Joined Cases C-393/04 and C-41/05

Air Liquide Industries Belgium SA

v

Ville de Seraing

and

Province de Liège

(References for a preliminary ruling from the Cour d'appel de Liège

and the Tribunal de première instance de Liège)

(State aid – Definition – Exemption from municipal and provincial taxes – Effects of Article 88(3) EC – Charges having equivalent effect – Internal taxation)

Summary of the Judgment

1. *Preliminary rulings – Jurisdiction of the Court – Limits*

(Art. 234 EC)

2. *State aid – Definition*

(Art. 87(1) EC)

3. *State aid – Planned aid – Prohibition on giving effect to plans before the Commission's final decision – Direct effect*

(Arts 87 EC and 88(3) EC)

4. *Free movement of goods – Customs duties – Charges having equivalent effect – Rules laid down in the Treaty*

5. *Free movement of goods – Customs duties – Charges having equivalent effect – Meaning*

(Art. 25 EC)

6. *Tax provisions – Internal taxation – Prohibition of discrimination between imported or exported products and similar domestic products*

(Art. 90 EC)

1. In the context of the procedure established by Article 234 EC providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it.

It is for the national court hearing a dispute to determine both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the

Court. The Court may, however, refuse to rule on a question referred for a preliminary ruling by a national court, inter alia where it is quite obvious that the interpretation of Community law sought bears no relation to the actual facts of the main action or its purpose.

(see paras 23-24)

2. The aim of Article 87 EC is to prevent trade between Member States from being affected by benefits granted to public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or the production of certain goods.

The conditions required by Article 87(1) EC for categorising a national measure as State aid are, first, the financing of that measure by the State or through State resources, secondly, the existence of a benefit for an undertaking, thirdly, the selective nature of the said measure, fourthly, its effect on trade between Member States and the distortion of competition resulting therefrom.

Concerning the first and second conditions, the definition of aid is more general than that of subsidy, because it includes not only positive benefits, such as subsidies themselves, but also State measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which thus, without being subsidies in the strict sense of the word, are similar in character and have the same effect. It follows that a measure by which the public authorities grant to certain undertakings a tax exemption which, although not involving a transfer of State resources, places the persons to whom the tax exemption applies in a more favourable situation than other taxpayers constitutes State aid within the meaning of Article 87(1) EC.

Concerning the third condition, relating to the selective nature of the measures at issue, tax advantages which do not apply to all economic operators, but which are granted solely to undertakings exercising certain types of activities, cannot be considered to be general measures of tax or economic policy.

As regards, finally, the fourth condition, which requires that the measure in question affects trade between Member States and distorts or threatens to distort competition, it is necessary, not to establish that the aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition. In particular, where aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid. Moreover, it is not necessary that the recipient undertaking itself be involved in the said trade. Finally, the relatively small amount of the aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that trade between Member States might be affected.

If those four conditions are satisfied, the exemption from a municipal or provincial tax on motive force granted solely in respect of motors used in natural gas stations, to the exclusion of motors used for other industrial gases, may be regarded as State aid within the meaning of Article 87 EC.

(see paras 27-36, 38, operative part 1)

3. In accordance with the third sentence of Article 88(3) EC, a Member State cannot put its proposed aid measures into effect until they have been declared compatible with the common market.

In that regard, national courts are involved in the system for reviewing State aid only through the direct effect attributed by case-law to the prohibition on putting State aid into effect, in accordance with the third sentence of Article 88(3) EC. It is, in particular, for the national courts to uphold the

rights of the persons concerned in the event of a possible breach by national authorities of the prohibition on putting aid into effect.

With regard to the measures which may or must be taken to ensure this legal protection, where such a breach is invoked, national courts must take all the consequential measures, in accordance with national procedures, as regards both the validity of measures giving effect to the aid and the recovery of financial support granted in disregard of Article 88(3) EC.

