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***Member States' possibilities to impose levies on
CO2 emissions from motor vehicles;***

EU indirect tax issues

By

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Abbreviations and explanations

CJEU	Court of Justice in the European Union
Commission	Commission of the European Union
Council	Council of the European Union
EU	European Union
Member States	Member States of the European Union
Parliament	European Parliament
TFEU	Consolidated version of the Treaty on the Functioning of the European Union
TEU	Consolidated version of the Treaty on European Union
VAT	value added tax

1 Introduction

1.1 Background

Most climate scientists agree on (as do most of the heads of the states of the Western world) that the main cause of the global warming is human enhancement of the so-called ‘greenhouse effect’, *i.e.* the trapping of the Sun’s warmth in planet’s lower atmosphere.¹ The Sun warms Earth’s surface, which radiates the heat back towards space. The atmosphere contains radiatively active gases, *e.g.* water vapour (H₂O), nitrous oxide (N₂O), methane (CH₄), and carbon dioxide (CO₂). As these so-called ‘greenhouse gases’ (hereafter referred to as ‘GHG’) exist in atmosphere, most of the heat from the Sun is absorbed by GHG molecules and re-emitted in all directions. In this process, the atmosphere traps heat radiating from Earth towards space. Thus, heat is blocked from escaping the atmosphere, which results in the greenhouse effect that warms Earth.²

In the battle against the global warming, CO₂ is the big villain. According to the Intergovernmental Panel on Climate Change (IPCC), CO₂ is the human influenced climate driver that most affects the warming of Earth.³ Furthermore, CO₂ remains in the atmosphere longer than the other major heat trapping gases emitted in course of human activities. Much of CO₂ emitted today will be gone in 100 years, but around 20% will exist in the atmosphere also after approximately 800 years.⁴ Against the background of CO₂: s significant effect on the global warming and its long-lasting character, the willingness to curb CO₂ emissions is not surprising.

In 2010, the Commission launched ‘Europe 2020’⁵ which is a 10-year strategy for the advancement and rehabilitation of EU’s economy in the aftermath of the 2008 financial crisis. The aim of this strategy is to turn the EU into a smart, sustainable and inclusive economy.⁶ To guide efforts and steer progress, the Commission proposed that the EU should commonly agree on a limited number of headline targets for 2020, representative of the theme of smart, sustainable and inclusive growth.⁷ From a sustainability perspective, Europe 2020 strategy aims at promoting a more resource

¹ See *e.g.* Dana Nuccitelli, ‘Is the climate consensus 97%, 99.9%, or is plate tectonics a hoax?’ *The Guardian* (3 May 2017)

² ‘Causes of Climate Change; A Blanket around the Earth’ (NASA)

³ ‘Climate Change 2007: Working Group I: The Physical Science Basis; Human and Natural Drivers of Climate Change’ (Intergovernmental Panel on Climate Change, IPCC)

⁴ ‘Why does CO₂ get most of the attention when there are so many other heat-trapping gases (greenhouse gases)?’ (Union of Concerned Scientists)

⁵ Commission, ‘EUROPE 2020; A strategy for smart, sustainable and inclusive growth’ (Communication) COM(2010) 2020 final

⁶ Commission, ‘EUROPE 2020; A strategy for smart, sustainable and inclusive growth’ (Communication) COM(2010) 2020 final, 5

⁷ Commission, ‘EUROPE 2020; A strategy for smart, sustainable and inclusive growth’ (Communication) COM(2010) 2020 final, 10

efficient, greener and more competitive economy. To this end, the Commission proposed the ‘20-20-20’ climate and energy targets as one of the Europe 2020 headline targets.⁸ The ‘20-20-20’ targets entail that the EU should (1) reduce its GHG emissions by at least 20% (30%)⁹ compared to 1990 levels; (2) increase the share of renewable energy sources in our final energy consumption to 20%; and (3) reach a 20% increase in energy efficiency.¹⁰ Furthermore, the Commission put forward seven flagship initiatives in the Europe 2020 strategy to catalyse progress.¹¹ The flagship initiative of ‘Resource efficient Europe’ aims at supporting the shift towards a resource efficient and low-carbon economy. Particularly, the objective of that initiative is to decouple EU’s economic growth from resource and energy use, reduce CO₂ emissions, enhance competitiveness, and promote greater energy security.¹²

As the Commission pointed out in the ‘Transport White Paper of 2011’¹³, transport and mobility are critical for the realisation of the internal market. As the Commission has pointed out: *“European Transport is at cross roads. Old challenges remain but new have come.”*¹⁴

On the one hand, oil will become scarcer in the future, and sourced increasingly from uncertain supplies. Accordingly, the less decarbonising succeeds, the more the oil price will increase. Hence, the challenge is to break EU’s dependence on oil without sacrificing the transport system’s efficiency, compromising mobility, or endangering the security and the competitiveness of the EU economy.¹⁵ In line with the Europe 2020 strategy and the Energy Efficiency Plan of 2011¹⁶, the ultimate goal of EU’s transport policy is to design a transport system that underpins EU’s

⁸ Commission, ‘EUROPE 2020; A strategy for smart, sustainable and inclusive growth’ (Communication) COM(2010) 2020 final, 5

⁹ By 30% provided that other developed countries commit themselves to comparable emission reductions and that developing countries contribute adequately according to their responsibilities and respective capabilities. See Commission, ‘EUROPE 2020; A strategy for smart, sustainable and inclusive growth’ (Communication) COM(2010) 2020 final, footnote 2, 11

¹⁰ Commission, ‘EUROPE 2020; A strategy for smart, sustainable and inclusive growth’ (Communication) COM(2010) 2020 final, 11

¹¹ Commission, ‘EUROPE 2020; A strategy for smart, sustainable and inclusive growth’ (Communication) COM(2010) 2020 final, 5

¹² Commission, ‘EUROPE 2020; A strategy for smart, sustainable and inclusive growth’ (Communication) COM(2010) 2020 final, 15

¹³ Commission, ‘Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system’ (White Paper) COM(2011) 144 final

¹⁴ Commission, ‘Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system’ (White Paper) COM(2011) 144 final, para 3, 3

¹⁵ Commission, ‘Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system’ (White Paper) COM(2011) 144 final, paras 5 and 17, 3 and 5

¹⁶ Commission, ‘Energy Efficiency Plan 2011’ (Communication) COM(2011) 109 final

economic progress, enhances competitiveness and offers high quality mobility services while using resources more efficiently.¹⁷

On the other hand, the international community has agreed that there is an urgent need to drastically reduce world GHG emissions with a goal of limiting climate change below 2° Celsius.¹⁸ Overall, the EU needs to reduce emissions by 80–95% below the 1990 levels by 2050.¹⁹ In the transport sector, this would mean that a reduction of at least 60% of the 1990 GHG emission levels would be required, which would correspond to emissions cuts of around 70% compared to the emission levels of 2008.²⁰ At the same time, transport sector is a significant, and still growing, source of GHG emissions.²¹ Even though EU transport sector has become more energy efficient, it still depends on oil and oil products for 96% of its energy needs.²² As the Commission puts it, it is thus clear that EU's transport sector cannot develop along the same path.²³

Carbon is present in hydrocarbon fuels and is converted to CO₂ when combusted. Road traffic contributes about 20% of the EU's total emissions of CO₂.²⁴ There is a common EU ambition to reduce road traffic related CO₂ emissions. At the same time, more resource-efficient vehicles and cleaner fuels are unlikely to achieve, on their own, the necessary cuts in CO₂ emissions related to road traffic.²⁵ Therefore, there are persuasive reasons why also levies on road transport related CO₂ emissions should be restructured in the direction of wider application of the '*polluter-pays principle*'.²⁶

The polluter-pays principle states that "*the polluter [for those who otherwise engage in environmentally degrading activities] should bear the cost of measures to reduce pollution [for other environmentally degrading activity]*"

¹⁷ Commission, 'Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system' (White Paper) COM(2011) 144 final, para 17, 5

¹⁸ See e.g. 'The Paris Agreement' (*United Nations Framework Convention on Climate Change*)

¹⁹ Commission, 'Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system' (White Paper) COM(2011) 144 final, para 6, 3

²⁰ Commission, 'Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system' (White Paper) COM(2011) 144 final, para 6 and footnote 2, 3

²¹ Commission, 'Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system' (White Paper) COM(2011) 144 final, para 6, 3

²² Commission, 'Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system' (White Paper) COM(2011) 144 final, para 7, 3–4

²³ Commission, 'Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system' (White Paper) COM(2011) 144 final, para 13, 4

²⁴ 'Road Transport: Reducing CO₂ emissions from vehicles' (*European Commission Climate Action*) (last updated 10 May 2017)

²⁵ Commission, 'Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system' (White Paper) COM(2011) 144 final, para 22, 6

²⁶ Commission, 'Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system' (White Paper) COM(2011) 144 final, para 58, 15

according to the extent of either the damage done to society or the exceeding of an acceptable level (standard) of pollution”²⁷. When market-based instruments, such as environmentally related levies, are used to implement the polluter-pays principle, the underlying rationale is to incentivise a shift to less damaging activities by making the environmentally degrading activities financially costly.²⁸ This perception builds on the Pigouvian prescription of internalising externalities, which, when reduced to a simplified essence, asserts that “[levies] equal to the externalities could equalize the private and social marginal costs”²⁹.

In the context of road traffic, this means the following. The road users have to pay costs that are directly related to the use, *e.g.* vehicle, fuel, insurance *etc.* Such costs are considered private as they are paid directly by the user. Nevertheless, road transport generates also negative externalities that involve a cost to the society and the economy. The effect of GHG emissions on climate change is an example of an externality that road transport generates. However, from the road user’s perspective, the costs related to externalities are external in the sense that he does not directly bear those. Instead, external costs are generally borne by the state and its citizens. The sum of the marginal private cost and the marginal external costs of road transport gives its marginal social cost.³⁰ Hence, in theory, internalising CO₂ emissions related to road traffic (*i.e.* the externality) would demand that the cost of CO₂ emissions on the society (*i.e.* the external cost) would be included in the road user’s costs so that those would equal the marginal social cost.

Traditionally, when it comes to curbing CO₂ emissions from motor vehicles, carbon tax on fuel and EU Emissions Trading System (hereafter referred to as ‘EU ETS’) are the market-based instruments that have been around in discussions.³¹ However, for some time now, voices have been raised in favour of introducing a road toll system that would vary costs based on a vehicle’s CO₂ emissions.³² Effectively, the Commission is scheduled to

²⁷ ‘Polluter-Pays Principle’ (*OECD Glossary of Statistical Terms* 11 December 2001)

²⁸ See *e.g.* Sally-Ann Joseph, ‘Environmental taxes – definitional analysis: behavioural change or revenue raising’ in Larry Kreiser *et al.* (eds), *Environmental Taxation and Green Fiscal Reform; Theory and Impact* (Edward Elgar Publishing 2014), 188

²⁹ Janet E Milne and Mikael Skou Andersen, ‘Introduction to environmental taxation concepts and research’ in Janet E Milne and Mikael Skou Andersen (eds), *Handbook of Research on Environmental Taxation* (Edward Elgar 2014), 17

³⁰ ‘Marginal Social Cost – MSC’ (*Investopedia*)

³¹ See *e.g.* Commission, ‘Strategy for the internalisation of external costs’ (Communication) COM(2008) 435 final, 3 and Commission, ‘Proposal for a Council Directive amending Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity’ COM(2011) 169 final

³² See *e.g.* Catherine Strupp, ‘MEPs demand Commission propose tolls on trucks to curb CO₂ emissions’ *EURACTIV.com* (20 November 2015); ‘CO₂ differentiated truck tolls – what the EU should do’ (*Transport & Environment* 30 September 2015); ‘Road charging for cars; What the European Commission should do’ (*Transport & Environment* May 2017)

review the Eurovignette Directive³³ which sets the parameters by which Member States may impose either a distance-based or a time-based levy for ‘heavy-duty vehicles’ (hereafter referred to as ‘HDVs’)³⁴ on certain road infrastructures. This review is intended to take place during the second quarter of 2017.³⁵ In 2016, it was announced that the Commission has on its agenda to propose a distance-based levy, *i.e.* a so-called ‘[road] toll’³⁶, on not only HDVs but also buses, coaches and ‘private vehicles’³⁷, the amount of which would be, at least partially, calculated based on the vehicle’s CO₂ emissions.³⁸

From EU law viewpoint, the case of curbing CO₂ emissions from motor vehicles is of interest for two main reasons. Firstly, safeguarding internal market requirements and undistorted competition is one of the EU’s basic principles. When Member States impose levies on CO₂ emissions from motor vehicles, there is an inherent risk that the freedoms of movement are restricted, that discrimination based on nationality occurs, and that the national laws or practices result in unsanctioned state aid and are thus contrary to Articles 107 and 108 TFEU. Secondly, motor fuels fall within the scope of the harmonised EU excise duty system. Since there is an inextricable link between the amount CO₂ emitted by a carbon fuel vehicle (or vehicle combination) during a given distance and the amount carbon in the fuel that the vehicle consumes during that same distance, the EU secondary law on indirect taxation is of central interest. At the same time, also road charging is regulated at EU level by the Eurovignette Directive. Accordingly, Member States, when imposing levies on CO₂ emissions from motor vehicles, must, in accordance with their Treaty obligation of sincere cooperation, not only comply with EU primary law but also ensure

³³ Consolidated version of Directive 1999/62/EC of the European Parliament and of the Council of 17 June 1999 on the charging of heavy goods vehicles for the use of certain infrastructures as it stands 22 May 2017

³⁴ In this paper, the term ‘*HDV*’ is used for the vehicles falling within the scope of the Eurovignette Directive. Thus, HDVs are defined as motor vehicles and articulated vehicle combinations intended or used for the carriage by road of goods having a maximum permissible laden weight of over 3.5 tonnes, see Articles 1 and 2(d) of the Eurovignette Directive.

³⁵ ‘Legislative train schedule; resilient energy union with a climate change policy; revision of the Directive 1999/62/EC on charging of heavy-goods vehicles for use of certain use of certain infrastructures (Eurovignette Directive)/before 2017-07’ (*European Parliament*)

³⁶ In this paper, the term ‘[road] toll’ is used as defined in Article 2(b) of the Eurovignette Directive, *i.e.* meaning a specified amount payable for a vehicle based on the distance travelled on a given infrastructure and on the type of the vehicle.

