Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

4 June 2015*

(Reference for a preliminary ruling — Article 267 TFEU — Interlocutory procedure for review of constitutionality — Examination of whether a national law complies with both EU law and with the Constitution of the Member State concerned — Discretion enjoyed by a national court to refer questions to the Court of Justice for a preliminary ruling — National legislation levying a duty on the use of nuclear fuel — Directives 2003/96/EC and 2008/118/EC — Article 107 TFEU — Articles 93 EA, 191 EA and 192 EA)

In Case C-5/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht Hamburg (Germany), made by decision of 19 November 2013, received at the Court on 7 January 2014, in the proceedings

Kernkraftwerke Lippe-Ems GmbH

v

Hauptzollamt Osnabrück,

THE COURT (Third Chamber),

composed of M. Ilešič (Rapporteur), President of the Chamber, A. Ó Caoimh, C. Toader, E. Jarašiūnas and C.G. Fernlund, Judges,

Advocate General: M. Szpunar,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 4 November 2014,

after considering the observations submitted on behalf of:

— Kernkraftwerke Lippe-Ems GmbH, by J. Lüdicke and G. Roderburg, Rechtsanwälte,

— the Hauptzollamt Osnabrück, by C. Schürle and I. Schmidtke, acting as Agents,

— the German Government, by T. Henze and K. Petersen, acting as Agents,

— the Finnish Government, by S. Hartikainen and J. Heliskoski, acting as Agents,

— the European Commission, by R. Lyal and R. Sauer, acting as Agents,

* Language of the case: German.

after hearing the Opinion of the Advocate General at the sitting on 3 February 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 267 TFEU, Article 14(1)(a) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ 2003 L 283, p. 51), Article 1(1) and (2) of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC (OJ 2009 L 9, p. 12), Article 107 TFEU, the first paragraph of Article 93 EA, Article 191 EA, read in conjunction with Article 3(1) of the Protocol (No 7) on the Privileges and Immunities of the European Union annexed to the EU, FEU and EAEC Treaties ('the Protocol'), and the second paragraph of Article 192 EA, in conjunction with the second paragraph of Article 1 EA and Article 2(d) EA.

2 The request has been made in proceedings between Kernkraftwerke Lippe-Ems GmbH ('KLE'), the operator of the Emsland nuclear power station in Lingen (Germany) and the Hauptzollamt Osnabrück (Principal Customs Office, Osnabrück) ('the Hauptzollamt') concerning a levy on nuclear fuel for which KLE is liable under the Kernbrennstoffsteuergesetz (Law on excise duty on nuclear fuel) of 8 December 2010 (BGB1. 2010 I, p. 1804) ('KernbrStG') in respect of the use by that company in June 2011 of fuel assemblies in the nuclear reactor of that power station.

Legal context

EU law

Directive 2003/96

3 Recitals 2, 3, 6 and 7 in the preamble to Directive 2003/96 are worded as follows:

'(2) The absence of Community provisions imposing a minimum rate of taxation on electricity and energy products other than mineral oils may adversely affect the proper functioning of the internal market.

(3) The proper functioning of the internal market and the achievement of the objectives of other Community policies require minimum levels of taxation to be laid down at Community level for most energy products, including electricity, natural gas and coal.

…

(6) In accordance with Article 6 of the [EC] Treaty, environmental protection requirements must be integrated into the definition and implementation of other Community policies.

(7) As a party to the United Nations Framework Convention on Climate Change, the Community has ratified the Kyoto Protocol. The taxation of energy products and, where appropriate, electricity is one of the instruments available for achieving the Kyoto Protocol objectives.'

4 Article 1 of Directive 2003/96 provides as follows:

‘Member States shall impose taxation on energy products and electricity in accordance with this Directive.’

5 Article 2 of that directive states as follows:

‘1. For the purposes of this Directive, the term “energy products” shall apply to products:

(a) falling within CN codes 1507 to 1518, if these are intended for use as heating fuel or motor fuel;

(b) falling within CN codes 2701, 2702 and 2704 to 2715;

(c) falling within CN codes 2901 and 2902;

(d) falling within CN code 2905 11 00, which are not of synthetic origin, if these are intended for use as heating fuel or motor fuel;

(e) falling within CN code 3403;

(f) falling within CN code 3811;

(g) falling within CN code 3817;

(h) falling within CN code 3824 90 99 if these are intended for use as heating fuel or motor fuel.

2. This Directive shall also apply to: Electricity falling within CN code 2716.

3. When intended for use, offered for sale or used as motor fuel or heating fuel, energy products other than those for which a level of taxation is specified in this Directive shall be taxed according to use, at the rate for the equivalent heating fuel or motor fuel.

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 at the rate for the equivalent motor fuel.

In addition to the taxable products listed in paragraph 1, any other hydrocarbon, except for peat, intended for use, offered for sale or used for heating purposes shall be taxed at the rate for the equivalent energy product.

4. This Directive shall not apply to:

…

(b) the following uses of energy products and electricity:

— energy products used for purposes other than as motor fuels or as heating fuels,

— dual use of energy products.

…

5. References in this Directive to codes of the combined nomenclature shall be to those of Commission Regulation (EC) No 2031/2001 of 6 August 2001, amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff [(OJ 2001 L 279, p. 1; "the combined nomenclature")].

A Decision to update the codes of the combined nomenclature for the products referred to in this Directive shall be taken once every year in accordance with the procedure laid down in Article 27. The Decision must not result in any changes in the minimum tax rates applied in this Directive or to the addition or removal of any energy products and electricity.'

6 Article 4 of Directive 2003/96 provides as follows:

'1. The levels of taxation which Member States shall apply to the energy products and electricity listed in Article 2 may not be less than the minimum levels of taxation prescribed by this Directive.

2. For the purpose of this Directive "level of taxation" is the total charge levied in respect of all indirect taxes (except [value added tax, "VAT"]) calculated directly or indirectly on the quantity of energy products and electricity at the time of release for consumption.'

