Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 12 December 2013 [1]

Joined Cases C-43/13 and C-44/13

Hauptzollamt Köln
v
Kronos Titan GmbH
and
Hauptzollamt Krefeld
v
Rhein-Ruhr Beschichtungs-Service GmbH

(Requests for a preliminary ruling from the Bundesfinanzhof (Germany))

(Directive 2003/96/EC — Article 2, paragraph 3 — Taxation of energy products other than those for which the level of taxation is specified in the directive — Notion of equivalent heating fuel or motor fuel — Assessment of equivalence — Substitutability)

I – Introduction

1. Council Directive 2003/96/EC [2] of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (Directive 2003/96 or 'the Directive') seeks to introduce a uniform structure for excise duties on energy products and to establish minimum rates of taxation for the energy products listed in the annexes to that directive. The products in question are identified by their code in the Combined Nomenclature ('the CN'). [3]

2. However, Directive 2003/96 also covers other energy products: the first subparagraph of Article 2(3) of the directive provides that, '[w]hen intended for use, offered for sale or used *as motor fuel or heating fuel*, energy products *other* than those for which a level of taxation is specified in this Directive shall be taxed *according to use*, at the rate *for the equivalent heating fuel or motor fuel*'. [4]

3. The Bundesfinanzhof (Germany) has made two references for a preliminary ruling seeking the Court's interpretation of that provision so as to enable it to determine which of the taxation levels laid down in the German legislation for 'other cases' is to be applied to such products. The products in question are toluene (in Case C-43/13) and white spirit and the light fuel oil Exxsol D 60 (in Case C-44/13).

1 — Original language: French.

2 — OJ 2003 L 283, p. 51.

3 — See Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1), as amended by Commission Regulation (EC) No 1549/2006 of 17 October 2006 (OJ 2006 L 301, p. 1).

4 — Emphasis added.

4. The referring court seeks interpretation of the abovementioned provision so that it may determine which rate of taxation applies to these energy products, in particular, in light of the fact that they are used in these cases by the plaintiff undertakings as heating fuels.

II – The legal framework, the disputes in the main proceedings, the question referred for a preliminary ruling and the procedure before the Court

A – *EU law*

5. Article 2 of Directive 2003/29 provides:

‘1. For the purposes of this Directive, the term “energy products” shall apply to products:

…

(b) falling within CN codes ... 2704 to 2715;

(c) falling within CN codes 2901 and 2902;

…

3. When intended for use, offered for sale or used as motor fuel or heating fuel, energy products other than those for which a level of taxation is specified in this Directive shall be taxed according to use, at the rate for the equivalent heating fuel or motor fuel.

…’

6. It is apparent from Article 7 of Directive 2003/96 that the minimum levels of taxation applicable to motor fuels are to be fixed as set out in Table A of Annex I to the directive. Under Article 8 of the directive, the minimum levels of taxation applicable to products used as motor fuels are to be fixed as set out in Table B of Annex I to the directive. Lastly, pursuant to Article 9 of the directive, the minimum levels of taxation applicable to heating fuels are to be fixed as set out in Table C of Annex I.

B – *German law*

7. The Energiesteuergesetz (Law on the Taxation of Energy) of 15 July 2006[5] (‘the EnergieStG’) transposes Directive 2003/96. Article 2 of the EnergieStG, in the version in force in 2007 and 2008, provides:

‘(1) The tax to be charged

1. for 1 000 litres of petrol coming within subheading 2710 11 41 to 2710 11 49 of the [CN]

…

(b) with a maximum sulphur content of 10 mg/kg, shall be [EUR] 654.50,

…

5 — BGBl. 2006 I, p. 1534.

(3) By way of derogation from subparagraphs 1 and 2, the tax to be charged ... [there follows a detailed list divided into five headings — with subheadings in some cases — and the significantly lower tax rates allocated to them, which includes, inter alia, gas oils within subheadings 2710 19 41 to 2710 19 49 of the CN as well as heating oils within subheadings 2710 19 61 to 2710 19 69 of the CN],

where they are used as heating fuels or are delivered for that purpose. …

(4) Products other than those described in paragraphs 1 to 3 shall be subject to the same tax as the energy products to which they are closest in terms of their properties and purpose …'

C – *The disputes in the main proceedings and the question referred for a preliminary ruling*

