Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 21 April 2016[1]

Case C-189/15

Istituto di Ricovero e Cura a Carattere Scientifico (IRCCS) — Fondazione Santa Lucia
v
Cassa conguaglio per il settore elettrico,
Ministero dello Sviluppo economico,
Ministero dell'Economia e delle Finanze,
Autorità per l'energia elettrica e il gas
(Request for a preliminary ruling

from the Consiglio di Stato (Council of State, Italian Republic))

(Taxation — Tax on energy products and electricity — Definition of 'tax reductions' — Energy-intensive businesses in the manufacturing sector — Mechanism for reduction of general electricity network costs)

In Italy, as in other Member States, electricity consumers, whether natural or legal

1. persons, pay so-called 'general electricity network costs' ('GECs') based on their individual consumption. In regulating those general costs or charges, Italian law allows certain industries, characterised by their intensive energy consumption, to reduce their payments in respect of those costs.

2. The Consiglio di Stato (Italian Council of State) is seised of a dispute in which a body which does not fall within the concept of a business belonging to the energy-intensive industrial sectors (specifically, it provides health services) seeks to benefit from the same treatment as such a business, in other words, to have its contribution to GECs reduced. Following the dismissal of its administrative complaint and of legal proceedings at first instance, the Consiglio di Stato (Council of State) must give final judgment on the case, for which purpose it has requested a preliminary ruling from the Court on the interpretation of Directive 2003/96/EC,[2] and in particular Articles 11 and 17 thereof.

3. The reference for a preliminary ruling also requires the Court to analyse Article 1(2) of Directive 2008/118/EC,[3] which permits harmonised excise duty on electricity to coexist with other indirect taxes under certain conditions.

1 — Original language: Spanish.

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).

3 — Council Directive of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC (OJ 2009 L 9, p. 12).

4. In the area of energy taxation, where there is limited case-law of the Court, this case raises a twofold legal problem which has not yet been resolved: a) whether it is possible to categorise as an indirect tax for the purposes of Directive 2008/118 the mechanism according to which GECs are apportioned between Italian consumers, and b) the question of the nature of the advantage granted by the Italian State to certain energy-intensive businesses whose final bill is reduced in respect of such costs.

5. The main difficulty which this case raises, and on which this Opinion will focus, is whether the liability to pay GECs constitutes a tax subject to Directives 2008/118 and 2003/96 or whether, on the other hand, it is a mechanism for charging consumers, within the electricity tariff, a compulsory financial contribution of a non-fiscal nature.

I – Legal framework

A – *EU law*

6. Directive 2003/96 does not harmonise excise duties on energy products and electricity but rather sets minimum levels of taxation with which Member States must comply by taking into account the total charge levied in respect of all indirect taxes which they have chosen to apply (with the exception of VAT). For its part, Directive 2008/118 provides for the partial harmonisation of various elements of harmonised excise duties, including their application to energy products and electricity.

7. According to Article 4 of Directive 2003/96:

‘1. The levels of taxation which Member States shall apply to the energy products and electricity listed in Article 2 may not be less than the minimum levels of taxation prescribed by this Directive.

2. For the purpose of this Directive “level of taxation” is the total charge levied in respect of all indirect taxes (except VAT) calculated directly or indirectly on the quantity of energy products and electricity at the time of release for consumption.’

8. Directive 2003/96 permits Member States to differentiate between the taxation of energy products and electricity, depending on whether they are used for business or by a private consumer. Article 5 stipulates that ‘provided that they respect the minimum levels of taxation prescribed by this Directive and that they are compatible with Community law, differentiated rates of taxation may be applied by Member States, under fiscal control, in the following cases:

…

— between business and non-business use, for energy products and electricity referred to in Articles 9 and 10’.

9. Pursuant to Article 11 of Directive 2003/96:

‘1. In this Directive, “business use” shall mean the use by a business entity, identified in accordance with paragraph 2, which independently carries out, in any place, the supply of goods and services, whatever the purpose or results of such economic activities.

The economic activities comprise all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions.

…

4. Member States may limit the scope of the reduced level of taxation for business use.'

10. Article 17 of Directive 2003/96 provides as follows:

'1. Provided the minimum levels of taxation prescribed in this Directive are respected on average for each business, Member States may apply tax reductions on the consumption of energy products used for heating purposes or for the purposes of Article 8(2)(b) and (c) and on electricity in the following cases:

(a) in favour of energy-intensive business

An "energy-intensive business" shall mean a business entity, as referred to in Article 11, where either the purchases of energy products and electricity amount to at least 3.0% of the production value or the national energy tax payable amounts to at least 0.5% of the added value. Within this definition, Member States may apply more restrictive concepts, including sales value, process and sector definitions.

…

2. Notwithstanding Article 4(1), Member States may apply a level of taxation down to zero to energy products and electricity as defined in Article 2, when used by energy-intensive businesses as defined in paragraph 1 of this Article.

…

4. Businesses that benefit from the possibilities referred to in paragraphs 2 and 3 shall enter into the agreements, tradable permit schemes or equivalent arrangements as referred to in paragraph 1(b). The agreements, tradable permit schemes or equivalent arrangements must lead to the achievement of environmental objectives or increased energy efficiency, broadly equivalent to what would have been achieved if the standard Community minimum rates had been observed.'