However, those liable to pay a tax cannot rely on the argument that the exemption enjoyed by other businesses constitutes State aid in order to avoid payment of that tax or to obtain reimbursement of it, since even if the exemption at issue constitutes aid within the meaning of Article 87 EC, the fact that the aid may be unlawful does not affect the tax itself. The last sentence of Article 88(3) EC lays down an obligation the aim of which is to ensure that aid is not granted until the Commission has declared it compatible with the common market. In this context, the powers of national courts are essentially preventive and cannot exceed those conferred on the Commission where it takes a decision on the legality of State aid following a substantive assessment. Finally, not only would an extension of the circle of potential recipients to other undertakings not make it possible to eliminate the effects of aid granted in breach of Article 88(3) EC but it would rather, on the contrary, lead to an increase in the effects of that aid, as a tax cannot be hypothecated to an exemption from payment of it for a category of businesses, since application of a tax exemption and its extent do not depend on the tax revenue.

(see paras 40-46, 48, operative part 2)

4. The Treaty provisions relating to charges having an equivalent effect and those relating to discriminatory internal taxation cannot be applied together, so that under the system of the Treaty the same measure cannot belong to both categories at the same time.

(see para. 50)

5. Any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense, constitutes a charge having equivalent effect within the meaning of Article 25 EC.

A tax on motive force, levied in particular on motors used for transporting industrial gas through very high pressure pipes, does not constitute a charge having equivalent effect within the meaning of Article 25 EC, since it is the functioning of these motors and their consumption of energy which constitute the chargeable event, whatever the substance or the energy source used to operate them, and not because a frontier is crossed, and thus the said tax is not connected with the import or export of goods.

(see paras 51, 53-54, operative part 3)

6. Within the system of the Treaty, Article 90 EC supplements the provisions on the abolition of customs duties and charges having equivalent effect. Its aim is to ensure free movement of goods between the Member States in normal conditions of competition by the elimination of all forms of protection which may result from the application of internal taxation that discriminates against products from other Member States.

Pecuniary charges resulting from a general system of internal taxation applied systemically, in accordance with the same objective criteria, to categories of products irrespective of their origin or destination fall within Article 90 EC.

A tax on motive force, levied in particular on motors used for transporting industrial gas through very high pressure pipes, does not constitute discriminatory internal taxation for the purposes of Article 90 EC since it is not imposed specifically on exported or imported products or in such a way as to differentiate them, given that it applies to economic activities carried out by industrial, commercial, financial or agricultural undertakings and not to products as such, and, in addition, the exemption granted concerns motors used for transporting natural gas which is not sufficient to establish that the tax is discriminatory, as that gas is not a product analogous to industrial gas or a product that competes with it.

(see paras 55-59, operative part 4)

JUDGMENT OF THE COURT (Second Chamber)

15 June 2006 (*)

(State aid – Definition – Exemption from municipal and provincial taxes – Effects of Article 88(3) EC – Charges having equivalent effect – Internal taxation)

In Joined Cases C-393/04 and C-41/05,

REFERENCES for a preliminary ruling under Article 234 EC, from the Cour d’appel (Court of Appeal), Liège (Belgium) (C-393/04) and the Tribunal de première instance (Court of First Instance), Liège (C?41/05), made by decisions of 15 September 2004 and 24 January 2005, received at the Court on 17 September 2004 and 3 February 2005 respectively, in the proceedings

Air Liquide Industries Belgium SA

v

Ville de Seraing (C-393/04),

Province de Liège (C-41/05),

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J. Makarczyk, R. Silva de Lapuerta (Rapporteur), P. K?ris and G. Arestis, Judges,

Advocate General: A. Tizzano,

Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 13 October 2005,

after considering the observations submitted on behalf of:

– Air Liquide Industries Belgium SA, by P. De Bandt, H. Deckers and G. Lienart, avocats,

– the ville de Seraing, by J.-L. Gilissen, R. Ghods and M.-P. Donea, avocats,

– the province de Liège, by C. Collard, avocat,

– the Belgian Government, by M. Wimmer, acting as Agent,

– the Commission of the European Communities, by J.-P. Keppenne and B. Stromsky, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 March 2006,

gives the following

Judgment

1 These references for a preliminary ruling concern the interpretation of the concept of State aid and the legal consequences which may arise at national level because of such aid. They also concern the interpretation of the concepts of charge having equivalent effect and internal taxation.

