures — just like the exemptions at issue — which are 'intended to release an undertaking from costs which it would normally have had to bear in its day-to-day management or normal activities, distor[t] the conditions of competition'. [15] And the Court has had occasion to make it clear that this condition is met even where there is merely the threat of a distortion of competition. [16]

47. But I must point out that, in this case, the Belgian authorities dispute that there is even any possibility of a distortion of competition, stressing that the undertakings which benefit from the alleged aid (Distrigaz and Fluxys) operate in sectors, namely the transport, distribution and supply of gas, which are characterised by statutory monopolies and are, therefore, by definition not subject to competition.

48. Although, on the basis of all the available information, it is not possible to give a definite answer to this question, in seems to me that some of the data in the case-file suggests a different conclusion from that put forward by the Belgian authorities, in so far as it indicates that the undertakings which benefit from the contested measure are in competition, albeit to a limited extent, with other operators on the relevant markets.

49. According to a recent decision of the Belgian Competition Council, for instance — which is annexed to the observations of the ville de Seraing — while Distrigaz 'enjoyed a monopoly on supplies before the market in gas was liberalised', after liberalisation, it was in a '*quasi*-monopolistic' position. In that same decision, the Competition Council also pointed out that Fluxys 'enjoys on the market for the transport of natural gas a *quasi-monopoly which is not, however, founded on provisions of law*'. [17]

15 — Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 30, as well as the case-law cited therein.

16 — See Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraphs 11 to 12; Case 40/85 *Belgium* v *Commission* [1986] ECR 2321, paragraph 22; see also Case T-214/95 *Het Vlaamse Gewest* v *Commission* [1998] ECR II-717, paragraph 46, and Case T-35/99 *Keller and Keller Meccanica* v *Commission* [2002] ECR II-261, paragraph 85.

17 — Decision No 2003-C/C-31 of 7 April 2003, in *Revue Trimestrielle de Jurisprudence 2003/02*, p. 15 et seq., paragraph 6.2.1; my emphasis.

50. Again to that effect, the European Commission stresses in a decision — to which the ville de Seraing refers in its observations — that, in the gas distribution sector, Distrigaz is encountering increasing competition from various undertakings active on the Belgian market, and anticipates the likelihood of further competitors entering that market in the future. [18]

51. I should add that the recipient undertakings are not only engaged in the transport, distribution and supply of natural gas in Belgium, they also offer a whole range of complementary and additional services (for instance, storage, assistance and advice to customers), services which are unquestionably provided in a system of free competition.

52. Finally, it is apparent from the case-file that the same infrastructure which is used by Distrigaz and Fluxys for the activities allegedly carried out on the basis of a monopoly are used, in the context of the provision of transit services through Belgian territory, for the purpose of supplying natural gas to consumers in other Member States, that is to say, in the context of international transport operations in relation to which the recipient undertakings are clearly in competition with various operators established in other European Union countries.

53. In the light of all those considerations, I am inclined to the view that the support measures granted to the recipient undertakings are, at least potentially, such as to cause distortions of competition in economic sectors in which there is the normal interplay of competition, at both national and international level. In point of fact, by relieving these undertakings of fiscal burdens which they would otherwise have had to bear, the tax exemptions could have an impact on the cost to consumers of the various products or services which they offer.

54. (iv) Finally, as far as the effect of the contested measures on intra-Community trade is concerned, I would point out that, contrary to what the Belgian authorities would appear to suggest, aid may be such as to affect trade between the Member States even if the recipient of the aid is active only at local or regional level and does not take part in cross-border trade. The effect of the aid may in fact be that the activity in which that recipient engages is maintained or increased, with the result that undertakings established in other Member States have less chance of penetrating the market of the country in question. [19]

18 — Commission Decision No C (2003) 582 of 13 February 2003, Cases No COMP/M.3075, 3076, 3077, 3078, 3079 and 3080, *ECS* v *Intercomunale IVEKA and Others*, paragraphs 39 to 40.

19 — See, for example, *Altmark*, paragraphs 78 and 82.

55. That is particularly true of a market, like the market in gas, characterised — following the entry into force of the second Community directive liberalising the market in gas [20] — by increasing levels of competition, including at a cross-border level. Aid, even if limited, which is granted in a market of that nature is therefore likely to constitute a further obstacle to the proper opening up of that sector and, consequently, also pose a threat to trade between the Member States.

