Reports of Cases

OPINION OF ADVOCATE GENERAL
Cruz Villalón
delivered on 2 July 2015 [1]

Case C-163/14

European Commission
v
Kingdom of Belgium

(Action for failure to fulfil obligations brought by the Commission against the Kingdom of Belgium)

(Failure of a Member State to fulfil obligations — Protocol (No 7) on the Privileges and Immunities of the European Union — Article 3 — Fiscal immunity of the Union — Exemption — Regional gas and electricity contributions — Mere charges for public utility services — Taxes — Indirect taxes — Public service obligations)

1. In the present case the Commission has, under the second paragraph of Article 258 TFEU, brought an action before the Court for a declaration that by refusing to grant the EU institutions and bodies established in Brussels exemption from payment of contributions allocated to the financing of tasks which the Kingdom of Belgium describes as public service tasks in the field of electricity and gas supply the Kingdom of Belgium has failed to fulfil its obligations under the second paragraph of Article 3 of the Protocol (No 7) on the Privileges and Immunities of the European Union annexed to the Treaty on the Functioning of the European Union ('the Protocol').

2. Pursuant to Article 343 TFEU, according to which 'the Union shall enjoy in the territories of the Member States such privileges and immunities as are necessary for the performance of its tasks', the Protocol provides that the Union is to enjoy fiscal immunity. This is explained by the public service activity of the Union, which on principle is non-profit-making and therefore exempt from taxation, [2] by the need to ensure that the Union is independent with regard to the Member States and by the principle of equality between Member States, which prohibits any Member State from obtaining financial advantages from the presence of those institutions and bodies on its territory. [3]

3. This case will require the Court to further define the scope of and conditions for the Union's fiscal immunity, which has been the subject of only three judgments up until now. [4]

1 — Original language: French.

2 — Jacques Mégret, Michel Waelbroeck, Jean-Victor Louis, Daniel Vignes and Jean-Louis Dewost, *Le droit de la Communauté économique européenne. Commentaire du traité at des texts pris pour son application*, volume 15, *Dispositions générales et finales*, Éditions de l'Université de Bruxelles, 1987, 'Article 218', point 8.

3 — Judgment in *AGF Belgium* (C-191/94, EU:C:1996:144, paragraph 19) and Opinion of Advocate General Stix-Hackl in *Commission* v *Belgium* (C-437/04, EU:C:2006:434, point 41).

4 — Judgments in *AGF Belgium* (C-191/94, EU:C:1996:144), *European Community* (C-199/05, EU:C:2006:678) and *Commission* v *Belgium* (C-437/04, EU:C:2007:178). The judgment in *ECB* v *Germany* (C-220/03, EU:C:2005:748) is concerned with the agreement between the Government of the Federal Republic of Germany and the European Central Bank concerning the seat of that institution. The order in *Ufficio imposte consumo* v *Commission* (2/68-IMM, EU:C:1968:50) is concerned essentially with the agreement between the Italian Government and the Commission for the establishment of a Joint Nuclear Research Centre.

I – **Legal background**

A – *EU law*

4. The Union's fiscal immunity is provided for in Article 3 of the Protocol.

5. This provides as follows:

'The Union, its assets, revenues and other property shall be exempt from all direct taxes.

The governments of the Member States shall, wherever possible, take the appropriate measures to remit or refund the amount of indirect taxes or sales taxes included in the price of movable or immovable property, where the Union makes, for its official use, substantial purchases the price of which includes taxes of this kind. These provisions shall not be applied, however, so as to have the effect of distorting competition within the Union.

'No exemption shall be granted in respect of taxes and dues which amount merely to charges for public utility services.'

B – *Belgian law*

1. Financing of public service tasks on the electricity market

6. The Order of 19 July 2001 concerning the organisation of the electricity market in the Brussels-Capital Region[5] ('the Electricity Order') provides for the performance of public service tasks. Those tasks are financed by a levy payable by the electricity supplier.

7. Article 24 of the Electricity Order, in the version in force on the date of notification of the reasoned opinion,[6] provides:

'Paragraph 1. The operator of the distribution network and suppliers shall be severally responsible for the public service obligations referred to in points 1 and 2 below:

1. The provision of a minimum uninterrupted supply of electricity for household consumption subject to the conditions set out in Chapter IV *bis*;

2. The supply of electricity at a special social tariff to the persons and subject to the conditions laid down in federal law and in Chapter IV *bis*;

Paragraph 2. The [Brussels] Institute [for the Management of the Environment] shall be responsible for the public service obligations relating to the promotion of the sustainable use of electricity by means of information, demonstrations and the provision of equipment, services and financial assistance to end customers ...'

5 — *Moniteur belge*, 17 November 2001.

6 — That is 27 February 2012 (see point 25 of this Opinion).

8. Article 24 *bis* of the Electricity Order, in the version in force on the date of notification of the reasoned opinion, provides as follows:

'The operator of the distribution network shall also be responsible for the following public service tasks:

1. the purchase of any green electricity generated that is neither consumed by the producer nor supplied to third parties, within the limits of its own needs;

2. an exclusive task for the construction, maintenance and renewal of public lighting installations on highways and in public green spaces ... and the supply of such installations with electricity; ...;

3. the role of supplier of last resort and the organisation of a follow-up service for customers transferred to it in that role;

4. provision of information to low-voltage residential and business customers concerning prices and conditions of connection and supply ...'

9. Article 26 of the Electricity Order introduces a levy for the purpose of financing the public service tasks referred to in Articles 24 and 24 *bis* ('the regional electricity contribution'). In the version in force on the date of the reasoned opinion, that Article 26 provides:

'Paragraph 1. The holding of a supply licence issued on the basis of Article 21[7] shall entail the monthly payment of a charge by the natural or legal person holding the licence, hereinafter "the person liable."

Paragraph 2. The charge shall be due on the first day of each month. It shall be payable by the 15th of the following month.

The person liable shall be exempt from the charge for the power made available to customers for their railway, tramway or metro networks.

Paragraph 3. The charge shall be calculated on the basis of the power made available to eligible end customers by means of networks, service connections and direct lines of 70 kV or less at consumption sites located in the Brussels-Capital Region. ...

Paragraph 7. The charge collected shall be allocated to the funds referred to respectively in points 15 and 16 of Article 2 of the Order of 12 December 1991 creating budgetary funds ...[8]

Paragraph 8. The charge shall be due with effect from January 2004.'

