Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 1 June 2017 [1]

Joined Cases C-215/16, C-216/16, C-220/16 and C-221/16

Elecdey Carcelén SA (C-215/16),
Energías Eólicas de Cuenca SA (C-216/16),
Iberenova Promociones SAU (C-220/16),
Iberdrola Renovables Castilla La Mancha SA (C-221/16)
v
Comunidad Autónoma de Castilla-La Mancha

(Request for a preliminary rulingfrom the Tribunal Superior de Justicia de Castilla-La Mancha (High Court of Justice of Castilla-La Mancha, Spain))

(Reference for a preliminary ruling — Environment — Wind power — Directive 2009/28/EC — Promotion of the use of energy from renewable sources — Directive 2008/118/EC — General arrangements for excise duty — Directive 2003/96/EC — Taxation of energy products and electricity — Regional levy on wind power plants ('canon eólico'))

I. Introduction

1. Don Quixote has already fought windmills in the Spanish region of La Mancha. So it is no surprise that a new dispute over wind power has been brought before the Court from the Autonomous Community of Castilla-La Mancha. After a number of recent decisions have had to be taken regarding its negative environmental impact, [2] but also regarding its promotion, [3] the present case concerns the levy on wind power plants devised by that region, a 'pole tax' as it were.

2. In addition to Directive 2009/28/EC [4] on the promotion of energy from renewable sources, the request for a preliminary ruling also relates to Directive 2008/118/EC [5] concerning the general arrangements for excise duty and Directive 2003/96/EC [6] on energy taxation. In particular, it must be examined whether the contested tax is compatible with the promotion objective of Directive 2009/28

1 Original language: German.

2 Judgments of 21 July 2011, *Azienda Agro-Zootecnica Franchini and Eolica di Altamura* (C-2/10, EU:C:2011:502), and of 14 January 2016, *Commission* v *Bulgaria* (C-141/14, EU:C:2016:8).

3 Judgments of 19 December 2013, *Vent De Colère! and Others* (C-262/12, EU:C:2013:851), and of 1 July 2014, *Ålands Vindkraft* (C-573/12, EU:C:2014:2037).

4 Directive of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ 2009 L 140, p. 16).

5 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), as amended by Council Directive 2010/12/EU of 16 February 2010 (OJ 2010 L 50, p. 1).

6 Council Directive of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ 2003 L 283, p. 51), as amended by Council Directive 2004/75/EC of 29 April 2004 (OJ 2004 L 157, p. 100).

or the provisions concerning administrative charges laid down in that directive. However, the Court should also consider the extent to which such a tax might be precluded by prejudice to the objectives of Directive 2009/28. With regard to the two taxation directives, it must be clarified, first and foremost, whether the tax falls within their scope, as in that case it would have to satisfy certain requirements.

II. Legislative framework

A. EU law

1. Directive 2009/28

3. Directive 2009/28 concerns the promotion of energy from renewable sources.

4. Article 2(k) of Directive 2009/28 defines 'support scheme' as follows:

'… any instrument, scheme or mechanism applied by a Member State or a group of Member States, that promotes the use of energy from renewable sources by reducing the cost of that energy, increasing the price at which it can be sold, or increasing, by means of a renewable energy obligation or otherwise, the volume of such energy purchased. This includes, but is not restricted to, investment aid, tax exemptions or reductions, tax refunds, renewable energy obligation support schemes including those using green certificates, and direct price support schemes including feed-in tariffs and premium payments'.

5. Article 3(1) and (2) of Directive 2009/28 requires Member States to cover certain minimum shares of their energy consumption from renewable energy sources:

'1. Each Member State shall ensure that the share of energy from renewable sources … in final consumption of energy in 2020 is at least their overall target for the share of energy from renewable sources in that year, as set out in the third column of the table in Part A of Annex I.

2. Member States shall introduce measures effectively designed to ensure that the share of energy from renewable sources equals or exceeds that shown in the indicative trajectory set out in part B of Annex I.'

