



Reports of Cases

OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 22 February 2018¹

Case C-31/17

Cristal Union, the legal successor to Sucrerie de Toury SA
v
Ministre de l'Économie et des Finances

(Request for a preliminary ruling from the Conseil d'État (Council of State, France))

(Reference for a preliminary ruling — Directive 2003/96/EC — Taxation of energy products and electricity — Article 14(1)(a) — Compulsory exemption from taxation of energy products used to produce electricity — Article 15(1)(c) — Power of Member States to apply total or partial exemptions or reductions in the level of taxation to energy products used for combined heat and power generation — Joint application of Article 14(1)(a) and Article 15(1)(c))

1. In the present case, the Court is called upon to rule on the application of Council Directive 2003/96/EC² to electricity produced from cogeneration.
2. Cogeneration is the simultaneous generation in one process of electricity and thermal energy.³ A conventional power plant produces electricity by, for instance, burning a fossil fuel such as oil, coal, or natural gas to release heat. That heat is used to boil water for steam. The steam rotates a turbine that activates a generator, which produces electricity. The problem with conventional power plants is their low efficiency. Indeed, when the water boiled into steam is cooled down, heat is released into the environment. That heat is wasted. By contrast, a combined heat and power plant recovers the heat normally lost in power generation to provide useful thermal energy. Therefore, cogeneration is more efficient than conventional electricity generation. It also results in lower greenhouse gas emissions.
3. Directive 2003/96 prescribes minimum levels of taxation for energy products used as heating fuels or motor fuels⁴ (such as natural gas) and electricity.⁵
4. However, Article 14(1)(a) of Directive 2003/96 requires Member States to exempt from taxation energy products used to produce electricity. Consequently, no excise duties are levied on those products. Excise duties are levied only on the electricity produced.

¹ Original language: English.

² Directive of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ 2003 L 283, p. 51).

³ See Article 2(30) of Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC (OJ 2012 L 315, p. 1).

⁴ See recital 22 and Articles 7 to 9 of Directive 2003/96.

⁵ See Article 10 of Directive 2003/96.

5. Moreover, Article 15(1)(c) of Directive 2003/96 allows Member States to exempt totally or partially, or to apply reduced levels of taxation, to energy products used for combined heat and power generation. Unlike Article 14(1)(a) of the same directive, Article 15(1)(c) does not provide for a compulsory exemption. Consequently, energy products used for the combined generation of heat and electricity are only exempt from excise duties (or applied reduced levels of taxation)⁶ if the Member State concerned exercises the option conferred by Article 15(1)(c) of Directive 2003/96. If the Member State concerned does not exercise that option, those products are subject to excise duties. Whether or not that option is exercised, the electricity produced is subject to excise duties (no excise duties are ever levied on heat since heat falls outside the scope of Directive 2003/96).⁷

6. There are two ways to look at the tax regime prescribed by Directive 2003/96 for energy products used for combined heat and power generation.

7. On the one hand, energy products used for combined heat and power generation may be considered as falling within the scope of Article 15(1)(c) of Directive 2003/96 alone. The tax regime of those products would be as described in point 5 above. If the option conferred by that provision is exercised, the exemption would apply to those products in their entirety.

8. On the other hand, energy products used for combined heat and power generation could be regarded as falling within the scope of Article 14(1)(a) *and* of Article 15(1)(c) of Directive 2003/96.

9. Indeed, Article 14(1)(a) of that directive applies to energy products ‘used to produce electricity’. Since that provision makes no reference to the mode of producing electricity, it should apply irrespective of the production mode. Therefore, energy products used for combined heat and power generation would fall within the scope of Article 14(1)(a) of Directive 2003/96. However, *only the portion of those products which is used to produce electricity* would fall within the scope of that provision. Indeed, Article 14(1)(a) of Directive 2003/96 applies to energy products used to produce *electricity*, not heat. As set out in point 4 above, that portion would be exempt from excise duties, while the electricity produced would be subject to excise duties.

10. The portion of those products which is used for the generation of heat would fall within the scope of Article 15(1)(c) of Directive 2003/96. As described in point 5 above, that portion would only be exempt from excise duties if the Member State concerned exercised the option conferred by that provision. The electricity produced would be subject to excise duties irrespective of whether that option is exercised.

11. In the present case, the Court is called upon to decide between the two approaches described above. Specifically, the Conseil d’État (Council of State, France) asks the Court whether, where energy products are used for the combined generation of heat and electricity, Article 15(1)(c) of Directive 2003/96 applies alone, or whether Article 14(1)(a) and Article 15(1)(c) of that directive apply jointly.⁸

⁶ To simplify matters, the power conferred on Member States by Article 15(1)(c) of Directive 2003/96 to ‘apply under fiscal control total or partial exemptions or reductions in the level of taxation’ will be referred to below as their power ‘to exempt’.

⁷ See recital 16 of Directive 2003/96.

⁸ I note that the Court has found on two occasions that the French Republic had infringed its obligations under Directive 2003/96. First, it held that the French Republic had failed to adopt any measures for the transposition of that directive (judgment of 29 March 2007, *Commission v France*, C-388/06, not published, EU:C:2007:207). Second, the Court found that the French Republic had failed to adapt its electricity taxation system to the provisions of Directive 2003/96 by 1 January 2009, as required by the second subparagraph of Article 18(10) of that directive (judgment of 25 October 2012, *Commission v France*, C-164/11, not published, EU:C:2012:665).

I. Legal framework

A. *EU law*

12. Article 4(1) of Directive 2003/96 states:

‘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.’

13. According to Article 9(1) of Directive 2003/96:

‘As from 1 January 2004, the minimum levels of taxation applicable to heating fuels shall be fixed as set out in Annex I Table C.’

14. Pursuant to Article 10(1) of Directive 2003/96:

‘As from 1 January 2004, the minimum levels of taxation applicable to electricity shall be fixed as set out in Annex I Table C.’

15. Article 14(1) of Directive 2003/96 provides:

‘In addition to the general provisions set out in Directive 92/12/EEC on exempt uses of taxable products, and without prejudice to other [Union] 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;

...’

16. Article 15(1) of Directive 2003/96 states:

‘Without prejudice to other [Union] provisions, Member States may apply under fiscal control total or partial exemptions or reductions in the level of taxation to:

...

