



## **German duty on nuclear fuel is compatible with EU law**

In 2010, Germany adopted a law on excise duty on nuclear fuel (Kernbrennstoffsteuergesetz). That law introduced, for the period from 1 January 2011 to 31 December 2016, a duty on the use of nuclear fuel for the commercial production of electricity. The duty in respect of 1 gramme of plutonium 239, plutonium 241, uranium 233 or uranium 235 is €145 and it is payable by nuclear power station operators. It is designed to raise revenue with a view, inter alia, to contributing, in the context of fiscal consolidation and in accordance with the polluter-pays principle, to a reduction in the burden entailed for the Federal budget by the rehabilitation required at the Asse II mining site, where radioactive waste from the use of nuclear fuel is stored.

Kernkraftwerke Lippe-Ems, which operates the Emsland nuclear power station in Lingen (Germany), has challenged the duty before the Finanzgericht Hamburg (Finance Court, Hamburg, Germany). As it used, in June 2011, fuel assemblies in the nuclear reactor of its power station, Kernkraftwerke Lippe-Ems is liable for duty in excess of €154 million. Kernkraftwerke Lippe-Ems takes the view that the German duty on nuclear fuel is incompatible with EU law. The Finanzgericht decided to submit questions to the Court of Justice concerning the compatibility of the duty with EU law.

**By today's judgment, the Court of Justice replies that EU law does not preclude a duty such as the German duty on nuclear fuel.**

First, the Court rejects the argument that nuclear fuel must be exempt from taxation under the **directive on taxation of energy products and electricity**<sup>1</sup> (the directive which lays down a mandatory exemption, inter alia, for energy products subject to harmonised excise duty and used to produce electricity). Given that, in any event, that fuel does not appear on the exhaustive list of energy products set out in the directive, nuclear fuel cannot be covered by the exemption provided for some of those products. According to the Court, nor can the exemption in question be applied by analogy. In essence, the Court rejects the idea that a duty cannot be levied at the same time on the consumption of electricity and on the sources from which that energy is produced which are not energy products within the meaning of the directive.

Next, the Court finds that the **directive concerning the general arrangements for excise duty**<sup>2</sup> does not preclude the German duty on nuclear fuel, which is levied on the use of such fuel for the commercial production of electricity. As it is not levied (directly or indirectly) on the consumption of electricity<sup>3</sup> or that of any other product subject to excise duty, that duty does not constitute excise duty or 'other indirect taxes' on that product within the meaning of the directive. In that connection, the Court observes, in particular, that it is not apparent that a direct and inseverable link exists between the use of nuclear fuel and the consumption of electricity produced by the reactor of a

<sup>1</sup> Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ 2003 L 283, p.51).

<sup>2</sup> 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).

<sup>3</sup> As covered by Directive 2003/96.

nuclear power plant. Nor can the duty in question be regarded as being calculated directly or indirectly on the quantity of electricity at the time of release for consumption of that product.

Moreover, the German duty on nuclear fuel does **not constitute State aid** prohibited by EU law. It is not a selective measure. Methods of producing electricity, other than that based on nuclear fuel, are not affected by the rules introduced by the law on duty on nuclear fuel. In any event, they are not, in the light of the objective pursued by those rules, in a factual and legal situation that is comparable to that of the production method based on nuclear fuel, as only that method generates radioactive waste arising from the use of such fuel.

The Court considers, next, that the **Treaty establishing the European Atomic Energy Community ('Euratom Treaty or EAEC')**, which covers nuclear fuel, does not preclude the duty in question, either. That duty does not constitute a charge having equivalent effect to a customs duty. It is levied not because nuclear fuel has crossed a frontier but because it is used for the commercial production of electricity, irrespective of the source of that fuel. The Court also observes that the attainment of the Euratom Treaty's objectives does not require Member States to maintain or increase their level of use of nuclear fuel or prevent them from taxing such use, which would make such use more costly and, therefore, less attractive. Furthermore, as it is levied not on the purchase of nuclear fuel but on the use of such fuel, the German duty does not jeopardise the fulfilment of the EAEC's duty to ensure that that community's users receive a regular and equitable supply of ores and nuclear fuels.

The Court also examines a question concerning the preliminary ruling mechanism, that question having been raised by the Finanzgericht in the context of a proceeding pending before the German Constitutional Court (Bundesverfassungsgericht) concerning whether the duty on nuclear fuel complies with the German constitution (Grundgesetz). According to the Court, a national court which has doubts as to whether national legislation is compatible with both EU law and with the Constitution of the Member State concerned neither loses the right nor, as the case may be, is exempt from the obligation to submit questions to the Court of Justice concerning the interpretation or validity of that law, on the simple ground that an interlocutory procedure for review of the constitutionality of that legislation is pending before the national court responsible for carrying out such review.

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**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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