Reports of Cases

OPINION OF ADVOCATE GENERAL
RICHARD DE LA TOUR
delivered on 16 July 2020 [1]

Case C-63/19

European Commission
v

Italian Republic

(Failure of a Member State to fulfil obligations – Article 258 TFEU – Directive 2003/96/EC – Taxation of energy products and electricity – Regional law adopted by the Friuli Venezia Giulia Region (Italy) – Contribution towards the purchase of petrol and diesel for residents of the region concerned – Classification of that contribution – Exemption from or reduction of excise duty – Concept of 'refunding all or part' of the amount of taxation – Infringement of Articles 4 and 19 of Directive 2003/96/EC – Proof of failure)

I. Introduction

1. By its application, the European Commission claims that the Court should declare that, by applying a reduction in the rates of excise duty, as provided for in the regional legislation adopted by the Friuli Venezia Giulia Region (Italy), on petrol and diesel used as motor fuel when those products are sold to residents of that region, the Italian Republic has failed to fulfil its obligations under Articles 4 and 19 of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity. [2]

2. The Commission considers, in essence, that the contribution scheme in respect of purchases of motor fuel introduced by the Friuli Venezia Giulia Region, since it has the effect of reducing the level of taxation of motor fuel in that region, undermines the principle of a minimum single rate of taxation for each product and for each use throughout the territory of the Italian Republic. Since the reduction in excise duty resulting from that scheme has not been authorised at EU level, the Court should find that that Member State has failed to fulfil its obligations under Articles 4 and 19 of Directive 2003/96.

3. In this Opinion, I shall point out that the burden of proving failure to fulfil obligations lies with the Commission and then explain why I consider that the present action should be dismissed.

[1] Original language: French.

[2] OJ 2003 L 283, p. 51.

II. Legal context

A. Directive 2003/96

4. Recitals 2 to 5, 9, 13 and 15 of Directive 2003/96 are worded as follows:

'(2) The absence of [EU] provisions imposing a minimum rate of taxation on electricity and energy products other than mineral oils may adversely affect the proper functioning of the internal market.

(3) The proper functioning of the internal market and the achievement of the objectives of other [EU] policies require minimum levels of taxation to be laid down at [EU] 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 [EU] minimum levels of taxation may enable existing differences in the national levels of taxation to be reduced.

…

(9) Member States should be given the flexibility necessary to define and implement policies appropriate to their national circumstances.

…

(13) Taxation partly determines the price of energy products and electricity.

…

(15) The possibility of applying differentiated national rates of taxation to the same product should be allowed in certain circumstances or permanent conditions, provided that [EU] minimum levels of taxation and internal market and competition rules are respected.'

5. Article 1 of that directive provides that 'Member States [are to] impose taxation on energy products and electricity in accordance with [that] Directive'.

6. Article 4 of Directive 2003/96 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.'

7. Article 6 of Directive 2003/96 reads as follows:

'Member States shall be free to give effect to the exemptions or reductions in the level of taxation prescribed by this Directive either:

(a) directly,

(b) by means of a differentiated rate,

or

(c) by refunding all or part of the amount of taxation.'

8. Under Article 18(1) of Directive 2003/96, by way of derogation from the provisions of that directive, Member States are authorised to continue to apply the reductions in the levels of taxation or exemptions set out in Annex II. Subject to a prior review by the Council of the European Union, on the basis of a proposal from the Commission, that authorisation was to expire on 31 December 2006 or on the date specified in Annex II.

9. Article 19 of that directive provides:

'1. In addition to the provisions set out in the previous Articles, in particular in Articles 5, 15 and 17, the Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce further exemptions or reductions for specific policy considerations.

A Member State wishing to introduce such a measure shall inform the Commission accordingly and shall also provide the Commission with all relevant and necessary information.

The Commission shall examine the request, taking into account, *inter alia*, the proper functioning of the internal market, the need to ensure fair competition and [EU] health, environment, energy and transport policies.

Within three months of receiving all relevant and necessary information, the Commission shall either present a proposal for the authorisation of such a measure by the Council or, alternatively, shall inform the Council of the reasons why it has not proposed the authorisation of such a measure.

2. The authorisations referred to in paragraph 1 shall be granted for a maximum period of 6 years, with the possibility of renewal in accordance with the procedure set out in paragraph 1.

3. If the Commission considers that the exemptions or reductions provided for in paragraph 1 are no longer sustainable, particularly in terms of fair competition or distortion of the operation of the internal market, or in terms of [EU] policy in the areas of health, protection of the environment, energy and transport, it shall submit appropriate proposals to the Council. The Council shall take a unanimous decision on these proposals.'

10. Annex II to Directive 2003/96, entitled 'Reduced rates of taxation and exemptions from such taxation referred to in Article 18(1)', provided for Italy a number of reductions in taxation levels, including 'a reduction in the rate of excise duty on petrol consumed on the territory of Friuli-Venezia Giulia, provided that the rates are in accordance with the obligations laid down in this Directive, and in particular the minimum rates of excise duty'.

B. Italian law

11. Under Article 5(3) of the Statuto speciale della Regione autonoma Friuli Venezia Giulia (Special Statute of the Friuli Venezia Giulia Region), adopted by the Legge costituzionale (Constitutional Law) of 31 January 1963,[3] in the version applicable to the dispute, that region has, inter alia, legislative power to introduce the regional charges provided for in Article 51 of that statute.

12. Under Article 49(7a) of the Special Statute of the Friuli Venezia Giulia Region, 29.75% of the excise revenue on petrol and 30.34% of the excise revenue on diesel consumed in that region for transport purposes and collected on its territory are to revert to that region.

13. Point (a) of the fourth paragraph of Article 51 of that statute provides that, subject to EU rules on State aid, the Friuli Venezia Giulia Region may, in cases where the State provides for such a possibility in respect of the tax revenue concerned, adjust tax rates, either by reducing them, within the limits currently provided for, or by increasing them, without exceeding the maximum level of tax provided for by State legislation, and may provide for exemptions or introduce tax deductions and tax base allowances.

14. Legge regionale n. 14, norme per il sostegno all'acquisto dei carburanti per autotrazione ai privati cittadini residenti in Regione e di promozione per la mobilità individuale ecologica e il suo sviluppo (Regional Law No 14, laying down rules to provide support for purchases of fuel for transport purposes for private citizens residing in the region and to promote and develop individual environmentally friendly travel)[4] of 11 August 2010, as amended ('Regional Law No 14/2010'), provides, in Article 1, entitled 'Objectives':

'1. In order to address the serious economic crisis, the Friuli Venezia Giulia Region lays down in the present law additional exceptional measures to support travel by road and to reduce environmental pollution. In particular:

(a) it provides for measures to support the purchase of fuel for private travel by road;

(b) it provides for measures to encourage the use for travel by road of engines that are, partly or totally, non-dependent on combustible fuel;

(c) it supports research and development of technologies for the construction of engines that are partly or totally non-dependent on combustible fuel;

(d) it promotes extension of the distribution network for fuel with a low environmental impact.'

15. Article 2 of Regional Law No 14/2010, entitled 'Definitions', reads:

'1. For the purposes of this law, the following definitions shall apply:

(a) "beneficiaries":

[3] GURI No 29 of 1 February 1963, p. 554.

[4] *Bolletino ufficiale della Regione* No 19 of 13 August 2010.