6. In this connection, Article 3(3) of Directive 2009/28 concerns, among other things, support schemes:

'In order to reach the targets set in paragraphs 1 and 2 of this Article Member States may, inter alia, apply the following measures:

(a) support schemes;

(b) …'

7. Approval procedures are addressed in recital 40 of Directive 2009/28:

'The procedure used by the administration responsible for supervising the authorisation, certification and licensing of renewable energy plants should be objective, transparent, non-discriminatory and proportionate when applying the rules to specific projects. …'

8. The corresponding rules are laid down in Article 13 of Directive 2009/28:

‘1. Member States shall ensure that any national rules concerning the authorisation, certification and licensing procedures that are applied to plants and associated transmission and distribution network infrastructures for the production of electricity, heating or cooling from renewable energy sources, and to the process of transformation of biomass into biofuels or other energy products, are proportionate and necessary.Member States shall, in particular, take the appropriate steps to ensure that

…

(e) administrative charges paid by consumers, planners, architects, builders and equipment and system installers and suppliers are transparent and cost-related;

…’

2. Directive 2008/118

9. Directive 2008/118 concerns the general arrangements for excise duty. Article 1(1) governs the scope and Article 1(2) the lawfulness of other excise duty:

‘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/EC;

(b) alcohol and alcoholic beverages covered by Directives 92/83/EEC and 92/84/EEC;

(c) manufactured tobacco covered by Directives 95/59/EC, 92/79/EEC and 92/80/EEC.

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. Directive 2003/96

10. Directive 2003/96 concerns the taxation of energy.

11. As is made clear by Article 4 of Directive 2003/96 in particular, it requires, in principle, a minimum rate of taxation on energy:

‘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 VAT) calculated directly or indirectly on the quantity of energy products and electricity at the time of release for consumption.’

12. The national court also refers to Article 15 of Directive 2003/96, which permits certain exemptions:

'Without prejudice to other Community provisions, Member States may apply under fiscal control total or partial exemptions or reductions in the level of taxation to:

(a) …

(b) electricity:

– of solar, wind, wave, tidal or geothermal origin;

– …'

B. Spanish law

13. By Ley 9/2011, de 21 de marzo, por la que se crea el canon eólico (Law 9/2011 of 21 March 2011 creating the levy on wind power, 'Law 9/2011'), the Autonomous Community of Castilla-La Mancha introduced a levy on wind power.

14. Article 4 of Law 9/2011 governs the chargeable event:

'1. The chargeable event for the purposes of the levy on wind power is constituted by the generation of harmful conditions and effects on the environment and on the territory, as a consequence of the installation on wind farms of turbines used for producing electricity … .

…

3. The chargeable event will be deemed to have occurred even if the wind turbines are not owned by the holder of the administrative permit to install a wind farm.'

15. The tax base is determined on the basis of Article 7 of Law 9/2011:

'1. The tax base is constituted by the total number of wind turbine units on a wind farm … .'

16. Article 8 governs the tax rate:

'1. The tax liability is determined by applying the following quarterly tax rates to the tax base:

On wind farms with up to 2 wind turbines: EUR 0 for each wind turbine unit.

On wind farms with 3 to 7 wind turbines: EUR 489 for each wind turbine unit.

On wind farms with 8 to 15 wind turbines: EUR 871 for each wind turbine unit.

On wind farms with more than 15 wind turbines:

(a) where the number of wind turbines is equal to or lower than the installed power of the farm measured in megawatts: EUR 1 233 for each wind turbine unit;

(b) where the number of wind turbines is greater than the installed power of the farm measured in megawatts: EUR 1 275 for each wind turbine unit.

…’

III. Facts and request for a preliminary ruling

17. Elecdey Carcelén SA (Case C-215/16), Energías Eólicas de Cuenca SA (Case C-216/16), Iberenova Promociones SAU (Case C-220/16) and Iberdrola Renovables Castilla La Mancha SA (Case C-221/16) operate wind power plants in the Autonomous Community of Castilla-La Mancha which are subject to the regional levy on wind power. The undertakings have submitted applications to the competent authority for rectification of their self-assessments made in respect of the levy on wind power in the financial year 2011 and for refund of the amounts paid.

