

OPINION OF ADVOCATE GENERAL
JACOBS

delivered on 13 March 2003¹

Introduction

and Council Recommendation 81/924/EEC of 27 October 1981 on electricity tariff structures in the Community.³

1. This reference from the Corte d'Appello di Firenze raises the issue whether Member States are precluded by Community law from imposing surcharges on the supply of electricity to an undertaking for use as a raw material in an electro-chemical process to produce caustic soda and caustic potash. The surcharges are intended in particular to offset the costs of abandoning and re-converting nuclear-powered electricity generating stations and of building plants generating electricity from renewable sources of energy.

The legal framework

The national provisions

2. According to the referring court, the Community law provisions at issue are Articles 81, 82 and 85 EC, Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products,²

3. Legislative Decree No 347 of 19 October 1944⁴ established the Comitato Interministeriale dei Prezzi ('Interministerial Price Committee' or 'CIP') charged with the coordination and regulation of prices. Pursuant to Legislative Decree No 896 of 15 September 1947,⁵ the CIP was empowered to set up compensation funds, and to set the criteria for contributions, for the unification or equalisation of prices of goods and services of primary importance.

1 — Original language: English

2 — OJ 1992 L 76, p. 1.

3 — OJ 1981 L 337, p. 12.

4 — *Gazzetta Ufficiale della Repubblica Italiana* ('GURI') of 5 December 1944, No 90.

5 — GURI of 22 September 1947, No 217.

Legislative Decree No 98 of 26 January 1948⁶ provided for a fine of three times the surcharge due in case of default of payment. Further, the surcharges and fines were to be enforced by the fiscal administration in accordance with the procedures for the enforcement of State taxes.

4. On the basis of those provisions, in 1974 the CIP introduced the 'sovrapprezzo termico' ('thermic surcharge'),⁷ aimed at 'compensating the higher cost of fuel used in the thermo-electric centres' after the petroleum crisis of the beginning of the 1970s, and established the Cassa Conguaglio per il Settore Elettrico ('Compensation fund for the electricity sector') into which those surcharges, which were levied by the undertakings distributing electricity, were paid.

5. After a national referendum in 1987, Italy decided to abandon the generation of electricity using nuclear power stations. To contribute to the costs of that decision, on 21 December 1988 the CIP extended the validity of the 'maggiorazione straordinaria del sovrapprezzo termico' ('thermic surcharge special supplement'),⁸ initially introduced on 27 January 1988 on a temporary basis as a supplement to the 'thermic surcharge'.⁹

6. Law No 9 of 9 January 1991 ('Law 9/91'),¹⁰ which implemented a new national energy plan, provided that the thermic surcharge special supplement was to be permanent and that the revenue therefrom was to be used to contribute to the costs of ENEL and of the construction undertakings concerned following the decision to close nuclear power stations ('sovrapprezzo per onere nucleare' or 'surcharge for nuclear charges') and to compensate the State for the lower revenue resulting from the application of Law 9/91. Article 22 of Law 9/91 provided for measures to develop the production of electricity from sources of renewable energy. Pursuant to that provision, on 29 April 1992 the CIP adopted the 'sovrapprezzo per nuovi impianti da fonti rinnovabili e assimilate' ('surcharge for new plants using renewable and other similar sources', or 'surcharge for new plants') aimed at financing aid to those undertakings producing electricity from sources of renewable energy or other similar sources.¹¹

7. Both surcharges are levied by ENEL, which distributes electricity, and are paid in to the Compensation fund for the electricity sector which then accounts to the beneficiaries.

8. On 26 June 1997, the Autorità per l'Energia Elettrica ed il Gas ('Authority

6 — GURI of 6 March 1947, No 56.

7 — GURI of 11 July 1974, No 181.

8 — GURI of 30 December 1988, No 305.

9 — GURI of 2 February 1988, No 26.

10 — GURI of 16 January 1991, Supplemento Ordinario No 13.

