Reports of Cases

OPINION OF ADVOCATE GENERAL
RANTOS
delivered on 13 October 2022 [1]

**Case C-571/21**

**RWE Power Aktiengesellschaft**
**v**
**Hauptzollamt Duisburg**

(Request for a preliminary ruling
from the Finanzgericht Düsseldorf (Finance Court, Düsseldorf, Germany))

(Reference for a preliminary ruling – Directive 2003/96/EC – Taxation of energy products and electricity – Article 14 – Exemption for electricity used to produce electricity and to maintain the ability to produce electricity – Opencast mines)

## I. Introduction

1. What type of electricity consumption is exempt from the electricity tax where that consumption is used to produce electricity? That is the question referred to the Court of Justice, in essence, for a preliminary ruling, which concerns the interpretation of the first sentence of Article 14(1)(a) of Directive 2003/96/EC. [2]

2. The request has been made in proceedings between RWE Power AG and the Hauptzollamt Duisburg (Principal Customs Office, Duisburg, Germany; 'the Hauptzollamt') relating to the latter's refusal to exempt from taxation the electricity used by RWE Power in 2003 and 2004 in the course of its opencast mining operations and in the production of electricity in its power plants.

3. By its questions, the Finanzgericht Düsseldorf (Finance Court, Düsseldorf, Germany) asks, in essence, the Court of Justice to clarify the scope of the tax exemption for electricity set out in the first sentence of Article 14(1)(a) of Directive 2003/96, which provides, inter alia, that 'electricity used to produce electricity and … used to maintain the ability to produce electricity' is exempt from the electricity tax ('the exemption at issue'). In particular, it is a question of determining whether and under what conditions, in the context of the production of electricity from lignite extracted from opencast mines, the use of electricity for activities upstream and downstream of the production of electricity – understood as the process of converting energy products to electricity in the technical sense – may benefit from the exemption at issue.

[1] Original language: French.

[2] Council Directive of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ 2003 L 283, p. 51).

4. In that regard, I note that the Court has already had the opportunity to interpret both Article 14(1),[3] and Article 21(3),[4] of Directive 2003/96, with the latter provision also regarded as being relevant by the referring court. However, the Court's case-law relating to Article 14(1) of Directive 2003/96 concerns 'energy products' which were undisputedly used to produce electricity, and therefore the circumstances of those cases differ from those of the present case where the question that arises focuses exclusively on the determination of the different processes that constitute such 'production'. The present case will therefore allow the Court to shed more light on the scope of that provision.

## II. Legal framework

### *A. European Union law*

5. Article 1 of Directive 2003/96 provides that Member States are to impose taxation on energy products and electricity in accordance with that directive.

6. Article 2(1) of that directive provides that, for the purposes of that directive, the term 'energy products' is to apply to products, inter alia, falling within CN code 2702.

7. Under Article 14(1)(a) of that directive:

'1. … Member States shall exempt the following from taxation under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse:

(a) energy products and electricity used to produce electricity and electricity used to maintain the ability to produce electricity. However, Member States may, for reasons of environmental policy, subject these products to taxation without having to respect the minimum levels of taxation laid down in this Directive. …'

8. Pursuant to Article 21(3) of the same directive:

'The consumption of energy products within the curtilage of an establishment producing energy products shall not be considered as a chargeable event giving rise to taxation, if the consumption consist[s] of energy products produced within the curtilage of the establishment. Member States may also consider the consumption of electricity and other energy products not produced within the curtilage of such an establishment and the consumption of energy products and electricity within the curtilage of an establishment producing fuels to be used for generation of electricity as not giving rise to a chargeable event. Where the consumption is for purposes not related to the production of energy products and in particular for the propulsion of vehicles, this shall be considered a chargeable event, giving rise to taxation.'

[3] See, in particular, judgments of 5 July 2007, *Fendt Italiana* (C-145/06 and C-146/06, EU:C:2007:411, paragraph 36); of 17 July 2008, *Flughafen Köln/Bonn* (C-226/07, 'the judgment in *Flughafen Köln/Bonn*', EU:C:2008:429); of 4 June 2015, *Kernkraftwerke Lippe-Ems* (C-5/14, EU:C:2015:354, paragraphs 40 to 54); of 13 July 2017, *Vakarų Baltijos laivų statykla* (C-151/16, 'the judgment in *Vakarų Baltijos laivų statykla*', EU:C:2017:537); of 7 March 2018, *Cristal Union* (C-31/17, 'the judgment in *Cristal Union*', EU:C:2018:168); of 27 June 2018, *Turbogás* (C-90/17, 'the judgment in *Turbogás*', EU:C:2018:498); of 16 October 2019, *UPM France* (C-270/18, 'the judgment in *UPM France*', EU:C:2019:862); and of 7 November 2019, *Petrotel-Lukoil* (C-68/18, 'the judgment in *Petrotel-Lukoil*', EU:C:2019:933, paragraphs 33, 46 and 47).

[4] See judgments of 6 June 2018, *Koppers Denmark* (C-49/17, EU:C:2018:395); in *Petrotel-Lukoil*; and of 3 December 2020, *Repsol Petróleo* (C-44/19, 'the judgment in *Repsol Petróleo*', EU:C:2020:982).