18. They brought proceedings against the rejection of those applications before the Tribunal Superior de Justicia de Castilla-La Mancha (High Court of Justice of Castilla-La Mancha, Spain). That court is therefore referring the following questions to the Court for a preliminary ruling:

‘(1) As the “support systems” defined in Article 2(k) of Directive 2009/28, including fiscal stimuli consisting of tax reductions, exemptions and refunds, are envisaged as a means of attaining the renewable energy consumption objectives provided for in the aforementioned Directive 2009/28, are those stimuli or measures to be regarded as mandatory and binding on the Member States, having direct effect in so far as they may be invoked and relied on by the individuals concerned in all kinds of public, judicial and administrative proceedings?

(2) Since the list of “support systems” mentioned in the previous question includes fiscal stimulus measures consisting of, “but … not restricted to”, tax reductions, exemptions and refunds, are those stimuli to be regarded as specifically including non-taxation, that is to say, the prohibition of any kind of specific and one-off levy, in addition to the general taxes levied on the economic activity and production of electricity, imposed on energy from renewable sources? Similarly, the following question is also asked in this paragraph: Is the general prohibition stated above also considered to include the prohibition of concurrence, double taxation or overlapping of multiple general or one-off taxes charged at different stages of the activity of generating renewable energy, affecting the same chargeable event taxed by the levy on wind power under consideration?

(3) If the answer to the previous question is in the negative and it is acknowledged that energy from renewable sources is taxable, for the purposes of the provisions of Article 1(2) of Directive 2008/118, is the term “specific purposes” to be interpreted as meaning that its objective must be exclusive and, furthermore, that the tax on renewable energy must, as regards its structure, be genuinely non-fiscal, and not merely budgetary or revenue-collecting in nature?

(4) In accordance with the provisions of Article 4 of Directive 2003/96, which, when referring to the levels of taxation which Member States are to apply to the energy products and electricity takes as its reference the minimum levels prescribed by the directive, which are understood to be the total of all direct and indirect taxes applied to those products at the time of release for consumption, should that total be understood as excluding from the level of taxation required by the directive those national taxes which, as regards their structure and specific purposes, are not genuinely non-fiscal, as interpreted according to the reply to the previous question?

(5) Is the term “charge” used in Article 13(1)(e) of Directive 2009/28 an autonomous concept of European law which is to be interpreted more broadly, as comprehensive and also synonymous with the concept of tax in general?

(6) If the answer to the previous question is in the affirmative, the question we raise is the following: May the charges, referred to in the aforementioned Article 13(1)(e) of Directive 2009/28, payable by consumers, include only those levies or taxes which are designed to compensate, where

appropriate, for the damage caused by the impact of energy from renewable sources on the environment and seek to make good, using the revenue generated, the damage linked to that adverse impact or effect, but not those taxes or benefits which, applying to non-polluting energy, fulfil a primarily budgetary or tax-collecting purpose?'

19. Before the Court, the wind power operators Elecdey Carcelén SA, Energías Eólicas de Cuenca SA, Iberenova Promociones SAU and Iberdrola Renovables Castilla la Mancha SA and the Comunidad Autónoma de Castilla-La Mancha, as parties to the main proceedings, as well as the Kingdom of Spain and the European Commission, submitted written observations and presented oral argument at the hearing on 29 March 2017.

IV. Legal assessment

20. The contested levy is applied on a quarterly basis to each individual wind power plant, the level of taxation depending on the size of the wind farm in question and the power of the wind power plants. The request for a preliminary ruling seeks to ascertain whether that levy is compatible with the support schemes for renewable energies under Directive 2009/28 (see section A) or the rules on certain charges laid down therein (see section B). In addition, the national court asks about compatibility with Directive 2008/118 on excise duty (see section C) and Directive 2003/96 on energy taxes (see section D).

A. The first and second questions — support scheme

21. By the first two questions, the national court wishes to know whether the contested levy on wind power is precluded by Article 2(k) of Directive 2009/28.