11. According to Article 1 of Directive 2008/118:

'1. This Directive lays down general arrangements in relation to excise duty which is levied directly or indirectly on the consumption of the following goods (hereinafter "excise goods"):

(a) energy products and electricity covered by Directive 2003/96/EC;

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

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

2. Member States may levy other indirect taxes on excise goods for specific purposes, provided that those taxes comply with the Community tax rules applicable for excise duty or value added tax as far as determination of the tax base, calculation of the tax, chargeability and monitoring of the tax are concerned, but not including the provisions on exemptions.

…'

B – *National law*

12. Italian law includes a number of cascading legal and administrative acts which establish a system of advantages for 'energy-intensive' businesses. Those acts are Legislative Decree No 26 of 2 February 2007 implementing Directive 2003/96 (attuazione della direttiva 2003/96) [4] and Decree-Law No 83 of 22 June 2012 on urgent measures for growth in Italy (misure urgenti per la crescita del Paese; 'the 2012 Decree'). [5] In particular, Article 39 of the 2012 Decree provides:

— in paragraph 1, that 'energy-intensive businesses', referred to in Article 17 of Directive 2003/96, are to be defined by 31 December 2012 in one or more ministerial decrees;

— in paragraph 2, that those businesses are to benefit from a favourable 'system of excise duty rates', which is to ensure continued tax revenue and which must, under no circumstances, entail new or additional costs for the public finances;

— in paragraph 3, that the amounts payable by those businesses to cover 'general electricity network costs' are to be amended in their favour.

13. The Ministerial Decree of 5 April 2013 defining energy-intensive businesses (definizione delle imprese a forte consumo di energia; 'the 2013 Ministerial Decree') [6] implements Article 39 of the 2012 Decree, and, in particular, sets out, in Article 2, a definition of 'energy-intensive businesses' in accordance with Article 17 of Directive 2003/96 and based on conditions and criteria related to minimum levels of consumption and the effect of energy costs on the value of the activities of a business. Article 3 of the 2013 Ministerial Decree provides for the review, after the issue of ministerial guidelines, of general electricity network costs. This review is to be carried out based on 'criteria on a sliding scale according to consumption' of energy. Article 6 stipulates that a national body called the Compensation Fund for the Electricity Sector (Cassa conguaglio per il settore elettrico; 'the Compensation Fund') will publish each year a list of energy-intensive businesses.

14. The Guidelines of the Minister for Economic Development of 24 July 2013 ('the 2013 Ministerial Guidelines') implementing Article 39(3) of the 2012 Decree and Article 3 of the 2013 Ministerial Decree refer the task of redefining the amounts covering 'general electricity network costs' to the Autorità per l'Energia Elettrica, il Gas e il Settore Idrico ('the AEEG') (Electricity, Gas and Water Authority), and in all cases restricts this benefit exclusively to 'energy-intensive' businesses operating in the manufacturing sector.

15. In October 2013, the AEEG issued three decisions restricting access to tax advantages exclusively to 'energy-intensive' businesses operating in the manufacturing sector, thereby excluding businesses which, like the appellant, operate in other sectors. This exclusion was also incorporated in final decisions issued by the Compensation Fund.

II – Facts and procedure before the national court

16. The Istituto di Ricovero e Cura a Carattere Scientifico (IRCCS) — Fondazione Santa Lucia ('Fondazione Santa Lucia') is a body providing health services and performing medical research. The referring court takes the view that it is covered by the concept of a 'business entity' referred to in Article 11(1) of Directive 2003/96.

4 — GURI No 68 of 22 March 2007.

5 — GURI No 147 of 26 June 2012.

6 — GURI No 91 of 18 April 2013.

17. In 2014 Fondazione Santa Lucia brought an action before the Tribunale amministrativo regionale (TAR) (Regional Administrative Court), Lombardy, seeking the annulment of the acts of the Italian authorities which had denied it access to the national system of tax advantages for 'energy-intensive businesses',[7] on the ground that it does not operate in the manufacturing sector.

18. In judgment No 1600/2014, the Lombardy TAR dismissed the action as being out of time, without ruling on the substance.

19. Fondazione Santa Lucia brought an appeal before the Consiglio di Stato (Council of State) against the judgment at first instance, seeking to overturn the part of the judgment in which the action was declared inadmissible and restating the other substantive arguments relied on before the TAR. The appellant claims that the system of tax concessions established by the Italian authorities in favour of energy-intensive businesses is contrary to Directive 2003/96, in particular Articles 11 and 17 thereof.

20. The Consiglio di Stato (Council of State) takes the view that the action at first instance was admissible and that the judgment of the Lombardy TAR must be amended in that respect. As to the substance, the Consiglio di Stato (Council of State) has no doubts regarding the application of the provisions of the TFEU on State aid (Articles 107 TFEU and 108 TFEU) but does have questions concerning the compatibility with Directive 2003/96 of the favourable arrangements for contributions by energy-intensive businesses to GECs.

21. Against that background, the Consiglio di Stato (Council of State) has referred the following two questions to the Court for a preliminary ruling:

'(1) Do Italian rules (such as those at issue in the main proceedings) which, first, include a definition of "energy-intensive businesses" in line with the Directive and, secondly, grant companies of this type payment incentives covering general electricity network costs (and not incentives relating to taxation of energy products and electricity as such) fall within the scope of Directive 2003/96?

If so:

(2) Does EU law, and in particular Articles 11 and 17 of Directive 2003/96, preclude a regulatory and administrative system (such as that in force in Italian law and described in the present order) which, first, opts to introduce a system of concessions on the consumption of energy products (electricity) by "energy-intensive businesses" within the meaning of the abovementioned Article 17 and, secondly, restricts the possibility of benefiting from those concessions to "energy-intensive" businesses operating in the manufacturing sector only, thereby excluding businesses operating in other production sectors?'