10. Article 26(4) of the Electricity Order lays down the scale for the regional electricity contribution: an amount in euros is determined for each power bracket made available.

7 — Article 21 of the Electricity Order provides that 'suppliers must hold a supply licence granted by the Government for the purpose of supplying electricity to eligible customers at a consumption site located in the Brussels-Capital Region ...'.

8 — The funds referred to in points 15 and 16 of Article 2 of the Order of 12 December 1991 creating budgetary funds (*Moniteur belge*, 26 February 1992) are the Special Energy Guidance Fund and the Energy Policy Fund.

11. Prior to its amendment in 2011,[9] Article 26 of the Electricity Order had a paragraph 9 according to which 'costs relating to the public service tasks referred to in Article 24 exceeding the amount of charges collected under this article shall be borne by the distribution network operator as operating costs. These costs shall be passed on in tariffs as determined by federal law'.

2. Financing of public service tasks on the gas market

12. The Order of 1 April 2004 concerning the organisation of the gas market in the Brussels-Capital Region, concerning highway charges for gas and electricity and amending the Order of 19 July 2001 concerning the organisation of the electricity market in the Brussels-Capital Region[10] ('the Gas Order') provides, like the Electricity Order, for the performance of public service tasks. These are financed by a levy payable by the operator of the gas distribution network and then the gas supplier.

13. In the version in force on the date of the reasoned opinion, Article 18 of the Gas Order provides:

'The operator of the network and suppliers shall be severally responsible for public service tasks and obligations referred to in points 1 to 3 below:

1. The provision of a minimum uninterrupted supply of gas for household consumption subject to the conditions set out in Chapter V *bis*;

2. The supply of gas at a special social tariff to the persons and subject to the conditions laid down in federal law and in Chapter V *bis*;

3. A risk prevention service relating to the use of natural gas, provided free of charge to households requesting it ...'

14. The Order of 14 December 2006[11] inserted a new Article 18 *bis* into the Gas Order. In the version in force on the date of the reasoned opinion, this provides as follows:

'Paragraph 1. The operator of the network shall also be responsible for the following public service tasks:

1. The organisation of a follow-up service for consumer relations and the supply to residential customers of information concerning prices and conditions for connection ...'

15. Article 20 of the Gas Order introduces a levy for the purpose of financing the public service tasks referred to in Articles 18 and 18 *bis* ('the regional gas contribution'). For simplicity's sake, the regional electricity contribution and the regional gas contribution will be referred to jointly below as 'the regional contributions'.

16. Article 20 of the Gas Order[12] provides that 'the costs relating to the public service tasks referred to in Articles 18 and 18 *bis* shall be borne by the network operator as operating costs. These costs shall be passed on in tariffs as determined by federal law'.

9 — The Order of 20 July 2011 amending the Order of 19 July 2001 concerning the organisation of the electricity market in the Brussels-Capital Region and the Order of 12 December 1991 creating budgetary funds (*Moniteur belge*, 10 August 2011) repealed Article 26(9) of the Electricity Order.

10 — *Moniteur belge*, 26 April 2004.

11 — Article 18 *bis* was inserted into the Gas Order by the Order of 14 December 2006 amending the Orders of 19 July 2001 and 1 April 2004 concerning the organisation of the electricity and gas markets in the Brussels-Capital Region and repealing the Order of 11 July 1991 on the right to a minimum supply of electricity and the Order of 11 March 1999 establishing measures to prevent cuts in the supply of gas for domestic use (*Moniteur belge*, 9 January 2007, p. 537).

12 — As amended by the Order of 14 December 2006, cited in the previous footnote.

17. In 2011, Article 20 of the Gas Order was repealed and a new Article 20 *septiesdecies* introduced.[13] According to Article 20 *septiesdecies* of the Gas Order,

'Paragraph 1. The holding of a supply licence issued on the basis of Article 15[14] shall entail the monthly payment of a charge by the natural or legal person holding the licence, referred to as the person liable.

Paragraph 2. The charge shall be due on the first day of each month. It shall be payable by the 15th of the following month.

Paragraph 3. Subject to subparagraph 2, the charge shall be calculated on the basis of the capacity of the meters used by the network operator at consumption sites located in the Brussels-Capital Region at the premises of end customers. The capacity of the meter shall be determined by the maximum gas flowrate specified in cubic metres per hour for which the meter was designed ...

Paragraph 7. The product of the charge shall be allocated to the funds referred to respectively in points 15 and 16 of Article 2 of the Order of 12 December 1991 creating budgetary funds …;

Paragraph 8. The charge shall be due with effect from January 2012.'

18. Article 20 *septiesdecies* (4) of the Gas Order sets a scale for the regional gas contribution similar to that provided in Article 26(4) of the Electricity Order.

II – **Pre-litigation procedure**

19. Up until 31 July 2009, the Commission, the Council, the Parliament and the Economic and Social Committee, which have their seats in Brussels, were supplied with electricity and gas by Electrabel. The contract entered into with Electrabel ('the Electrabel contract') stipulated that the amount of regional contributions for which Electrabel was liable under the terms of Article 26 of the Electricity Order and Article 20, subsequently Article 20 *septiesdecies*, of the Gas Order were to be borne by the Union. The Union was to pay them to Electrabel, which would then pass them on to the authorities of the Brussels-Capital Region.

20. In July 2005 the Commission, taking the view that it was exempt from regional contributions under Article 3 of the Protocol, ceased paying the regional contributions to Electrabel. At the same time, it made an informal request to the authorities of the Brussels-Capital Region to exempt it from payment of regional contributions.

21. Those informal contacts having proved unsuccessful, on 27 June 2008 the Commission sent the Kingdom of Belgium a letter of formal notice claiming that the latter had infringed the second paragraph of Article 3 of the Protocol by applying Article 26 of the Electricity Order and Article 20 of the Gas Order to the EU institutions. The Kingdom of Belgium submitted its observations on the first letter of formal notice by letter of 9 September 2008, received on 15 September 2008.

13 — By the Order of 20 July 2011 amending the Gas Order (*Moniteur belge*, 10 August 2011, p. 45586).

14 — Article 15 of the Gas Order provides that 'suppliers shall hold a licence to supply gas to eligible customers at a consumption site located in the Brussels-Capital Region ...'.