³⁷ In this paper, the term ‘*private vehicles*’ is used as defined in COM(2012) 199 final, *i.e.* for passenger cars, motor cycles, and other motor vehicles with a permissible laden weight of no more than 3.5 tonnes, used predominantly for private purposes. See Commission, ‘on the application of national road infrastructure charges levied on light private vehicles’ (Communication) COM(2012) 199 final, footnote 3, 3

³⁸ Commission, ‘A European Strategy for Low-Emission Mobility’ (Communication) COM(2016) 501 final, 4

compliance with the EU secondary law on indirect taxation and the Eurovignette Directive.³⁹

1.2 Purpose

The Author intends, with this Thesis, to answer the following research question:

What possibilities do Member States have to impose levies on CO₂ emissions from motor vehicles in the light of EU indirect tax law and the Eurovignette Directive?

1.3 Method and material

This paper is a descriptive study *de lege lata*, i.e. a study of law as it stands. The method the Author has employed to that end is the legal-dogmatic method in combination with the EU law method. Furthermore, the Author employs some basic elements of the theory of public finance to explain the interconnections between the legal issues related to imposing a levy on CO₂ emissions from motor vehicles and the economic theory on how market-based environmental policy instruments operate.

The legal-dogmatic method concerns researching current positive law as laid down in sources of law.⁴⁰ The EU law method, in turn, governs the Author's choice of sources of law and the mutual hierarchy of those.

When EU law method is used, the EU sources of primary law and those of secondary law, as well as supplementary sources of EU law, are employed. EU primary law consists mainly of the Treaties.⁴¹ EU secondary law consists of binding legislative acts, i.e. regulations, directives, and decisions,⁴² and non-binding legislative acts which include recommendations and opinions but also other documents, such as resolutions, programmes, notices *etc.*⁴³ Of supplementary sources of EU law, international agreements, case law, and the general principles of EU law are binding. Travaux préparatoires, the opinions of the Advocate

³⁹ Article 4(3) TEU

⁴⁰ Sjoerd Douma, *Legal Research in International and EU Tax Law*, (Wolters Kluwer 2014), 17–18

⁴¹ 'Primary law' (*EUR-Lex* 12 August 2010) and Jörgen Hettne, '1.3 'Primär- och sekundärrätt' in Jörgen Hettne and Ida Otken Eriksson (eds) *EU-rättslig metod; teori och genomslag i svensk rättstillämpning* (2nd edn Norstedts Juridik 2011), 41–42

⁴² Article 288 TFEU

⁴³ Article 288 TFEU and Jörgen Hettne, '1.3 'Primär- och sekundärrätt' and '1.5 Icke-bindande rättsakter' in Jörgen Hettne and Ida Otken Eriksson (eds) *EU-rättslig metod; teori och genomslag i svensk rättstillämpning* (2nd edn Norstedts Juridik 2011), 42 and 46–47

Generals, literature and economic theories are, on the other hand, only to give guidance.⁴⁴

The presumption of the method of law and economics is that the goal of legislation is to reach an efficient outcome.⁴⁵ However, in this paper, the method of law and economics is not used to argue *de lege ferenda* what would be the most efficient way for the EU or Member States to curb CO₂ emissions from motor vehicles. Yet, environmental levies, such as a carbon tax on fuel or CO₂ differentiated road tolls, are market-based environmental policy instruments that aim to address the market failure of environmental externalities. For this reason, in Chapter 5, the method of law and economics, or, more precisely, very basic elements of public finance theory, is used to explain how these instruments work in theory to correct the market failure. The Author's intention with this way of contemplating the issue is to make it more understandable.

The Author's purpose with this paper is to examine Member States' possibilities to impose levies on CO₂ emissions from motor vehicles in the light of EU indirect tax legislation and the Eurovignette Directive. Moreover, the Author has limited her study to an examination of EU secondary law implications (see below Chapter 1.4) on Member States' margin of appreciation in this respect. Naturally, this also has consequences regarding the use of sources.

With respect to the Author's choice of topic, the following secondary legislative acts are the starting point for her study: The General Arrangements Directive⁴⁶; the Energy Taxation Directive⁴⁷; the VAT Directive⁴⁸; and the Eurovignette Directive. Also, case law of the CJEU related to the interpretation of Articles 1(2) and 1(3) of the General Arrangements Directive is studied in order to clarify the limits of the Member States' margin of appreciation in relation to EU excise duty system when imposing levies on CO₂ emissions from motor vehicles. Most of the

⁴⁴ Jörgen Hettne, '1.2 'EU-rättskällornas inbördes förhållanden' in Jörgen Hettne and Ida Otken Eriksson (eds) *EU-rättslig metod; teori och genomslag i svensk rättstillämpning* (2nd edn Norstedts Juridik 2011), 40

⁴⁵ Christian Dahlman, Marcus Glader and David Reidhav, *Rättsekonomi; En introduktion* (Studentlitteratur 2004), 9

⁴⁶ Consolidated version of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC as it stands 22 May 2017

⁴⁷ Consolidated version of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity as it stands 22 May 2017

⁴⁸ Consolidated version of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax as it stands 22 May 2017

referred case law concerns the Horizontal Excise Directive⁴⁹ that preceded the General Arrangements Directive. In this Thesis, however, the Author has decided, when referring to the case law, to consistently refer to the up-to-date corresponding provisions in the General Arrangements Directive. Furthermore, the reason why no case law is discussed in relation to the Eurovignette Directive is that there is no case law where the CJEU would have discussed the Eurovignette Directive in the light of EU indirect tax legislation.

Travaux préparatoires, *i.e.* Commission proposals, a White Paper, and communications from the Commission, are used as material to describe the legislative trends and developments related to imposing levies on CO₂ emissions from motor vehicles at EU level. In addition, the Author has consulted relevant literature especially in connection to the analysis of Member States' margin of appreciation to impose levies on CO₂ emissions from motor vehicles in the light of EU indirect tax law. *Vis-à-vis* the relationship between the Eurovignette Directive and EU indirect tax law, earlier research shines with its absence.

Because of the time limitation for the conclusion of this Thesis, EU legislative acts, case law of the CJEU, and travaux préparatoires are taken into account as of 22 May 2017 which is the date of handing in the raw manuscript of the Thesis before the opposition seminar.

1.4 Delimitations

The *primary* law questions related to potential distortions of competition in the internal market are not dealt with in this Thesis more than by mentioning in passing. With respect to the questions related to EU primary law in context of taxing CO₂ emissions, Readers with knowledge of Scandinavian languages are referred to Sebastian Houe's book *CO₂-beskatning i et EU-retligt og nationalt perspektiv*⁵⁰ that is based on his doctoral thesis.

Furthermore, the Author has decided to limit levies relating to ownership and registration of motor vehicles outside the scope of this Thesis. The Author wants also to emphasise that EU ETS which, for that matter, is not an issue of EU indirect taxation, is not dealt with.

1.5 Outline

In Chapter 2, the EU excise duty system is introduced. In more detail, the Author presents the relevant EU secondary law provisions and case law of the CJEU in relation to Member States' margin of appreciation when it

⁴⁹ Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (repealed)

⁵⁰ Sebastian Houe, *CO₂-beskatning i et EU-retligt og nationalt perspektiv* (Jurist- og Økonomforbundets forlag 2013)

comes to imposing levies on CO₂ emissions from motor vehicles vis-à-vis the harmonised EU excise duty system. In Chapter 3, the character of a general tax of EU VAT is described. In Chapter 4, the central provisions of the Eurovignette Directive that are relevant for the Author's topic are introduced. In Chapter 5, the Author analyses Member States' possibilities to impose levies on CO₂ emissions from motor vehicles. The market-based environmental policy instruments included in the analysis are carbon tax on fuel and CO₂ differentiated road tolls. In Chapter 6, the Author examines the Commission's agendas and initiatives to include the external cost of road traffic related CO₂ emissions in the price of road tolls. Finally, Chapter 7 concludes the Thesis.

2 EU excise duties

As Cnossen has put it: "*Broadly speaking, the distinguishing features of excise taxation are selectivity in coverage, discrimination in intent, and often some form of quantitative measurement in determining the tax liability.*"⁵¹ Excise taxation, *i.e.* selective taxes, duties or charges on goods and services, are among the oldest forms of taxation in the world.⁵² Excise taxation has variable objectives. Traditionally, the purpose of excise taxation has mainly been fiscal, *i.e.* gathering revenue for general purposes. Later, other objectives have amplified the scale of purposes that excise taxation serves. These specifically include internalising external costs in accordance with the Pigouvian prescription, discouraging consumption of health depriving products, and charging for the use of government-provided road infrastructure.⁵³

In the EU, excise duties are partly harmonised. The General Arrangements Directive sets the general scheme of EU excise duty that Member States must follow when drafting their excise duty laws. There are three groups of commodities that are subject to the EU general arrangements procedure. These are (1) energy products and electricity; (2) alcohol and alcoholic beverages; and (3) manufactured tobacco.⁵⁴ The structure of the excise duty on alcohol and alcoholic beverages is regulated in the Alcohol Structures

⁵¹ Sijbren Cnossen, 'Economics and Politics of Excise Taxation' in S Cnossen (ed) *Theory and Practice of Excise Taxation: Smoking, Drinking, Gambling, Polluting, and Driving* (e-book 2005 OUP), 2

⁵² Sijbren Cnossen, 'Economics and Politics of Excise Taxation' in Sijbren Cnossen (ed) *Theory and Practice of Excise Taxation: Smoking, Drinking, Gambling, Polluting, and Driving* (e-book 2005 OUP), 1

⁵³ Sijbren Cnossen, 'Economics and Politics of Excise Taxation' in Sijbren Cnossen (ed) *Theory and Practice of Excise Taxation: Smoking, Drinking, Gambling, Polluting, and Driving* (e-book 2005 OUP), 1–5

⁵⁴ Article 1(1) of the General Arrangements Directive

Directive⁵⁵. The Alcohol Rates Directive⁵⁶, in turn, sets the minimum rates for excise duty that Member States must apply on alcohol and alcoholic beverages. Regarding energy products and electricity as well as manufactured tobacco, both the structure of and the minimum rates for excise duty are covered by the Energy Taxation Directive and the Tobacco Taxation Directive⁵⁷, respectively.

Article 1 of the General Arrangements Directive defines the scope. Article 1(1) of the General Arrangements Directive lays down the arrangements in relation to excise duty which is levied directly or indirectly on ‘*excise goods*’, *i.e.* energy products and electricity, alcohol and alcoholic beverages, and manufactured tobacco. Thus, the starting point is that excise duties on the defined excise goods are harmonised within the EU.

However, it is possible for Member States to introduce national taxes with a connection to excise goods under Articles 1(2) and 1(3) of the General Arrangements Directive. Of Article 1(2) of the General Arrangements Directive follows that Member States may levy other indirect taxes on excise goods for *specific purposes*. However, in such cases Member States must comply with certain essential elements of EU rules relating to indirect taxes in order not to jeopardise the useful effect of those rules.⁵⁸ Accordingly, Article 1(2) of the General Arrangements Directive further prescribes that levying other indirect taxes on excise goods for specific purposes is subject to the condition that those taxes comply with the EU tax rules applicable for excise duties or VAT 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.

Furthermore, as Article 1(3) of the General Arrangements Directive stipulates, Member States may levy taxes on products other than excise goods and on the supply of services, including those relating to excise goods, which cannot be characterised as turnover taxes. However, the levying of such taxes may not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.⁵⁹ As elaborated below,

⁵⁵ Consolidated version of Council Directive 92/83/EEC of 19 October 1992 on the harmonization of the structures of excise duties on alcohol and alcoholic beverages as it stands 22 May 2017

⁵⁶ Council Directive 92/84/EEC of 19 October 1992 on the approximation of rates of excise duty on alcohol and alcoholic beverages as it stands 22 May 2017

⁵⁷ Council Directive 2011/64/EU of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco as it stands 22 May 2017

⁵⁸ Recital (4) to the preamble of the General Arrangements Directive

⁵⁹ Schröder-Schallenberg has notified that some scholars have taken a very restrictive view regarding the prerequisite of the levy not giving rise to any formalities connected with the crossing of frontiers claiming that any control of cross-border trade, including domestic fiscal supervision performed as part of national tax regimes, would be contrary to Article 1(3) of the General Arrangements Directive. As Schröder-Schallenberg, in the Author’s view, correctly points out, that interpretation of Article 1(3) of the General Arrangements

the key difference between Articles 1(2) and 1(3) of the General Arrangements Directive is thus that a levy to which Article 1(2) applies must have a specific purpose while Article 1(3) presents no such requirement.⁶⁰

2.1 Article 1(2) of the General Arrangements Directive

2.1.1 A levy for a specific purpose does not necessarily have to apply to a whole category of excise goods

In *Commission v France*, France had introduced a social security contribution on tobacco and alcoholic beverages that was levied on the ground of the health risks involved in immoderate consumption of those products (hereafter referred to as ‘the social security contribution’).⁶¹

While the Commission acknowledged that the social security contribution, in itself, pursued a specific purpose within the meaning of Article 1(2) of the General Arrangements Directive, it took the view that its scope and tax base were incompatible with the Alcohol Structures Directive.⁶² As the social security contribution was only levied on alcoholic beverages having greater than 25% in alcohol by volume (ABV), the Commission considered that it had a disparity in scope with the Alcohol Structures Directive which sets out the definition of ‘ethylic alcohol’ for products exceeding 22% ABV. Thus, the French legislation, in the Commission’s opinion, created a specific sub-category of alcoholic products not envisaged by the Alcohol Structures Directive for Alcohol.⁶³ Furthermore, the Commission criticised the fact that the social security contribution was determined by reference to the volume of the beverage, while the Alcohol Structures Directive provided, as the tax base for excise duty on ethyl alcohol, the number of hectolitres of pure alcohol.⁶⁴

Directive would, however, amount to a prohibition of non-harmonised excise duties, which would contradict the aim behind the General Arrangements Directive. Thus, Schröder-Schallenberg is of the opinion that only control measures imposed in conjunction with the crossing of internal frontiers, *i.e.* routine border controls, would be unlawful. See Sabine Schröder-Schallenberg, ‘The legality of non-harmonised excise duties in the European internal market using the Federal Republic of Germany as an example’ (2012) 6(2) World Customs Journal, under sub-chapter 2.1.3 ‘Must not give rise to any formalities with the crossing of frontiers’

