Provisional text

JUDGMENT OF THE COURT (Fifth Chamber)

14 January 2021 (*)

(Failure of a Member State to fulfil obligations – Article 258 TFEU – Directive 2003/96/EC – Taxation of energy products and electricity – Articles 4 and 19 – Regional law adopted by the autonomous region of a Member State – Contribution towards the purchase of petrol and diesel subject to excise duties – Article 6(c) – Exemption from or reduction of excise duty – Concept of 'refunding all or part of' the amount of taxation – No evidence of a link between that contribution and excise duties)

In Case C−63/19,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 29 January 2019,

European Commission, represented by R. Lyal and F. Tomat, acting as Agents,

applicant,

v

Italian Republic, represented by G. Palmieri, acting as Agent, and by G.M. De Socio, avvocato dello Stato,

defendant,

supported by:

Kingdom of Spain, represented by S. Jiménez García and J. Rodríguez de la Rúa, acting as Agents,

intervener,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, M. Ilešič, E. Juhász (Rapporteur), C. Lycourgos and I. Jarukaitis, Judges,

Advocate General: J. Richard de la Tour,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 16 July 2020,

gives the following

Judgment

1 By its application, the European Commission seeks a declaration from the Court that, by applying a reduction in the rates of excise duty, as provided for in the regional legislation adopted by the Regione autonoma Friuli Venezia Giulia (Autonomous Region of Friuli Venezia Giulia, Italy; 'the Region'), on petrol and diesel used as motor fuel when those products are sold to residents of that region, the Italian Republic has failed to fulfil its obligations under Articles 4 and 19 of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ 2003 L 283, p. 51).

Legal context

EU law

2 Recitals 2 to 5, 9 and 24 of Directive 2003/96 are worded as follows:

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

(3) The proper functioning of the internal market and the achievement of the objectives of other Community policies require minimum levels of taxation to be laid down at Community level for most energy products, including electricity, natural gas and coal.

(4) Appreciable differences in the national levels of energy taxation applied by Member States could prove detrimental to the proper functioning of the internal market.

(5) The establishment of appropriate Community minimum levels of taxation may enable existing differences in the national levels of taxation to be reduced.

…

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

…

(24) Member States should be permitted to apply certain other exemptions or reduced levels of taxation, where that will not be detrimental to the proper functioning of the internal market and will not result in distortions of competition.'

3 Article 4 of that directive provides:

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

2. For the purpose of this Directive "level of taxation" is the total charge levied in respect of all indirect taxes (except [value added tax (VAT)]) calculated directly or indirectly on the quantity of energy products and electricity at the time of release for consumption.'

4 Article 5 of that directive states:

'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:

– when the differentiated rates are directly linked to product quality;

– when the differentiated rates depend on quantitative consumption levels for electricity and energy products used for heating purposes;

– for the following uses: local public passenger transport (including taxis), waste collection, armed forces and public administration, disabled people, ambulances;

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

5 Article 6 of that directive is worded as follows:

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

(a) directly,

(b) by means of a differentiated rate,

or

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

6 Article 7(2) and (4) of Directive 2003/96 provides:

‘2. Member States may differentiate between commercial and non-commercial use of gas oil used as propellant, provided that the Community minimum levels are observed and the rate for commercial gas oil used as propellant does not fall below the national level of taxation in force on 1 January 2003, notwithstanding any derogations for this use laid down in this Directive.

…

4. Notwithstanding paragraph 2, Member States which introduce a system of road user charges for motor vehicles or articulated vehicle combinations intended exclusively for the carriage of goods by road may apply a reduced rate on gas oil used by such vehicles …’

7 Under Articles 15 and 17 of Directive 2003/96, Member States may also apply exemptions or reductions in the level of taxation in the cases referred to in those articles.

