

Case C-645/23**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

26 October 2023

Referring court:

Corte d'appello di Bologna (Italy)

Date of the decision to refer:

26 October 2023

Appellant:

Hera Comm SpA

Respondent:

Falconeri Srl

Subject matter of the main proceedings

Appeal brought before the Corte d'appello di Bologna (Court of Appeal, Bologna, Italy) against the order of the Tribunale di Bologna (District Court, Bologna) of 19 April 2021 upholding the respondent company's claim for repayment of a sum unduly paid to the appellant company and ordering the appellant to repay EUR 43 492.69 plus interest.

Subject matter and legal basis of the request

By the reference for a preliminary ruling, made pursuant to Article 267 TFEU, the Court of Appeal of Bologna seeks an interpretation of Article 1(2) of Directive 2008/118/EC in order to determine: – whether the additional tax on electricity excise duty may be considered to be '[an]other indirect tax' within the meaning of that article; – if so, whether that article has direct effect and whether Italian legislation may be disapplied in the context of a relationship between private individuals.

Questions referred for a preliminary ruling

(a) Does an additional tax on electricity excise duty, levied by the Member State as a fraction or multiple of the excise duty to which the product is already subject, fall within the concept of ‘other indirect taxes’ referred to in Article 1(2) of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC, or must it be understood as a mere increase in the rate of the excise duty, with the result that the Member State is at liberty not to use it for the ‘specific purposes’ required by Article 1(2) of Directive 2008/118/EC?

(b) If the additional tax on electricity excise duty falls within the concept of ‘other indirect taxes’, must Article 1(2) of Council Directive 2008/118/EC of 16 December 2008 be interpreted as meaning that it meets the conditions for being relied on by a private individual before a national court for the purposes of:

- challenging the seller of the product subject to the additional excise duty, to which the private individual has paid the indirect tax, on the ground that the Member State’s tax charge to the vendor is unlawful because it is based on a national provision contrary to the Directive;

– as a result, recovering from the vendor the undue payment that it claimed from him?

Provisions of European Union law relied on

Principle of primacy (Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, A. DECLARATIONS CONCERNING PROVISIONS OF THE TREATY – 17. Declaration concerning primacy); principles of effectiveness and equivalence (Article 47(1) of the Charter of Fundamental Rights of the European Union, Article 19(2) TEU); principle of sincere cooperation (Article 4(3) TEU, Article 288 TFEU, Articles 1(2) and 9(2) of Directive 2008/118/EC)

Provisions of national law relied on

Decreto-legge del 28 novembre 1988, n. 511 (Decree-Law No 511 of 28 November 1988)

Preamble: ‘Given the extraordinary need and urgency of providing the necessary resources to regional and local financial institutions, in order to ensure the performance of the institutional tasks [...]’

Article 6, in the version in force before its repeal:

‘1. An additional tax is hereby introduced on the excise duty on electricity provided for in Articles 52 et seq. of the [...] testo unico delle accise (Consolidated Law on Excise Duties), as follows:

- (a) EUR 18.59 per MWh for municipalities for any use in dwellings [...]
- (b) EUR 20.40 per MWh for municipalities, for any use in second homes;
- (c) EUR 9.30 per MWh for provinces for any use in premises and places other than dwellings, for all users, up to a maximum of 200 MWh of consumption per month.

2. By a decision to be adopted within the deadlines for approval of the preliminary budget, the provinces may increase the measure referred to in paragraph 1(c) up to EUR 11.40 per MWh. [...]

3. The additional taxes referred to in paragraph 1 shall be payable by the taxable persons referred to in Article 53 of the Consolidated Law on Excise Duties, at the time of supply of electricity to final consumers or, in respect of electricity produced or purchased for own use, at the time of consumption. The additional taxes shall be assessed and collected in the same way as the excise duty on electricity. [...].’

Decreto legislativo del 26 ottobre 1995, n. 504 (Legislative Decree No 504 of 26 October 1995, Article 52(1): ‘Electricity [...] shall be subject to excise duty, at the rates laid down in Annex I, at the time of supply to final consumers or at the time of consumption of electricity produced for own use.’

Decreto-legge del 29 dicembre 2010, n. 225 (Decree-Law No 225 of 29 December 2010), Article 2(2bis): ‘Pending full implementation of the financial arrangements for the waste management cycle [...], the direct and indirect costs of the entire waste management cycle may be covered in full [...] as follows: [...]; (b) municipalities may make a specific increase in the additional tax on electricity excise duty referred to in Article 6(1)(a) and (b) of Decree-Law No 511 of 28 November 1988, [...] by means of an increase not exceeding the amount in force of the above-mentioned additional tax.’

Decreto legislativo del 14 marzo 2011, n. 23 (Legislative Decree No 23 of 14 March 2011), Article 2(6): ‘From 2012, the additional tax on the excise duty on electricity referred to in Article 6(1)(a) and (b) of Decree-Law No 511 of 28 November 1988, converted, with amendments, by Law No 20 of 27 January 1989, shall cease to apply in ordinary-statute regions [...].’