## *B. German law*

9. The electricity tax is, in particular, governed by the Stromsteuergesetz (Law on electricity tax) of 24 March 1999 [5] ('the StromStG'). Since its adoption, that law has been amended several times. In so far as the dispute in the main proceedings concerns the tax years 2003 and 2004, the versions of the StromStG applicable to the main proceedings are those resulting from the law of 30 December 2002 and the law of 29 December 2003, respectively. [6]

10. Paragraph 9(1), point 2, of the StromStG provides, in the versions applicable to the main proceedings, that electricity which is consumed in order to produce electricity is exempt from electricity tax.

11. Under Paragraph 11 of the StromStG, the Bundesministerium der Finanzen (Federal Ministry of Finance, Germany) is authorised to adopt by decree, inter alia, provisions in order to implement the tax advantages granted under Paragraph 9 of that law.

12. The relevant decree enacted by the Federal Ministry of Finance – namely the Verordnung zur Durchführung des Stromsteuergesetzes (Regulation implementing the electricity tax) of 31 May 2000 [7] ('the StromStV') – provides, in Paragraph 12(1), point 1, thereof, that 'electricity is consumed in order to produce electricity' within the meaning of Paragraph 9(1), point 2, of the StromStG where it is used in the ancillary and auxiliary systems of an electricity production unit, in particular for the purposes of water treatment, steam generator water supply, fresh air supply, fuel supply or flue gas purification, to produce electricity in the technical sense.

## III. The dispute in the main proceedings, the questions referred and the procedure before the Court

13. RWE Power operated three opencast mines situated in different sites in the Rhenish lignite mining area, from which it extracted lignite primarily for the production of electricity in its power plants and, at a rate of 10%, for the production of pulverised lignite and briquettes in its factories. [8]

14. In 2004, RWE Power extracted electricity from the opencast mines, which it used primarily: (i) in water pumps used to lower the groundwater level; (ii) in large equipment such as bucket-wheel excavators, which mined raw lignite and overburden, and spreaders, which backfilled the opencast mine with overburden in another part of the mine; (iii) for lighting the opencast mine; and (iv) for transporting the raw lignite on electrically operated freight trains on the company's own lines and via electrically operated conveyor systems that conveyed both raw lignite and overburden.

15. The operation of RWE Power's power plants was designed for uninterrupted electricity production. In order to ensure uninterrupted electricity production, RWE Power operated bunkers for the lignite, from which the coal was gradually fed to the boilers in the power stations. In each opencast mine, the lignite was first stored in an opencast mining bunker, from where it was transported to the power station bunkers via a conveyor system or via the company's railway.

[5] BGBl. 1999 I, p. 378, and BGBl. 2000 I, p. 147.

[6] BGBl. 2002 I, p. 4602 and BGBl. 2003 I, p. 3076.

[7] BGBl. 2000 I, p. 794.

[8] In 2004, RWE Power produced just under 10% of the electricity consumed in Germany with its power plants associated with the opencast mines.

Those bunkers had a capacity allowing operation for one to two days. From there, electrically operated coal excavators loaded the coal onto a bunker belt, from which the raw lignite entered crushing facilities. The crushed lignite was then fed into the boiler bunkers.

16. In 2004, the Hauptzollamt ordered an on-site inspection of RWE Power in respect of, inter alia, electricity tax for the years 2003 and 2004. During the on-site inspection of electricity tax, it was found, in a report of 20 May 2009, that the preparation of lignite constitutes ‘fuel production’ and is therefore subject to electricity tax. The same was found to be true with regard to all electricity consumption serving to extract and transport raw lignite, with the further consequence that the corresponding uses of electricity by means of coal excavators, coal belts and coal mills are also taxable.

17. On 8 October 2009, the Hauptzollamt issued a tax assessment notice pursuant to the report of 20 May 2009 and requested, on the basis of the findings contained therein, that RWE Power pay the electricity tax which it considered had been incurred.

18. Since the objection lodged by RWE Power against that tax assessment notice was rejected, it brought proceedings before the referring court.

19. Before the referring court, RWE Power submitted that, pursuant to Directive 2003/96, all electricity necessary for the input of the electricity production process should be covered by the exemption at issue. In line with that directive and in accordance with Paragraph 12(1), point 1, of the StromStV, all ancillary and auxiliary systems without which an electricity production plant cannot be operated are in principle to be covered by the exemption from electricity tax. Accordingly, the consumption of electricity for the purpose of converting lignite into electricity, accounting for approximately 90% of the electricity used, should be exempt from electricity tax on the ground that it served to produce electricity pursuant to Paragraph 9(1), point 2, of the StromStG.[9] The raw lignite should therefore be regarded as fuel, with the result that the consumption of electricity for the purposes of extraction and transport in the opencast mine should also be exempt from tax. RWE Power explained that the operation of a lignite-fired power plant is a single process, from the extraction of the coal through to the disposal of waste products. The opencast mine and the lignite-fired power plant thus form a permanent economic and technical electricity production unit which cannot be artificially broken down into individual and independent operations, in so far as the electricity consumption in question is vitally necessary to ensure uninterrupted electricity production.

