Reports of Cases

OPINION OF ADVOCATE GENERAL
RANTOS
delivered on 2 February 2023 [1]

Case C-833/21

Endesa Generación SA
v
Tribunal Económico Administrativo Central

(Request for a preliminary ruling from the Audiencia Nacional (National High Court, Spain))

(Reference for a preliminary ruling – Taxation – Directive 2003/96/EC – Taxation of energy products and electricity – Article 14(1)(a) – Exemption of energy products and electricity used to produce electricity and of electricity used to maintain the ability to produce electricity – Option for Member States to derogate from that exemption for 'reasons of environmental policy' – National tax on coal used for electricity generation – Environmental policy objectives – Assessment criteria)

I. Introduction

1. Directive 2003/96/EC, [2] on the taxation of energy products and electricity, provides, in Article 14(1)(a) thereof, for exemption from taxation of energy products and electricity used to produce electricity and of electricity used to maintain the ability to produce electricity. That provision also states that, by way of derogation, Member States may, for reasons of environmental policy, subject those products to taxation without having to respect the minimum levels of taxation laid down in that directive.

2. Under what conditions can the taxation of coal used for electricity generation, as provided for by national legislation, be regarded as having been introduced 'for reasons of environmental policy', within the meaning of Article 14(1)(a) of Directive 2003/96? That is, in essence, the question raised by the Audiencia Nacional (National High Court, Spain).

3. The request for a preliminary ruling has been made in proceedings between Endesa Generación SA ('Endesa') and the Tribunal Económico Administrativo Central (Central Tax Tribunal, Spain) concerning a tax assessment notice relating to application of Spanish coal tax with respect to coal used by a thermal power plant to generate electricity.

[1] Original language: French.

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

II. Legal context

A. European Union law

1. Directive 2003/96

4. Article 1 of Directive 2003/96 states:

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

5. Article 2 of that directive provides:

'1. For the purposes of this Directive, the term "energy products" shall apply to products:

…

(b) falling within CN [3] codes 2701, 2702 and 2704 to 2715.

…

5. References in this Directive to codes of the combined nomenclature shall be to those of Commission Regulation (EC) No 2031/2001 of 6 August 2001, amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff. [4]

…'

6. Article 4 of that directive provides:

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

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

7. Article 10 of that directive is worded as follows:

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

2. Above the minimum levels of taxation referred to in paragraph 1, Member States will have the option of determining the applicable tax base provided that they respect Directive 92/12/EEC.' [5]

3 Combined nomenclature.

4 OJ 2001 L 279, p. 1.

5 Council Directive of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1).

8. Article 14(1)(a) of Directive 2003/96 states:

'In addition to the general provisions set out in Directive [92/12] 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:

(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.'

2. Directive 2008/118/EC

9. Article 1 of Directive 2008/118/EC,[6] which, under Article 47 thereof, repealed and replaced Directive 92/12 with effect from 1 April 2010, provides:

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

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

…

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

3. Member States may levy taxes on:

(a) products other than excise goods;

…

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

B. Spanish law

10. The Ley 22/2005 por la que se incorporan al ordenamiento jurídico español diversas directivas comunitarias en materia de fiscalidad de productos energéticos y electricidad y del régimen fiscal común aplicable a las sociedades matrices y filiales de estados miembros diferentes, y se regula el

[6] Council Directive of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC (OJ 2009 L 9, p. 12).

régimen fiscal de las aportaciones transfronterizas a fondos de pensiones en el ámbito de la Unión Europea (Law 22/2005 transposing into Spanish law various Community directives on the taxation of energy products and electricity and on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, and governing the tax regime for cross-border contributions to pension funds within the European Union, 'Law 22/2005') [7] of 18 November 2005 introduced in Spain a tax on coal ('the coal tax'). To that end, Ley 38/1992 de Impuestos Especiales of 28 December 1992 (Law 38/1992 on special taxes) [8] was amended by the introduction of a Title III, entitled 'Excise duties on coal', comprising, inter alia, Articles 75 to 84 of that law ('Law 38/1992').

11. Article 75(1) of Law 38/1992 states:

'For the purposes of that tax, the following shall be considered to be coal: products falling under codes 2701, 2702, 2704, 2708, 2713 and 2714 of the tariff and statistical nomenclature established by Council Regulation (EEC) No 2658/87 [9] …'

12. Article 77(1) of that law provides:

'The release for consumption of coal within its territorial scope shall be subject to excise duty.'

13. Article 79(3)(a) of that law provided:

'Transactions constituting a release for consumption of coal shall be exempt from excise duty where they involve the use of coal for the following purposes:

(a) the production of electricity and the cogeneration of electricity and heat.'

14. Article 83(1) of that law reads as follows:

'The tax base for the excise duty is the energy yield of the coal which is the subject of the taxable transactions, expressed in gigajoules (GJ).'

15. Article 84 of Law 38/1992 provided:

'The rate of excise duty is EUR 0.15 per gigajoule.'

16. Law 38/1992 was amended by Ley 15/2012 de medidas fiscales para la sostenibilidad energética of 27 December 2012 (Law 15/2012 on fiscal measures for sustainable energy, 'Law 15/2012'). [10] According to the preamble of Law 15/2012:

'(I) The objective of this Law is to adapt our tax system to more efficient and environmentally friendly use and sustainable development, values that inspire this tax reform, and as such in line with the basic principles that govern the fiscal, energy and, of course, environmental policy of the European Union.