Decreto-legge del 2 marzo 2012, n. 16 (Decree-Law No 16 of 2 March 2012), Article 4(10): ‘With effect from 1 April 2012, in order to coordinate the national tax provisions applied to the consumption of electricity with the provisions of Article 1(2) of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC,

Article 6 of Decree-Law No 511 of 28 November 1988, converted, with amendments, by Law No 20 of 27 January 1989, is hereby repealed.’

Legislative Decree No 504 of 26 October 1995

Article 2(1): ‘In respect of excise goods, the tax debt shall be incurred at the time of their production, including extraction from the subsoil if the excise duty is applicable, or on their importation.’

Article 53(1)(a): ‘The persons liable to pay excise duty on electricity shall be: (a) persons billing electricity to final consumers, referred to as “vendors”.’

Article 16(3): ‘The claims which persons liable to excise duty have against the transferees of products on behalf of whom those persons have paid that tax may be charged by way of recovery [...]’

Article 14: ‘1. Excise duty shall be reimbursed where it has been unduly paid; [...]

2. [...] reimbursement must be requested within two years of the date of payment or of the date on which the right to reimbursement may be exercised, or the right to reimbursement shall be forfeited. [...]

4. Where, at the end of court proceedings, the person liable to pay the excise duty is ordered to repay to third parties sums unduly levied by way of recovery of excise duty, the reimbursement shall be requested by that person within 90 days of the date when the judgment ordering repayment of the sums becomes *res judicata*, or the right to request reimbursement shall be forfeited.’

Article 2033 of the Civil Code: ‘Any person making an undue payment shall be entitled to recover the sum paid.’ [...].’

Succinct presentation of the facts and procedure in the main proceedings

- 1 On 1 October 2009, an electricity supply company (the appellant) concluded a contract for the periodic supply of electricity with a customer company (the respondent). Until 1 April 2012, the date on which Article 6 of Decree-Law No 511/1988 was repealed, the electricity company paid the State the additional excise duty on the product sold to the customer company and requested from the latter, and obtained, under the recovery mechanism, reimbursement of the amount paid.
- 2 Believing the additional excise duty at issue to be contrary to EU law, the customer company brought an action before the District Court of Bologna seeking an order that the electricity company should repay the amount paid. By order of 19 April 2021, the District Court of Bologna granted the application and held that Article 6 of Decree-Law No 511/1988 was contrary to Article 1(2) of Directive 2008/118/EC, disapplied the domestic provision and ordered the electricity

company to reimburse the payments made to it from the expiry of the deadline for transposing the directive until the time the tax was abolished.

- 3 The electricity company initially complied with the order and repaid the customer company the amount of the payments made. It then appealed to the Court of Appeal of Bologna, requesting that the order be amended and that the sum paid be refunded to it.

The essential arguments of the parties in the main proceedings

- 4 The appellant contests the order of the District Court of Bologna in so far as it maintained that: – the additional tax and the excise duty are different; – the legal principles laid down by the Court of Justice of the European Union in the context of the reference for a preliminary ruling are enforceable *erga omnes* irrespective of the self-executing nature of the directive. According to the appellant, the additional tax and the excise duty are not different taxes: the additional tax is merely an increase in the rate of the excise duty. In the appellant's view, therefore, it does not constitute '(an)other indirect tax' for the purposes of Article 1(2) of the above-mentioned directive.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 5 The referring court points out that the order of the District Court of Bologna follows well-established case-law of the Corte di Cassazione (Court of Cassation) according to which the rules governing reimbursement of the additional tax are compatible with EU law, since, in the absence of common rules on the reimbursement of taxes, it is the Member States that regulate such reimbursement in compliance with the principles of equivalence and effectiveness (see, to that effect, judgments of the Court of Justice of the European Union of 15 March 2007, *Reemtsma Cigarettenfabriken*, C-35/05, EU:C:2007:167, paragraph 37; of 7 November 2018, *K, B*, C-380/17, EU:C:2018:877, paragraphs 56 and 58; and of 14 February 2019, *Nestrade* (C-562/17, EU:C:2019:115, paragraphs 40 and 41). Thus, the user may claim reimbursement of the additional tax from the transferor and it is only if reimbursement by the transferor is impossible or excessively difficult, as in the event of its insolvency, that the State may be applied to (see, to that effect, judgments of the Court of 27 April 2017, *Farkas*, C-564/15, EU:C:2017:302, paragraph 57, and of 31 May 2018, *Kollroß*, C-660 and C-661/16, EU:C:2018:372, paragraph 66).
- 6 According to that line of case-law, the additional tax and the excise duty constitute two separate taxes, but the additional tax cannot have the specific purposes required by Article 1(2) of Directive 2008/118/EC: its sole objective is 'providing the necessary resources to regional and local financial institutions, in order to ensure the performance of the institutional tasks' (preamble to Decree-Law No 511/1988), whereas, according to the District Court of Bologna, its hypothetical further purpose of supporting the waste disposal service is indicated

by the law as purely potential and it has not been proved that it was pursued in the present case. In that regard, the referring court points out that the interpretation given so far to the concept of ‘specific purposes’ by the Court of Justice, followed by the District Court of Bologna, precludes the purpose of the additional tax at issue being included within that concept.