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

9 Article 19 of Directive 2003/96 provides:

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

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

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

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

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

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

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

Italian law

11 In accordance with Article 5(3) of the Statuto speciale della Regione autonoma Friuli Venezia Giulia (Special Statute of the Autonomous Region of Friuli Venezia Giulia), adopted by the legge costituzionale (Constitutional Law) of 31 January 1963 (GURI No 29 of 1 February 1963, p. 554), in the version applicable to the present case, the Region has legislative power to introduce the regional charges provided for in Article 51 of that statute.

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

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

14 Article 1, entitled 'Objectives', of the legge regionale n. 14, norme per il sostegno all'acquisto dei carburanti per autotrazione ai privati cittadini residenti in Regione e di promozione per la mobilità individuale ecologica e il suo sviluppo (Regional Law No 14, laying down rules to provide support for purchases of fuel for transport purposes for private citizens residing in the Region and to promote and develop individual environmentally friendly travel) of 11 August 2010 (*Bollettino ufficiale della Regione autonoma Friuli Venezia Giulia* No 19 of 13 August 2010), in the version applicable to the present dispute ('Regional Law No 14/2010'), provides, in paragraph 1:

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

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

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

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

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

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

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

(a) "beneficiaries":

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

…

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

(c) "identification cards": cards stating the technical characteristics referred to in Annex A, point 1;

…

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

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

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

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

3. The amounts of the contributions towards purchases of petrol and diesel referred to in paragraph 2 shall be increased by 7 cents per litre and 4 cents per litre, respectively, for beneficiaries residing in communes situated in mountainous or semi-mountainous areas designated as less-favoured or partially less-favoured areas by Council Directive 75/273/EEC of 28 April 1975 concerning the Community list of less-favoured farming areas within the meaning of Directive No 75/268/EEC (Italy) [(OJ 1975 L 128, p. 72)] and in communes identified by [various Commission decisions concerning regional aid].

4. For economic reasons or due to regional budgetary constraints, and after consulting the relevant committee of the executive, the contributions referred to in paragraph 2 and the increases referred to in paragraph 3 may be adjusted, within a variation limit of 10 and 8 cents per litre, respectively, by decision of the Giunta regionale [del Friuli-Venezia Giulia (regional executive of Friuli Venezia Giulia, Italy)], for petrol and diesel separately and for a maximum period of three months, which is renewable. The decision shall be published in *Bollettino ufficiale della Regione autonoma Friuli Venezia Giulia*.

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

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

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

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

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

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

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

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

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

18 Article 5 of that regional law, entitled ‘Procedure for electronic payment’, provides:

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

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

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

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

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

…’

19 Article 6 of Regional Law No 14/2010, entitled ‘Procedure for non-electronic payments’, provides, in paragraphs 1 and 2, that the regional executive may decide to activate methods for non-electronic granting of contributions in respect of the purchase of fuel for transport purposes to be activated by beneficiaries

outside the territory of the Region and that, in those cases, the beneficiary is to submit an application to the relevant Chamber of Commerce for his or her commune of residence.

20 Article 9 of that regional law, entitled 'Granting of the contribution', provides:

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

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

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

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

21 Article 10 of Regional Law No 14/2010, entitled 'Refunds in respect of contributions', provides:

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

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

…'

Background to the dispute

22 In order to counteract the practice of residents of the Region of refuelling their vehicles at a better price in Slovenia, the Italian Republic requested, in 1996, a derogation under Article 8(4) of Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils (OJ 1992 L 316, p. 12), to be able to apply a reduced excise duty rate on fuel in that region.

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

24 Subsequently, on the basis of Article 18 of Directive 2003/96, the Italian Republic had been authorised to continue applying, until 31 December 2006, a reduction in the rate of excise duty on petrol consumed in the territory of that region.

25 On 17 October 2006, the Italian Republic had submitted a request for a derogation under Article 19 of Directive 2003/96 for the territory of the Region.

