JUDGMENT OF THE COURT (Sixth Chamber)

11 September 2003 *

In Case C-207/01,

REFERENCE to the Court under Article 234 EC by the Corte d'appello di Firenze (Italy) for a preliminary ruling in the proceedings pending before that court between

Altair Chimica SpA

and

ENEL Distribuzione SpA,

on the interpretation of Articles 81, 82 and 85 EC, Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1), as amended by Council Directive 96/99/EC of 30 December 1996 (OJ 1997 L 8, p. 12), and Council Recommendation 81/924/EEC of 27 October 1981 on electricity tariff structures in the Community (OJ 1981 L 337, p. 12),

* Language of the case: Italian.

THE COURT (Sixth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, R. Schintgen (Rapporteur), V. Skouris, F. Macken and J.N. Cunha Rodrigues, Judges,

Advocate General: F.G. Jacobs,
Registrar: M.-F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

— Altair Chimica SpA, by F. Lorenzoni, avvocato,

— the Italian Government, by U. Leanza, acting as Agent, and G. De Bellis, Avvocato dello Stato,

— the Commission of the European Communities, by E. Traversa, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Altair Chimica SpA, represented by F. Lorenzoni; of ENEL Distribuzione SpA, represented by G.M. Roberti and A. Franchi, avvocati; of the Italian Government, represented by G. de Bellis; and of the Commission, represented by E. Traversa, at the hearing on 16 January 2003,

after hearing the Opinion of the Advocate General at the sitting on 13 March 2003,

gives the following

Judgment

1 By order of 23 January 2001, received at the Court on 18 May 2001, the Corte d'appello di Firenze (Court of Appeal, Florence) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Articles 81, 82 and 85 EC, Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1), as amended by Council Directive 96/99/EC of 30 December 1996 (OJ 1997 L 8, p. 12) ('Directive 92/12'), and Council Recommendation 81/924/EEC of 27 October 1981 on electricity tariff structures in the Community (OJ 1981 L 337, p. 12).

2 That question was raised in proceedings between Altair Chimica SpA ('Altair') and ENEL Distribuzione SpA ('ENEL') regarding the imposition of surcharges on the supply of electricity.

Legal background

Community legislation

3 The third recital in the preamble to Directive 92/12 is worded as follows:

'... the concept of products subject to excise duty should be defined;... only goods which are treated as such in all the Member States may be the subject of Community provisions;... such products may be subject to other indirect taxes for specific purposes;... the maintenance or introduction of other indirect taxes must not give rise to border-crossing formalities.'

4 Article 3 of Directive 92/12 provides:

'1. This Directive shall apply at Community level to the following products as defined in the relevant Directives:

— mineral oils,

— alcohol and alcoholic beverages,

— manufactured tobacco.

2. The products listed in paragraph 1 may be subject to other indirect taxes for specific purposes, provided that those taxes comply with the tax rules applicable for excise duty and VAT purposes as far as determination of the tax base, calculation of the tax, chargeability and monitoring of the tax are concerned.

3. Member States shall retain the right to introduce or maintain taxes which are levied on products other than those listed in paragraph 1 provided, however, that those taxes do not give rise to border-crossing formalities in trade between Member States.

Subject to the same proviso, Member States shall also retain the right to levy taxes on the supply of services which cannot be characterised as turnover taxes, including those relating to products subject to excise duty.'

5 Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils (OJ 1992 L 316, p. 12), as amended by Council Directive 94/74/EC (OJ 1994 L 365, p. 46) ('Directive 92/81'), defines in greater detail the mineral oils subject to harmonised excise duties.

6 Article 2(1) of that Directive sets out a closed list of products to which it applies. Electricity does not feature among those products.

7 Article 2(2) and (3) of Directive 92/81 also provides:

'2. Mineral oils other than those for which a level of duty is specified in Directive 92/82/EEC shall be subject to excise duty if intended for use, offered for sale or used as heating fuel or motor fuel. The rate of duty to be charged shall be fixed, according to use, at the rate for the equivalent heating fuel or motor fuel.

3. In addition to the taxable products listed in paragraph 1, any product intended for use, offered for sale or used as motor fuel, or as an additive or extender in motor fuels, shall be taxed as motor fuel. Any other hydrocarbon, except for coal, lignite, peat or other similar solid hydrocarbons or natural gas, intended for use, offered for sale or used for heating purposes shall be taxed at the rate for the equivalent mineral oil.