7 BOE No 277, of 19 November 2005, p. 37821.

8 BOE No 312, of 29 December 1992, p. 44305.

9 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).

10 BOE No 312, of 28 December 2012, p. 88081.

In today's society, the increasing impact of energy production and consumption on environmental sustainability requires a normative and regulatory framework that guarantees all agents the proper functioning of the energy model and that also contributes to preserving our rich environmental heritage.

This Law is based principally on Article 45 of the Constitution, a provision in which the protection of our environment becomes one of the guiding principles of social and economic policies. Thus, one of the axes of this tax reform is to internalise the environmental costs resulting from electricity production and from the storage of spent nuclear fuel and radioactive waste. This Law must serve as a stimulus to improve our levels of energy efficiency while at the same time ensuring better management of natural resources and continuing to enhance the new model of sustainable development, both from an economic and social point of view, as well as from an environmental point of view.

The present reform also contributes to integrating environmental policies into our tax system, which allows both the levying of specific environmental taxes and the possibility of incorporating environmental considerations into other pre-existing levies.

The values and objectives underlying this Law are intended to be cross-cutting and must therefore be a central element in the coherence of sectoral measures, particularly where those measures affect the energy sector, which has such economic and environmental importance to the country.

To that end, this Law introduces three new taxes: the tax on the value of electricity production, the tax on the production of spent nuclear fuel and radioactive waste resulting from the generation of nuclear power, and the tax on the storage of spent nuclear fuel and radioactive waste in centralised facilities. This Law introduces a tax on the use of inland waters for the production of electricity. This Law amends the rates of taxation for natural gas and coal, by also abolishing the exemptions for energy products used in the production of electricity and in the cogeneration of electricity and useful heat.

…

(IV) … the law revises the treatment for tax purposes of different energy products used for electricity generation. The activities of producing electricity from fossil fuels are major sources of greenhouse gas emissions, with the result that, for tax purposes, it was considered that that form of electricity generation should be taxed more appropriately, in accordance with the externalities caused by it.

On that basis, certain exemptions provided for in Article 51(2)(c) and Article 79(3)(a) of Law 38/1992 are abolished, in accordance with the provisions of Article 14(1)(a) of Directive [2003/96], which allows Member States to tax, for those purposes, energy products used to produce electricity, and in accordance with the provisions of Article 15(1)(c) of that directive as regards combined heat and power generation.

To the same effect, in order to apply similar treatment to the production of electricity from fossil energy sources, the rate of taxation on coal is increased and, at the same time, specific rates on fuel oils and gas oils for the production of electricity or for the cogeneration of electricity and useful heat are introduced.

…'

17. Accordingly, Law 15/2012 deleted Article 79(3)(a) of Law 38/1992 and amended Article 84 of the latter law as follows:

'The rate of excise duty shall be set at EUR 0.65 per gigajoule.' [11]

18. According to the order for reference, Law 15/2012 retained the exemptions from hydrocarbon tax in respect of the production of electricity at power plants and the production of electricity or the cogeneration of electricity and heat at combined power plants for fuels falling within the scope of that law, which include natural gas and diesel fuel. [12] In addition, as stated in its preamble, that law created three new taxes, namely the tax on the value of electricity production, the tax on the production of spent nuclear fuel and radioactive waste resulting from the generation of nuclear power, and the tax on the storage of spent nuclear fuel and radioactive waste in centralised facilities.

19. The second additional provision of Law 15/2012, entitled 'Costs of the electricity system', was worded as follows:

'Each year, the State's general finance laws allocate to the financing of the costs of the electricity system provided for in Article 16 of Ley 54/1997 del Sector Eléctrico (Law 54 on the electricity sector) of 27 November 1997 [13] an amount equivalent to the sum of:

(a) an estimate of the annual amounts collected by the State in respect of the levies and taxes included in this Law;

(b) the estimated revenue generated by the auctioning of greenhouse gas emission allowances, with a maximum of EUR 500 million.' [14]

III. The dispute in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

20. Endesa is an undertaking whose activity consists in the generation of electricity using, inter alia, coal. It purchases coal through a related company, Carboex SA, which, for tax purposes, claimed entitlement to exemption from coal tax for consignments of coal purchased for resale, since consumption is the chargeable event for that tax.

21. Following a tax inspection in respect of the financial year 2013 concerning the Litoral de Almería thermal power plant (Spain), which belongs to Endesa, the Tax Inspectorate considered that the basis of assessment of coal tax should be determined by reference to the higher calorific value of the coal, irrespective of the energy actually used in the production of electricity. It argued that the consignments of coal in question had been acquired by Endesa to be consumed

[11] It is apparent from the order for reference that Real Decreto-ley 9/2013 por el que se adoptan medidas urgentes para garantizar la estabilidad financiera del sistema eléctrico (Royal Decree-Law 9/2013 on urgent measures to guarantee the financial stability of the electricity system) of 12 July 2013 (BOE No 167, of 13 July 2013, p. 52106) subsequently introduced, into Article 84 of Law 38/1992, a reduced rate of excise duty (EUR 0.15 per gigajoule) for coal for commercial use, provided that it is not used for cogeneration processes and the direct or indirect production of electricity.