2 The references were made in the course of proceedings between Air Liquide Industries Belgium SA (‘Air Liquide’) and the ville de Seraing, first, and the province de Liège, second.

3 Air Liquide is an international group which specialises in the production and transport of industrial and medicinal gases and also provides associated services. In particular, Air Liquide supplies oxygen, nitrogen, hydrogen and many other gases to sectors of activity as diverse as iron and steel manufacturing and refining, chemistry and metallurgy, the glass, electronics, paper, food processing, healthcare and aerospace industries.

4 In the context of its activities, Air Liquide undertakes inter alia the transport of industrial gas from the various production facilities in Belgium, France and the Netherlands to its customers established in those three States. This transport is carried out, in the said States, using a network of very high pressure pipelines allowing, in particular, major consumers located in the steel- and chemical-producing areas to be supplied.

5 To supply its network of pipelines, Air Liquide operates an industrial gas production unit in the territory of the ville de Seraing, in the province de Liège. That unit includes a gas compression station.

National legal framework

6 On 13 December 1999, the municipal council of the ville de Seraing adopted a regulation introducing a tax on motive force. Under that regulation industrial, commercial, financial and agricultural undertakings established in the territory of that municipality are required to pay an annual tax on the motors used in the establishments or plants linked to them, whatever the substance or the energy source used to operate them. The tax rate is proportionate to the power of the motor used.

7 Article 3 of this regulation provides for exemption from this tax in certain situations. In

particular, Article 3(9) provides that motors used in natural gas compression stations in order to drive the compressors which create pressure in the supply pipes are exempt from the tax on motive force.

8 On 30 October 1998 and 29 October 1999, the provincial council of Liège adopted a regulation introducing a tax on motive force. This regulation establishes an annual tax on motors, payable to the province de Liège, whatever the substance used to operate them. This tax is imposed on industrial, commercial, financial and agricultural undertakings and on any professions and trades. The rate is proportionate to the power of the motor used.

9 Article 5 of this regulation provides for numerous situations which give rise to exemption from the tax. In particular, Article 5(12) provides that motors used in natural gas compression stations in order to drive the compressors which create pressure in the supply pipes are exempt from the tax on motive force.

The main proceedings and the questions referred for a preliminary ruling

Case C-393/04

10 On 28 June 2000, Air Liquide received from the municipality of Seraing a demand for payment of BEF 41 275 757 (EUR 1 023 199.20) by way of tax on motive force relating to its activities in 1999.

11 On 22 September 2000, Air Liquide applied to the municipal council of Seraing to have that demand withdrawn.

12 Air Liquide then brought, before the Tribunal de première instance (Court of First Instance) de Liège, an action for annulment of the decision rejecting that application. In the context of that action, it claimed that the tax on motive force was discriminatory, in particular in view of the fact that undertakings transporting natural gas enjoyed an exemption which it considers arbitrary.

13 By judgment of 28 November 2002, the Court of First Instance, Liège, dismissed the said action as unfounded.

14 Air Liquide appealed against that judgment to the Cour d'Appel (Court of Appeal) de Liège, which decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Must exemption from a municipal tax on motive force granted solely in respect of motors used in natural gas stations, to the exclusion of motors used for other industrial gases, be regarded as State aid within the meaning of Article 87 of the consolidated version of the Treaty establishing the European Community?'

Case C-41/05

15 On 20 April 2000 and 9 May 2001, the province de Liège sent Air Liquide demands for payment of BEF 4 744 980 (EUR 117 624.98) in respect of the 1999 tax year and BEF 2 403 360 (EUR 59 577.74) in respect of the 2000 tax year, by way of tax on motive force.

16 On 26 June 2000 and 23 July 2001, Air Liquide applied to the relevant authorities of the province de Liège to have these demands withdrawn.