However, coal, lignite, peat or any other similar solid hydrocarbons or natural gas may be subject to taxation in accordance with Article 3(3) of Directive 92/12/EEC.'

8 The first paragraph of Article 4(3) is worded as follows:

'The consumption of mineral oils within the curtilage of an establishment producing mineral oils shall not be considered a chargeable event giving rise to excise duty as long as the consumption is for the purpose of such production.'

9 Council Directive 92/82/EEC of 19 October 1992 on the approximation of the rates of excise duties on mineral oils (OJ 1992 L 316, p. 19), as amended by Directive 94/74 ('Directive 92/82'), contains in Article 2(1) an exhaustive list of mineral oils to which it applies. Electricity is not included on the list.

10 Recommendation 81/924 calls on the Member States to take steps to structure electricity tariffs so that they are based on the following common principles:

'1. Electricity tariff structures should be drawn up and adopted so as to allow the application of a rational price policy and to reflect the costs incurred in supplying the various categories of consumer; tariff structures should be designed with the rational use of energy in mind, should avoid encouraging unjustifiable consumption and should be as clear and simple as possible.

2. The two-part tariff system which, of the various tariff options available, best reflects the cost structure of providing electricity, should be generally used ...

3. Promotional tariff structures which encourage unnecessary consumption and in which the price of electricity is artificially lowered as increasing amounts of electricity are used should be discontinued.

4. Tariffs based on the use to which electricity is put should be eliminated, unless such tariffs conform with the general requirements of Point 1 above and contribute to the achievement of long-term energy policy objectives.

5. With the aim of transferring demand to off-peak periods or to allow load-shedding, provision should be made for multiple tariffs with differential rates and/or for the possibility of interruptible supplies.

6. Tariffs should not be kept artificially low, for example on social grounds or for anti-inflationary policy reasons; in such cases, separate action, where warranted, should be taken.

7. Tariffs should be formulated in such a way that it is possible to up-date prices at regular intervals;

that research be pursued and developed, in close cooperation at Community level, into the characteristics of electricity demand for different categories of consumers and their evolution in the long term, with the objective of further improving tariff structures;

that electricity prices on the market be characterised by the greatest possible degree of transparency, and that these prices and the cost to the consumer be made known to the public as far as possible.'

National legislation

11 Legislative Decree No 347 of 19 October 1944 (GURI No 90, special series, of 5 December 1944), provides in Article 1 for the establishment of a Comitato Interministeriale dei Prezzi (Interministerial Price Committee, 'CIP') to ensure coordination and regulation of prices.

12 Article 1 of Legislative Decree No 896 of 15 September 1947 (GURI No 217 of 22 September 1947, p. 2789) empowered the CIP to set up compensation funds and to set the criteria for contributions for the unification or equalisation of prices. The Cassa Conguaglio per il Settore Elettrico (Compensation Fund for the Electricity Sector, 'the Fund') was constituted on the basis of that text. It was

financed, *inter alia*, by the 'sovrapprezzo termico', which was a surcharge on the price of electricity introduced to encourage energy saving and whose amount was periodically revised by the CIP.

13 In 1987 the Italian Republic decided by referendum to end the generation of electricity using nuclear power and to close nuclear power stations. In order to meet the costs arising as a result of that decision the CIP, by a resolution of 27 January 1988 (GURI No 26 of 2 February 1988, p. 27), decided to introduce a 'maggiorazione straordinaria del sovrapprezzo termico' ('thermic surcharge special supplement') which was to be applied on a provisional basis.

14 Under Law No 9 of 9 January 1991 (GURI suppl. ord. No 13 of 16 January 1991, p. 3) that special surcharge was called a 'sovrapprezzo per onere nucleare' (surcharge for nuclear charges). It also became permanent and the revenue that it generates is used, *inter alia*, to reimburse ENEL and the companies which had constructed the nuclear power plants in question for the additional costs incurred by the decision to definitively abandon the construction of nuclear power stations.

15 Article 22 of Law No 9/91 provides for the adoption of measures to encourage the generation of electricity from renewable and other similar sources of energy.

16 By resolution of 29 April 1992 (GURI No 109 of 12 May 1992, p. 21) the CIP decided to introduce a 'sovrapprezzo per nuovi impianti da fonti rinnovabili e

assimilate' (surcharge for new plants using renewable and other similar sources) intended to finance the aid granted to undertakings producing energy from renewable sources. That surcharge consists of a levy on the supply of electricity with decreasing tariffs based on the amount of electricity consumed.