7 Article 14(1) of Directive 2003/96 is worded as follows:

'In addition to the general provisions set out in [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)] on exempt uses of excisable products, and without prejudice to other Community provisions, Member States shall exempt the following from taxation under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse:

(a) energy products and electricity used to produce electricity and electricity used to maintain the ability to produce electricity. However, Member States may, for reasons of environmental policy, subject these products to taxation without having to respect the minimum levels of taxation laid down in this Directive. In such case, the taxation of these products shall not be taken into account for the purpose of satisfying the minimum level of taxation on electricity laid down in Article 10;

…'

Directive 2008/118

8 Recital 9 in the preamble to Directive 2008/118 is worded as follows:

'Since excise duty is a tax on the consumption of certain goods, duty should not be charged in respect of excise goods which, under certain circumstances, have been destroyed or irretrievably lost.'

9 Article 1 of that directive provides as follows:

'1. This Directive lays down general arrangements in relation to excise duty which is levied directly or indirectly on the consumption of the following goods (hereinafter "excise goods"):

(a) energy products and electricity covered by Directive [2003/96];

…

2. Member States may levy other indirect taxes on excise goods for specific purposes, provided that those taxes comply with the Community tax rules applicable for excise duty or [VAT] as far as determination of the tax base, calculation of the tax, chargeability and monitoring of the tax are concerned, but not including the provisions on exemptions.

3. Member States may levy taxes on:

(a) products other than excise goods;

(b) the supply of services, including those relating to excise goods, which cannot be characterised as turnover taxes.

However, the levying of such taxes may not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.'

10 Article 47 of Directive 2008/118 provides as follows:

'1. Directive [92/12] is repealed with effect from 1 April 2010.

…

2. References to the repealed Directive shall be construed as references to this Directive.'

German law

11 The first sentence of Paragraph 100(1) of the Basic Law for the Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland) provides as follows:

'If a court or tribunal considers that a law is unconstitutional and its decision is conditional upon the validity of that law, it shall stay the proceedings and submit the question … for a decision by the Bundesverfassungsgericht [Federal Constitutional Court] …'

12 Paragraph 1 of the KernbrStG, entitled 'Taxable items, fiscal territory', is worded as follows:

'(1) Nuclear fuel used for the commercial production of electricity shall be subject in the fiscal territory to nuclear fuel duty. Nuclear fuel duty is a tax on consumption for the purposes of the Tax Code.

(2) The fiscal territory is the territory of the Federal Republic of Germany …'

13 Paragraph 2 of KernbrStG, entitled 'Definition of the terms used in this Law', provides as follows:

'For the purposes of this Law, the following definitions shall apply:

1. Nuclear fuel:

(a) plutonium 239 and plutonium 241,

(b) uranium 233 and uranium 235,

including in the form of compounds, alloys, ceramics and mixtures;

2. fuel assembly: the unit, consisting of a number of individual fuel rods, in the form in which the nuclear fuel is inserted into the nuclear reactor;

3. fuel rod: the geometric form in which the nuclear fuel, covered with a protective sheath, is inserted into the nuclear reactor;

4. chain reaction: the process by which neutrons release, as a result of the fission of nuclear fuel elements, other neutrons which, in turn, cause the fission of other nuclear fuel elements;

5. nuclear reactor: the geometrical device in which fuel assemblies or individual fuel rods and other technical components are arranged in such a way as to start a controlled self-sustaining chain reaction;

6. operator: the holder of a licence to operate a plant for the commercial production of electricity by fission of nuclear fuel.'

14 Paragraph 3 of that law, entitled 'Rate of duty', sets the duty payable in respect of 1 gramme of plutonium 239, plutonium 241, uranium 233 or uranium 235 at EUR 145.

15 Paragraph 5 of KernbrStG, entitled 'Chargeable event for the duty, person liable for payment of the duty', is worded as follows:

'(1) The duty shall be payable when a fuel assembly or individual fuel rods are used for the first time in a nuclear reactor, starting a self-sustaining chain reaction. …

(2) The person liable for payment of the duty is the operator.'

16 Paragraph 6 of KernbrStG, entitled 'Tax declaration, chargeability', provides in the first subparagraph thereof that the person liable for payment must submit a declaration in which he calculates the duty owing himself.

The dispute in the main proceedings and the questions referred for a preliminary ruling

17 In June 2011, KLE used fuel assemblies in the reactor of the Emsland nuclear power station to start a self-sustaining chain reaction.

18 KLE submitted to the Hauptzollamt a declaration for the purpose of nuclear fuel duty, dated 13 July 2011, in which it calculated, in accordance with the KernbrStG provisions in force as of 1 January 2011, that an amount of EUR 154 117 745 was owing in respect of that duty.

19 Subsequently, KLE initiated an opposition procedure in respect of that declaration. By decision of 16 November 2011, its claim was rejected. KLE subsequently brought proceedings challenging that decision before the Finanzgericht Hamburg (Finance Court, Hamburg) on 30 November 2011. By notice of assessment of 28 August 2013, the Hauptzollamt amended the amount of duty payable, fixing it at EUR 154 117 455. It is that notice which forms the subject matter of the dispute in the main proceedings.

20 It is apparent from the information provided by the referring court that the parties to the main proceedings disagree, in particular, as to whether KernbrStG is compatible with EU law.

21 KLE is of the view, first, that Directives 2008/118 and 2003/96 authorise the taxation of electricity as an end product, but not the levying at the same time of excise duty on energy sources consumed for the purpose of producing electricity. Second, KLE considers that KernbrStG is at odds with

Article 107 TFEU, as that law affects competition between different electricity producers, in that it taxes the production of electricity by nuclear power stations, whereas the other methods of producing electricity which do not produce CO_2 emissions and those methods which are responsible for such emissions are not taxed. Third, as it encourages producers of electricity to switch to production methods that are less favourable to the reduction of CO_2 emissions, KernbrStG is incompatible with Article 191 TFEU et seq., in conjunction with Article 4(3) TEU. Lastly, according to KLE, KernbrStG is at odds with the logic underlying Article 93 EA and with the objective set out in Article 191 EA, 192 EA and in the Protocol of promoting the production of electricity from nuclear energy, which does not produce CO_2 emissions.