17 Since those applications were rejected, Air Liquide brought before the Court of First Instance, Liège, an action for withdrawal of the said demands and reimbursement of the tax paid

prior to the 1999 tax year, an amount of BEF 30 788 100 (EUR 763 217.06). In the context of that action, it claimed that the tax on motive force was discriminatory, in particular in view of the fact that undertakings transporting natural gas benefited from an exemption, and that that tax was incompatible with the EC Treaty.

18 The Court of First Instance, Liège, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Must exemption from a provincial tax on motive force granted solely in respect of motors used in natural gas stations, to the exclusion of motors used for other industrial gases, be regarded as State aid within the meaning of Article 87 of the consolidated version of the Treaty establishing the European Community?

(2) If the answer to the preceding question is “yes”, must the national court, before which an action is brought by a taxpayer who has not enjoyed exemption from the provincial tax on motive force, order the public authority which levied that tax to repay it to that taxpayer if it finds that, in law or in fact, it is not possible for the public authority which levied that tax to claim it from the taxpayer who enjoyed exemption from the tax on motive force?

(3) Must a tax on motive force levied on motors used for transporting industrial gas through very high pressure pipes, which requires the use of compression stations, be regarded as a charge having equivalent effect prohibited by Article 25 et seq. of the consolidated version of the Treaty, if it is apparent that, de facto, it is levied by a province or a municipality on the transport of industrial gas outside its territorial limits, when in the same conditions the transport of natural gas is exempt from such a tax?

(4) Must a tax on motive force levied on motors used for transporting industrial gas through very high pressure pipes, which requires the use of compression stations, be regarded as internal taxation, prohibited by Article 90 et seq. of the Treaty, if it is apparent that the transport of natural gas is exempt from that tax?

(5) If the answer to the questions above is “yes”, is a taxpayer who has paid the tax on motive force justified in seeking the reimbursement of that tax from 16 July 1992, the date on which the *Legros* judgment was given?’

19 By order of 21 July 2005 of the President of the Second Chamber of the Court of Justice, Cases C-393/04 and C-41/05 were joined for the purposes of the oral procedure and the judgment.

The questions referred

The question referred in Case C-393/04 *and the first question referred in Case* C?41/05

On the admissibility of the questions

20 The Belgian Government and the Commission of the European Communities submit that these two questions are inadmissible given that, even if the answers thereto are in the affirmative, they would have no bearing on the outcome of the main proceedings, in which reimbursement of the disputed taxes is sought.

21 The Belgian Government and the Commission recall that, as is apparent from the case-law of the Court of Justice, the national court, before which a trader has brought a claim for reimbursement of a tax paid, is in principle not in a position, faced with an infringement of the last sentence of Article 88(3) EC, to contribute to safeguarding the rights which the trader might claim.

In fact, such a reimbursement would only create further unlawful aid which would be added to the first and, in the same way as any other national authority, a national court is bound to comply with Community law and cannot, therefore, adopt a decision which would consist in granting further unlawful aid.

22 The Belgian Government and the Commission consider that, even if the disputed exemptions were to be regarded as State aid, the applicant in the main proceedings would not be justified in refusing to pay the taxes in question. It would only be otherwise if those taxes constituted the method of financing an aid measure and if the proceeds of the taxes had a bearing on the amount of aid. In the present case, neither the application of these exemptions nor their scope fulfils these conditions.

23 It should be noted that, according to settled case-law, in the context of the procedure established by Article 234 EC providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it (see Case C-334/95 Kr*üger* [1997] ECR I-4517, paragraph 22, and Case C-88/99 *Roquette Frères* [2000] ECR I-10465, paragraph 18).

24 It should also be noted that, according to settled case-law, it is for the national court hearing a dispute to determine both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. The Court may, however, refuse to rule on a question referred for a preliminary ruling by a national court, inter alia where it is quite obvious that the interpretation of Community law sought bears no relation to the actual facts of the main action or its purpose (see, inter alia, CaseC-421/97 *Tarantik* [1999] ECR I-3633, paragraph 33, Case C-437/97 *EKW andWein & Co* [2000] ECR I?1157, paragraph 52, and Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 19).