20. The Hauptzollamt takes the view, in essence, that, in accordance with Article 14(1)(a) of Directive 2003/96, electricity used for the purposes of producing electricity is exempt from the electricity tax if it is consumed in the ancillary or auxiliary systems of an electricity production unit for the purposes of producing electricity in the technical sense. According to the Hauptzollamt, only electricity that is *directly* connected with, or necessary for, the production of electricity – such as that used to supply fuel to the boiler burner from the coal mill – is exempt. Electricity that is used only *indirectly* in certain systems by means of which raw lignite is further processed, in particular by crushing, grinding and drying, is not exempt.

[9] In so far as RWE Power attributes those activities to the production in its factories of briquettes and pulverised lignite for industrial customers, it does not claim tax exemption. Its electricity tax declaration for EUR 31 526 540.15 was therefore submitted subject to reservations.

21. Expressing doubts as to the scope of the exemption provided for in the first sentence of Article 14(1)(a) of Directive 2003/96, the referring court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Having regard to the second sentence of Article 21(3) of [Directive 2003/96], can the first sentence of Article 14(1)(a) of [that directive], in so far as it provides that electricity used to produce electricity is to be exempt from taxation, be interpreted as meaning that that exemption also covers operations in which energy products are extracted in opencast mines and made more suitable for use in power stations, such as the operations of breaking the products down, separating foreign matter from them and grinding them down to the size operationally required by the boiler?

(2) Having regard to the third sentence of Article 21(3) of Directive 2003/96, can the first sentence of Article 14(1)(a) of [that directive], in so far as it provides that electricity used to maintain the ability to produce electricity is to be exempt from taxation, be interpreted as meaning that the use of electricity to operate bunker installations and means of transport necessary for the permanent operation of power stations must also be exempt from taxation under that provision?’

22. Written observations were submitted to the Court by RWE Power, the Hauptzollamt and the European Commission.

## IV. Analysis

23. By its two questions, the referring court asks the Court to clarify the scope of the exemption at issue and, in particular, whether and under what conditions, in the context of the production of electricity from lignite extracted from opencast mines, the use of electricity for activities upstream and downstream of the production of electricity may benefit from the exemption at issue.

24. More specifically, the first question submitted for a preliminary ruling concerns the electricity used for operations taking place before the lignite is stored in the boiler bunkers and converted into electricity, namely: (i) the extraction of lignite from opencast mines and (ii) the preparation of lignite in the power plants (crushing, removal of foreign bodies and grinding it down to the size operationally required by the boiler). As for the second question submitted for a preliminary ruling, it concerns electricity consumed in operations to ensure uninterrupted electricity production and, in particular, for: (i) transporting lignite in the power plants (via train and electric conveyer belts) and (ii) bunker systems.

### *A. Preliminary observations*

25. As a preliminary point, I note that the objective of Directive 2003/96 is to create a system of harmonised taxation for energy products and electricity, within the framework of which a minimum rate of taxation is the rule, in order to promote the smooth functioning of the internal market in the energy sector by avoiding, in particular, distortions of competition.[10]

[10] See Article 1 and recitals 2 to 5 and 24 of Directive 2003/96, and the judgments in *Cristal Union* (paragraph 29 and the case-law cited) and *Repsol Petróleo* (paragraph 21).

26. To that end, with regard, in particular, to electricity generation, the EU legislature made the choice [11] to require Member States to tax electricity as distributed; [12] the energy products used for the generation of that electricity must, as a corollary, be exempted from taxation in order to avoid the double taxation of electricity. [13] In accordance with Article 4(1) and Article 10 of Directive 2003/96, as from 1 January 2004, except where provided for, [14] the minimum levels of taxation applicable to electricity are fixed at EUR 0.5 per MWh (for business use) and EUR 1.0 per MWh (for non-business use). [15]

27. In that regard, the first sentence of Article 14(1)(a) of Directive 2003/96 provides for a compulsory tax exemption, first, for 'energy products' used to produce electricity and, second, for 'electricity' used to produce electricity and electricity used to maintain the ability to produce electricity. However, pursuant to the second sentence of that provision, Member States may, for reasons of environmental policy, subject those products to taxation without having to respect the minimum levels of taxation. In the present case, that provision is not applicable as the Federal Republic of Germany has not exercised that option. [16]

28. The Court has twice had the opportunity to interpret the scope of the first sentence of Article 14(1)(a) of Directive 2003/96. By its judgment in *Cristal Union*, the Court held that the compulsory exemption provided for in that provision applies to energy products, such as natural gas, which are used for the production of electricity where those products are used for combined heat and electricity generation. [17] Furthermore, by its judgment in *Turbogás*, the Court interpreted that provision as meaning that the natural gas and diesel used in the production of thermal electricity by a combined-cycle power plant are exempted from taxation. [18]

29. However, the cases which gave rise to the two abovementioned judgments differ from the case in the main proceedings, in so far as they concerned the application of the exemption at issue to 'energy products', whose use in electricity generation was not disputed. In the present case, on the one hand, the product which may be exempted from taxation is not the 'energy product' but the 'electricity' and, on the other, the point of contention is precisely whether such electricity must be considered part of the electricity production process, within the meaning of the exemption at issue.