[12] In its written observations, Endesa argues that the exemption for hydrocarbons was abolished by Law 15/2012 but reinstated by Real Decreto-Ley 15/2018 de medidas urgentes para la transición energética y la protección de los consumidores (Royal Decree-Law 15/2018 on urgent measures for energy transition and consumer protection) of 5 October 2018 (BOE No 242, of 6 October 2018, p. 97430).

[13] BOE No 285, of 28 November 1997, p. 35097.

[14] That provision was first amended by Ley 24/2013 del Sector Eléctrico (Law 24/2013 on the Electricity Sector) of 26 December 2013 (BOE No 310, of 27 December 2013, p. 105198).

for the production of electricity, as a result of which the chargeable event for that tax had occurred and liability for the tax had arisen. In addition, a check was carried out in relation to formal obligations concerning the declaration of stocks. As a result, the Tax Inspectorate issued a tax assessment notice to Endesa demanding a higher amount of tax, plus default interest for the amounts outstanding.

22. On 7 April 2016, Endesa lodged an administrative complaint with the Tribunal Económico-Administrativo Central (Central Tax Tribunal) contesting (i) the determination of the coal tax on the basis of the higher calorific value of the coal, (ii) the taxation of 268 717.98 tonnes of coal which Carboex had declared as exempt in respect of 2011, on the ground that that coal was intended for resale and was subsequently used by Endesa for electricity generation, (iii) the determination of the stocks as shown in the accounts as at 31 December 2012 and, (iv) the compatibility of that tax with EU law with respect to consumption for the production of electricity.

23. By decision of 28 March 2019, the Tribunal Económico Administrativo Central (Central Tax Tribunal) held that the lower calorific value of the coal should not be taken into account in determining the tax base for coal tax. It noted that taxing consignments of coal which were previously declared as exempt from coal tax on the ground that they were intended for resale did not constitute double taxation, since the purchaser used those consignments for self-consumption in the generation of electricity, which was the chargeable event for that tax. That tribunal also held that the alleged error in the declaration of coal stocks had not been established. Moreover, it did not rule on the compatibility with EU law of Law 15/2012, which abolished the exemption from coal tax for coal consumed for the purposes of electricity generation.

24. Endesa brought an administrative appeal before the Audiencia Nacional (National High Court), the referring court, against that decision of the Tribunal Económico Administrativo Central (Central Tax Tribunal), raising complaints identical to those it had relied on before that tribunal and requesting a reference for a preliminary ruling on the compatibility of the provision of Law 15/2012 which abolished the exemption from coal tax for coal consumed for the purposes of electricity generation.

25. The referring court states that it has reached the conclusion that, if the Spanish legislation sets a rate of excise duty based on the thermal energy generated by the consumption of coal, measured in gigajoules, it is not necessary to take into consideration only the energy which is actually used in the production of electricity. Moreover, the chargeable event for coal tax occurs when the company concerned purchases coal from its related company for use in electricity generation. Furthermore, there is no evidence of an error in the declaration of stocks.

26. Therefore, according to that court, Endesa's claims that it is not required to pay the amount of coal tax assessed can be upheld only by calling into question the compatibility of that tax, which is imposed on the consumption of coal used for electricity generation, with the EU legislation restructuring the system of taxation of energy products and electricity. In the referring court's view, if that tax does not have an environmental objective for the purposes of Article 14(1)(a) of Directive 2003/96, the Spanish legislation at issue is incompatible with EU law and must be disregarded, thereby depriving the tax assessment notice in question of any legal basis.

27. In that regard, the referring court has serious doubts as to whether taxation of the consumption of coal used to produce electricity complies with Directive 2003/96 on the ground that, for a tax to have a specific purpose within the meaning of Article 14(1)(a) of that directive, it

cannot have an exclusively budgetary purpose, namely that of financing the costs of the Spanish electricity system. That budgetary purpose follows from the fact that the second additional provision of Law 15/2012 expressly provides that an amount equivalent to the sum of an estimate of the annual amounts collected by the State in respect of the levies and taxes included in that law is to be allocated by the general State's general finance laws to the financing of the costs of the electricity system.

28. In addition, the structure of the coal tax does not reflect the environmental objective set out in the preamble to Law 15/2012 and the proceeds of that tax are not intended to reduce the environmental impact of the use of coal for electricity generation. According to the referring court, the fact that use, for that purpose, of a highly polluting energy product is taxed does not appear to fulfil the requirement that a tax must pursue a specific purpose, given that this case involves an electricity market based on marginal pricing and the fact that coal-fired power stations are not excluded from remuneration for the activity of generating electricity, which contributes to their economic and financial sustainability.

29. In those circumstances, the Audiencia Nacional (National High Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is the Spanish legislation which provides for a tax on coal used for electricity generation compatible with Article 14(1)(a) of Directive [2003/96], when, despite stating that its aim is to protect the environment, that aim is not reflected in the structure of the tax and the tax levied is used to finance the costs of the electricity system?

(2) Is it possible to consider that the environmental aim is given concrete expression in the structure of the tax on the ground that the tax rates are set in relation to the calorific value of coal used for electricity generation?