8. The dispute in Case C-43/13 centres on the manufacture by Kronos Titan GmbH ('Kronos Titan') of titanium dioxide powder (known as 'white pigment'), for which purpose the company has chosen, for economic reasons connected with the chemical procedure applied, to burn toluene which is sprayed into an oxygen stream, that is to say, to use toluene as a heating fuel. [6]

9. Case C-44/13 concerns the manufacture by Rhein-Ruhr Beschichtungs-Service GmbH ('Rhein-Ruhr Beschichtungs-Service') of finish coatings, the heat treatment process for which involves the use of white spirit and the light fuel oil Exxsol D 60, which are burned during the manufacturing process. The white spirit and light fuel oil Exxsol D 60 are thus used as heating fuels.

10. Kronos Titan and Rhein-Ruhr Beschichtungs-Service paid energy taxes amounting to EUR 1.1 million and EUR 134 747.70 respectively. They made their declarations in accordance with the instructions given respectively by the Hauptzollamt Köln (Principal Customs Office, Cologne) and the Hauptzollamt Krefeld (Principal Customs Office, Krefeld) (together 'the Hauptzollämter').

11. In determining the applicable tax rate, the Hauptzollämter relied on Article 2 of the EnergieStG. Given that toluene, white spirit and the light fuel oil Exxsol D 60 are none of them directly referred to in the EnergieStG, the Hauptzollämter took the view that the rate specified for petrol with a sulphur content of 10 mg/kg or less should be applied, in accordance with Article 2(4) of the EnergieStG, on the ground that this was the product to which they were closest in terms of their nature and purpose, despite the fact that petrol is a motor fuel.

12. Kronos Titan and Rhein-Ruhr Beschichtungs-Service then lodged appeals against their respective declarations seeking the application of one of the significantly lower tax rates which, pursuant to Article 2(3) of Directive 2003/96, apply to energy products that are used as heating fuels.

13. Interpreting Article 2 of the EnergieStG in a manner consistent with the first subparagraph of Article 2(3) of Directive 2003/96, the Finanzgericht Düsseldorf upheld those appeals on the ground that the products in question were being used as heating fuels. The Finanzgericht Düsseldorf held that the rates of taxation could not be taken from Article 2(1) of the EnergieStG, only from Article 2(3) thereof, for it was only in that provision that the rates of taxation for heating fuels were specified.

14. The Hauptzollämter appealed on a point of law ('Revision') against the judgments handed down by the Finanzgericht Düsseldorf.

6 — Kronos Titan states in its written observations that it uses pure toluene as referred to in subheading 2902 30 00 of the CN rather than toluene as referred to in subheading 2707 20 of the CN, which is a blended product. Its competitors use the fuel as a heating fuel for the same technical reason, namely, to trigger the desired chemical reaction, for which a temperature of 1 650 degrees Celsius is necessary.

15. Taking the view that the resolution of the disputes before it required an interpretation of the first subparagraph of Article 2(3) of Directive 2003/96, the Bundesfinanzhof decided to stay the proceedings in both cases and to refer the following question to the Court for a preliminary ruling:

'Does Article 2(3) of [Directive 2003/96] require, in relation to the taxation of energy products other than those for which a level of taxation is specified in [that] directive, the application of a rate of tax that national law specifies for the use of an energy product as heating fuel where that other energy product is also used as heating fuel? Or, in cases in which the other energy product — in circumstances where it is used as heating fuel — is equivalent to a particular energy product, can the rate of tax specified by national law for this energy product be applied, even in the case where the rate of tax is the same irrespective of whether it is being used as motor fuel or as heating fuel?'

D – *The procedure before the Court*

16. The orders for reference, dated 14 November 2012, were received by the Court on 28 January 2013. Cases C-43/13 and C-44/13 were joined by order of the President of the Court on 7 February 2013. Written observations have been lodged by the Hauptzollämter, Kronos Titan, Rhein-Ruhr Beschichtungs-Service and the European Commission. The Portuguese Government has lodged observations in Case C-43/13 only. No hearing has been held.