56. In the light of the above considerations, I consider that all of the conditions under Article 87(1) EC are fulfilled and that, consequently, the exemptions at issue constitute State aid within the meaning of that provision.

57. I therefore propose that the Court's answer to the national courts should be that the exemptions from municipal and provincial taxes on motive force, which benefit only motors used in natural gas stations, constitute State aid within the meaning of Article 87(1) EC.

20 — Directive 2003/55/EC of the European Parliament and the Council of 26 June 2003 concerning common rules for the internal market in gas and repealing Directive 98/30/EC (OJ 2003 L 176, p. 57)

The second question (Case C-41/05)

58. By its second question, the Tribunal de première instance is asking the Court whether a national court, before which an action is brought by a taxpayer who has not enjoyed exemption from the tax at issue, may order the public authority to repay the tax paid by that taxpayer if it finds that, in law or in fact, it is not possible for the public authority to recover the aid from the recipients.

59. That question arises because, according to Air Liquide, in this case, it is absolutely impossible to recover the incompatible aid. Since the aid consists in a tax exemption, recovering it from the recipient undertakings would mean making those undertakings subject to taxes from which they are currently exempt. According to Air Liquide, a court order to that effect would be contrary to the Belgian Constitution, in particular Article 170(1) thereof, according to which taxes from which revenue accrues to the State must be established by law. Consequently, the only way of restoring the status quo ante would be to order the public authority to refund the tax incorrectly paid by those undertakings which did not benefit from the exemption.

60. However, the Commission and the Belgian authorities reject that solution and contend that the refund of taxes which have been collected would have the effect not of eliminating any anti-competitive effects of the measure but of actually increasing the numbers benefiting from it and thus, in a sense, compounding the breach of the rules on competition. The Commission adds that, rather than asking for the refund of the sums it has paid by way of the tax at issue, Air Liquide ought to have sought an order that the State must recover the aid unlawfully granted to the undertakings which have improperly benefited from the tax exemption.

61. I must state immediately that the arguments advanced by Air Liquide do not appear to me to be convincing, for reasons of two kinds.

62. In the first place, it does not seem to me that the circumstances which the applicant describes actually make it impossible to recover aid granted under any unlawful support measure.

63. As we in fact know, the Court has already made clear, in general terms, and specifically in regard to the recovery of unlawful aid, that 'a Member State may not plead *provisions, practices or circumstances existing in its internal legal system* in order to justify a failure to comply with obligations ... resulting from Community rules'. [21]

64. More particularly, then, the Court has also had occasion to reply to a similar objection to that raised by Air Liquide. After pointing out that 'recovery of unlawful aid is the logical consequence of the finding that it is unlawful ... [and that] [t]hat consequence cannot depend on the form in which the aid was granted', the Court in fact stated that 'where aid has been granted ... in the form of a tax exemption and has been duly found to be unlawful, it is not correct to argue ... that recovery of the aid in question must take the form of a retroactive tax, which would as such be absolutely impossible to enforce'. In point of fact, 'the ... authorities 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'. [22]

65. In other words, and contrary to the view Air Liquide takes, the conclusion must be that in cases such as the present, any recovery order issued by the national court

21 — See Case C-74/89 *Commission* v *Belgium* [1990] ECR I-491, paragraph 8; my emphasis. See also Case 14/88 *Italy* v *Commission* [1989] ECR 3677, paragraph 26.

22 — Case C-183/91 *Commission* v *Greece* [1993] ECR I-3131, paragraphs 15 to 17.

would involve not applying to the exempt undertakings a 'non-existent' tax but simply disapplying the rule granting the exemption (with the result that the 'normal' tax regime applies), as well as requiring the authority which granted the exemption to remove the consequences of its own unlawful conduct by recovering from the beneficiaries sums equivalent to those which it unlawfully failed to collect.

66. But the Court has already had occasion to rule on requests for reimbursement of the kind made by the applicant in this case. And it took the view that this was possible only in the case of aid funded by means of so-called parafiscal taxes, that is to say where the State aid consists in the grant, in the form of subsidies which benefit certain persons, of resources acquired on the basis of a tax introduced specifically for that purpose (that is to say, a parafiscal tax). [23]

67. In such cases, the contributions paid by the undertakings as tax constitute the method of financing the public support measure; and there is thus a 'close link' between the tax which has been introduced and the fiscal advantage conferred on certain parties. [24] It is thus on that ground that the Court allows the contribution to be refunded, given that any illegality of the aid must extend to the tax measure per se, as an 'integral part' of the aid.