⁶⁰ This is clear from the letter of Article 1(3) of the General Arrangements Directive as it stands today but has also been confirmed by the CJEU in case *Case C-491/03 Ottmar Hermann v Stadt Frankfurt am Main* [2005] ECLI:EU:C:2005:157, paras 31–34

⁶¹ *Case C-434/97 Commission of the European Communities v French Republic* [2000] ECLI:EU:C:2000:98, para 6

⁶² *Case C-434/97 Commission of the European Communities v French Republic* [2000] ECLI:EU:C:2000:98, para 7

⁶³ *Case C-434/97 Commission of the European Communities v French Republic* [2000] ECLI:EU:C:2000:98, para 8

⁶⁴ *Case C-434/97 Commission of the European Communities v French Republic* [2000] ECLI:EU:C:2000:98, para 9

Firstly, the CJEU pointed out that it is crucial to observe that the harmonisation achieved by the EU excise duty system is no more than partial.⁶⁵ In fact, Article 1(2) was inserted in the General Arrangements Directive because of the different fiscal traditions in Member States with regard to the structure of the excise duties and the frequent recourse to indirect taxes for the purpose of implementing non-budgetary policies.⁶⁶ Thus, the provision was designed to allow Member States to establish, in addition to the minimum excise duty fixed by the Alcohol Structures Directive, other indirect taxes for a specific purpose.⁶⁷

Regarding the Commission's complaint that the social security contribution did not apply to the category of alcoholic beverages, as defined in the Alcohol Structures Directive, in full, the CJEU remarked that Article 1(2) of the General Arrangements Directive did not, on this point, demand the compliance with the EU rules applicable for excise duty or VAT purposes.⁶⁸ As to the Commission's complaint that the amount of the social security contribution was proportionate to the quantity of the beverage, irrespective of its alcohol content, the CJEU held that this tax base, in fact, was consistent with the general scheme of tax rules applicable for excise duty purposes. Neither was it precluded by the Alcohol Structures Directive, since it takes the quantity as tax base for excise duty on wine and fermented beverages other than wine and beer.⁶⁹ Consequently, the CJEU dismissed the Commission's application.⁷⁰

2.1.2 The requirement of a specific purpose

The CJEU has ruled in several occasions that a *specific purpose* is other than a budgetary purpose.⁷¹ In *EKW*⁷², the CJEU was asked to take stand at

⁶⁵ Case C-434/97 *Commission of the European Communities v French Republic* [2000] ECLI:EU:C:2000:98, para 17

⁶⁶ Case C-434/97 *Commission of the European Communities v French Republic* [2000] ECLI:EU:C:2000:98, para 18

⁶⁷ Case C-434/97 *Commission of the European Communities v French Republic* [2000] ECLI:EU:C:2000:98, para 19

⁶⁸ Case C-434/97 *Commission of the European Communities v French Republic* [2000] ECLI:EU:C:2000:98, paras 29–30

⁶⁹ Case C-434/97 *Commission of the European Communities v French Republic* [2000] ECLI:EU:C:2000:98, paras 31–32

⁷⁰ Case C-434/97 *Commission of the European Communities v French Republic* [2000] ECLI:EU:C:2000:98, para 33

⁷¹ Case C-434/97 *Commission of the European Communities v French Republic* [2000] ECLI:EU:C:2000:98, para 19, Case C-437/97 *Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien and Wien & Co HandelsgesmbH, formerly Ikera Warenhandels-gesellschaft mbH v Oberösterreichische Landesregierung* [2000] ECLI:EU:C:2000:110, para 33, Case C-491/03 *Ottmar Hermann v Stadt Frankfurt am Main* [2005] ECLI:EU:C:2005:157, para 16, Case C-82/12 *Transportes Jordi Besora SL v Generalitat de Catalunya* [2014] ECLI:EU:C:2014:108, para 23 and Case C-553/13 *Tallinna Eteevõtlusamet v Statoil Fuel & Retail Eesti AS* [2015] ECLI:EU:C:2015:149, para 37

an Austrian municipal duty. This so-called ‘beverage duty’ was levied on the supply for consideration of ice cream and beverages, including alcoholic beverages, to consumers.⁷³ The EKW, which operated a hospital cafeteria, had become subject of a recovery assessment under which it was requested to pay beverage duty on sales during a certain period.⁷⁴ The EKW challenged the recovery assessment as it considered that the beverage duty was contrary to EU law, in particular Article 401 of the VAT Directive (regarding this argument, see Chapter 3) and Article 1 of the General Arrangements Directive.⁷⁵

To begin with, the CJEU accentuated that Article 1 of the General Arrangements Directive contains different provisions depending on whether the product subject to the duty is an excise good listed in paragraph (1), which is the case with alcoholic beverages, or whether it is not so mentioned. Thus, the CJEU drew a distinction between alcoholic beverages on the one hand, and non-alcoholic beverages and ice cream on the other hand.⁷⁶

Purportedly, the specific purpose of the beverage duty was to reinforce the municipalities’ tax autonomy.⁷⁷ The CJEU maintained that the purpose of reinforcing municipal tax autonomy through the grant of power to generate tax income constituted a purely budgetary objective, which could not, taken alone, constitute a specific purpose.⁷⁸ Furthermore, it was also submitted that the specific purpose of the beverage duty was to be found in the need to offset the substantial costs borne by municipalities in connection with tourism.⁷⁹ The CJEU dismissed this explanation with reference to the fact

⁷² Case C-437/97 *Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien and Wien & Co HandelsgesmbH, formerly Ikeru Warenhandels-gesellschaft mbH v Oberösterreichische Landesregierung* [2000] ECLI:EU:C:2000:110

⁷³ Case C-437/97 *Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien and Wien & Co HandelsgesmbH, formerly Ikeru Warenhandels-gesellschaft mbH v Oberösterreichische Landesregierung* [2000] ECLI:EU:C:2000:110, para 4

⁷⁴ Case C-437/97 *Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien and Wien & Co HandelsgesmbH, formerly Ikeru Warenhandels-gesellschaft mbH v Oberösterreichische Landesregierung* [2000] ECLI:EU:C:2000:110, para 12

⁷⁵ Case C-437/97 *Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien and Wien & Co HandelsgesmbH, formerly Ikeru Warenhandels-gesellschaft mbH v Oberösterreichische Landesregierung* [2000] ECLI:EU:C:2000:110, para 14

⁷⁶ Case C-437/97 *Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien and Wien & Co HandelsgesmbH, formerly Ikeru Warenhandels-gesellschaft mbH v Oberösterreichische Landesregierung* [2000] ECLI:EU:C:2000:110, para 27

⁷⁷ Case C-437/97 *Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien and Wien & Co HandelsgesmbH, formerly Ikeru Warenhandels-gesellschaft mbH v Oberösterreichische Landesregierung* [2000] ECLI:EU:C:2000:110, para 32

⁷⁸ Case C-437/97 *Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien and Wien & Co HandelsgesmbH, formerly Ikeru Warenhandels-gesellschaft mbH v Oberösterreichische Landesregierung* [2000] ECLI:EU:C:2000:110, para 33

⁷⁹ Case C-437/97 *Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien and Wien & Co HandelsgesmbH, formerly Ikeru Warenhandels-gesellschaft mbH v Oberösterreichische Landesregierung* [2000] ECLI:EU:C:2000:110, para 34

that municipalities were not required to assign the income from the duty to any predetermined purpose. Furthermore, there was no connection with tourist infrastructures or the development of tourism since the beverage duty was also levied in areas where there were little or no tourism. Additionally, the CJEU noted that taxes already existed in Austria which specifically concerned the promotion of tourism.⁸⁰ Finally, Austria had contended that the beverage duty was intended to protect public health, since it encouraged the consumption of non-alcoholic beverages, which were subject to a lower rate than that used for alcoholic beverages.⁸¹ On this point, the CJEU pronounced that direct sales of wine in Austria were exempted from beverage duty and thus disregarded the Austrian explanation that the duty was intended to discourage the consumption of alcoholic beverages and to protect public health.⁸²

2.1.3 Direct link between the use of the revenue and the purpose of the tax

Furthermore, it follows of *Transportes Jordi Besora*⁸³ that an internal allocation rule is not enough in itself, but that there has to be a direct link between the use of the revenue and the purpose of the tax at issue. This has also later been confirmed by the CJEU in *Statoil Fuel & Retail Eesti*.⁸⁴

Transportes Jordi Besora regards a Spanish tax on retail sale of certain hydrocarbons, *i.e.* petrol, diesel, heavy fuel oil and kerosene not used as heating fuel (hereafter referred to as ‘the IVMDH’). *Transportes Jordi Besora* (hereafter referred to as ‘TJB’), a Catalan haulage company, had paid, as final consumer, a total of EUR 45,632.38 in respect of the IVMDH for the tax years 2005 to 2008.⁸⁵ TJB had requested for a refund of that amount from the Catalan Excise Duty Authorities. As grounds for its request, TJB had invoked that the IVMDH was contrary to Article 1(2) of the General Arrangements Directive since it pursued a purely budgetary

⁸⁰ Case C-437/97 *Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien and Wien & Co HandelsgesmbH, formerly Ikeru Warenhandels-gesellschaft mbH v Oberösterreichische Landesregierung* [2000] ECLI:EU:C:2000:110, para 35

⁸¹ Case C-437/97 *Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien and Wien & Co HandelsgesmbH, formerly Ikeru Warenhandels-gesellschaft mbH v Oberösterreichische Landesregierung* [2000] ECLI:EU:C:2000:110, para 36

⁸² Case C-437/97 *Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien and Wien & Co HandelsgesmbH, formerly Ikeru Warenhandels-gesellschaft mbH v Oberösterreichische Landesregierung* [2000] ECLI:EU:C:2000:110, para 37

⁸³ Case C-82/12 *Transportes Jordi Besora SL v Generalitat de Catalunya* [2014] ECLI:EU:C:2014:108

⁸⁴ Case C-553/13 *Tallinna Ettevõtlusamet v Statoil Fuel & Retail Eesti AS* [2015] ECLI:EU:C:2015:149, para 41

⁸⁵ Case C-82/12 *Transportes Jordi Besora SL v Generalitat de Catalunya* [2014] ECLI:EU:C:2014:108, para 14

objective. Moreover, TJB had summoned that the IVMDH complied with neither the scheme of VAT or excise duty so far as concerns chargeability.⁸⁶

The IVMDH was intended to finance the exercise of certain powers of the Autonomous Communities of Spain in the field of health, and where relevant, environmental expenditure.⁸⁷ Moreover, in *Transportes Jordi Besora*, it was established that the revenue from the IVMDH had actually been allocated to the Autonomous Communities.⁸⁸

The CJEU repeated its earlier standpoint established in *EKW*. Accordingly, the CJEU reiterated 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.⁸⁹ Furthermore, the CJEU emphasised that, since every tax necessarily pursues a budgetary purpose, the mere fact that a tax is intended to achieve a budgetary objective cannot suffice, unless it has an *additional* specific purpose.⁹⁰

The CJEU declared that a predetermined allocation of the proceeds of a tax with the objective to finance, by regional authorities, of powers transferred to them by the State in the field of health and the environment could constitute a factor to be taken into account for the purpose of establishing the existence of a specific purpose within the meaning of Article 1(2) of the General Arrangements Directive.⁹¹ However, such an allocation as that at issue in *Transportes Jordi Besora*, which merely was a matter of internal organisation of the Spanish budget, could not, in itself, constitute a sufficient condition in that regard. This was the case since, as the CJEU explained, “... any Member State may decide to lay down, irrespective of the purpose pursued, that the proceeds of a tax [are to] be allocated to financing particular expenditure. Otherwise, any purpose could be considered to be specific within the meaning of [Article 1(2) of the General Arrangements Directive], which would deprive the harmonised excise duty established by that directive of all practical effect and be contrary to the

⁸⁶ Case C-82/12 *Transportes Jordi Besora SL v Generalitat de Catalunya* [2014] ECLI:EU:C:2014:108, para 15

⁸⁷ Case C-82/12 *Transportes Jordi Besora SL v Generalitat de Catalunya* [2014] ECLI:EU:C:2014:108, para 26

⁸⁸ Case C-82/12 *Transportes Jordi Besora SL v Generalitat de Catalunya* [2014] ECLI:EU:C:2014:108, para 24

⁸⁹ Case C-437/97 *Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien and Wien & Co HandelsgesmbH, formerly Ikeru Warenhandelsgesellschaft mbH v Oberösterreichische Landesregierung* [2000] ECLI:EU:C:2000:110, para 33 and Case C-82/12 *Transportes Jordi Besora SL v Generalitat de Catalunya* [2014] ECLI:EU:C:2014:108, para 25

⁹⁰ Case C-82/12 *Transportes Jordi Besora SL v Generalitat de Catalunya* [2014] ECLI:EU:C:2014:108, para 27

⁹¹ Case C-82/12 *Transportes Jordi Besora SL v Generalitat de Catalunya* [2014] ECLI:EU:C:2014:108, para 28

principle that a derogating provision such as [Article 1(2)], must be interpreted strictly.”⁹² Quite the reverse, in order to be regarded as pursuing a specific purpose, a tax would itself have to be directed at protecting health and the environment. This would, according to the CJEU, in particular, be the case “... where the proceeds of that tax had to be used for the purpose of reducing the social costs specifically linked to the consumption of [the excise good] on which that tax is imposed, so that there [would be] a direct link between the use of the revenue and the purpose of the tax in question.”⁹³

In *Transportes Jordi Besora*, the CJEU concluded that the revenue from the IVMDH had to be allocated by Autonomous Communities to health expenditures in general and not to health expenditure which would have been specifically linked to the consumption of the taxed hydrocarbons. Such general expenditure could have been financed by the proceeds of all kinds of taxes.⁹⁴ Furthermore, the Spanish law did not lay down any mechanisms for the predetermined allocation of revenue from the IVMDH to environmental purposes. In the absence of such a predetermined allocation, a tax such as the IVMDH could have been regarded as being itself pursuing the objective of environmental protection, and thus a specific purpose within the meaning of Article 1(2) of the General Arrangements Directive, only if it had been designed, so far as concerns its structure, and particularly the taxable item or tax rate, in such a way as to dissuade taxpayers from using mineral oils or to encourage substituting for other products that would have been less harmful to the environment.⁹⁵