26 That application was withdrawn by that Member State on 11 December 2006.

Pre-litigation procedure

27 On 1 December 2008, the Commission sent a letter of formal notice to the Italian Republic on the basis of the first paragraph of Article 258 TFEU, objecting to the application of reduced rates of excise duty on

petrol and diesel used as motor fuel to the sale of those products to residents of the Region. According to the Commission, the legislation providing for that reduction in excise duty rates was contrary to the EU rules on the taxation of energy products, since it was not one of the possible exemptions or reductions provided for by Directive 2003/96.

28 The Commission questioned whether the scheme introduced by Legge n. 549, Misure di razionalizzazione della finanza pubblica (Law No 549 on measures to rationalise public finances), of 28 December 1995 (GURI No 302 of 29 December 1995, p. 5), and by Legge regionale n. 47, Disposizioni per l'attuazione della normativa nazionale in materia di riduzione del prezzo alla pompa dei carburanti per autotrazione nel territorio regionale e per l'applicazione della Carta del cittadino nei vari settori istituzionali (Regional Law No 47, laying down provisions for the application of national legislation concerning the reduction of pump prices of fuel for motor vehicles in the region and the application of the Citizens' Charter in various institutional sectors), of 12 November 1996 (*Bollettino ufficiale della Regione autonoma Friuli Venezia Giulia* No 33, of 14 November 1996; 'Regional Law No 47/96'), entitling residents of the Region to a reduction in the 'pump' price of petrol and, with effect from 2002, of diesel. The mechanism at issue provided for a discount to be granted to final consumers of fuel who were residents of that region. In order to implement that mechanism, the fuel suppliers paid to the operators of sales outlets amounts corresponding to the price reductions and then applied for refunding of those amounts from the Region.

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

30 By letter of 1 April 2009, the Italian authorities replied to that letter of formal notice, maintaining that the scheme of reductions introduced by Regional Law No 47/96 did not affect the tax system. Those authorities also stated that the scheme provided for by Regional Law No 47/96, which was criticised by the Commission, had been reformed by the regional legislature. Following that legislative intervention, the refunds were received directly by the service station operators and no longer by the fuel suppliers.

31 Regional Law No 14/2010 established a new scheme ('the contribution scheme at issue') intended to reduce the final cost of fuel borne by the final consumer, consisting of a 'contribution towards the purchase' of those products by the public authorities. Under the contribution scheme at issue, at the time of purchase of petrol or diesel, for use as fuel, at service stations by natural persons residing in the Region who are owners of motor vehicles or motorcycles, those natural persons are granted a subsidy, corresponding to a fixed base amount per litre of petrol and diesel purchased, varying according to the type of fuel and the area of that region in which the consumer concerned is resident ('the contribution at issue'). The contribution at issue is granted directly to the final consumer by service station operators, who are subsequently refunded by the regional authorities for the corresponding sum.

32 Following a request for clarification from the Commission, sent to the Italian Republic on 11 May 2011, the Italian authorities replied, by letter of 13 July 2011, that the contribution scheme at issue, introduced by Regional Law No 14/2010, would be effective as from 1 November 2011.

33 On 12 April 2013, the Commission asked the Italian Republic for further clarification on the method of calculating the contribution at issue.

34 By letter of 16 May 2013, the Italian authorities provided clarification on those arrangements and on the division of the Region into two territorial areas, each having a different level of contribution.

35 On 11 July 2014, the Commission sent a supplementary letter of formal notice to the Italian Republic, in which it criticised the contribution scheme at issue for infringing Directive 2003/96 since it led to a reduction in excise duties in the form of a refund of those duties, which was not provided for in that directive or authorised by the Council under Article 19 of that directive.

36 By letter of 4 September 2014, the Italian authorities contested the arguments put forward by the Commission in that supplementary letter of formal notice.

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

38 Not satisfied with that reply, the Commission brought the present action.

Procedure before the Court

39 By decision of the President of the Court of 3 June 2019, the Kingdom of Spain was granted leave to intervene in support of the form of order sought by the Italian Republic.