[11] See, in that regard, page 5 of the proposal for a Council Directive restructuring the Community framework for the taxation of energy products (OJ 1997 C 139, p. 14; 'the Commission's proposal').

[12] Judgment of 16 October 2019, *UPM France* (C-270/18, EU:C:2019:862, paragraph 39). In this respect, I recall that the Court has held that, where an entity produces electricity for its own use, that electricity is not distributed and therefore falls outside the scope of the system of harmonised taxation established by Directive 2003/96 (see judgments in *Turbogás* (paragraphs 32 and 38) and in *UPM France* (paragraph 33)).

[13] Judgments in *Cristal Union* (paragraph 30) and *Turbogás* (paragraph 35).

[14] In accordance with Article 2(4)(b) of Directive 2003/96, the directive does not apply to electricity used principally for the purposes of chemical reduction and in electrolytic and metallurgical processes (third indent) or when it accounts for more than 50% of the cost of a product (fourth indent).

[15] See the minimum levels of taxation applicable to electricity set out in Annex I Table C of Directive 2003/96. In accordance with Article 4(2) thereof, the level of taxation is the total charge levied in respect of all indirect taxes (except value added tax (VAT)) calculated directly or indirectly on electricity at the time of release for consumption.

[16] See, in that regard, judgment in *Flughafen Köln/Bonn* (paragraphs 22 to 25).

[17] Judgment in *Cristal Union* (paragraphs 38 and 46).

[18] Judgment in *Turbogás* (paragraphs 12 and 42).

## *B. The first question*

30. By its first question, the referring court asks, in essence, whether the first sentence of Article 14(1)(a) of Directive 2003/96 must be interpreted as meaning that the tax exemption for the 'electricity used to produce electricity' also covers the electricity quantities used to extract lignite from opencast mines and the subsequent conversion and treatment of the lignite in power plants (namely, crushing, removal of foreign bodies and grinding them down to the size operationally required by the boiler).

31. According to the Hauptzollamt, the first question should be answered in the negative. It argues, in essence, that a strict interpretation of the abovementioned provision, as required by the Court's case-law, would exempt only the consumption of electricity closely linked to the production of electricity, thus effectively excluding the electricity used to extract and process energy products.

32. On the contrary, RWE Power contends that the first question should be answered in the affirmative. It takes the view that the electricity used both for the purposes of extracting lignite and subsequent further treatment thereof is covered by the exemption at issue, in so far as those processes are necessary and form part of the electricity production process.

33. As for the Commission, it agrees, in essence, with the Hauptzollamt's analysis with regard to the electricity used to extract lignite but considers that the exemption at issue could nevertheless apply to the further processing of the lignite, where those processes are necessary for the operation of the boilers in the power stations.

34. For the following reasons, I agree with the position adopted by the Commission.

35. I note that, according to settled case-law, provisions concerning exemptions provided for by Directive 2003/96 must be given an autonomous interpretation, based on their wording and the scheme of that directive and the objectives pursued by the latter.[19] It is on the basis of that preliminary autonomous interpretation that the examination as to whether the extraction of lignite from opencast mines and further subsequent processing in the power plants should benefit from the exemption at issue will be carried out.

36. In the first place, it is apparent from the wording of the first sentence of Article 14(1)(a) of Directive 2003/96 that Member States are required to exempt from the electricity tax provided for by that directive, inter alia, 'energy products and electricity used to produce electricity' (the first scenario) and 'electricity used to maintain the ability to produce electricity' (the second scenario).

37. In that regard, it should be noted, on the one hand, so far as concerns the first scenario, which relates to the *electricity production* process, that Directive 2003/96 defines clearly the 'energy products' covered by the exemption, by drawing up, in Article 2(1) of that directive, an exhaustive list of those products covered by that definition by reference to the codes of the

[19] Judgment in *Cristal Union* (paragraph 21 and the case-law cited). Any divergent interpretation at national level of the exemption obligations laid down by Directive 2003/96 would undermine the objective of harmonising the European Union's rules and legal certainty, and would risk introducing inequalities of treatment between the economic operators concerned (see judgment of 21 December 2011, *Haltergemeinschaft*, (C-250/10, not published, EU:C:2011:862, paragraphs 18 and 19)).

combined nomenclature.[20] However, that directive does not provide any clarification as to the concept of 'use for the production of electricity', as the concept has not been defined in either the directive or by reference to the national law of the Member States.[21] On the other, with regard to the second scenario – electricity *used to maintain the ability to produce electricity* –[22] it is not the subject of any further clarification in Directive 2003/96 either.

