



Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

16 November 2023*

(Reference for a preliminary ruling – Taxation of energy products and electricity – Directive 2003/96/EC – Article 7(2) and (3) – Differentiated rates of taxation according to the commercial or private use of gas oil – Concept of ‘commercial gas oil used as propellant’ – Gas oil used for the carriage of passengers by regular service – National legislation providing for the reimbursement of excise duty with the exception of gas oil consumed during journeys made for the purpose of maintaining or refuelling passenger vehicles)

In Case C-391/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Pécsi Törvényszék (Pécs High Court, Hungary), made by decision of 7 June 2022, received at the Court on 14 June 2022, in the proceedings

Tüke Busz Községi Közlekedési Zrt.

v

Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága,

THE COURT (Tenth Chamber),

composed of M. Ilešič (Rapporteur), acting as President of the Chamber, I. Jarukaitis and D. Gratsias, Judges,

Advocate General: J. Richard de la Tour,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Hungarian Government, by M.Z. Fehér and R. Kissné Berta, acting as Agents,
- the European Commission, by A. Armenia and A. Tokár, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

* Language of the case: Hungarian.

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of 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).
- 2 The request has been made in proceedings between Tüke Busz Közösségi Közlekedési Zrt. ('Tüke Busz') and the Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága (Appeals Directorate of the National Tax and Customs Administration, Hungary) ('the Appeals Directorate') concerning the latter's refusal to grant Tüke Busz reimbursement of the amount of excise duty on gas oil consumed during journeys made for the repair, maintenance and refuelling of vehicles used by Tüke Busz in its activity of transporting passengers.

Legal context

European Union law

Directive 2003/96

- 3 Recitals 3 to 6, 12, 19 and 20 of Directive 2003/96 state:
 - '(3) The proper functioning of the internal market and the achievement of the objectives of other Community policies require minimum levels of taxation to be laid down at Community level for most energy products, including electricity, natural gas and coal.
 - (4) Appreciable differences in the national levels of energy taxation applied by Member States could prove detrimental to the proper functioning of the internal market.
 - (5) The establishment of appropriate Community minimum levels of taxation may enable existing differences in the national levels of taxation to be reduced.
 - (6) In accordance with Article [11 TFEU], environmental protection requirements must be integrated into the definition and implementation of other Community policies.
- ...
- (12) Energy prices are key elements of Community energy, transport and environment policies.
- ...
- (19) The taxation of diesel motor fuel used by hauliers, notably those engaging in intra-Community activities, requires a possibility for a specific treatment, including measures to allow for the introduction of a system of road user charges, in order to limit the distortion of competition operators might be confronted with.

(20) Member States may need to differentiate between commercial and non-commercial diesel. Member States may use this possibility to reduce the gap between the taxation of non-commercial gas oil used as propellant and petrol.’

4 Under Article 1 of that directive:

‘Member States shall impose taxation on energy products and electricity in accordance with this Directive.’

5 Article 4 of that directive provides:

‘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 [value added tax (VAT)]) calculated directly or indirectly on the quantity of energy products and electricity at the time of release for consumption.’

6 Article 5 of that directive provides:

‘Provided that they respect the minimum levels of taxation prescribed by this Directive and that they are compatible with Community law, differentiated rates of taxation may be applied by Member States, under fiscal control, in the [cases listed in that article.]’

7 Article 7 of Directive 2003/96 reads as follows:

‘1. As from 1 January 2004 and from 1 January 2010, the minimum levels of taxation applicable to motor fuels shall be fixed as set out in Annex I Table A.

Not later than 1 January 2012, the Council [of the European Union], acting unanimously after consulting the European Parliament, shall, on the basis of a report and a proposal from the [European] Commission, decide upon the minimum levels of taxation applicable to gas oil for a further period beginning on 1 January 2013.

2. Member States may differentiate between commercial and non-commercial use of gas oil used as propellant, provided that the Community minimum levels are observed and the rate for commercial gas oil used as propellant does not fall below the national level of taxation in force on 1 January 2003, notwithstanding any derogations for this use laid down in this Directive.

3. “Commercial gas oil used as propellant” shall mean gas oil used as propellant for the following purposes:

(a) the carriage of goods for hire or reward, or on own account, by motor vehicles or articulated vehicle combinations intended exclusively for the carriage of goods by road and with a maximum permissible gross laden weight of not less than 7.5 tonnes;

(b) the carriage of passengers, whether by regular or occasional service, by a motor vehicle of category M2 or category M3, as defined in Council Directive 70/156/EEC of 6 February 1970 on the approximation of the laws of the Member States relating to the type-approval of motor vehicles and their trailers [(O), English Special Edition 1970(I), p. 96)].