III – Legal analysis

A – *Preliminary observations*

17. It should be recalled that Article 93 EC (now Article 113 TFEU) confers jurisdiction on the European Union to adopt provisions for, inter alia, the harmonisation of legislation concerning excise duties to the extent to which such harmonisation is necessary to ensure the establishment and the functioning of the internal market. Since 1992, EU legislation in the field of excise duties has addressed, in particular, tobacco, alcohol and mineral oils. In respect of each product, EU instruments have harmonised the structure of excise duties and brought the rates of duty closer together. Directive 2003/96 restructured the European framework for the taxation of energy products by setting the minimum rates of taxation for petrol, coal, natural gas and electricity where those products are used as motor fuel or heating fuel.

18. In the cases in the main proceedings, the referring court is essentially seeking interpretation of the notion of 'equivalent heating fuel or motor fuel' appearing in the first subparagraph of Article 2(3) of Directive 2003/96. In other words, the Court is called upon to establish the criteria by which two products may be regarded as equivalent within the meaning of that provision. I would observe that it is settled case-law that, in interpreting a provision of EU law, its wording, context and objectives must all be taken into account.[7]

19. None of the parties which have submitted written observations disputes the fact that toluene, white spirit and the light fuel oil Exxsol D 60 may, in principle, be used either as motor fuel or as heating fuel. They also acknowledge that those products were used, in the cases in issue in the main proceedings, as heating fuels. The products are not expressly referred to either in Directive 2003/96 or in the first sentence of Article 2(3) of the EnergieStG. Nevertheless, the scope of Directive 2003/96 extends to all energy products, subject to certain exemptions for particular uses. The parties in the main proceedings disagree on the interpretation to be given to the condition that a product is to be taxed, according to its use, at the rate which applies to the 'equivalent' motor fuel or heating fuel.

7 — See, in particular, Case C-85/11 *Commission* v *Ireland* [2013] ECR, paragraph 35 and the case-law cited.

20. The Hauptzollämter consider that the approach adopted in Directive 2003/96 is based on the nature of the energy products in question and that the level of taxation to be applied must be determined, first and foremost, by reference to their classification under one or other NC code. Only after that may it become necessary to ascertain whether there is a different minimum level of taxation — the specification of which is not binding — for use as heating fuel. Accordingly, the criterion of equivalence in nature should, they suggest, be applied. The Portuguese Government also takes the view that energy products for which no level of taxation is specified in the directive must be treated in the same way as a particular energy product following the principle of equivalence in nature.

21. Kronos Titan et Rhein-Ruhr Beschichtungs-Service, on the other hand, submit that the question of which energy products listed in Tables A to C of Annex I to Directive 2003/96 are 'equivalent' to 'other' energy products, within the meaning of Article 2(3) of the directive, must be addressed in light of the rule that taxation should be based on usage. The rate of taxation to be applied is therefore the rate set by the legislation for use as heating fuel of an equivalent heating fuel or for use as motor fuel of an equivalent motor fuel. In other words, they favour the criterion of use.

22. The Commission takes very much the same view as Kronos Titan and Rhein-Ruhr Beschichtungs-Service, in so far as it considers that the notion of equivalent heating fuel or equivalent motor fuel does not rest upon a comparison of purely chemical or physical criteria (in other words, upon equivalence in nature), and that, on the contrary, it is necessary to establish whether a particular energy product not listed in Annex I to Directive 2003/96 is used for the same specific purposes as a product that is listed in the annex and whether it competes with that product. The Commission therefore favours the criterion of use, albeit with the additional nuance of the substitutability of the 'other' energy product for the energy product directly referred to in Directive 2003/96.

B – *Interpreting the notion of equivalent heating fuel or motor fuel*

1. The literal interpretation

23. In its orders for reference, the national court acknowledges that the expression 'according to use' may mean much the same thing as 'equivalent', the latter term implying, at most, that account must be taken of the fact that the potential of an energy product may, according to the circumstances, vary depending on whether it is used as heating fuel or motor fuel.

24. The Hauptzollämter submit that the key element in the first subparagraph of Article 2(3) of Directive 2003/96 is the factor of equivalence to an energy product for which a level of taxation is specified in the directive. They submit that the words 'according to use' are ancillary to the main statement 'shall be taxed ... at the rate for the equivalent heating fuel or motor fuel'.

25. Kronos Titan, Rhein-Ruhr Beschichtungs-Service and the Commission, on the other hand, argue that it is clear from several of the linguistic versions that 'according to use' is the decisive factor.