(3) Is the environmental aim achieved simply by reason of the fact that taxes have been imposed on certain non-renewable energy products and that no tax is levied on the use of such products where they are considered to be less harmful to the environment?'

30. Written observations were submitted to the Court by Endesa, the Spanish Government and the European Commission.

IV. Analysis

31. By its questions, which it is appropriate to examine together, the referring court is asking, in essence, whether Article 14(1)(a) of Directive 2003/96 must be interpreted as meaning that national legislation providing for the taxation of coal used for electricity generation fulfils the requirement that the tax must be introduced 'for reasons of environmental policy' where, in a situation in which the national legislature has relied on the objective of environmental protection for the purpose of adopting that tax, an environmental objective is not incorporated into the structure of that tax – the rate of which is fixed in relation to the calorific value of the coal – the proceeds of that tax are allocated to financing the costs of the national electricity system and the use of other energy products considered to be less harmful to the environment is not taxed.

32. In order to answer those questions, it is necessary, first of all, to recall the case-law of the Court relating to the option of Member States to tax energy products used to produce electricity under Directive 2003/96.

33. In that regard, in accordance with Article 4(1) of that directive, Member States must tax the energy products falling within its scope, namely motor fuels, heating fuels and electricity, at levels of taxation which may not be less than the minimum levels of taxation provided for in that directive. [15] Article 4(2) of that directive defines the level of taxation which Member States must apply to the products in question as the total charge levied in respect of all indirect taxes (except VAT) calculated directly or indirectly on the quantity of energy products and electricity at the time of release for consumption.

34. As the Court has stated, by providing for a harmonised system of taxation of energy products and electricity, Directive 2003/96 seeks to promote the proper functioning of the internal market in the energy sector, in particular by avoiding distortions of competition. [16] To that end, in particular with regard to electricity, the EU legislature has made the choice, as can be seen, in particular, from page 5 of the explanatory memorandum to the Proposal for a Council Directive restructuring the Community framework for the taxation of energy products, [17] to impose on Member States, in accordance with Article 1 of Directive 2003/96, taxation of distributed electricity, with the energy products used for its production being, at the same time, exempted from taxation in order to avoid double taxation of electricity. [18]

35. Thus, the first sentence of Article 14(1)(a) of that directive provides that Member States are required to exempt energy products and electricity used, in particular, to produce electricity. [19] Since Article 14(1) of that directive sets out an exhaustive list of the exemptions which Member States must apply in connection with the taxation of energy products and electricity, its provisions cannot be interpreted broadly without depriving the harmonised taxation established by that directive of all practical effect. [20]

36. The first sentence of Article 14(1)(a) of Directive 2003/96, in so far as it imposes on Member States the compulsory exemption of energy products used to generate electricity, provides a precise and unconditional obligation, with the result that it confers on individuals the right to rely directly on it before national courts. [21]

37. Moreover, Directive 2003/96 seeks also to promote environmental policy objectives. [22] Those objectives take the form of the option given to Member States to tax energy products used for electricity generation. In that regard, when the EU legislature intended to allow Member States to derogate from the regime of mandatory exemption introduced by that directive, it did so explicitly, inter alia, in the second sentence of Article 14(1)(a) of that directive, which states that Member States may tax energy products used to produce electricity 'for reasons of environmental

15 Judgment of 31 March 2022, *Commission* v *Poland (Taxation of energy products)* (C-139/20, EU:C:2022:240, paragraph 39).

16 See judgment of 14 January 2021, *Commission* v *Italy (Contribution towards the purchase of motor fuel)* (C-63/19, EU:C:2021:18, paragraph 75 and the case-law cited), and my Opinion in *RWE Power* (C-571/21, EU:C:2022:780, paragraphs 25 and 26).

17 OJ 1997 C 139, p. 14.

18 See judgment of 16 October 2019, *UPM France* (C-270/18, EU:C:2019:862, paragraph 38 and the case-law cited), and my Opinion in *RWE Power* (C-571/21, EU:C:2022:780, paragraph 47).

19 Judgment of 16 October 2019, *UPM France* (C-270/18, EU:C:2019:862, paragraph 39 and the case-law cited).

20 Judgment of 7 March 2018, *Cristal Union* (C-31/17, EU:C:2018:168, paragraphs 24 and 25 and the case-law cited).

21 Judgment of 7 March 2018, *Cristal Union* (C-31/17, EU:C:2018:168, paragraph 26 and the case-law cited).

22 See judgment of 30 January 2020, *Autoservizi Giordano* (C-513/18, EU:C:2020:59, paragraph 32 and the case-law cited), and my Opinion in *RWE Power* (C-571/21, EU:C:2022:780, points 46 and 48).

policy'.[23] Accordingly, Directive 2003/96 does not exclude all risk of double taxation,[24] since Member States have the option to add to the tax on electricity an additional tax on non-environmentally desirable fuels.[25] Nevertheless, in line with the case-law referred to in point 35 of this Opinion, the second sentence of Article 14(1)(a) of that directive cannot be interpreted broadly without depriving the harmonised taxation established by that directive of all practical effect.