4. Notwithstanding paragraph 2, Member States which introduce a system of road user charges for motor vehicles or articulated vehicle combinations intended exclusively for the carriage of goods by road may apply a reduced rate on gas oil used by such vehicles, that goes below the national level of taxation in force on 1 January 2003, as long as the overall tax burden remains broadly equivalent, provided that the Community minimum levels are observed and that the national level of taxation in force on 1 January 2003 for gas oil used as propellant is at least twice as high as the minimum level of taxation applicable on 1 January 2004.'

Directive 2007/46/EC

- 8 Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive) (OJ 2007 L 263, p. 1), repealed and replaced Directive 70/156.
- 9 Directive 2007/46, as amended by Commission Regulation (EU) No 678/2011 of 14 July 2011 replacing Annex II and amending Annexes IV, IX and XI to Directive 2007/46 (OJ 2011 L 185, p. 30), includes Annex II, entitled 'General definitions, criteria for vehicle categorisation, vehicle types and types of bodywork', Part A(1) of which states that category M₂ vehicles correspond to '[motor] vehicles [designed and constructed primarily for the carriage of persons and their luggage] comprising more than eight seating positions in addition to the driver's seating position and having a maximum mass not exceeding 5 tonnes[; vehicles] belonging to category M₂ may have space for standing passengers in addition to the seating positions'. Category M₃ vehicles are '[motor] vehicles [designed and constructed primarily for the carriage of persons and their luggage] comprising more than eight seating positions in addition to the driver's seating position and having a maximum mass exceeding 5 tonnes[; vehicles] belonging to category M₃ may have space for standing passengers'.

Regulation (EC) No 1370/2007

- 10 Article 2(a) of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ 2007 L 315, p. 1) is worded as follows:

'For the purpose of this Regulation:

- (a) "public passenger transport" means passenger transport services of general economic interest provided to the public on a non-discriminatory and continuous basis'.

Hungarian law

The 2003 law on excise duties

- 11 Paragraph 7(51) of the a jövedéki adóról és a jövedéki termékek forgalmazásának különös szabályairól szóló 2003. évi CXXVII. törvény (Law No CXXVII of 2003 on excise duties and special regulations on the distribution of excise goods), as amended by the az adó- és járuléktörvények, a számviteli törvény és a könyvvizsgálói kamarai törvény, valamint az európai közösségi jogharmonizációs kötelezettségek teljesítését célzó adó- és vámjogi tárgyú törvények

módosításáról szóló 2010. évi CXXIII. törvény (Law No CXXIII of 2010 amending the laws on taxes and contributions, the Law on accounting, the Law on the Chamber of auditors and the laws on taxation and customs in order to comply with harmonisation obligations imposed by the European Community), provides, for the purposes of applying that law:

‘commercial gas oil: gas oil as referred to in Paragraph 52(1)(d) that is used for the following purposes:

- (a) the carriage of goods for hire or reward, or on own account, by motor vehicles or articulated vehicle combinations (with a tractor unit) intended exclusively for the carriage of goods by road and with a maximum permissible gross laden weight of not less than 7.5 tonnes; or
- (b) the carriage of passengers, whether by regular or occasional service, by a motor vehicle of category M2 or category M3, as defined in the a közúti járművek műszaki megvizsgálásáról szóló miniszteri rendelet (Ministerial Order on the technical inspection of road vehicles).’

The 2016 law on excise duties

- 12 Paragraph 3(2)(21) of the a jövedéki adóról szóló 2016. évi LXVIII. törvény (Law No LXVIII of 2016 on excise duties; ‘the 2016 law on excise duties’) provides, as regards the taxation of energy products for the purposes of applying that law:

‘commercial gas oil: gas oil that is used for the following purposes:

- (a) the carriage of goods for hire or reward, or on own account, by motor vehicles or articulated vehicle combinations (with a tractor unit) intended exclusively for the carriage of goods by road and with a maximum permissible gross laden weight of not less than 7.5 tonnes; or
- (b) the carriage of passengers, whether by regular or occasional service, by a motor vehicle of category M2 or category M3, as defined in the Ministerial Order on the technical inspection of road vehicles.’

- 13 Under Paragraph 113(3) and (5) of that law:

‘3. Persons who operate coaches and buses of category M2 or category M3, as defined in the Ministerial Order on the technical inspection of road vehicles, in urban or interurban traffic are to be entitled to reimbursement of the duty on the natural gas used for that activity.

...