22. Written observations were lodged by Italy, the Commission and Fondazione Santa Lucia, following which the Court decided to give a ruling without holding a hearing.

III – Analysis of the questions

A – *Preliminary remarks*

23. Before replying to the two questions referred by the Consiglio di Stato (Council of State), it is necessary to point out that neither refers to the compatibility of the Italian rules with the provisions of EU law on State aid. Moreover, as I have just mentioned, the referring court stresses that it has no doubts on that point, which it has excluded from the reference for a preliminary ruling.

7 — Footnote not relevant to English translation.

24. However, in its written observations, the Commission, after stating that proceedings are still pending concerning the compatibility of those rules with the EU law on State aid, goes on to argue at length about their compatibility. Therefore, the Commission believes that it is expedient to remind the referring court of its obligations in the event that Italy has failed to comply fully with its duty to notify the relevant provisions to the Commission.

25. In view of the fact that the Consiglio di Stato (Council of State) does not ask the Court about the application of the EU provisions on State aid, despite referring to those provisions in the order for reference (specifically to rule out that it has any doubts in that regard), I believe that it is not appropriate to accede to the Commission's suggestion. In my opinion, the Court ought to confine itself to replying solely to the two questions as formulated.

B – *The first question: application of Directive 2003/96 to the tax concessions for energy-intensive businesses, laid down in conjunction with the mechanism for contribution to the payment of GECs*

1. Summary of the observations lodged

26. The Consiglio di Stato (Council of State) asks whether a system of tax concessions for 'energy-intensive' businesses, of the kind governed by the Italian provisions, is covered by the term 'tax reductions' used by Article 17(1) of Directive 2003/96.

27. The parties which have presented written observations adopt different positions on the subject. Fondazione Santa Lucia submits that the concessions for energy-intensive businesses should be classified as a tax reduction under Article 17(1) of Directive 2003/96 because their effects are equivalent to a tax advantage.

28. The Commission acknowledges the difficulty of differentiating between direct and indirect taxes in EU law but submits that the system of concessions for energy-intensive businesses consists of a rebate on an indirect tax (again, according to EU law) the cost of which is basically borne by end consumers of electricity.

29. In order to ascertain whether those advantages can be treated as tax reductions within the meaning of Article 17 of Directive 2003/96, the Commission relies on Article 1 of Directive 2008/118, paragraph 1 of which refers to harmonised excise duty on certain products, including electricity. Article 1(2) also provides that Member States may create other indirect taxes (on excise goods) for specific purposes. The Commission submits that the advantages which Italy grants energy-intensive businesses fit into that category (non-harmonised indirect taxes) and the question of their lawfulness should be analysed in the light of the conditions which Directive 2008/118 stipulates for their creation.

30. However, the Commission questions whether a contribution to some of the components of GECs is an indirect tax and submits that, in some cases, the advantages are reductions of the excise duty on electricity. The Commission contends that it is for the national court to determine the components of GECs to which Directive 2003/96 and Article 17 thereof are applicable and to differentiate those components from other components the payment of which may be classified as an indirect tax for specific purposes, which will be covered by Directive 2008/118, but not by Directive 2003/96 or Article 17 thereof.

31. The Italian Government puts forward the opposite approach to that of the Commission. The Italian Government contends that the advantages granted to energy-intensive businesses are tariff measures which are outside the scope of Directive 2003/96 and, therefore, do not constitute a 'tax reduction' within the meaning of Article 17. A tax reduction is an advantage that affects the level of taxation, which leads to the lowering of the tax burden for the beneficiary, and that is not what occurs under the Italian legislation.

32. According to the Italian Government, the apportionment [8] of GECs between users of the electricity network is the mechanism used by Italy, in accordance with Directive 92/96/EC, [9] to finance the so-called stranded costs which were incurred when the electricity sector was liberalised in many Member States of the Union. The Italian legislation provides that those costs must be paid by electricity supply undertakings, which pass them on to end consumers.

33. Supply undertakings transfer the money collected to a public body, the Compensation Fund, which earmarks it for each of the general interest objectives financed by this system. [10] In accordance with its national law, the Italian Government contends that the obligation to pay GECs constitutes a financial contribution that is compulsory, but is not of a fiscal nature. The crucial reason why it should not be classified as a tax is that the sums collected do not pass into the State budget in order to finance public needs but are allocated by the Compensation Fund, in a lawfully quantified manner, to each of the components of the system. The aim is not to meet a public need but to offset a cost.

34. Although the Italian Government accepts that that interpretation cannot be extrapolated automatically, it submits that EU law allows it because the Commission accepted as permitted State aid the system of compensation for general costs established in Italy. [11] Moreover, the distinction between indirect taxes and compulsory financial contributions, like general costs, appears at points 167 and 181 of the Commission Guidelines on State aid for environmental protection and energy. [12]

35. The Italian Government also contends that the mechanism for paying GECs does not come within the concept of excise duty under Directive 2008/118. The Italian Government submits that it follows from that directive that excise duty is an indirect tax levied on consumption of a product, due to the fact of its production, and it is payable by whoever markets the product at the time when it is made available to consumers. Excise duty must always have a general purpose and the revenue raised cannot be earmarked for preselected economic operators.