- (c) energy products and electricity used for combined heat and power generation;

...’

17. According to Article 21(5) of Directive 2003/96:

‘For the purpose of applying Articles 5 and 6 of Directive 92/12/EEC, electricity and natural gas shall be subject to taxation and shall become chargeable at the time of supply by the distributor or redistributor. ...’

...

An entity producing electricity for its own use is regarded as a distributor. Notwithstanding Article 14(1)(a), Member States may exempt small producers of electricity provided that they tax the energy products used for the production of that electricity.

...'

B. French law

18. According to paragraph 1 of Article 266 *quinquies* of the code des douanes (Customs Code), in the version applicable at the material time:

'Natural gas falling within CN code 2711 21 00 is subject to a domestic tax on consumption on delivery to the end-user.'

19. However, pursuant to paragraph 3 of Article 266 *quinquies* of the Customs Code, in the version applicable from 1 January 2006 to 31 December 2006:

'...

Supplies of gas are ... exempt [from the tax provided for by paragraph 1] when it is intended for use:

...

(c) as fuel for the generation of electricity, from 1 January 2006, unless those supplies are intended for use in the installations referred to in Article 266 *quinquies* A.'

20. According to Article 266 *quinquies* A of the Customs Code, in the version applicable at the material time:

'Supplies of natural gas ... intended for use in cogeneration units, for the combined generation of heat and electricity ..., are exempt from [the domestic tax on consumption] imposed by ... Article 266 *quinquies* for a period of five years from their entry into service. ...

That exemption applies to units put into service no later than 31 December 2007. ...

...'

21. Paragraph 3 of Article 266 *quinquies* of the Customs Code was amended on 31 December 2006⁹ to the effect that supplies of natural gas intended for use in cogeneration units are exempt from the tax imposed by paragraph 1 of that provision provided that, first, the producer operating the unit in question is not a party to a contract that imposes on certain distributors¹⁰ an obligation to purchase, and, second, that producer has waived entitlement to the exemption provided for in Article 266 *quinquies* A of the Customs Code.

22. According to paragraph 3 of Article 266 *quinquies* of the Customs Code, in the version applicable from 31 December 2006:

'...

⁹ Only paragraph 3 of Article 266 *quinquies* of the Customs Code was amended. Paragraph 1 of that provision was not amended.

¹⁰ Such as Électricité de France.

Supplies of gas are ... exempt [from the tax provided for by paragraph 1] when it is intended for use:

...

(c) as fuel for the generation of electricity, from 1 January 2006.

The exemption provided for in paragraph 3(c) does not apply to supplies of gas intended for use in the units referred to Article 266 *quinquies* A. However, producers whose unit does not benefit from a contract for the purchase of electricity entered into pursuant to Article 10 of Law No 2000-108 of 10 February 2008 on the modernisation and development of the public service of electricity, or referred to in Article 50 of that law, benefit from the scheme provided for in paragraph 3(c) provided that they waive entitlement to the exemption from the domestic ta[x] provided for in Article 266 *quinquies* A.'

II. The facts, the main proceedings and the question referred for a preliminary ruling

23. The French company Sucrerie de Toury SA ('Sucrerie de Toury'), the legal successor to which is Cristal Union, operates in France a unit for the combined generation of heat and electricity, for which it uses natural gas as a fuel. The heat and electricity produced are then used for sugar production.

24. Sucrerie de Toury sources natural gas from third parties. As regards natural gas purchased from 1 January 2006 to 25 December 2007, the supplier of Sucrerie de Toury paid the tax provided for by Article 266 *quinquies* of the Customs Code ('the domestic tax'). The amount corresponding to the domestic tax was then passed on to Sucrerie de Toury as part of the purchase price for the natural gas.

25. Sucrerie de Toury considers that those supplies of natural gas should have been exempt from the domestic tax. Therefore, it brought an action before the tribunal administratif d'Orléans (Administrative Court, Orléans, France) seeking compensation for the loss allegedly suffered as a result of the late transposition of Directive 2003/96 by the French Republic.¹¹ The damages requested by Sucrerie de Toury amounted to EUR 98 768, that is, the amount of the domestic tax for the period from 1 January 2006 to 25 December 2007.¹²

26. By judgment of 31 January 2013, the tribunal administratif d'Orléans (Administrative Court, Orléans) dismissed the action brought by Sucrerie de Toury.

27. On 29 March 2013, Sucrerie de Toury brought an appeal against the judgment of the tribunal administratif d'Orléans (Administrative Court, Orléans) before the cour administrative d'appel de Nantes (Administrative Court of Appeal, Nantes, France).

28. By judgment of 18 December 2014, the cour administrative d'appel de Nantes (Administrative Court of Appeal, Nantes) dismissed the appeal. It held that the natural gas supplied to Sucrerie de Toury fell within the scope of Article 15(1)(c) of Directive 2003/96, not within the scope of Article 14(1)(a) of that directive. Those provisions could not be applied jointly since it was not possible to apply separate tax regimes depending on whether the natural gas supplied to Sucrerie de Toury was used to produce electricity or to generate heat. Therefore, Article 266 *quinquies* and Article 266 *quinquies* A of the Customs Code were consistent with Directive 2003/96.

¹¹ See footnote 8 above.

¹² According to the judgment of 18 December 2014 of the cour administrative d'appel de Nantes (Administrative Court of Appeal, Nantes), the applicant in the main proceedings contends that 'the loss it suffered corresponds to the amount of the [domestic tax] passed on by its suppliers for the period from 1 January 2006 to 25 December 2007, that is, EUR 98 768'.

29. On 10 February 2015, Sucrerie de Toury brought an appeal against the judgment of the cour administrative d'appel de Nantes (Administrative Court of Appeal, Nantes) before the Conseil d'État (Council of State). Sucrerie de Toury argued, in particular, that Article 15(1)(c) of Directive 2003/96 applies only to the portion of the natural gas used for the generation of heat, and that, consequently, Article 14(1)(a) of that directive applies to the portion of the natural gas used to produce electricity, so that Member States are required to exempt the latter portion from taxation.