68. It follows that to restore the status quo ante, the competent national authorities which find that aid is unlawful must take action not only in relation to those undertakings which have improperly benefited from the aid (by ordering its recovery), but also in relation to those which have had to finance unlawful aid (by ordering the reimbursement of the sums they have paid). [25]

69. But where a tax exemption has been granted, the Court has specifically ruled out the possibility of the national court accepting requests for the reimbursement of the taxes paid. It is clear from settled case-law that in such cases '[p]ersons liable to pay an obligatory contribution cannot rely on the argument that the exemption enjoyed by

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

24 — As regards the importance of that link between the tax and the aid, see Case C-174/02 *Streekgewest* [2005] ECR I-85, paragraph 22. See also Joined Cases C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04 *Casino France and Others* [2005] ECR I-9481, paragraphs 40 to 41.

25 — On that point, see *Enirisorse*, cited above, paragraphs 44 to 45.

other persons constitutes State aid in order to avoid payment of that contribution'[26] or 'to obtain reimbursement.'[27]

70. This is because what constitutes an unlawful support measure is not the fiscal measure itself but the exemption in favour of certain taxpayers.[28] And so it is that exemption, and only that aspect of the fiscal measure, which must be challenged by those applicants which object to the existence of the aid.[29]

71. It seems clear to me that the present case falls clearly into the latter category. In point of fact, as we saw earlier, the aid in this case specifically consists in the exemption from the tax on motive force which the Province de Liège grants to undertakings operating in the natural gas sector.

72. I would also point out that the sums paid by Air Liquide and the other taxpayers by way of the tax on motive force are not used to finance a support measure but are simply destined for the general budget of the local authorities which collect taxes. In other words, unlike the cases involving parafiscal taxes, the sums collected by way of the tax at issue are not earmarked for a specific purpose.

73. In addition, the tax on motive force and the exemption accorded to undertakings operating in the natural gas sector constitute measures which are patently discrete and independent. As the Belgian Government in fact confirmed at the hearing, a tax on motive force was introduced by many Belgian municipalities well before the exemptions at issue were adopted. Therefore, unlike the tax at issue in *Boiron* (to which I referred in footnote 29 above), the introduction of the tax at issue here is not a functional measure which is linked to the grant of a support measure to undertakings operating in the natural gas sector. On the contrary, as I have just pointed out, it introduces a tax of a general nature designed to increase the local authorities' revenue.

74. It is therefore specifically the abovementioned exemptions (which were not introduced until the 1970s) which established an economic advantage for undertakings operating in the natural gas sector. Consequently, it is that element of the fiscal

26 — Judgment in *Banks*, paragraph 80. To the same effect, see the judgments in *EKW*, paragraph 52, and *Idéal tourisme*, paragraph 20.

27 — *Casino France and Others*, cited above, paragraph 44.

28 — On that point, see, in particular, the Opinion of 14 July 2005 of Advocate General Stix-Hackl in *Casino France and Others*, point 38.

29 — The answer would have been different had the imposition of the tax itself been unlawful, in so far as it was designed to create an unlawful situation benefiting certain persons, as in *Boiron*, in which I today delivered my Opinion (and to which I refer for further details on that point). That case concerns a tax established in the form of an 'asymmetric' charge, since it is designed solely to apply to certain economic operators and not to others in a competitive relationship with the former, and is introduced specifically and *only* to create a situation that favours the undertakings which are not subject to it. There is thus a close link between the tax and the aid, like two sides of the same coin, because the advantage given to the undertakings which are not subject to the tax exactly corresponds to the disadvantage imposed on the undertakings liable to it. In a situation of that kind, therefore, it is the actual imposition of the tax which may be deemed to be unlawful in the light of the Community rules on aid.

measure which Air Liquide ought to have challenged, seeking to have it abolished and the aid recovered from the beneficiaries. But by choosing to seek reimbursement of the sums it has paid to the Province de Liège, the applicant is in fact challenging the legitimacy of the fiscal measure as a whole.