40 As a result of the health crisis linked to the spread of the coronavirus, acting on a proposal from the Judge-Rapporteur and after hearing the Advocate General, the Court decided to cancel the hearing scheduled for 23 April 2020 and, by decision of 26 March 2020, sent the parties questions to be answered in writing, to which the Commission, the Italian Republic and the Kingdom of Spain replied.

The action

Arguments of the parties

The Commission's arguments

41 The Commission claims that excise duties are indirect taxes levied on the consumption of certain products and that the economic burden of those taxes is borne by final consumers. It maintains there is no doubt that the contribution scheme at issue introduced by the Region has the effect of reducing the cost borne by the final consumer by reducing the taxation of the products concerned.

42 By providing that, at the time of purchase of petrol and diesel at service stations by natural persons residing in the Region, service station operators are to grant those persons a fixed-price reduction that applies to each litre of fuel purchased, the amount of which is subsequently to be reimbursed to them by the regional authorities, the contribution scheme at issue constitutes a reduction in excise duties on fuel which is not authorised under Directive 2003/96.

43 In support of that complaint, the Commission points out that Directive 2003/96 contains a set of provisions allowing Member States to apply reductions, exemptions or variations in the level of taxation applicable to certain products or according to certain uses. In that regard, it refers in particular to Articles 5, 7 and 15 to 19 of that directive. Those reductions, exemptions or variations may be put into effect by the Member States in the different ways provided for in Article 6 of that directive.

44 Where a Member State intends to apply a reduced level of taxation at regional level, it must comply with the provisions of Article 19 of Directive 2003/96 and, accordingly, request authorisation from the Council under that provision. In the absence of such authorisation, the introduction of a reduction in the rates of excise duty on fuel for residents of the Region constitutes an infringement of Articles 4 and 19 of that directive.

45 As regards the classification of the contribution scheme at issue as an unauthorised reduction in excise duty rates, the Commission takes the view that, where a Member State grants a subsidy not authorised by

EU law, calculated directly or indirectly on the basis of the quantity of an energy product falling within the scope of Directive 2003/96 at the time of release for consumption, that subsidy leads to an unlawful reduction of the tax burden on that energy product. In such a case, that subsidy offsets in whole or in part the excise duty on the product in question. The terms used to designate the measure at issue are irrelevant. The nature, characteristics and effects of the measure are all that matters.

46 The Commission submits that the contribution at issue is granted in the present case in the form of a fixed amount according to the quantity of fuel purchased, which corresponds to the method of calculation used to determine the amount of the excise duty.

47 The Commission claims that it is apparent from the judgment of 25 April 2013, *Commission* v *Ireland* (C−55/12, not published, EU:C:2013:274), that one of the forms in which the Member States may give effect to exemptions or reductions in the level of taxation is by 'refunding all or part of the amount of taxation', as provided in Article 6(c) of Directive 2003/96. In order to establish the existence of refunding of excise duty within the meaning of that provision, it is immaterial that the person who is liable to pay the excise duty is not the same as the person who receives the contribution at issue.

48 Furthermore, in order to classify the scheme as a 'refunding of excise duty', within the meaning of that provision, the Commission considers decisive the finding that the contribution at issue is paid out of public funds and, as in the present case, from regional funds. Refunding from public funds means that the taxation of the product is neutralised.

49 In that regard, it is immaterial that the financing of the contribution scheme at issue comes from the general revenue of the Region and not specifically from the share of excise duties which the State repays to that region after they have been collected. It is also immaterial that the contribution at issue is also paid to residents of the Region in respect of fuel purchases made outside that region.