2.1.4 The requirement of compliance with the EU rules applicable for VAT and excise duty purposes

Furthermore, the power to impose other indirect taxes on excise goods for specific purposes conferred on Member States requires compliance with EU rules on excise duty and VAT as far as determination of the tax base, calculation of the tax, chargeability and monitoring of the tax are concerned. However, as the CJEU has remarked in *Commission v France* and *EKW*, the different language versions diverge regarding the wording of Article 1(2) of the General Arrangements Directive.⁹⁶ Some of the language versions

⁹² Case C-82/12 *Transportes Jordi Besora SL v Generalitat de Catalunya* [2014] ECLI:EU:C:2014:108, para 29

⁹³ Case C-82/12 *Transportes Jordi Besora SL v Generalitat de Catalunya* [2014] ECLI:EU:C:2014:108, para 30

⁹⁴ Case C-82/12 *Transportes Jordi Besora SL v Generalitat de Catalunya* [2014] ECLI:EU:C:2014:108, para 31

⁹⁵ Case C-82/12 *Transportes Jordi Besora SL v Generalitat de Catalunya* [2014] ECLI:EU:C:2014:108, para 32

⁹⁶ Case C-434/97 *Commission of the European Communities v French Republic* [2000] ECLI:EU:C:2000:98, paras 20–27 and Case C-437/97 *Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien and Wien & Co HandelsgesmbH, formerly*

establish an alternative between compliance with the EU VAT and excise duty rules, whereas some of the language versions establish a cumulative obligation to comply with those rules.⁹⁷

In these cases, the CJEU acknowledged the fact that EU rules on VAT and excise duties have several incompatible characteristics. Firstly, 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. Secondly, VAT is levied at each stage of production and distribution process, whereas excise duty becomes chargeable when the products subject to it are released for consumption. Correspondingly, input VAT paid on the previous transaction is, in principle, deductible for a trader, whereas there is no similar deduction system regarding the excise duties. Thirdly, VAT is characterised by its general nature, whereas excise duty is imposed only on specific goods. Observing the above mentioned, the CJEU recognised that it would be impossible for Member States to comply simultaneously with the rules on both VAT and excise duties.⁹⁸ Thus, the CJEU concluded it to be sufficient that the national indirect taxes pursuing specific objectives accord with the general scheme of either VAT or excise duty.⁹⁹

2.1.5 Specific purpose may not conflict with the provisions on exemptions

Moreover, the national indirect taxes pursuing specific objectives may not conflict with the provisions on exemptions. This addition was made to Article 1(2) of the General Arrangements Directive after the case *Braathens*¹⁰⁰ was adjudicated. *Braathens* deals with a later abolished Swedish environmental tax that was imposed on domestic commercial aviation calculated on fuel consumption and emissions of hydrocarbons and nitric oxide (hereafter referred to as ‘the environmental tax’).¹⁰¹ The tax was

Iker *Warenhandelsgesellschaft mbH v Oberösterreichische Landesregierung* [2000] ECLI:EU:C:2000:110, paras 40–47

⁹⁷ Case C-434/97 *Commission of the European Communities v French Republic* [2000] ECLI:EU:C:2000:98, para 23 and Case C-437/97 *Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien and Wien & Co HandelsgesmbH, formerly Iker* *Warenhandelsgesellschaft mbH v Oberösterreichische Landesregierung* [2000] ECLI:EU:C:2000:110, para 40

⁹⁸ Case C-434/97 *Commission of the European Communities v French Republic* [2000] ECLI:EU:C:2000:98, para 24 and Case C-437/97 *Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien and Wien & Co HandelsgesmbH, formerly Iker* *Warenhandelsgesellschaft mbH v Oberösterreichische Landesregierung* [2000] ECLI:EU:C:2000:110, para 44

⁹⁹ Case C-434/97 *Commission of the European Communities v French Republic* [2000] ECLI:EU:C:2000:98, para 27 and Case C-437/97 *Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien and Wien & Co HandelsgesmbH, formerly Iker* *Warenhandelsgesellschaft mbH v Oberösterreichische Landesregierung* [2000] ECLI:EU:C:2000:110, para 47

¹⁰⁰ Case C-346/97 *Braathens Sverige AB v Riksskatteverket* [1999] ECLI:EU:C:1999:291

¹⁰¹ Case C-346/97 *Braathens Sverige AB v Riksskatteverket* [1999] ECLI:EU:C:1999:291, para 8

calculated by reference to data kept by Swedish Civil Aviation Authority on the fuel consumption and emissions of hydrocarbons and nitric oxide from the type of aircraft used on an average flight. The tax was charged on each flight, at fixed rates per kilogram of aviation fuel consumed and per kilogram of hydrocarbons and nitric oxide emitted.¹⁰² Braathens, a Swedish regional airline company, had received several notices of assessment from the Swedish Tax Authorities requiring Braathens to pay the environmental tax due.¹⁰³ Braathens considered that the environmental tax was contrary to EU law. Namely, Braathens was of the opinion that it infringed the Member States' obligation following from Article 14(1)(b) of the Energy Taxation Directive to exempt from harmonised excise duty aviation fuel except in case of private pleasure-flying.¹⁰⁴

The CJEU concluded that the environmental tax was calculated based on data on fuel consumption and emissions of hydrocarbons and nitric oxide by the relevant type of aircraft on an average flight.¹⁰⁵ The CJEU acknowledged that the General Arrangements Directive concerns products subject to excise duty and other indirect taxes which are levied, even if indirectly, on the consumption of such products. The CJEU underlined that, with regard to the environmental tax at issue, there was “... a direct and inseverable link between fuel consumption and the polluting substances [...] which [were] emitted in the course of such consumption, so that the tax at issue, as [regarded] both the part calculated by reference to the emissions of hydrocarbons and nitric oxide and the part determined by reference to fuel consumption, which [related] to carbon dioxide emissions, [had to] be regarded as levied on consumption of the fuel itself for the purposes of [the General Arrangements Directive].”¹⁰⁶ Thus, the environmental tax was found incompatible with the harmonised excise duty system. Ultimately, the CJEU emphasised that allowing a Member State to levy another indirect tax on products, which had to be exempt according to the General Arrangements Directive, would render the provision harmonising the exemption entirely ineffective.¹⁰⁷

¹⁰² Case C-346/97 *Braathens Sverige AB v Riksskatteverket* [1999] ECLI:EU:C:1999:291, para 8

¹⁰³ Case C-346/97 *Braathens Sverige AB v Riksskatteverket* [1999] ECLI:EU:C:1999:291, para 11

¹⁰⁴ Case C-346/97 *Braathens Sverige AB v Riksskatteverket* [1999] ECLI:EU:C:1999:291, paras 11–13

¹⁰⁵ Case C-346/97 *Braathens Sverige AB v Riksskatteverket* [1999] ECLI:EU:C:1999:291, para 22

¹⁰⁶ Case C-346/97 *Braathens Sverige AB v Riksskatteverket* [1999] ECLI:EU:C:1999:291, para 23

¹⁰⁷ Case C-346/97 *Braathens Sverige AB v Riksskatteverket* [1999] ECLI:EU:C:1999:291, para 24

2.2 Article 1(3) of the General Arrangements Directive

As illustrated above, the most significant difference between Articles 1(2) and 1(3) of the General Arrangements Directive is that Article 1(2) of the General Arrangements Directive requires the additional national indirect tax on an excise good to have a specific purpose, while levies on products other than excise goods according to Article 1(3)(a) of the General Arrangements Directive and on the supply of services according to Article 1(3)(b) of the General Arrangements Directive, respectively, pose no such requirement.

This difference between Articles 1(2) and 1(3) was also highlighted *Ottmar Hermann*¹⁰⁸. In *Ottmar Hermann*, Mr. Hermann, liquidator of Volkswirt Weinschänken GmbH (hereafter ‘the Company’), challenged the lawfulness of a tax on alcoholic beverages imposed by the City of Frankfurt am Main (hereafter referred to as ‘the local beverage tax’).

The Company had operated a restaurant in Frankfurt, and was thus liable to pay the local beverage tax under the municipal law. The fundamental question in this case was whether the local beverage tax related to products subject to excise duty for the purposes of Article 1(2) of the General Arrangements Directive or to the supply of services relating to excise goods within the meaning of Article 1(3)(b) of the General Arrangements Directive.¹⁰⁹

In *Ottmar Hermann*, the CJEU attached decisive importance to the fact that, in case of the local beverage tax, the chargeable event was the supply for consideration of alcoholic beverages for immediate consumption on the premises. Unlike in *EKW*, in which the beverage tax was levied on the supply for consideration of alcoholic beverages, the chargeable event in *Ottmar Hermann* was not the mere supply of such beverages but, on the contrary, referred to a transaction involving a supply of services.¹¹⁰

With reference, by analogy, to the principle of unity of supply established in *Faaborg-Gelting Linien*¹¹¹, the CJEU maintained that when determining “... whether [a national tax] applies to products subject to excise duty for the purposes of [Article 1(2) of the General Arrangements Directive] or, rather, to services supplied in relation to such products for the purposes of [Article 1(3)(b)], regard must be had to the predominant feature of the transaction

¹⁰⁸ Case C-491/03 *Ottmar Hermann v Stadt Frankfurt am Main* [2005] ECLI:EU:C:2005:157

¹⁰⁹ Case C-491/03 *Ottmar Hermann v Stadt Frankfurt am Main* [2005] ECLI:EU:C:2005:157, paras 15–18

¹¹⁰ Case C-491/03 *Ottmar Hermann v Stadt Frankfurt am Main* [2005] ECLI:EU:C:2005:157, para 20

¹¹¹ Case C-231/94 *Faaborg-Gelting Linien A/S v Finanzamt Flensburg* [1996] ECLI:EU:C:1996:184

on which it is imposed”¹¹². Accordingly, the CJEU notified that where the marketing of a product is always accompanied by a minimal supply of services, *e.g.* the displaying of the products on shelves or the issuing of an invoice, only services other than those which necessarily accompany the marketing of a product may be taken into account when assessing the part played by the supply of services within the whole of a complex transaction also involving the supply of a product.¹¹³ Furthermore, the CJEU laid down that it is not possible to state generally that, for all the operations falling within the scope of a certain tax, the features relating to the supply of services would always predominate.¹¹⁴ Hence, it is necessary to individually determine each transaction’s predominant nature.¹¹⁵

The Company had operated a restaurant.¹¹⁶ The CJEU stated that, in context of a restaurant business such as the Company’s, the supply of alcoholic beverages to customers in catering context was accompanied by a series of services other than the operations which were necessarily connected with marketing of the alcoholic beverages. Those services consisted in placing an infrastructure at the customer’s disposal, *e.g.* dining room, toilets *etc.*; providing the customer with advice and explanations concerning the beverages served; serving them to him in a suitable container; serving at table; and, finally, clearing the tables and cleaning after the food and drink had been consumed.¹¹⁷ In such context, a supply of alcoholic beverages was thus characterised by an array of features and acts, of which the supply of the product itself was only one component, and in which services thus predominated.¹¹⁸ Consequently, the CJEU considered the local beverage tax as a tax on the supply of services relating to excise goods which thus fell within the scope of Article 1(3)(b) of the General Arrangements Directive.¹¹⁹

¹¹² Case C-491/03 *Ottmar Hermann v Stadt Frankfurt am Main* [2005] ECLI:EU:C:2005:157, para 21

¹¹³ Case C-491/03 *Ottmar Hermann v Stadt Frankfurt am Main* [2005] ECLI:EU:C:2005:157, para 22

¹¹⁴ Case C-491/03 *Ottmar Hermann v Stadt Frankfurt am Main* [2005] ECLI:EU:C:2005:157, para 23

¹¹⁵ Case C-491/03 *Ottmar Hermann v Stadt Frankfurt am Main* [2005] ECLI:EU:C:2005:157, para 24

¹¹⁶ Case C-491/03 *Ottmar Hermann v Stadt Frankfurt am Main* [2005] ECLI:EU:C:2005:157, para 25

¹¹⁷ Case C-491/03 *Ottmar Hermann v Stadt Frankfurt am Main* [2005] ECLI:EU:C:2005:157, para 26

¹¹⁸ Case C-491/03 *Ottmar Hermann v Stadt Frankfurt am Main* [2005] ECLI:EU:C:2005:157, paras 27–28

¹¹⁹ Case C-491/03 *Ottmar Hermann v Stadt Frankfurt am Main* [2005] ECLI:EU:C:2005:157, para 30

2.3 The Energy Taxation Directive

The Energy Taxation Directive defines the taxable energy products and electricity, the uses that make them subject to tax, and the minimum rates that Member States must apply on energy products and electricity depending on the use. ‘*Energy products*’ covered are listed in the Energy Taxation Directive. The list includes various products used as heating or motor fuels defined based on Combined Nomenclature codes (hereafter ‘CN code(s)’).¹²⁰ Among others, various mineral fuels, mineral oils and products of their distillation, which comprise *e.g.* different types of petrol and gas oil (*i.e.* “diesel”), are included.¹²¹ In addition, the list also includes the products falling within the CN code for not elsewhere specified and included chemical products and preparations if these are intended for use as heating fuel or motor fuel.¹²²

According to the preamble to the Energy Taxation Directive, the proper functioning of the internal market and the achievement of the objectives of other EU policies require minimum levels of taxation to be laid down at EU level for most energy products.¹²³ Furthermore, appreciable differences in the national legislation on levels of energy taxation applied by Member States could prove detrimental to the proper functioning of the internal market.¹²⁴ Accordingly, Member States must impose taxation to the energy products and electricity covered which may not be less than the minimum levels prescribed in the Energy Taxation Directive.¹²⁵ ‘*Level of taxation*’ means the total charge levied in respect of all indirect taxes (except VAT) calculated, directly or indirectly, on the *quantity* of the energy product or electricity at the time of release for consumption.¹²⁶ Regarding carbon-based motor fuels used in motor vehicles, *i.e.* petrol and diesel, minimum levels of taxation are expressed in euro per 1 000 litres.¹²⁷

Furthermore, Member States may apply differentiated rates of taxation on the same product under certain conditions. Provided that the prescribed minimum levels of taxation are respected, differentiated rates are allowed *e.g.* when those are directly linked to product quality or when the product is

¹²⁰ Article 2 of the Energy Taxation Directive

¹²¹ Article 2(1)(b) of the Energy Taxation Directive and Commission Implementing Regulation (EU) 2016/1821 of 6 October 2016 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff

¹²² Article 2(1)(h) of the Energy Taxation Directive and Commission Implementing Regulation (EU) 2016/1821 of 6 October 2016 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff

¹²³ Recital (3) of the preamble to the Energy Taxation Directive

¹²⁴ Recital (4) of the preamble to the Energy Taxation Directive

¹²⁵ Art. 4(1) of the Energy Taxation Directive

¹²⁶ Art. 4(2) of the Energy Taxation Directive

¹²⁷ Arts. 7–9 and Annex I to the Energy Taxation Directive

used for local public passenger transport including cabs; waste collection; armed forces and public administration; disabled people; or ambulances. Moreover, Member States may differentiate between business and non-business uses for tax purposes.¹²⁸ In addition, the Energy Taxation Directive includes some other, mainly structure-related provisions. The most noteworthy of these are related to compulsory exemptions and tax refunds as well as facultative exemptions and reductions.¹²⁹

2.3.1 The Commission proposal for CO₂ differentiated energy tax

Customarily, tax on energy products and electricity has been levied for mainly fiscal reasons.¹³⁰ Nevertheless, tax on energy products and electricity is also one of the market-based instruments at the EU's disposal to reach its '20-20-20' target related to reducing GHG emissions.¹³¹ However, taking into account the energy content of the various products, minimum levels of taxation established by the Energy Taxation Directive vary substantially. Accordingly, some products are given preference over others, coal being treated most favourably. Moreover, the price signals that the Energy Taxation Directive give are not properly related to the need to combat climate change. In spite of the growing market for renewable fuels, the standard taxation rate of those is based on volume and on the rate applicable to the fossil fuel replaced by it. Furthermore, taxes on energy products and electricity are levied the same way whether or not, in a particular case, the limitation of CO₂ emissions is ensured through the EU ETS. Mechanisms of EU law intended to limit CO₂ emissions may overlap in certain cases with double taxation as result, while they may be completely missing in others so that double non-taxation occurs.¹³²

Implying that the Energy Taxation Directive was outdated as it did not reflect the contemporary EU policy objectives in the areas of energy and climate change, the Council made request to bring the Energy Taxation Directive more closely into line with those objectives in March 2008.¹³³ Consequently, the Commission presented the proposal COM(2011) 196 final that aimed at restructuring the EU framework for the taxation of energy products and electricity in April 2011. The proposal aimed at (1) ensuring

¹²⁸ Arts. 5 and 11 of the Energy Taxation Directive

¹²⁹ See Arts. 14–18b of the Energy Taxation Directive

¹³⁰ Commission, 'Proposal for a Council Directive amending Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity' COM(2011) 169 final, 2

¹³¹ See *e.g.* Commission 'Market-based instruments for environment and related policy purposes' (Green Paper) COM(2007) 140 final, 7–8

¹³² Commission, 'Proposal for a Council Directive amending Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity' COM(2011) 169 final, 3

¹³³ Commission, 'Proposal for a Council Directive amending Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity' COM(2011) 169 final, 2

consistent treatment of energy sources within the Energy Taxation Directive in order to provide a genuine level playing field between energy consumers independent from the energy source used; (2) providing an adapted framework for the taxation of renewable energies; and (3) providing a framework for the use of CO₂ taxation to complement carbon price signals established by the EU ETS while avoiding overlaps between the two instruments.¹³⁴

Among other things, the Commission proposed that an explicit distinction between CO₂-related taxation on the one hand and general energy consumption taxation on the other hand. CO₂-related taxation would have been specifically linked to CO₂ emissions attributable to the consumption of the energy products and electricity, while general energy consumption taxation would have been based on the energy content of those. These two components would conjointly have determined the overall rate at which energy products and electricity would have been taxed.¹³⁵ It was specifically highlighted that economic efficiency arguments plead in favour of introducing CO₂-related taxes as complement to the EU ETS. However, the Commission emphasised that Member States should also in continuation have been able to tax consumption of motor fuels and heating fuels for purely fiscal purposes in a way not linked to reductions of GHG emissions. Hence, the Energy Taxation Directive would have allowed for diversification of objectives with the tax on energy products and electricity. In order to ensure that, to the extent possible, all the different objectives (*e.g.* fiscal and environmental) could have been pursued in a consistent manner, the Commission considered that taxation on energy products and electricity other than CO₂-related taxation should have been linked to the energy content of the products.

The Parliament approved the proposal as amended and called the Commission to alter its proposal accordingly.¹³⁶ Most notably, the alignment of motor fuel taxation was rejected.¹³⁷ Moreover, as changing the Energy Taxation Directive is a matter of harmonisation of legislation

¹³⁴ Commission, 'Proposal for a Council Directive amending Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity' COM(2011) 169 final, 2

¹³⁵ Commission, 'Proposal for a Council Directive amending Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity' COM(2011) 169 final, 5

¹³⁶ 'European Parliament legislative resolution of 19 April 2012 on the proposal for a Council Directive amending Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity' (*European Parliament* 25 July 2013)

¹³⁷ Commission, 'Proposal for a Council Directive amending Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity' COM(2011) 169 final, 6

concerning excise duties, it requires unanimous vote in the Council.¹³⁸ After negotiations between Member States in the Council proved unsuccessful, the Commission withdrew the proposal in 2015.¹³⁹ Hence, CO₂ element was not included in fuel taxation within the harmonised EU excise duty system.

3 EU VAT

Article 401 of the VAT Directive states that, without prejudice to other provisions of EU law, the VAT Directive shall not prevent a Member State from maintaining or introducing taxes on insurance contracts, taxes on betting and gambling, excise duties, stamp duties or, more generally, any taxes, duties or charges which cannot be characterised as turnover taxes, provided that the collection of those taxes, duties or charges does not give rise, in trade between Member States, to formalities connected with the crossing of frontiers.

As Terra and Kajus have pointed out, the requirement that taxes, duties or charges may not be characterised as *turnover taxes* is an issue that has frequently gained the CJEU's attention.¹⁴⁰ For instance, in *Banca popolare di Cremona*¹⁴¹, the CJEU declared that, in order to interpret Article 401 of the VAT Directive, that provision must be viewed against its legislative background. After reviewing the First VAT Directive¹⁴² and the Second VAT Directive¹⁴³, the CJEU concluded that “[*in*] order to attain the objective of ensuring equal conditions of taxation for the same transaction, no matter in which Member State it is carried out, the common system of VAT [*introduced by the Second VAT Directive*] was intended ... to replace the turnover taxes in force in the various Member States. [*Article 401 of the VAT Directive*] accordingly permits a Member State to maintain or introduce taxes, duties or charges on the supply of goods, the provision of services or imports only if they cannot be characterised as turnover taxes.”¹⁴⁴

¹³⁸ Art. 113 TFEU

¹³⁹ Withdrawal of Commission proposals [2015] OJ C80/19 and ‘Excise Duties: Energy Tax Proposal’ (*European Commission* 12 May 2017)

¹⁴⁰ Ben J M Terra and Julie Kajus, *Introduction to European VAT (recast)* (e-book IBFD 1 January 2017) second paragraph under subtitle ‘21.5 Taxes not to be characterized as turnover taxes’

¹⁴¹ Case C-475/03 *Banca popolare di Cremona Soc. coop. arl v Agenzia Entrate Ufficio Cremona* [2006] ECLI:EU:C:2006:629

¹⁴² First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes

¹⁴³ Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes—Structures and procedures for application of the common system of value added tax

¹⁴⁴ Case C-475/03 *Banca popolare di Cremona Soc. coop. arl v Agenzia Entrate Ufficio Cremona* [2006] ECLI:EU:C:2006:629, paras 23–24

The CJEU has repeatedly stated that, among other cases in *Banca popolare di Cremona*, to decide whether a tax, duty or charge should be characterised as a turnover tax, it is necessary to determine whether the tax, duty or charge at issue has the effect of jeopardising the functioning of the common system of VAT by being levied on the movement of goods and services and commercial transactions in a way comparable to VAT.¹⁴⁵ Moreover, the CJEU has laid down that taxes, duties and charges having the essential characteristics of VAT must in any event be deemed to have such effect, even though they are not identical to VAT in all respects.¹⁴⁶ The four essential characteristics of VAT established in the CJEU's case law are: (1) VAT is a *general* tax on transactions relating to goods or services; (2) it is proportional to the price for the goods or services; (3) it is charged at each stage of the production and distribution process, including the retail sale, irrespective of the number of transactions which have previously taken place; and, finally, (4) it is imposed on the added value of goods and services, the tax payable being calculated after deduction of the tax paid on the previous transactions, so that the final burden of the tax rests ultimately on the consumer.¹⁴⁷

As said above in Chapter 2.1.2, the question whether the Austrian beverage duty was to be considered as a turnover tax and, as such, incompatible with Article 401 of the VAT Directive and Article 1(3) of the General Arrangements Directive, was up for the CJEU's adjudication in *EKW*. The CJEU observed that the beverage duty at issue was not intended to apply to all economic transactions in Austria. Consequently, neither was it a general tax.¹⁴⁸ Since the beverage duty lacked the essential characteristic of generality of the VAT, it could not be characterised as a turnover tax.¹⁴⁹ Hence, the CJEU pronounced that Article 1(3) of the General Arrangements Directive allowed the beverage duty on non-alcoholic beverages and ice-cream.¹⁵⁰

¹⁴⁵ Case C-475/03 *Banca popolare di Cremona Soc. coop. arl v Agenzia Entrate Ufficio Cremona* [2006] ECLI:EU:C:2006:629, para 25

¹⁴⁶ Case C-475/03 *Banca popolare di Cremona Soc. coop. arl v Agenzia Entrate Ufficio Cremona* [2006] ECLI:EU:C:2006:629 para 26

¹⁴⁷ Case C-475/03 *Banca popolare di Cremona Soc. coop. arl v Agenzia Entrate Ufficio Cremona* [2006] ECLI:EU:C:2006:629, para 28

¹⁴⁸ Case C-437/97 *Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien and Wien & Co HandelsgesmbH, formerly Ikeri Warenhandelsgesellschaft mbH v Oberösterreichische Landesregierung* [2000] ECLI:EU:C:2000:110, para 24

¹⁴⁹ Case C-437/97 *Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien and Wien & Co HandelsgesmbH, formerly Ikeri Warenhandelsgesellschaft mbH v Oberösterreichische Landesregierung* [2000] ECLI:EU:C:2000:110, para 25

¹⁵⁰ Case C-437/97 *Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien and Wien & Co HandelsgesmbH, formerly Ikeri Warenhandelsgesellschaft mbH v Oberösterreichische Landesregierung* [2000] ECLI:EU:C:2000:110, para 28

4 EU road charging legislation

4.1 The Eurovignette Directive

The Eurovignette Directive provides the EU legal framework for charging HDVs for the use of certain road infrastructures. This framework includes the characteristics of the road infrastructures to which EU road charging scheme applies, the maximum levels of certain rates and other general conditions that will have to be complied with.¹⁵¹ The Eurovignette Directive aims at eliminating the distortion of competition between transport undertakings by a step-wise harmonisation of the levy systems and by establishing fair mechanisms for charging infrastructure costs to hauliers.¹⁵² Before the adaptation of the Eurovignette Directive, a degree of harmonisation of the levy systems had already been achieved by the General Arrangements Directive and the Energy Taxation Directive.¹⁵³

The Eurovignette Directive does not oblige Member States to charge for road use. However, in case a Member State decides to charge HDVs for the use of the road infrastructures falling within the scope of the Eurovignette Directive, it limits Member States' margin of appreciation regarding the design of the road charging regime. This is to safeguard EU's internal market by avoiding overcharging, which could hamper freedom of movement.¹⁵⁴ Thus, the Eurovignette Directive specifies that national road charging regimes shall be related to the cost of constructing, operating and developing the road infrastructure.¹⁵⁵ Additionally, an external-cost component may be included.¹⁵⁶ The use of road-friendly and less polluting vehicles is encouraged through differentiation of levies. Nevertheless, such differentiation may be done only provided that it does not interfere with the functioning of the internal market.¹⁵⁷

According to the framework provided by the Eurovignette Directive, road charging regimes can be based on either road tolling or user charging. A '*road toll*' is a specified amount payable for an HDV based on the distance travelled on a given road infrastructure on the one hand, and on the type of the vehicle on the other hand. A road toll may comprise of an '*infrastructure-cost charge*'¹⁵⁸ and/or an '*external-cost charge*'¹⁵⁹.¹⁶⁰ A

¹⁵¹ Recital (17) to the preamble of the Eurovignette Directive

¹⁵² Recitals (1) and (2) to the preamble of the Eurovignette Directive

¹⁵³ Recital (2) to the preamble of the Eurovignette Directive

¹⁵⁴ Commission, 'Strategy for the internalisation of external costs' (Communication) COM(2008) 435 final, 4

¹⁵⁵ Article 1(1) of the Eurovignette Directive and Recital (17) to the preamble of the Eurovignette Directive

¹⁵⁶ Article 2(bb) of the Eurovignette Directive and Recital (18) to the preamble of the Eurovignette Directive

¹⁵⁷ Recital (7) to the Eurovignette Directive

¹⁵⁸ Article 2(ba) of the Eurovignette Directive

'*user charge*', in turn, is a specified amount payment that confers the right for a HDV to use the road infrastructures covered during a certain period.¹⁶¹ Member States may not impose both road tolls and user charges on any given category of vehicles for the use of a single road section. However, a Member State which imposes a user charge may also impose road tolls for the use of bridges, tunnels, and mountain passes.¹⁶²

Member States may introduce road charging for HDVs on the '*trans-European road network*'¹⁶³ or on certain sections of that network, or on any other additional sections of their network of motorways which are not part of the trans-European road network under conditions laid down in the Eurovignette Directive. However, this is without prejudice to the Member States' rights, in compliance with the TFEU, to apply road charging on *other* roads, provided that road charging with regard to such other roads does not discriminate against international traffic and does not result in the distortion of competition between operators. Furthermore, road charging shall not result in direct or indirect discrimination on the grounds of the nationality of the haulier, or registration of the vehicle, or the origin or destination of the transport operation.¹⁶⁴