22. Article 2(k) of Directive 2009/28 defines 'support scheme'. The definition includes tax exemptions, tax reductions and tax refunds.

23. However, a definition as such cannot preclude the charging of a national levy. The important factor is the rules which refer to that definition.

24. In this regard, mention should be made, first of all, of Article 3(3)(a) of Directive 2009/28. Under that provision, Member States *may* apply support schemes in order to achieve the share of renewable energies provided for in Article 3(1) and (2) and Annex I. It cannot, however, be inferred from the possibility of applying support schemes that levies on wind power plants are unlawful.

25. Nor is the contested tax precluded by the possibility of joining or coordinating support schemes of different Member States under Article 11 of Directive 2009/28. Elecdey Carcelén posits the plausible assumption that the tax reduces the potential for joining schemes with a view to a 'statistical transfer' of renewable energy pursuant to Article 6. Nevertheless, the directive does not require Member States to establish such potential, and there is also nothing to suggest that it has already been agreed to join schemes and that this would be affected by the tax.

26. Nor can the other provisions of Directive 2009/28 relating to support schemes be invoked as an argument against a levy on wind power plants. Those provisions concern technical specifications for using support schemes (Article 13(2)), building regulations and codes on increased use of renewable energies in the building sector (Article 13(4)), the relationship between guarantees of origin and support schemes (Article 15) and professional duties (Articles 22 and 23).

27. However, the request for a preliminary ruling also makes a link with the central obligation laid down by Directive 2009/28, the minimum shares of renewable energy in overall consumption provided for in Article 3(1) and (2). In order to give the referring court an answer which will be of use to it,[7] I would like to examine this point.

28. Under Article 3(1) of Directive 2009/28, each Member State must ensure that the share of energy from renewable sources in gross final consumption of energy in 2020 is at least an overall target specified in the annex. Article 3(2) requires Member States to introduce measures effectively designed to ensure that the share of energy from renewable sources equals or exceeds that shown in the indicative trajectory also specified in the annex.

29. Directive 2009/28 thus defines the shares of renewable energy which Member States are required to achieve both in 2020 and during the transitional period up to then. Higher shares would be welcomed, but are not required by the directive at least.

30. Compliance with Article 3(2) of Directive 2009/28 therefore ensures that, in the transitional period up to the expiry of the time limit for achieving the share of renewable energies for 2020, Member States already take the necessary measures to achieve that target. There is therefore no need, alongside this provision, to have recourse to the prohibition of national measures liable seriously to compromise the attainment of the result prescribed by a directive,[8] which stems from the principle of sincere cooperation with the European Union.

31. Rather, the contested levy would infringe Article 3(1) and (2) of Directive 2009/28 simply if it meant that Spain would fail to achieve the shares of renewable energy stipulated under those provisions.

32. It is nevertheless doubtful whether it would actually be possible to prove that a certain levy introduced by a region prevents the Member State as a whole achieving the abovementioned targets, as other levies will generally also apply and other economic or technical obstacles to the increased use of renewable energies will exist. However, there is no need to give a definitive answer to this question in the present case.

33. According to the submissions made by the Commission, in particular, at the hearing and the most recent Eurostat figures[9] to which all the parties referred at that hearing, at present an infringement of the requirements of Directive 2009/28 is neither apparent nor to be expected for Spain, unlike, for example, the Netherlands or France for a certain time. Spain consistently used, up to and including 2015, a higher share of renewable energy than is required by the directive. The average share of 16%, which was not envisaged until 2017 and 2018, was even exceeded in 2015.

34. Further considerations regarding the effects of the contested levy would be necessary only if the national court concluded, on the basis of more recent or better figures, that the trend shown in the Eurostat figures will not continue. However, because no convincing evidence in support of this view has been put forward in the present case, there is no need for the Court to explore further this scenario at the present time.