- 7 A minority of the case-law on the substance of the case holds, however, that the additional tax is not another indirect tax for the purposes of Article 1(2) of that directive but merely an increase in the excise duty on electricity.
- 8 In the context of the question as to whether the additional tax may be regarded as another electricity tax, the referring court notes that the excise duty and the additional tax have a partially overlapping structure and rules; in particular, the additional tax constitutes an increase in the rate of the excise duty and has identical methods of assessment and collection. In the referring court’s view, the doubt remains, however, as to whether the additional tax at issue is to be regarded as different from excise duty. The uncertainty in that regard is confirmed by a similar request for a preliminary ruling from the German court, the subject matter of which is in part similar as regards an additional tax on heated tobacco (Case C-336/22). According to the referring court, a literal, global and teleological interpretation of Article 1(2) of the directive precludes the classification of the excise duty on electricity and the additional tax as a single indirect tax, since both entail independent obligations to provide services.
- 9 As regards the effects of Article 1(2) of the above-mentioned directive, the referring court notes that some of the case-law, in particular that of the Court of Cassation, supports the obligation to disapply paragraphs 1 and 2 of Article 6 of Decree-Law No 511/1988, disregarding the horizontal or vertical direct effect of Article 1(2) of the directive and invoking the principle of the immediate applicability of the interpretation of EU law given by the Court of Justice. However, the referring court notes that, in the cases in which the Court of Cassation has ruled, the addressee of the claim for repayment has always been the public administration, whereas, in the present case, the appellant is not a public undertaking and the relationship forming the subject matter of the dispute, although dependent on a vertical relationship, is horizontal in nature. The referring court also notes that the Court of Cassation has held that a user may, in compliance with the principle of effectiveness, bring an action against the vendor for recovery of sums unduly paid or, as the case may be, against the State for compensation for loss or damage resulting from incorrect transposition of the EU directive.
- 10 The case-law that takes a different approach accepts in certain cases that Article 1(2) of the above-mentioned directive is capable of producing negative effects vis-à-vis third parties, or maintains that the ineffectiveness of self-executing directives in horizontal relations prevents a customer from relying on it against the supplier, so that only protection for loss and damages can be relied on

in that event (see, in that regard, judgment of the Court of Justice of 19 November 1991, *Francovich*, C-6/90 [and] C-9/90, EU:C:1991:428).

- 11 The referring court points out that the Court of Justice has repeatedly set out the principle that directives, by imposing obligations on Member States alone, may create advantages for individuals vis-à-vis the State but cannot confer rights on individuals in relations between individuals. In the referring court's view, however, the limits of the prohibition on the horizontal effect of directives have not been expressly clarified.
- 12 Since the judgment in *Link Logistic*, the Court of Justice, in its judgment of 24 June 2019, *Popławski*, C-573/17, EU:C:2019:530, paragraphs 61 and 62, ruling on a framework decision but extending its reasoning to directives, seems to equate direct effect and disapplication. The judgment of 18 January 2022, *Thelen Technopark Berlin GmbH* (C-261/20, EU:C:2022:33, paragraph 33) recognises the possibility for a court to disapply a national provision that is contrary to a provision of EU law that does not have direct effect.
- 13 According to the referring court, there is a distinction in the case-law of the Court of Justice between cases where a directive is intended to regulate relations between individuals and those where it is intended to regulate vertical relations between individuals and States involving only incidentally or by extension relations between individuals: in the former the directive may not be invoked against an individual in order to change their rights or obligations, but serves solely as a parameter for the lawfulness of domestic provisions; in the latter, however, it may give rise to 'mere adverse repercussions on the rights of third parties' (see judgments of 7 January 2004, *Delena Wells*, C-201/02, EU:C:2004:12, paragraph 57; of 7 July 2008, *Arcor AG & Co. KG*, C-152/07 to C-154/07, EU:C:2008:426, paragraph 36) or may even be applied in horizontal relations (see judgment of 26 September 2000, *Unilever*, C-443/98, EU:C:2000:496, paragraph 51).
- 14 According to the referring court, recognising the applicability of Article 1(2) of the directive to a horizontal relationship that is dependent on a vertical relationship would implement the principles of equivalence and effectiveness, avoiding the unreasonable discrimination against individuals who would otherwise have to hope that the other party were unable to fulfil its obligations, in order to then be able to claim reimbursement from the State of the sum unduly paid. If the undertaking were in a position to repay the sum, users would not be able to rely, as against the other party to the contract, on the unlawfulness of the tax paid by them. Only the protection of loss or damages would therefore be possible, and that would increase the burden of proof on the individual (see judgment of 30 September 2003, *Köbler*, C-224/01, EU:C:2003:513, paragraphs 51 to 56).
- 15 Finally, the referring court notes that the subject matter of the present reference for a preliminary ruling is partially the same as the reference for a preliminary

ruling from the Tribunale di Como (District Court, Como), whose proceedings are currently pending (Case C-316/22).

WORKING DOCUMENT