38. In the absence of a definition of 'use for the production of electricity' in that directive,[23] the determination of the meaning and scope of that concept must be determined by considering its usual meaning in everyday language, while also taking into account the context in which it occurs and the purposes of the rules of which it is part.[24]

39. In that regard, I note, first of all, that it is clear from that wording that electricity which may be exempted from taxation must be understood as electricity consumed *for the purposes* of producing electricity. It follows that it is therefore necessary to exclude from the exemption at issue electricity simply consumed during the electricity production process, without being directly connected with, or necessary for, that process.[25] Such electricity consumption could include, for example, the electricity consumed in the administrative buildings of power stations.

40. Next, it should be observed that the distinction drawn between the two scenarios covered by the exemption at issue – namely electricity used 'to produce electricity', on the one hand, and 'to maintain the ability to produce electricity', on the other – suggests that activities relating to the *production* of electricity cannot be regarded as activities linked to *maintaining the ability* to produce electricity.[26]

41. Lastly, since the wording of the first sentence of Article 14(1)(a) of Directive 2003/96 does not specify the various types of electricity consumption that may benefit from the exemption at issue, I consider it necessary to assess the concept of 'use for the production of electricity' by taking into account the specific characteristics thereof. Such an approach seems to me to be reasonable, in so far as the generic nature of the concept of 'production of electricity' makes it possible to distinguish the application of the exemption according to the method of production.[27] It is in this light that the Court accepted that the wording of that provision in no way excludes from the scope of the exemption at issue energy products used for the generation of electricity by a cogeneration unit for the combined production of electricity and heat.[28]

[20] See, to that effect, judgment of 4 June 2015, *Kernkraftwerke Lippe-Ems* (C-5/14, EU:C:2015:354, paragraphs 46 and 47). Moreover, the Court has held that, in that regard, the exemption obligation is sufficiently precise and unconditional to confer on individuals the right to rely on it in proceedings before national courts with a view to contesting national rules that are incompatible with it (judgment in *Flughafen Köln/Bonn* (paragraph 33)).

[21] Such a reference is however made with regard to the concept of '"environmentally friendly" combined heat and power generation', referred to in Article 15(1)(d) of Directive 2003/96.

[22] Italicised by me.

[23] I also note that Directive 2003/96 does not govern how proof of use of energy products or electricity for purposes giving rise to a right to exemption is to be adduced. On the contrary, as is clear from Article 14(1) of that directive, it gives the Member States the responsibility for laying down the conditions referred to in that provision, in order to ensure the correct and straightforward application of such exemptions and to prevent any evasion, avoidance or abuse (see, to that effect, judgment of 2 June 2016, *Polihim-SS* (C-355/14, EU:C:2016:403, paragraph 57)).

[24] See judgment of 12 June 2018, *Louboutin and Christian Louboutin* (C-163/16, EU:C:2018:423, paragraph 20 and the case-law cited).

[25] See, by analogy, judgment in *Vakarų Baltijos laivų statykla* (paragraphs 29 and 30), on the application of the exemption provided for in Article 14(1)(c) of Directive 2003/96 to navigation operations which do not *directly* serve to supply a service for consideration.

[26] See analysis in point 66 of this Opinion.

[27] By way of example, I take the view that it cannot be denied that the various electricity production processes in a wind power station differ from those in a nuclear power station or, like in the present case, a lignite-fired power station.

[28] Judgment in *Cristal Union* (paragraph 23).

42. That being said, the wording of the exemption at issue does not make it possible to establish with any certainty whether electricity to be used for activities upstream of the production of electricity – in particular the extraction of lignite and further subsequent processing thereof in the power plants – must be exempted as part of the 'production of electricity' process, within the meaning of the first sentence of Article 14(1)(a) of Directive 2003/96.

43. In the second place, it should be recalled that the general scheme of Directive 2003/96, in so far as the taxation of energy products and electricity is the general rule, does not seek to establish general exemptions. Accordingly, since Article 14(1) of Directive 2003/96 sets out an exhaustive list of the exemptions which Member States must apply in connection with the taxation of energy products and electricity, that provision cannot be interpreted broadly without depriving the harmonised taxation of all practical effect.[29]

44. The Court has also held that it is apparent from the general scheme of Directive 2003/96 that, apart from two specific cases – namely those set out in the second sentence of Article 14(1)(a) and the third subparagraph of Article 21(5) of that directive – the compulsory exemption of energy products used to generate electricity referred to in the first sentence of Article 14(1)(a) of that directive is unconditionally binding on Member States.[30] This implies that the application of that exemption cannot be affected by the non-compulsory provisions of that directive, such as the second sentence of Article 21(3) thereof.

45. Therefore, if the exemption at issue must be interpreted strictly, provided that the electricity is used to produce electricity or to maintain the ability to produce electricity, that exemption must be applied unconditionally.

46. In the third place, as regards the objectives pursued by Directive 2003/96, it should be borne in mind, from the outset, that that directive, by making provision for a system of harmonised taxation of energy products and electricity, has a dual purpose, namely to promote the smooth functioning of the internal market in the energy sector by avoiding, in particular, distortions of competition,[31] on the one hand, and to promote environmental policy objectives, on the other.[32]

47. On the one hand, so far as concerns the first objective, and, in particular, the objective of avoiding distortions of competition, I note that if the energy used for the generation of electricity by a power station were not exempt from tax under the exemption at issue, there would be a risk of double taxation, since the electricity generated would, in accordance with Article 1 of that directive, also be taxed.[33] Therefore, that objective implies that the application of the exemption at issue could lead to unequal treatment between electricity producers.[34] Any enlargement of the scope of the exemption from the electricity tax to cover a particular type of energy production would be likely to disadvantage electricity producers using other forms of energy products that may be subject to double taxation. Similarly, there is a risk of discrimination among energy producers using the same energy products, due to double taxation, where the inputs necessary for production, the processing of which requires electricity, are imported by only some of those producers.