26. I concur with the latter view for a number of reasons.

27. First of all, several of the linguistic versions cite 'use' as the primary criterion for determining which level of taxation is applicable and only mention the criterion of the 'equivalent' product subsequently.[8] The classification of a product as an 'equivalent' is therefore not independent of the question whether the product is used as motor fuel or heating fuel.

8 — See the Spanish, German, English, French and Italian versions of the first subparagraph of Article 2(3) of Directive 2003/96.

28. Next, the criterion of 'use' is emphasised in several language versions by the use of commas. This suggests that it must be examined first and that only subsequently should it be determined which product of reference is 'equivalent'. [9]

29. For those reasons it seems clear to me that a literal interpretation of the provision militates in favour of treating the criterion of use as the primary criterion. That conclusion is confirmed by the general structure of Directive 2003/96.

2. A contextual interpretation

30. The referring court considers that Directive 2003/96 allows the Member States a broad discretion in setting the rates of taxation and that, consequently, it is sufficient, in order to comply with the directive, to ensure that 'other' energy products are in all cases taxed at a higher rate than those specified in the directive, without its being necessary to make a formal reference to any particular group of products.

31. Kronos Titan and Rhein-Ruhr Beschichtungs-Service submit that the fundamental distinction between the two methods of use (either as motor fuel or as heating fuel) is drawn several times in Directive 2003/96.

32. The Hauptzollämter do not dispute that assertion. In their view, whilst the legislature indeed set different levels of taxation according to whether the energy product in question is used as a motor fuel or a heating fuel, Directive 2003/ 96 does not in fact contain any compulsory requirement to implement a dual taxation system entailing the variation of rates according to whether a product is used as motor fuel or heating fuel.

33. It seems to me indisputable that the legislature intended to draw a clear distinction between motor fuels and heating fuels. That is obvious from recitals 17 and 18 of the preamble to the directive, which state that '[i]t is necessary to establish different Community minimum levels of taxation according to the use of the energy products and electricity' [10] and that '[e]nergy products used as a motor fuel for certain industrial and commercial purposes and those used as heating fuel are normally taxed at lower levels than those applicable to energy products used as a propellant'. Equally, that distinction underlies Articles 7 to 9 of Directive 2003/96, each of which addresses a specific group of products. [11]

34. It appears to me that the criterion of use is employed by the European legislature itself, inasmuch as the second subparagraph of Article 2(3) of Directive 2003/96 provides that 'any product intended for use, offered for sale or used as motor fuel ... shall be taxed at the rate for the equivalent motor fuel'. In other words, a product that is used as motor fuel must always be taxed at a rate applicable to a motor fuel and national legislatures may not apply to such a product a rate of taxation specified for a heating fuel.

35. A teleological interpretation of Directive 2003/96 confirms these literal and contextual interpretations of the directive, according to which the legislature intentionally employed the criterion of use.

9 — Ibidem.

10 — The wording of Directive 2003/96 shows that recital 17 does not contrast the use of energy products with the use of energy, but allows a distinction to be drawn according to the type of use from among the uses referred to in the directive.

11 — Articles 7 and 8 concern 'the minimum levels of taxation applicable to motor fuels' and 'the minimum levels of taxation applicable to products used as motor fuel' respectively, while Article 9 concerns 'the minimum levels of taxation applicable to heating fuels'.

3. A teleological interpretation

36. The Hauptzollämter maintain that Directive 2003/96 was meant to lay down minimum levels of taxation, as is clear from Articles 7 to 9 of the directive, but does entail point for point harmonisation in the sense of imposing uniform levels of taxation. They argue that '[t]he proper functioning of the internal market', which is the objective referred to in recital 3 of the preamble to Directive 2003/96, does not preclude national legislatures from applying to energy products used as heating fuels a level of taxation that is normally applied to products principally used as motor fuels, provided that the specified minimum levels are exceeded.

37. Rhein-Ruhr Beschichtungs-Service observes that the legal basis of Directive 2003/96 is none other than Article 93 EC (now Article 113 TFEU), which provides for the harmonisation of legislation concerning excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition. It concludes from that that such harmonisation is possible only if clear, compulsory criteria are laid down for all Member States. Only a clear, systematic distinction between heating fuels and motor fuels can possibly attain that objective . Kronos Titan emphasises that taxing 'other' energy products used as heating fuel at a rate which national legislation specifies for use as motor fuel would, on the contrary, lead to distortion of competition.