11 — GURI of 12 May 1992, No 109.

for electricity and gas') decided¹² that the surcharges for nuclear charges and for new plants were to be integrated in the electricity tariff. By contrast, that part of the thermic surcharge special supplement compensating the lower revenue to the Italian State was to remain separate from that tariff.

goods which are treated as such in all the Member States may be the subject of Community provisions;... whereas the maintenance or introduction of other indirect taxes must not give rise to border-crossing formalities'.

11. Article 3 of Directive 92/12 provides that

The Community provisions

9. Article 81(1) and Article 82 EC respectively prohibit agreements and concerted practices between undertakings and abuses of dominant positions which distort competition within the common market. Both provisions refer *inter alia* to conduct which makes the conclusion of contracts subject to the acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.¹³

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

— mineral oils;

— alcohol and alcoholic beverages,

10. Directive 92/12¹⁴ lays down general provisions for products subject to excise duty and the holding, movement and monitoring of such products. In particular, the third recital to the Directive reads: 'whereas the concept of products subject to excise duty should be defined; whereas only

— manufactured tobacco.

2. The products listed in paragraph 1 may be subject to other indirect taxes for specific purposes, provided that those taxes comply with the tax rules applicable for

12 — GURI of 30 June 1997, No 150.

13 — Article 81(1)(e) and Article 82(d) EC respectively.

14 — Cited in note 2.

excise duty and VAT purposes as far as the determination of the tax base, calculation of the tax, chargeability and monitoring of the tax are concerned.

92/82/EEC shall be subject to excise duty if intended for use, offered for sale or used as heating fuel or motor fuel....

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

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

12. A definition of the mineral oils subject to the harmonised excise duty can be found in Directive 92/81.¹⁵ In particular, Article 2(1) contains a list of items of the Combined Nomenclature which does not include electricity.

14. Article 4(3) of Directive 92/81 provides:

13. Article 2 provides further as follows:

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

'2. Mineral oils other than those for which a level of duty is specified in Directive

15. Further, Article 8 provides for mandatory and optional exemptions from, or reductions in the rate of, the harmonised excise duty. In particular, Article 8(1)(d) provides for a mandatory exemption for

¹⁵ — Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils, OJ 1992 L 316, p. 12, as last amended by Council Directive 94/74/EC of 22 December 1994, OJ 1994 L 365, p. 46.

'mineral oils [that are] injected into blast furnaces for the purposes of chemical reduction as an addition to the coke used as the principal fuel'.

16. Article 2 of Directive 92/82,¹⁶ which provides for the approximation of the rates of excise duties on mineral oils, lists the mineral oils covered by it. These are leaded petrol, unleaded petrol, gas oil, heavy fuel oil, liquid petroleum gas, methane, kerosene.

17. Article 1 of Recommendation 81/924¹⁷ on electricity tariff structures provides *inter alia* that 'electricity tariff structures should be drawn up and adopted so as to allow the application of a rational price policy and to reflect the costs incurred in supplying the various categories of consumer'.

The main proceedings and the order for reference

18. Altair Chimica produces caustic soda and caustic potash by means of an electro-

chemical process. According to the Corte d'Appello di Firenze ('Corte d'Appello'), 'this is... an energy-consuming industry in which electric power is used as "power for the industrial process" and so constitutes a real and genuine raw material which forms part of the production process, since it is incorporated into the end product into which it flows, and from which it cannot be distinguished, and it is in consequence an essential factor, for which there is no substitute, in the course of the production process, given that no electro-chemical process can take place without electricity'.

19. The question before the Court has been referred in the context of an appeal brought by Altair Chimica against a decision of the Tribunale di Firenze which (i) rejected Altair Chimica's claim that the surcharges for nuclear charges and for new plants were contrary to Community law and that the relevant sums should be reimbursed and (ii) ordered Altair Chimica to pay the interest accrued on those sums as provided for in the electricity supply agreement with ENEL.