7 See, for example, judgments of 11 February 2015, *Marktgemeinde Straßwalchen and Others* (C-531/13, EU:C:2015:79, paragraph 37); of 13 October 2016, *M. and S.* (C-303/15, EU:C:2016:771, paragraph 16); and of 1 February 2017, *Município de Palmela* (C-144/16, EU:C:2017:76, paragraph 20).

8 See, for example, judgments of 18 December 1997, *Inter-Environnement Wallonie* (C-129/96, EU:C:1997:628, paragraph 45); of 26 May 2011, *Stichting Natuur en Milieu and Others* (C-165/09 to C-167/09, EU:C:2011:348, paragraphs 78 and 79); and of 11 September 2012, *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others* (C-43/10, EU:C:2012:560, paragraphs 57 and 58).

9 See Eurostat News Release 43/2017 of 14 March 2017 and the relevant figures in the 'Eurostat SHARES 2015' spreadsheet (both available at http://ec.europa.eu/eurostat/web/energy/data/shares).

35. Accordingly, it is regrettable if the Autonomous Community of Castilla-La Mancha applies levies which make the use of renewable energies desired according to Directive 2009/28 less attractive and, furthermore, undermine the national promotion of wind power, at least in part. However, provided the Member State as a whole still meets its obligations under EU law, this does not constitute an infringement of the rules on support schemes under the directive or on the prescribed shares of renewable energies, but at most a problem of national law.

36. Therefore, Article 2(k) and Article 3(1) and (2) of Directive 2009/28 do not preclude a levy which is applied on a quarterly basis to wind power plants, provided that that levy does not prevent the Member State from achieving the minimum shares of renewable energy in overall consumption provided for in the directive.

B. The fifth and sixth questions — charges for wind power plants

37. By the fifth and sixth questions, which should also be answered together, the national court wishes to know whether the contested levy is precluded by the rules on charges in Article 13(1)(e) of Directive 2009/28.

38. Under Article 13(1)(e) of Directive 2009/28, Member States must, in particular, take the appropriate steps to ensure that administrative charges paid by consumers, planners, architects, builders and equipment and system installers and suppliers are transparent and cost-related.

39. The background to that provision is the more broadly formulated first sentence of Article 13(1) of Directive 2009/28. It provides that Member States must ensure that any national rules concerning the authorisation, certification and licensing procedures that are applied to plants and associated transmission and distribution network infrastructures for the production of electricity, heating or cooling from renewable energy sources, and to the process of transformation of biomass into biofuels or other energy products, are proportionate and necessary.

40. Contrary to the view taken by the Autonomous Community of Castilla-La Mancha, the concept of 'administrative charges' is not to be defined by national law, but is an EU law concept, as there is no evident reference to national law.[10]

41. However, the contested levy does not prima facie come under Article 13(1)(e) of Directive 2009/28. It is neither an administrative charge paid by consumers, planners, architects, builders and equipment and system installers and suppliers, nor is it applied in connection with the authorisation, certification and licensing procedures for wind power plants. It is applied in respect of the operation of plants. The examination of this question could therefore be concluded at this point.

42. However, Iberenova Promociones and Iberdrola Renovables Castilla la Mancha, in particular, take the view, also hinted at in the request for a preliminary ruling, that Article 13(1)(e) of Directive 2009/28 has a much further-reaching effect than is suggested by its wording. They rely in this regard on the case-law regarding Article 11 of Directive 97/13/EC[11] and subsequently Articles 12 and 13 of Directive 2002/20/EC,[12] which concern authorisations in the field of electronic communications.

10 See, for example, judgments of 9 November 2016, *Wathelet* (C-149/15, EU:C:2016:840, paragraph 29), and of 2 March 2017, *J. D.* (C-4/16, EU:C:2017:153, paragraph 24).

11 Directive of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services (OJ 1997 L 117, p. 15).

12 Directive of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) (OJ 2002 L 108, p. 21).

43. Those provisions govern the permitted extent of administrative charges to be levied on undertakings operating in the field of telecommunications and electronic communications networks and services on the basis of authorisations regulated by EU law. Those charges cover certain administrative costs and must be imposed in an objective, transparent and proportionate manner.