50 The Commission notes, first, that, in the past, the Italian Republic has been authorised to apply a reduction in the rate of excise duty on fuel consumed in the territory of the Region and that, subsequently, on 17 October 2006, a request for a derogation for the territory of the Region was submitted, pursuant to Article 19 of Directive 2003/96, which that Member State withdrew on 11 December 2006. The Commission considers that, despite the changes made over the years, the refund scheme introduced by Regional Law No 47/96 had the same overall structure and effect as the contribution scheme at issue.

51 Secondly, the Commission states that the Council has already authorised, on the basis of Article 19 of Directive 2003/96, a number of reductions in excise duty for the benefit of specific regions or zones of a Member State. In that regard, it mentions, inter alia, Council Implementing Decision (EU) 2017/1767 of 25 September 2017 authorising the United Kingdom to apply reduced levels of taxation to motor fuels consumed on the islands of the Inner and Outer Hebrides, the Northern Isles, the islands in the Clyde, and the Isles of Scilly, in accordance with Article 19 of Directive 2003/96 (OJ 2017 L 250, p. 69), and Council Implementing Decision (EU) 2015/356 of 2 March 2015 authorising the United Kingdom to apply differentiated levels of taxation to motor fuels in certain geographical areas, in accordance with Article 19 of Directive 2003/96 (OJ 2015 L 61, p. 24). The Commission states that the mechanism put in place by the United Kingdom for fuel consumed in the Hebrides and the islands in the Clyde and the Isles of Scilly, is, in essence, identical to the contribution scheme at issue.

52 Furthermore, as regards the link between the contribution granted to residents of that region and the fuel price component corresponding to excise duties, the Commission notes that the fact that the respective amounts of excise duty and the contribution at issue are not the same is irrelevant, given that the refund of excise duties may also be partial. The fact that the share of the fuel price consisting of its production costs is greater than the amount of the contribution at issue is also irrelevant and does not alter the fact that payment of that contribution constitutes refunding of excise duty.

Arguments of the Italian Republic

53 The Italian Republic acknowledges that ‘the flexibility necessary to define and implement policies appropriate to their national circumstances’, which the Member States should have according to recital 9 of that directive, does not mean that they are free to introduce variations in the level of taxation, since they may do so only in accordance with the provisions of that directive that provide for derogations to that effect.

54 It is therefore necessary for the objective pursued by the contribution scheme at issue to fall within the cases listed in Articles 5, 15 and 17 of Directive 2003/96 in particular. If there are various objectives, connected with ‘specific policy considerations’, the Member State concerned must, in accordance with Article 19 of that directive, request authorisation from the Council, which, acting unanimously, may authorise the introduction of additional exemptions or reductions. However, the Italian Republic states that those restrictions apply only in so far as a Member State intends to introduce a measure consisting of an ‘exemption or reduction in the level of taxation’ of energy products and that, therefore, a national measure which does not have such an effect will not be subject to those restrictions.

55 In that regard, the Italian Republic considers that, in order to determine whether or not it has failed to fulfil its obligations, particular regard must be had to Article 6(c) of Directive 2003/96, which includes within the scope of the directive cases in which the exemptions or reductions in the level of taxation are made by ‘refunding all or part of the amount of taxation’. According to that Member State, the Commission interprets Article 6(c) of that directive too broadly in considering that any form of subsidy or contribution in respect of goods subject to excise duty, simply because it is financed from public funds, is an excise refund and therefore constitutes a circumvention of that directive.

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

57 The Italian Republic submits that, unlike the situation in the case which gave rise to the judgment of 25 April 2013, *Commission* v *Ireland* (C−55/12, not published, EU:C:2013:274), in which the national rules expressly stated that the subject of the refund was the ‘excise duty’ component of the price of motor fuel, the Court cannot start from such a premiss in the present case. It is for the Commission to establish that the contribution at issue actually corresponds to a refund of excise duties. The Commission has not adduced such proof.