20. Before the Corte d'Appello, Altair Chimica argued that the legislative provisions establishing the surcharges for nuclear charges and for new plants were

16 — Council Directive 92/82/EEC of 19 October 1992 on the approximation of the rates of excise duties on mineral oils, OJ 1992 L 316, p. 19.

17 — Cited in note 3.

incompatible with Community law, in particular with Articles 81, 82 and 85 EC, Directive 92/12 and Recommendation 81/924.

and the Commission, all of whom, together with ENEL, were represented at the hearing.

21. The Corte d'Appello appears to agree that the provisions of national law at issue are incompatible with Community law. In particular, it observes that there is no obvious connection between the surcharges and the subject-matter of the electricity supply contract and that the use of electricity as a raw material should be exempt from taxation. In any event, the Corte d'Appello deems it necessary that the Court of Justice give a ruling determining the precise scope and interpretation of the Community legislation in question.

22. By order of 23 January 2001 the Corte d'Appello therefore made a reference to the Court of Justice for a preliminary ruling on the interpretation of Articles 81, 82 and 85 EC, Directive 92/12 and Recommendation 81/924 to ascertain whether the provisions of national law laid down in Legislative Decrees No 347 of 1944 and No 896 of 1947, Presidential Decree No 373 of 1994, Legislative Decree No 98 of 1948 and Law 9/91 are compatible with those provisions of Community law.

23. Written submissions were presented by Altair Chimica, the Italian Government

The arguments of the parties

24. Altair Chimica maintains that its production process requires the continuous use of considerable quantities of electricity; its expenditure on electricity is therefore substantial. At the same time, however, the actual cost to ENEL of supplying electricity to Altair Chimica, as compared with supply to other users, should be lower. Altair Chimica observes that its expenditure on electricity amounts to half of its overall industrial costs and that it pays twice as much as it would in the other Member States. Against that background, Altair Chimica claims that the imposition of the surcharges at issue is contrary to Community competition law because it places Italian undertakings at a considerable competitive disadvantage compared to those from other Member States where similar charges are not imposed. The surcharges constitute 'supplementary obligations' under Articles 81(1)(e) and 82(d) EC since they do not bear any relation to the supply of electricity. In that regard, Altair Chimica observes that, at the material time, ENEL had a dominant, even monopolistic, position in the distribution of electricity. The fact that the surcharges are not propor-

tionate to the costs actually incurred by ENEL in supplying electricity to Altair Chimica is contrary both to the competition rules and to Recommendation 81/924.

25. Altair Chimica also argues that Directive 92/12 should be read in an extensive fashion so as to encompass electricity. The surcharges, which are to be regarded as taxes, are not consistent with the principle, allegedly enshrined in Directive 92/12, whereby, when different uses are possible, the use of electricity as raw material in a production process should not be subject to taxation.

26. ENEL first claims that the order for reference does not contain sufficient information to establish infringement of Articles 81 and 82 EC. The surcharges are public measures and, as such, they are in principle not caught by those provisions. In any event, the imposition of a compulsory surcharge in pursuance of the public interest cannot be considered to be a form of supplementary obligation under Articles 81(1)(e) and 82(d) EC. In ENEL's view, Altair Chimica's claim in fact concerns the differences between the Italian fiscal regime covering electricity and those in the other Member States; those differences are allegedly disadvantageous for Italian undertakings. In other words, the complaint is that there is no harmonisation in the area. Electricity is not covered by Directives 92/12, 92/81 and 92/82. That is

confirmed by the proposal for a Council Directive restructuring the Community framework for the taxation of energy products¹⁸ which expressly regulates electricity and introduces an exemption from taxation for electricity used as a raw material in electro-chemical production processes. In any event, no general principle whereby raw materials should not be taxed can be found in Directives 92/12, 92/81 and 92/82.

