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Press and Information

Advocate General's Opinion in Case C-82/12
Transportes Jordi Besora v Tribunal Económico Administrativo Regional de Cataluña (TEARC), Generalitat de Catalunya

According to Advocate General Wahl, a Spanish tax on retail sales of hydrocarbons is contrary to EU law

He also advises against limiting the temporal effects of the Court's judgment

The Excise Duty Directive[1] lays down rules relating to the levying of excise duties in the EU in order to prevent additional indirect taxes from improperly obstructing trade. It concerns, amongst others, mineral oils such as petrol, diesel, fuel oil and paraffin. However, one of its provisions[2] gives Member States the right to introduce or maintain indirect non-harmonised taxes on products that are already subject to rules regarding excise duty. This possibility is subject to two conditions: (i) that the tax at issue pursues a specific, non-budgetary purpose; and (ii) that it complies with the rules applicable to excise duty or VAT as far as determination of the tax base, calculation of the tax, chargeability and monitoring of the tax are concerned.

This case reviews the compatibility with EU law of a Spanish tax ('the IVMDH') which is levied on the consumption of certain mineral oils (namely petrol, diesel, fuel oil and paraffin). This means that the tax is passed on to the final consumer. In accordance with Spanish legislation governing the IVMDH, the revenue generated from this tax has to be spent on health or environmental matters. More specifically, its aim is to ensure that the Autonomous Communities possess sufficient resources to meet the health-related costs which they took on as a result of the transfer of competences in the health sector from the national to the regional level. Revenue generated from the IVMDH has been used, inter alia, to build new hospitals.

The case arises from a claim made by Transportes Jordi Besora, S.L. ('TJB'), a haulage company established in the Autonomous Community of Catalonia. This company purchases large quantities of fuel for its vehicles. Between 2005 and 2008, a total amount of €45 632.38 of IVMDH was passed on to TJB. Considering the IVMDH to be contrary to the Excise Duty Directive, TJB has requested reimbursement of this amount. The Tribunal Superior de Justicia de Cataluña (High Court of Justice, Catalonia) (Spain), which is hearing the case on appeal, seeks guidance on whether the IVMDH is compatible with the Excise Duty Directive.

In his Opinion today, **Advocate General Wahl considers that the IVMDH is contrary to the Excise Duty Directive**. He examines the IVMDH in light of the two above-mentioned conditions which must be fulfilled in order for a tax such as the IVMDH to comply with the Excise Duty Directive.

Firstly, the Advocate General finds that a tax such as the IVMDH does not fulfil the condition concerning the existence of a specific purpose. This is so, in particular, because the IVMDH pursues the same objective as the already harmonised excise duty on mineral oils, which consists of reducing the social (health and environmental) costs resulting from the consumption of hydrocarbons. According to him, this overlap rules out the possibility of regarding the IVMDH as compatible with the requirement that the tax in question must serve a specific purpose. Finding

[1] 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), as amended. Directive 92/12 has, as from 1 April 2010, been repealed and replaced by Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC (OJ 2009 L 9, p. 12).
[2] Article 3 (2).

otherwise would compromise efforts to harmonise the excise duty regime and give rise to an additional excise duty, contrary to the very purpose of the Directive to abolish remaining barriers in the internal market.

The Advocate General further observes that where no such overlap exists, the structure or, alternatively, the use of the tax may help identify a specific non-budgetary purpose. As regards the structure, a non-budgetary purpose can be identified where a tax is set at a level which discourages or encourages certain behaviour. In this case, however, he considers that there is no information suggesting that the structure of the IVMDH is in fact designed specifically to discourage the consumption of hydrocarbons or to encourage the use of some other less harmful product. With regard to the use of the tax, the revenues collected must be allocated to specific measures. In the present case, the mere allocation of tax revenue from the IVMDH to health and environmental measures in general does not suffice to prove that the tax pursues a non-budgetary purpose. In fact, no direct link has been established between, on the one hand, the measures financed with the revenue obtained from the IVMDH, and the aim of obviating and rectifying the adverse impact associated with the consumption of hydrocarbons, on the other.

Secondly, the Advocate General considers that the IVMDH does not comply with the general scheme of excise duty or VAT as far as determination of chargeability is concerned. This is so because the IVMDH is levied at a point in time which does not coincide with the requirements set by either EU legislation on chargeability of excise duty or that on VAT. Unlike excise duty, which becomes chargeable once the product leaves the last tax warehouse, and VAT, which is charged at each stage of the production and distribution process, the IVMDH is charged when hydrocarbons are sold to the consumer.

In this case, Spain has also requested the Court to limit the temporal effects of the judgment in the event that it finds the IVMDH to be contrary to EU law. In practice, this would mean that the judgment would only produce effects in the future and would not affect any taxes levied in the past. On this issue, Advocate General Wahl observes that the Court accepts such requests only in exceptional circumstances where two conditions are met. On the one hand, a finding of incompatibility must entail a risk of serious economic repercussions. On the other hand, there must also be objective and significant uncertainty concerning the interpretation and scope of the EU law provisions in question.

In this respect, the Advocate General considers that a risk of serious economic repercussions cannot be ruled out given the considerable sums involved (€13 billion according to the estimate of the Spanish Government[3]). This is so in particular because of the current precarious financial situation of Spain and its Autonomous Communities. Moreover, a finding of incompatibility could in his view have serious repercussions on the system which contributes to the financing of the Autonomous Communities and upset or disrupt regional funding of health care. However, the Advocate General considers that there was no significant uncertainty as to the meaning and scope of the relevant EU legal provisions. In particular, when the IVMDH was adopted, the Court had already given a ruling on the incompatibility of a similar duty[4].

Lastly, the Advocate General points out that it cannot be categorically ruled out that the Court could consider limiting the temporal effects of a judgment even where the condition concerning the uncertainty as to the meaning of relevant EU law provisions is not fulfilled. This would be possible in certain highly exceptional circumstances where the financial impact of retroactivity would be particularly serious. However, in this case, he cautions against discarding that criterion. In fact, Spain appears to have knowingly taken the risk of going forward with the legislation in question and, as a result, that legislation has been applied for many years to the detriment of the end-user and the internal market.

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[3] The Commission and TJB have called into question these estimates. In their view, national limitation rules would automatically bar any claims older than four years. Moreover, given the large amount of cases already pending, the Commission also questioned the practical effect of limiting the retrospective application of a finding of incompatibility.

[4] Case C-437/97 EKW and Wein & Co.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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