2. Assessment

36. Can the apportionment of GECs among electricity consumers be regarded as a tax for the purposes of applying Directives 2003/96 and 2008/118? If the reply is in the affirmative, the answer to the first question will be that the advantages for energy-intensive businesses constitute a tax reduction (it will then remain to be seen whether that reduction is compatible with Article 17 of Directive 2003/96). If,

8 — In the order for reference (p. 17/24), the Consiglio di Stato (Council of State) points out that so-called *general electricity network costs* are costs, identified by law in support of general interests, which are imposed *pro quota* on users, including businesses, through their inclusion in (electricity) bills.

9 — Directive of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (OJ 1997 L 27, p. 20).

10 — The list of objectives is as follows: decommissioning of nuclear power plants and closure of the nuclear fuel cycle; generation of energy from renewable sources; financing of special tariff arrangements; financing of research and development activities; electricity vouchers for disadvantaged customers; concessions for energy-intensive businesses; compensation for small electricity undertakings; measures for promoting energy efficiency; compensation for local communities which house nuclear power plants; compensation for imbalances in transport and distribution costs; and measures for restoring the quality of the service.

11 — Commission Decision C(2004) 4333/8 of 1 January 2004.

12 — OJ 2014 C 200, p. 1.

on the other hand, the reply is negative, the non-fiscal nature of the contribution will mean that the specific advantages granted to certain undertakings will not constitute a tax reduction, from which it will follow that they do not fall within the scope of the directives governing the indirect taxation of electricity.

37. In order to resolve this problem, the legal structure of those taxes under Directives 2003/96 and 2008/118 must first of all be clarified.[13] The starting point is Article 1(1) of Directive 2008/118, providing for the levy of excise duty on energy products and electricity, which is partially harmonised by Directive 2003/96. The tax in question is one which, in fact, is not in issue in this case because the tax advantages for energy-intensive businesses, which the Italian State has established, when legislating on the passing on of GECs, do not concern harmonised excise duty.

38. Article 39 of the 2012 Decree authorised two types of measure for energy-intensive businesses: a) a favourable 'system of excise duty rates' (paragraph 2) and b) the amendment, also in their favour, of the amounts payable by those businesses for general electricity network costs (paragraph 3). The 2013 Ministerial Decree confined itself to implementing the latter measure but did not amend the excise duty rates for electricity in favour of energy-intensive businesses or provide for any other type of tax reductions applicable to that duty.

39. By way of exception to the general rule that only three types of harmonised excise duty are permitted, Article 1(2) of Directive 2008/118 grants the Member States the right to create or maintain 'indirect taxes' (that is, additional indirect taxes which are therefore not harmonised) on electricity, provided that they satisfy two conditions:

— they must have specific purposes;

— they must comply with the EU tax rules applicable to excise duty or VAT as far as determination of the tax base, calculation of the tax, chargeability and monitoring of the tax are concerned. That compatibility requirement does not include the provisions on exemptions.[14]

40. Those indirect taxes for specific purposes (or 'indirect taxation for a specific purpose': 'ITSP'), together with harmonised excise duty, are relevant for the purposes of the application of Directive 2003/86, since, according to Article 4(1) thereof, the levels of taxation which Member States apply to electricity may not be less than the minimum levels prescribed by that directive, while Article 4(2) provides that the 'level of taxation' is the total charge levied in respect of all indirect taxes (except VAT) calculated directly or indirectly on electricity at the time of release for consumption.

41. That interpretation is also borne out by recital 10 in the preamble to Directive 2003/96, according to which '… Member States should be permitted to comply with the Community minimum taxation levels by taking into account the total charge levied in respect of all indirect taxes which they have chosen to apply (excluding VAT)'. It may be deduced from this that the tax reductions referred to in Article 17 of Directive 2003/96 are permitted on both the harmonised excise duty on electricity and on non-harmonised ITSP which Member States may levy on electricity.

13 — In the field of excise duty, specific directives which harmonise the tax bases and the minimum rates of tax for goods subject to excise duty (as is the case of Directive 2003/96 in relation to hydrocarbons and electricity) are combined with a general directive which lays down the general arrangements for the production, holding, movement and monitoring of products subject to excise duty (Directive 2008/118). See Maitrot de la Motte, A., *Droit fiscal de l'Union européenne*, Bruylant, Brussels, 2012, p. 386 et seq.; Becker, F.; Cazorla, L.M.; Martínez-Simancas, J., *Los tributos del sector eléctrico*, Aranzadi, Pamplona, 2013; Rozas Valdés, J.A., 'El modelo español de sistema financiero eléctrico a la luz del derecho comunitario', *Quincena fiscal*, 2015, No 3, pp. 55 to 84.

14 — That provision is unclear, according to specialised literature. See, for example, Berlin, D., *Politique fiscale, vol. I, Commentaire J. Mégret*, Éditions de l'Université de Bruxelles, 2012, p. 561.

42. Therefore, the dispute turns on whether the mechanism for the apportionment of GECs is, in general, fiscal in nature, and, if it is, whether it is possible for the payment obligation imposed on users of the electricity network to come within the category of ITSP for the purposes of Article 1(2) of Directive 2008/118.

43. From the first (general) point of view, Italian law interprets the obligation to pay general charges of this kind as a financial contribution of a non-fiscal nature,[15] and the case-law of the Italian courts precludes its treatment as a tax.

44. However, when the Court is required to determine whether a tax, duty, charge or levy exists under EU law, it must have regard to its objective characteristics, irrespective of its classification under national law.[16] Accordingly, the classification as ITSP, for the purposes of Article 1(2) of Directive 2008/118, of a system for the apportionment of GECs between electricity users must be made in the light of EU law.