22 The Hauptzollamt is of the view that Directive 2008/118 concerns only the movement between Member States of excise goods and that Directive 2003/96 contains no rules applicable to nuclear fuel. It considers that KernbrStG is not a State aid measure within the meaning of Article 107 TFEU and that, in any event, that TFEU provision cannot confer on KLE the right to secure the annulment of its nuclear fuel duty declaration of 13 July 2011. Moreover, the second subparagraph of Article 194(2) TFEU gives Member States the freedom to choose whether or not to adopt the actual principle of using nuclear energy and whether to make the use of such energy subject to tax. According to the Hauptzollamt, the KernbrStG is not at odds with the provisions of the EAEC Treaty as that law does not provide that the European Atomic Energy Community (EAEC) is liable for nuclear fuel duty and nor does it make it liable for payment of that duty by virtue of its right to property. The Hauptzollamt is of the view that those provisions do not affect either Member States' powers to determine the arrangements for their energy supply or their powers to impose taxes in connection with the operation of nuclear power stations.

23 It is also apparent from the order for reference that, in a parallel procedure, the Finanzgericht Hamburg has referred the question of whether KernbrStG complies with the Basic Law for the Federal Republic of Germany to the Bundesverfassungsgericht.

24 The Finanzgericht Hamburg is uncertain in that regard whether it is possible to submit questions to the Court for a preliminary ruling while the procedure before the Bundesverfassungsgericht is still pending.

25 The Finanzgericht Hamburg states, in the first place, that if the Bundesverfassungsgericht, which alone has jurisdiction to review the constitutionality of federal laws and, if appropriate, to declare them null and void, were to find that the KernbrStG was invalid and inapplicable *ex tunc*, KLE's nuclear fuel duty declaration of 13 July 2011 would have to be annulled *ab initio* on that ground and the interpretation of EU law would no longer be decisive for the outcome of the dispute in the main proceedings. However, the referring court considers that the fact that the matter has been referred to the Bundesverfassungsgericht does not permit it to proceed on the basis that it will not be required to apply that law and that, as a consequence, the question whether KernbrStG complies with EU law will no longer arise, as that law remains valid until and unless held otherwise. Moreover, the Bundesverfassungsgericht might declare that that law is invalid and inapplicable only with future effect.

26 In the second place, the referring court states that it is interpreting the first sentence of Paragraph 100(1) of the Basic Law for the Federal Republic of Germany as prohibiting courts from adjudicating on the substance until the Bundesverfassungsgericht has given its decision, but as not prohibiting references to the Court for preliminary rulings.

27 In the third place, the Finanzgericht Hamburg states that, if an interpretation of EU law by means of a reference for a preliminary ruling could be sought only after the Bundesverfassungsgericht had given a decision to the effect that KernbrStG complied with the constitution, the total duration of the proceedings could extend over several years. It is necessary to have regard, in particular, to the requirement to have the case dealt with within a reasonable time.

28 In those circumstances, the Finanzgericht Hamburg decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Does the second sentence, in conjunction with section (b) of the first sentence, of Article 267 TFEU justify a court of a Member State in referring to the Court of Justice of the European Union questions on the interpretation of EU law which have been put to the national court in connection with the legality of a national law, even if the national court not only has doubts concerning the legality of the national law under EU law, but also considers that the national law is inconsistent with the national Constitution and therefore, in a parallel case, the national court has already sought a decision from the Constitutional Court which, under national law, alone has jurisdiction to decide on the constitutionality of laws, but the Constitutional Court has not yet given a decision?

If question 1 is answered in the affirmative:

(2) Do Directives 2008/118 and 2003/96, which were adopted for the harmonisation of excise duty and for energy products and electricity in the European Union, preclude the introduction of a national duty which is levied on nuclear fuels used for the commercial production of electricity? Does this depend on whether the national duty can be expected to be passed on to consumers by means of the electricity price and, if appropriate, what is meant by “passed on”?

(3) Can an undertaking resist a duty which a Member State imposes in order to raise revenue on the use of nuclear fuels for the commercial production of electricity, by objecting that the levying of the duty constitutes aid contrary to EU law under Article 107 TFEU? If the answer to the previous question is in the affirmative: does KernbrStG, under which a tax for raising revenue is imposed only on undertakings which produce electricity commercially by using nuclear fuels, constitute State aid within the meaning of Article 107 TFEU? What circumstances are to be taken into account in considering whether other undertakings which are not taxed in the same way are in a similar factual and legal situation?

(4) Is the levying of the German nuclear fuel duty inconsistent with the provisions of the EAEC Treaty?’

Consideration of the questions referred

Question 1

29 By its first question, the Finanzgericht Hamburg seeks, in essence, to ascertain whether Article 267 TFEU must be interpreted as meaning that a national court which has doubts as to whether national legislation is compatible with both EU law and with the Constitution of the Member State concerned loses the right or, as the case may be, is exempt from the obligation to submit questions to the Court concerning the interpretation or validity of that law, on the ground that an interlocutory procedure for review of the constitutionality of that legislation is pending before the national court responsible for carrying out such review.

30 It should be noted that Article 267 TFEU confers jurisdiction on the Court to give preliminary rulings concerning both the interpretation of the Treaties and acts of the institutions, bodies, offices or agencies of the European Union and the validity of those acts. The second paragraph of Article 267 TFEU provides that a national court or tribunal may refer such questions to the Court if it considers that a decision on the question is necessary to enable it to give judgment, and the third paragraph of Article 267 TFEU provides that the national court or tribunal must bring the matter before the Court if there is no judicial remedy under national law against its decisions.