27. The Italian Government observes as a preliminary point that the order for reference of the Corte d'Appello is inadmissible as it does not provide sufficient information concerning the relevant national law and the facts. In the alternative, it argues that neither Article 81 nor Article 82 EC is applicable as the surcharges are imposed by the State. In any event, those surcharges could not be considered to be supplementary obligations that have no connection with the subject of the contract in issue as they concern the production and distribution of electricity. Furthermore neither Directive 92/12 nor Directive 92/81 is applicable as they do not apply to electricity. In any event, however, those surcharges would be covered by the deroga-

¹⁸ — COM(97) 30 Final, OJ 1997 C 139, p. 14.

tion provided for in Article 3(2) of Directive 92/12. The alleged disadvantage to Altair Chimica is a consequence of the lack of harmonisation. For its part, Recommendation 81/924 is not binding.

mitted in its written observations that there were no grounds for applying the prohibition of internal taxation discriminating between domestic and imported products under Article 90 EC, at the hearing the Commission invited the Court to consider whether the taxation provisions of the Treaty applied to the surcharges.

Assessment

28. The Commission shares the view of the Corte d'Appello as to the fiscal nature of the surcharges. Support for that conclusion is found in cases where similar surcharges were considered to be fiscal.¹⁹ Articles 81 and 82 EC, which concern conduct attributable to undertakings, are not applicable to a fiscal contribution imposed by the State. The Commission thus suggests that the question should be rephrased, omitting any reference to Articles 81 and 82 EC and adding a reference to Directive 92/81. In view of the fiscal nature of the surcharges, Recommendation 81/924, which mainly regards the transparency of electricity tariff structures, is also inapplicable. Turning to Directives 92/12 and 92/81, the Commission concludes that they do not apply to electricity and that their scope cannot be extended by analogy. The Commission also points out that the harmonisation of taxation on electricity is covered by a proposal for a directive which has not yet been adopted.²⁰ Finally, although it had sub-

Admissibility

29. The Italian Government submits that the order for reference is inadmissible because it does not provide sufficient information concerning the legal context or the reasons for the referring court's view that the question whether the national provisions at issue are compatible with Community law is material to the outcome of the main proceedings. At the hearing, ENEL appeared to put forward a similar argument, at least with regard to Articles 81 and 82 EC.

30. I disagree with that view. I consider that the information provided by the Corte d'Appello, as supplemented by the information included in the written observa-

19 — Case 77/76 *Cucchi* [1977] ECR 987; Case 105/76 *Interzuccheri* [1977] ECR 1029; Case C-99/92 *Terni and Italsider* [1994] ECR I-541; Case C-100/92 *Fonderia* [1994] ECR I-561.

20 — See footnote 18 above.

tions, is such as to enable the Court to fulfil its duty to interpret Community law. *Substance*

31. Further, although, according to settled case-law, it is solely for the national court before which the dispute has been brought to determine both the need for a preliminary ruling and the relevance of the questions which it submits to the Court, that does not preclude the Court from rephrasing those questions when that is necessary to give a useful answer to the referring court. That power, however, should not be taken so far as to allow the Court to include points of law which have not been raised at all in the order for reference and which, as far as can be seen from the file before the Court, have not been debated in the main proceedings. That would clearly lead the Court to interpret issues which are wholly beyond the scope of the reference.

32. That would be the case, in my view, if the Court were to accept the Commission's suggestion that it should rule on the compatibility of the surcharges with the tax provisions of the Treaty. An interpretation of those provisions would plainly go beyond the scope of the reference of the Corte d'Appello.

33. First, I can see no reason for not considering surcharges such as those at issue to be tax measures according to Community law. Indeed all the parties seem substantially to agree on that.

34. The surcharges are imposed by the State for a public purpose, and are paid in to a public fund. In the event of default, following a pattern which is typical of public law sanctions, a fine is payable which amounts to three times the surcharge. Furthermore, surcharges and fines are recovered by the fiscal administration in accordance with the procedures for the enforcement of State tax measures.