30. The Conseil d'État (Council of State) stayed the proceedings and referred the following question to the Court for a preliminary ruling:

'Do energy products used for the combined generation of heat and electricity fall exclusively within the scope of the power to exempt conferred by Article 15(1)(c) of [Directive 2003/96], or do they also fall, as regards the portion of those products used to produce electricity, within the scope of the compulsory exemption provided for by Article 14(1)(a) of that directive?'

31. Written observations were submitted by the applicant in the main proceedings, the French Government, the Finnish Government and the European Commission. The applicant in the main proceedings, the French Republic and the European Commission also presented oral argument at the hearing on 22 November 2017.

III. Analysis

32. The referring court asks whether energy products used for the combined generation of heat and electricity fall within the scope of Article 15(1)(c) of Directive 2003/96 alone, or whether they also fall, as regards the portion of those products used to produce electricity, within the scope of Article 14(1)(a) of that directive.

33. The applicant in the main proceedings submits that energy products used for the combined generation of heat and electricity fall within the scope of Article 15(1)(c) of Directive 2003/96 *and*, as regards the portion of those products used to produce electricity, within the scope of Article 14(1)(a) of that directive.

34. The applicant in the main proceedings relies on a letter sent on 16 May 2011 by the Commission to its legal representative. That letter states that 'Article 15(1)(c) [of Directive 2003/96], which allows Member States to exempt in their entirety energy products used for the combined generation of heat and power, does not exclude cogeneration units from the scope of the exemption provided for by Article 14(1) [of that directive], as regards the portion of those products used to produce electricity'. Otherwise, the tax regime of energy products used to produce electricity from cogeneration would, with no reason, be less favourable than that of energy products used to produce electricity by conventional modes. That interpretation of Article 14(1)(a) of Directive 2003/96 is consistent with the logic underlying that directive, namely, to avoid the double taxation of electricity which would result from the collection of excise duties on (i) the energy products used to produce electricity, and (ii) the electricity produced. Therefore, Article 14(1)(a) of Directive 2003/96 applies to the portion of energy products used to produce electricity, while Article 15(1)(c) of that directive applies to the portion of those products used to generate heat.

35. The French Government contends that energy products used for the combined production of heat and electricity fall within the scope of Article 15(1)(c) of Directive 2003/96 alone.

36. The French Government stresses, first, that the exemption provided for by Article 14(1)(a) of Directive 2003/96 must be interpreted strictly since it derogates from the obligation to tax energy products laid down by that directive. Second, Article 14(1)(a) of that directive does not state expressly that, where energy products are used for combined heat and power generation, the portion of those

products which is used to produce electricity falls within its scope. By contrast, Article 15(1)(c) of that directive states expressly that it applies to energy products used for the combined generation of heat and electricity. The latter provision does not state that it applies only to the portion of those products used for the generation of heat. Third, Article 14(1)(e) of the Commission's proposal for what would become Directive 2003/96¹³ ('the Commission's proposal') allowed Member States to exempt 'heat generated during the production of electricity'.¹⁴ Article 14(1)(e) of the Commission's proposal is to be read as allowing Member States to exempt the portion of energy products used to generate heat, while Article 13(1)(b) of that proposal required Member States to exempt the portion of those products used to produce electricity. However, Article 14(1)(e) of the Commission's proposal was amended so that the corresponding provision of Directive 2003/96, namely Article 15(1)(c), no longer refers to heat alone. Consequently, the intention of the EU legislature was to allow Member States to exempt in their entirety, under Article 15(1)(c) of Directive 2003/96, energy products used for the combined generation of heat and electricity. The EU legislature did not intend Member States to exempt, under Article 14(1)(a) of the same directive, the portion of those products used to produce electricity. Fourth, it is, in practice, difficult to separate the portion of energy products used to produce electricity from the portion used for the generation of heat.

37. The Finnish Government and the Commission agree with the solution proposed by the applicant in the main proceedings as described in point 33 above.

38. According to case-law, the provisions of Directive 2003/96 concerning exemptions must receive an autonomous interpretation, based on their wording and on the objectives pursued by that directive.¹⁵

39. Therefore, I will start by examining the wording of Article 14(1)(a) and Article 15(1)(c) of Directive 2003/96, which does not, in my view, allow a conclusion to be drawn as to whether those provisions must be applied jointly. I will then assess whether Directive 2003/96 seeks to avoid the double taxation of electricity, which is, in my opinion, the case (with the one exception of environmental measures) and leads to the conclusion that Article 14(1)(a) of that directive applies to the portion of energy products used to produce electricity. Finally, I will demonstrate that that interpretation of Article 14(1)(a) of Directive 2003/96 meets the objectives of that directive, namely, the proper functioning of the internal market and the improvement of environmental protection.

A. No definitive conclusion may be drawn from the wording of Article 14(1)(a) and Article 15(1)(c) of Directive 2003/96

40. In my opinion, the question whether Article 14(1)(a) and Article 15(1)(c) of Directive 2003/96 must be applied jointly cannot be answered by consideration of their wording alone.

41. On the one hand, Article 15(1)(c) of Directive 2003/96 states that it applies to energy products 'used for combined heat and power generation'. By contrast, Article 14(1)(a) of that directive refers only to energy products 'used to produce electricity'. The latter provision makes no express reference to electricity produced from cogeneration. This suggests that Article 15(1)(c) of Directive 2003/96 is

¹³ Commission's proposal, of 12 March 1997, for a Council Directive restructuring the Community framework for the taxation of energy products (COM(97) 30 final).

¹⁴ Article 14(1) of the Commission's proposal states that 'without prejudice to other Community provisions, Member States may apply total or partial exemptions or reductions in the level of taxation to: ... (e) heat generated during the production of electricity; ...' (emphasis added).