31 In the first place, it is apparent from Article 267 TFEU that, while it may be convenient, in certain circumstances, for the facts of the case to be established and for questions of purely national law to be settled at the time the reference is made to the Court (see judgments in *Creamery Milk Suppliers Association and Others*, 36/80 and 71/80, EU:C:1981:62, paragraph 6; *Meilicke*, C-83/91, EU:C:1992:332, paragraph 26; and *JämO*, C-236/98, EU:C:2000:173, paragraph 31), national courts have the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving interpretation of provisions of EU law, or consideration of their validity, necessitating a decision on their part (see, inter alia, judgments in *Mecanarte*, C-348/89, EU:C:1991:278, paragraph 44; *Cartesio*, C-210/06, EU:C:2008:723, paragraph 88; *Melki and Abdeli*, C-188/10 and C-189/10, EU:C:2010:363, paragraph 41; and *A*, C-112/13, EU:C:2014:2195, paragraph 35).

32 In the second place, the Court has stated that a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of EU law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means (see, inter alia, judgments in *Simmenthal*, 106/77, EU:C:1978:49, paragraphs 21 and 24; *Filipiak*, C-314/08, EU:C:2009:719, paragraph 81; *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 45; and *A*, C-112/13, EU:C:2014:2195, paragraph 36).

33 Any provision of a national legal system, including provisions of a constitutional nature, and any legislative, administrative or judicial practice which might impair the effectiveness of EU law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent EU rules from having full force and effect are incompatible with those requirements, which are the very essence of EU law (see judgments in *Simmenthal*, 106/77, EU:C:1978:49, paragraph 22; *Factortame and Others*, C-213/89, EU:C:1990:257, paragraph 20; and, to that effect, *Križan and Others*, C-416/10, EU:C:2013:8, paragraph 70). This would be the case in the event of a conflict between a provision of EU law and a national law, if the solution of the conflict were to be reserved to an authority with a discretion of its own, other than the court called upon to apply EU law, even if such an impediment to the full effectiveness of EU law were only temporary (see judgment in *A*, C-112/13, EU:C:2014:2195, paragraph 37 and the case-law cited).

34 In the third place, the Court has held that a national court which, in a case concerning EU law, considers that a provision of national law is not only contrary to EU law, but also unconstitutional, does not lose the right or escape the obligation under Article 267 TFEU to refer questions to the Court of Justice on the interpretation or validity of EU law by reason of the fact that the declaration that a rule of national law is unconstitutional is subject to a mandatory reference to the constitutional court. The effectiveness of EU law would be in jeopardy if the existence of an obligation to refer a matter to a constitutional court could prevent a national court hearing a case governed by EU law from exercising the right conferred on it by Article 267 TFEU to refer to the Court of Justice questions concerning the interpretation or validity of EU law in order to enable it to decide whether or not a provision of national law was compatible with that EU law (judgment in *Mecanarte*, C-348/89, EU:C:1991:278, paragraphs 39, 45 and 46; *Melki and Abdeli*, C-188/10 and C-189/10, EU:C:2010:363, paragraph 45; and *A*, C-112/13, EU:C:2014:2195, paragraph 38).

35 The Court has concluded from all the above considerations that the functioning of the system of cooperation between the Court of Justice and the national courts established by Article 267 TFEU requires, as does the principle of primacy of EU law, the national court to be free to refer to the Court for a preliminary ruling any question that it considers necessary, at whatever stage of the proceedings it considers appropriate, even at the end of an interlocutory procedure for the review of constitutionality (judgment in *A*, C-112/13, EU:C:2014:2195, paragraph 39).

36 For the reasons given in paragraphs 31 to 35 above, the effectiveness of EU law would be impaired and the effectiveness of Article 267 TFEU diminished if, as a result of the fact that an interlocutory procedure for review of constitutionality is pending, the national court were precluded from referring questions to the Court for a preliminary ruling and immediately applying EU law in a manner consistent with the Court's decision or case-law (see, to that effect, judgment in *Simmenthal*, 106/77, EU:C:1978:49, paragraph 20).

37 With regard to the fact that the first sentence of Paragraph 100(1) of the Basic Law for the Federal Republic of Germany imposes on a national court which considers that a law is unconstitutional not only the obligation to seek a decision from the Bundesverfassungsgericht as to whether that law complies with the said Basic Law but also the obligation to stay proceedings, it should be recalled that the existence of a national procedural rule cannot call into question the discretion enjoyed by national courts to make a reference to the Court of Justice for a preliminary ruling where they have doubts, as in the case before the referring court, as to the interpretation of EU law (judgment in *Križan and Others*, C-416/10, EU:C:2013:8, paragraph 67 and the case-law cited).

38 Lastly, with regard to the effect of the procedure before the Bundesverfassungsgericht on the relevance of an interpretation of EU law for the outcome of the dispute before the referring court, the Court finds that, in so far as, irrespective of the constitutionality of the provisions at issue in the main proceedings, that dispute and the questions referred relate to the compatibility with EU law of national legislation which levies a duty on the use of nuclear fuel, it is not manifestly obvious that the interpretation sought bears no relation to the actual facts of the main action or its purpose, that the problem is hypothetical, or that the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, to that effect, judgment in *Filipiak*, C-314/08, EU:C:2009:719, paragraphs 43 and 45).

39 In the light of the foregoing considerations, the answer to the first question is that Article 267 TFEU must be interpreted as meaning that a national court which has doubts as to whether national legislation is compatible with both EU law and with the Constitution of the Member State concerned neither lose the right nor, as the case may be, is exempt from the obligation to submit questions to the Court concerning the interpretation or validity of that law, on the ground that an interlocutory procedure for review of the constitutionality of that legislation is pending before the national court responsible for carrying out such review.

Question 2

40 By its second question, the Finanzgericht Hamburg seeks, in essence, to ascertain whether, on the one hand, Article 14(1)(a) of Directive 2003/96 and, on the other, Article 1(1) and (2) of Directive 2008/118 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which levies a duty on the use of nuclear fuel for the commercial production of electricity.