22. On 15 April 2009, the Commission sent the Kingdom of Belgium a second letter of formal notice, replacing the first one, for breach of the second paragraph of Article 3 of the Protocol. The second letter of formal notice was virtually identical to the first one, except that the Commission seemed to think that the Kingdom of Belgium had been in breach of its obligations since 2001 and not, as in the first letter of formal notice, since 2004. [15]

23. On 22 April 2011, the Commission brought an action before the Tribunal de première instance de Bruxelles (Court of First Instance, Brussels) against the Belgian State, the Brussels-Capital Region, Electrabel and Sibelga, the operator of the electricity and gas distribution networks in the Brussels-Capital Region. It sought reimbursement of the regional contributions paid between 1 July 2004 and 31 December 2008, [16] a sum of EUR 4036170.88, without prejudice to an increase for subsequent periods. [17]

24. When the Electrabel contract expired, the EU institutions and bodies entered into a contract with another electricity and gas supplier, Luminus ('the Luminus contract'). Unlike the Electrabel contract, the Luminus contract does not provide that the EU institutions and bodies are to pay the regional contributions. However, by three letters of 13 May 2011, 21 October 2011 and 2 July 2013, Luminus asked the Union to reimburse it for the regional contributions it had paid, a sum of EUR 2235404.51, demanding that they reimburse this sum by 14 August 2014. [18]

25. In a reasoned opinion of 27 February 2012, the Commission informed the Kingdom of Belgium that by refusing to exempt the EU institutions from the regional contributions provided for in Article 26 of the Electricity Order and Article 20 of the Gas Order it was in breach of the second paragraph of Article 3 of the Protocol. The Kingdom of Belgium submitted its observations on the reasoned opinion by letter of 23 April 2012.

26. Unconvinced by the arguments of the Kingdom of Belgium, which had not changed its position, the Commission brought the present action.

III – **The Commission's action**

27. The Commission complains that the Kingdom of Belgium has failed to fulfil its obligations under the second paragraph of Article 3 of the Protocol by refusing to grant the EU institutions and bodies exemption from the regional contributions provided for in Article 26 of the Electricity Order and Article 20 of the Gas Order and by objecting to the refund of those contributions by the Brussels-Capital Region.

28. The Commission considers that the conditions for immunity from indirect taxes provided for in the second paragraph of Article 3 of the Protocol are satisfied: the supply of electricity and gas is a substantial purchase for the Union's official use.

15 — The second letter of formal notice makes reference to a letter in which the Commission asked the authorities of the Brussels-Capital Region to reimburse the regional contributions paid 'since their introduction in 2001'. I note, however, that the Commission concludes the second letter of formal notice (like the first letter of formal notice, the reasoned opinion and the application) by stating that the Kingdom of Belgium has failed to fulfil its obligations under the second paragraph of Article 3 of the Protocol by failing to exempt the Union 'from the contributions introduced by Article 26 of [the Electricity Order] and by Article 20 of [the Gas Order]'. However, Article 26(8) of the Electricity Order provides that 'the charge shall be due from the month of January 2004' and the Gas Order was adopted in 2004.

16 — In September 2008 the Commission had resumed payment of the regional contributions to Electrabel and paid up the amount of regional contributions unpaid since July 2005.

17 — The case is pending and was to be heard on 21 May 2015.

18 — I do not know whether the Union complied or, if it did not, whether Luminus sued it for payment as it had threatened to do.

29. The Commission argues that the judgment in *Commission* v *Belgium* (C-437/04, EU:C:2007:178), in which the Court ruled out immunity on the grounds that the person liable to pay the tax in question was not the Union but a party contracting with it, is not applicable to the present case. That judgment was concerned with a direct tax, whereas the regional contributions are an indirect tax. According to the Commission, while the Union is not the person liable to pay the regional contributions, they are in practice always passed on to it, on the basis of their nature as indirect taxes and the intention of the Belgian legislature.

30. The third paragraph of Article 3 of the Protocol, which excludes exemption for taxes which 'amount merely to charges for public utility services', does not in the Commission's view apply to this case. First, the public services supplied, or likely to be supplied, to the Union are not specific to it, as the Court's case-law requires. Secondly, there is no direct and proportional link between the actual cost of the service and the amount of regional contributions as the case-law also demands.

31. The Commission claims that the Court should declare that the Kingdom of Belgium has failed to fulfil its obligations under the second paragraph of Article 3 of the Protocol. The Commission also requests that the Kingdom of Belgium be ordered to pay the costs.

IV – **Procedure before the Court**

32. In its defence, the Kingdom of Belgium pleads that the EU institutions and bodies are not exempt from regional contributions on the basis of the second paragraph of Article 3 of the Protocol. It argues that the approach adopted by the Court in the judgment in *Commission* v *Belgium* (C-437/04, EU:C:2007:178) must be applied to the present case because the Union is not the person liable for the regional contributions, since neither the Electricity Order nor the Gas Order require the person liable to pass them on to the end customer and the fact that they are passed on to the Union is therefore a strictly contractual matter. In the alternative, should the Court hold that the second paragraph of Article 3 of the Protocol applies to the regional contributions, the Kingdom of Belgium considers that exemption should be refused on the basis of the third paragraph of that provision. The Kingdom of Belgium contends that the Court should dismiss the action as unfounded and order the Commission to pay the costs.

33. In its reply, the Commission reiterates that while the supplier or network operator is the person liable to pay the regional contributions, it merely collects them and passes on the burden to the end customer. So far as the third paragraph of Article 3 of the Protocol is concerned, the Commission states that the Union is unable to benefit from any public service task financed by the regional gas contribution, since those tasks are intended exclusively to benefit households, and that the public service tasks financed by the regional electricity contribution either do not constitute services or are not provided specifically to it.

34. In its rejoinder, the Kingdom of Belgium states in particular that it matters little whether the regional contributions are a direct tax or an indirect tax since, contrary to what the Commission maintains, all indirect taxes are not passed on to the end customer.

V – **Appraisal**

35. Before examining the Commission's arguments, I think it would be useful briefly to recall the structure of Article 3 of the Protocol in order to define the constituent elements of the Kingdom of Belgium's alleged failure to fulfil obligations.