[29] Judgment in *Cristal Union* (paragraphs 24 and 25 and the case-law cited).

[30] See judgments in *Cristal Union* (paragraphs 27 and 28) and *UPM France* (paragraph 53).

[31] Judgments in *Cristal Union* (paragraph 29 and the case-law cited) and *Turbogás* (paragraph 34).

[32] See judgment of 6 June 2018, *Koppers Denmark* (C-49/17, EU:C:2018:395, paragraph 28 and the case-law cited). See, also, recital 6 of Directive 2003/96.

[33] See, to that effect, judgment in *Cristal Union* (paragraphs 31 and 33 and the case-law cited).

[34] See, to that effect, judgment in *Turbogás* (paragraphs 35 and 42).

48. On the other, with regard to environmental protection objectives, it is common ground that the production of electricity from lignite carries numerous obligations under environmental law, which provide for the use of energy products to be as clean as possible. It cannot therefore be ruled out that the exemption at issue may affect the implementation of the obligations imposed under environmental law, where they involve the processing of the energy product by using electricity, in order to facilitate the production of greener energy.

49. It is in the light of these general considerations that it is necessary to examine the consumption in question.

50. On the one hand, so far as concerns electricity used for the extraction of lignite in opencast mines, I consider, first of all, that although the operation is carried out with the (ultimate) aim of producing electricity, it cannot, however, with regard also to the meaning of 'production of electricity' in everyday language, be regarded as forming part of the electricity production process, within the meaning of the exemption at issue. The electricity used during the extraction process is intended to produce raw lignite which, in accordance with Article 2(1)(b) of Directive 2003/96, constitutes an 'energy product'. [35] The exemption at issue applies only to the production of electricity, and not to the 'production of energy products'. [36] Furthermore, if the EU legislature had wished for that type of consumption to be covered by the exemption at issue, it would have indicated so more explicitly, by referring, for example, to 'the electricity used for the production of energy products', as it did, in essence, in the context of the optional exemption provided for in the second sentence of Article 21(3) of the directive. That interpretation is also consistent with the strict interpretation that must be given to the scope of the exemption at issue. Moreover, having regard to the objective of avoiding distortions of competition, it would be preferable to distinguish the process of extracting energy products from the production of electricity. Otherwise, there could be unequal treatment between entities operating power plants and which extract lignite for the production of electricity, and entities which procure raw lignite from third parties for the purpose of producing electricity, on account of different tax burdens. [37]

51. Based on that reasoning, the production of raw lignite should end at the stage when it is stored in the opencast mine bunker. Consequently, any consumption of electricity prior to that phase relating to the operation of water pumps used to lower the groundwater level, for the operation of heavy machinery such as bucket-wheel excavators, which mine raw lignite and overburden, and spreaders, which backfill the opencast mine with overburden in another part of the opencast mine, and for lighting the opencast mine, should not benefit from the exemption at issue.

52. That conclusion cannot, in my view, be called into question in the light of the factual considerations put forward by RWE Power to demonstrate the production unit formed by lignite-fired power plants and opencast mines which cannot be broken down into separate operations. While it is likely that a lignite-fired power plant can be operated only where the lignite is ready to be used as a source of energy, in so far as lignite cannot be transported over large distances and the lignite required for burning cannot be purchased on the market, [38] that

[35] See Article 2(1)(b) of Directive 2003/96, which refers to NACE code 2702 corresponding, in particular, to 'lignite, whether or not agglomerated, excluding jet', and the Explanatory Notes to the Combined Nomenclature of the European Union (OJ 2015 C 76, p. 1), on heading 2702.

[36] The word 'production' may also include, where appropriate, 'extraction' (see, to that effect, Article 21(2) of Directive 2003/96). See, in the same vein, recital 25 of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243).

[37] See, to that effect, judgment in *Turbogás* (paragraph 42).

[38] That inseparable link between the extraction and the production of electricity is apparent from the lack of a German or international market for the supply of lignite.

consideration is not sufficient as a basis on which the extraction of lignite can be treated as an inseparable part of the process of energy conversion from lignite to electricity. Although such claims could make the case for enlarging the scope of the exemption at issue with regard, specifically, to the production of energy from lignite, it cannot be justified under the wording of Directive 2003/96 which is of a more general nature, and which does not take into account the specific features of the energy market using lignite as the energy source.