¹⁵ Judgments of 1 April 2004, *Deutsche See-Bestattungs-Genossenschaft*, C-389/02, EU:C:2004:214, paragraph 19; of 1 March 2007, *Jan De Nul*, C-391/05, EU:C:2007:126, paragraph 22; of 1 December 2011, *Systeme Helmholtz*, C-79/10, EU:C:2011:797, paragraph 19; of 21 December 2011, *Haltergemeinschaft*, C-250/10, not published, EU:C:2011:862, paragraph 19; and of 13 July 2017, *Vakaru Baltijos laivų statykla*, C-151/16, EU:C:2017:537, paragraph 24.

lex specialis in relation to Article 14(1)(a) of that directive and that, as such, the former provision applies in lieu of the latter where energy products are used to produce electricity from cogeneration.¹⁶ This was the position of the cour administrative d'appel de Nantes (Administrative Court of Appeal, Nantes).¹⁷

42. Moreover, as stressed by the referring court, Article 15(1)(c) of Directive 2003/96 does not state that it applies to energy products used for combined heat and power generation without prejudice to the application of Article 14(1)(a) to the portion of those products used for the production of electricity.¹⁸

43. On the other hand, Article 15(1)(c) of Directive 2003/96 does not state that it applies 'notwithstanding Article 14(1)(a)' of that directive. By contrast, the second sentence of the third subparagraph of Article 21(5) of the same directive expressly provides that it applies 'notwithstanding Article 14(1)(a)'. Therefore, it seems that, where the EU legislature intended to exclude the application of Article 14(1)(a) of Directive 2003/96, it did so expressly, and that, failing an express exclusion, that provision applies. This suggests that Article 15(1)(c) of Directive 2003/96 does not derogate from Article 14(1)(a) of that directive.

44. Moreover, the introductory sentence of Article 15(1) of Directive 2003/96 states that that provision applies 'without prejudice to other [Union] provisions'. Although that phrase, unlike the wording suggested in point 42 above, makes no express reference to Article 14(1)(a) of Directive 2003/96, it could nevertheless be read as a reference to that provision. A joint application of Article 14(1)(a) and Article 15(1)(c) of the same directive would thus be possible, all the more since the introductory sentence of Article 14(1) of that directive also states that it applies 'without prejudice to other [Union] provisions'.

45. Finally, Article 14(1)(a) of Directive 2003/96 simply provides that it applies to 'energy products ... used to produce electricity'. As mentioned in point 9 above, that provision makes no reference to the mode of electricity production, which suggests that it applies irrespective of the production mode. It would then cover energy products used to produce electricity by conventional modes and by non-conventional modes such as cogeneration.

46. Consequently, it cannot be determined, by consideration of the wording of Article 14(1)(a) and Article 15(1)(c) of Directive 2003/96, whether they must be applied jointly. In order to answer that question, I will thus turn to consider the general scheme and the objectives of that directive.

¹⁶ See, by analogy, judgment of 15 July 2010, *Commission v United Kingdom*, C-582/08, EU:C:2010:429, paragraph 35.

¹⁷ The order for reference indicates that '[according to] the cour [administrative d'appel de Nantes (Administrative Court of Appeal, Nantes)], ... the *special* rule provided for in Article 15 [of Directive 2003/96] derogates from the *general* rule provided for in Article 14 [of that directive]' (emphasis added).

¹⁸ The order for reference indicates that 'the interpretation upheld by the cour [administrative d'appel de Nantes (Administrative Court of Appeal, Nantes)], according to which the special rule provided for in Article 15 [of Directive 2003/96] derogates from the general rule provided for in Article 14 [of that directive], may be based on the wording of Article 15, which does not explicitly reserve the application of Article 14 to the proportion of gas used for the generation of electricity' (emphasis added).

B. Does Directive 2003/96 seek to avoid the double taxation of electricity?

47. The applicant in the main proceedings,¹⁹ the Finnish Government²⁰ and the Commission²¹ submit that Directive 2003/96 seeks to avoid the double taxation of electricity. Therefore, the compulsory exemption provided for by Article 14(1)(a) of that directive should, in their view, apply to the portion of energy products used to produce electricity from cogeneration. Indeed, were that exemption not to apply, there would be double taxation of electricity since excise duties would be levied on (i) the energy products used to produce electricity and (ii) the electricity produced.

48. There can be no question that, were Article 14(1)(a) of Directive 2003/96 not to apply to the portion of energy products used to produce electricity from cogeneration, there would be double taxation of electricity. Indeed, the energy products used to produce electricity would be subject to excise duties and thus to the minimum levels of taxation prescribed by Article 9 and Annex I Table C of that directive (input taxation), while the electricity produced would be subject to excise duties and thus to the minimum levels of taxation pursuant to Article 10 and Annex I Table C of the same directive (output taxation).

49. What needs to be determined is whether, as argued by the applicant in the main proceedings, the Finnish Government and the Commission, Directive 2003/96 seeks to avoid the double taxation of electricity.

1. Only the Commission's proposal refers expressly to the prevention of double taxation

50. Neither the recitals nor the provisions of Directive 2003/96 refer expressly to the double taxation of electricity.

51. The only reference to the double taxation of electricity is to be found in the Commission's proposal.²² In the Explanatory Memorandum accompanying that proposal, the Commission explains that, as regards electricity, it 'has proposed harmonisation on the basis of output taxation' because, in particular, electricity can thus 'be traded within and between countries without having been taxed *thus avoiding double taxation in the country of consumption*'.²³ In order to avoid such double taxation, the Commission's proposal sets forth a scheme similar to the one in Directive 2003/96. First, that proposal makes energy products used as heating fuel and electricity subject to excise duties.²⁴ Second, Article 13(1)(b) of that proposal provides for the compulsory exemption of energy products used to produce electricity.²⁵

19 According to the written observations of the applicant in the main proceedings, 'the interpretation put forward by the applicant is perfectly consistent with the logic behind the exemption of energy products used to produce electricity, which is to prevent electricity from being subjected twice to excise duties: the [domestic tax] levied on the gas used to produce electricity, then the internal tax on end-consumption of electricity'.

20 According to the written observations of the Finnish Government, 'since the consumption of electricity is itself subject to taxation, it was considered that the energy products which were intended to be used for energy production would not be subject to separate taxation. Thereby, double taxation of electricity is avoided'.

21 According to the written observations of the Commission, 'one objective of Directive [2003/96] is the implementation of the principle of the "single taxation" of electricity. ... Article 14(1)(a) of Directive [2003/96] requires Member States to exempt from taxation energy products used to produce electricity. This is to avoid double taxation, which would result from the collection, at the same time, of a tax on the energy produced and a tax on the energy products used to produce that energy.'