(1) natural persons residing in the region, who are owners or joint-owners of means of transport eligible for the contribution towards the purchase of fuel for transport purposes – namely, fuel used for refuelling motor vehicles and motorcycles – or persons entitled to use such means of transport or persons hiring or leasing them;

…

(b) "means of transport": motor vehicles and motorcycles recorded in the region's public registers of motor vehicles, including means of transport that are hired or leased, provided they belong to beneficiaries.

…

(f) "POS": standard equipment with the technical features listed in Annex A, point 2.'

16. Article 3 of that regional law, entitled 'Contribution Scheme in respect of purchases of motor fuel', provides:

'1. The regional administrative authority is authorised to make contributions towards purchases of fuel for transport purposes by persons who are beneficiaries, each time they make an individual fuel purchase, on the basis of the quantity of fuel purchased.

2. Contributions towards purchases of petrol and diesel are set at 12 cents per litre and 8 cents per litre, respectively.

3. The amounts of the contributions towards purchases of petrol and diesel referred to in paragraph 2 shall be increased by 7 cents per litre and 4 cents per litre, respectively, for beneficiaries residing in communes situated in mountainous or semi-mountainous areas designated as less-favoured or partially less-favoured areas by Council Directive 75/273/EEC of 28 April 1975 concerning the Community list of less-favoured farming areas within the meaning of Directive No 75/268/EEC (Italy)[,[5]] and in communes identified by [various Commission decisions concerning regional aid].

4. For economic reasons or due to regional budgetary constraints, and after consulting the relevant committee of the executive, the contributions referred to in paragraph 2 and the increases referred to in paragraph 3 may be adjusted, within a variation limit of 10 and 8 cents per litre, respectively, by decision of the regional executive, for petrol and diesel separately and for a maximum period of three months, which is renewable. The decision shall be published in the Official Journal of the Region.

4a. Without prejudice to the overall balance of the budget, the regional executive may, in order to address an exceptional economic situation, increase the contributions referred to in paragraph 3, up to 10 cents per litre, by means of a decision applicable until 30 September 2012 at the latest.

5. Beneficiaries shall be entitled to receive the contributions referred to in paragraph 2 for any fuel purchases made electronically as provided for by this law at any sales outlets located on the territory of the region.

[5] OJ 1975 L 128, p. 72.

5a. The agreements referred to in Article 8(5) may lay down the procedure whereby refunds are to be made to beneficiaries where a fuel purchase is made outside the territory of the region.

6. A contribution shall not be made in respect of an individual fuel purchase where the total amount of the benefit is less than EUR 1.

7. The contributions referred to in the present article shall be increased by 5 cents per litre if the motor vehicle being refuelled is fitted with at least one zero-emission engine combined or coordinated with a petrol or diesel engine.

8. With effect from 1 January 2015, the contributions referred to in paragraph 2 shall be reduced by 50% for motor vehicles other than those referred to in paragraph 7 that meet emissions standard "Euro 4" or below.

9. The contributions referred to in paragraph 2 shall not be granted for new or second-hand vehicles purchased after 1 January 2015 if they are different from those referred to in paragraph 7 and meet emissions standard "Euro 4" or below.

9a. Any other regional benefit linked to the purchase of fuel cannot be combined with contributions granted under this article.'

17. Article 4 of Regional Law No 14/2010, entitled 'Requirements and procedure for obtaining authorisation', provides, in paragraphs 1 and 3, that authorisation to benefit from the price reduction shall be issued to the relevant persons by the Camera di commercio, industria, artigianato ed agricoltura (Chamber of Commerce, Industry, Crafts and Agriculture, Italy)[6] of the province of residence, and that the identification card may be used only for fuel purchases for the vehicle in respect of which authorisation is granted, solely by the beneficiary or by any other person formally authorised by the latter to use that vehicle, the beneficiary remaining liable for any misuse of the identification card.

18. Article 5 of that regional law, entitled 'Procedure for electronic payment', provides:

'1. In order to obtain the contribution electronically when purchasing fuel for transport purposes, the beneficiary shall present to the operator of facilities where POS are installed ("the operators"), established in the territory of Friuli Venezia Giulia Region, the identification card relating to the means of transport in respect of which it was issued.

2. The operator is required to verify that the means of transport being refuelled is the one that corresponds to the identification card. Verification may also be done using visual or electronic equipment, or devices for electronically verifying that the vehicle refuelled matches the data on the card used.

3. After refuelling, the operator is required to record immediately, using the POS, the volume supplied, in litres, to register it electronically, and to hand the beneficiary the documents setting out the procedure and information referred to in Annex B, point 3.

4. The beneficiary must check that the volume supplied, in litres, corresponds to what is stated in the documents he or she has received.

[6] 'the Chamber of Commerce'.

5. Save in the case referred to in Article 3(5a), the contribution that has been calculated shall be paid directly by the operator in the form of a corresponding reduction in the price of the fuel.

…'

19. Article 6 of that regional law, entitled 'Procedure for non-electronic payments', provides, in paragraphs 1 and 2, that it is possible to activate methods for non-electronic payment of contributions in respect of the purchase of fuel for transport purposes to be activated by beneficiaries outside the territory of the Friuli Venezia Giulia Region and that, in those cases, the beneficiary is to submit an application to the relevant Chamber of Commerce for his or her commune of residence.

20. Article 9 of Regional Law No 14/2010, entitled 'Granting of the contribution', provides:

'1. Operators of establishments equipped with POS are authorised to grant the contribution towards the purchase of fuel for transport purposes electronically.

2. Operators shall not grant the contribution towards the purchase of motor fuel where the identification card produced for that purpose has been issued in respect of a vehicle other than that to be refuelled or where that identification card has been deactivated.

3. Operators are required to communicate to the relevant Chamber of Commerce, electronically …, the same day or on the next working day, the data relating to the quantity of fuel sold for transport purposes.

4. For the purposes of the communication referred to in paragraph 3, operators must record, by means of the POS, data relating to the total quantities of fuel for transport purposes sold, as shown on the pumps and recorded in the register of the Ufficio tecnico di finanza [(the Finance Office, Italy)].'

21. Article 10 of Regional Law No 14/2010, entitled 'Refunds in respect of contributions', provides, in paragraphs 1, 2 and 7:

'1. The regional administrative authority shall refund to operators the contributions in respect of the purchase of motor fuel granted to beneficiaries, in principle on a weekly basis.

2. Refunds shall be made on the basis of the data stored on the database, without prejudice to cases where refunding is suspended or contributions wrongly paid are recovered.

…

7. During each financial year, the regional administrative authority shall carry out one or more random checks on operators involved in financial transactions as a result of the contribution towards the purchase of motor fuel, in particular in order to ensure that the documents required in respect of applications for a refund exist. In any event, the documents relating to the financial transactions must be retained by persons concerned other than the final beneficiaries of the contribution for a period of no less than two years from the date of the corresponding applications for a refund.'

III. Background to the dispute and the pre-litigation procedure

22. On 1 December 2008, pursuant to Article 258 TFEU, the Commission sent a letter of formal notice to the Italian Republic concerning the levying of reduced rates of excise duty on petrol and diesel used as fuel when those products are sold to residents of the Friuli Venezia Giulia Region. According to the Commission, the legislation providing for that reduction in excise duty rates was contrary to the EU rules on the taxation of energy products, since it was not one of the possible exemptions or reductions provided for by Directive 2003/96.