35. Support for that classification can be found in two cases cited by the Commission, *Cucchi* and *Interzuccheri*,²¹ where a surcharge similar to those in issue — introduced by the CIP and paid into an equalisation fund used to grant subsidies to the sugar industry — was unequivocally regarded as a tax measure.

21 — Cited in note 19.

36. The conclusion that the surcharges for nuclear charges and for new plants are fiscal is not undermined by the fact that the Authority for electricity and gas has integrated those surcharges into the electricity tariff but left the remaining part of the thermic surcharge special supplement (which compensates the lower revenue to the Italian State) separate from that tariff. It could thus be argued that that integration recognises that only the element that compensates the lower tax revenue could be classified as a tax.

37. I am not convinced by that argument. Important aspects of the surcharges such as their source, their purpose and, in case of non-payment, the sanction and enforcement procedures, all lead to the conclusion that they are indeed of a fiscal nature for the purpose of Community law irrespective of their definition and classification under national law. The inclusion of a surcharge in the electricity tariff does not affect its qualification as a tax under Community law.

Articles 81 and 82 EC and tax measures

38. Article 81 EC prohibits agreements and concerted practices between undertakings that distort or restrict competition within

the common market. Article 82 EC prohibits abuse by dominant undertakings. It is thus clear that those provisions apply to the conduct of undertakings and do not cover legislative or regulatory measures taken by the Member States. Only exceptionally may those provisions be applied in conjunction with Articles 3(1)(g), 10(2) or 86(1) EC to preclude Member States from adopting or maintaining in force any measure, even of a legislative or regulatory nature, which could deprive the competition rules of their effectiveness.²² According to the settled case-law of the Court, that is the case when a Member State requires or favours the adoption of agreements, decisions or concerted practices contrary to Article 81 or reinforces their effects or deprives its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere.²³

39. However, Articles 3(1)(g), 10(2) and 81 do not apply in the absence of any link with conduct on the part of undertakings of the kind referred to in Article 81.²⁴ In any event, 'Articles [81 and 82] apply only to anti-competitive conduct engaged in by

22 — Case 13/77 *Inno v ATAB* [1977] ECR 2115, paragraph 31 of the judgment; Case C-2/91 *Meng* [1993] ECR I-3751, paragraph 14.

23 — See, for instance, Case 267/86 *Van Eycke v ASPA* [1988] ECR 4769, paragraph 16 of the judgment.

24 — *Meng*, paragraph 22 of the judgment.

undertakings on their own initiative. If anti-competitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Articles [81 and 82] do not apply. In such a situation, the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings'.²⁵

40. Tax measures are a typical form of public intervention in the economy, being imposed by governments only. They are therefore exclusively attributable to the State and cannot, from any perspective, be considered to be the conduct of private undertakings. Accordingly, taxes cannot constitute one of the 'supplementary obligations' under Articles 81(1)(e) and 82(d) EC.

41. The public nature of the surcharges at issue is not affected by the fact that they may be actually levied by private bodies or entities, as may happen in the case of parafiscal charges, in particular when, as is apparently the case here, those charges are

enforceable by the fiscal administration in accordance with public procedures provided for taxes.

42. Altair Chimica has also argued that, in the present case, the competition rules are infringed because payment of the surcharges places it at a competitive disadvantage as compared to its competitors in the other Member States where there are allegedly no similar charges. It is however clear that competitive disadvantages (and advantages) attributable to differences in indirect taxation in the Member States are regulated not under Articles 81 and 82 EC but, should it be deemed necessary, by appropriate harmonisation measures taken at the Community level such as the directives on excise duties.

43. The surcharges at issue cannot therefore be caught by the competition rules regulating the conduct of undertakings.

Directives 92/12 and 92/81

25 — Joined Cases C-359/95 P and C-379/95 P *Commission and France v Ladbrooke Racing* [1997] ECR I-6265, paragraph 33 of the judgment.