58 The Italian Republic states in that regard that it cannot be inferred from the judgment of 25 April 2013, *Commission* v *Ireland* (C−55/12, not published, EU:C:2013:274), that Article 6(c) of Directive 2003/96 covers all cases of subsidy from public funds of goods subject to excise duty, but rather that that provision includes only the payment of sums that retain, in one way or another, a link with the excise duty initially paid. It points out that the contribution at issue is granted to final consumers and that there is no link between the duty initially paid by the persons liable to pay it and the sum of money granted to residents of the Region from the regional budget.

59 In order to establish that there is no link between the excise duty initially paid by the persons liable to pay it and the contribution at issue, the Italian Republic refers, in essence, to the following factors.

60 In the first place, the beneficiaries of the contribution at issue are natural persons residing in the territory of the Region, who are not liable to pay excise duty.

61 In the second place, that contribution is not financed by the part of the excise duties repaid by the State to the Region, but from the latter’s general revenue.

62 In the third place, that contribution is also granted to residents of that region in respect of fuel purchases made outside the territory of that region.

63 In the fourth place, that contribution is borne by service stations operators who temporarily bear the cost of the contribution, before subsequently being refunded by the regional administration. Those operators are also not liable to pay excise duty on fuel. In that regard, the scenario suggested by the Commission that a fuel distribution facility might, in certain cases, operate as a tax warehouse entitled to market fuel does not exist in Italian law, with the result that such a facility can never be liable to pay excise duty.

64 In the fifth place, the contribution at issue is granted by the Region, whereas excise duty on fuel is a tax levied by the State and paid when the fuel is transferred to the tanks of the service station.

65 In the sixth place, the contribution is granted on the basis of criteria distinct from those on which the levying of excise duties is based. Its amount varies according to the type of fuel and the recipient's area of residence.

66 In the seventh place, the purpose of the measure put in place by the contribution scheme at issue does not relate to the 'excise duty' component of the fuel price, unlike the situation in the case which gave rise to the judgment of 25 April 2013, *Commission* v *Ireland* (C−55/12, not published, EU:C:2013:274).

67 Lastly, in the eighth place, it is impossible to establish an objective link between the contribution at issue and the 'excise duty' component of the price of fuel 'at the pump'. Rather, that contribution relates to the 'production cost' component of that price, the amount of which is higher, since it is intended to offset that cost in a region characterised by a lack of infrastructure. The significant price variations from one region to another within Italy are attributable only to the 'production cost' component, which is itself influenced by the level of the infrastructure in each region.

Arguments of the Kingdom of Spain

68 The Kingdom of Spain considers that the contribution scheme at issue, provided for by Regional Law No 14/2010, constitutes aid for the purchase of fuel for residents of the Region with the aim of reducing the additional cost arising from the fact that the cost of producing fuels is higher in that region.

69 That Member State states a number of factors which, in its view, confirm the absolute autonomy of the contribution at issue in relation to the excise duties to which fuel is subject.

70 In the first place, excise duty is levied in full by the State at the time when the fuel is released for consumption. In the second place, that contribution at issue is not financed by the part of the excise duties repaid by the State to the Region, but from the latter's general revenue. That contribution is also granted where the beneficiaries of the contribution purchase fuel in other regions of Italy. In the third place, that contribution is not granted to the person liable for excise duty, but to natural persons residing in the territory of the Region. In the fourth place, the same contribution is made to beneficiaries by service station operators and refunded to the latter by the administration of that region. Lastly, in the fifth place, the contribution at issue is granted on the basis of a criterion that has no link whatsoever with excise duties, in the form of a fixed amount, whatever the rate of excise duty on the fuel concerned.

71 The Kingdom of Spain also considers that regional aid expressed as a fixed value, below the production cost of motor fuel and governed by rules which are not of a fiscal nature, cannot be regarded as a means of reducing the tax burden in respect of motor fuel.

72 The selling price of fuel to the final consumer is made up of a number of elements, namely, first, the cost of crude oil and the refining margin; secondly, the marketing cost and the cost of transport to the point of sale; and, thirdly, the tax components of the price, such as excise duty and VAT.