38. In the present case, it is apparent from the order for reference that Law 22/2005, which transposed Directive 2003/96 into the Spanish legal order, introduced the coal tax. To that end, Law 38/1992, as amended, provided, inter alia, in Article 79(2) thereof, that transactions constituting a release for consumption of coal were to be exempt from excise duty where they involve the use of coal for the purposes, inter alia, of the production of electricity and the cogeneration of electricity and heat. That provision was abolished by Law 15/2012, which invoked grounds of environmental protection, with the consequence that the coal tax became applicable to the use of coal for the production of electricity and the cogeneration of electricity and heat. Moreover, Law 15/2012 increased the amount of coal tax from EUR 0.15 to EUR 0.65 per gigajoule.

39. In that connection, as expressly stated in the preamble to Law 15/2012, the Kingdom of Spain sought to implement the option provided for in the second sentence of Article 14(1)(a) of Directive 2003/96, with a view to introducing, by way of derogation from the regime of exemption established by the first sentence of that provision, a tax regime 'for reasons of environmental policy' concerning coal used for electricity generation. That Member State thus provided for double taxation of electricity, that is to say, on the one hand, the taxation of coal used for electricity generation and, on the other hand, the taxation of distributed electricity.

40. In that context, the referring court seeks to ascertain whether the application of the coal tax to coal used for electricity generation complies with the second sentence of Article 14(1)(a) of Directive 2003/96 in so far as that tax was indeed introduced for reasons of environmental policy. In that regard, the referring court referred to the case-law of the Court relating to Article 1(2) of Directive 2008/118, according to which Member States may levy other indirect taxes on excise goods for specific purposes, provided that those taxes comply with the EU tax rules applicable for excise duty or VAT. The referring court asks whether the coal tax pursues a 'specific purpose', which is, in that court's view, required in the same way both in the context of the application of Article 1(2) of Directive 2008/118 and in the context of the application of the second sentence of Article 14(1)(a) of Directive 2003/96.

41. In the light of the questions raised by the referring court, I consider it useful to recall the case-law of the Court relating to Article 1(2) of Directive 2008/118, before examining whether that case-law can be applied by analogy to the second sentence of Article 14(1)(a) of Directive 2003/96.

42. As the Court has noted, Article 1(2) of Directive 2008/118, which seeks to take due account of the Member States' different fiscal traditions in this regard and the frequent recourse to indirect taxation for the implementation of non-budgetary policies, allows Member States to introduce,

[23] See, to that effect, judgment of 16 October 2019, *UPM France* (C-270/18, EU:C:2019:862, paragraph 52 and the case-law cited). I note that on 14 July 2021 the Commission presented a new proposal for a Council Directive restructuring the Union framework for the taxation of energy products and electricity (COM(2021) 563 final). Under that proposal, Article 14 of Directive 2003/96 would be repealed. However, the proposed new Article 13 of that directive would, in essence, reproduce the current content of Article 14(1)(a) of that directive.

[24] See, to that effect, judgment of 7 March 2018, *Cristal Union* (C-31/17, EU:C:2018:168, paragraph 32 and the case-law cited).

[25] See, to that effect, judgment of 4 June 2015, *Kernkraftwerke Lippe-Ems* (C-5/14, EU:C:2015:354, paragraph 51).

in addition to minimum excise duty, other indirect taxes having a specific purpose.[26] The term 'other indirect taxes', within the meaning of that provision, thus refers to indirect taxes which are levied on the consumption of the products listed in Article 1(1) of that directive – other than 'excise duty' within the meaning of that provision – and are levied for specific purposes.[27]

43. According to the case-law of the Court, under Article 1(2) of Directive 2008/118 Member States may levy other indirect taxes on excise goods, subject to two conditions. First, such taxes must be levied for specific purposes and, second, those taxes must comply with the EU tax rules applicable for excise duty or VAT as far as determination of the tax base, calculation of the tax, chargeability and monitoring of the tax are concerned, but not including the provisions on exemptions. Those two conditions, which are intended to prevent additional indirect taxes from improperly obstructing trade, are cumulative, as is apparent from the very wording of Article 1(2) of Directive 2008/118.[28]

44. As regards the first condition, it is apparent from the settled case-law of the Court that a specific purpose within the meaning of that provision is a purpose other than a purely budgetary purpose. However, since every tax necessarily pursues a budgetary purpose, the mere fact that a tax is intended to achieve a budgetary objective cannot, in itself, suffice, if Article 1(2) of Directive 2008/118 is not to be rendered meaningless, to preclude that tax from being regarded as having, in addition, a specific purpose within the meaning of that provision. Thus, in order to be regarded as pursuing a specific purpose within the meaning of that provision, a tax must itself be directed at achieving the specific purpose stated.[29] That is the case, in particular, where the proceeds of that tax must be used for the purpose of reducing the environmental costs specifically linked to the consumption of the electricity on which that tax is imposed and promoting territorial and social cohesion, so that there is a direct link between the use of the revenue and the purpose of the tax in question.[30]