A – *The structure of Article 3 of the Protocol*

36. Article 3 of the Protocol makes a distinction between direct and indirect taxes. As the Court has pointed out, the former are exempted 'unconditionally and in general', whereas fiscal immunity from the latter 'is not unlimited'.[19] The first paragraph of Article 3 of the Protocol provides that 'the Union, its assets, revenues and other property shall be exempt from all direct taxes': there is no reservation attached to the exemption. On the other hand, the second paragraph of Article 3 of the Protocol provides for 'measures to remit or refund the amount of indirect taxes or sales taxes included in the price of movable or immovable property, where the Union makes, for its official use, substantial purchases.' It also states that 'these provisions shall not be applied … so as to have the effect of distorting competition within the Union'. Exemption from indirect taxes is therefore granted only if three conditions are satisfied: first, the indirect taxes must be paid on the occasion of a substantial purchase; secondly, the purchase must be made by the Union for its official use; thirdly, the exemption must not have any effect on competition.[20]

37. The third paragraph of Article 3 of the Protocol in turn provides that 'no exemption shall be granted in respect of taxes and dues which amount merely to charges for public utility services.'

38. So far as the scope of Article 3 of the Protocol is concerned, in its judgment in *AGF Belgium* the Court held that 'subject solely to the reservations mentioned in the second and third paragraphs of Article 3 ... immunity covers all types of taxation, whether direct or indirect'.[21]

39. I would point out that, for the purposes of Article 3 of the Protocol, the concept of taxation, whether the 'direct taxes' referred to in the first paragraph or the 'indirect taxes and sales taxes' referred to in the second paragraph, must be interpreted autonomously. The Court has held, again in *AGF Belgium*, that Article 3 of the Protocol was applicable to additional insurance premiums 'however they are described under national law' (in that case the referring court had indicated that the additional premiums in question seemed to have more in common with social contributions than with tax resources).[22]

19 — Judgment in *European Community* (C-199/05, EU:C:2006:678, paragraph 31).

20 — I should point out that the remission or refund of indirect taxes and sales taxes provided for by the second paragraph of Article 3 of the Protocol applies to all types of purchase, including obtaining supplies of services (judgment in *AGF Belgium*, C-191/94, EU:C:1996:144, paragraph 36).

21 — *AGF* Belgium (C-191/94, EU:C:1996:144, paragraph 20).

22 — *AGF Belgium*, C-191/94, EU:C:1996:144. paragraph 16: '*however they are described under national law*, the charges in question cannot be treated as contributions due from persons subject to a social security scheme or from members of a social insurance body ...' (emphasis added). As Advocate General Jacobs states, 'it is immaterial how a charge is classified under national law. The term "taxes" in Article 3 must be interpreted by reference to its normal meaning and in the light of the purpose of the provision. Such an approach is the only means of ensuring that the provision is effectively and uniformly applied' (Opinion of Advocate General Jacobs in *AGF Belgium*, C-191/94, EU:C:1996:53, point 17). See also, with regard to the second paragraph of (the present) Article 13 of the Protocol concerning tax exemption for officials, the judgment in *Humblet* v *Belgian State*, 6/60-IMM, EU:C:1960:48: 'from the point of view of the law applicable, the general problem must be resolved according to the law of the Community ... and not according to Belgian law'. Likewise in *Commission* v *Belgium* (C-437/04, EU:C:2007:178, paragraphs 44 to 46), the Court adopts an autonomous interpretation of the concept of 'direct tax' for the purposes of the first paragraph of Article 3 of the Protocol.

40. The 'reservation' of the scope of Article 3 of the Protocol referred to in its third paragraph is for taxes and dues which amount 'merely to charges for public utility services'. The third paragraph defines the scope of Article 3 of the Protocol negatively, in excluding from it charges for public utility services. I note in that regard that if such measures are excluded from the scope of Article 3 it is because that article provides for fiscal immunity and payments described as 'charges for public utility services' cannot be fiscal in nature. The concept of consideration — of 'charges' — is in principle extraneous to that of tax. [23]

41. The 'reservation' of the scope of Article 3 of the Protocol referred to in its second paragraph concerns, it seems to me, the requirement that the indirect taxes should be 'included in the price of movable or immovable property' purchased by the Union: the indirect tax must be an integral part of the price of the property. The conditions relating to the size and purpose of the purchase (official use of the Union) relate to the *particular* purchase on the occasion of which the indirect tax is levied and not to the nature of the charge itself: they are therefore substantive requirements for immunity, and not requirements for its applicability. [24] By the same token, the absence of any effects on competition in the internal market can only be considered a substantive requirement.

42. I would point out that there are no exclusions from the scope of Article 3 of the Protocol other than those referred to in the two foregoing points. In the judgment in *AGF Belgium* the Court states that Article 3 of the Protocol applies to 'all types of taxation', 'subject *solely* to the reservations' provided for in the second and third paragraphs of that provision. [25] The Court justifies the exclusive nature of those two reservations by the wording of Article 3 of the Protocol which, it states, defines the immunity 'in very broad terms'. [26] It seems to me, moreover, that the express nature of those two reservations is the reason why they are the only reservations to the scope of Article 3 of the Protocol. If it had been the EU legislature's intention that Article 3 of the Protocol should allow other reservations, it would have made express provision for those other reservations, as it did for charges for public utility services and indirect taxes that are not included in the price of the property purchased.

B – *The constituent elements of the failure to fulfil obligations*

43. The Commission maintains that by refusing to grant the Union immunity from regional contributions the Kingdom of Belgium has failed to fulfil its obligations under the second paragraph of Article 3 of the Protocol.

44. The Commission must therefore establish that the regional contributions satisfy the conditions of the second paragraph of Article 3 of the Protocol. It must show that the regional contributions are 'included in the price' paid by the Union for the supply of electricity and gas, that the supply constitutes a 'substantial' purchase made for its 'official use' and that it does not have the effect of distorting competition in the internal market.