44. The Court has in fact interpreted the provisions in question to the effect that Member States may not, within the framework of those directives, levy any charges or fees in relation to the provision of networks and electronic communication services other than those provided for by the respective directive. [13]

45. At first sight it is understandable why operators of wind power plants transpose this case-law to Article 13(1)(e) of Directive 2009/28 and oppose the contested levy on that basis.

46. Such an approach is suggested in particular by the overall objective of Directive 2009/28 and of EU environmental policy of combating climate change by reducing the release of greenhouse gases. It is consistent with that objective to minimise obstacles to the use of renewable energy sources.

47. However, while the regulatory framework for electronic communications seeks, in principle, the complete liberalisation of telecommunications services and infrastructures, [14] Directive 2009/28 has much less ambitious objectives. The Court has already held that the EU legislature certainly did not seek to bring about exhaustive harmonisation of national support schemes for renewable energy production. [15] The immediate main objective of Directive 2009/28 consists in the prescribed shares of renewable energies in overall consumption, the Member States being allowed broad discretion in choosing the means to achieve those shares on schedule. This limited objective raises doubts whether Article 13(1)(e) of Directive 2009/28 contains a comprehensive prohibition of onerous levies on renewable energies.

48. Furthermore, the Court has recently nuanced its case-law regarding obstacles in the field of electronic communications. It has made clear that not all additional taxation of telecommunications services falls under the prohibition of other taxes. The trigger for the tax must be linked to the authorisation procedure regulated in Directive 2002/20. [16] There was no such link, for example, in the case of municipal taxes on mobile telephony pylons. [17]

49. This must apply a fortiori to Article 13(1)(e) of Directive 2009/28. That provision may not be construed, going far beyond its wording, as a general prohibition on the imposition of all taxes whatever on renewable energies.

50. Consequently, Article 13(1)(e) of Directive 2009/28 does not preclude a levy which is applied on a quarterly basis to the operation of wind power plants.

13 Judgments of 18 September 2003, *Albacom and Infostrada* (C-292/01 and C-293/01, EU:C:2003:480, paragraph 42); of 18 July 2013, *Vodafone Omnitel and Others* (C-228/12 to C-232/12 and C-254/12 to C-258/12, EU:C:2013:495, paragraph 36); and of 17 December 2015, *Proximus* (C-517/13, EU:C:2015:820, paragraph 27).

14 Judgments of 18 September 2003, *Albacom and Infostrada* (C-292/01 and C-293/01, EU:C:2003:480, paragraphs 35 and 37); of 19 September 2006, *i-21 Germany and Arcor* (C-392/04 and C-422/04, EU:C:2006:586, paragraph 70); and of 21 July 2011, *Telefónica de España* (C-284/10, EU:C:2011:513, paragraph 18).

15 Judgment of 1 July 2014, *Ålands Vindkraft* (C-573/12, EU:C:2014:2037, paragraphs 59 to 63).

16 Judgments of 4 September 2014, *Provincie Antwerpen* (C-256/13 and C-264/13, EU:C:2014:2149, paragraph 36); of 6 October 2015, *Base Company* (C-346/13, EU:C:2015:649, paragraph 17); and of 17 December 2015, *Proximus* (C-517/13, EU:C:2015:820, paragraph 28); see also, to that effect, judgments of 17 September 2015, *Fratelli De Pra and SAIV* (C-416/14, EU:C:2015:617, paragraph 41); of 27 June 2013, *Commission* v *France* (C-485/11, not published, EU:C:2013:427, paragraphs 30, 31 and 34); and of 27 June 2013, *Vodafone Malta and Mobisle Communications* (C-71/12, EU:C:2013:431, paragraphs 24 and 25).

17 Judgments of 6 October 2015, *Base Company* (C-346/13, EU:C:2015:649, paragraphs 22 and 23), and of 17 December 2015, *Proximus* (C-517/13, EU:C:2015:820, paragraph 32 et seq.).