25 Concerning the purpose of the main actions, it is important to point out that, as is apparent from the written and oral evidence presented to the Court, in particular the explanations given by the applicant in the main proceedings, although the purpose of Air Liquide’s claims is the reimbursement of the disputed taxes, they also call in question the validity of the legal instruments which introduced those taxes.

26 In those circumstances, a reply must be given to the questions referred.

The reply to the questions referred

27 It is important to recall that the aim of Article 87 EC is to prevent trade between Member States from being affected by benefits granted by the public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or the production of certain goods (Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 13).

28 It is therefore appropriate to examine the tax exemptions at issue in the main proceedings in the light of the conditions required by Article 87(1) EC for categorising a national measure as State aid, namely the financing of that measure by the State or through State resources, the existence of a benefit for an undertaking, the selective nature of the said measure, and its effect on trade between Member States and the distorsion of competition resulting therefrom.

29 Concerning the first and second conditions, it should be recalled that, according to settled case-law, the definition of aid is more general than that of subsidy, because it includes not only positive benefits, such as subsidies themselves, but also State measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which thus, without being subsidies in the strict sense of the word, are similar in character and have the same

effect (see, in particular, Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer &Peggauer Zementwerke* [2001] ECR I-8365, paragraph 38; Case C-501/00 *Spain* v *Commission* [2004] ECR I-6717, paragraph 90, and Case C-66/02 *Italy* v *Commission* [2005] ECR I-0000, paragraph 77).

30 It follows that a measure by which the public authorities grant to certain undertakings a tax exemption which, although not involving a transfer of State resources, places the persons to whom the tax exemption applies in a more favourable financial situation than other taxpayers constitutes State aid within the meaning of Article 87(1) EC (see Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 14, and Case C-222/04 *Cassa di Risparmio diFirenze and Others* [2006] ECR I-0000, paragraph 132).

31 Concerning the third condition, relating to the selective nature of the measures at issue in the main proceedings, it is common ground that the tax advantages concerned do not apply to all economic operators, but are granted to undertakings exercising certain types of activities, that is those using, in natural gas compression stations, motors to drive the compressors which create pressure in the supply pipes.

32 Since they do not therefore apply to all economic operators, these measures cannot be considered to be general measures of tax or economic policy (see Case C?66/02 *Italy* v *Commission*, paragraph 99, and Case C-148/04 *Unicredito Italiano* [2005] ECR I-0000, paragraph 49).

33 As regards the fourth condition relating to the existence of State aid, Article 87(1) EC requires that the measure in question affects trade between Member States and distorts or threatens to distort competition.

34 For the purpose of such a categorisation, it follows from the case-law that it is necessary, not to establish that the aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition (see Case C?372/97 *Italy* v *Commission* [2004] ECR I-3679, paragraph 44; Case C-66/02 *Italy* v *Commission*, paragraph 111, and *Unicredito Italiano*, paragraph 54).

35 In particular, where aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid. Moreover, it is not necessary that the recipient undertaking itself be involved in the said trade (see, in particular, Case C-66/02 *Italy* v *Commission*, paragraphs 115 and 117, and *Unicredito Italiano*, paragraphs 56 and 58, and the case-law cited).

36 Finally, the relatively small amount of the aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that trade between Member States might be affected (see Joined Cases C-278/92 to C?280/92 *Spain* v *Commission* [1994] ECR I?4103, paragraph 42).

37 It is for the referring courts to establish, in the light of the guidance set out above, whether State aid exists in the main proceedings.

38 The answer to the question referred in Case C?393/04 and to the first question referred in Case C-41/05 must therefore be that exemption from a municipal or provincial tax on motive force granted solely in respect of motors used in natural gas stations, to the exclusion of motors used for other industrial gases, may be regarded as State aid within the meaning of Article 87 EC. It is for the referring courts to establish whether the conditions relating to the existence of State aid are met.

The second question referred in Case C-41/05

39 With this question, the referring court seeks to ascertain from the Court the legal consequences of the classification of the exemption at issue as State aid and the rights of a taxpayer who has paid a tax, where the exemption from that tax granted to other undertakings may constitute such aid.