23 — As Advocate General Jacobs points out in the case of *AGF Belgium* 'a charge for a public utility service ... is the price paid for a specific service. There is a direct link between the charge and the benefit received ... . That is not so in the case of a tax, where the link between the payment and any benefits received is both indirect and remote (Opinion of Advocate General Jacobs in Case C-191/94 *AGF Belgium*, EU:C:1996:53, points 31 to 32). The distinction between taxes and charges for services rendered is, moreover, known from the tax laws of the Member States: see, in this connection, the Opinion of Advocate General Roemer in *Van Leeuwen* (32/67, EU:C:1968:2), who states that the distinction between taxes and charges that are nothing other than consideration for the particular use of public services is known from Netherlands, German, French, Italian and Belgian law; see, in relation to French law, Jean Lamarque, Olivier Négrin and Ludovic Ayrault, *Droit fiscal général*, 3rd edition, LexisNexis, 2014, paragraph 94 et seq.

24 — If the purchase is of negligible value and immunity is refused for that reason, the charge in question none the less does not lose its fiscal nature: Article 3 of the Protocol applies to it. Simply, immunity is refused because the transaction does not satisfy one of the substantive requirements of the second paragraph, namely that it should be a 'substantial' purchase.

25 — *AGF Belgium* (C-191/94, EU:C:1996:144, paragraph 20) (emphasis added).

26 — *AGF Belgium* (C-191/94, EU:C:1996:144, paragraph 19).

45. The Kingdom of Belgium objects that the second paragraph of Article 3 of the Protocol applies only to taxes for which the Union is liable under national law. Therefore, where, as in this case, the Union bears the tax burden under a contract concluded with the person liable, it falls outside the scope of the immunity provided for in Article 3 of the Protocol. The Commission must therefore also show that the second paragraph of Article 3 of the Protocol is applicable to the taxes borne by the Union even though it is not the person liable.

46. In the alternative, the Kingdom of Belgium objects that the regional contributions are merely charges for public utility services within the meaning of the third paragraph of Article 3 of the Protocol and that they do not therefore enjoy the immunity provided for in the second paragraph of that article. Accordingly, it is for the Commission to establish that the regional contributions are not merely charges for public utility services. [27]

47. It seems to me that it is hardly disputable that the three conditions for immunity from indirect taxation are satisfied in this case; moreover, the Kingdom of Belgium does not dispute that they are. I shall therefore very briefly examine those three conditions before turning to the issues which are disputed between the parties. Those issues are concerned, first, with the applicability of the second paragraph of Article 3 of the Protocol to taxes, the burden of which is borne by the Union even though it is not the person liable — an issue which lies at the heart of the pleadings of both the Commission and the Kingdom of Belgium — and, secondly, and relating to the argument submitted by the Kingdom of Belgium in the alternative, with whether the regional contributions can be considered merely charges for public utility services within the meaning of the third paragraph of Article 3.

C – *The conditions for the immunity provided for in the second paragraph of Article 3 of the Protocol*

48. Let me repeat that immunity from indirect taxation is granted only if the taxes are paid in connection with a substantial purchase, if that purchase is made by the Union for its official use and provided that the immunity does not have the effect of distorting competition in the internal market.

49. I have no doubt that those conditions are satisfied in the present case.

50. The supply of electricity and gas to four EU institutions and bodies is undoubtedly a substantial purchase; I would point out that the dispute before the Tribunal de première instance de Bruxelles concerning the Electrabel contract involves a sum in excess of EUR 4 million and that the sum whose payment Luminus is claiming from the Union exceeds EUR 2 million. It seems to me, too, that the purchase is indisputably made for the official use of the Union: the officials and agents of the Union would be unable to work without electricity and gas. [28]

27 — In that regard, I would point out that the classification used in Belgian law for the regional contributions is of no help to the Commission since, as we have seen, for the purposes of Article 3 of the Protocol the concept of taxation must be interpreted autonomously. It is therefore of little importance that Belgian law seems to consider the regional gas contribution a tax rather than a charge for services rendered on the grounds that, to be considered a charge for services rendered the service would have to benefit the person liable considered in isolation, which is not the case. See the opinion handed down by the Conseil d'État belge (Belgian Council of State) on the preliminary draft order on the organisation of the electricity market in the Brussels-Capital Region, Parliament of Brussels-Capital, Parliamentary Documents, Session 2000/2001, Document No A-192/1-00/01, p. 64.

28 — Concerning the 'official use' of purchases made by the Union, see Claudia Schmidt, 'Le protocole sur les privilèges et immunités des Communautés européennes — Commentaire de l'article 218 du Traité de Rome et de l'article 28, premier alinéa du traité de fusion', *Cahiers de droit européen*, 1991, pp. 67 to 100, point 17; and Jean Duffar, *Contribution à l'étude des privilèges et immunités des organisations internationales*, Paris, LGDJ, 1982, Chapter VII, pp. 291 to 292, point 341.

51. The third condition, relating to the effects on competition, is not even addressed by the parties. Moreover, it seems to me that it is likely to become confused with the second condition, concerning the official use of the purchase: where the Union purchases movable or immovable property for its official use, it is engaging in a non-profit-making activity, and such activity cannot have any effect on competition. [29]

52. Finally, I would point out that the three conditions examined above are the only ones provided for in the second paragraph of Article 3 of the Protocol. Although the Court states, in the judgments in *Commission* v *Belgium* and *European Community*, that the Commission did not show that refusal of immunity could adversely affect the independence and proper functioning of the Union, it did so for the sake of completeness, having excluded immunity on other grounds. [30] The Court therefore does not make an adverse effect on the independence and proper functioning of the Union a supplementary condition of immunity.

D – *The applicability of Article 3 of the Protocol to taxes borne by the Union although it is not the person liable under national law*

53. The Kingdom of Belgium pleads that it has not failed to fulfil its obligations under the second paragraph of Article 3 of the Protocol, because that paragraph applies only to taxes for which the Union is liable under national law. However, that is not the case with the regional contributions. If the Union bears the burden of those contributions, it is, in the Kingdom of Belgium's view, under the contract between the Union and the person liable: it is because the Union has agreed for them to be passed on.

54. In that regard, the Kingdom of Belgium is relying on the judgment in *Commission* v *Belgium*. [31] In that judgment, the Court held that the first paragraph of Article 3 of the Protocol does not provide for any exemption for parties contracting with the Union. The Court inferred from this that the Kingdom of Belgium had not failed to fulfil its obligations under the first paragraph of Article 3 of the Protocol by refusing to exempt the Union from a regional property tax which was payable by the owner of the building but the burden of which was borne by the Union on the basis of the lease. The tax was passed on to the Union under a contractual provision; it had therefore been freely agreed to by the Commission.