44. With regard to Directives 92/12 and 92/81, I share the view of ENEL, the Italian

Government and the Commission. Those directives, and indeed Directive 92/82 also, are not relevant in the present case because they do not apply to electricity *ratione materiae*.

general principle according to which raw materials cannot be taxed. That principle thus prevents the imposition of the surcharges at issue in the instant case because electricity is used as a raw material in an electro-chemical process to produce caustic soda and caustic potash.

45. Article 3(1) of Directive 92/12 states that the directive 'shall apply' to mineral oils, alcohol and tobacco 'as defined in the relevant Directives'. For present purposes the 'relevant' Directives are Directive 92/81 and Directive 92/82, which do not mention electricity when they define mineral oils by reference to the Combined Nomenclature.

46. That conclusion is not affected by Article 2(2) and (3) of Directive 92/81. In no circumstance can electricity be regarded as a 'mineral oil', as a 'hydrocarbon', or as 'any product intended for use, offered for sale or used as *motor fuel*, or as an additive or extender in motor fuels'.²⁶

47. Altair Chimica further argues that Directives 92/12 and 92/81 embody a

48. However, I do not consider it necessary for the Court to analyse that issue on the ground that Directives 92/12, 92/81 and 92/82 manifestly do not apply to the surcharges since electricity is beyond their scope *ratione materiae*. Moreover, even the provisions which, in the submission of Altair Chimica, allegedly embody that principle in fact support the view that the directives do not apply. Thus the first part of Article 4(3) of Directive 92/81 provides that 'the consumption of *mineral oils* within the curtilage of an establishment producing *mineral oils* shall not be considered a chargeable event giving rise to excise duty as long as the consumption is for the purpose of such production'.²⁷ For its part Article 8(1)(d) refers to '*mineral oils* injected into blast furnaces for the purposes of chemical reduction as an addition to the coke used as the principal fuel'.²⁸

26 — Emphasis added.

27 — Emphasis added.

28 — Emphasis added.

49. It is clear beyond any doubt that neither of those provisions is applicable to the instant case for the simple reason that they concern the consumption, production and use of mineral oils and, as has been explained above, even on a broad interpretation of the scope *ratione materiae* of the directives at issue, electricity cannot fall within the category of mineral oils.

50. It may be noted that Altair Chimica implicitly accepts that the directives are not applicable to electricity since it submits that electricity should be 'assimilated' to a mineral oil, thus seeming to suggest an extensive, or perhaps analogical, interpretation of that concept. However I do not consider that it is possible to extend the scope of the directives through such an interpretation. The directives unequivocally list the products to which they apply; those products do not include electricity. Indeed, as is shown by the preamble to Directive 92/12,²⁹ one of the aims of that directive is precisely to define the concept of products subject to excise duty, thus giving further support to a restrained interpretation of the categories of products subject to the Directive.³⁰

29 — First part of the third recital.

30 — Similar statements, underlining the importance of providing a definition of mineral oils, can be found also in the preambles to Directive 92/81 and Directive 94/74/EC of 22 December 1994 which amends Directives 92/12, 92/81 and 92/82, OJ 1994 L 363, p. 46.

51. Since electricity is not included in the category of mineral oils and cannot be assimilated to them, the argument put forward by the Italian Government concerning Article 3(2) of Directive 92/12 is not relevant. That provision permits the Member States to impose other indirect taxes for specific purposes on the 'products listed in paragraph 1' which, as has been shown, do not include electricity.

52. As has been rightly observed by the Commission and ENEL, that conclusion is also supported by some of the provisions of the proposal for a Council Directive restructuring the Community framework for the taxation of energy products³¹ which *inter alia* regulate the taxation of electricity.

