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The Italian Regional Tax on Petrol for Automotive Is Incompatible with Directive 2008/118/CE on Excise Duties

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The Court of Justice of the European Union (CJEU), by means of an Order in Case C-255/20 of 9 November 2021 **[1]**, established the incompatibility with EU law, in particular with Directives 2008/118/EC and 92/12/EEC, of the Italian Regional Tax on Petrol for Automotive (IRBA), due to the absence of a specific purpose attributed to it by the Italian lawmaker. Following the CJEU's decision, the IRBA must be set aside, and a right to reimbursement for the taxpayer arises.

The IRBA, introduced by Law No. 158/1990 and Legislative Decree No. 398/1990, is a non-harmonized indirect tax used in Italian regions having an ordinary statute. The tax targets fuel consumption supplied by distribution plants, including those intended for private use.

Being a special indirect tax, the IRBA falls within the scope of Directive 2008/118/EC, concerning the general arrangements for excise duties. Art. 1(2) of Directive 2008/118/EC allows Member States to apply other indirect taxes with specific purposes to products already subject to harmonized excise duties, provided that such taxes comply with the EU rules applicable to excise duties or VAT concerning the determination of the tax base, calculation, chargeability and control of the tax.

In other words, Member States can introduce an additional indirect tax on products already subject to excise duties only to the extent that a "specific purpose" exists so that the national levy might be seen as a sort of "purpose tax".

The CJEU's Decision

The CJEU found that the Italian legislator failed to attribute any specific purpose to the IRBA. Only a generic purpose of increasing the general budget was recognizable, which alone cannot integrate the requirements under Directive 2008/118/EC, being it CJEU's constant jurisprudence **[2]**.

Worth recalling, in July 2018, the EU Commission started an infringement procedure (n. 2017/2114) in light of a potential conflict of the IRBA with EU law. The Commission could not detect any specific purpose attributed to the IRBA, thus declaring it incompatible with EU law. Based on similar considerations, an Italian tax lower court recognized the absence of a direct link between the use of the revenue and the purpose attributed to the IRBA, resulting in the IRBA's incompatibility with EU law **[3]**.

The IRBA was ultimately repealed by the Italian Budget Law for 2021 (Articles 1(628) et seq. of Law No. 178 of 30 December 2020), although without affecting past tax obligations. The CJEU's order of 9 November 2021 reopens the floodgates. Indeed, compliant interpretation of national law vis-à-vis EU law implies that the second must prevail over the first in the case of a conflict, also impacting past tax obligations.

The CJEU extended the said incompatibility also by virtue of the regulatory equivalence between Art. 1(2) of Directive 2008/118/EC and Art. 3(2) of Directive 92/12/EEC. Indeed, the two provisions carry the same obligation to assign a specific purpose to additional national taxes with respect to excise duties. It follows from this that not only for the period of validity of Directive 2008/118/EC but also for that relating to Directive 92/12/EEC the IRBA was incompatible with EU law.

[1] CJEU, 9 November 2021, Case C-255/20, *Agenzia delle Dogane e dei Monopoli – Ufficio delle Dogane di Gaeta*, EU:C:2021:926.

[2] *See*, in particular, CJEU, 5 March 2015, Case C-553/13, *Statoil Fuel & Ret*ail, EU:C:2015:149; CJEU, 27 February 2014, Case C-82/12, *Transportes Jordi Besora*, EU:C:2014:108.

[3] Fiscal Court of Piedmont, 14 January 2020, Case no. 53/6/2020.

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