55. In the present case, the person liable for the regional electricity contribution is, according to Article 26(1) of the Electricity Order, the electricity supplier, who buys electricity from the producer and resells it. According to Article 20 of the Gas Order, the person liable for the regional gas contribution is the distribution network operator, and then, from 2011, according to Article 20 *septiesdecies* (1), the gas supplier, who buys gas from importers and resells it. The Union therefore pays regional contributions on the basis of contracts between it and the liable parties. Accordingly, Electrabel, which supplied the Commission, Council, Parliament and Economic and Social Committee

29 — See Jean Duffar, cited in previous footnote, point 339: 'le souci de ne pas fausser la concurrence est expressément énoncé à l'article 3, [deuxième] alinéa, du [protocole]. L'exonération doit être limitée aux activités qui forment l'objet de l'organisation et dès que les limites de cet objet sont franchies, l'exonération perd sa signification' ('the concern that competition should not be distorted is expressly voiced in Article 3, [second] paragraph, of [the Protocol]. The exemption must be limited to activities that constitute the object of the organisation and once the limits of that object are exceeded the exemption loses its meaning').

30 — In the judgment in *Commission* v *Belgium* the Court holds that the exemption must be refused on the ground that it does not benefit the party contracting with the Union, only then going on to explain that such a finding 'is not … called into question' by the purpose of Article 3 of the Protocol, namely to guarantee the independence and proper functioning of the Union (*Commission* v *Belgium*, C-437/04, EU:C:2007:178, paragraphs 55 to 56). In *European Community* the Court notes 'in any event' that the Commission has not established that payment of the duty in question would adversely affect the independence and proper working of the Union (*European Community*, C-199/05, EU:C:2006:678, paragraph 43).

31 — *Commission* v *Belgium*, C-437/04, EU:C:2007:178, paragraphs 50 to 51.

with electricity up until 31 July 2009, and still to this day supplies them with gas, passed on to the Union the amount of the regional contributions.[32] On the other hand, Luminus, which supplied them with electricity from 1 August 2009 to 31 July 2012,[33] did not pass on to the Union the regional contributions.[34]

56. In that regard the Commission claims that the solution adopted by the Court in *Commission* v *Belgium* cannot be applied to the present case. It does not dispute that under Belgian law the supplier or the distribution network operator and not the Union is liable for the regional contributions. It argues, however, in substance, that the passing on of regional contributions is not solely a consequence of the parties' freedom of contract since, first, the Belgian legislature intends the regional contributions to be passed on and, secondly, the regional contributions, as a form of indirect taxation, are passed on to the consumer. The situation in the present case, which concerns an indirect tax, therefore differs from that on which the Court had to rule in *Commission* v *Belgium*, which was concerned with a direct tax. To refuse immunity from indirect taxation on the ground that the Union is not the person liable would, in practice, amount to refusing it immunity from indirect taxation in almost every case.

57. I must begin by confessing that I am hardly convinced by the Commission's argument that it is in the nature of indirect taxes that they are passed on. The question is not whether indirect taxes are by nature passed on but whether the indirect tax at issue in the present case, namely the regional contributions, is passed on.

58. However, I consider that the Commission's position that immunity cannot be ruled out solely on the ground the Union is not the person liable for the regional contributions deserves to be adopted for the reasons set out below.

59. First, it does not follow from the wording of the second paragraph of Article 3 of the Protocol that, in order to benefit from immunity, the indirect taxes or sales taxes referred to must be payable directly by the Union. The EU legislature could, for example, have provided that 'the Governments of the Member States shall, wherever possible, take the appropriate measures to remit or refund the amount of indirect taxes or sales taxes *for which the Union is liable* where it makes, for its official use, substantial purchases of movable or immovable property'. However, it did not do so. That provision simply requires, as we have seen, that the indirect taxes should be 'included in the price' paid by the Union and that the price 'includes' indirect taxes. It would therefore be sufficient that the Union pay, in practice, the amount of the indirect taxes for them to fall within the second paragraph of Article 3 of the Protocol, without there being any requirement that the Union be the person liable for them.

60. Secondly, immunity cannot be denied merely on the ground that national law does not specify the Union as the person liable.

61. It is Belgian law which defines who is liable for the regional contributions (the electricity supplier, the distribution network operator and then the gas supplier), as well as their tax base (the making available of electricity, the gas meter capacity), the rate of them (the value in euros corresponding to a range of electricity made available or to the gas meter capacity) and the exemptions (the exemption for power placed at the disposal of customers for their rail transport networks).

32 — Clause 4.2 of the general conditions of the contract which the Commission entered into with Electrabel for the supply of high voltage electricity provides that 'our energy prices shall be increased ... by any taxes, levies, fees, payments, contributions, supplements and charges imposed on us by a competent authority that we are permitted or required to pass on to our customers and which relate to or result from our electric energy or natural gas business in the broadest sense of the term, such as the CREG financing charge, the federal contribution for the financing of certain public service obligations and the energy contribution'.

33 — For high voltage only: for low voltage (in the Parliament's case, medium voltage), Electrabel continues to supply the Commission, the Council and the Parliament to this day (it is not clear from the documents before the Court whether the Economic and Social Committee has a low voltage contract).

34 — Article 3.2 of the special conditions of the contract concluded with the Commission for the supply of high voltage electricity provides that 'taxes, charges and other regional and federal contributions shall not be invoiced'.

62. Consequently, to refuse immunity on the ground that the Union is not the person liable for the tax, be it a direct tax or an indirect tax, would be tantamount to allowing the State in which an institution has its seat to define the concept of taxation for the purpose of Article 3 of the Protocol. However, as we have seen, in *AGF Belgium* the Court held that the concept of taxation must be interpreted autonomously. [35]

63. It remains for me to examine the Kingdom of Belgium's argument concerning the contractual nature of the passing on of the regional contributions to the end customer. In that regard, it seems to me that there are strong reasons to doubt the strictly contractual nature of passing them on.