5. The owner or, in the case of a hired vehicle, the lessee of the vehicle referred to in Paragraph 3(2)(21) shall be entitled to reimbursement on commercial gas oil:

- (a) purchased by means of a fuel card at a service station, or
- (b) purchased in a Hungarian establishment using an electronic measuring device from a fuel tank specifically designed for the storage of fuel and equipped with an automatic fuel-filling device

of 3.5 [forint (HUF)] per litre if the tax rate referred to in Paragraph 110(1)(c)(ca) applies and of [HUF 13.5] per litre where the tax rate referred to in Paragraph 110(1)(c)(cb) applies.’

- 14 In accordance with Paragraph 149(1) of the 2016 law on excise duties, that law entered into force on 1 November 2016. However, under subparagraph 3 of that paragraph, Paragraphs 3 and 113 of that law entered into force on 1 July 2017.

The Law on passenger transport services

- 15 The a személyszállítási szolgáltatásokról szóló 2012. évi XLI. törvény (Law No XLI of 2012 on passenger transport services) defines public passenger transport services, in Paragraph 2(29), as passenger transport services within the meaning of Article 2(a) of Regulation No 1370/2007, provided under a public service contract.
- 16 In accordance with Paragraph 2(30) of that law, passenger transport service means the carriage of passengers by means of one of the vehicles determined in that law, under contract and for consideration, together with the corresponding ancillary services.

The dispute in the main proceedings and the question referred for a preliminary ruling

- 17 Tüke Busz is an undertaking established in Hungary that carries on the activity of passenger transport by bus on the basis of a public service contract.
- 18 In 2017, that company sought reimbursement of excise duty on gas oil that it had used in connection with that activity.
- 19 Having found that Tüke Busz had asserted its right to reimbursement of excise duty on not only the gas oil consumed in carrying on that transport activity itself, but also that consumed during journeys relating to the maintenance and refuelling of the vehicles concerned, the Appeals Directorate adopted a decision declaring that the reimbursement of excise duty relating to the gas oil used for those journeys was unlawful and consequently increased those duties on energy products owed by Tüke Busz in respect of January to December 2017.
- 20 Before the Pécsi Törvényszék (Pécs High Court, Hungary), which is the referring court, the Appeals Directorate claims that only services connected with a principal obligation may be classified as ancillary services. As regards passenger transport, that would be the case for the supply of services for consideration by the carrier to passengers, such as, inter alia, the transport of luggage, bicycles or animals.
- 21 By contrast, since travellers are not the recipients of the repair or maintenance services provided for the vehicles concerned, those services cannot fall within the concept of ‘ancillary services’.
- 22 The Appeals Directorate infers from this that the excise duty on gas oil consumed during journeys for the repair or maintenance of vehicles intended for passenger transport cannot be reimbursed, since they are not ancillary services connected with the passenger transport service.

- 23 Tüke Busz submits, inter alia, that, as regards buses powered by natural gas, Paragraph 113(3) of the 2016 law on excise duties allows the reimbursement of such duties relating to gas used for their ‘activity’, and not only for passenger transport in the strict sense, with the result that it would be unjustified for a different rule to govern the reimbursement of excise duty on gas oil.
- 24 In those circumstances, the Pécsi Törvényszék (Pécs High Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Are the decision adopted in this case by [the Appeals Directorate] and the practice followed by that authority, whereby “regular passenger transport does not include the mileage necessary for the maintenance of regular passenger transport vehicles or for refuelling”, compatible with the provisions of [Directive 2003/96]?’

Consideration of the question referred

Admissibility

- 25 Without expressly raising an objection of inadmissibility with regard to the request for a preliminary ruling, the Commission submits that certain elements of the factual and legal context of the main proceedings, as described by the referring court, lack precision. In particular, the order for reference fails to indicate the legal basis on which Tüke Busz relies in order to claim the right to reimbursement of excise duty on gas oil consumed by the bus that it operates, as well as the excise duty reimbursement rate claimed by that company.
- 26 It must also be stated that the referring court does not set out the reasons that led it to question the interpretation of Directive 2003/96 or the link it establishes between that directive and the provisions of Law No XLI of 2012 on passenger transport services.
- 27 In that regard, it is appropriate to note that, in accordance with settled case-law of the Court, the procedure provided for by Article 267 TFEU is an instrument of cooperation between the Court of Justice and national courts and tribunals, by means of which the former provides the latter with an interpretation of such EU law as is necessary for them to give judgment in cases upon which they are called to adjudicate (judgment of 1 October 2020, *Elme Messer Metalurgs*, C-743/18, EU:C:2020:767, paragraph 40 and the case-law cited).
- 28 According to equally settled case-law, and also in line with Article 94 of the Rules of Procedure of the Court of Justice, the need to provide an interpretation of EU law which will be of use to the national court makes it necessary for that court to define the factual and legal context of the questions it is asking or, at the very least, to explain the factual circumstances on which those questions are based. The order for reference must also set out the precise reasons why the national court is unsure as to the interpretation of EU law and considers it necessary to refer a question to the Court for a preliminary ruling (judgment of 1 October 2020, *Elme Messer Metalurgs*, C-743/18, EU:C:2020:767, paragraph 41 and the case-law cited).
- 29 However, in view of the spirit of judicial cooperation which governs relations between national courts and the Court of Justice in the context of preliminary-ruling proceedings, the fact that the referring court did not make certain initial findings does not necessarily mean that the request for a preliminary ruling is inadmissible if, in spite of those deficiencies, the Court, in the light of the