C. The third question — relationship with excise duty

51. The third question seeks to ascertain whether the application of the contested levy is compatible with Article 1(2) of Directive 2008/118. The national court asks this question in the event that the answer to the second question is — as I propose — answered in the negative and the taxation of energy from renewable sources is regarded as permissible under Article 1(2) of Directive 2008/118. It must therefore be clarified, first of all, whether the levy falls within the scope of that provision.

52. Under Article 1(2) of Directive 2008/118, Member States may levy other indirect taxes on excise goods for specific purposes subject to certain conditions.

53. The conditions applicable under that provision all presuppose that the contested levy on wind power plants is an indirect tax on excise goods.

54. The Court has held that the term 'other indirect taxes' within the meaning of Article 1(2) of Directive 2008/118 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. [18]

55. Article 1(1) of Directive 2008/118 mentions energy products and electricity covered by Directive 2003/96 (point (a)), alcohol and alcoholic beverages covered by Directives 92/83/EEC and 92/84/EEC (point (b)), and manufactured tobacco covered by Directives 95/59/EC, 92/79/EEC and 92/80/EEC (point (c)).

56. A levy on wind power plants does not fall directly in any of these categories. It could be covered only if it were to be regarded as an indirect tax on electricity generated by the plants subject to the levy.

57. According to the Court's case-law, an indirect tax of this kind must have a direct and inseverable link with the consumption of electricity. [19]

58. The Court has rejected such a link in the case of taxes on fuel assemblies in nuclear power stations [20] or their thermal power [21] because there was an insufficient link between the chargeable event in question and the consumption of the electricity generated.

59. That also applies to the levy on wind power plants at issue in the present case. It is not calculated by reference to the electricity generated by the plants or based on their theoretical capacity. The level of duty is instead graduated according to the size of the wind farm to which the plant belongs and, for particularly large wind farms, also according to whether they are particularly powerful plants. [22] In the latter case, more powerful turbines are even subject to lower taxation than less powerful turbines.

60. The parties also discuss whether the contested levy can be passed on to consumers. It is true that in the case of the fuel assembly tax the Court also relied on the fact that the tax could not be passed on in its entirety. [23] However, at least one ground cited by the Court also applies in the present case, as the levy on wind power plants, which is not dependent on electricity generation, cannot be passed on specifically to the price of the electricity generated. In addition, it is excluded a fortiori that it can

18 Judgment of 4 June 2015, *Kernkraftwerke Lippe-Ems* (C-5/14, EU:C:2015:354, paragraph 59).

19 Judgments of 4 June 2015, *Kernkraftwerke Lippe-Ems* (C-5/14, EU:C:2015:354, paragraph 61); of 1 October 2015, *OKG* (C-606/13, EU:C:2015:636, paragraph 35); and, to that effect, judgment of 10 June 1999, *Braathens* (C-346/97, EU:C:1999:291, paragraph 23).

20 Judgment of 4 June 2015, *Kernkraftwerke Lippe-Ems* (C-5/14, EU:C:2015:354, paragraphs 62 and 63).

21 Judgment of 1 October 2015, *OKG* (C-606/13, EU:C:2015:636, paragraph 35).

22 See above, point 15.

23 Judgment of 4 June 2015, *Kernkraftwerke Lippe-Ems* (C-5/14, EU:C:2015:354, paragraph 64).

be charged to final consumers in the form of a transparent surcharge, as it cannot be determined what proportion of the electricity purchased by them was generated by wind power plants subject to the levy. Any possibility of passing on the burden of the levy economically to consumers cannot therefore mean that the levy is to be regarded as an indirect tax within the meaning of Article 1(2) of Directive 2008/118.

61. Article 1(2) of Directive 2008/118 does not therefore preclude a levy which is applied on a quarterly basis to the operation of wind power plants but does not have a direct and inseverable link with the consumption of the electricity generated.

D. The fourth question — relationship with energy taxes

62. By the fourth question, the national court wishes to know whether in accordance with Article 4 of Directive 2003/96 the contested levy is part of the total charge levied in respect of all indirect taxes (except value added tax) calculated directly or indirectly on the quantity of energy products and electricity at the time of release for consumption. The amount thus calculated must be at least as large as the minimum level of taxation provided for in the directive.