53. On the other, so far as concerns the electricity used in the further treatment of lignite in power stations, I take the view that since lignite, in its raw form, is classified as an 'energy product', the electricity consumed within the framework of any processes carried out in the same system or, at the very least, in ancillary and auxiliary systems, for the purpose of energy conversion or for the further treatment of lignite in power stations, should be exempted from the electricity tax, in so far as such processes do not contribute to the production of the 'energy product', but directly to the production of electricity.[39]

54. However, it is for the referring court to verify whether those processes are actually necessary and indispensable according to the type of lignite-fired power station.[40] In that regard, RWE Power operated three types of power plant, the boilers of which burned different types of lignite, namely 'grate-fired boilers', 'fluidised-bed-fired boilers', and 'mill-fired boilers, which were operated with pulverised lignite'. It appears to be common ground that, with the exception of the first type (grate-fired boilers), which is obsolete, further treatment of the lignite is required under the rules and requirements laid down by industrial and environmental law, both for fluidised-bed-fired boilers and mill-fired boilers. It is for the referring court to verify whether the aforementioned processes actually correspond to the regulatory requirements and to the boilers in question. In this respect, possible practical difficulties resulting from the need to identify the portion of electricity used for lignite processing as compared with that used for other purposes cannot in any circumstances relieve the Member States of their unconditional obligation to exempt the energy used to produce the electricity, in accordance with the exemption at issue.[41]

55. In the light of the foregoing, the exemption at issue could apply to processes such as crushing, removal of foreign bodies and grinding, where such processes are essential for, and exclusively aimed at, using the lignite in the specific boilers of the power stations in order to generate electricity.

56. In the last place, for the sake of completeness, I consider that that interpretation cannot be called into question by the provisions of the second sentence of Article 21(3) of Directive 2003/96, in the light of which the referring court asks the Court to interpret the exemption at issue.

57. By way of reminder, under the first sentence of Article 21(3) of Directive 2003/96, the consumption of energy products within the curtilage of an establishment producing energy products is not to be considered as a chargeable event giving rise to taxation of energy products, if the consumption consists of energy products produced within the curtilage of the establishment. The second sentence of that provision – to which the referring court specifically refers – provides, in particular, that Member States *may* also consider the consumption of

[39] See, to that effect, judgment in *Petrotel-Lukoil* (paragraph 34).

[40] See, by analogy, judgment in *Vakarų Baltijos laivų statykla* (paragraphs 35 and 36).

[41] See, by analogy, judgment in *Cristal Union* (paragraph 45).

electricity not produced within the curtilage of an establishment producing energy products and the consumption of electricity within the curtilage of an establishment producing fuels to be used for generation of electricity as not giving rise to a chargeable event.

58. On the one hand, it should be borne in mind at the outset that that provision confers a possibility on the Member States. It thus amounts to an optional exception to the chargeability of tax, but the German legislature has not made use of that option. Accordingly, an optional regime cannot constitute a determining factor in defining the scope of compulsory exemptions, such as that of the exemption at issue. To the extent that the exemption at issue imposes on Member States an unconditional obligation to exempt energy products used for electricity generation, an optional regime, such as that provided for in the second sentence of Article 21(3) of Directive 2003/96, can only be residual in nature. [42]

59. On the other hand, assuming that the various activities of RWE Power are carried out ‘within the curtilage of an establishment’, within the meaning of Article 21 of Directive 2003/96, which it is for the referring court to determine, I take the view that the electricity consumed in opencast mines in order to extract lignite may fall within the scope of the first part of the second sentence of Article 21(3) of that directive. Accordingly, Member States may consider ‘the consumption of electricity not produced within the curtilage of an establishment producing energy products’ as not being a chargeable event. That interpretation is consistent with the approach advocated in relation to the extraction of lignite, in so far as the optional exemption provided for in the second sentence of Article 21(3) of Directive 2003/96 would have no meaning or logical reason for existence if that same exemption was already compulsory under the first sentence of Article 14(1)(a) of that directive.

60. I therefore propose that the answer to the first question is that the exemption at issue, relating to ‘electricity used to produce electricity’, must be interpreted as meaning that that exemption covers only electricity which is used in operations that are essential for and contribute directly to the production of electricity, thus excluding the extraction of an energy product but including operations carried out in the same establishment or, at least, in ancillary and auxiliary installations, which are aimed exclusively at the further processing and treatment of the energy product for power plant supply.

### *C. The second question*

61. By its second question, the referring court asks, in essence, whether the first sentence of Article 14(1)(a) of Directive 2003/96 can, having regard to the third sentence of Article 21(3) of that directive, be interpreted as meaning that the exemption from taxation for ‘electricity used to maintain the ability to produce electricity’ also covers electricity to operate bunker installations and means of transport necessary for the permanent operation of those power stations.

62. According to the Hauptzollamt, that second question should also be answered in the negative, in so far as the use of electricity to operate bunker installations and means of transport cannot be exempted from tax since the exemption for electricity used ‘to maintain the ability to produce electricity’ is merely an extension of the exemption for ‘electricity used to produce electricity’ and, as such, concerns only processes for which the use of electricity would also be exempted as electricity used to produce electricity.

[42] See, by analogy, judgment in *Cristal Union* (paragraphs 41 to 43).