23. The Commission challenged the scheme introduced by Legge n. 549, Misure di razionalizzazione della finanza pubblica (Law No 549 for the rationalisation of public finances),[7] of 28 December 1995, and by Legge regionale n. 47, Disposizioni per l'attuazione della normativa nazionale in materia di riduzione del prezzo alla pompa dei carburanti per autotrazione nel territorio regionale e per l'applicazione della Carta del cittadino nei vari settori istituzionali (Regional Law No 47, laying down provisions for the application of national legislation concerning the reduction of pump prices of fuel for motor vehicles in the region and the application of the Citizens' Charter in various institutional sectors),[8] of 12 November 1996, entitling residents of the Friuli Venezia Giulia Region to a reduction in the 'pump' price of petrol (and of diesel with effect from 2002). The mechanism in question provided for a discount to be granted to final consumers of fuel who were residents of that region. In order to implement that mechanism, the fuel suppliers paid to the operators of sales outlets amounts corresponding to the price reductions and then applied for refunding of those amounts from the region.

24. In the Commission's view, that scheme constituted an unlawful reduction in excise duties, taking the form of the refunding of such duties. It observed that, first, the beneficiary of the refund was the same person as the person liable to pay the excise duty; secondly, there was a direct link between the amounts of excise duty paid to the State by the persons liable to pay the duty – the fuel suppliers – and the amounts of the refunds covered by those amounts for the service station operators; and, thirdly, the objective of the scheme was to offset significant price differences in relation to the neighbouring Republic of Slovenia, which, at the time of the entry into force of Regional Law No 47/96, was not yet a Member State of the European Union.

25. In order to avoid journeys for the purpose of filling up with petrol at a lower price in Slovenia ('pump tourism'), the Italian Republic had requested and obtained during 1996 a derogation under Article 8(4) of Directive 92/81/EEC[9] in order to be able to apply a reduced rate of excise duty on fuel in the Friuli Venezia Giulia Region.[10] Subsequently, on the basis of Article 18 of Directive 2003/96, the Italian Republic had been authorised to continue applying, until 31 December 2006, a reduction in the rate of excise duty on petrol consumed in the territory of that region. On 17 October 2006, the Italian Republic had submitted a request for a derogation under Article 19 of Directive 2003/96 for the territory of the Friuli Venezia Giulia Region. That request was subsequently withdrawn in December 2006.

7 GURI No 302 of 29 December 1995, p. 5.

8 *Bolletino ufficiale della Regione* No 33 of 11 November 1996; 'Regional Law No 47/96'.

9 Council Directive of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils (OJ 1992 L 316, p. 12).

10 Council Decision 96/273/EC of 22 April 1996 authorising certain Member States to apply or to continue to apply to certain mineral oils, when used for specific purposes, reduced rates of excise duty or exemptions from excise duty, in accordance with the procedure provided for in Article 8(4) of Directive 92/81 (OJ 1996 L 102, p. 40).

26. By letter of 1 April 2009, the Italian Republic replied to the letter of formal notice, explaining that the scheme provided for by Regional Law No 47/96, objected to by the Commission, had been adapted by Legge regionale n. 14, norme speciali in materia di impianti di distribuzione di carburanti e modifiche alla legge regionale 12 November 1996, n. 47 in materia di riduzione del prezzo alla pompa dei carburanti per autotrazione nel territorio regionale (Regional Law No 14 laying down special rules concerning fuel distribution facilities and amending Regional Law No 47 of 12 November 1996 on the reduction of pump prices for fuel in the territory of the region),[11] of 5 December 2008. The latter provided that refunds would be made directly to the operators of fuel distribution facilities and no longer to the fuel suppliers.

27. Furthermore, by Regional Law No 14/2010, the Italian Republic introduced a new contribution scheme, providing for a fixed amount of refund (per litre) for purchases of petrol and diesel, adjusted according to the type of fuel and the area of residence of the person buying the fuel.

28. On 12 April 2013, the Commission asked the Italian Republic to provide clarification regarding the procedure for calculating the contribution on the basis of the prices of fuel purchased by residents of the Friuli Venezia Giulia Region.

29. By letter of 16 May 2013, the Italian Republic provided clarification concerning the amount of the contributions granted to residents of the Friuli Venezia Giulia Region in respect of the purchase of motor fuel and the division of that region into two territorial areas, each having a different level of contribution.

30. On 11 July 2014, the Commission sent a supplementary letter of formal notice to the Italian Republic, concerning Regional Law No 14/2010, in so far as the new mechanism for payments made by the Chamber of Commerce to operators of service stations introduced a reduction in excise duty in the form of a refund of such duty, which was not provided for by Directive 2003/96 or authorised by the Council under Article 19 of that directive.

31. By letter of 4 September 2014, the Italian Republic submitted its observations on that supplementary letter of formal notice.

32. The Commission sent a reasoned opinion to the Italian Republic on 11 December 2015, to which the latter replied by letter of 11 February 2016.

33. Not being satisfied with that reply, the Commission, taking the view that the scheme provided for by Regional Law No 47/96 and the scheme provided for by Regional Law No 14/2010 were essentially identical and followed on from one other, brought the present action under Article 258 TFEU.

IV. Forms of order sought by the parties

34. In the present action, the Commission claims that the Court should:

– declare that, by applying a reduction in excise duty on the basis of regional legislation adopted by the Friuli Venezia Giulia Region which provides for a scheme of contributions towards purchases of petrol and diesel used as motor fuel when those products are sold to residents of

[11] *Bolletino ufficiale della Regione* No 50 of 10 December 2008.

that region, the Italian Republic has failed to fulfil its obligations under Articles 4 and 19 of Directive 2003/96, and

– order the Italian Republic to pay the costs.

35. The Italian Republic contends that the Court should:

– dismiss the action, and

– order the Commission to pay the costs.

36. By decision of the President of the Court of 3 June 2019, the Kingdom of Spain was granted leave to intervene in support of the Italian Republic.

V. Arguments of the parties

A. Arguments of the Commission

37. The Commission observes that excise duties are indirect taxes levied on the consumption of certain products and that the economic burden of those taxes is borne by final consumers. There can be no doubt that the specific purpose and effect of the measure introduced by the Friuli Venezia Giulia Region is to ease the burden borne by final consumers by reducing their tax burden in that respect.

38. In order to show that the legislation in question involves a reduction in rates of excise duty not authorised by Directive 2003/96, the Commission points out that the scheme of that directive requires a single level of taxation for each product and for each use to apply throughout the territory of an individual Member State. The Commission makes clear that the directive does not, however, require the selling price to the final consumer to be the same throughout the territory of a Member State, since that directive concerns the taxation of energy products but does not regulate the selling price of such products.

39. It explains that Directive 2003/96 contains a number of provisions enabling the Member States to apply reductions, exemptions or differentiations in the level of taxation for certain products or certain uses. In that regard, the Commission refers in particular to Articles 5, 7 and 15 to 19 of that directive. Those reductions, exemptions or differentiations may be put into effect by the Member States in the different ways provided for in Article 6 of that directive. The principle of a single level of taxation for each product and for each use may be derogated from only in the cases provided for by Directive 2003/96. That applies irrespective of whether the minimum levels of taxation provided for by that directive are observed.