17 The 'maggiorazione straordinaria del sovrapprezzo termico' and the 'sovrapprezzo per nuovi impianti da fonti rinnovabili e assimilate' ('the surcharges') are collected by ENEL, which then pays them into the Fund. The Fund distributes the sums received between the different undertakings for which they are intended.

The main proceedings and the question referred for a preliminary ruling

18 Altair is a company which produces caustic soda, caustic potash and potassium chloride using an electro-chemical process. According to the national court, that process constitutes a high-energy-consuming industrial process, for which electricity is used as 'power for the industrial process' and is a genuine raw material which forms part of the production process, to the extent that it is incorporated into the final product from which it cannot be distinguished.

19 According to the documents before the Court, Altair initially refused to pay the surcharges on its electricity consumption for the months of February and March 1997. As a consequence, by application of 27 June 1997 ENEL asked the President of the Tribunale (District Court) di Firenze to order Altair to pay the amounts in question.

20 Having been ordered to pay the disputed sums following several sets of proceedings, Altair brought an action before the Corte d'appello di Firenze. Before that court it argued that the legislative provisions introducing the surcharges were incompatible with Community law and, in particular, with Articles 81, 82 and 85 EC, Directive 92/12 and Recommendation 81/924.

21 Taking the view that the resolution of the dispute before it required the interpretation of various provisions of Community law, the Corte d'appello di Firenze decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'The Corte di Appello di Firenze hereby makes a reference to the Court of Justice of the European Communities for a ruling on the precise interpretation of Articles 81, 82 and 85 [EC], Directive 92/12 and Recommendation [81/924/EEC], in order to ascertain whether the provisions of national law laid down in Legislative Decrees No 347/44 and No 896/47, Presidential Decree No 373/94, Legislative Decree No 98/48 and Law No 9/91 are compatible with those provisions of Community law.'

22 In the order for reference the Corte d'appello takes the view that the surcharges constitute supplementary obligations, for the purposes of Article 81(1)(e) EC and 82(d) EC, and that raw materials cannot be subject to tax.

Admissibility

23 The Italian Government has expressed doubts as to the admissibility of the present reference for a preliminary ruling. It submits that the order for reference does not contain the essential minimum information as to either the legal or the factual context of the dispute in the main proceedings and therefore, it does not fulfil the conditions of admissibility set out in the case-law of the Court.

24 It must be recalled that according to settled case-law, the need to provide an interpretation of Community law which will be of use to the national court makes it necessary that the national court define the factual and legal context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based (see, in particular, Joined Cases C-115/97 to C-117/97 *Brentjens'* [1999] ECR I-6025, paragraph 38).

25 The information provided in orders for reference must not only be such as to enable the Court to reply usefully but must also enable the governments of the Member States and other interested parties to submit observations pursuant to Article 23 of the Statute of the Court of Justice. It is the Court's duty to ensure that the possibility to submit observations is safeguarded, bearing in mind that, by virtue of the abovementioned provision, only the orders for reference are notified to the interested parties (see, in particular, the orders in Joined Cases C-128/97 and C-137/97 *Testa and Modesti* [1998] ECR I-2181, paragraph 6, and Case C-325/98 *Anssens* [1999] ECR I-2969, paragraph 8).

26 In the present case, it appears from the order for reference that the national court defined the factual and legal context of its request for an interpretation of Community law sufficiently and that it has provided the Court with all the information necessary to enable it to reply usefully to that request.

27 Moreover, it is clear from the observations submitted, in accordance with Article 23 of the Statute of the Court of Justice, by the Italian Government and the Commission that the information contained in the order for reference enabled them to properly express their views on the question referred to the Court.

28 It follows that the reference is admissible.

The question referred

29 By its question the national court asks, essentially, whether Articles 81, 82 and 85 EC, Directive 92/12 or Recommendation 81/924 must be interpreted as meaning that they preclude a measure providing for the levy of surcharges on the price of electricity such as those at issue in the main proceedings when electricity is used in an electro-chemical process.

30 As regards, first, the interpretation of the articles of the Treaty, it must be recalled that Articles 81 and 82 EC apply only to anti-competitive conduct engaged in by undertakings on their own initiative. If anti-competitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Articles 81 and 82 EC do not apply. In such a situation the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings (Joined Cases C-359/95 P and C-379/95 P *Commission and France* v *Ladbroke Racing* [1997] ECR I-6265, paragraph 33).