41 First, it is apparent from the order for reference that the Finanzgericht Hamburg is uncertain whether nuclear fuel should benefit from the exemption under Article 14(1)(a) of Directive 2003/96. The referring court also asks whether, even it were found that nuclear fuel is not covered by that exemption, it should none the less be applied to that fuel by analogy.

42 Second, the referring court seeks to ascertain whether the duty introduced by KernbrStG constitutes an excise duty which is levied indirectly on the consumption of electricity falling within Directive 2003/96, for the purpose of Article 1(1) of Directive 2008/118, or another indirect tax on that product, for the purpose of Article 1(2) of that directive and, if it is covered by one of those provisions, whether that duty complies with the provisions of Directive 2003/96 or Directive 2008/118, respectively. The Finanzgericht Hamburg is uncertain, in particular, whether the fact that the burden of a tax is borne

by persons other than those liable for payment of the tax is decisive for the purposes of its classification under Article 1 of Directive 2008/118 and whether the nuclear fuel used must be commensurate with the amount of electricity produced for that purpose.

Directive 2003/96

43 Without prejudice to whether acts of secondary law adopted on the basis of Article 93 EC (now Article 113 TFEU), such as Directive 2003/96, are intended to apply to nuclear fuel, which is covered by the provisions of the EAEC Treaty on the nuclear common market, it should be noted that that fuel does not, in any event, qualify for the exemption provided in Article 14(1)(a) of that directive.

44 Article 1 of Directive 2003/96 requires Member States to impose taxation on energy products in accordance with that directive, which seeks to impose, as is apparent from recitals 2 and 3 in the preamble thereto, minimum levels of taxation at EU level for most energy products.

45 Article 14 of Directive 2003/96 sets out an exhaustive list of the exemptions which the Member States must apply in connection with the taxation of energy products and electricity (see, to that effect, judgment in *Fendt Italiana*, C-145/06 and C-146/06, EU:C:2007:411, paragraph 36).

46 Furthermore, inasmuch as it imposes on Member States the obligation not to impose taxation under the directive on 'energy products and electricity used to produce electricity and electricity used to maintain the ability to produce electricity', Article 14(1)(a) of Directive 2003/96 defines clearly the products covered by the exemption (see, to that effect, judgment in *Flughafen Köln/Bonn*, C-226/07, EU:C:2008:429, paragraph 29).

47 It should be noted in that regard that Article 2(1) of Directive 2003/96 defines 'energy products' for the purposes of that directive by drawing up an exhaustive list of the products covered by that definition by reference to the codes of the combined nomenclature.

48 It is sufficient to observe that, as it does not appear on that list, the nuclear fuel that is the subject of KernbrStG does not constitute an 'energy product' for the purposes of Directive 2003/93 and it is not, therefore, covered by the exemption laid down in Article 14(1)(a) of that directive.

49 Accordingly, there is no need to determine whether that product falls within the scope of Directive 2003/96 or whether it falls outside that scope by virtue of Article 2(3) and (4) of that directive.

50 KLE maintains that the exemption laid down in Article 14(1)(a) of Directive 2003/96 must, none the less, be applied by analogy to nuclear fuel, on the ground that the purpose of that directive is to implement the principle that a single rate of duty should be applied to electricity, which would preclude the levying at the same time of a duty on that energy and a duty on the source of its production. Moreover, the fact that that fuel does not appear on the list of energy products within the meaning of that directive is due to an unintended lacuna on the part of the EU legislature, as it could not have foreseen that the Member States would adopt a measure, such as KernbrStG, which, in so far as it introduces a duty only on a process for generating electricity which does not produce CO_2 emissions, is at odds with EU policy on reducing such emissions and with recitals 6 and 7 in the preamble to that directive.

51 It should be noted in that regard that it is not possible to conclude, on the basis of the arguments put forward by KLE, that there exists a principle to the effect that a duty cannot be levied at the same time on the consumption of electricity and on the source from which that energy is produced. It is apparent from page 5 of the Explanatory Memorandum to the Proposal for a Council Directive restructuring the Community framework for the taxation of energy products (OJ 1997 C 139, p. 14), to which KLE refers, that, at the very most, 'there are two possible ways of bringing electricity within the scope of

the taxation arrangements: by taxing the fuels used in the production of electricity (input tax) or by taxing the electricity itself (output tax)'. It is not apparent from that proposal that those two methods are, as a matter of principle, mutually exclusive, the European Commission having accepted that they are complementary by reserving in that proposal the option for the Member States 'to add an additional (non-harmonised) input tax in the case of non-environmentally desirable fuels'. Furthermore, nor is it apparent from that proposal that the Commission intended to propose that Member States should be under an obligation to exempt products that did not form part of the harmonised tax system from all forms of taxation.

52 Moreover, if the operation of Articles 2(1) and 14(1)(a) of Directive 2003/96 is not to be radically changed, any inconsistency between national legislation and EU policy on reduction of CO_2 emissions cannot, contrary to the clear intention of the EU legislature, justify interpreting those provisions as being applicable to products other than energy products and electricity within the meaning of that directive.

53 It follows from the considerations set out at paragraphs 51 and 52 above that the exemption laid down in Article 14(1)(a) of Directive 2003/96 cannot be applied by analogy to the nuclear fuel that is the subject of KernbrStG.

54 Accordingly, Article 14(1)(a) of Directive 2003/96 must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which levies a duty on the use of nuclear fuel for the commercial production of electricity.

Directive 2008/118

55 As regards whether the duty introduced by KernbrStG constitutes 'excise duty' on electricity within the meaning of Article 1(1) of Directive 2008/118 or 'other indirect taxes' on that product within the meaning of Article 1(2) of the directive, it should be noted that the directive does not define those terms.

56 However, it is clear from recital 9 in the preamble to Directive 2008/118 that excise duty is a tax on consumption, namely an indirect tax. Furthermore, it is apparent from the wording of Article 1(1) of that directive that that provision relates to excise duty which is levied, directly or indirectly, on the consumption of, inter alia, energy products and electricity covered by Directive 2003/96.

