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Excise duty exemption for electricity: the word to the Court of Justice

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In his conclusions in Case C-571/21 on 13 October 2022 [1], AG Rantos addressed the exemption from excise duties for electricity intended to produce more electricity.

The case concerns the refusal by the German customs authorities concerning the application for an exemption from excise duties made by a local company which extracted lignite in open-air quarries and used this material for electricity production.

The company also used part of the electricity produced by the combustion of lignite to fuel the extraction of said fossil material. According to the German customs authorities, electricity destined for mining should not instead have been exempt.

The referring judge therefore asked to verify which type of electricity consumption can be considered exempt from excise duty.

Directive no. 2003/96/EC, which recast the EU framework for the taxation of energy products and electricity, intended to establish a harmonized tax regime for energy products and electricity to promote the smooth functioning of the internal market in the energy sector, thus avoiding distortions of competition.

For this reason, the EU legislator decided to impose taxation on distributed electricity to the Member States, but exempting electricity used to produce more electricity. The tax system provides for minimum levels of taxation, distinguishing between commercial and non-commercial uses.

In this regard, Article 14, paragraph 1, letter a), first sentence of Directive no. 2003/96 provides for a mandatory exception to the taxation regime, on the one hand, for energy products used to produce electricity and, on the other hand, for electricity used for electricity production or to maintain the capacity of such a production. However, under the second sentence of the same provision, Member States retain the option to tax such products, beyond the minimum levels of taxation, for environmental policy reasons.

On this point, the Court of Justice of the European Union (CJEU) has already had the opportunity to point out (Case C-250/10) that the mandatory exemption laid down in this provision applies to energy products, such as natural gas, used for the production of electricity when said products are

used for the combined production of electricity and heat [2].

According to the AG, only electricity used in operations that are indispensable and contribute directly to electricity production may be exempt. The exemption is instead not available to the extraction of an energy product but including operations that (directly or indirectly) are aimed at transforming energy products to provide power plants.

Similarly, according to the AG, only electricity used in operations that are indispensable and contribute directly to processing and maintaining electricity generation capacity may be exempt. This might include operations whereby energy products are stored or transported to power plants.

The interpretative reading provided by the AG appears to be in line with the rationale of the EU Directive on excise regarding the scope of the exemption: the benefit of the exemption applies to the production or maintenance of electricity but not also to the production or maintenance of energy products. Furthermore, the facilitation rules must be interpreted in a restrictive sense, introducing a rule to the general regime. Otherwise, the risk is undermining the single market, introducing distortions to free competition.

The subject matter is now subject to the CJEU's scrutiny.

[1] *See*, CJUE, 13 October 2022, Case C-571/21, *RWE Power Aktiengesellschaft*, ECLI:EU:C:2022:780

[2] *See*, CJUE, 21 December 2011, Case C-250/10, *Haltergemeinschaft LBL GbR*, ECLI:EU:C:2011:862

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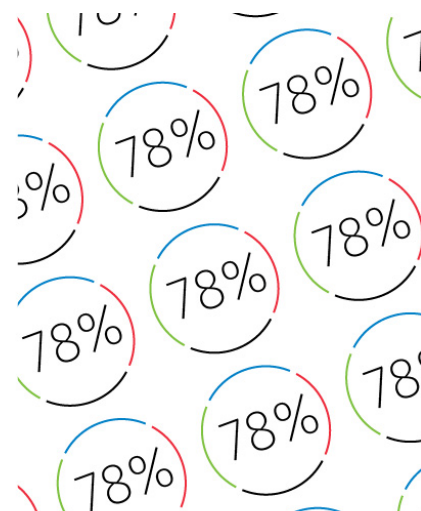
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