Findings of the Court

73 The Commission submits that, by introducing the contribution scheme at issue, which provides for the granting to natural persons residing in the Region a fixed-price reduction per litre of petrol and diesel purchased for use as fuel, the Italian Republic has established a reduction in excise duties, in the form of a refund of the amount of the tax, in breach of its obligations under Articles 4 and 19 of Directive 2003/96.

74 In that regard, it should be noted at the outset that, according to settled case-law relating to the burden of proof in proceedings for failure to fulfil an obligation under Article 258 TFEU, it is for the Commission to determine whether the obligation has not been fulfilled. It is the Commission that must provide the Court with the information necessary for it to determine whether the infringement is made out, and the Commission may not rely on any presumption for that purpose (judgment of 5 September 2019 *Commission* v *Italy (Bacteria Xylella fastidiosa)*, C−443/18, EU:C:2019:676, paragraph 78 and the case-law cited).

75 By providing for a harmonised system of taxation of energy products and electricity, Directive 2003/96 seeks, as is clear from recitals 2 to 5 and 24 thereof, to promote the proper functioning of the internal market in the energy sector, in particular by avoiding distortions of competition (judgment of 30 January 2020, *Autoservizi Giordano*, C−513/18, EU:C:2020:59, paragraph 30 and the case-law cited). To that end, that directive states, in Article 4(1) thereof, that the levels of taxation that Member States apply to the energy products and electricity listed in Article 2 of that directive may not be less than the minimum levels laid down by the directive, while including, in particular in Articles 5 and 7 and 15 to 19, a series of provisions which allow Member States to apply reductions, exemptions or differentiations from the level of taxation for certain products or for certain uses.

76 According to the Commission, it is clear from the latter provisions that where a Member State intends to apply a reduced level of taxation at regional level, as the Italian Republic has done through the contribution scheme at issue, the only possibility is for it to rely on Article 19 of that directive and, in accordance with that provision, it must request an authorisation to that effect.

77 In order to determine whether the failure to fulfil obligations alleged by the Commission has been established, it is necessary to examine the premiss on which it is based and, accordingly, to assess whether the contribution scheme at issue must be regarded as 'refunding all or part of the amount of taxation' within the meaning of Article 6(c) of that directive.

78 A finding that there has been a failure to fulfil the obligations under that directive, consisting of an unauthorised reduction in excise duties, implies that such a reduction has taken one of the three forms listed in Article 6 of that directive. Of those three forms, only that of refunding all or part of the amount of taxation could possibly result from the contribution scheme at issue.

79 In that regard, it should be noted that, in order for that contribution scheme to be regarded as a 'refund' within the meaning of Article 6(c) of Directive 2003/96, it is necessary that the amount paid under that scheme derive from the amounts of excise duty levied by the Italian State or, at least, that the amount paid has a real link with the excise duties levied by the Italian State and, therefore, that the contribution scheme be intended to neutralise or reduce excise duties on fuel.

80 The Commission's argument that the origin of the sums paid as a refund of tax is of little importance, in so far as they come from public State funds, cannot be accepted.

81 In that regard, it should be noted in particular that, in the context of the present action, the Commission does not dispute the fact that the contribution scheme at issue is financed by the general budget of the Region and not, specifically, by the share of excise duties on fuel transferred by the Italian State to that budget. The sums paid by way of that transfer are integrated in the general budget of the Region and lose all individualisation.

82 In any event, in the present case, the Commission neither claims nor establishes the existence of an objective interference between the financial source of the contribution scheme at issue and the revenue

from the collection, by the Italian State, of excise duties on fuel, part of which is then transferred into the general budget of the Region.