40. According to the Commission, where a Member State intends to apply a reduced level of taxation at regional level, the only possibility is to have recourse to Article 19 of Directive 2003/96 and therefore to request authorisation under that provision. In the absence of such authorisation, the deviation from the principle of the single rate of taxation for each product and for each use resulting from the introduction of a reduction in the rates of excise duty on fuel for residents of the Friuli Venezia Giulia Region constitutes an infringement of Articles 4 and 19 of

that directive. It contends that the arguments put forward by the Italian Republic to show that the contribution towards the purchase of motor fuel did not infringe the provisions of that directive should be rejected.

41. As regards the classification of the contribution towards the purchase of motor fuel as a reduction in excise duty rates, the Commission takes the view that, where a Member State grants a subsidy not authorised by EU law, calculated directly or indirectly on the basis of the quantity of an energy product falling within the scope of Directive 2003/96 at the time of release for consumption, that subsidy leads to an unlawful reduction of the tax burden on that energy product. In such a case, that subsidy offsets in whole or in part the excise duty on the product in question. The terms used to designate the measure at issue are irrelevant. The nature, characteristics and effects of the measure are all that matters.

42. In support of its position, the Commission points out that the contribution towards the purchase of motor fuel is granted in the form of a fixed amount according to the quantity of fuel purchased, which corresponds to the method of calculation used to determine the amount of the excise duty.

43. The Commission observes that, as can be seen from the judgment of 25 April 2013, *Commission* v *Ireland*,[12] one of the forms in which the Member States may give effect to exemptions or reductions in the level of taxation is by 'refunding all or part of the amount of taxation', as provided in Article 6(c) of Directive 2003/96. In order to establish the existence of refunding of excise duty within the meaning of the latter provision, it is immaterial, first, that the person who releases the products for consumption and who is therefore liable to pay the excise duty, in this case the fuel supplier, is not the same as the person who receives the regional contribution, in this case the service station operator, and, secondly, that that contribution ultimately benefits the final consumer, who sees the pump price fall as a result. That interpretation is guided by the need not to deprive the provisions of Directive 2003/96 of their effectiveness. That being the case, the classification of the contribution towards the purchase of motor fuel as constituting a refund of excise duties does not require it to be established that the sole objective of the measure at issue is to circumvent the provisions of that directive.

44. Furthermore, in order to classify the contribution towards the purchase of motor fuel as 'refunding of excise duty', the Commission considers that the decisive factor is the finding that that contribution is paid out of State funds or, as in the present case, from regional funds. Refunding from public funds would mean that the taxation of the product would be neutralised.

45. In that regard, it is immaterial that the financing of the contribution towards the purchase of motor fuel comes from the general revenue of the Friuli Venezia Giulia Region and not specifically from the share of excise duties which the State repays to that region after they have been collected. It is also immaterial that the contribution towards the purchase of motor fuel is also paid to residents of the Friuli Venezia Giulia Region in respect of fuel purchases made outside that region.

46. Even though the Commission accepts that certain provisions of Regional Law No 14/2010 pursue an environmental or socio-economic objective, it considers that the main reason for maintaining the measure at issue is to avoid 'pump tourism', that is to say, residents of the Friuli Venezia Giulia Region travelling to another Member State, in this case Slovenia, in order to fill up on fuel at a lower price.

[12] C-55/12, not published, EU:C:2013:274.

47. In any event, the objectives the Italian Republic cites in order to justify the contribution towards the purchase of motor fuel should have been pleaded in the context of the system of derogations provided for in Article 19 of Directive 2003/96. The Commission points out that on 11 December 2006 the Italian authorities withdrew their request for a derogation under that article in respect of the previous scheme, which, according to the Commission, had the same overall structure and effect. The Commission notes in that regard that that request for a derogation concerned a reduction in the rates of excise duty on petrol consumed in the Friuli Venezia Giulia Region. It also states that the Council previously authorised, under Article 19 of Directive 2003/96, a number of excise duty reductions for specific regions or areas within a Member State. [13]

48. Lastly, as regards the link between the contribution granted to residents of the Friuli Venezia Giulia Region and the fuel price component relating to excise duty, the Commission observes that the fact that the rate of excise duty and the contribution are not the same is irrelevant, since the refunding of excise duty may also be partial. The fact that the share of the fuel price consisting of its production costs is greater than the amount paid by way of the contribution at issue is also irrelevant and does not alter the fact that payment of that contribution constitutes refunding of excise duty.

B. Arguments of the Italian Republic

49. The Italian Republic rejects the assertion that the previous scheme and that to which the present action relates have essentially identical characteristics and effects, as the result of which the second scheme should therefore, like the first, have been the subject of an authorisation procedure at EU level, in accordance with the provisions of Directive 2003/96. That Member State consequently stresses the differences between the two schemes. Accordingly, under the previous scheme, the reduction in the pump price of petrol and diesel was financed by the regions through the share of excise duties reserved for them. That share of excise duties was therefore restricted as regards its allocation, in that it was intended to cover the financial requirements of the measure at issue. The Italian Republic states that, under the new scheme, in contrast, the contribution is financed, like all other expenditure, out of the general budget revenue of the Friuli Venezia Giulia Region. The share of excise duties transferred by the State to that region is therefore no longer subject to a specific constraint allocating it for the financing of the measure at issue but can be used to cover any expenditure of that region.

50. In addition, the Italian Republic points out that, under the previous scheme, the contribution was determined on the basis of the difference between the fuel price charged in the region and the lower fuel price charged on the other side of the border with the Republic of Slovenia. The discount to be made was also differentiated according to the distance from the border. In contrast, under the new scheme, the contribution was unconnected with price trends in Slovenia and fixed as a flat-rate sum based on two geographical areas.

[13] The Commission cites Council Implementing Decisions 2011/776/EU and (EU) 2017/1767 of 24 November 2011 and 25 September 2017 authorising the United Kingdom to apply reduced levels of taxation to motor fuel consumed on the islands of the Inner and Outer Hebrides, the Northern Isles, the islands in the Clyde, and the Isles of Scilly, in accordance with Article 19 of Directive 2003/96/EC (OJ 2011 L 317, p. 34, and OJ 2017 L 250, p. 69), and Council Implementing Decision (EU) 2015/356 of 2 March 2015, authorising the United Kingdom to apply differentiated levels of taxation to motor fuel in certain geographical areas, in accordance with Article 19 of Directive 2003/96/EC (OJ 2015 L 61, p. 24). In such cases, the Council noted that, in those areas, the average price of petrol and diesel was higher than in the rest of the United Kingdom. In view, in one case, of the insular nature of certain regions and, in the other, of the specific nature of the areas concerned (including the low population numbers and the delivery of relatively low volumes of fuel), the Council decided to grant that derogation. The Commission states that the mechanism introduced by the United Kingdom for fuel consumed in the Hebrides and the islands in the Clyde and the Isles of Scilly, approved by the Council on the basis of Article 19 of Directive 2003/96, is essentially the same as that currently used in the Friuli Venezia Giulia Region.

51. Furthermore, the Italian Republic points out that, under both the old and the new schemes, the beneficiaries of the contribution are citizens residing in the Friuli Venezia Giulia Region. However, whereas under the previous scheme it was the oil companies that were responsible for payment and subsequently entitled to apply for a refund, under the new scheme that contribution is paid to beneficiaries by the operators of the fuel distribution plants and the region then refunds the cost borne.