22 See footnote 13 above.

23 See p. 5 of the Commission's proposal (emphasis added).

24 See the sixth indent of Article 8 and Article 9 of the Commission's proposal.

25 Article 13(1) of the Commission's proposal reads as follows: 'in addition to the general provisions set out in Directive 92/12/EEC on exempt uses of taxable 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: ... (b) energy products used to produce electricity and heat generated during its production. 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 9 of this Directive. ...'.

2. Double taxation is allowed on environmental grounds

52. However, it may be questioned whether Directive 2003/96 actually seeks to prevent the double taxation of electricity.

53. Indeed, the second and third sentences of Article 14(1)(a) of Directive 2003/96 allow Member States to derogate from the exemption of energy products used to produce electricity laid down in the first sentence of that provision. According to the second sentence of Article 14(1)(a) of Directive 2003/96, Member States may, ‘for reasons of environmental policy’, subject those products to taxation. Where a Member State exercises that option, this results in the double taxation of electricity since, according to the third sentence of the same provision, the tax levied on energy products ‘shall not be taken into account for the purpose of satisfying the minimum level of taxation on electricity’.

54. It may even be questioned whether the Commission’s intention was to avoid the double taxation of electricity. Indeed, the second and third sentences of Article 14(1)(a) of Directive 2003/96 are identical to the second and third sentences of Article 13(1)(b) of the Commission’s proposal.²⁶ Moreover, in the Explanatory Memorandum accompanying its proposal, the Commission, having stated that harmonisation should be achieved on the basis of output taxation, nonetheless stresses that ‘output taxation does not allow Member States to directly differentiate tax levels in line with the environmental quality of the fuel used’ and that, consequently, Member States should be allowed ‘to add *an additional* (non-harmonised) *input tax* in the case of non-environmentally desirable fuels’.²⁷

55. This led the Court, in *Kernkraftwerke Lippe-Ems*, to reject the argument that Directive 2003/96 precludes the levying of excise duties on energy products used to produce electricity *and* on the electricity produced. The Court noted that ‘it is not possible to conclude ... 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 not apparent from [the Commission’s] proposal that [input taxation and output taxation] are, as a matter of principle, mutually exclusive, the [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”’.²⁸

3. Directive 2003/96 seeks to avoid double taxation, with the one exception of environmental measures

56. Nevertheless, I consider that Directive 2003/96 seeks to avoid the double taxation of electricity.

57. Indeed, as explained in point 43 above and as argued by the Commission,²⁹ where the EU legislature intended to exclude the application of the exemption from input taxation laid down in the first sentence of Article 14(1)(a) of Directive 2003/96, it did so expressly. There are only two express derogations from that exemption, namely, the second and third sentences of Article 14(1)(a) of Directive 2003/96 and the third subparagraph of Article 21(5) of that directive.

58. The third subparagraph of Article 21(5) of Directive 2003/96 allows Member States to exempt from taxation the electricity produced by small producers, ‘provided that they tax the energy products used for the production of that electricity’. Therefore, as regards small producers of electricity, input taxation is permitted but double taxation is not.

²⁶ See footnote 25 above.

²⁷ See p. 5 of the Commission’s proposal (emphasis added).

²⁸ Judgment of 4 June 2015, *Kernkraftwerke Lippe-Ems*, C-5/14, EU:C:2015:354, paragraph 51.

²⁹ According to the Commission’s written observations, ‘Directive [2003/96] provides for two derogations from the compulsory exemption. First, Article 14(1)(a) ... Then, the third subparagraph of Article 21(5) ... Therefore, where derogations were allowed by the legislature, they were allowed expressly.’

59. Consequently, the double taxation of electricity is only allowed ‘for reasons of environmental policy’, pursuant to the second and third sentences of Article 14(1)(a) of Directive 2003/96. It is not permitted on other grounds. Moreover, according to the second sentence of that provision, Member States ‘may’ subject energy products to input taxation. They are not required to do so. Furthermore, in laying down input taxes Member States do not ‘hav[e] to respect the minimum levels of taxation laid down in [Directive 2003/96]’. Therefore, input taxes imposed pursuant to the second sentence of Article 14(1)(a) of that directive may result in limited double taxation.

60. I should also stress that in 1999 the Parliament amended the Commission’s proposal so that Article 13, which provided for the compulsory exemption of, in particular, energy products used to produce electricity, was deleted, while electricity was still, pursuant to Article 9 of that proposal, subject to a minimum level of taxation. Moreover, the Parliament amended the latter provision so that Member States were required to introduce a supplementary tax based on the carbon content of the fuels used to produce electricity.³⁰ However, those amendments, which would have resulted in the double taxation of electricity, were not taken over into the final version of those provisions (namely, Articles 10 and 14 of Directive 2003/96).

61. Finally, it may be worth noting that during the preparatory work the Presidency of the Council stressed that the ‘general rule’ was that of output, not input, taxation of electricity.³¹

62. Therefore, in my opinion, Directive 2003/96 seeks to avoid the double taxation of electricity, with the one exception of measures taken by Member States for reasons of environmental policy.

63. Consequently, I consider that, where energy products are used for combined heat and power generation, the portion of those products which is used to produce electricity falls within the scope of the compulsory exemption provided for by Article 14(1)(a) of Directive 2003/96. Indeed, were that provision not to apply to that portion of products, electricity produced from cogeneration would be subject to double taxation, which Directive 2003/96 seeks to avoid. In my opinion, subjecting that portion of products to taxation can hardly be seen as a measure taken ‘for reasons of environmental policy’ pursuant to the second sentence of Article 14(1)(a) of Directive 2003/96 since electricity produced from cogeneration results in energy savings and lower greenhouse gas emissions, as compared with electricity produced by conventional modes.³² As for the portion of energy products which is used to generate heat, it falls within the scope of the power to exempt conferred on Member States by Article 15(1)(c) of Directive 2003/96.

³⁰ Legislative resolution, of 13 April 1999, embodying Parliament’s opinion on the proposal for a Council Directive on Restructuring the Community Framework for the Taxation of Energy Products (COM(97)0030 - C4-0155/97 - 97/0111(CNS)) (OJ 1999 C 219, p. 91). See Amendments 21 and 24.