57 It should be noted in that regard, as observed by the German Government and the Commission, that in the specific case of energy products and electricity, Article 4 of Directive 2003/96, which requires Member States to observe certain minimum levels of taxation for those products, provides a degree of guidance as to the nature of the taxes covered by Article 1(1) of Directive 2008/118. Article 4(2) of Directive 2003/96 defines the 'level of taxation' which Member States must apply to the products in question as the 'total charge levied in respect of all indirect taxes (except VAT) calculated directly or indirectly on the quantity of energy products and electricity at the time of release for consumption'.

58 With regard to the term 'other indirect taxes' within the meaning of Article 1(2) of Directive 2008/118, it should be noted that that provision, which seeks to take due account of the Member States' different fiscal traditions in this regard and the frequent recourse to indirect taxation for the implementation of non-budgetary policies, allows Member States to introduce, in addition to minimum excise duty, other indirect taxes having a specific purpose (see, by analogy, judgment in *Commission* v *France*, C-434/97, EU:C:2000:98, paragraphs 18 and 19).

59 It follows that the term 'other indirect taxes' within the meaning of Article 1(2) of Directive 2008/118 refers to indirect taxes which are levied on the consumption of the products listed in Article 1(1) of that directive — other than 'excise duty' within the meaning of that provision — and are levied for specific purposes.

60 Accordingly, in order to determine whether the duty introduced by KernbrStG falls within Article 1(1) of Directive 2008/118 or in Article 1(2) of that directive, it is necessary, first of all, to ascertain whether that duty is an indirect tax which is levied directly or indirectly on the consumption of electricity covered by Directive 2003/96.

61 In that regard, the Court has held, in connection with certain fuels covered by Council Directive 92/82/EEC of 19 October 1992 on the approximation of the rates of excise duty on mineral oils (OJ 1992 L 316, p. 19), which was replaced by Directive 2003/96, that a national environmental protection tax levied on aviation which is calculated by reference to data on fuel consumption and emissions of hydrocarbons and nitric oxide during an average flight by the type of aircraft used must be regarded as a tax levied on the consumption of such fuels, as there is a direct and inseverable link between fuel consumption and the polluting substances which are emitted in the course of such consumption (see, to that effect, judgment in *Braathens*, C-346/97, EU:C:1999:291, paragraphs 22 and 23).

62 It is apparent from the order for reference that the duty introduced by KernbrStG, first, is payable when fuel assemblies or individual fuel rods are used for the first time in a nuclear reactor, starting a self-sustaining chain reaction, for the commercial production of electricity and, second, is calculated on the basis of the amount of nuclear fuel used, a common rate being applied to all types of such fuel.

63 It should be noted in that regard that, according to the information provided by the referring court, the amount of electricity produced by the reactor of a nuclear power station is not directly commensurate with the amount of nuclear fuel used, but may vary according to the nature and properties of the fuel used and the yield level of the reactor concerned. Moreover, as the Commission observed, the duty introduced by KernbrStG could be levied on the basis that a self-sustaining chain reaction has been started, without any electricity having necessarily even been produced or, as a consequence, consumed.

64 Furthermore, unlike the tax at issue in the case which gave rise to the judgment in *Braathens* (C-346/97, EU:C:1999:291), which was levied directly on certain air transport operators, the tax introduced by KernbrStG is not levied directly on the consumer of the excise product but on the electricity producer. It is true that the financial burden of that tax could, in principle, as the Advocate General observed at point 61 of his Opinion, be borne indirectly in its entirety by the final consumer if the producer included the amount of that tax in the price charged for each amount of the product released for consumption, thus rendering the tax neutral for the producer. However, it is apparent from the analysis carried out by the referring court on that point that the tax introduced by KernbrStG cannot be passed on in its entirety to the final electricity consumer in view of, inter alia, the particular nature of that product, it not being possible to determine the origin of any given amount of electricity, and of the pricing mechanism for electricity applied in Germany, which is characterised by the fact that the price of electricity is, essentially, a single price arrived at by negotiation on the energy exchange market.

65 In the light of the above considerations, it is not apparent that a direct and inseverable link, within the meaning of *Braathens* (C-346/97, EU:C:1999:291), exists between the use of nuclear fuel and the consumption of electricity produced by the reactor of a nuclear power plant. Nor can the duty at issue be regarded as being calculated directly or indirectly on the quantity of electricity at the time of release for consumption of that product, within the meaning of Article 4(2) of Directive 2003/96.

66 As a consequence, the tax introduced by KernbrStG, which is not levied directly or indirectly on the consumption of electricity covered by Directive 2003/96, or that of any other excise product, does not fall within Article 1(1) of Directive 2008/118 or Article 1(2) of that directive.

67 It follows that Article 1 of Directive 2008/118 does not preclude national legislation, such as that at issue in the main proceedings, which levies a duty on the use of nuclear fuel for the commercial production of electricity.

68 In the light of the foregoing considerations, the answer to Question 2 is that Article 14(1)(a) of Directive 2003/96 and Article 1(1) and (2) of Directive 2008/118 are to be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which levies a duty on the use of nuclear fuel for the commercial production of electricity.

Question 3

69 By its third question, the referring court seeks, in essence, to ascertain whether Article 107 TFEU is to be interpreted as precluding national legislation, such as that at issue in the main proceedings, which levies a duty on the use of nuclear fuel for the commercial production of electricity and, if that question is answered in the affirmative, whether that provision must be interpreted as meaning that those liable for payment of such a duty may challenge it on the ground that it constitutes State aid, which is prohibited by that provision.

70 Article 107(1) TFEU covers 'any aid granted by a Member State or through State resources in any form whatsoever'.

71 According to settled case-law, the definition of aid is more general than that of a subsidy as it includes not only positive benefits, such as subsidies themselves, but also State 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 (see judgments in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, C-143/99, EU:C:2001:598, paragraph 38; *Paint Graphos and Others*, C-78/08 to C-80/08, EU:C:2011:550, paragraph 45; and *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 71).