31 Articles 81 and 82 EC may apply, however, if it is found that the national legislation does not preclude undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition (*Commission and France* v *Ladbroke Racing*, cited above, paragraph 34).

32 It must be observed that having regard to the source of the provisions governing the surcharges, the recipient of those surcharges, the use of the revenue that they generate and the sanctions and recovery procedures applicable if they are not paid, the surcharges constitute tax measures.

33 Moreover, that classification is in accordance with that accepted by the Court in Case 73/79 *Commission* v *Italy* [1980] ECR 1533, paragraph 22, concerning a surcharge on the price of sugar also introduced by the CIP and paid to an equalisation fund for redistribution to the Italian sugar industry.

34 As such, and although they were invoiced and collected by ENEL, the surcharges therefore fall exclusively within the competence of the Italian State.

35 In so far as ENEL's involvement is limited to the collection on behalf of the State of those surcharges, it must be considered to be a tax collector. Since in the exercise of that function ENEL does not act as an economic operator and does not have any margin of discretion, its involvement cannot be considered to constitute anti-competitive conduct for the purpose of the case-law cited in paragraphs 30 and 31 of the present judgment.

36 That finding cannot be challenged by the argument that the levy of surcharges such as those at issue in the main proceedings jeopardises the competitivity of economic operators who are subject to them as compared with economic operators established in other Member States who are not subject to such a surcharge. Articles 81 and 82 EC are intended to apply only to the anti-competitive conduct of undertakings and are not intended to eliminate differences which may exist between the tax regimes of the different Member States.

37 Having regard to those considerations, Articles 81, 82 and 85 EC do not preclude the levy of surcharges such as those at issue in the main proceedings.

38 As regards, second, the compatibility of the surcharges with Directive 92/12, it must be recalled that the Directive sets out in Article 3(1) the products to which it applies.

39 It is clear from a reading of that provision together with Article 2 of Directive 92/81 and Article 2 of Directive 92/82 that electricity does not fall within the scope *ratione materiae* of Directive 92/12.

40 In those circumstances, and without there being any need to consider whether, as Altair submits, Directive 92/12 contains a principle that raw materials are not subject to tax, it must be held that the Directive cannot preclude the levy of surcharges such as those at issue in the main proceedings.

41 As regards, third, the interpretation of Recommendation 81/924, it must be recalled that, according to the case-law of the Court, even if recommendations are not intended to produce binding effects and are not capable of creating rights that individuals can rely on before a national court they are not without any legal effect. The national courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions (Case C-322/88 *Grimaldi* [1989] ECR 4407, paragraphs 7, 16 and 18).

42 It is necessary to point out that it is clear, both from its title and from the principles that it lays down, that Recommendation 81/924 applies only to the structure of the electricity tariff. It seeks to harmonise the principles forming the basis of the tariff structures in the different Member States and to improve

transparency and public knowledge of electricity prices. Whilst the recommendation gives indications as to the different costs that the prices may include there is nothing in it to suggest that it can be interpreted as applying to the introduction of a tax on electricity consumption.

43 In those circumstances it must be held that Recommendation 81/924 does not prevent a Member State from levying surcharges such as those at issue in the main proceedings.

44 Having regard to all the preceding considerations, the answer to the question referred must be that Articles 81, 82 and 85 EC and Directive 92/12 must be interpreted as meaning that they do not preclude a national rule providing for the levy of surcharges on the price of electricity such as those at issue in the main proceedings when the electricity is used in an electro-chemical process and that Recommendation 81/924 is not capable of preventing a Member State from levying such surcharges.

Costs

45 The costs incurred by the Italian Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the question referred to it by the Corte d'appello di Firenze by order of 23 January 2001, hereby rules:

Articles 81, 82 and 85 EC and Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, as amended by Council Directive 96/99/EC of 30 December 1996, must be interpreted as meaning that they do not preclude a national rule providing for the levy of surcharges on the price of electricity such as those at issue in the main proceedings when the electricity is used in an electro-chemical process and that Council Recommendation 81/924/EEC of 27 October 1981 on electricity tariff structures in the Community is not capable of preventing a Member State from levying such surcharges.

Puissochet Schintgen Skouris

Macken Cunha Rodrigues

Delivered in open court in Luxembourg on 11 September 2003.

R. Grass

Registrar

J.-P. Puissochet

President of the Sixth Chamber