³¹ See paragraph 2 of the note of the Presidency of the Council of 20 April 2001, according to which ‘a vast majority of ... Member States have been in favour of output (consumption) taxation as *the general principle* in an energy taxation directive. ... Those Member States in favour of an output taxation have also acknowledged the need to give the Member States that so desire a possibility to also subject fuels used to produce electricity to input taxation’ (Council document 8085/01) (emphasis added). See also paragraph 2.3.4 of the compromise proposal prepared by of the Presidency of the Council of 24 April 2002, which states that ‘taxation of output (consumption) should be *the general rule* in electricity taxation. However, that approach should be coupled with the option for Member States to apply, additionally, input taxation based on environmental considerations with regard to the various fuels used to generate electricity’ (Council document 7814/1/02 REV 1) (emphasis added). Finally, see paragraph 7.3 of the Annex to the Progress Report of the Presidency of the Council of 20 June 2002 (Proposed Council guidelines on energy taxation) which states that ‘as *a general principle*, electricity output will be taxed. In addition, those Member States which so wish may tax inputs used to generate electricity, on the basis of environmental considerations’ (Council document 10195/02) (emphasis added). Those documents are available on the website of the Council’s public register at the following address: <https://register.consilium.europa.eu/>.

³² In any event, I note that the French Government did not contend that, where energy products are used for the combined generation of heat and electricity, Article 266 *quinquies* A of the Customs Code and paragraph 3 of Article 266 *quinquies* of that code subject those products to taxation ‘for reasons of environmental policy’ pursuant to the second sentence of Article 14(1)(a) of Directive 2003/96.

64. That conclusion cannot be called into question by the Court's findings in *Kernkraftwerke Lippe-Ems*.³³ Indeed, the situation in *Kernkraftwerke Lippe-Ems* was very specific and it differs from the one in the present case. In *Kernkraftwerke Lippe-Ems*, the Court was asked whether the compulsory exemption laid down in Article 14(1)(a) of Directive 2003/96 applies to nuclear fuel. Although that fuel is, as required by that provision, 'used to produce electricity', it is not listed among the 'energy products' to which, according to Article 2(1) of Directive 2003/96, that directive applies.³⁴ Therefore, the Court found that nuclear fuel falls outside the scope of that directive and that, consequently, the compulsory exemption does not apply. The Court rejected the argument put forward by the company operating the nuclear power station that Article 14(1)(a) of Directive 2003/96 should be applied 'by analogy' to nuclear fuel used to produce electricity since the purpose of that directive was to avoid the double taxation of electricity. Indeed, there is no question that, had the Court applied Article 14(1)(a) of Directive 2003/96 to nuclear fuel used to produce electricity, it would have extended the scope of application of that directive in violation of Article 2(1) of the same directive.³⁵ By contrast, in the present case, natural gas is an 'energy product' within the meaning of Article 2(1) of Directive 2003/96.³⁶ Therefore, in applying Article 14(1)(a) of that directive to the portion of natural gas used to produce electricity from cogeneration, the Court would not extend the scope of that directive.

65. Nor can my conclusion at point 62 above be called into question by the fact that Article 13(1)(b) of the Commission's proposal, which provided for the compulsory exemption of 'energy products used to produce electricity and heat generated during its production',³⁷ was amended so that Article 14(1)(b) of Directive 2003/96 applies only to 'energy products used to produce electricity'. Indeed, the Commission's intention, as explained in the Explanatory Memorandum accompanying its proposal, was to introduce harmonisation on the basis of output taxation of electricity, in order to avoid double taxation.³⁸ There is no indication whatsoever in that Explanatory Memorandum that the Commission intended to limit harmonisation on the basis of output taxation to *electricity produced from cogeneration*.

66. Finally, I should mention that the Parliament, which in September 2003 was consulted a second time on the draft directive,³⁹ amended Article 15(1) thereof so that it provided for a compulsory exemption instead of a power to exempt.⁴⁰ Directive 2003/96 was adopted without that amendment. However, this does not, in my opinion, call into question my conclusion at point 62 above. Indeed, first, the Parliament did not, in September 2003, amend the compulsory exemption of energy products used to produce electricity provided for by Article 14(1)(a) of the draft directive.⁴¹ Therefore, the amendment to Article 15(1)(c) of the draft directive could only result in the compulsory exemption of the portion of energy products used to generate heat. The fact that that amendment was not taken over only means that Member States have a power, not an obligation, to exempt that portion of products. Second, I stress that, following the adoption of that amendment by the Parliament, the Commission's representative stated, at a meeting of the Fiscal Counsellors and Attachés from the

³³ See point 55 above.

³⁴ The nuclear fuel at issue consisted of specific isotopes of plutonium and uranium. See Opinion of Advocate General Szpunar in *Kernkraftwerke Lippe-Ems*, C-5/14, EU:C:2015:51, point 42.

³⁵ Judgment of 4 June 2015, *Kernkraftwerke Lippe-Ems*, C-5/14, EU:C:2015:354, paragraphs 47, 48, 50 and 51.

³⁶ Indeed, Article 2(1)(b) of Directive 2003/96 makes reference to products 'falling within CN codes ... 2704 to 2715', and CN codes 2711 11 00 and 2711 21 00 correspond to natural gas. Combined Nomenclature codes ('CN codes') are laid down in Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1). See Article 2(5) of Directive 2003/96.

³⁷ See footnote 25 above.

³⁸ See point 51 above.

³⁹ See Council document 8084/03, of 3 April 2003 ('the draft directive'). That document is available on the website of the Council's public register (see footnote 31 above). As explained below, Article 15(1) of the draft directive is identical to Article 15(1) of Directive 2003/96.

⁴⁰ See Amendment 10 of the European Parliament legislative resolution, of 24 September 2003, on the draft Council directive restructuring the Community framework for the taxation of energy products and electricity (8084/2003 – C5-0192/2003 – 1997/0111(CNS)) (OJ 2004 C 77E, p. 246).

⁴¹ Article 14(1) of the draft directive is identical to Article 14(1) of Directive 2003/96.

Permanent Representations, that ‘it was inadvisable to amend the draft [d]irective *at this stage*’ and ‘the Commission could bear the proposals in mind for any amendment to the [d]irective’.⁴² This suggests that – at least as regards the Commission – no consideration was given to the substance of that amendment, and it was not taken over mostly because of its timing.