45. Again according to the settled case-law of the Court, while the predetermined allocation of the proceeds of a tax to the financing of the exercise, by the authorities of a Member State, of powers transferred to them can constitute a factor to be taken into account for the purpose of establishing the existence of a specific purpose, such an allocation, which is merely a matter of internal organisation of the budget of a Member State, cannot, in itself, constitute a sufficient condition, since any Member State may decide to lay down, irrespective of the purpose pursued, that the proceeds of a tax are [to] be allocated to financing particular expenditure. Otherwise, any purpose could be considered to be specific within the meaning of Article 1(2) of Directive 2008/118, which would deprive the harmonised excise duty established by that directive of all practical effect and be contrary to the principle that a derogating provision such as Article 1(2) must be interpreted strictly.[31]

46. Lastly, in the absence of such a mechanism for the predetermined allocation of revenue, a levy on excise goods can be regarded as pursuing a specific purpose within the meaning of Article 1(2) of Directive 2008/118 only if it is designed, so far as its structure is concerned, and particularly the taxable item or the rate of tax, in such a way as to guide the behaviour of taxpayers in a direction

[26] Order of 7 February 2022, *Vapo Atlantic* (C-460/21, EU:C:2022:83, paragraph 20 and the case-law cited).

[27] Judgment of 3 March 2021, *Promociones Oliva Park* (C-220/19, EU:C:2021:163, paragraph 48 and the case-law cited).

[28] Order of 7 February 2022, *Vapo Atlantic* (C-460/21, EU:C:2022:83, paragraphs 21 and 22 and the case-law cited).

[29] Order of 7 February 2022, *Vapo Atlantic* (C-460/21, EU:C:2022:83, paragraphs 23 to 25 and the case-law cited).

[30] Judgment of 25 July 2018, *Messer France* (C-103/17, EU:C:2018:587, paragraph 38 and the case-law cited).

[31] Order of 7 February 2022, *Vapo Atlantic* (C-460/21, EU:C:2022:83, paragraph 26 and the case-law cited).

which facilitates the achievement of the stated specific purpose, for example by taxing the goods in question heavily in order to discourage their consumption [32] or by encouraging the use of other products that are less harmful to the environment. [33]

47. In the light of that case-law of the Court, I consider it important to draw a clear distinction between, on the one hand, taxes imposed under Directive 2003/96 and, on the other hand, other indirect taxes on excise goods referred to in Article 1(2) of Directive 2008/118. As provided for in Article 1(1) of Directive 2008/118, that directive lays down general arrangements in relation to excise duty which is levied directly or indirectly on the consumption of certain excise goods, which include 'energy products and electricity covered by Directive [2003/96]'. In other words, energy products, where they fall within the scope of Directive 2003/96, are subject to taxation under the conditions laid down by that directive, while Member States may lay down, in addition to that taxation, other indirect taxes pursuing a specific purpose, under Article 1(2) of Directive 2008/118.

48. In the present case, it is not disputed that the coal tax falls within the scope of Directive 2003/96. Accordingly, the referring court pointed out that that tax was introduced by Law 22/2005, which transposed that directive into the Spanish legal order. Similarly, the Spanish Government argued that Article 2 of that directive provides that, for the purposes of that directive, the term 'energy products' includes those products falling within combined nomenclature codes CN 2701, 2702 and 2704 to 2715, which relate to coal, and that Article 75 of Law 38/1992 provides that products falling within CN codes 2701, 2702, 2704, 2708, 2713 and 2714 are to be considered to be coal, with the consequence that the coal tax falls within the scope of Directive 2003/96.

49. According to the referring court and Endesa, Directives 2003/96 and 2008/118 lay down requirements which may be regarded as equivalent with respect to the taxation of energy products subject to excise duty, inasmuch as reasons of environmental policy, within the meaning of the former directive, constitute one of the specific purposes referred to in the latter directive. I do not agree with that interpretation. As stated in point 47 of this Opinion, the tax regimes established by those directives differ, since the first is mandatory and the second optional, subject to compliance with certain conditions. In that regard, it is important to note that the wording of the second sentence of Article 14(1)(a) of Directive 2003/96 makes no reference to the need for the existence of 'specific purposes'. Accordingly, in my view, the case-law of the Court concerning the 'specific purpose' to be pursued by other indirect taxes on excise goods, within the meaning of Article 1(2) of Directive 2008/118, cannot be applied by analogy to a tax falling within the scope of the second sentence of Article 14(1)(a) of Directive 2003/96. That analysis is perfectly consistent with the case-law of the Court relating to Article 1(3) of Directive 2008/118, which subjects the possibility for Member States to levy taxes on products other than those subject to the harmonised excise duty arrangements to the sole condition that the levying of such taxes does not, in trade between Member States, give rise to formalities connected with the crossing of frontiers. As the Court pointed out, unlike Article 1(2)

[32] Order of 7 February 2022, *Vapo Atlantic* (C-460/21, EU:C:2022:83, paragraph 27 and the case-law cited).