63. By contrast, RWE Power considers that this question should be answered in the positive, in particular because the reference to '[maintaining] the ability to produce electricity' indicates that the exemption for electricity goes beyond the process of energy conversion and includes electricity used in upstream and downstream activities.

64. As for the Commission, it considers that the storage and transport of lignite are not part of the energy production process, in the strict sense of the term, and must therefore be excluded from the exemption at issue.

65. For the following reasons, I advocate a nuanced approach according to which it would be possible to concede that electricity used to transport lignite to power stations and to store it there could benefit from the exemption at issue, if it were demonstrated that such operations are directly linked to and essential for maintaining the production capacity of the power station in question.

66. First of all, I note that the distinction drawn between the two scenarios covered by the exemption at issue – electricity used 'to produce electricity', on the one hand, and electricity used 'to maintain the ability to produce electricity', on the other – suggests that activities linked to *maintaining the ability* to produce electricity are not the same as activities relating to the *production* of electricity. This implies that, contrary to what the Hauptzollamt essentially maintains, electricity exempted under the second scenario does not (necessarily) have to be part of the process of energy conversion, so that electricity used upstream or downstream of the process of energy conversion may also be exempted from tax if it is used to maintain the ability to produce electricity.

67. Next, that interpretation is supported by the origin of Directive 2003/96. In its initial proposal, the Commission simply provided for an exemption from tax for 'energy products used to produce electricity and heat generated during its production', [43] which corresponds, in essence, to the first scenario covered by the exemption at issue. However, the second scenario covered by the exemption at issue was included in the text of that directive by the Council only at a later stage in the adoption process. For that addition to make sense and not to be considered redundant, it must be inferred that the authors of that directive necessarily wanted to create a new ground for exemption going beyond that set out in the Commission's proposal.

68. Furthermore, it should be reiterated that, as for the first scenario, the exemption provided for by the second scenario must be interpreted strictly. To that effect, it is only if it is indeed established that there is a direct link between maintaining the production of electricity and the electricity consumed that the application of that exemption should be permitted.

69. In the present case, it is apparent from the order for reference that the operation of RWE Power's power plants was designed for uninterrupted electricity provision. It is common ground that, in order to ensure uninterrupted electricity production, RWE Power operated bunkers for the lignite in three different sizes, each serving a different function, from which the lignite was gradually fed to the boilers in the power stations. More specifically, in each opencast mine, the lignite was first stored in an opencast mining bunker with a capacity allowing for up to six days' operation of the power station, from where it was transported to the power station bunkers, which had a capacity allowing operation for one or two days. On the basis of that factual description, in respect of which only the referring court is competent, it would appear that both

[43] See Article 13(1)(b) of the Commission's proposal (OJ 1997 C 139, p. 14).

the bunker and transport systems were designed to ensure the uninterrupted production of electricity and the maintenance of that ability. I consider that such operations should certainly be covered by the exemption at issue, otherwise the very concept of 'electricity used to maintain the ability to produce electricity' would be negated.

70. That conclusion cannot, in my view, be called into question by the provisions of the third sentence of Article 21(3) of Directive 2003/96, which provides that where the consumption of energy products is for purposes not related to the production of energy products and in particular for the propulsion of vehicles, it is considered a chargeable event giving rise to taxation. First of all, that provision concerns the 'consumption of energy products' for purposes not related to the production of energy products, such as, for example, the transport of personnel to the working areas on RWE Power's premises. In the present case, all the consumption at issue concerns the use of electricity and, with the exception of electricity used for the purpose of extracting lignite, is not used to produce energy products, but electrical energy. In any event, it is apparent from its place in the scheme of Directive 2003/96 that the third sentence of that provision is intended to restrict only the exemptions set out in the first and second sentences of that provision.[44]

71. Having regard to the foregoing considerations, I propose that the answer to the second question referred for a preliminary ruling is that the exemption at issue, relating to 'electricity used to maintain the ability to produce electricity', must be interpreted as meaning that that exemption covers only electricity which is used in operations that are essential for and contribute directly to the process of maintaining the ability to produce electricity, which may include operations by which energy products are stored or transported to power plants.

## V. Conclusion

72. In the light of the foregoing, I propose that the Court's answer to the questions referred for a preliminary ruling by the Finanzgericht Düsseldorf (Finance Court, Düsseldorf, Germany) should be as follows:

(1) The first sentence of Article 14(1)(a) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, relating to 'electricity used to produce electricity',

must be interpreted as meaning that that exemption covers only electricity which is used in operations that are essential for and contribute directly to the production of electricity, thus excluding the extraction of an energy product but including operations carried out in the same establishment or, at least, in ancillary and auxiliary installations, which are aimed exclusively at the further processing and treatment of the energy product for power plant supply.

(2) The first sentence of Article 14(1)(a) of Directive 2003/96, relating to 'electricity used to maintain the ability to produce electricity',

[44] See, to that effect, Opinion of Advocate General Szpunar in *Petrotel-Lukoil* (C-68/18, EU:C:2019:422, point 27).

must be interpreted as meaning that that exemption covers only electricity which is used in operations that are essential for and contribute directly to the process of maintaining the ability to produce electricity, which may include operations by which energy products are stored or transported to power plants.