45. There is no definition of 'indirect tax' in EU legislation and nor is one provided by the case-law of the Court, although some judgments attribute certain distinctive features to indirect taxes: they are not levied on the income or wealth of natural or legal persons (which is the sphere of direct taxes), but on the consumption of goods or the provision of a service,[17] and they are usually included in invoices to consumers.[18]

46. The Court referred to Article 1(2) of Directive 2008/118 in the judgment in *Kernkraftwerke Lippe-Ems*,[19] in which it observed that that provision, which seeks to take due account of the Member States' different fiscal traditions in this regard and the frequent recourse to indirect taxation for the implementation of non-budgetary policies, allows Member States to introduce, in addition to minimum excise duty, other indirect taxes that pursue a specific objective.

47. Article 1(2) of Directive 2008/118 lays down an exception to the general rule that only harmonised excise duty and VAT are levied on the consumption of electricity, which means that it must be interpreted strictly. The discretion of the Member States is, moreover, limited by the fact that Article 1(2) of Directive 2008/118 stipulates the two conditions which ITSP must satisfy cumulatively (it must have a specific purpose and must comply with the basic EU provisions applicable to excise duty or VAT).[20]

15 — That is why Article 39(3) of the 2012 Decree and the 2013 Ministerial Guidelines refer to the advantages for energy-intensive businesses in respect of GECs separately from the tax reductions which the Italian State may grant those businesses, which were provided for in Article 39(2) of the 2012 Decree but were not implemented or applied.

16 — Judgment in *Test Claimants in the FII Group Litigation*, C-446/04, EU:C:2006:774, paragraph 107 and the case-law cited therein. The Court has also observed that the provisions of Directive 2003/96 concerning exemptions must receive an autonomous interpretation, based on their wording and on the objectives pursued by that directive (judgments in *Systeme Helmholz*, C-79/10, EU:C:2011:797, paragraph 19, and *Jan de Nul*, C-391/05, EU:C:2007:126, paragraphs 20 to 23).

17 — Judgment in *Kernkraftwerke Lippe-Ems*, C-5/14, EU:C:2015:354, paragraph 56.

18 — The contribution applied in respect of electricity by the Brussels-Capital Region was classified as an indirect tax because it was conceived and implemented with a view to being passed on to the end consumer and the supply undertakings included it in their invoices to consumers, which, in that case, were EU institutions (judgment in *Commission* v *Belgium*, C 163/14, EU:C:2016:4, paragraphs 39 and 48).

19 — C-5/14, EU:C:2015:354, paragraphs 58 and 59; and, by analogy, judgment in *Commission* v *France*, C-434/97, EU:C:2000:98, paragraphs 18 and 19.

20 — Those basic provisions concern determination of the tax base, calculation of the tax, chargeability and monitoring of the tax (they do not include provisions on exemptions).

48. In relation to the 'specific purpose' of ITSP, the Court has pointed out that ITSP must have a purpose other than a purely budgetary one.[21] The judgment in *Transportes Jordi Besora*[22] held that the reinforcement of the autonomy of a regional or local authority through the grant of a power to generate tax income constitutes a purely budgetary objective that cannot, on its own, constitute a specific purpose.[23] In order for that tax to have fitted into the category of ITSP, the revenue from it would have had to be used mandatorily to reduce the social and environmental costs specifically associated with the consumption of the hydrocarbons on which that tax was levied, so that there was a direct connection between the use of the revenue and the purpose of that tax.[24]

49. If it is possible for the apportionment of GECs between Italian consumers to come within the category of ITSP, the requirement of specificity will be satisfied because, according to the order for reference and the observations of the Italian Government, the sums collected by electricity supply undertakings are transferred to the Compensation Fund which, in turn, distributes those sums to each of the general interest objectives laid down in the Italian legislation.[25] In any event, it will be for the national court to analyse the components of the mechanism for GECs and to verify whether these are ring-fenced for the purpose laid down in law and do not pass into the State budget as public revenue, that is, without being earmarked for attainment of the objective which gave rise to the charge.

50. However, I believe that there are sound arguments for concluding that the Italian mechanism for financing GECs does not satisfy the second condition which would allow it to be covered by Article 1(2) of Directive 2008/118. In accordance with that condition, the mechanism must involve an indirect tax with features similar[26] to either excise duty harmonised at EU level or VAT.[27]

51. Before setting out those arguments, it would perhaps be appropriate to refer to occasions on which the Court has analysed arrangements similar to the Italian system but from the perspective of their compatibility with the provisions on State aid, which meant that the Court did not have to rule directly on whether or not those arrangements for passing on GECs to consumers were fiscal in nature.

52. In the judgment in *Association Vent De Colère! and Others*,[28] the Court held that a mechanism for offsetting the additional costs, to be financed by all end consumers of electricity on national territory, in accordance with which the sums collected in that way are apportioned and distributed to beneficiary undertakings pursuant to the legislation of the Member State by a public body, must be regarded as an intervention by the State or through State resources for the purposes of Article 107(1) TFEU.

21 — See judgments in *Commission* v *France*, C-434/97, EU:C:2000:98) paragraph 19; *EKW and Wein & Co.*, C-437/97, EU:C:2000:110, paragraph 31; and *Hermann*, C-491/03, EU:C:2005:157, paragraph 16.