As general rule, a Member State that chooses to apply road charging has to cover all the vehicles falling within the scope of the Eurovignette Directive. Nevertheless, it may choose to apply road charging only to HDVs having a maximum permissible laden weight of not less than 12 tonnes under certain conditions.¹⁶⁵ Among others, this is the situation if the Member State considers that an extension to HDVs of less than 12 tonnes would create significant adverse effects on the free flow of traffic, the environment, noise levels, congestion, health, or road safety because of traffic diversion.¹⁶⁶ Furthermore, this is the case also if such an extension would involve administrative costs of more than 30% of the additional revenue which would have been granted by that extension.¹⁶⁷ Member States choosing to apply road tolls or user charges only to vehicles having a maximum permissible laden weight of not less than 12 tonnes shall inform the Commission of their decision and on the reasons for that.¹⁶⁸

¹⁵⁹ Article 2(bb) of the Eurovignette Directive

¹⁶⁰ Article 2(b) of the Eurovignette Directive

¹⁶¹ Article 2(c) of the Eurovignette Directive

¹⁶² Article 7(2) of the Eurovignette Directive

¹⁶³ As defined in Section 2 of the Annex I to Decision No 1692/96/EC of the European Parliament and the Council of 23 July 1996, see Article 2(1) of the Eurovignette Directive

¹⁶⁴ Article 7(1) and (3) of the Eurovignette Directive

¹⁶⁵ Article 7(5) of the Eurovignette Directive

¹⁶⁶ Article 7(5)(a) of the Eurovignette Directive

¹⁶⁷ Article 7(5)(b) of the Eurovignette Directive

¹⁶⁸ Article 7(5) of the Eurovignette Directive

4.1.1 External-cost charge

The external-cost element that may be included in a road toll, *i.e.* the road charging levy that is based on distance, is the external-cost charge. As defined in the Eurovignette Directive, external-cost charge means a charge levied for the purpose of recovering the costs incurred in a Member State related to traffic based air pollution and/or traffic based noise pollution.¹⁶⁹ The external-cost charge shall vary and be set in accordance with the minimum requirements and methods and shall respect the maximum values specified and set in the Eurovignette Directive.¹⁷⁰ The Member States shall define a single specific amount constituting the external-cost charge for each vehicle class, type of road and time period. When setting the external-cost charge, the Member State shall be guided by the principle of efficient pricing. This means that the external-cost charge shall be priced close to the social marginal cost of the vehicle charged. Member States shall also monitor the effectiveness of the charging scheme in reducing environmental damage arising from road transport.¹⁷¹

Where a Member State chooses to include all or part of the traffic-based air pollution in the external-cost charge, it shall apply the mathematical formula set by the Eurovignette Directive. This formula gives the air pollution cost of a vehicle of a given vehicle class on a given type of road in euros per vehicle-kilometre¹⁷². The formula takes into account, as variables, the emission factor of a given pollutant of the given vehicle class in grams per vehicle-kilometre and the monetary cost of the given pollutant for the given road type in euros per gram. Member States may also apply scientifically proven alternative methods to calculate the value of air pollution costs using the data from air pollutant measurement and the local value of the monetary costs of air pollutants, provided that the results do not exceed the values for maximum chargeable air pollution costs set in the Eurovignette Directive.¹⁷³ The emission factors for pollutants shall be the same as those used for by Member States to draft the national emissions inventories provided for in Directive 2001/81/EC¹⁷⁴.¹⁷⁵ Thus, the relevant pollutants are sulphur dioxide (SO₂), nitrogen oxides (NO_x), volatile organic compounds and ammonia

¹⁶⁹ Article 2(bb) of the Eurovignette Directive

¹⁷⁰ Article 7c(1) of the Eurovignette Directive and Annexes IIIa and IIIb to that Directive

¹⁷¹ Annex IIIa, point 3 to the Eurovignette Directive

¹⁷² The definition of 'vehicle-kilometre': "*Unit of measurement representing the movement of a vehicle over one kilometre. The distance to be considered is the distance actually run. Units made up of a tractor or a lorry and a trailer are counted as one vehicle.*" See 'Illustrated Glossary for Transport Statistics' (*Eurostat*), B.IV-07, 58

¹⁷³ Annex IIIa, point 4(1) to the Eurovignette Directive

¹⁷⁴ Directive 2001/81/EC of the European Parliament and of the Council of 23 October 2001 on national emission ceilings for certain atmospheric pollutants as it stands 22 May 2017

¹⁷⁵ Annex IIIa, point 4(1) to the Eurovignette Directive

(NH₃).¹⁷⁶ Accordingly, the Eurovignette Directive does not currently allow for including the cost of road traffic related CO₂ emissions in the external-cost charge calculation.

5 Analysis of Member States' possibilities to impose levies on CO₂ emissions from motor vehicles

5.1 A levy on CO₂ emissions is specific

To begin with, it shall be concluded that levies on CO₂ emissions are not, in any case, general taxes on transactions relating to goods or services. Consequently, as highlighted above in Chapter 3, such levies lack the essential characteristics of a turnover tax. Accordingly, Article 401 of the VAT Directive does not preclude Member States from imposing neither CO₂ differentiated road tolls nor a carbon tax on fuel.

5.2 Carbon tax on fuel

A carbon tax on fuel is a tax levied on the carbon content of motor fuels. As accentuated in Chapter 2, motor fuels are excise goods, the duties on which are, as a rule, harmonised within the EU. However, Article 1(2) of the General Arrangements Directive provides a derogation from the harmonised excise duty system. Of that provision follows that Member States may levy other indirect taxes than excise duties and VAT for specific purposes. Furthermore, such indirect taxes must comply with the general scheme of excise duty or VAT (see Chapter 2.1.4).

Since Article 1(2) of the General Arrangements Directive is an exception to the general rule, it must be interpreted restrictively. Accordingly, the requirements for qualifying as a specific purpose are strict.¹⁷⁷ The General Arrangements Directive does not define what a 'specific purpose' is explicitly. It is clear from the CJEU's case law that a merely budgetary purpose cannot fulfil the prerequisite of the tax having a specific purpose (see Chapter 2.1.2). However, there are further requirements on the design, or possibly even the impact, of a national carbon tax on fuel in order for it to be allowed.

In the Author's opinion, the terminology of environmental economics facilitates the discussion of the CJEU's case law in the context of imposing

¹⁷⁶ Articles 2, 4 and 7 of Directive 2001/81/EC of the European Parliament and of the Council of 23 October 2001 on national emission ceilings for certain atmospheric pollutants as it stands 22 May 2017

¹⁷⁷ Case C-82/12 *Transportes Jordi Besora SL v Generalitat de Catalunya* [2014] ECLI:EU:C:2014:108, para 29 and Case C-553/13 *Tallinna Eteevõtlusamet v Statoil Fuel & Retail Eesti AS* [2015] ECLI:EU:C:2015:149, para 39

levies on CO₂ emissions from motor vehicles. Thus, the following concepts are employed in the upcoming analysis:

- '*Incentive environmental levies*'; mean levies that are driven by their environmental impact.¹⁷⁸ Incentive environmental levies give, by making the environmentally degrading activities financially costly, a price signal. This price signal serves as an incentive for the actor, by making him to bear not only his private costs, but also, at least to some extent, the negative external costs of his activity, to shift to activities that are less costly and that damage the environment less.
- '*Financing environmental levies*'; mean levies that have the ability to finance environmental measures.¹⁷⁹
- '*Fiscal environmental levies*'; mean levies that primarily are designed to meet the demand of revenue.¹⁸⁰

Advocate General Saggio already in his Opinion in *EKW* declared that, bearing in mind that one of the purposes of harmonised excise duties is to obtain funds to meet the general budgetary needs, all taxes whose objective is other than meeting the general demands of public expenditure, and which are not contrary to the EU's objectives, may be described as indirect taxes having specific purposes.¹⁸¹ More precisely, Advocate General Saggio expressed that the requirement of a specific purpose in Article 1(2) of the General Arrangements Directive can be served both (A) by an allocation rule in the national law that links the expenditure of the revenue to the accomplishment of particular purposes; and (B) by means of the structure of the tax, *i.e.* by choosing special methods for its calculation.¹⁸² The CJEU's

¹⁷⁸ Kalle Määttä, *Environmental Taxes; An Introductory Analysis*, (Edward Elgar Publishing 2006), 19 and Janet E Milne and Mikael Skou Andersen, 'Introduction to environmental taxation concepts and research' in Janet E Milne and Mikael Skou Andersen (eds) *Handbook of Research on Environmental Taxation* (Edward Elgar Publishing 2014), 22

¹⁷⁹ Kalle Määttä, *Environmental Taxes; An Introductory Analysis*, (Edward Elgar Publishing 2006), 19–20 and Janet E Milne and Mikael Skou Andersen, 'Introduction to environmental taxation concepts and research' in Janet E Milne and Mikael Skou Andersen (eds) *Handbook of Research on Environmental Taxation* (Edward Elgar Publishing 2014), 22

¹⁸⁰ Kalle Määttä, *Environmental Taxes; An Introductory Analysis*, (Edward Elgar Publishing 2006), 20 and Janet E Milne and Mikael Skou Andersen, 'Introduction to environmental taxation concepts and research' in Janet E Milne and Mikael Skou Andersen (eds) *Handbook of Research on Environmental Taxation* (Edward Elgar Publishing 2014), 22

¹⁸¹ Case C-437/97 *Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien and Wien & Co HandelsgesmbH, formerly Ikerä Warenhandels-gesellschaft mbH v Oberösterreichische Landesregierung* [2000] ECLI:EU:C:2000:110, Opinion of AG Saggio, para 39

¹⁸² Case C-437/97 *Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien and Wien & Co HandelsgesmbH, formerly Ikerä Warenhandels-gesellschaft mbH v Oberösterreichische Landesregierung* [2000] ECLI:EU:C:2000:110, Opinion of AG Saggio, para 39, para 40

conclusions in *EKW* conformed entirely to the guidelines provided by Advocate General Saggio. Nevertheless, as Ginter *et al.* have pointed out, the CJEU did not explicitly refer to the guidelines that Advocate General Saggio suggested in his Opinion in *EKW*.¹⁸³

Advocate General Saggio's guidelines have, however, later been accepted by the CJEU in *Transportes Jordi Besora* and then confirmed in *Statoil Fuel & Retail Eesti*.¹⁸⁴ Although, this was done without explicit reference to the Opinion of Advocate General Saggio in *EKW*. As also Ginter *et al.* have concluded, the CJEU in these cases has established that the allocation of revenue to the explicit purpose of the levy constitutes a specific purpose only on condition that the revenue spent for the explicit purpose is directly linked to the harmful activity that is to be prevented by it.¹⁸⁵ Thus, from these cases, it can be derived that financing environmental levies, *i.e.* levies the revenue of which is linked, through a national allocation rule, to expenditure on accomplishment of the explicit environmental purpose of the levy, could qualify as indirect taxes for a specific purpose in accordance with Article 1(2) of the General Arrangements Directive.

When it comes to the fulfilment of the requirement for a specific purpose through designing the tax so that it would dissuade taxpayers to behave in a less harmful way, some ambiguity still remains. The CJEU's way of reasoning in *Transportes Jordi Besora* and *Statoil Fuel & Retail Eesti* gives at hand that a levy, in order to fulfil that requirement, would have to be designed, so far as its structure is concerned, and particularly the taxable item or tax rate, in such a way as to guide behaviour of taxpayers in direction that facilitates the achievement of the explicit specific purpose.¹⁸⁶ This line of reasoning would imply that incentive environmental levies, *i.e.* levies designed the way that they, through price signal, would incentivise a shift to activities that are less costly and less harmful to the environment, could qualify as indirect taxes for a specific purpose in accordance with Article 1(2) of the General Arrangements Directive.

¹⁸³ Carri Ginter, Nele Laidvee and Albert Linntam, 'The 'Specific Purpose' Exception of the European Union Excise Tax Regime: Testing the Boundaries of Member States' Tax Autonomy' (2016) 25(4) EC Tax Review, 230

¹⁸⁴ Case C-82/12 *Transportes Jordi Besora SL v Generalitat de Catalunya* [2014] ECLI:EU:C:2014:108, paras 30 and 32 and Case C-553/13 *Tallinna Ettevõtlusamet v Statoil Fuel & Retail Eesti AS* [2015] ECLI:EU:C:2015:149, paras 40–42

¹⁸⁵ Case C-82/12 *Transportes Jordi Besora SL v Generalitat de Catalunya* [2014] ECLI:EU:C:2014:108, para 30 and Case C-553/13 *Tallinna Ettevõtlusamet v Statoil Fuel & Retail Eesti AS* [2015] ECLI:EU:C:2015:149, para 41 and Carri Ginter, Nele Laidvee and Albert Linntam, 'The 'Specific Purpose' Exception of the European Union Excise Tax Regime: Testing the Boundaries of Member States' Tax Autonomy' (2016) 25(4) EC Tax Review, 232

¹⁸⁶ Case C-82/12 *Transportes Jordi Besora SL v Generalitat de Catalunya* [2014] ECLI:EU:C:2014:108, para 32 and Case C-553/13 *Tallinna Ettevõtlusamet v Statoil Fuel & Retail Eesti AS* [2015] ECLI:EU:C:2015:149, para 42

In this context, it shall, however, be observed that an incentive environmental levy's environmental impact is a result of its effect on relative prices.¹⁸⁷ With regard to a carbon tax on fuel, for the price signal to be effective, those consuming motor fuel have to be price sensitive. Price sensitivity is measured by price elasticity of demand. Price elasticity of demand is a measure that shows the responsiveness, *i.e.* elasticity, of the quantity demanded of a good or service to a change in price, *ceteris paribus* or, in other words, other things being equal. The more inelastic the demand for a product is, the less the demand changes when price changes. Moreover, price sensitivity tends to be higher when there are substitutes for the product.¹⁸⁸ Accordingly, the more inelastic the demand for motor fuel is, the less environmental impact that the levy will have. Other way around, the more elastic the demand for motor fuel is, the greater the effect of the levy will be—regardless whether it to its design is an incentive, financing, or fiscal environmental levy. Therefore, as Joseph has underlined, an incentive environmental levy addressing *e.g.* motor vehicle related CO₂ emissions would have the same environmental impact as would an identical levy introduced for fiscal reasons.¹⁸⁹

From an economic perspective, it would thus be logical to tie the prerequisites of a levy qualifying as having a specific purpose to: (1) financing environmental levies confirmed by an allocation rule in the national law that satisfies the direct link test established in *Transportes Jordi Besora* and confirmed by *Statoil Fuel & Retail Eesti*; and (2) levies that have a verifiable *de facto* environmental impact—regardless whether the explicit purpose of imposing those has been an incentive or a fiscal one.