information contained in the case file, considers that it is in a position to provide a useful answer to the referring court (judgment of 1 October 2020, *Elme Messer Metalurgs*, C-743/18, EU:C:2020:767, paragraph 42 and the case-law cited).

- 30 In the present case, while it would certainly have been useful for the referring court to explain further the factual and legal frameworks in which the question referred arises and the reasons that led it to question the interpretation of Directive 2003/96, the fact remains that, in the light of the nature and scope of the provision of EU law the interpretation of which is sought, that lack of precision does not preclude a sufficient understanding of the context in which that question arises.
- 31 According to the information provided by the referring court, Tüke Busz claims before that court, in essence, that Paragraph 113(3) of the 2016 law on excise duties must be interpreted as providing for the reimbursement of those duties relating to gas oil used for journeys connected to the repair, maintenance or refuelling of vehicles used for that type of transport. Thus, the outcome of the dispute in the main proceedings depends, inter alia, on whether Article 7(2) of Directive 2003/96 precludes Member State law or a practice of its tax authorities providing for such reimbursement. That would be the case if the gas oil thus used could not fall within the concept of ‘commercial gas oil used as propellant’ within the meaning of Article 7(3) of that directive. In that regard, notwithstanding the abovementioned inaccuracies, the information provided by the referring court, relating to the factual and legislative context, makes it possible to assess the scope of that question and to provide that court with an answer that will be of use to it in resolving the dispute in the main proceedings.
- 32 Consequently, the request for a preliminary ruling is admissible.

Substance

- 33 By its question, the referring court asks, in essence, whether Article 7(3)(b) of Directive 2003/96 must be interpreted as meaning that gas oil consumed during journeys made for the repair, maintenance or refuelling of vehicles used for passenger transport falls within the concept of ‘commercial gas oil used as propellant’, within the meaning of that provision.
- 34 As a preliminary point, it should be borne in mind that, in determining the scope of a provision of EU law, account should be taken not only of the wording of that provision, but also of the context in which it is used and of the aims of the legislation of which it is part. The legislative history of a provision of EU law may also reveal elements that are relevant to its interpretation.
- 35 In the first place, as regards the wording of Article 7(3)(b) of Directive 2003/96, it must be observed that it is apparent from the words ‘used as propellant for ... the carriage of passengers, whether by regular or occasional service, by a motor vehicle of category M2 or category M3’, read in conjunction with point 1 of Part A of Annex II to Directive 2007/46, as amended by Regulation No 678/2011, which replaced Directive 70/156, that, in order to fall within that provision, gas oil must not only be used by a vehicle that has been designed and constructed for the carriage of persons, but must also be used for the purpose of passenger transport.
- 36 For the purposes of that provision, the concept of ‘commercial gas oil used as propellant’ therefore responds to a twofold criterion based on both the category of the motor vehicle concerned and the purposes for which the gas oil is used (see, to that effect, judgment of 30 January 2020, *Autoservizi Giordano*, C-513/18, EU:C:2020:59, paragraph 20).