52. The Italian Republic accepts that the principle that there must be a single level of taxation for each product and for each use throughout the territory of an individual Member State follows from a systematic interpretation of Directive 2003/96. The Italian Republic also acknowledges that 'the flexibility necessary to define and implement policies appropriate to their national circumstances', which the Member States should have according to recital 9 of that directive, does not mean that they are free to introduce differentiations in the level of taxation, since they may do so only in accordance with the provisions of that directive that provide for derogations to that effect. It is therefore necessary for the objective pursued to fall within the cases listed in Articles 5, 15 and 17 of Directive 2003/96 in particular. If there are various objectives, connected with 'specific policy considerations', the Member State concerned must, in accordance with Article 19 of that directive, request authorisation from the Council, which, acting unanimously, may authorise the introduction of additional exemptions or reductions. The Italian Republic states that those restrictions apply only in so far as a Member State intends to introduce a measure consisting of an 'exemption or reduction in the level of taxation' of energy products and that, therefore, it is clear that a national measure which does not have such an effect will not be subject to those restrictions.

53. In that regard, the Italian Republic considers that the key provision for resolving the present dispute is Article 6(c) of Directive 2003/96, which includes within the scope of the directive cases in which the exemptions or reductions in the level of taxation provided for by that directive are made by 'refunding all or part of the amount of taxation'. According to that Member State, the Commission interprets Article 6(c) of that directive too broadly in considering that any form of subsidy or contribution in respect of goods subject to excise duty, simply because it is financed from public funds, is an excise refund and therefore constitutes a circumvention of that directive.

54. The Italian Republic takes the view that refunding all or part of the amount of taxation, within the meaning of Article 6(c) of Directive 2003/96, takes place where the tax authority refunds to the person liable to pay excise duty the duty which the latter has previously paid. It therefore submits that national or regional measures which do not have the characteristics defined in Article 6(c) of that directive must be regarded as falling outside the scope of that directive and coming within the discretion of the Member States. Directive 2003/96 is therefore not applicable.

55. According to the Italian Republic, the Commission's extremely broad interpretation of Article 6(c) of Directive 2003/96 removes the possibility of any intervention of an economic nature in respect of excise goods, thereby limiting the tax sovereignty of Member States in a sector which is only partially harmonised.

56. Unlike the situation in the case which gave rise to the judgment of 25 April 2013, *Commission* v *Ireland*,[14] in which the national rules expressly stated that the subject of the refund was the 'excise duty' component of the price of motor fuel, the Court cannot start from such a premiss in

[14] C-55/12, not published, EU:C:2013:274.

the present case. It is for the Commission to prove that the subject of the contribution at issue in the present action is indeed a refund of excise duty. The Commission has not, however, provided such proof.

57. According to the Italian Republic, in order for the measure at issue to be regarded as the refunding of excise duty for the purposes of applying Directive 2003/96, it must be shown, first, that that measure achieves the same result as a refund of taxation to the person liable to pay excise duty who has previously paid it and, secondly, that the sole or main purpose of that measure is to circumvent the provisions of Directive 2003/96, in particular Articles 5, 15, 16, 17 and 19 of that directive. Conversely, if a national measure does not meet those criteria, it falls outside the scope of that directive and need not be subject to any authorisation.

58. The Italian Republic states in that regard that it cannot be inferred from the judgment of 25 April 2013, *Commission* v *Ireland*,[15] that Article 6(c) of Directive 2003/96 covers all cases of subsidy or contribution from public funds concerning excise goods, but rather that that provision includes only financial payments that retain, in one way or another, a link with the excise duty initially paid.

59. Applying those considerations to the contribution towards the purchase of motor fuel provided for by Regional Law No 14/2010, the Italian Republic contends that, apart from the fact that the discount at issue is granted to final consumers, there is no link between the duty initially paid by the persons liable to pay it and the sum of money subsequently paid to residents of the Friuli Venezia Giulia Region from the regional budget. The contribution at issue is justified by legitimate objectives and has neither the object nor the effect of circumventing the provisions of Directive 2003/96.

60. In that regard, the Italian Republic states that the objective of the scheme introduced by Regional Law No 14/2010 is, as is clear from the first sentence of Article 1 of that law, to address the serious economic crisis persisting in the Friuli Venezia Giulia Region. That scheme provides for a coordinated framework of a number of measures concerning travel, including measures to support travel by road, in this case measures to support fuel purchases by individuals, combining with this measures to reduce environmental pollution caused by such travel. The purpose of the contribution towards the purchase of motor fuel is to reduce, as part of a coherent package of environmental measures, traffic to and from places where the pump price is lower, not only Slovenia but also other regions of Italy that have more efficient infrastructure, as a result of which a lower cost of fuel production is possible. That contribution is thus intended to support the economy through a discount on the cost of motor fuel granted to natural persons residing in the Friuli Venezia Giulia Region, the 'production cost' component of which is particularly high because of the infrastructural backwardness of that region, while promoting sustainable travel and anti-pollution measures.

61. In order to demonstrate that there is no link between the excise duty initially paid by persons liable to pay it and the contribution towards the purchase of motor fuel granted to residents of the Friuli Venezia Giulia Region, the Italian Republic lists, in brief, all the following factors:

1. the beneficiaries of the measure are natural persons residing in the Friuli Venezia Giulia Region, who are not liable to pay excise duty;

[15] C-55/12, not published, EU:C:2013:274.

2. the contribution is not financed from the proceeds of excise duty repaid by the State to the region, but from the latter's general revenue;

3. the contribution is granted to residents of the region concerned also in respect of fuel purchases made outside the territory of that region;

4. the burden of the contribution falls on the operators of service stations, which temporarily bear the cost of it, which are subsequently reimbursed by the region and which are not liable to pay excise duty; in that regard, the scenario suggested by the Commission that a fuel distribution facility might, in certain cases, operate as a tax warehouse entitled to market fuel does not exist in Italian law, with the result that such a facility can never be liable to pay excise duty;

5. the contribution is granted by the region concerned, whereas excise duty is a tax levied by the State and paid when petrol and diesel arrive at the distribution facility;

6. the contribution is granted on the basis of criteria that are unconnected with excise duty; the amount of the contribution varies according to the type of fuel and the area where the beneficiary resides;

7. the subject of the measure at issue does not relate to the 'excise duty' component of the fuel price, unlike the situation in the case which gave rise to the judgment of 25 April 2013, *Commission* v *Ireland*;[16] and

8. it is impossible to establish an objective link between the contribution granted to citizens residing in the region concerned and the 'excise duty component' of the pump prices of fuel; that contribution relates on the contrary to the 'production cost' component of fuel, the amount of which is higher, since it is intended to offset that cost in a region characterised by a lack of infrastructure; the Italian Republic points out, in that regard, that significant price variations from one region to another within Italy are attributable only to the 'production cost' component, which is itself influenced by the level of the infrastructure in each region.

62. The Italian Republic also cites judgment No 185/2011 of the Corte costituzionale (Constitutional Court, Italy) of 7 June 2011, in which that court held that the contribution towards the purchase of motor fuel had neither the purpose nor the effect of reducing the excise duty initially paid. That Member State states that, by that judgment, which underlines the substantial difference between the previous scheme and the scheme established by Regional Law No 14/2010, the Corte costituzionale (Constitutional Court) found that the excise duty was paid in full at the time the fuel was released for consumption, that there was no reduction in the level of taxation and that the contribution granted to the beneficiaries does not constitute a refund, since the final consumers of the fuel are not the persons liable to pay that duty.