38. I would point out that recital 9 of the preamble to Directive 2003/96 states that 'Member States should be given the flexibility necessary to define and implement policies appropriate to their national circumstances' and that the Hauptzollämter are right to say that Directive 2003/96 does not provide for full harmonisation. That is confirmed by the title of the directive itself, which merely refers to a restructuring of the Community framework of taxation. In other words, the Member States remain free to set such taxation levels as they deem necessary, provided that they observe the minimum levels laid down in Directive 2003/96 and the exemptions and distinctions stipulated by the legislature. [12]

39. That, in my view, implies that national legislation must follow the distinction drawn between motor fuels and heating fuels. However, it is not necessary for the rate of taxation applied to any given product to be dependent upon its use and so the two different uses of the same energy product may be taxed at the same rate if the Member State regards it as expedient and the rate in question complies with the minima laid down by Directive 2003/96.

40. Nevertheless, the fact remains that the objective of the harmonisation which Directive 2003/96 seeks to achieve is to ensure 'the proper functioning of the internal market', in that appreciable differences in the national levels of energy taxation applied by Member States could prove detrimental to its proper functioning. [13] Requiring the Member States to apply to all products used as heating fuel a rate of taxation specified for another heating fuel is a way of limiting such differences, without encroaching upon the Member State's discretion.

41. The Commission also points out, quite rightly, that avoiding distortions of competition is an objective that cannot be attained solely by virtue of the existence of minimum rates such as those laid down in Annex I to Directive 2003/96 and that it is also necessary for all Member States to follow the same system for setting national taxation levels, that is to say, the system laid down in Article 2(3) of Directive 2003/96. Within that system, the only distinction that may be drawn is by reference to the product groups referred to in Annex I to the directive, the two principal groups of products being heating fuels and motor fuels. Therefore, it is indeed the criterion of use which determines which of the two principal groups 'other' energy products will fall into.

12 — See, to that effect, Case C-391/05 *Jan De Nul* [2007] ECR I-1793, paragraphs 18 to 23.

13 — See recital 4 of the preamble to Directive 2003/96.

42. The need to ensure that all Member States apply the system of taxing energy products in the same way is also clear, to an extent, from the case-law of the Court of Justice relating to the legislative acts which preceded Directive 2003/96.

43. Indeed, it should be recalled that the Court of Justice has held that the objective of the three directives, that is to say, Directives 92/81/EEC,[14] 92/82/EEC[15] and 94/74/EC,[16] 'is to … avoid distortions of competition which could stem from different structures of excise duties'.[17] The Court has emphasised that, although the harmonisation was no more than partial, the legislature had established, at Community level and in a uniform manner, the uses of mineral oils which gave rise to the levy of excise duty, thus avoiding the situation in which the cases in which mineral oils are subject to excise duty vary from one Member State to another according to their use.[18]

44. After emphasising in his Opinion in that case that, according to settled case-law, the fact that the harmonisation achieved is of limited character cannot deprive the provisions of a directive of their effectiveness, Advocate General Geelhoed concluded that '[t]he purpose of the directives, which is to prevent distortions of competition, … suggests that the basis of taxation should be as uniform as possible'.[19]

45. By analogy, the Member States are, in my view, bound by an obligation to adhere to the taxation system as defined by the European legislature, which clearly distinguishes between heating fuels and motor fuels.

46. Like Kronos Titan, Rhein-Ruhr Beschichtungs-Service and the Commission, I am therefore of the opinion that the notion of equivalent heating fuel or equivalent motor fuel, within the meaning of the first subparagraph of Article 2(3) of Directive 2003/96, must, for the reasons set out above, be assessed according to the criterion of use.[20] It would, however, appear necessary to define that criterion, inasmuch as it might be understood either in functional terms or as a reference to substitutability, although it is the latter interpretation which seems to me to be the more fitting, for the following reasons.

C – *Defining the criterion of 'use'*

47. The system implemented by the European legislature is intended to ensure that the very many products that can be put to a particular use are not subject to different rates of taxation at national level. Given that, it is necessary, in order to avoid distortions of competition between Member States, to limit the potential for differences between the various national levels of taxation that are actually applied to energy products, including products used as heating fuel.