- 37 It follows that gas oil consumed by a category M2 or M3 motor vehicle during journeys made directly for the provision of a passenger transport service falls within that concept (see, by analogy, judgment of 13 July 2017, *Vakaryų Baltijos laivų statykla*, C-151/16, EU:C:2017:537, paragraph 29). That is the case, in particular, with regard to the journey made between the bus depot and the first passenger-boarding platform and the return journey to the depot after the passengers have disembarked.
- 38 By contrast, journeys made exclusively for the repair, maintenance or refuelling of the vehicles concerned, in so far as they are, in principle, made ‘unladen’ and are not intended to board passengers, cannot be classified as ‘passenger transport’ since they are not used directly for the provision of a passenger transport service (see, by analogy, judgment of 13 July 2017, *Vakaryų Baltijos laivų statykla*, C-151/16, EU:C:2017:537, paragraphs 30, 35 and 36).
- 39 That interpretation is, in the second place, supported by the context of Article 7(3)(b) of Directive 2003/96.
- 40 In that regard, it should be noted that Article 7(1) provides that motor fuels are subject to minimum levels of taxation. As is apparent from recital 3 and Article 4, that directive is not intended to harmonise exhaustively the rates of excise duty on energy products and electricity, but merely sets minimum levels of taxation.
- 41 Article 7(2) of Directive 2003/96 thus provides that the option granted to Member States to provide for different levels of taxation according to whether gas oil used as propellant is used for commercial or non-commercial purposes is subject to the minimum levels of taxation laid down in that directive. Furthermore, that provision prevents Member States from setting the rate of taxation of commercial gas oil at a level below the national rate that was in force on 1 January 2003. Those factors indicate that the entry into force of that directive should not lead to a reduction in the level of taxation of commercial gas oil.
- 42 In those circumstances, the concept of ‘commercial gas oil used as propellant’ cannot be given a broad interpretation.
- 43 That finding is supported by Article 7(4) of Directive 2003/96, which, by way of derogation from the provisions of Article 7(2), allows Member States, in certain circumstances, to apply a reduced rate that may be lower than the national level of taxation in force on 1 January 2003 to gas oil used by motor vehicles or articulated vehicle combinations intended exclusively for the carriage of goods by road. A broad interpretation of the concept of ‘commercial gas oil used as propellant’ would have the effect of extending the scope of that derogation accordingly, which would run counter to the principle that a derogating provision, such as Article 7(4) of Directive 2003/96, must be interpreted strictly.
- 44 In the third place, the literal interpretation of Article 7(3)(b) of Directive 2003/96, set out in paragraphs 37 and 38 above, is confirmed by the objectives pursued by that directive. In particular, it is apparent from recitals 6, 12 and 20 thereof that that directive seeks, inter alia, to implement environmental protection requirements, in particular by encouraging the reduction of the gap between the taxation of non-commercial gas oil used as propellant and petrol. In the light of recitals 3 to 5 and 19 of that directive, it also seeks to permit the approximation of national levels of taxation on gas oil in order, inter alia, to avoid distortions of competition and,

thus, to promote the proper functioning of the internal market (see, to that effect, judgment of 30 January 2020, *Autoservizi Giordano*, C-513/18, EU:C:2020:59, paragraphs 30 and 32 and the case-law cited).

- 45 A restrictive interpretation of the concept of ‘commercial gas oil used as propellant’ makes it possible to contribute to both the attainment of that environmental policy objective, since it limits the possibilities of benefiting from a reduced rate and thus encourages a reduction in total fuel consumption, and the attainment of the objective of promoting the proper functioning of the internal market, by ensuring a greater approximation of the levels of taxation of gas oil.
- 46 Lastly, in the fourth place, the literal, contextual and teleological interpretation of Article 7(3)(b) of Directive 2003/96 is supported by the *travaux préparatoires* relating to that directive, from which it is clear that the EU legislature intended to create a strictly circumscribed framework in which differentiated rates of taxation may be provided for the same product.
- 47 While Article 5(1) of the Proposal for a Council Directive restructuring the Community framework for the taxation of energy products (OJ 1997 C 139, p. 14), according to which ‘Member States may apply differentiated rates of taxation according to the use or quality of a product provided that they respect the minimum levels of taxation set out in this Directive and that they are compatible with Community law’, gave the Member States a relatively wide discretion in determining the rates of taxation of energy products, that discretion was considerably reduced during the legislative process. Article 5 of Directive 2003/96 authorises Member States to provide, with due regard for the minimum levels of taxation prescribed by that directive and in compliance with EU law, for differentiated rates of taxation only in the cases exhaustively listed in that article.
- 48 In the light of all the foregoing considerations, the answer to the question referred is that Article 7(3)(b) of Directive 2003/96 must be interpreted as meaning that gas oil consumed during journeys made for the repair, maintenance or refuelling of vehicles used for passenger transport does not fall within the concept of ‘commercial gas oil used as propellant’, within the meaning of that provision.

Costs

- 49 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Tenth Chamber) hereby rules:

Article 7(3)(b) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity must be interpreted as meaning that gas oil consumed during journeys made for the repair, maintenance or refuelling of vehicles used for passenger transport does not fall within the concept of ‘commercial gas oil used as propellant’, within the meaning of that provision.

[Signatures]