72 Consequently, a measure by which the public authorities grant certain undertakings advantageous tax treatment which, although not involving the transfer of State resources, places the beneficiaries of such treatment in a more favourable financial position than that of other taxpayers amounts to State aid within the meaning of Article 107(1) TFEU (judgments in *Banco Exterior de España*, C-387/92, EU:C:1994:100, paragraph 14, and *Paint Graphos and Others*, C-78/08 to C-80/08, EU:C:2011:550, paragraph 46 and the case-law cited).

73 Article 107(1) TFEU prohibits aid 'favouring certain undertakings or the production of certain goods', that is to say, selective aid.

74 As regards appraisal of the condition of selectivity, it is clear from settled case-law that Article 107(1) TFEU requires assessment of whether, under a particular legal regime, a national measure is such as to favour certain undertakings or the production of certain goods in comparison with others which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation (judgments in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, C-143/99, EU:C:2001:598, paragraph 41; *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraph 82; and *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 75).

75 It should also be noted that Article 107(1) TFEU does not distinguish between measures of State intervention by reference to their causes or their aims but defines such measures in relation to their effects, and thus independently of the techniques used (judgments in *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraphs 85 and 89, and *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 87).

76 In that regard, KLE contends, in essence, that KernbrStG forms part of a regime for the taxation of energy sources used for the production of electricity or, at the very least, a regime for the taxation of energy sources used for the production of electricity which do not contribute to CO_2 emissions. The effect of KernbrStG is that energy sources other than nuclear fuel used for the production of electricity are not taxed.

77 However, subject to verification by the referring court, it is not apparent from the material available to the Court that — regardless of the fact that the energy sector in Germany is, from a tax perspective, according to the information provided by that court, heavily regulated and subject to measures of State intervention — it is possible, in the light of the effects of that degree of regulation and those measures, to identify a tax regime which has as its objective the taxation of energy sources used to produce electricity or energy sources used to produce electricity which do not contribute to CO_2 emissions.

78 On the other hand, it is apparent from the order for reference that, in accordance with the explanatory memorandum to the proposal for the law which culminated in the adoption of KernbrStG, that law introduced for a specific period, namely from 1 January 2011 to 31 December 2016, a duty on the use of nuclear fuel for the commercial production of electricity with a view to raising revenue intended, inter alia, to contribute, in the context of fiscal consolidation and in accordance with the polluter-pays principle, to a reduction in the burden entailed for the Federal budget by the rehabilitation required at the Asse II mining site, where radioactive waste from the use of nuclear fuel is stored.

79 It must be noted that methods of producing electricity, other than that based on nuclear fuel, are not affected by the rules introduced by KernbrStG and that, in any event, they are not, in the light of the objective pursued by those rules, in a factual and legal situation that is comparable to that of the production method based on nuclear fuel, as only that method generates radioactive waste arising from the use of such fuel.

80 It follows that KernbrStG is not a selective measure, for the purpose of Article 107(1) TFEU, and it does not therefore constitute State aid prohibited by that provision.

81 Therefore, there is no need to answer the second part of the third question.

82 The answer to Question 3 is therefore that Article 107 TFEU must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which levies a duty on the use of nuclear fuel for the commercial production of electricity.

Question 4

83 It is apparent from the information provided by the referring court that, by its fourth question, it seeks, in essence, to ascertain whether the first paragraph of Article 93 EA, Article 191 EA, in conjunction with paragraph 1 of Article 3 of the Protocol, and the second paragraph of Article 192 EA, in conjunction with the second paragraph of Article 1 EA and Article 2(d) EA, are to be interpreted as precluding national legislation, such as that at issue in the main proceedings, which imposes a duty on the use of nuclear fuel.

84 As regards the first paragraph of Article 93 EA, it should be noted that that provision requires Member States to abolish between themselves all customs duties on imports and exports or charges having equivalent effect and all quantitative restrictions on imports and exports in respect of the goods and products covered by the provisions of the EAEC Treaty relating to the nuclear common market.

85 It is therefore necessary to ascertain whether the duty introduced by KernbrStG, which does not constitute a customs duty or a quantitative restriction on imports and exports, constitutes a charge having equivalent effect to a customs duty within the meaning of that provision.

86 In that regard, Article 93 EA, together with the other provisions of Chapter 9 in Title II of the EAEC Treaty, constitute the application, in a highly specialised field, of the legal conceptions which form the basis of the structure of the general common market (see, to that effect, Ruling 1/78, EU:C:1978:202, paragraph 15).

87 With regard to the classification of a national tax as a charge having equivalent effect to a customs duty, it should be borne in mind that the justification for the prohibition of customs duties and any charges having an equivalent effect lies in the fact that any pecuniary charge, however small, imposed on goods by reason of the fact that they cross a frontier, constitutes an obstacle to the movement of goods which is aggravated by the resulting administrative formalities (see, by analogy, judgment in O *rgacom*, C-254/13, EU:C:2014:2251, paragraph 22 and the case-law cited).

88 Any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense, constitutes a charge having equivalent effect (see, to that effect, judgments in *Stadtgemeinde Frohnleiten and Gemeindebetriebe Frohnleiten*, C-221/06, EU:C:2007:657, paragraph 27, and *Orgacom*, C-254/13, EU:C:2014:2251, paragraph 23).

89 It should be recalled in that connection that the essential feature of a charge having equivalent effect to a customs duty is that it is borne specifically by an imported product, to the exclusion of the similar domestic product (see, to that effect, judgments in *Commission* v *France*, 90/79, EU:C:1981:27, paragraphs 12 and 13, and *Orgacom*, C-254/13, EU:C:2014:2251, paragraph 28).

90 The Court has none the less recognised that a charge borne by a product imported from another Member State, when there is no identical or similar domestic product, does not constitute a charge having equivalent effect if it relates to a general system of internal dues applied systematically to categories of products in accordance with objective criteria irrespective of the origin of the products (see, to that effect, judgments in *Commission* v *France*, 90/79, EU:C:1981:27, paragraph 14, and *CRT France International*, C-109/98, EU:C:1999:199, paragraph 13).