53. The first and twelfth recitals of the preamble to the proposed directive state that: 'the scope of Directive 92/81/EEC... and of Directive 92/82/EEC.... is *restricted to mineral oils*', and that 'the proper functioning of the internal market and the achievement of the objectives of other

31 — See footnote 18 above.

Community policies require minimum levels of taxation to be laid down at Community level for all energy products, including *electricity*'.³²

though, as is expressly provided under the fifth paragraph of Article 249 EC, 'recommendations... shall have no binding force'. Recommendations cannot create rights upon which individuals may rely before national courts.³⁴

54. The most interesting provisions, however, are Article 2 and Article 13(1)(a). The former provides a definition of 'energy products' within the context of the proposed directive, which in its second paragraph expressly includes electricity within that category. The latter states that 'Member States shall also exempt electricity used principally for the purposes of chemical reduction, and in metallurgical and electrolytic processes'. According to ENEL and the Commission, that provision would expressly introduce an exemption from taxation of electricity when it is used in production processes such as those in the present case.

56. The parties have not adduced any argument to suggest that, despite its form and in view of its content, Recommendation 81/924 is intended to produce binding legal effects and hence should not be considered to be a recommendation. On the contrary, even Altair Chimica appears to agree that that act is not binding.

Recommendation 81/924

55. It is established³³ that national courts may make references to the Court on the interpretation of a recommendation even

57. Admittedly the Court has also stressed that the fact that recommendations do not have binding force cannot be regarded as meaning that they have no legal effect whatsoever. Indeed 'national courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national

32 — Emphasis added.

33 — Case C-322/88 *Grimaldi* [1989] ECR 4407, paragraphs 8 and 9 of the judgment.

34 — *Ibid.*, paragraph 16 of the judgment.

measures adopted in order to implement them or where they are designed to supplement binding Community provisions'.³⁵ At most, therefore, recommendations 'have to be taken into consideration' and can 'cast light on' certain national or Community provisions. It thus seems to me that their effects are in any event somewhat limited.

58. I also see some force in the Commission's view that, since the surcharges at issue are undoubtedly of a fiscal nature, Recommendation 81/924, which mainly focuses on the transparency of electricity prices, is irrelevant. It is none the less true that the surcharges have since 1997 been incorporated in the electricity tariff so that they may reasonably be regarded as part of it. And, most crucially, the fact that the tariff includes a tax element makes transparency more, not less, important.

59. I would however observe that, even if Recommendation 81/924 were regarded as applicable, it does not seem to assist on the

substance. The only provision of possible relevance to the instant case merely requires that 'electricity tariff structures should be drawn up and adopted so as to allow the application of a rational price policy and to reflect the costs incurred in supplying the various categories of consumers'. In my view, that provision cannot be construed as requiring that the electricity tariff paid by a certain category of consumers should *exclusively* reflect the costs incurred in supplying that category and excluding any possibility of recovering any of the costs resulting from major reorganisations affecting the generation and distribution industries. Support for that conclusion seems to be provided by the preamble to Recommendation 81/924 which states that 'electricity supply undertakings should, in accordance with the principles of sound management, cover their costs on the basis of the most objective allocation *possible* of such costs among the various categories of users'.³⁶

60. In any event, however, whatever the correct interpretation of Recommendation 81/924, I cannot see how a Recommendation could preclude the imposition of surcharges such as those at issue given its inherently limited legal effects.

³⁵ — *ibid*, paragraph 18 of the judgment.

³⁶ — Sixth recital. Emphasis added.

Conclusion

61. For the above reasons, I am therefore of the opinion that the question referred by the Corte d'Appello di Firenze should be answered as follows:

Articles 81 and 82 EC, Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils, Council Directive 92/82/EEC of 19 October 1992 on the approximation of the rates of excise duties on mineral oils and Council Recommendation 81/924/EEC of 27 October 1981 on electricity tariff structures in the Community do not preclude a Member State from imposing surcharges on electricity used in an electro-chemical process to produce caustic soda and caustic potash.