Does *Gabel Industria Tessile and Canavesi (C-316/22)* demand the application of the EU principle of effectiveness to Portuguese road network user charge disputes brought by final consumers?

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In this note, the author explores the following questions:

(1) Should the conclusions of the Court of Justice of the European Union (ECJ) in the *Gabel Industria Tessile and Canavesi* case (C-316/22) be applied to domestic road network user charge (the CSR) disputes brought to court by final consumers?
(2) Does the European Union (EU) principle of effectiveness demand such an application?

To answer these questions, it is essential to explain: (i) what CSR consists of, (ii) the relevant ECJ case law – in particular, the *Vapo Atlantic* case (C-460/21) and (iii) the massification of the disputes brought by private entities (as final consumers) to Portuguese tax courts, against the Portuguese Tax and Customs Authority (Portuguese Authority), after the VAPO ATLANTIC case.

The *Gabel Industria Tessile and Canavesi* case – especially paragraphs 28 to 38 of the judgment, potentially applicable to CSR disputes – is also discussed.
Finally, the author shares her views and anticipates possible implications.

1. What is CSR?

Generally, CSR was a charge (tributo) for using the national road network, which was included in the payment for fuel consumption. This regime was in force until 31 December 2022. CSR was a funding source for the national road network operated by Infraestruturas de Portugal, S.A. (former EP – Estradas de Portugal, EPE). It was levied on petrol and diesel subject to tax on petroleum and energy products. CSR was due by the taxpayer (as a rule, the entity that introduces fuel into consumption, such as petrol companies).

However, the taxpayer could/should have passed it on to other entities (for example, to final consumers) when (and if) it sold the fuel, through the price. Portuguese tax jurisprudence is divided on the nature of the repercussion – whether optional or mandatory. The wording of article 2 of the Portuguese Excise Duty Code, introduced by article 3 of the Portuguese Law 24-E/2022 of 30 December 2022, has densified this discussion.

2. ECJ case law on CSR: *Vapo Atlantic* Case

In its order of 7 February 2022, the ECJ stated that the CSR regime is not in line with the Excise Duty Directive (the Directive) (in the version applicable ratione temporis) due to this charge not having "specific purposes" as per article 1(2) of the Directive. Contrary to the Portuguese Tax Authority's position, the ECJ considered that the absence of "specific purposes" stemmed from the charge's structure, which was not intended to discourage the consumption of road fuels.

A taxpayer brought the domestic legal action that gave rise to this order. The action had a favourable outcome. The Portuguese arbitration tax court further relied on the findings established in the Vapo Atlantic case.

3. Massification of legal actions by final consumers against the Portuguese Authority and domestic courts' views

After that legal action, entities in the final consumers' role filed several other actions against the Portuguese Authority, claiming to have effectively borne CSR (due to its repercussion on the fuel price) and, consequently, requesting its reimbursement. Some final consumers chose to bring their cases to the Portuguese arbitration tax courts and others to the Portuguese judicial tax courts. Taxpayers are not part of these actions.

Some Portuguese first-instance tax courts have considered the said actions as inadmissible. Among other arguments, they argue that only the taxpayers are entitled to and have the legal standing to directly require the reimbursement of the CSR from the Portuguese State through the Portuguese tax courts. Portuguese tax courts underpin that no (legal-tax) relationship exists between the final consumer and the Portuguese State. The final consumer's relationship is only with the taxpayer (i.e. with the entity that passed on the CSR through the fuel price). This is a relationship between two private entities governed, for this reason, by private law. Therefore, a final consumer wishing to recover the unduly borne CSR should initiate a civil action against the taxpayer with the civil courts. In support of their position, the Portuguese tax courts claim that the CSR repercussion is merely economic and, consequently, optional.

Portuguese higher tax courts have issued no rulings yet (or at least, to date, they are unknown) on this matter.

4. The *Gabel Industria Tessile and Canavesi* case: An overview

In this case, Italian law introduced an additional tax on electricity excise duty deemed contrary to the Directive (in the version applicable ratione temporis) due to the absence of "specific purposes" set out in article 1(2) of the Directive.

Under Italian law, the final consumer paid this additional tax as part of the electricity price invoiced by the taxpayer (the electricity supplier).

According to the ECJ, the Directive has no horizontal direct effect, meaning that it cannot be directly invoked in court by a private entity (i.e. the final consumer) against another private entity (i.e. the taxpayer) to recover the tax illegally borne.

The ECJ ruled that, if the inability to invoke the Directive in a civil action prevents the tax reimbursement – i.e. the tax refund to the final consumer (the one who has effectively borne the tax) – the principle of effectiveness demands that the final consumer is able to claim the tax reimbursement directly from the Italian State.

The crux of the matter is therefore, under the EU principle of effectiveness, can final consumers demand CSR reimbursement directly from the Portuguese State with the Portuguese tax courts?

Does the *Gabel Industria Tessile and Canavesi* judgment apply to the Portuguese disputes at stake?

5. The author's take

In the author's opinion, given the unquestionable similarities – in both situations, we are dealing with a charge contrary to article 1(2) of the Directive, as expressly decided by the ECJ, which the taxpayer passed to a third party, having the latter bringing an action against the State to recover it –, the findings of the *Gabel Industria Tessile and Canavesi* case should apply to Portuguese litigation with the tax courts, in line with the *acte clair* doctrine (unless the national tax courts can invoke a suitable justification for its non-application, which the author fails to discern).

Otherwise, the final consumer will have no legal means of defence since no provision in Portuguese law foresees the horizontal direct effect of the Directive and, under EU law, such an effect is not permissible, which prevents access to civil courts and the respective means of defence.

This lack of defence would consequently breach the principle of effectiveness.

It is, therefore, essential to close the "loophole" by bringing action directly against the Portuguese State by the final consumers, invoking the vertical direct effect of the Directive (with a tax court).

Given the above, the author believes this action should not be dismissed because of the final consumers' alleged absence of legal standing.

However, when (and if) this occurs, the final consumers should consider reacting to such a ruling, for example, as a last resort, by appealing for review on the grounds of a judicial error. The *Köbler* case (C-224/01) and the *Traghetti del Mediterraneo* case (C-173/03) may be informative on this matter.

With this ETF, the author hopes to contribute to adequately applying EU law in the Portuguese tax field. Notwithstanding, the author recognises that this litigation involves several other issues of considerable importance and complex resolution, which the Portuguese courts will perseveringly scrutinise.

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