75. I would finally point out that a declaration that the whole of the fiscal measure was invalid in a case such as the present would, in the final analysis, have an excessive and completely unjustified effect on public finances. While the tax on motive force is a general tax with a very broad scope, the exemption at issue benefits an extremely limited number of undertakings. Therefore, opting for the solution of generalised reimbursement, which is what Air Liquide seeks, rather than recovering the aid from the beneficiaries, would mean for the State (and for its local authorities) the loss of substantial fiscal revenue, simply because it had (in theory) unfairly exempted from the tax undertakings operating in a specific market. [30]

76. In the light of the above considerations, I therefore propose that the Court should answer the second question submitted by the Tribunal de première instance to the effect that undertakings subject to a tax, such as the tax on motive force, cannot claim that the exemption from that tax, which other parties enjoy, constitutes State aid in order to obtain the reimbursement of the sums they have paid by way of that tax.

The third question (Case C-41/05)

77. By its third question, the Tribunal de première instance is asking the Court whether the tax on motive force ought to be regarded as a charge having equivalent effect to a customs duty, prohibited by Article 25 EC, in so far as it is in fact levied by a province or municipality when industrial gas is transported outside its own territorial limits, whereas, in the same conditions, the transport of natural gas is exempted.

78. Air Liquide, on the one hand, and the Commission and the Belgian authorities, on the other, give completely different answers to this question: while Air Liquide takes the view that all the conditions required by Article 25 EC are met, the Commission and the Belgian authorities take the opposite view.

30 — In that connection, see the Opinion of Advocate General Jacobs in *Transalpine Ölleitung in Österreich*, cited above, paragraphs 83 and 90.

79. So let me begin by pointing out that, according to Article 25 EC, '[C]ustoms duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature'.

80. A charge having equivalent effect within the meaning of that provision is, therefore, a tax which, like a customs duty, applies to import or export transactions, by reason of the fact that, or when, certain goods cross the border between Member States. [31]

81. Now it must be clear that the tax in question is not payable as a result of the crossing of a particular border. As is in fact evident from Article 3 of the provincial regulation, the tax on motive force is triggered not by the crossing of a border but by the use of a motor in a business context. And it is actually levied, within the territory of the Province de Liège, on all persons using motors in relation to economic activities.

31 — See, inter alia, Case 46/76 *Bauhuis* [1977] ECR 5, paragraphs 9 and 10; Joined Cases C-485/93 and C-486/93 *Simitzi* v *Dimos Kos* [1995] ECR I-2655, paragraph 15, and Case C-347/95 *Fazende Pública* v *UCAL* [1997] ECR I-4911, paragraph 18.

82. I therefore propose answering that a tax on motive force, like the tax introduced by the Province de Liège, which applies solely to motors used for the transport of industrial gas through high pressure pipes which require the use of compression stations, does not constitute a charge having equivalent effect within the meaning of Article 25 EC.

The fourth question (Case C-41/05)

83. By its fourth question, the Tribunal de première instance is asking the Court whether the tax on motive force should be regarded as a discriminatory internal tax measure, prohibited by Article 90 et seq. of the Treaty.

84. According to Air Liquide, the tax at issue is discriminatory in so far as it applies solely to the use of the motors required to propel industrial gases into underground pipes; it therefore penalises that form of transport as compared with other methods of transporting industrial gases, and in particular transport by lorry. Since gases transported by lorry are basically of national origin, whereas those transported through pipes are largely imported, the applicant takes the view that the contested measure favours industrial gas produced in Belgium to the detriment of imported gas.

85. Both the Commission and the Belgian authorities are fundamentally opposed to that view, for reasons which I shall set out in brief.

86. Let me begin by pointing out that, as we know, Article 90 EC is designed to guarantee the free movement of goods between the Member States in normal conditions of competition, prohibiting any form of protection which may result from the application to goods originating in other Member States of internal taxes of a discriminatory nature. In other words, its aim is to 'guarantee the complete neutrality of internal taxation as regards competition between domestic products and imported products.' [32] The prohibition laid down by that provision must therefore be deemed to be applicable when a fiscal charge is likely to deter the import of goods originating in other Member States for the benefit of goods of national origin. [33]

87. But that does not seem to me to apply to the tax at issue. That charge is not in fact used to tax goods of any kind, but the pursuit of economic activities (which involve the use of motors) in the Province de Liège. As confirmed by the Belgian Government at the hearing, motive force is considered by many local authorities to be a useful indicator for determining economic operators' ability to pay tax.

88. It therefore seems clear to me that, as submitted by the Belgian authorities and the Commission, the tax at issue is levied on the basis of a criterion which is objective, transparent and, above all, entirely independent of the origin (or, indeed, destination) of the goods produced or used in the context of the economic activities in question.