C. Arguments of the Kingdom of Spain

63. The Kingdom of Spain considers that the regional rules at issue constitute aid for the purchase of motor fuel for residents of the Friuli Venezia Giulia Region, reducing fuel production costs. The fuel price component corresponding to the production cost is higher than the contribution at issue and there is no reason not to conclude that the latter is intended to reduce that component.

[16] C-55/12, not published, EU:C:2013:274.

64. That Member State agrees with the Italian Republic's argument that there is a clear distinction between the present dispute and the case which gave rise to the judgment of 25 April 2013, *Commission* v *Ireland*,[17] in which the Irish legislation conferred on the Minister for Finance the option to grant specifically a refund of excise duty on fuel for motor vehicles used by disabled persons.

65. The Kingdom of Spain considers that regional aid expressed as a fixed value, below the production cost of motor fuel and governed by rules which are not of a fiscal nature, cannot be regarded as a means of reducing the tax burden in respect of motor fuel. It submits evidence which, in its view, confirms the absolute autonomy of the contribution at issue in relation to excise duty:

1. the excise duty is collected in full by the State at the time of release for consumption;

2. the contribution is financed not from the excise duty repaid by the State to the Friuli Venezia Giulia Region, but from the general revenue of that region (the contribution is granted also when beneficiaries refuel in other regions of Italy);

3. the contribution is not granted to the person liable to pay the duty, but to natural persons residing in the territory of the region;

4. the contribution is paid to beneficiaries by the fuel distributors and refunded to the latter by the Friuli Venezia Giulia Region; and

5. the contribution is granted according to a criterion completely unconnected with excise duty, since it is granted as a fixed value having no link with excise duty.

66. That Member State explains that the selling price of fuel to the final consumer is made up of several elements, namely, first, the cost of crude oil and the refining margin; secondly, the marketing cost and the cost of transport to the point of sale and, thirdly, the tax components of the price (excise duty, VAT). It observes that the selling price varies from one part to another of the same Member State because of those different elements. Directive 2003/96 by no means requires the selling price charged to the final consumer to be the same throughout the national territory.

67. In those circumstances, according to the Kingdom of Spain, it is impossible to establish any parallel between, on the one hand, the excise duty paid to the Erario (State Treasury, Italy) by the person liable to pay that duty in respect of the total quantity of fuel released for consumption and, on the other hand, the amount of the contribution paid by the Friuli Venezia Giulia Region to residents in respect of fuel purchased by them.

VI. Assessment

68. Under Regional Law No 47/96, residents of the Friuli Venezia Giulia Region were entitled to receive a reduction in the 'pump' price of petrol (and, from 2002, of diesel also). The fuel suppliers paid the operators of sales outlets amounts corresponding to the price reductions and then claimed a refund of those amounts from the region. In the Commission's view, that scheme constituted a reduction, in the form of a refund, in excise duties. However, that scheme, against

[17] C-55/12, not published, EU:C:2013:274.

which the Commission had initiated the pre-litigation procedure, is not the subject of the present infringement proceedings, since it was replaced by another contribution scheme, which became applicable on 1 November 2011.

69. Regional Law No 14/2010 governs the contribution scheme in respect of purchases of motor fuel which is the subject of the present action.

70. It will be recalled that Article 2 of that law defines beneficiaries of the contribution towards the purchase of motor fuel as natural persons residing in the region, owners or co-owners of motor vehicles and motorcycles.

71. Article 3 of that law provides for a fixed contribution per litre towards the purchase of petrol and diesel, which is paid when the fuel is purchased at the pump. Where the conditions laid down by Regional Law No 14/2010 are met, the contribution is paid directly by the operators of distribution facilities through a corresponding reduction in the price payable for the fuel. In essence, therefore, service station operators give beneficiaries a reduction on the 'pump' price. The contribution varies depending on the type of fuel and the area of residence of the person purchasing the fuel. The amount of the contribution may also be adjusted for economic reasons or due to regional budgetary requirements.

72. Article 10 of Regional Law No 14/2010 provides that the regional administrative authority is to refund to service station operators the contributions in respect of the purchase of motor fuel that have been paid to beneficiaries, in principle on a weekly basis. Refunds are to be made on the basis of the data stored on a computer database.

73. The beneficiaries of the contribution are, therefore, the final consumers of motor fuel who reside in the Friuli Venezia Giulia Region. The contribution is not paid by that region directly to those consumers but is paid to beneficiaries by a player in the distribution sector, to which that region then refunds the cost.

74. While the Commission considers that in order to be compatible with Directive 2003/96 the implementation of the scheme of a contribution towards the purchase of motor fuel should have been authorised in accordance with Article 19 of that directive, the Italian Republic considers that the scheme does not constitute a reduction in excise duty and therefore did not have to be authorised in accordance with those provisions.

75. The Commission and the Italian Republic, supported by the Kingdom of Spain, thus hold opposing views on the classification of the contribution towards the purchase of motor fuel provided for by Regional Law No 14/2010. While the Commission contends that this is a reduction in excise duty, taking the form of a refund of such duty and having the effect of partially offsetting the initial taxation of the fuel, the Italian Republic denies that there is any link between the excise duty initially paid by the fuel suppliers and that contribution.

76. It should be recalled at the outset that, according to settled case-law relating to the burden of proof in proceedings under Article 258 TFEU for failure to fulfil obligations, it is for the Commission to prove the existence of the alleged infringement and to provide the Court with the information necessary for it to determine whether the infringement is made out, and in so doing the Commission may not rely on any presumption.[18] The Commission cannot avoid complying

[18] See, inter alia, judgment of 5 March 2020, *Commission* v *Cyprus (Collection and treatment of urban waste water)* (C-248/19, not published, EU:C:2020:171, paragraph 20 and the case-law cited).

with that obligation to prove the alleged failure on the basis of specific evidence demonstrating infringement of the particular provisions on which it relies and rely on mere presumptions or schematic causal links. [19]

77. In the present case, it is therefore for the Commission to prove that, by applying a reduced rate of excise duty, the Italian Republic has failed to fulfil its obligations under Articles 4 and 19 of Directive 2003/96.

78. As is apparent from recitals 2 to 5 and 24 of Directive 2003/96, that directive, by making provision for a system of harmonised taxation of energy products and electricity, seeks to promote the proper functioning of the internal market in the energy sector by avoiding, in particular, distortions of competition. [20] In order to attain that objective, that directive intends to reduce the differences between national levels of energy taxation, since that is a factor that is detrimental to the proper functioning of the internal market. To that end, it provides for EU minimum levels of taxation to be set to enable differences between national levels of taxation to be reduced. That is an area which is only partially harmonised, in so far as that directive merely sets harmonised minimum levels of taxation, without fully harmonising rates of excise duty on energy products and electricity. [21]

79. I note that Article 4(1) of Directive 2003/96 establishes the principle that 'the levels of taxation which Member States … apply to the energy products and electricity … may not be less than the minimum levels of taxation prescribed by [that] Directive'. The first subparagraph of Article 19(1) of that directive provides that, 'in addition to the provisions set out in the previous Articles, in particular in Articles 5, 15 and 17, the Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce further exemptions or reductions for specific policy considerations'.

80. It is common ground between the parties that Directive 2003/96 requires compliance with a minimum single level of taxation for each product and for each use throughout the territory of an individual Member State, which follows both from Article 4(1) of that directive and from a systematic interpretation of that provision.