If these guidelines were applied, Member States, when imposing a carbon tax on fuel, would have two options. Firstly, they could design the carbon tax on fuel as a financing environmental levy, the revenue of which would have to be allocated to expenditure related to accomplishment of a reduction of CO₂ emissions from motor vehicles. Secondly, they could design the carbon tax on fuel as either an incentive environmental levy or a fiscal environmental levy, as long as there would be a verifiable *de facto* environmental impact.

As regards the second alternative, it must be strongly emphasised that the legal situation is uncertain. It might be that only a carbon tax on fuel that would be designed as an incentive environmental levy, and that would have a verifiable *de facto* environmental impact, would qualify. From an

¹⁸⁷ See *e.g.* Kees A Heineken, 'Environmental Taxation in Europe: A Bird's Eye View' (2002) 42(11) *European Taxation*, 464

¹⁸⁸ 'Price Elasticity of Demand' (*Investopedia*)

¹⁸⁹ Sally-Ann Joseph, 'Environmental taxes – definitional analysis: behavioural change or revenue raising' in Larry Kreiser et.al. (eds), *Environmental Taxation and Green Fiscal Reform; Theory and Impact* (Edward Elgar Publishing 2014), 188

economic perspective, this would be ridiculous since an equal levy with a pronounced fiscal purpose and with an identical environmental impact would not qualify. It might also be that a carbon tax on fuel that, indeed, would be designed as an incentive environmental levy, but which, because of inelastic demand for fuel, would have no significant environmental impact, would qualify. This, in turn, would be absurd because it would allow Member States to introduce a purely budgetary, *i.e.* fiscal, purpose through the backdoor while such an introduction through the front door still would not be allowed.

Furthermore, besides qualifying as having a specific purpose within the meaning of Article 1(2) of the General Arrangements Directive, a national carbon tax on fuel should comply with the EU tax rules applicable for excise duty or VAT so 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 (see Chapter 2.1.4 and the discussion below in Chapter 5.3).

5.3 CO₂ differentiated road tolls

The Eurovignette Directive, as it stands today, precludes Member States from including CO₂ emissions in the calculation of the external-cost charge that the road toll may comprise. Consequently, road tolls that are imposed on HDVs on trans-European road network or on certain sections of that network, or on any other additional sections of the Member States' network of motorways which are not part of the trans-European road network cannot be differentiated based on CO₂ emissions.

As a rule, the Eurovignette Directive does not preclude Member States' rights, in accordance with TFEU, to apply road tolls on vehicles or road infrastructures *other* than those falling within the scope of the Eurovignette Directive.¹⁹⁰ In short, this means that Member States' may apply road tolls on such vehicles or such road infrastructures, provided that they honour their obligations in accordance with the Treaties, such as respecting the freedoms of movement in the single market and the prohibition of unsanctioned state aid.

Consequently, Member States are free to apply CO₂ differentiated road tolls in situations that fall outside the scope of the Eurovignette Directive. Notwithstanding the requirements of not to discriminate against international traffic and not to distort competition between operators, Member States may, in that case, decide to form and calculate the road toll differently from the scheme established by the Eurovignette Directive.¹⁹¹ In this context, the Author would like to strongly emphasise that there are

¹⁹⁰ Article 7(1) and (3) of the Eurovignette Directive

¹⁹¹ Article 7(1) of the Eurovignette Directive

potential problems regarding compliance with EU primary law if a road toll that, to its design, deviates from the scheme of the Eurovignette Directive is imposed. Moreover, from an administrative point of view, it may be assumed that, if nothing else, Member States applying road tolls on vehicles or road infrastructures which are subject to the Eurovignette Directive would wish to have a fairly coherent regime for road charging. In legislative practice, these issues must, of course, be carefully considered. However, a discussion on EU primary law or administrative issues related to imposing a levy on CO₂ emissions from motor vehicles falls outside the scope of this Thesis.

If a Member State wants to follow the model (but not necessarily the scheme) of the Eurovignette Directive, the road toll should comprise of an infrastructure-cost charge and/or of an external-cost charge. In addition to the above-mentioned complex of primary law problems related to departure from the scheme of road tolling established in the Eurovignette Directive, the EU excise duties legislation places constraints on the Member States' margin of appreciation regarding CO₂ differentiated road tolling.

In line with *Braathens*, there is a direct and inseverable link between the consumption of carbon-based fuel and CO₂ emission which are emitted in course of such consumption.¹⁹² In case of a national CO₂ differentiated road toll would include, or consist of, an external-cost charge calculated based on CO₂ emissions, there would exist a direct and inseverable link between the fuel consumed, the distance driven, the CO₂ emitted, and the amount of the external-cost charge. Hence, at least the part of the national CO₂ differentiated road toll consisting of the external-cost charge should be characterised as related to an excise good (*i.e.* motor fuel).

Furthermore, the question whether a national CO₂ differentiated road toll should be viewed as a single levy or, in fact, as two separate levies under one umbrella concept, must be addressed. This is not least because the answer to that question is of immense importance for whether Article 1(2) or 1(3) of the General Arrangements Directive should apply.

If the national CO₂ differentiated road toll was to be divided into two separate levies for the purposes of the General Arrangements Directive, the result would be the following. One of the levies, *i.e.* the infrastructure-cost charge, would, potentially, fall within the scope of Article 1(3)(b) of the General Arrangements Directive. The other of the levies, *i.e.* the external-cost charge, would, in this case, be a levy on CO₂ emissions and, as such, in effect, a levy on the consumption of the motor fuel itself for the purposes of the General Arrangements Directive. Thus, in case of dividing the road toll

¹⁹² Case C-346/97 *Braathens Sverige AB v Riksskatteverket* [1999] ECLI:EU:C:1999:291, para 23

into two separate levies, Article 1(2) of the General Arrangements Directive could apply to the external-cost charge.

Article 1(2) of the General Arrangements Directive is applicable only to ‘*indirect taxes*’. The definition of an indirect tax is based on the assumption of shifting of the tax. The legal character of indirect taxes requires the possibility of shifting the indirect tax forward, so that the tax, potentially, is shifted into the consumer price of the product or service.¹⁹³ Therefore, the question whether Article 1(2) of the General Arrangements Directive could apply to the external-cost charge forming a part of the national CO₂ differentiated road toll depends on the design of the road toll. For instance, if the taxable person was the vehicle owner, the likelihood of the taxable person being able to pass on the cost of the external-cost charge would vary depending partly on whether the vehicle was used for business or private purposes, partly, in case of business use, on the competition situation and the market structure of the given business sector. If a taxable person used the vehicle for private purposes, no shifting of the burden of the external-cost charge would occur. In that case, the levy would be direct—as opposed to indirect—and thus would fall outside the scope of Article 1(2) of the General Arrangements Directive. On the other hand, if shifting was determined to occur, which, in turn, would lead the external-cost charge to be considered as an indirect levy, Article 1(2) of the General Arrangements Directive would apply.

In case the external-cost charge would be characterised as an indirect tax, it should, in order to be allowed, have a specific purpose (see the discussion above in Chapter 5.2). Moreover, it should comply with the EU tax rules applicable for excise duties or VAT 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.

As presented above, there is a direct and inseverable link between the amount CO₂ emitted by a carbon fuel vehicle during a given distance and the amount carbon in the fuel the vehicle consumes during that same distance. Thus, presuming identical rates would apply, an external-cost charge which would be calculated based on the volume of CO₂ emitted per given distance (*e.g.* grams/kilometre) by a certain (type of) vehicle would be equivalent to a specific carbon tax on fuel if that tax was calculated based on the volume of CO₂ emissions from combustion of a given volume of a certain fuel (*e.g.* grams/litre) that the vehicle uses. Hence, amount of money of the external-cost charge for “Vehicle A” in 100 kilometres would equal to the amount of money of the carbon tax on fuel on the volume of fuel consumed by “Vehicle A” per 100 kilometres. With reference to

¹⁹³ Ben J M Terra and Julie Kajus, *Introduction to European VAT (Recast)* (1 January 2017) under sub-chapter 7.2.3. ‘Indirect’

Commission v France, the external-cost charge might, in the Author's opinion, thus comply with the requirement of compliance with the general scheme of excise duty regarding determination of tax base and calculation of the tax.

However, according to the general scheme, excise duties become chargeable when the product subject to it is released for consumption.¹⁹⁴ 'Release for consumption' occurs when excise goods depart from a 'duty suspension arrangement'¹⁹⁵, or when they are held outside a duty suspension arrangement, provided that excise duties have not been levied at the moment of production or upon importation.¹⁹⁶ In this context, it is essential to observe that Article 1(2) of the General Arrangements Directive deals with a specific tax on an excise good. As the relevant excise good here is motor fuel, the relevant time of chargeability is the time of release for consumption of the motor fuel.

For example, if the national CO₂ differentiated road toll relied on a declaration-based system where information on how vehicles have been used on the road infrastructures would be obtained afterwards, based on the kilometres driven, chargeability of the road toll, and thus, in effect, chargeability of the external-cost charge, would occur when a vehicle covered would be used on the road infrastructures that would be subject to road tolling. Vis-à-vis chargeability, it is thus evident that the times of occurrence would not coincide. Consequently, the external-cost charge would not comply with the general scheme of excise duty.

As a result, Article 1(2) of the General Arrangements Directive precludes Member States from imposing a national CO₂ differentiated road toll that would have the characteristics of an indirect tax and that would comprise only of a CO₂ differentiated external-cost charge. The outcome would clearly be the same in case the road toll would comprise both an infrastructure-cost charge and a CO₂ differentiated external-cost charge, provided that the road toll would be determined as consisting of two separate levies.

When it comes to the question whether a road toll should be viewed as a single levy or as two separate levies, the cases *Ottmar Hermann* and *Faaborg-Gelting Linien* are fundamental. In *Ottmar Hermann*, the CJEU referred to the principle of unity of supply which it had established in the VAT case *Faaborg-Gelting Linien*. The principle of unity of supply

¹⁹⁴ Article 7(1) of the General Arrangements Directive

¹⁹⁵ As defined in Article 7(4) of the General Arrangements Directive, a 'duty suspension arrangement' is a tax arrangement applied to the production, processing, holding or movement of excise goods not covered by a customs suspensive procedure or arrangement, excise duties being suspended.

¹⁹⁶ Article 7(2) of the General Arrangements Directive

prescribes that, when determining whether a national levy (*e.g.* the road toll) is imposed on products subject to excise duty (*e.g.* motor fuel) for the purposes of Article 1(2) of the General Arrangements Directive or, rather on services supplied in relation to such products for the purposes of Article 1(3)(b) of the General Arrangements Directive, regard must be taken to the predominant features of the transaction on which it is imposed.¹⁹⁷

Indeed, whether there is any transaction involved regarding road tolling may be up for discussion. An infrastructure-cost charge that would be designed according to the model of Eurovignette Directive would follow the '*user-pays principle*'. Accordingly, it would take into account, as cost elements, investment costs; annual maintenance and structural repair costs; and operating, management and tolling costs.¹⁹⁸ That way designed, the infrastructure-cost charge would be aimed as an instrument of cost-recovery. In addition, paying the road toll would grant the road user the right to use the road infrastructures subject to the road toll. In this fashion, road tolling could arguably be defined as a transaction where the right to use the road infrastructures would be supplied for consideration.

Going back to the principle of unity of supply and the predominant features of road tolling, the Author's view is that following circumstances should be considered.¹⁹⁹ A road toll designed according to the model of Eurovignette Directive may consist of two components: the infrastructure-cost charge and the external-cost charge. In essence, payment of the road toll confers the user the right to drive with a motor vehicle covered on the road infrastructures that are subject to the road toll. As said above, it is correct that the CO₂ differentiated external-cost charge *per se* is equivalent to a carbon tax on fuel. On the one hand, it could thus be argued that an external-cost charge, when combined with an infrastructure-cost charge, would ultimately be reduced to a component on the basis of which the price of the right to use the road infrastructures would be determined in an individual case. Nevertheless, the problem with this argument is that the amount of the external-cost charge, as opposed to the amount of the infrastructure-cost charge, is not dependent only on the distance driven but also on the CO₂ emitted. Thus, if different fuel, or similar vehicle using fuel with lower carbon content, was used instead, the amount of the infrastructure-cost

¹⁹⁷ Case C-491/03 *Ottmar Hermann v Stadt Frankfurt am Main* [2005] ECLI:EU:C:2005:157, para 21

¹⁹⁸ See Annex II to the Eurovignette Directive

¹⁹⁹ The CJEU's case law regarding the principle of unity of supply and composite supplies in the context of VAT is robust. Nothing in this case law, however, contradicts the Author's line of argumentation regarding the principle of unity of supply in the context of a CO₂ differentiated road toll calculated according to the model of the Eurovignette Directive and consisting of partly an infrastructure-cost charge, partly an external-cost charge. Compare Oskar Henkow, 'Defining the tax object in composite supplies in European VAT' (2013) 2(3) World Journal of VAT/GST Law

charge would remain unchanged, while the amount of the external-cost charge would change. This notion attracts the Author to believe that the external-cost charge lacks such connection to the infrastructure-cost charge, which would make the principle of unity of supply applicable. This, in turn, would have as consequence that the road toll would have to be divided into two different levies of which the infrastructure-cost charge would be defined as a tax on the supply of services for the purposes of Article 1(3)(b) of the General Arrangements Directive and the external-cost charge as a (potentially) another indirect tax on fuel. In case of classification as a separate levy, and provided that the road toll would be classified as an indirect tax, the external-cost charge would, again, have to fulfil the requirements set up in Article 1(2) of the General Arrangements Directive.

With reference to the discussion above regarding the external-cost charge in the light of Article 1(2) of the General Arrangements Directive, the Author has her doubts on whether it currently would be possible for Member States to apply CO₂ differentiated road tolls on vehicles and/or road infrastructures even other than those covered by the Eurovignette Directive. Therefore, the Author's opinion is that Member States wishing to internalise the cost of CO₂ emissions related to road transportation are today, in practice, left with the option to impose a carbon tax on fuel that complies with Article 1(2) of the General Arrangements Directive.

5.4 Combining CO₂ differentiated road tolls and a carbon tax on fuel

Having in mind the potential upcoming changes to the Eurovignette Directive (see Chapter 6), it is of great interest to discuss whether it would be possible for Member States to simultaneously apply a carbon tax on fuel and a CO₂ differentiated road toll.