22 — C-82/12, EU:C:2014:108, paragraphs 20 and 21. See also the judgments in *EKW and Wein & Co.*, C-437/97, EU:C:2000:110, paragraph 30, and *Commission* v *France*, C-434/97, EU:C:2000:98, paragraph 26. In the first case cited, the dispute concerned the autonomous community tranche of the tax rate for the Spanish tax on retail sales of certain hydrocarbons, which is added to the State tranche and earmarked for the financing of certain powers devolved to the autonomous communities.

23 — Judgments in *EKW and Wein & Co.*, C-437/97, EU:C:2000:110, paragraph 33, and *Transportes Jordi Besora*, C-82/12, EU:C:2014:108, paragraph 25.

24 — *Transportes Jordi Besora*, C-82/12, EU:C:2014:108, paragraphs 30 to 32, and the Opinion of Advocate General Wahl in the same case, C-82/12, EU:C:2013:694, points 28 to 30.

25 — According to the Italian Government, only a portion of the A2 component of GECs is included in the general State budget: the portion earmarked for the cost of decommissioning nuclear power plants.

26 — Similarity, not identity, is sufficient, since the case-law of the Court requires only conformity with the general tax system provided for in EU law. In that connection, see judgment in *EKW and Wein & Co.*, C-437/97, EU:C:2000:110, paragraph 47.

27 — That condition means that it is necessary to demonstrate that there are similarities with excise duty or VAT, but not with both, since these are indirect taxes but with very different features. As the Court stated in its judgment in *EKW and Wein & Co.*, C-437/97, EU:C:2000:110, at paragraph 44, '*VAT and excise duty have a number of incompatible characteristics. VAT is proportional to the price of the goods on which it is charged, whereas excise duty is primarily calculated on the volume of the product. Further, VAT is levied at each stage of the production and distribution process (input tax paid on the occasion of the previous transaction being in principle deductible), whereas excise duty becomes payable when the products subject to it are made available for consumption (without any similar deduction mechanism coming into operation). Finally, VAT is characterised by its general nature, whereas excise duty is imposed only on specified products*'.

28 — C-262/12, EU:C:2013:851, paragraphs 28 and 37.

53. On the same lines, in the order in *Elcogás*,[29] the Court observed that 'it is immaterial in that regard that the sums earmarked for offsetting the additional costs do not come from a specific supplement on the electricity price and that the financing mechanism concerned does not, strictly speaking, fall into the category of a tax, tax levy or parafiscal levy under national law'.[30]

54. The Court has also analysed the compatibility of other tariff mechanisms, in force in the electricity sector, with the EU provisions on State aid. On occasions, the Court has described those mechanisms as parafiscal levies and has applied to them the case-law on the prohibition of charges having equivalent effect and discriminatory internal taxation. In *Alcoa Transformazioni* v *Commission*,[31] the Court categorised as a parafiscal levy, in general and vague terms, the additional sum invoiced to Italian consumers for the purpose of granting a preferential electricity tariff to energy-intensive industries in Italy, in particular aluminium plants owned by Alcoa. The revenue from that parafiscal levy was transferred to the Compensation Fund which reimbursed directly to Alcoa the difference between the amount of the tariff paid to ENEL and the preferential tariff.

55. In *Régis Network*,[32] the Court annulled a decision of the Commission treating as compatible with EU law the State aid granted by France to local radio stations, financed by the application of a parafiscal charge for the benefit of funds to support radio broadcasting, which was framed as a genuine tax by the French legislation. Moreover, the charge was levied, assessed and collected for that fund by the Direction générale des impôts (Directorate-General for Taxation) in accordance with the rules applicable to VAT, and the same guarantees and penalties applied.

56. The broad terms in which the Court has defined the concepts of charges having equivalent effect and discriminatory internal taxation has enabled it to apply those concepts to any financial contribution imposed unilaterally by the Member States, irrespective of its fiscal nature.[33] I believe, therefore, that it would be expedient on the occasion of this reference for a preliminary ruling for the Court to adopt a clearer position (and, if possible, to take a stricter line, also from the point of view of the doctrine of tax law) when it categorises parafiscal charges so that it does not simply place authentic taxes on the same footing as public financial contributions of a non-fiscal nature.

57. While that clarification is not strictly necessary for the application of the rules on State aid in the case of the prohibition of charges having equivalent effect and discriminatory internal taxation, I believe that it is necessary when interpreting the harmonisation directives on taxation, as occurs in this case.

29 — *Elcogás*, C-275/13, EU:C:2014:2314, paragraph 31 [translator's note: free translation as no English version available]. The Spanish Tribunal Supremo (Supreme Court) had expressed doubts in that case concerning the State origin of the funds received by Elcogás because the financing mechanism did not strictly belong to the categories of tax, tax levy or parafiscal levy, but to that of an additional cost of the electricity network.

30 — The Spanish arrangements in *Elcogás* were very similar to the Italian system of GECs, since the final price charged to electricity consumers and users of the transport and distribution networks included a component which, together with the electricity price, was intended to remunerate recipient undertakings in the electricity sector for the electricity supplied and use of networks and also for the other 'permanent costs of the network', which included the contribution to Elcogás. Furthermore, the 'common fund' financed by electricity consumers and network users was distributed subsequently through a payment settlement mechanism managed by a State-controlled organisation, which received the sums concerned and calculated and settled the amounts due to each beneficiary of the system in accordance with statutory criteria and without any discretionary power (order in *Elcogás*, C-275/13, EU:C:2014:2314, paragraphs 15 and 16). See, to the same effect, order in *Alcoa Transformazioni* v *Commission*, C-604/14 P, EU:C:2016:54, delivered later.