81. That obligation to ensure a single level of taxation throughout the territory of a Member State applies irrespective of whether the minimum levels of taxation required by Directive 2003/96 are complied with. Thus, that directive does not give the Member States any discretion to set freely the differentiated rates of taxation which they consider appropriate, relying solely on the fact that the rate applied remains higher than the minimum rate charged.

82. Member States may apply derogations from the principle of a single level of taxation for each product and for each use only in the cases expressly provided for in Directive 2003/96. To that effect, recital 15 of that directive states that 'the possibility of applying differentiated national rates of taxation to the same product should be allowed in certain circumstances or permanent conditions, provided that [EU] minimum levels of taxation and internal market and competition rules are respected'.

[19] See, inter alia, judgment of 5 September 2019, *Commission* v *Italy (Bacterium Xylella fastidiosa)* (C-443/18, EU:C:2019:676, paragraph 80 and the case-law cited).

[20] See, inter alia, judgment of 7 March 2018, *Cristal Union* (C-31/17, EU:C:2018:168, paragraph 29 and the case-law cited).

[21] See judgment of 30 January 2020, *Autoservizi Giordano* (C-513/18, EU:C:2020:59, paragraph 26).

83. Several provisions of Directive 2003/96 make it possible for Member States to apply exemptions, reductions and differentiations in the level of taxation of products subject to excise duty. These are, in particular, Articles 5, 7 and 15 to 19 of that directive. Those provisions show that the EU legislature has left a certain margin of discretion to Member States in the field of excise duties. [22] That discretion is however circumscribed, in so far as the possibility thus offered to Member States to introduce differentiated levels of taxation, exemptions from taxation or reductions in excise duties can be used only in strict compliance with the conditions laid down in the relevant provisions of that directive.

84. Thus, in order to apply a differentiated rate in a given region, a Member State must have recourse to Article 19 of Directive 2003/96 and request an authorisation under that article. It is common ground, however, that the Italian Republic did not seek such authorisation in the context of implementing the contribution scheme in respect of the purchase of motor fuel provided for by Regional Law No 14/2010. The Commission therefore considers that the deviation from the principle of the single rate for each product and for each use resulting from the introduction of what it classifies as a reduction in rates of excise duty on fuel for residents of the Friuli Venezia Giulia Region constitutes an infringement of Articles 4 and 19 of Directive 2003/96.

85. In order to find that the Italian Republic has failed to fulfil its obligations under those provisions, it must first be ascertained whether the contribution towards the purchase of motor fuel for residents of the Friuli Venezia Giulia Region can be deemed to be an exemption or a reduction in the level of taxation.

86. In that regard, Article 6(c) of Directive 2003/96, which is not expressly referred to by the Commission in the form of order sought in its application, but which is central to the arguments put forward by the parties, refers to the 'refunding [of] all or part of the amount of taxation' as one of the options available to Member States for giving effect to the exemptions from or reductions in the level of taxation set out in the directive. [23] As is apparent from the wording of Article 6 of that directive, it is possible for 'exemptions' or 'reductions' of the level of taxation, within the meaning of that provision, not to be applied by a Member State directly, but for them to be granted by it in the form of a refund. [24] To consider that refunding is not a form of exemption or reduction of excise duty would, according to the Court, 'be to circumvent the statutory rules on derogation set out in Articles 6, 18 and 19 of Directive 2003/96 and Annex II to the directive'. [25]

87. The Court has also inferred from Article 6 of Directive 2003/96 that 'Member States may grant only the exemptions or reductions in the level of taxation prescribed by the directive'. [26]

88. The Court's interpretation makes it possible to avoid circumvention of the obligations incumbent on the Member States under Directive 2003/96. In that regard, if the amount of excise duty levied on fuel is subsequently reimbursed to the final consumers, it must be held that such reimbursement neutralises the effect of the initial tax. The view cannot therefore be taken that the excise duty which has been levied on fuel complies with the rules laid down by Directive 2003/96. [27]

22 See judgment of 30 January 2020, *Autoservizi Giordano* (C-513/18, EU:C:2020:59, paragraph 26).

23 See judgment of 25 April 2013, *Commission* v *Ireland* (C-55/12, not published, EU:C:2013:274, paragraph 37).

24 See judgment of 25 April 2013, *Commission* v *Ireland* (C-55/12, not published, EU:C:2013:274, paragraph 38).

25 See judgment of 25 April 2013, *Commission* v *Ireland* (C-55/12, not published, EU:C:2013:274, paragraph 39).

26 See judgment of 25 April 2013, *Commission* v *Ireland* (C-55/12, not published, EU:C:2013:274, paragraph 40).

27 See judgment of 25 April 2013, *Commission* v *Ireland* (C-55/12, not published, EU:C:2013:274, paragraph 41).

89. Having regard to those factors and to the arguments exchanged between the parties, can it be considered that the Commission has adduced, to the requisite legal standard, evidence that the contribution towards the purchase of motor fuel can be classified as a 'reduction in excise duty'? More specifically, has the Commission shown that that contribution amounts to 'refunding … the amount of taxation', within the meaning of Article 6(c) of Directive 2003/96?

90. I do not think so.

91. I agree with the Commission that the two facts, first, that the economic operator who is liable to pay excise duty (the fuel supplier) is different from the economic operator to whom the regional contribution is paid (the operator of a service station) and, secondly, that the contribution benefits the final consumers, do not preclude the finding that that contribution could be deemed to be a refund of excise duty and therefore have the effect of reducing the level of taxation.

92. It is clear from the judgment of 25 April 2013, *Commission* v *Ireland*,[28] that a situation in which the excise duty has already been paid by the oil companies and the cost relating to excise duty on fuel purchases is refunded to a particular category of consumers does not avoid being classified as an 'exemption' within the meaning of Directive 2003/96. The same conclusion must be drawn as regards the classification of a payment made as a reduction in the rate of excise duty.

93. In other words, the separation of the person liable to pay excise duty from the person who obtains a refund of the contribution he or she has paid and the final consumer, who is the designated beneficiary of that contribution, does not, in itself, preclude a finding that the effect of the initial tax is neutralised or at least modified.

94. It is also necessary to establish that the refund in question does indeed relate to the cost associated with the excise duty on the purchase of motor fuel. It must therefore be demonstrated that there is a link between the excise duty initially paid and the regional contribution at issue. The main focus of the dispute between the parties is on whether or not such a link exists.

95. The present action provides in that regard an element of uncertainty, which distinguishes it from the case which gave rise to the judgment of 25 April 2013, *Commission* v *Ireland*.[29]

96. In that case, under the first subparagraph of Article 18(1) of Directive 2003/96 and Annex II to that directive, Ireland had been authorised to apply until 31 December 2006, by way of derogation from the provisions of that directive, reductions in the levels of taxation and exemptions in respect of fuel for vehicles used by disabled persons. It was common ground that the repayment of excise duty on fuel for such vehicles provided for under the Irish legislation had continued to be applied in Ireland after 31 December 2006, even though that Member State had no such authorisation.[30] The Court therefore found that, since the expiry on 31 December 2006 of the derogation granted to Ireland, the repayment of excise duty provided for under Irish legislation had been contrary to the terms of Article 4(1) of Directive 2003/96, which requires adherence to minimum levels of taxation for energy products and electricity.[31]

[28] C-55/12, not published, EU:C:2013:274.

[29] C-55/12, not published, EU:C:2013:274.

[30] See judgment of 25 April 2013, *Commission* v *Ireland* (C-55/12, not published, EU:C:2013:274, paragraph 32).