67. Should it, however, be considered that Directive 2003/96 does not seek to avoid the double taxation of electricity, Article 14(1)(a) of that directive would nevertheless, in my view, apply to the portion of energy products used to produce electricity from cogeneration. Indeed, this would meet the other objectives of that directive, namely the proper functioning of the internal market and the protection of the environment.

C. The joint application of Article 14(1)(a) and Article 15(1)(c) of Directive 2003/96 would contribute to the proper functioning of the internal market and the protection of the environment

68. One of the objectives of Directive 2003/96 is to ensure the proper functioning of the internal market by reducing differences in national levels of taxation and to maintain the competitive position of Union enterprises. This follows from recitals 2 to 5 of that directive, which state that appreciable differences in the levels of taxation applied by Member States could be detrimental to the proper functioning of the internal market, while minimum levels of taxation set at EU level would contribute to the proper functioning of that market. This has also been recognised by the Court.⁴³

69. Were energy products used to produce electricity from cogeneration to fall within the scope of Article 15(1)(c) of Directive 2003/96 alone, whereas the same products would, if used to produce electricity by conventional modes, fall within the scope of Article 14(1)(a) of that directive, this would place cogeneration units at a disadvantage with conventional units. Indeed, the latter would be subject to the compulsory exemption laid down in Article 14(1)(a) of Directive 2003/96, whereas the former would only be exempted if the Member State concerned exercised the power conferred by Article 15(1)(c) of that directive. As argued by the Commission, this would be inconsistent with recital 24 of Directive 2003/96, which states that the power to exempt granted to Member States must not, in particular, ‘result in distortions of competition’. Were Article 15(1)(c) of Directive 2003/96 to apply solely to energy products used to produce electricity from cogeneration, and were the Member State concerned not to exercise the option to exempt totally those products from taxation, this would create a distortion of competition between cogeneration units and conventional units.

70. The reasoning above is consistent with the Court’s findings in *Jan de Nul*. In that judgment, the Court held that the power to exempt mineral oils used for navigation on inland waterways, provided for by Article 8(2)(b) of Directive 92/81,⁴⁴ ‘can only be residual’ in that it is applicable only where the compulsory exemption of mineral oils used as fuel for the purposes of navigation within Union waters, provided for by Article 8(1)(c) of that directive, does not apply.⁴⁵ Indeed, sea vessels, which fall within

⁴² See Council document 13258/03, of 7 October 2003 (emphasis added). That document is available on the website of the Council’s public register (see footnote 31 above).

⁴³ Judgment of 13 July 2017, *Vakaru Baltijos laivų statykla*, C-151/16, EU:C:2017:537, paragraph 37, and Opinion of Advocate General Jääskinen in Joined Cases *Kronos Titan*, C-43/13 and C-44/13, EU:C:2013:839, point 40. See also, as regards Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils (OJ 1992 L 316, p. 12), which was repealed and replaced by Directive 2003/96, judgments of 29 April 2004, *Commission v Germany*, C-240/01, EU:C:2004:251, paragraph 39, and of 1 March 2007, *Jan De Nul*, C-391/05, EU:C:2007:126, paragraph 28.

⁴⁴ See footnote 43 above. Article 8(1) of Directive 92/81 provides that ‘in addition to the general provisions set out in Directive 92/12/EEC on exempt uses of excisable products, and without prejudice to other [Union] provisions, Member States shall exempt the following from the harmonised excise duty 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: ... (c) mineral oils supplied for use as fuel for the purposes of navigation within [Union] waters (including fishing), other than in private pleasure craft. ...’. Article 8(2) of the same directive states that ‘without prejudice to other [Union] provisions, Member States may apply total or partial exemptions or reductions in the rate of duty to mineral oils used under fiscal control: ... (b) for navigation on inland waterways other than for private pleasure craft; ...’.

⁴⁵ Judgment of 1 March 2007, *Jan De Nul*, C-391/05, EU:C:2007:126, paragraph 31.

the scope of the compulsory exemption,⁴⁶ can also navigate on certain inland waterways towards certain ports which, although they are not situated on the coast, are sea ports.⁴⁷ Therefore, were sea vessels to be excluded from the scope of the compulsory exemption when they operate on inland waterways towards sea ports, they would be placed at a disadvantage with sea vessels which operate only in coastal ports. This would risk diverting traffic away from sea ports. Therefore, the Court held that the power to exempt provided for in Article 8(2)(b) of Directive 92/81 applies to navigation on inland waterways only in so far as such navigation is engaged in beyond the waters on which maritime navigation can be carried on.

71. Directive 2003/96 also has another objective, namely, the improvement of environmental protection. It follows from recitals 6, 7, and 12 of that directive that environment protection requirements must be integrated into the definition of the energy policy. This has been recognised by the Court.⁴⁸

72. Were the portion of energy products used to produce electricity from cogeneration to fall within the scope of the compulsory exemption provided for in Article 14(1)(a) of Directive 2003/96, this would contribute to the protection of the environment. Indeed, cogeneration, unlike conventional modes of production of electricity, allows energy savings to be made. In that regard, during the preparatory work for Directive 2003/96, the Presidency of the Council estimated that ‘generation of electricity from power stations normally has a conversion efficiency of between 25 % and 50[%], where 50[%] is a very high rate’, whereas, where electricity is produced from cogeneration, ‘the conversion efficiency typically increases to an overall level of 60 to 80[%]’.⁴⁹

73. As mentioned above, should Article 14(1)(a) of Directive 2003/96 be applied to the portion of energy products used to produce electricity, this would not deprive Article 15(1)(c) of that directive of any purpose. Indeed, that provision applies to the portion of energy products used for the generation of heat.

74. The argument raised by the French Government that it is, in practice, extremely difficult to isolate the portion of energy products used to produce electricity, must be rejected.⁵⁰ Indeed, at the oral hearing, the applicant in the main proceedings and the Commission explained that separate taxation is possible. The applicant in the main proceedings proposed to calculate the minimum quantity of natural gas necessary for the production of electricity by a unit which produces only electricity (as opposed to a cogeneration unit) and which uses the best available and economically justifiable technology. According to the applicant in the main proceedings, that minimum quantity should, where natural gas is used for the combined generation of heat and electricity, be regarded as the

⁴⁶ The reason why sea vessels fall within the scope of the compulsory exemption provided for by Article 8(1)(c) of Directive 92/81 is that the term ‘[Union] waters’ must be understood as including all the waters in which maritime navigation is normally practised for commercial ends (judgment of 1 March 2007, *Jan De Nul*, C-391/05, EU:C:2007:126, paragraph 26).