63. It is not immediately clear to what extent this question might be important for the decision in the main proceedings. The Court could therefore reject it as hypothetical and thus inadmissible.

64. It is nevertheless clear from the grounds for the question that the national court doubts that the contested levy is compatible with the objective of Directive 2003/96 of promoting the proper functioning of the internal market.

65. This question is relevant to the decision in the main proceedings, at least in principle. However, it misunderstands the regulatory content of Directive 2003/96. The directive does not contain comprehensive rules governing taxes and charges which can arise in connection with electricity generation, but only defines a *minimum level* for the taxation of electricity consumption. It does not, however, preclude higher tax charges on electricity generation.

66. The fact that the first indent of Article 15(1)(b) of Directive 2003/96, to which the national court refers, permits an exemption for electricity generated by wind power also does not lead to any other conclusion. This option neither requires Member States to grant such an exemption nor prohibits them from taxing the generation of electricity from wind power through specific levies.

67. In so far as Energías Eólicas de Cuenca, in particular, submits that the contested levy infringes Directive 2003/96 in that, aside from expressly authorised tax reductions, the directive does not permit any regional differentiation of energy taxation, it should be noted that this question is not the subject of the request for a preliminary ruling.

68. Should the Court nevertheless wish to examine this point in order to give an answer which will be of use for the decision in the main proceedings, this line of argument too would lead no further. The levy is not a tax within the meaning of Directive 2003/96.

69. In accordance with Article 1 of Directive 2003/96, its scope is restricted to the taxation of energy products and electricity, as defined in Article 2(1) and (2) of the directive.[24] The contested levy could at most be regarded as indirect taxation of electricity generated by the wind power plants in question.

24 Judgment of 1 October 2015, *OKG* (C-606/13, EU:C:2015:636, paragraph 24).

70. However, such a tax requires a link between its chargeable event and the amount of electricity actually generated.[25] There is no such link, for example, in the case of a tax on the authorised maximum thermal power of a nuclear reactor which does not take account of the quantity of electricity actually generated.[26]

71. The link between the contested levy and the amount of electricity generated by the wind power plants in question is even weaker. While the maximum thermal power of a nuclear reactor allows inferences to be drawn as to how much electricity it is able to generate, the level of the contested levy varies primarily according to the size of the wind farms in which the turbines are located. Only for wind farms with more than 15 turbines is there a distinction depending on whether the installed power of the turbines averages more or less than one megawatt. Moreover, this distinction does not result in a higher rate of tax commensurate with the amount of electricity generated, but reduces the level of taxation on more powerful turbines.

72. The contested levy does not therefore constitute a tax within the meaning of Directive 2003/96 and a possible prohibition of regionally differentiated taxation would not be applicable.

73. Consequently, the contested levy is also not precluded by Directive 2003/96.

V. Conclusion

74. I therefore propose that the Court should rule as follows:

(1) Article 2(k) and Article 3(1) and (2) of Directive 2009/28/EC on the promotion of the use of energy from renewable sources do not preclude a levy which is applied on a quarterly basis to the operation of wind power plants, if it does not prevent the Member State concerned from achieving the minimum shares of renewable energy provided for in the directive.

(2) Article 13(1)(e) of Directive 2009/28 and Articles 4 and 15(1) of Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity do not preclude a levy which is applied on a quarterly basis to the operation of wind power plants.

(3) Article 1(2) of Directive 2008/118/EC concerning the general arrangements for excise duty does not preclude a levy which is applied on a quarterly basis to the operation of wind power plants but does not have a direct and inseverable link with the consumption of the electricity generated.

25 Judgment of 1 October 2015, *OKG* (C-606/13, EU:C:2015:636, paragraphs 32 and 33).

26 Judgment of 1 October 2015, *OKG* (C-606/13, EU:C:2015:636, paragraphs 31 and 32).