40 In order to reply to that question, it is important to recall that, in accordance with the third sentence of Article 88(3) EC, a Member State cannot put its proposed aid measures into effect until they have been declared compatible with the common market.

41 In that respect, the Court has held that national courts are involved in the system for reviewing State aid only through the direct effect attributed by case-law to the prohibition on putting State aid into effect, in accordance with the third sentence of Article 88(3) EC. The Court has in particular stated that it is for the national courts to uphold the rights of the persons concerned in the event of a possible breach by national authorities of the prohibition on putting aid into effect (see Joined Cases C-261/01 and C-262/01 *VanCalster and Others* [2003] ECR I?12249, paragraph 53).

42 With regard to the measures which may or must be taken to ensure this legal protection, the Court has stated that, where such a breach is invoked by individuals, national courts must take all the consequential measures, in accordance with national procedures, as regards both the validity of measures giving effect to the aid and the recovery of financial support granted in disregard of Article 88(3) EC (see Case C?354/90 *Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon* [1991]ECR I-5505, paragraph 12, and Case C-174/02*Streekgewest* [2005] ECR I-85, paragraph 17).

43 The Court has also held that those liable to pay a tax cannot rely on the argument that the exemption enjoyed by other businesses constitutes State aid in order to avoid payment of that tax (see Case C-390/98*Banks* [2001] ECR I-6117, paragraph 80). It follows that, even if the exemption at issue in the main proceedings constitutes aid within the meaning of Article 87 EC, the fact that the aid may be unlawful does not affect the legality of the tax itself.

44 The last sentence of Article 88(3) EC lays down an obligation the aim of which is to ensure that aid is not granted until the Commission has declared it compatible with the common market. In this context, the powers of national courts are essentially preventive and cannot exceed those conferred on the Commission where it takes a decision on the legality of State aid following a substantive assessment.

45 Finally, it should be pointed out that an extension of the circle of potential recipients to other undertakings would not make it possible to eliminate the effects of aid granted in breach of Article 88(3) EC but would rather, on the contrary, lead to an increase in the effects of that aid.

46 It would be otherwise if the tax and the envisaged exemption were an integral part of an aid measure. For a tax to be regarded as forming an integral part of an aid measure, it must be

hypothecated to the aid measure under the relevant national rules, in the sense that the revenue from the tax is necessarily allocated for the financing of the aid and has a direct impact on the amount thereof and, consequently, on the assessment of the compatibility of that aid with the common market (see *Streekgewest*, paragraph 26, and Joined Cases C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04 *Casino France and Others* [2005] ECR I?9481, paragraph 40). However, a tax cannot be hypothecated to an exemption from payment of that same tax for a category of businesses. Application of a tax exemption and its extent do not depend on the tax revenue (see *Streekgewest*, paragraph 28, and *Casino France and Others*, paragraph 41).

47 It is common ground that, in the main proceedings, it has not been established that the tax on motive force is hypothecated to the envisaged exemptions therefrom.

48 Consequently, the answer to the second question in Case C-41/05 must be that the fact that a tax exemption, such as that at issue in the main proceedings, may be unlawful in the light of Community law on State aid does not affect the legality of the tax itself, so that undertakings liable to pay such a tax cannot rely before national courts on the argument that the exemption was unlawful, in order to avoid payment of the tax or to obtain reimbursement of it.

The third and fourth questions referred in Case C-41/05

– Preliminary observations

49 By its third and fourth questions the referring court seeks to ascertain whether the tax on motive force may constitute a charge having an effect equivalent to customs duties on imports and exports within the meaning of Article 25 EC or discriminatory internal taxation prohibited by Article 90 EC.

50 It must first be borne in mind that Treaty provisions relating to charges having equivalent effect and those relating to discriminatory internal taxation cannot be applied together, so that under the system of the Treaty the same measure cannot belong to both categories at the same time (see Case C-266/91*Celbi* [1993] ECR I-4337, paragraph 9).

– The third question

51 It is important to note that, according to settled case-law, any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense, constitutes a charge having equivalent effect within the meaning of Article 25 EC (see Case C-347/95 *UCAL* [1997] ECR I-4911, paragraph 18; Case C-72/03 *Carbonati Apuani* [2004] ECR I?8027, paragraph 20, and Case C-293/02 *Jersey Produce MarketingOrganisation* [2005] ECR I-9543, paragraph 55).