⁴⁷ The journey at issue in *Jan de Nul* was carried out on the Elbe, in an area between Cuxhaven (where the Elbe meets the North Sea) and Hamburg (a sea port although not situated on the coast). That area corresponds to the estuary of the Elbe and is considered as an inland waterway. See judgment of 1 March 2007, *Jan De Nul*, C-391/05, EU:C:2007:126, paragraph 7, and Opinion of Advocate General Bot in *Jan De Nul*, C-391/05, EU:C:2006:791, point 78.

⁴⁸ Judgment of 7 September 2017, *Hüttenwerke Krupp Mannesmann*, C-465/15, EU:C:2017:640, paragraph 26. See also Opinions of Advocate General Sharpston in *X*, C-426/12, EU:C:2014:446, point 40, and of Advocate General Wahl in *Dilly’s Wellnesshotel*, C-493/14, EU:C:2016:174, point 82.

⁴⁹ Note of the Presidency of the Council of 24 June 2002, point 2 (Council document 10360/02). That document defines ‘conversion efficiency’ as ‘the ratio between the quantity of primary energy used to produce a second form of energy and the quantity of secondary energy actually produced’. That document is available on the website of the Council’s public register (see footnote 31 above).

⁵⁰ At the oral hearing, the French Government argued that such a calculation could only be theoretical since the same energy products are used to generate simultaneously heat and electricity. Moreover, the French Government stressed that a significant portion of those products (up to 40 %) is not used to produce either electricity or heat but is simply lost in the process, and that that calculation would not allow those losses to be accounted for.

portion of natural gas allocated to the production of electricity.⁵¹ The Commission, for its part, stressed that several Member States have developed a method for the calculation of the taxable portion of energy products. According to the Commission, as of today the portion of energy products used to generate heat is subject to taxation under French law.⁵² Similarly, in Belgium, only the portion of energy products used to produce electricity is exempted from taxation.⁵³ The Commission further stated that it is irrelevant that different methods are applied by the Member States for the calculation of the taxable portion of energy products used for the combined generation of heat and power. Indeed, Directive 2003/96 is silent on that issue.

75. Consequently, in my opinion, where energy products are used for the combined generation of heat and electricity, the portion of those products used to produce electricity falls within the scope of Article 14(1)(a) of Directive 2003/96, while the portion used to generate heat falls within the scope of Article 15(1)(c) of that directive.

76. In the present case, Sucrerie de Toury was denied the benefit of the exemption provided for by Article 266 *quinquies* A of the Customs Code and, after 31 December 2006, paragraph 3 of Article 266 *quinquies* of that code, for natural gas purchased from 1 January 2006 to 25 December 2007.

77. At the oral hearing, the applicant in the main proceedings stated that the reason why it was denied the exemption provided for by Article 266 *quinquies* A of the Customs Code is that that exemption can only be granted for five years following the entry into service of the cogeneration unit. Since the cogeneration unit of Sucrerie de Toury was put into service in 1996, it was too old to benefit from the exemption when Article 266 *quinquies* A of the Customs Code entered into force.⁵⁴

78. It is for the referring court to determine why Sucrerie de Toury was denied the benefit of the exemption provided for by French legislation. Should the reason be that that exemption is limited to five years from the entry into service of the cogeneration unit, this would, in my opinion, hardly be consistent with the unconditional nature of the exemption provided for by Article 14(1)(a) of Directive 2003/96.⁵⁵

79. Therefore, the answer to the question referred should be that, where energy products are used for the combined generation of heat and power, Article 14(1)(a) and Article 15(1)(c) of Directive 2003/96 must be applied jointly. The portion of energy products used to produce electricity falls within the scope of the compulsory exemption provided for by the former provision, while the portion of those products used for the generation of heat falls within the scope of the latter provision.

51 According to the applicant in the main proceedings, that method is based on Directive 2004/8/EC of the European Parliament and of the Council, of 11 February 2004, on the promotion of cogeneration based on a useful heat demand in the internal energy market and amending Directive 92/42/EEC (OJ 2004 L 52, p. 50), and on the Commission Decision of 21 December 2006 establishing harmonised efficiency reference values for separate production of electricity and heat in application of Directive 2004/8/EC of the European Parliament and of the Council (OJ 2007 L 32, p. 183).

52 At the oral hearing, the Commission cited paragraph 95 of the instruction of the Minister for Finance and Public Accounts of 13 April 2016 pertaining to the domestic tax (*Bulletin officiel des douanes* n° 7106, of 13 April 2016).

53 At the oral hearing, the Commission cited the third paragraph of Article 8 of the Royal Decree of 2 April 2014 laying down the terms of the federal contribution towards financing certain public service obligations and the costs relating to the regulation and monitoring of the market for natural gas (*Moniteur belge*, 25 April 2014, p. 34863).

54 However, the representative of the French Government replied that Article 266 *quinquies* A of the Customs Code entered into force in 1993. Therefore, according to the French Government, the reason why Sucrerie de Toury was denied the benefit of that exemption was that it applied for that exemption after the time limit had expired. Indeed, Sucrerie de Toury had to apply for the exemption within three years of the entry into service of its cogeneration unit, allegedly in 1996. It applied only in 2010.

55 Indeed, the ‘conditions’ referred to in the introductory sentence of Article 14(1) of Directive 2003/96 have the sole purpose of ‘ensuring the correct and straightforward application of [the] exemptions [laid down by that provision] and of preventing any evasion, avoidance or abuse’.

IV. Conclusion

80. In the light of the foregoing, I propose that the Court give the following reply to the question referred by the Conseil d'État (Council of State, France):

Where energy products are used for the combined generation of heat and power, Article 14(1)(a) and Article 15(1)(c) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity must be applied jointly. The portion of energy products used to produce electricity falls within the scope of the compulsory exemption provided for by the former provision, while the portion of those products used for the generation of heat falls within the scope of the latter provision.