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Press and Information

Advocate General's Opinion in Case C-591/17
Austria v Germany

Advocate General Wahl proposes that the Court of Justice should dismiss Austria's action against the new German motorway charge

The fact that owners of vehicles registered in Germany benefit from a tax relief on the German motor vehicle tax in an amount that corresponds to the amount of the charge does not constitute discrimination on grounds of nationality

In 2015 Germany adopted a law providing for the levy of a charge for the use of federal roads (in particular motorways) with vehicles with a weight of less than 3.5 tonnes, the so called 'infrastructure charge'.

For vehicles registered in Germany ('domestic vehicles'), the charge must be paid upfront, in the form of an annual vignette, by the vehicle owner.

For vehicles registered abroad, the obligation to pay the infrastructure charge is imposed either on the owner or on the driver and arises on the first use of federal roads after the crossing of a national border. For such vehicles there are three options: a ten-day vignette, a two-month vignette and an annual vignette.

Depending on cylinder capacity, the type of engine and the class of emission, the price of a ten-day vignette varies between a minimum of €2.50 to a maximum of €25. The price of the two-month vignette varies between a minimum of €7 to a maximum of €55. Finally, the annual vignette has a maximum price of €130.

Once the collection of the infrastructure charge has started, owners of domestic vehicles will benefit from a tax relief on the motor vehicle tax in an amount that corresponds to the amount of the infrastructure charge (owners of 'Euro 6' vehicles benefit from an even higher relief).

Austria considers that Germany has infringed a number of provisions of EU law by establishing the infrastructure charge. In particular, according to Austria, the combined effect of the infrastructure charge and the tax relief for owners of domestic vehicles is that, in practice, only drivers of vehicles registered in other Member States ('foreign vehicles') are subject to the infrastructure charge, thereby giving rise to indirect discrimination on grounds of nationality.

As the Commission had (after Germany had amended its legislation with regard to the price for short-term vignettes and to the tax relief) terminated the infringement procedure that it had initiated against Germany, Austria brought an infringement action against Germany before the Court of Justice. In these proceedings Austria is supported by the Netherlands, whereas Germany is supported by Denmark. It is one of the very rare cases in which a Member State has started an infringement procedure against another Member State.[1]

In today's opinion, Advocate General Nils Wahl proposes that the Court of Justice should dismiss the action brought by Austria against Germany.

[1] The present action is the seventh out of in total eight. See for the sixth case, where Hungary sued Slovakia, Press Release No. 131/12. The eighth case is at present pending, Slovenia v Croatia (C-457/18).

He considers in particular that Austria's arguments based on an alleged discrimination on grounds of nationality are premised on a fundamental misunderstanding of the concept of 'discrimination'.

He concedes that the owners of domestic vehicles are, for the vast majority, of German nationality, whereas drivers of foreign vehicles are mostly of the nationality of other Member States. Thus, although the German legislation in question does not establish any express discrimination based on nationality, if the arguments put forward by Austria were to be held well founded, there would be indirect discrimination on the ground of nationality and, consequently, a breach of EU law.

However, The Advocate General is of the opinion that Austria has failed to make its case in relation to two basic tenets of discrimination.

First, **the two groups of persons that it has compared are not, with respect to the measures criticised, in a comparable situation.**

Owners of domestic vehicles are both users of German roads (and thus subject to the infrastructure charge) and German taxpayers (since they are subject to the motor vehicle tax). Conversely, drivers of foreign vehicles are taxpayers of other Member States: they may, as such, be subject to other taxes or charges in their respective country of residence but they will never be required to pay the German motor vehicle tax.

Therefore, owners of domestic vehicles and drivers of foreign vehicles are comparable with respect to the use of German motorways, but they are not comparable when examined in the light of both measures, which entails considering them as both users of German motorways and taxpayers. That is why there is a mismatch in Austria's arguments: on the one hand, it insists that the two measures are to be examined jointly but, on the other hand, when identifying the comparator, it merely looks at the comparability of the two groups in relation to their use of German motorways.

Secondly, **Austria could not point to any less favourable treatment that the measures at issue grant to drivers of foreign vehicles.**

When examined in the light of both measures, drivers of foreign vehicles are not, and can never be, in a situation that is less favourable than that in which owners of domestic vehicles find themselves. In order to be allowed to drive on German motorways, the former are to pay only the infrastructure charge and are not obliged to pay for the yearly rate: they can opt for a vignette of shorter duration, depending on their actual need. Conversely, in order to be allowed to drive on German motorways, owners of domestic vehicles are required by law to pay both an infrastructure charge and a motor vehicle tax. Moreover, irrespective of their actual use of local motorways, owners of vehicles registered in Germany are obliged to pay the infrastructure charge in the amount due for the annual vignette.

Consequently, when both measures are considered together — as Austria asks the Court to do — there is manifestly no less favourable treatment for foreign drivers: any vehicle registered in another Member State that will be used on German motorways will always pay to the German authorities, to be permitted to use them, a lower amount than that paid by the owner of the same vehicle model registered in Germany.

The Advocate General admits that the amount of the motor vehicle tax to be paid by owners of domestic vehicles will be lower than in the past thanks to the tax relief. However, even if the tax relief had the effect of 'zeroing' the motor vehicle tax (which is not the case) any foreign driver would be required to pay, for using German motorways, an amount that is, at maximum, that which would be payable by owners of domestic vehicles.

In the Advocate General's view, the German authorities were fully entitled to take the view that, first, the cost of the motorway network, until now borne mainly by its taxpayers, had to be equally shared among all users, including drivers of foreign vehicles. Second, owners

of domestic vehicles would have been subject to a disproportionate amount of taxation had they been subject to both the infrastructure charge and the motor vehicle tax.

With respect to the German **measures of control and enforcement** (random checks, collection of a security, prohibition of further travel, threat of fines), the Advocate General takes the view that Austria has not discharged its burden of proving that they give rise to indirect discrimination on grounds of nationality.

As regards the alleged violation of the **free movement of goods** and **free movement of services**, the Advocate General finds that Austria has not provided evidence of any kind with regard to the possible impact that the infrastructure charge may have on cross-border trade. There is, according to the Advocate General, no element that may point towards a hindrance to market access. Any effect on the freedoms of movement appears uncertain, or indirect at best.

As regards the treaty provisions on **common transport policy**, more precisely the **standstill clause** prohibiting Member States to make provisions less favourable in their effect on carriers of other Member States[2], the Advocate General doubts that this clause is still applicable. But even if that was the case, Austria has, according to the Advocate General, fallen short of explaining, let alone providing any evidence of, how a measure that concerns only vehicles of less than 3.5 tonnes could have a real impact on foreign carriers.

The Advocate General points out in this context **that the German infrastructure charge is in line with two widely accepted dogmas of the EU transport policy: costs relating to the use of transport infrastructures should be based on the 'user pay' and the 'polluter-pay' principles.**

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: An action for failure to fulfil obligations directed against a Member State which has failed to comply with its obligations under European Union law may be brought by the Commission or by another Member State. If the Court of Justice finds that there has been a failure to fulfil obligations, the Member State concerned must comply with the Court's judgment without delay.
Where the Commission considers that the Member State has not complied with the judgment, it may bring a further action seeking financial penalties. However, if measures transposing a directive have not been notified to the Commission, the Court of Justice can, on a proposal from the Commission, impose penalties at the stage of the initial judgment.

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[2] Article 92 TFEU.