[33] See, to that effect, judgment of 27 February 2014, *Transportes Jordi Besora* (C-82/12, EU:C:2014:108, paragraph 32). On the Court's approach to the interpretation of Article 1(2) of Directive 2008/118, see Pitrone, F., 'Defining "Environmental Taxes": Input from the Court of Justice of the European Union', *Bulletin for International Taxation*, 2015, vol. 69, No 1, pp. 58 to 64. Concerning the existence of a non-budgetary 'specific purpose', see Opinion of Advocate General Wahl in *Transportes Jordi Besora* (C-82/12, EU:C:2013:694, points 17 to 32).

of that directive, read in the light of recital 4 [34] in its preamble, Article 1(3) thereof does not provide that the taxes in question must be taxes other than the harmonised excise duty *or that they must be for specific purposes*. [35]

50. Therefore, in the context of the second sentence of Article 14(1)(a) of Directive 2003/96, it is not necessary, in particular, to verify whether there is a direct link between the use of the revenue and the purpose of the tax in question. [36] It is necessary only to examine the reasons for the tax in question, that is to say whether it was actually introduced 'for reasons of environmental policy', those reasons constituting an autonomous concept of EU law. In that regard, I am of the view that it is, however, possible to draw inspiration from the case-law of the Court relating to Article 1(2) of Directive 2008/118, by considering that a tax contributes to environmental protection if it is designed, so far as its structure is concerned, and particularly the taxable item or the rate of tax, in such a way as to guide the behaviour of taxpayers in a direction which facilitates the achievement of improved environmental protection, for example by taxing the goods in question heavily in order to discourage their consumption or by encouraging the use of other products that are less harmful to the environment. [37]

51. Such an interpretation is supported by Regulation (EU) No 651/2014, [38] on categories of aid compatible with the internal market. [39] Under Article 44(1) of that regulation, aid schemes in the form of reductions in environmental taxes fulfilling the conditions of Directive 2003/96 are to be compatible with the internal market within the meaning of Article 107(3) TFEU and are to be exempted from the notification requirement of Article 108(3) TFEU, provided that certain conditions are fulfilled. Article 2(119) of that regulation defines an 'environmental tax' as a 'tax with a specific tax base that has a clear negative effect on the environment or which seeks to tax certain activities, goods or services so that the environmental costs may be included in their price and/or so that producers and consumers are oriented towards activities which better respect the environment'.

52. In the present case, the referring court is seeking to ascertain whether taxation of the consumption of coal used for electricity generation, as provided for by the national legislation, complies with Directive 2003/96. In that regard, it should be noted that, when the Court is requested to give a preliminary ruling in order to determine whether a tax was established by a Member State for reasons of environmental policy, within the meaning of the second sentence of Article 14(1)(a) of that directive, its task is to provide the national court with guidance on the

[34] According to that recital, 'excise goods may be subject to other indirect taxes for specific purposes. In such cases, however, and in order not to jeopardise the useful effect of Community rules relating to indirect taxes, Member States should comply with certain essential elements of those rules'.

[35] See judgment of 12 February 2015, *Oil Trading Poland* (C-349/13, EU:C:2015:84, paragraphs 33 and 34). The Court inferred from this that Article 1(3) of Directive 2008/118 does not preclude, in itself, Member States from imposing on products other than those subject to the harmonised excise duty arrangements a tax governed by rules identical to those relating to those arrangements.

[36] See the case-law cited in point 44 of this Opinion.

[37] Similarly, I would point out that, in my Opinion in *RWE Power* (C-571/21, EU:C:2022:780, paragraph 48), I stated, with regard to the environmental policy objective, that it is common ground that the production of electricity from lignite entails numerous obligations imposed by environmental rules, which are aimed at making the cleanest possible use of energy products, and that it cannot therefore be ruled out that the exemption at issue in that case might affect the implementation of those obligations, where they require the processing of the energy product using electricity, in order to make it possible to produce greener energy.

[38] Commission Regulation of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ 2014 L 187, p. 1).

[39] On the link between Directive 2003/96 and State aid under Article 107 TFEU, see Villar Ezcurra, M., and Fonseca Capdevila, E., 'Parafiscal charges and contributions to general electricity networks: a legal analysis of its nature under the scope of Directive 2003/96 and the EU State aids regime' in Weishaar, S. E., *The Green Market Transition: Carbon Taxes, Energy Subsidies and Smart Instrument Mixes*, Edward Elgar Publishing, Cheltenham, 2017, pp. 143 to 156.

criteria which will enable the latter to determine whether that tax actually pursues such a purpose, rather than to carry out that assessment itself, a fortiori since the Court does not necessarily have available to it all the information which is essential in that regard. [40]

53. From that point of view, first, the referring court points out that the Spanish national legislation, in providing for the taxation of coal used for electricity generation, purports to have the objective of environmental protection. Endesa, for its part, considers that that justification is merely apparent, with a view to complying with EU law, whereas the true objective of Law 15/2012 was exclusively to increase tax revenue. In that regard, I note that, in its decision, the referring court cited part of the preamble to that law, [41] from which it is clear that the Spanish legislature sought, by adopting that law, to protect the environment. The Kingdom of Spain thus justified the adoption of the coal tax 'for reasons of environmental policy'. Nevertheless, as stated in point 50 of this Opinion, in order to comply with the second sentence of Article 14(1)(a) of Directive 2003/96, the tax in question must, in fact, also improve environmental protection.

54. Second, the referring court considers, with reference to the second additional provision of Law 15/2012, that the coal tax has an exclusively budgetary purpose, namely that of financing the costs of the Spanish electricity system. Such an argument is connected with the interpretation of the concept of 'specific purposes', within the meaning of Article 1(2) of Directive 2008/118. However, as stated in points 49 and 50 of this Opinion, there is no need to apply that concept in the context of the second sentence of Article 14(1)(a) of Directive 2003/96 and, in particular, to verify whether there is a direct link between the use of the revenue and the purpose of the coal tax. I would add that the Spanish Government has argued that that second additional provision makes no reference to the coal tax and that the taxes covered by that provision are the three new taxes introduced by Law 15/2012. [42] Therefore, according to the Spanish Government, in any event, the coal tax does not fall within the scope of the second additional provision of that law.