[31] See judgment of 25 April 2013, *Commission* v *Ireland* (C-55/12, not published, EU:C:2013:274, paragraph 33).

97. It was not disputed that the object of the legislation at issue was the repayment of excise duty on fuel for vehicles used by disabled persons. The point at issue was to determine whether that repayment could be deemed to be an unauthorised exemption from excise duty, in breach of Directive 2003/96.

98. In the context of the present action, the very existence of a refund relating specifically to the share of the fuel costs relating to excise duty is disputed by the Italian Republic.

99. I share the Commission's view that what matters is not the legal name given by a Member State to the mechanism at issue, but the nature, characteristics and effects of that mechanism.

100. That being so, I would point out that the Italian Republic presents an in-depth and detailed refutation of the arguments put forward by the Commission in support of its action. The Member State describes precisely a number of characteristics of the contribution towards the purchase of motor fuel in order to challenge the Commission's claim that it constitutes the refunding of excise duty. In that regard, the Italian Republic contends in a duly substantiated way, as can be seen from the presentation of its case, that there is no link between the excise duty paid by the person liable to pay such duty and the reduction in the pump price following the payment of the contribution benefiting the final consumers. I consider that the evidence put forward by that Member State casts doubt on the classification of that contribution as a reduction in excise duty.

101. Thus, in the light of the explanations provided by the Italian Republic, it seems to me that the Commission's argument that, in essence, a contribution financed from State or regional funds, the amount of which is calculated according to the quantity of an energy product subject to excise duty under Directive 2003/96, constitutes a reduction in excise duty, lacks sufficient reasoning.

102. In particular, I, like the Italian Republic, consider that the fact that the contribution towards the purchase of motor fuel comes from regional funds does not provide an adequate reason for finding the existence of a reduction in excise duty. Moreover, I would point out that, unlike the previous scheme, the scheme introduced by Regional Law No 14/2010 no longer makes reference to that contribution being financed from the share of excise duty transferred by the State to the Friuli Venezia Giulia Region.

103. The fact that the contribution also benefits natural persons residing in the territory of the Friuli Venezia Giulia Region when they obtain fuel in other regions constitutes an additional factor which casts doubt on whether that contribution should, as the Commission maintains, be deemed to be a refund of the excise duty initially paid. In that situation there is certainly no link between the excise duty repaid by the State into the budget of another region and the contribution which is paid by the Friuli Venezia Giulia Region to its residents in respect of their purchases of motor fuel in another region. As the Kingdom of Spain points out in essence, if the logic of the scheme had been to refund the excise duty initially paid in order to avoid it being borne by final consumers, the criterion for granting the contribution would have been that the place where the fuel was purchased had to be in the Friuli Venezia Giulia Region, and not the consumers' place of residence.

104. Furthermore, as the Italian Republic and the Kingdom of Spain contend, since the 'production cost' component of the fuel price is higher than the contribution provided for by Regional Law No 14/2010, there is no reason, from a mathematical viewpoint, not to conclude that the contribution is intended to reduce that component. Conversely, there is no evidence that

the contribution is intended to reduce the 'excise duty' component of the fuel price, as the Commission contends. It is only a reduction of the latter component, which is not authorised under Directive 2003/96, which constitutes an infringement of that directive.

105. In so far as both the 'production cost' component of the fuel price and the 'excise duty' component of that price are higher than the amount of the contribution towards the purchase of motor fuel, it may be argued that that contribution has an impact on both those components. I cannot infer with any certainty, from the evidence submitted to the Court by the Commission in support of its action, that the contribution at issue affects the tax component of the selling price of fuel.

106. I note also that the Commission endorses the Kingdom of Spain's argument that Directive 2003/96 does not require the selling price to the final consumer to be the same throughout the national territory. As the Commission rightly states, the fact that a Member State introduces a different retail price for a particular energy product in its national territory does not in itself constitute a problem in the light of Directive 2003/96, even where the component relating to the taxation of that product constitutes one of the components of that price.

107. In that respect, recital 13 of Directive 2003/96 states that 'taxation partly determines the price of energy products and electricity'. In the context of the present action, the Commission does not seem to me to have proved that the contribution at issue specifically affects the tax component of the fuel price.

108. In order to establish that the Italian Republic has failed to fulfil its obligations under Articles 4 and 19 of Directive 2003/96, the Court cannot, however, merely assert that, in mathematical terms, the contribution towards the purchase of motor fuel has the effect of reducing the share of the price represented by excise duty. The Commission's finding that the contribution has the effect of easing the burden on final consumers when they purchase fuel is not sufficient to demonstrate that it eases the *tax* burden on those consumers. That assertion is equal to a presumption if it is not supported by specific, substantiated evidence.

109. Thus, in the light of the evidence submitted to the Court by the Commission, it is possible to establish that the measure at issue constitutes a reduction in the pump price of fuel for residents of the Friuli Venezia Giulia Region, but it is not possible, in my view, to conclude with certainty that that reduction is, in fact, a reduction in the rate of excise duty.

110. In that regard, it should be noted that, if it is not proven that the measure at issue constitutes a reduction in the level of taxation, it cannot be concluded that the Italian Republic should have requested authorisation in order to obtain an exemption or a reduction in the amount of excise duty under Article 19 of Directive 2003/96.

111. I would add that the premiss on which the Commission's action is largely based, namely that the scheme provided for by Regional Law No 47/96, for which a derogation was granted at EU level, is the same as the scheme resulting from Regional Law No 14/2010, has been convincingly refuted by the Italian Republic's explanations concerning the characteristics and objectives of the latter scheme.

112. In addition, the argument that both the excise duty and the contribution are calculated on the basis of the quantity of fuel does not, in itself, demonstrate a reduction in the tax cost of the fuel when the contribution is granted.

113. Lastly, I note that the partial harmonisation of levels of taxation of energy products and electricity brought about by Directive 2003/96 must, as stated in recital 9 of that directive, be reconciled with the need for 'Member States [to] be given the flexibility necessary to define and implement policies appropriate to their national circumstances'. The broad interpretation of Article 6(c) of that directive advocated by the Commission does not seem to me to respect the balance thus required between partial harmonisation of levels of taxation and the pursuit of public policy objectives by the Member States. In my view, such an interpretation imposes excessive limits on the actions of the Member States, particularly those of a social and environmental nature, where those actions concern products which fall within the scope of that directive.

114. It follows from the foregoing that, whereas the Italian Republic has provided the Court with specific, substantiated evidence to show that the contribution towards the purchase of motor fuel is entirely unconnected with the initial fiscal relationship, the Commission has not, in my view, succeeded in proving the existence of a link between the excise duty initially paid to the State by fuel suppliers and that contribution. The Commission cannot therefore be deemed to have adduced, to the requisite legal standard, evidence that the Italian Republic has infringed Articles 4 and 19 of Directive 2003/96.

115. Since the Commission has not discharged the burden of proof which it bears in the context of an action for failure to fulfil obligations, the present action should, in my view, be dismissed by the Court.

VII. Costs

116. Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since I consider that the Court should grant the form of order sought by the Italian Republic, the Commission should be ordered to pay the costs.

117. In accordance with Article 140(1) of those rules, the Kingdom of Spain, the intervener, must bear its own costs.

VIII. Conclusion

118. In view of the above considerations, I propose that the Court should:

1. Dismiss the action.

2. Order the European Commission to pay the costs.

3. Order the Kingdom of Spain to bear its own costs.