31 — *Alcoa Transformazioni* v *Commission*, C-194/09 P, EU:C:2011:497, paragraph 14.

32 — *Régis Network*, C-333/07, EU:C:2008:764.

33 — See, for example, Opinion of Advocate General Mengozzi in *Essent Netweerk Noord*, C-206/06, EU:C:2008:33, points 40 to 44, in which the Advocate General categorised as a parafiscal charge (covered by the concept of a charge having equivalent effect to a customs duty or internal taxation) a Dutch price surcharge temporarily imposed on the consumption of electricity, collected by the network operators and paid by the latter to an undertaking which was the joint subsidiary of the national electricity producers. That undertaking was required, under that rule, to retain a part of that revenue to cover the non-recoverable costs resulting from the investments made by that undertaking or the producer undertakings before the market was opened to competition, as well as to pay over to the State any excess. According to Advocate General Mengozzi, the surcharge at issue possessed features that distinguished it from a tax in the traditional sense (point 41 of his Opinion).

58. In my opinion, there are two key arguments to support the proposition that the *pro quota* payment of GECs by electricity users is not derived from a tax liability. The first relates to the nature of the payment, which is that of a financial contribution, admittedly one which is established by Italian law but which is of a non-fiscal nature. [34] Even if it is accepted that the total amounts into which that payment translates have the nature of State resources, leading to their possible classification as State aid, that does not give those amounts the characteristics (or the nature) of a tax.

59. The contribution towards the payment of GECs cannot be categorised as a tax for the present purposes (that is, in relation to Directives 2003/96 and 2008/118), because it does not have a tax structure similar to harmonised excise duty or VAT. As a reminder, that condition is essential for inclusion in the category of ITSP, within the meaning of Article 1(2) of Directive 2008/118.

60. Unlike taxes, public financial contributions do not generate revenue which goes on to form part of the State budget for meeting public, general or specific needs which national authorities are required to finance. The Court has identified that factor (the generation of 'revenue for the public authorities') as a feature of taxes. [35]

61. The Italian electricity network (not the tax authorities) receives from electricity consumers sums which are earmarked for defraying certain costs inherent in that network, in accordance with a decision of the legislature. The public body which administers those costs (the Compensation Fund) acts as a simple deposit and compensation fund which receives the revenue for distribution in the form stipulated by Italian law. The revenue collected is intended not for public entities but for certain undertakings or other recipients of the amounts corresponding to the costs defrayed by that mechanism. Therefore, the sums collected towards GECs do not constitute revenue which passes to the budget of the State or of certain State-controlled organisations and is then used to finance specific expenditure. [36] Hence, that revenue can hardly be classified as taxation in a technical sense.

62. The second argument in support of that view is that the mechanism for apportionment of GECs does not entail any action by the national tax authorities and nor may those authorities exercise the usual prerogatives of the public treasury. When a consumer does not pay the sum which the utility company includes in his electricity bill to cover GECs (and which is then transferred to the Compensation Fund), tax authority officials do not take action: any disagreement between the company and the user, including in relation to that sum, must be settled before the ordinary courts.

34 — See the articles by Lavilla Rubira, J.J., 'Prestaciones patrimoniales públicas no tributarias impuestas a las empresas que operan en el sector eléctrico', pp. 69 to 102, and Gómez-Ferrer Rincón, R., 'Las prestaciones patrimoniales de carácter público y naturaleza no tributaria', pp. 31 to 67, in López Ramón, F. (ccord.), *Las prestaciones patrimoniales públicas no tributarias y la resolución extrajudicial de conflictos*, Instituto Nacional de Administración Pública, Madrid, 2015.

35 — The judgment in *Air Transport Association of America and Others*, C-366/10, EU:C:2011:864, paragraph 143, states, in relation to the EU allowance trading scheme, that, 'unlike a duty, tax, fee or charge on fuel consumption, the scheme introduced by Directive 2003/87, as amended by Directive 2008/101, apart from the fact that *it is not intended to generate revenue for the public authorities*, does not in any way enable the establishment, applying a basis of assessment and a rate defined in advance, of an amount that must be payable per tonne of fuel consumed for all the flights carried out in a calendar year' (emphasis added). It follows *a contrario* from that assertion that, under EU law, the generation of public revenue is a necessary condition for the existence of a tax.

36 — In the judgment in *CIBA*, C-96/08, EU:C:2010:185), paragraph 23, the Court examined a vocational training levy to be paid by undertakings based on their wage costs. The revenue from that levy was allotted to a part of the fund for the employment market providing assistance to vocational training establishments in Hungary. The Court held that the fact that the levy was paid directly to a fund distinct from the State's central budget and ring-fenced for a particular use, was not such as to preclude it from coming within the field of direct taxation. In that case, the funds obtained from the levy were public revenue collected by the Hungarian authorities with the sole special feature that they were ring-fenced for a particular item of the budget.

63. A financial contribution with those features cannot be classified as ITSP within the meaning of Article 1(2) of Directive 2008/118 if it is not supported by a collection and penalty system invested with the prerogatives of the tax authorities, which guarantee the effective collection of VAT and harmonised and non-harmonised excise duty. The Italian mechanism for GECs lacks a system for 'monitoring of the tax' akin to that applicable to VAT and harmonised excise duty, which is expressly required by Article 1(2) of Directive 2008/118 to ensure that Member States establish indirect taxes on excise goods such as electricity.