64. First of all, the option of passing on regional contributions is expressly provided for in the Electricity Order and the Gas Order. Article 20 of the Gas Order provides [36] that the passing on of '[costs relating to the public service tasks] in tariffs shall be determined by federal law'. Article 26(9) of the Electricity Order contains [37] a similar provision. The explanatory notes on the articles of the draft Gas Order state with regard to Article 20 that it 'provides only that the cost of performing [public service tasks] is borne by the network operator, who may *include* it, on the same basis as his other cost factors, in the tariff proposal submitted to the [Electricity and Gas Regulatory Commission], in accordance with the Royal Decree concerning the organisation of the general tariff structure of distribution networks'. [38] The Royal Decree of 29 February 2004 on the general tariff structure and the basic principles and procedures concerning tariffs and accounts of operators of natural gas distribution networks active on Belgian territory [39] provides that 'the invoicing of tariffs *shall include* tariff items associated with taxes, levies, surcharges, contributions and remunerations ... . They *shall include as appropriate*: 1. surcharges, levies or remunerations for the purpose of financing public service obligations ...'. [40]

65. Next, I note that under the second subparagraph of Article 26(2) of the Electricity Order the person liable is exempt from the regional electricity contribution 'in respect of the power made available to customers for their rail transport networks'. In other words, this contribution is not payable where the end customer operates a rail transport network: the Belgian legislature has therefore indeed taken into account consumption, at least one particular form of consumption (rail traction). It may be inferred from Article 26(2) of the Electricity Order that the regional electricity contribution is intended to be applied to consumption, that is to say that it is intended to be passed on to the end consumer.

66. Finally, it is particularly significant that, in so far as the Court is aware, *only one* person liable for regional contributions, Luminus, agreed not to pass on the regional contributions to the Union. The Commission says it had to abandon the inclusion in its invitations to tender of a clause providing that the regional contributions would not be passed on to the Union because no bidder was prepared to agree to such a clause. Incidentally, although Luminus agreed not to pass on the regional contributions, it was, according to the Commission, because it was convinced, wrongly, that it did not have to pay those contributions itself. Moreover, Luminus subsequently asked the Union to reimburse the regional contributions it had paid.

35 — Judgment in *AGF Belgium* (C-191/94, EU:C:1996:144, paragraph 16). See point 39 of this Opinion.

36 — Until its repeal by the Order of 20 July 2011 amending the Gas Order; see footnote 13.

37 — Until its repeal by the Order of 20 July 2011 amending the Electricity Order; see footnote 9.

38 — Parliament of Brussels-Capital, Parliamentary documents, Session 2003/2004, document A-506/1-03/04, explanatory notes on articles, Article 20 (emphasis added).

39 — *Moniteur belge*, 11 March 2004.

40 — Article 9 (emphasis added).

67. While it is true that, as the Kingdom of Belgium notes, the person liable is under no obligation to pass on the regional contributions to the end customer, the fact remains that even if they are not passed on the person liable is still required to pay the regional contributions to the public authorities of the Brussels-Capital Region.

68. On that point, the Commission maintains that a person liable who, in the absence of a clause to that effect, did not pass on the regional contributions to its customers, would have difficulty in absorbing their economic impact and would therefore find itself in a precarious situation. The Kingdom of Belgium responds that if that were the case the Commission would have awarded Luminus an 'unprofitable public contract' and that it cannot base its action on an illegality of which it is the source.

69. In that regard, it seems clear to me that a person liable that did not pass on the regional contributions to its customers would find itself in a precarious situation. It would be in its own interests to pass them on, since it is required to pay them to the public authorities even if it does not pass them on. It would appear to be required to pass them on if it wishes to avoid being in an economically difficult position.

70. Finally, I would point out that the situation in this case differs from that on which the Court had to rule in *Commission* v *Belgium*.

71. In that judgment, the Court justified the refusal to grant exemption from the regional property tax at issue on the ground that the tax was passed on to the Union under a contractual provision, which meant that the Union was free to refuse to agree to their being passed on. In the present case, the Union does not appear to me to have a freedom to refuse to agree to regional contributions being passed on comparable to the freedom it had to refuse to agree to the regional property tax being passed on. If the owner of the building had made the passing on of that tax a condition of signing the lease, the Union could no doubt have turned to other lessors. It would be more difficult for it to turn to other electricity or gas suppliers, since, while the electricity and gas markets are indeed open to competition, the number of suppliers is not unlimited.

72. The Court may therefore grant the Commission's application in the present case without contradicting the judgment in *Commission* v *Belgium*. It is true that in that judgment the Court held that 'such market conditions cannot give rise to fiscal immunity'. It seems to me, however, that freedom of choice of supplier is limited not by the economic situation on the electricity and gas market but by its nature, which while open is regulated. The market for electricity and gas cannot be compared to the property market at issue in the judgment in *Commission* v *Belgium*.

73. My interim conclusion is that the Commission has demonstrated to the requisite legal standard that the conditions for immunity provided for in the second paragraph of Article 3 of the Protocol are satisfied.

E – *The expression 'which amount merely to charges for public utility services' in the third paragraph of Article 3 of the Protocol*

74. In the alternative, the Kingdom of Belgium submits that, assuming the regional contributions are payable by the Union, they should nevertheless be described as amounting merely to charges for public utility services. As such, under the third paragraph of Article 3 of the Protocol they would not enjoy immunity. We therefore need to consider this argument before reaching a final conclusion.

75. The Court has held that a levy constitutes 'mere remuneration for public utility services' for the purposes of the third paragraph of Article 3 of the Protocol if it satisfies two conditions. First, the public utility service must be provided, or at least be capable of being provided, to those paying the charge.[41] Secondly, there must be a direct and proportional link between the actual cost of that service and the duty paid by the recipient.[42] I shall consider in turn whether the regional contributions satisfy those two conditions.

1. The concept of service provided to those paying the charge

76. The Commission argues that the services paid for by the regional contributions are either not capable of being provided to the Union or are not capable of being provided to it specifically.

77. In the case of the regional electricity contribution, some of the public service tasks referred to in Articles 24 and 24 *bis* of the Electricity Order are, as the Commission underlines, intended only for residential customers: the Union is not therefore capable of benefiting from them. That is true of the uninterrupted minimum supply of electricity for household consumption and of the supply of electricity at a special social tariff, provided for in Article 24(1)(1) and (2). Contrary to what the Kingdom of Belgium maintains, it is of little importance that EU staff may be capable of benefiting from those public service tasks: Article 3 of the Protocol provides immunity for the Union, not for its officials and agents. It is therefore to the Union that the public utility services must be provided.