89. The taxing of the gas of foreign origin which Air Liquide transports therefore seems to me to be a completely indirect and unintended consequence — the result of the way in which Air Liquide has decided to conduct its gas transportation activities (that is by using pipes which require the use of motors). But, as the Court has rightly stated in the past, 'the fact that a charge ... has different effects on the cost prices of the various undertakings by reason of particular features of the economic structure of such undertakings ... is irrelevant to the application of [Article 90 EC]'. [34]

32 — Case 252/86 *Bergandi* v *Directeur général des impôts* [1988] ECR 1343, paragraph 24.

33 — See, for example, *Bergandi*, paragraphs 24 and 25; Case 171/78 *Commission* v *Denmark* [1980] ECR 447, paragraph 5, and Case C-45/94 *Ayuntamiento de Ceuta* [1995] ECR I-4385, paragraph 29.

34 — Case 32/80 *Kortmann* [1981] ECR 251, paragraph 29.

90. Moreover, as the Belgian Government has pointed out, it is perfectly normal that different taxes should have a different impact on competing undertakings which have not structured their own economic or industrial activity in the same way. For example, the road tax which applies to the lorries needed to transport by road gas produced by Air Liquide's competitors affects the latter but not Air Liquide.

91. Furthermore, it seems evident that the tax has no protectionist effect, simply bearing in mind that any goods produced in the territory of the Province de Liège for whose manufacture the undertaking must employ a motor are caught by the tax at issue; whereas those same goods produced abroad (or rather outside the provincial territory) and transported to be sold in the territory of Liège escape the tax.

92. Nor can the fact, cited by the national court, that the tax system at issue accords different treatment to the transport of natural gas and the transport of industrial gas lead to a different conclusion. Were that in fact the case, and accepting also that there is actually competition between the two products, it would be necessary to conclude that the tax at issue would, paradoxically, end up benefiting an imported product, namely natural gas, in comparison with others in which there is also national production, namely industrial gases. It is, however, settled case-law that this kind of fiscal measure, which discriminates to the detriment of national products, falls outside the scope of Article 90 EC. [35]

93. In the light of the above considerations, I therefore propose that the Court should answer the national court that a tax on motive force, such as the tax at issue, does not constitute a discriminatory tax measure within the meaning of Article 90 of the Treaty.

The fifth question (Case C-41/05)

94. By its fifth question, the Tribunal de première instance is seeking to establish whether, if the answer to the third and fourth questions is 'yes', the taxpayer who has paid the tax on motive force is justified in seeking the reimbursement of that tax, as of 16 July 1992, the date on which judgment was handed down in *Legros and Others*.

35 — See, for example, Case 86/78 *Peureux* v *Services fiscaux de la Haute-Saône et du territoire de Belfort* [1979] ECR 897, paragraphs 32 and 33, and Case 68/79 *Just* v *Danish Ministry for Fiscal Affairs* [1980] ECR 501, paragraphs 15 and 16.

95. On that point, I shall simply note that, having ruled out the possibility of the measure at issue constituting a charge having equivalent effect to a customs duty, within the meaning of Article 25 EC, or a discriminatory internal tax, prohibited by Article 90 EC, it does not seem to me to be necessary to answer that question.

V — Conclusion

96. In the light of the above considerations, I therefore propose that the Court should rule:

— In Case C-393/04:

The exemption from a municipal tax on motive force, accorded solely to motors used in natural gas stations, constitutes State aid within the meaning of Article 87(1) EC.

— In Case C-41/05:

(1) The exemption from a provincial tax on motive force, accorded solely to motors used in natural gas stations, constitutes State aid within the meaning of Article 87(1) EC.

(2) Persons subject to a tax, such as the tax on motive force, introduced by the Province de Liège, by provincial regulations of 30 October 1998 and 29 October 1999, cannot claim that the exemption from that tax, which other parties enjoy, constitutes State aid in order to obtain the reimbursement of the sums they have paid by way of that tax.

(3) A tax on motive force, such as that introduced by the Province de Liège, by provincial regulations of 30 October 1998 and 29 October 1999, does not constitute a charge having equivalent effect within the meaning of Article 25 EC.

(4) A tax on motive force, such as that introduced by the Province de Liège, by provincial regulations of 30 October 1998 and 29 October 1999, does not constitute a discriminatory internal tax measure within the meaning of Article 90 EC.