52 Having regard to that definition and concerning the characteristics of the tax at issue in the main proceedings, it should be noted that, as emerged during oral argument before the Court, this tax is imposed, in particular, on the users of motors employed for transporting industrial gas through very high pressure pipes, which requires the use of compression stations. Moreover, the said tax is imposed on a large number of industrial activities which involve the use of these motors.

53 Consequently, it is the functioning of these motors and their consumption of energy which constitute the chargeable event, whatever the substance or the energy source used to operate them. Since it is not levied because a frontier is crossed, the said tax is thus not connected with the import or export of goods.

54 The answer to the third question referred in Case C-41/05 must therefore be that a tax on motive force, levied in particular on motors used for transporting industrial gas through very high pressure pipes, does not constitute a charge having equivalent effect within the meaning of Article 25 EC.

– The fourth question

55 As the Court has already held, within the system of the Treaty, Article 90 EC supplements the provisions on the abolition of customs duties and charges having equivalent effect. Its aim is to ensure free movement of goods between the Member States in normal conditions of competition by the elimination of all forms of protection which may result from the application of internal taxation that discriminates against products from other Member States (Case 168/78 *Commission* v *France* [1980] ECR 347, paragraph 4; Case 169/78 *Commission* v *Italy* [1980] ECR 385, paragraph 4, and Case 171/78 *Commission* v *Denmark* [1980] ECR 447, paragraph 4).

56 It is important to add that pecuniary charges resulting from a general system of internal taxation applied systematically, in accordance with the same objective criteria, to categories of products irrespective of their origin or destination fall within Article 90 EC (see, in particular, Case 90/79 *Commission* v *France* [1981] ECR 283, paragraph 14; Case C-163/90 *Legrosand Others* [1992] ECR I-4625, paragraph 11, and Case C-17/91 *Lornoy and Others* [1992] ECR I-6523, paragraph 19).

57 As regards the tax on motive force at issue in the main proceedings, it should be noted that it is not imposed specifically on exported or imported products or in such a way as to differentiate them, given that it applies to economic activities carried out by industrial, commercial, financial or agricultural undertakings and not to products as such.

58 It should also be pointed out that the fact that the exemption granted concerns motors used for transporting natural gas is not sufficient to establish that the tax is discriminatory, since, as is clear from the oral argument before the Court, it does not appear that natural gas is a product analogous to industrial gas or a product that competes with it.

59 The answer to the fourth question must therefore be that a tax on motive force, levied in particular on motors used for transporting industrial gas through very high pressure pipes, does not constitute discriminatory internal taxation for the purposes of Article 90 EC.

60 Having regard to the replies given to the third and fourth questions in Case C?41/05, it is not necessary to reply to the fifth question referred in that case.

Costs

61 Since these proceedings are, for the parties to the main proceedings, a step in the actions before the national courts, the decisions on costs are a matter for those courts. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

1. **The exemption from a municipal or provincial tax on motive force granted solely in respect of motors used in natural gas stations, to the exclusion of motors used for other industrial gases, may be regarded as State aid within the meaning of Article 87 EC. It is for the referring courts to establish whether the conditions relating to the existence of State aid are met.**

2. **The fact that a tax exemption, such as that at issue in the main proceedings, may be unlawful in the light of Community law on State aid does not affect the legality of the tax itself, so that undertakings liable to pay such a tax cannot rely before national courts on the argument that the exemption was unlawful, in order to avoid payment of the tax or to obtain reimbursement of it.**

3. **A tax on motive force, levied in particular on motors used for transporting industrial gas through very high pressure pipes, does not constitute a charge having equivalent effect within the meaning of Article 25 EC.**

4. **A tax on motive force, levied in particular on motors used for transporting industrial gas through very high pressure pipes, does not constitute discriminatory internal taxation for the purposes of Article 90 EC.**

[Signatures]

* Language of the case: French.