78. It follows that neither the uninterrupted minimum supply of electricity for household consumption nor the supply of electricity at a special social tariff are public utility services within the meaning of the third paragraph of Article 3 of the Protocol.

79. On the other hand, its seems to me that other public service tasks among those provided for by the Electricity Order are capable of benefiting or actually benefit the Union.

80. It cannot, in my opinion, be ruled out that the purchase of electricity produced by cogeneration, provided for in Article 24 *bis* (1) of the Electricity Order, benefits the Union. The Commission does state that the EU institutions have cogeneration systems. It seems to me of little importance that the institutions' output is less than their consumption and that they do not therefore sell the electricity they produce by cogeneration: it is sufficient that the Union is capable of benefiting from the purchase of electricity so produced. Neither is it important that the purchase of electricity produced by cogeneration is part of an environmental policy of the Brussels-Capital Region: contrary to what the Commission maintains, purchase of that electricity is none the less a service provided to the Union. Moreover, it is not impossible that the Union produces more than it consumes at certain times of the day. Finally, in view of the small quantities involved, the sale of electricity cannot be treated as a commercial activity, in which the Union is not intended to engage.

81. Furthermore, the construction, maintenance and renewal of public lighting installations, provided for in Article 24 *bis* (2) of the Electricity Order, benefits the Union in as much as lighting is provided to the districts where the EU institutions and bodies are located. It is true that public lighting benefits everyone in Brussels, not only the Union. Contrary to the Commission's argument, however, the concept of a charge for a public utility service does not in my opinion imply that the service is provided specifically to the party who pays for it: the third paragraph of Article 3 of the Protocol is

41 — Judgment in *AGF Belgium* (C-191/94, EU:C:1996:144, paragraph 26); judgment in *European Community* (C-199/05, EU:C:2006:678, paragraph 21).

42 — Judgment in *European Community* (C-199/05, EU:C:2006:678, paragraph 25).

concerned with services of 'public utility', not with services rendered that would be the equIV bislent of a contractual service under prIV biste law. Public lighting as such can therefore in principle be a public utility service benefiting the Union within the meaning of the third paragraph of Article 3 of the Protocol.

82. In particular, the programme for sustainable use of electricity provided for in Article 24(2) of the Electricity Order has indeed benefited the Union. The Commission does not dispute that the EU institutions and bodies have benefited from the 'energy premiums' intended, for example, to improve the energy performance of a building's lighting.

83. The Union is therefore capable of benefiting from some of the public service tasks financed by the regional electricity contribution (purchase of electricity obtained by cogeneration) or has done so in the past (public lighting, the sustainable energy use programme).

84. In the case of the regional gas contribution, I shall simply point out that the Union is capable of benefiting from one of the public service tasks provided for in Articles 18 and 18 *bis* of the Gas Order: the programme for the sustainable use of gas provided for in Article 18 *bis* (2) of the Gas Order. I would point out that Article 18 *bis* (2) of the Gas Order is still in force and that there is therefore cause to doubt the Commission's statement that since August 2011 the public service tasks financed by the regional gas contribution have all been targeted only at households.

85. However, if the regional gas contributions are to be classified as merely charges for public utility services and hence fall outside the scope of Article 3 of the Protocol, it is not enough that they should constitute payment for public utility services provided to the Union. There must also be a direct and proportional link between the actual cost of those services and the amount of regional contributions. It seems to me that there is no such link in this case.

2. The direct and proportional link between the actual cost of the service and the duty paid by the recipient

86. The Commission points out that the regional contributions are calculated on the basis of the power made available to the end customer.[43] From this it infers that the regional contributions are not calculated on the basis of the costs of the public service tasks which they finance.

87. In my opinion the Commission's argument must be accepted.

88. Article 26(3) of the Electricity Order provides that 'the duty shall be calculated on the basis of the power made available to eligible end customers' Article 20 *septiesdecies* (3) of the Gas Order, introduced in 2011,[44] provides that 'the duty shall be calculated on the basis of the capacity of the meters used by the network operator at the premises of end customers at consumption sites in the Brussels-Capital Region. The capacity of the meter shall be determined by the maximum gas flowrate specified in cubic metres per hour for which the meter was designed'. Under the terms of those provisions, the amount of regional contributions increases with the power made available to customers. But the cost of the services provided to the recipient does not increase with the power made available. A customer to whom a significant amount of power is made available does not benefit

43 — Subject, in the case of the regional gas contribution and end customers whose meters have a capacity of 6 to 10 m^3/h (the smallest in existence), to the last annual consumption.

44 — Order of 20 July 2011 amending the Order of 1 April 2004 concerning the organisation of the gas market in the Brussels-Capital Region, concerning highway charges for gas and electricity and amending the Order of 19 July 2001 concerning the organisation of the electricity market in the Brussels-Capital Region (*Moniteur belge*, 10 August 2011).

any more from the public service tasks than does a customer to whom less power is made available: the benefit from public service tasks, and hence their cost, bears no relation to the power made available. The amount of the regional contributions therefore bears no relation to the cost of the public service tasks.

89. Consequently, the regional contributions cannot be considered merely charges for public utility services within the meaning of the third paragraph of Article 3 of the Protocol. While some of the public service tasks they finance constitute services provided, or capable of being provided, to the Union, their amount is not a function of the cost of those services. The Commission has therefore established that the regional contributions are a tax within the meaning of Article 3 of the Protocol.

90. The Commission's application should therefore be upheld. In accordance with Article 138(1) of the Rules of Procedure of the Court of Justice, the kingdom of Belgium should be ordered to pay the costs.

VI – **Conclusion**

91. In the light of the foregoing considerations, I therefore propose that the Court should:

(1) Declare that, by refusing to grant the EU institutions and bodies established in Brussels immunity from the regional contributions intended to finance public service obligations in the field of electricity and gas supply provided for in Article 26 of the Order of 19 July 2001 concerning the organisation of the electricity market in the Brussels-Capital Region and in Article 20 of the Order of 1 April 2004 concerning the organisation of the gas market in the Brussels-Capital Region, concerning highway charges for gas and electricity and amending the Order of 19 July 2001 concerning the organisation of the electricity market in the Brussels-Capital Region, the Kingdom of Belgium has failed to fulfil its obligations under the second paragraph of Article 3 of the Protocol (No 7) on the Privileges and Immunities of the European Union;

(2) Order the Kingdom of Belgium to pay the costs.