64. In summary, I believe that: a) the mechanism for financing GECs should not be categorised as ITSP within the meaning of Article 1(2) of Directive 2008/118, and b) consequently, a system of advantages established in favour of energy-intensive businesses, of the kind laid down by the Italian provisions cited by the national court, does not fall within the concept of 'tax reductions' referred to in Article 17(1) of Directive 2003/96. Accordingly, a Member State may opt for a system of advantages in favour of energy-intensive businesses, provided that it is compatible with the provisions of EU law on State aid. [37]

65. Should the Court find, contrary to my proposal, that the mechanism for defraying GECs used by Italy is fiscal in nature, that mechanism will have to be classified as a tax for a specific purpose within the meaning of Article 1(2) of Directive 2008/118, in which case it will fall within the scope of Directive 2003/96. In those circumstances, energy-intensive businesses would qualify for the tax reductions provided for in Article 17 of Directive 2003/96, because, in accordance with that provision, and obviously within the limits laid down therein, it is possible to reduce the tax burden generated by harmonised excise duty on electricity and by non-harmonised indirect taxes.

C – *The second question: the compatibility with Directive 2003/96 of a national system of tax reductions in favour solely of energy-intensive businesses in the manufacturing sector*

66. I have suggested in answer to the first question that the mechanism for defraying GECs does not fall within the scope of Directive 2008/118, from which it follows that it also falls outside the scope of Directive 2003/96. Should the Court accept that line of reasoning, it will not be necessary to deal with the second question referred by the Consiglio di Stato (Council of State).

67. Nevertheless, I shall give my view on that question in the alternative, in case the Court finds that the contribution to GECs by Italian electricity consumers may be categorised as ITSP for the purposes of Article 1(2) of Directive 2008/118 and Directive 2003/96 is therefore applicable to it.

68. In those circumstances, I do not believe that the answer to the second question raises any particular difficulties. Under Article 5 of Directive 2003/96, Member States have competence to tax electricity differently depending on whether its use is for business or non-business purposes. Article 11(1) provides that business use means use by a business entity which carries out the economic activities defined in the second subparagraph thereof namely 'all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions'. Energy-intensive businesses which benefit under the Italian legislation undoubtedly use electricity for business purposes in the context of their economic activities.

37 — As regards energy products excluded from the scope of Directive 2003/96, the Court has held that Member States are in principle competent to tax those products provided that they exercise their competence in accordance with EU law (judgments in *Fendt Italiana*, C-145/06 and C-146/06, EU:C:2007:411, paragraphs 38 and 41, and *X*, C-426/12, EU:C:2014:2247, paragraph 30).

69. Article 11(4) of Directive 2003/96 also provides that Member States may 'limit the scope of the reduced level of taxation for business use'. The provision therefore affords Member States freedom to restrict the lower tax burden to some but not all production sectors. National legislation, like the Italian legislation, which restricts such business use solely to the manufacturing sector is, in my view, compatible with Directive 2003/96.

70. Further, Article 17(1) of Directive 2003/96 permits Member States to apply tax reductions on the consumption of electricity for certain energy-intensive businesses,[38] and, once again, allows Member States the freedom to 'apply more restrictive concepts, including sales value, process and sector definitions'.

71. The Italian provision is compatible with that provision of Directive 2003/96, for it includes the definition of energy-intensive business (as used in the directive itself) and, moreover, exercising the discretion conferred in Article 17(1), grants the tax concessions solely those operating in the manufacturing sector. The exclusion of tax concessions for businesses in other sectors (such as the health care sector, to which Fondazione Santa Lucia belongs) is not prohibited at all by Directive 2003/96. It cannot be classified as discrimination since, relying on general categories, it differentiates certain undertakings (those in the manufacturing sector) from others based on predetermined objective criteria, such as belonging to a specific field of economic activity which, in the legislature's view, requires special measures.

72. I agree fully with the view of the Consiglio di Stato (Council of State), to the effect that Article 17 of Directive 2003/96 empowers the national authorities to choose between: a) not allowing the incentives in question for any energy-intensive business; b) allowing those incentives for all energy-intensive businesses; or c) allowing those incentives only for certain energy-intensive businesses operating in specific sectors identified by the national authorities for the purpose of pursuing specific objectives of general interest.

73. Accordingly, should the Court find that a mechanism like the mechanism applicable to GECs laid down by Italian law is ITSP, Article 17 of Directive 2003/96 permits Member States to grant reductions from that tax exclusively to energy-intensive businesses in the manufacturing sector.

IV – Conclusion

74. In the light of the foregoing, I propose that the Court of Justice should reply to the questions referred for a preliminary ruling by the Consiglio di Stato (Council of State) as follows:

(1) The advantages established in favour of certain 'energy-intensive' businesses, enabling them to reduce their contribution to general electricity network costs, do not fall within the concept of 'tax reductions' provided for in Article 17(1) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, in view of the fact that the mechanism for defraying those general costs cannot be categorised as indirect taxation for specific purposes within the meaning of Article 1(2) of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC.

38 — Specifically, in the case of 'a business entity, as referred to in Article 11, where either the purchases of energy products and electricity amount to at least 3.0% of the production value or the national energy tax payable amounts to at least 0.5% of the added value'.

(2) In the event that the contribution towards general electricity network costs were to constitute indirect taxation for specific purposes, within the meaning of Article 1(2) of Directive 2008/118, the Member States would be able, under Article 17 of Directive 2003/96, to establish tax reductions in that respect in favour of energy-intensive businesses belonging to the manufacturing sector.