55. Third, the referring court maintains that the structure of the coal tax does not reflect the environmental objective set out in the preamble to Law No 15/2012, in that the rate of that tax is fixed in relation to the calorific value of coal used for electricity generation. In that regard, I should point out that Article 10(1) of Directive 2003/96 provides that, as from 1 January 2004, the minimum levels of taxation applicable to electricity are to be fixed as set out in Annex I, Table C, of that directive, for both business and non-business use. However, as regards hard coal and coke, several language versions of that Table C, entitled 'Minimum levels of taxation applicable to heating fuels and electricity', namely, inter alia, the Estonian, Croatian, German, Hungarian, Latvian, Lithuanian, Maltese, Polish, Romanian and Slovenian versions, expressly refer to the 'gross calorific value' of coal and coke. Accordingly, even though the Spanish version of Table C does not refer to the calorific value, the fact that the Spanish legislature took this as its yardstick for the taxation of the use of coal does not call into question the fact that the coal tax may have been adopted for reasons of environmental policy.

56. Fourth, the referring court states that the proceeds of the coal tax are not intended to reduce the environmental impact of the use of coal for electricity generation. However, as is clear from point 50 of this Opinion, a tax contributes to environmental protection if it is designed, so far as its structure is concerned, and particularly the taxable item or the rate of tax, in such a way as to guide the behaviour of taxpayers in a direction which facilitates the achievement of improved environmental protection, for example by taxing the goods in question heavily in order to

[40] See, by analogy, Order of 7 February 2022, *Vapo Atlantic* (C-460/21, EU:C:2022:83, paragraph 28 and the case-law cited).

[41] See point 16 of this Opinion.

[42] See point 18 of this Opinion.

discourage their consumption or by encouraging the use of other products that are less harmful to the environment. It is for the referring court to ascertain whether, in the dispute before it, that is the case with the coal tax. In that regard, I consider it appropriate to point out that the abolition of the exemption from coal tax combined with the increase in its rate is a means which could serve to discourage the use of coal for electricity generation and to promote other, less polluting, sources of energy and that, according to the Commission, the abolition of that exemption does indeed appear in practice to have had an impact on the volume of electricity produced from coal in Spain.

57. Fifth, the referring court asks whether the environmental objective is achieved simply by reason of the fact that taxes have been imposed on certain non-renewable energy products and that no tax is levied on the use of such products where they are considered to be less harmful to the environment. As regards that issue, it is clear from the preceding point in this Opinion that, where a tax discourages the consumption of a product which is harmful to the environment or encourages the use of other products that are less harmful to the environment, it contributes to environmental protection. In the present case, the Spanish Government took the view that coal is a polluting energy which should be taxed when it is used for electricity generation. In that respect, I consider that, by discouraging the consumption of coal, which is, it is common ground, very harmful to the environment,[43] that Government sought to protect the environment for the purposes of the second sentence of Article 14(1)(a) of Directive 2003/96.

58. Sixth and lastly, Endesa argues that, although the coal tax was introduced, the Spanish Government subsequently reinstated the exemption for hydrocarbons used in the production of electricity, which demonstrates the absence of a genuine environmental objective. However, in my view, the examination of a tax under the second sentence of Article 14(1)(a) of Directive 2003/96 must be carried out on a case-by-case basis. Because that tax was established 'for reasons of environmental policy', it falls within the scope of that provision even though, at the same time, other polluting products used for electricity generation are not taxed.

59. In the light of all the foregoing considerations, I am of the opinion that Article 14(1)(a) of Directive 2003/96 must be interpreted as meaning that national legislation providing for the taxation of coal used for electricity generation fulfils the requirement that the tax must be introduced 'for reasons of environmental policy' where, in a situation in which the national legislature has relied on the objective of environmental protection for the purpose of adopting that tax, an environmental objective is not incorporated into the structure of that tax – the rate of which is fixed in relation to the calorific value of the coal – the proceeds of that tax are allocated to financing the costs of the national electricity system and the use of other energy products considered to be less harmful to the environment is not taxed.

V. Conclusion

60. In the light of the foregoing considerations, I propose that the Court answer the questions referred by the Audiencia Nacional (National High Court, Spain) as follows:

Article 14(1)(a) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity

[43] See, in particular, the third part of the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC), published in April 2022, a summary of which is available at: https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_SummaryForPolicymakers.pdf.

must be interpreted as meaning that national legislation providing for the taxation of coal used for electricity generation fulfils the requirement that the tax must be introduced 'for reasons of environmental policy' where, in a situation in which the national legislature has relied on the objective of environmental protection for the purpose of adopting that tax, an environmental objective is not incorporated into the structure of that tax – the rate of which is fixed in relation to the calorific value of the coal – the proceeds of that tax are allocated to financing the costs of the national electricity system and the use of other energy products considered to be less harmful to the environment is not taxed.