91 It must be noted that the duty introduced by KernbrStG is levied not because nuclear fuel has crossed a frontier but, as Paragraph 1(1) of that law makes clear, because it is used for the commercial production of electricity, irrespective of the source of that fuel. Similarly, KernbrStG makes no such a distinction as regards the rate of taxation or the person liable for payment of the duty.

92 It follows that the duty introduced by KernbrStG does not constitute a charge having equivalent effect to a customs duty within the meaning of the first paragraph of Article 93 EA.

93 In the light of the case-law cited at paragraph 90 above, that finding is not affected by KLE's claim that only a very small amount of nuclear fuel is obtained in Germany.

94 With regard to Article 191 EA and the first paragraph of Article 3 of the Protocol, it is apparent from the combined application of those provisions that the EAEC, its assets, revenues and other property are exempt from all direct taxes.

95 It should be noted in that regard that KernbrStG introduced a duty on the use of nuclear fuel for the commercial production of electricity, not a direct tax on that fuel.

96 While Article 86 EA provides that that fuel is the property of the EAEC, the fact nevertheless remains that, under Article 87 EA, the right to use and consume that fuel belongs to Member States, persons or undertakings when that fuel has properly come into their possession.

97 It follows that Article 191 EA, in conjunction with the first paragraph of Article 3 of the Protocol, is to be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which levies a duty on the use of nuclear fuel.

98 Furthermore, at the hearing, KLE argued, in essence, that, under German tax law, excise goods serve as a guarantee of payment of excise duties applicable to them. Accordingly, the EAEC, as owner of nuclear fuel, could be required to act as guarantor for payment, by the person liable, of the duty introduced by KernbrStG. Such a situation would be contrary to Article 3 of the Protocol.

99 It must be noted that that argument, which was raised and discussed for the first time at the hearing before the Court, does not appear either in the order for reference or in the written observations submitted by the parties concerned. Accordingly, in the absence of more detailed and specific information on that point, the Court finds that the documents submitted to it do not indicate with sufficient clarity that that matter may be relevant for the purpose of resolving the dispute in the main proceedings and, therefore, of any assistance to the national court, which, as the court that must resolve the dispute, is best placed to determine the relevance of the questions referred to the Court in the light of the particular features of the case before it (see, to that effect, judgment in *Flughafen Köln/Bonn*, C-226/07, EU:C:2008:429, paragraphs 37 and 38)

100 As regards, lastly, the second paragraph of Article 192 EA, that provision requires Member States to abstain from any measure which could jeopardise the attainment of the objectives of the EAEC Treaty.

101 The referring court is asking, in essence, whether the duty introduced by KernbrStG has the effect of jeopardising the attainment of the EAEC's objective of establishing the conditions necessary for the speedy establishment and growth of nuclear industries, set out in the second paragraph of Article 1 EA, and the fulfilment of the EAEC's duty to ensure that all its users receive a regular and equitable supply of ores and nuclear fuels, laid down in Article 2(d) EA.

102 It should be noted, in that regard, first, that the combined application of the second paragraph of Article 192 EA and the second paragraph of Article 1 EA does not have the effect of requiring Member States to maintain or increase their level of use of nuclear fuel or of preventing them from taxing such use, which would make such use more costly and, therefore, less attractive.

103 Second, the implementation of the obligation laid down in Article 2(d) EA is the subject of Chapter 6 in Title II of the EAEC Treaty (Articles 52 to 76), which establishes a common supply policy for ores, source materials and special fissile materials (judgment in *ENU* v *Commission*, C-357/95 P, EU:C:1997:144, paragraph 2).

104 It is not apparent from the information available to the Court that the duty introduced by KernbrStG, which, as observed by KLE, undoubtedly has the effect of making the use of nuclear fuel for the commercial production of electricity more costly, constitutes an infringement of the Member States' obligations set out in those provisions or that, in general terms, it conflicts with the principles underlying that policy, in particular the principle of equal access to resources set out in Article 52 EA or the principles relating to price setting set out in Articles 67 EA and 69 EA. Indeed, as observed by the Commission, that duty is not liable to affect the supply of fuel to operators of nuclear power stations as it is levied not on the purchase of nuclear fuel but on the use of such fuel.

105 It follows that the duty in question is not liable to jeopardise the fulfilment of the EAEC's duty to ensure that all that community's users receive a regular and equitable supply of ores and nuclear fuels, laid down in Article 2(d) EA.

106 In the light of the foregoing considerations, the answer to Question 4 is that the first paragraph of Article 93 EA, Article 191 EA, in conjunction with the first paragraph of Article 3 of the Protocol, and the second paragraph of Article 192 EA, in conjunction with the second paragraph of Article 1 EA and Article 2(d) EA, are to be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which imposes a duty on the use of nuclear fuel for the commercial production of electricity.

Costs

107 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **Article 267 TFEU must be interpreted as meaning that a national court which has doubts as to whether national legislation is compatible with both EU law and with the Constitution of the Member State concerned neither loses the right nor, as the case may be, is exempt from the obligation to submit questions to the Court of Justice of the European Union concerning the interpretation or validity of that law, on the ground that an interlocutory procedure for review of the constitutionality of that legislation is pending before the national court responsible for carrying out such review.**

2. **Article 14(1)(a) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity and Article 1(1) and (2) of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC are to be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which levies a duty on the use of nuclear fuel for the commercial production of electricity.**

3. **Article 107 TFEU must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which levies a duty on the use of nuclear fuel for the commercial production of electricity.**

4. **The first paragraph of Article 93 EA, Article 191 EA, in conjunction with the first paragraph of Article 3 of the Protocol (No 7) on the Privileges and Immunities of the European Union annexed to the EU, FEU and EAEC Treaties, and the second paragraph of Article 192 EA, in conjunction with the second paragraph of Article 1 EA and Article 2(d) EA, are to be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which imposes a duty on the use of nuclear fuel for the commercial production of electricity.**

[Signatures]