83 In addition, as the Advocate General observed, in essence, in point 103 of his Opinion, the fact that the contribution at issue also benefits natural persons residing in the territory of the Region when they buy fuel in other regions of Italy calls into question the existence of a link between the amount paid under that contribution and the amounts of excise duty levied.

84 Moreover, in the light of the considerations set out in paragraph 79 of the present judgment, it must be held that the Commission has not adduced any evidence capable of establishing that the contribution scheme at issue constitutes a neutralisation or a reduction in excise duty on fuel.

85 As the Italian Republic submits, supported on that point by the Kingdom of Spain, since the cost of producing fuel exceeds the amount of the contribution at issue, it cannot be excluded that the purpose of that scheme is to mitigate the impact of higher production costs on the final price of fuel, in so far as those costs, which can vary significantly from one region to another, may, depending on the region concerned, give rise to differences in fuel prices.

86 As the Advocate General noted in points 105 and 108 of his Opinion, since the Commission does not rely on any specific evidence in support of its assertion that the contribution scheme at issue neutralises or reduces the excise duty on fuel, that assertion is equal to a presumption. As stated in point 109 of that Opinion, it is impossible to conclude with certainty that the reduction in fuel prices amounts to a reduction in the excise duty.

87 In those circumstances, it must be concluded that the Commission has not adduced evidence of the existence of a real link between the sums paid under the contribution scheme at issue and those levied in respect of excise duties on fuel sold to residents of the Region, resulting in that contribution scheme leading to the neutralisation or reduction of excise duties by means of that contribution.

88 It is true that the fact that the persons liable for the excise duty and the beneficiaries of the contribution at issue are different does not in itself preclude a finding that there is a refund of that tax, as is apparent from the judgment of 25 April 2013, *Commission* v *Ireland* (C−55/12, not published, EU:C:2013:274). However, as noted in point 94 of the Advocate General's Opinion, it is also necessary to establish that there is a real link between that contribution and the excise duty on the purchase of fuel.

89 Similarly, nor does the fact that the contribution at issue is granted on the basis of the quantity of fuel purchased and that its amount thus varies according to that quantity indicate the existence of a link between that contribution and the excise duty. That variation is due solely to the fact that, like the contribution at issue, excise duties on fuel are payable per litre of fuel purchased, without that mere similarity in the method of calculation being capable of calling into question the conclusion in paragraph 87 of the present judgment. In addition, unlike excise duty, that contribution is expressed in fixed amounts and also varies according to the area where the beneficiary resides.

90 The fact that a pre-existing refund scheme, some elements of which are similar to those of the contribution scheme at issue, was the subject of a derogation authorised in accordance with the provisions of Directive 2003/96 or of earlier EU legislation on the subject is merely a factor justifying the examination of the conformity of the new scheme, namely the contribution scheme at issue, with EU law, but cannot prejudge the outcome of that examination.

91 The same applies to the fact that national schemes which have certain similarities with the contribution scheme at issue were approved by the Council on the basis of Article 19 of Directive 2003/96.

92 It follows from all the foregoing considerations that the Commission has not proved to the requisite legal standard that, by introducing the contribution system at issue, which provides for the granting to natural persons residing in the Region a fixed-price reduction per litre of petrol and diesel purchased for use as

fuel, the Italian Republic has introduced a reduction in excise duty in the form of a refund of the amount of the tax, or, consequently, that that Member State has failed to fulfil its obligations under Articles 4 and 19 of Directive 2003/96.

93 The Commission's action must therefore be dismissed.

Costs

94 Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Italian Republic has applied for costs and the Commission has been unsuccessful, the latter must be ordered to pay the costs.

95 Pursuant to Article 140(1) of those rules, which provides that Member States which have intervened in the proceedings are to bear their own costs, the Kingdom of Spain is to be ordered to bear its own costs.

On those grounds, the Court (Fifth Chamber) hereby:

1. Dismisses the action;

2. Orders the European Commission to pay the costs;

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

[Signatures]

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* Language of the case: Italian.