48. In other words, it is necessary to know whether a given energy product not listed in Annex I to Directive 2003/96 is used for the same specific purposes as a product that is mentioned in the annex and whether it therefore competes with that product. Like the Commission, I take the view that the notion of 'product equivalence' must, consequently, be interpreted in terms of the substitutability or

14 — Council Directive 92/81/EEC of 19 October 1992 on the harmonization of the structures of excise duties on mineral oils (OJ 1992 L 316, p. 12).

15 — Council Directive 92/82/EEC of 19 October 1992 on the approximation of the rates of excise duties on mineral oils (OJ 1992 L 316, p. 19).

16 — Council Directive 94/74/EC of 22 December 1994 amending Directive 92/12/EEC on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, Directive 92/81 and Directive 92/82 (OJ 1994 L 365, p. 46).

17 — Case C-240/01 *Commission* v *Germany* [2004] ECR I-4733, paragraph 39.

18 — *Commission* v *Germany*, paragraphs 40 and 44.

19 — See, to that effect, points 52 and 53 of the Opinion of Advocate General Geelhoed in the case giving rise to the judgment in *Commission* v *Germany*.

20 — See, to that effect, Case C-201/08 *Plantanol* [2009] ECR I-8343, paragraph 39.

interchangeability of the energy products in question. Moreover, such an approach will also make it possible to prevent distortions of competition between producers of competing products arising from the use as heating fuel, for industrial or economic reasons, of an energy product 'other' that one appearing in Table C of Annex I to Directive 2003/96.

49. Applying these considerations to the cases in the main proceedings, it becomes necessary to ask whether the products in question were being used as a substitute for one or other of the products appearing in Table C of Annex I to Directive 2003/96. If so, then there will be a direct competitive relationship between the product of reference and the product actually used, the latter being 'equivalent', within the meaning of Directive 2003/96, to the former, in which case it must be taxed at the corresponding level.

50. Nevertheless, like the Commission, I do not think that that was the situation in the cases in the main proceedings because of the very specific nature of the products in issue and their actual industrial application. Directive 2003/96 does not, therefore, make it possible to identify, from among the products whose level of taxation might be taken as a reference, any product that must in the absolute be regarded as an 'equivalent'. In such a situation, Directive 2003/96 does no more than point to a group of products that are potentially equivalent.

51. In such cases Directive 2003/96 allows the Member States a degree of latitude, which implies that it is for them to determine, in compliance with the directive, the objective criteria for identifying which product among the heating fuels listed in Table C of Annex I to the directive must be regarded as the equivalent of the product actually used in any individual case. In this connection the Member States might have regard to recital 14 of the preamble to Directive 2003/96, which states that '[t]he minimum levels of taxation should reflect the competitive position of the different energy products and electricity. It would be advisable in this connection to base the calculation of these minimum levels *as far as possible* on the energy content of the products. However, this method should not be applied to motor fuels' (my italics).

52. The reasoning to be used may therefore be summarised as follows: first of all, it is necessary to establish whether the 'other' energy product is used as heating fuel or as motor fuel. If the product is used as heating fuel, it is then necessary to determine, case by case, whether the energy product is a substitute for one or other of the energy products expressly referred to in Directive 2003/96 or whether its particular characteristics and the use to which it may be put as a result rule out the possibility of substitution. If the possibility of substitution must be excluded, the Member State must then establish, in compliance with the directive, objective criteria for determining which product from among the heating fuels listed in Table C of Annex I to the directive may be regarded as equivalent to the product actually used.

IV – Conclusion

53. In the light of the foregoing considerations, I propose that the Court should answer the question referred by the Bundesfinanzhof (Germany) in Cases C-43/13 and C-44/13: as follows:

When an energy product, within the meaning of Article 2(1) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, that does not appear in Table C of Annex I to the directive, is used as heating fuel, it must be taxed, in accordance with the first subparagraph of Article 2(3) of the directive, at the rate applicable, under national law, to one or other of the products listed in that table where it is used as heating fuel. Of the products listed in that table, that for which the product actually used is substituted for the purposes of its actual use is to be regarded as the equivalent product. If, because of the particular characteristics of the product in question and the use to which it is actually put, the

possibility of substitution must be excluded, the Member State must then establish, in compliance with Directive 2003/96, objective criteria for determining which product from among the heating fuels listed in Table C of Annex I may be regarded as equivalent to the product actually used.