As highlighted above in Chapter 5.3, a carbon tax on fuel calculated based on the volume of CO₂ emitted from combustion of a given volume of a certain fuel and an external-cost charge calculated based on the volume of CO₂ emitted during a given distance by a vehicle using that fuel are equivalent, provided that identical rates would be applied. If a simultaneous application of these two mutually equivalent levies was allowed according to Article 1(2) of the General Arrangements Directive, it would mean that two separate levies, imposed on the same excise good, could qualify as having a specific purpose with the *same* specific purpose.

Furthermore, in *EKW*, the CJEU remarked, in connection to Austria's argument that the specific purpose of the beverage tax was to be found in the need to offset the substantial costs borne by municipalities in connection with the constraints resulting from tourism, that other taxes already existed

in Austria which specifically concerned the promotion of tourism.²⁰⁰ The CJEU's reasoning in *EKW* thus suggests that two different levies could not qualify as levies having a specific purpose for the purposes of Article 1(2) of the General Arrangements Directive when these levies have the same specific purpose.

Hence, the Author is tempted to conclude that Article 1(2) of the General Arrangements Directive precludes Member States from imposing both a carbon tax on fuel and a CO₂ differentiated road toll—at least regarding the same type of vehicles. Consequently, Member States would have to choose to either impose a carbon tax on fuel or a CO₂ differentiated road tolling regime. Also, it is worth observing that the Energy Taxation Directive already allows Member States charging for road use to apply a reduced rate for gas oil used for the vehicles covered by the road charging regime.²⁰¹

6 Future of road charging at EU level

Already in the Transport White Paper of 2011, the Commission communicated the need of a review of EU road charging legislation. The Transport White Paper aimed to promote a more systematic use of distance based road charging reflecting the infrastructure and external costs based on the user-pays and polluter-pays principles.²⁰² However, despite the fact that road transport is responsible for over 70% of transport related GHG emissions,²⁰³ while as much as about 25% of CO₂ emissions related to road transport are estimated to be produced by HDVs, it took until 2014 before any official action was taken at EU level to curb CO₂ emissions from HDVs.²⁰⁴

On 21 May 2014, the Commission adopted the so-called 'HDV Strategy'.²⁰⁵ In the HDV Strategy, the Commission articulated that it had been estimated that CO₂ emissions from HDVs had grown by about 36% between 1990 and 2010. At the same time, it noted that estimates predict that total transport activity will grow further in the next 40 years. According to scientists, fuel efficiency and alternative fuels will somewhat mitigate the effect of that growth on CO₂ emissions. Nevertheless, under current trends and policies,

²⁰⁰ Case C-437/97 *Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien and Wien & Co HandelsgesmbH, formerly Ikeru Warenhandels-gesellschaft mbH v Oberösterreichische Landesregierung* [2000] ECLI:EU:C:2000:110, para 35

²⁰¹ Article 7(4) of the Energy Taxation Directive

²⁰² Commission, 'Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system' (White Paper) COM(2011) 144 final, para 39, 29

²⁰³ Commission, 'A European Strategy for Low-Emission Mobility' (Communication) COM(2016) 501 final, 2

²⁰⁴ Commission, 'Strategy for reducing Heavy-Duty Vehicles' fuel consumption and CO₂ emissions' (Communication) COM(2014) 285 final, 2

²⁰⁵ Commission, 'Strategy for reducing Heavy-Duty Vehicles' fuel consumption and CO₂ emissions' (Communication) COM(2014) 285 final

CO₂ emissions from HDVs are estimated to remain stable and thus be about 35% above the 1990 levels in both 2030 and 2050. As also the Commission has highlighted in the HDV Strategy, this would clearly be irreconcilable with the ‘20-20-20’ target of lowering road transport related GHG emissions by 60% by 2050 compared to the 1990 levels.²⁰⁶

The manifested objective of the HDV Strategy is to curb CO₂ emissions from HDVs in a cost-efficient and proportionate way for stakeholders and the society. The Commission’s intent has been that the strategy would provide stakeholders with a clear and coherent policy framework, and indicate likely regulatory developments, thereby facilitating decision making and investment planning.²⁰⁷ Also, it has been notified by the Commission that the pre-requisite to address CO₂ emissions from HDVs at EU level would be to render possible to measure and monitor them in a transparent and unified way.²⁰⁸

The chosen EU policy is to steer, by way of introducing price signals on the market, the demand and supply of long-distance transportations towards more fuel-efficient HDVs emitting less CO₂ on the one hand, and towards other modes of transportation on the other hand.²⁰⁹ Fundamentally, price signalling through internalising the external cost of road transport related CO₂ emissions in the price of transportation by road is a doomed approach without a standardised way of measuring and monitoring CO₂ emissions from HDVs in the EU.

Because of the diversity of HDV models and tasks, the Commission is of the opinion that it would not be appropriate to measure CO₂ emissions of HDVs by emissions testing as is currently done for cars and vans. Quite the reverse, the Commission considers that a computer simulation tool would be better to this end.²¹⁰ Since 2009, the Commission has, in cooperation with industry stakeholders, been developing Vehicle Energy Consumption Calculation Tool (‘VECTO’) which is a simulation tool tailored to measure whole vehicle combination’s CO₂ emissions. This way of measuring CO₂ emissions takes into account the technology and combinations used in the HDV and thus includes emissions due to its motor and transmission, aerodynamics, rolling resistance, and auxiliaries. VECTO is expected to be

²⁰⁶ Commission, ‘Strategy for reducing Heavy-Duty Vehicles’ fuel consumption and CO₂ emissions’ (Communication) COM(2014) 285 final, 3

²⁰⁷ Commission, ‘Strategy for reducing Heavy-Duty Vehicles’ fuel consumption and CO₂ emissions’ (Communication) COM(2014) 285 final, 2

²⁰⁸ Commission, ‘Strategy for reducing Heavy-Duty Vehicles’ fuel consumption and CO₂ emissions’ (Communication) COM(2014) 285 final, 7

²⁰⁹ Commission, ‘Strategy for reducing Heavy-Duty Vehicles’ fuel consumption and CO₂ emissions’ (Communication) COM(2014) 285 final, 5–6

²¹⁰ Commission, ‘Strategy for reducing Heavy-Duty Vehicles’ fuel consumption and CO₂ emissions’ (Communication) COM(2014) 285 final, 7

the backbone of the future fuel consumption monitoring and CO₂ certification procedures for HDVs in the EU.²¹¹

Likewise, changes are on the way also regarding emissions testing of cars and vans. In September 2015, the United States Environmental Protection Agency ('EPA') uncovered that certain car manufacturers had installed software on certain diesel vehicles that was designed to detect when the vehicle was undergoing emissions testing and turned full emissions control on only during the test.²¹² This so-called "Volkswagen emissions scandal", or "dieselgate", revealed that the current laboratory-based EU type approval procedure was rather easily exploitable to artificially reduce the vehicle's CO₂ emissions.

In 2016, the Commission proposed the adoption of the World Harmonised Light-duty Vehicle Test Procedure (WLTP).²¹³ WLTP is a new, globally harmonised test procedure developed under the umbrella of United Nations' Economic Commission for Europe (UNECE) for measuring CO₂ emissions and fuel consumption of cars and vans. On 14 June 2016, Technical Committee of Motor Vehicles (TCMV)²¹⁴ voted in favour of the Commission's draft Regulation to introduce TCMV.²¹⁵ The setting of post-2020 EU fuel efficiency and CO₂ emissions standards for cars and vans will be based on this new test procedure.²¹⁶

In February 2015, the Commission adopted the 'Energy Union Strategy'²¹⁷. Again, the Commission restated the issue that realising transport's energy efficiency potential requires a continuing focus on tightening CO₂ emissions standards for cars and vans as well as measures to increase fuel efficiency for and to reduce CO₂ emissions from HDVs and buses. Furthermore, the Commission, again, emphasised that the use of road charging regimes as an

²¹¹ Nikiforos-Georgios Zacharof and Georgios Fontaras, *JRC Technical Reports: Report on VECTO Technology Simulation Capabilities and Future Outlook* (2016), 4

²¹² 'Learn About Volkswagen Violations' (*United States Environmental Protection Agency* 19 May 2017)

²¹³ 'Car industry: European Commission tightens rules for safer and cleaner cars' (*European Commission Press Release Database* 27 January 2016)

²¹⁴ The European Commission's Technical Committee of Motor Vehicles is the technical regulatory committee gathering Member States representatives in questions related to regulation of motor vehicles. See Commission, 'A European Strategy for Low-Emission Mobility' (Communication) COM(2016) 501 final, footnote 22, 7

²¹⁵ 'Car emissions: EU moves closer to more robust testing methods for CO₂ emissions and fuel consumption' (*European Commission Press Release Database* 15 June 2016)

²¹⁶ Commission, 'A European Strategy for Low-Emission Mobility' (Communication) COM(2016) 501 final, 4 and 7 and 'Car industry: European Commission tightens rules for safer and cleaner cars' (*European Commission Press Release Database* 27 January 2016)

²¹⁷ Commission, 'Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy' (Communication) COM(2015) 80 final

instrument against pollution and congestion in line with the polluter-pays and user-pays principles should also be promoted at EU level.²¹⁸

Finally, in July 2016, the Commission adopted the so-called ‘Low-Emission Mobility Strategy’²¹⁹ which gives more hands-on indications on to what direction the Commission aims to take the EU road charging framework. Congruently, the Low-Emission Mobility Strategy sets guiding principles to Member States to prepare for the future by framing the initiatives that the Commission is planning in the coming years, and maps the areas in which it is exploring options.²²⁰ The Low-Emission Mobility Strategy deals with all modes of transport, while the focus lies on road transportation, which is the most significant source of transport related CO₂ emissions.²²¹

As pronounced in the Low-Emission Mobility Strategy, the EU’s role is to create enabling conditions and provide strong initiatives for low-emission mobility. In conformity to this declaration, the actions included in the Low-Emission Mobility Strategy are part of a holistic approach requiring a long-term active engagement of all stakeholders, *e.g.* Member States, manufacturing and service industries, researchers *etc.*²²² Concurrently, the Commission underlines that the transportation service and motor vehicle manufacturing industries need the right kind of incentives and investments at the right time in order to deliver low-emission mobility solutions and innovations to the market.²²³ Internalising externalities is one of the most economically rational ways to introduce price signals that incentivise more fuel-efficient transport operations, low-emission fuels, and a faster renewal of the fleet. Thus, the Commission considers that the process of facilitating the transition to low-emission mobility must include a further move in the EU road charging framework towards a direction that better includes externalities of road transportation in the costs of those who produce them.²²⁴ Hence, the Commission expressed that, across the EU, road charging should move towards road tolling.²²⁵

²¹⁸ Commission, ‘Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy’ (Communication) COM(2015) 80 final, 13

²¹⁹ Commission, ‘A European Strategy for Low-Emission Mobility’ (Communication) COM(2016) 501 final, 4

²²⁰ Commission, ‘A European Strategy for Low-Emission Mobility’ (Communication) COM(2016) 501 final, 2–13

²²¹ Commission, ‘A European Strategy for Low-Emission Mobility’ (Communication) COM(2016) 501 final, 2

²²² Commission, ‘A European Strategy for Low-Emission Mobility’ (Communication) COM(2016) 501 final, 2–3

²²³ Commission, ‘A European Strategy for Low-Emission Mobility’ (Communication) COM(2016) 501 final, 3

²²⁴ Commission, ‘A European Strategy for Low-Emission Mobility’ (Communication) COM(2016) 501 final, 3–4

²²⁵ Commission, ‘A European Strategy for Low-Emission Mobility’ (Communication) COM(2016) 501 final, 4

Moreover, the Commission told that it is currently developing standards for inter-operable electronic road tolling systems in the EU.²²⁶ Currently, lack of interoperability between the various systems applied in Member States add superfluous costs on road transport operators and hinder mobility within the EU.²²⁷ The Commission's objective with this action is to facilitate access to markets for new tolling service providers and to reduce overall systems costs.²²⁸

Most importantly, in the Low-Emission Mobility Strategy, the Commission announced that the Eurovignette Directive will be revised to enable differentiation of road tolls on the basis of CO₂ emissions. Additionally, the Commission declared that it plans to extend some of the principles set in the Eurovignette Directive to buses and coaches as well as private vehicles.²²⁹ At the time of writing this paper, the Commission has not yet published any proposal on changing the Eurovignette Directive in accordance with the guiding principles proclaimed in the Low-Emission Mobility Strategy. However, there are rumours circulating that the Commission will publish the proposal on 31 May 2017.²³⁰

7 Conclusion

To conclude, EU excise duties law and the Eurovignette Directive place limitations on Member States' margin of appreciation when it comes to imposing levies in order to curb motor vehicle related CO₂ emissions. Accordingly, Member States need to take account the following when imposing a carbon tax on fuel or a CO₂ differentiated road toll.

Motor fuel is an excise good to which the harmonised EU excise duty system applies. However, Article 1(2) of the General Arrangements Directive provides for an exception of that system. Accordingly, Member States may apply other indirect taxes on excise goods for specific purposes, provided that they comply with the general scheme of either excise duty or VAT.

In accordance with the principle that a derogating provision has to be applied strictly, Article 1(2) of the General Arrangements Directive must be interpreted restrictively.

²²⁶ Commission, 'A European Strategy for Low-Emission Mobility' (Communication) COM(2016) 501 final, 6

²²⁷ Susanne Pillath, 'Briefing: Road charges for private vehicles in the EU' (European Parliament, May 2016)

²²⁸ Commission, 'A European Strategy for Low-Emission Mobility' (Communication) COM(2016) 501 final, 4

²²⁹ Commission, 'A European Strategy for Low-Emission Mobility' (Communication) COM(2016) 501 final, 4

²³⁰ Julia Fioretti, 'EU to propose linking CO₂ emissions for trucks, cars to road toll charges' *Reuters* (21 April 2017)

It is clear from the CJEU's case law that a purely budgetary purpose cannot be a specific purpose. In addition, the CJEU's case law suggests that levies, the revenue of which is linked, through a national allocation rule, to expenditure on accomplishment of the explicit specific purpose of the levy, would qualify as indirect taxes for specific purposes within the meaning of Article 1(2) of the General Arrangements Directive. Accordingly, a carbon tax on fuel, the revenue of which would be allocated to expenditure related to accomplishment of a reduction of CO₂ emissions from motor vehicles, should qualify.

Furthermore, the CJEU's case law indicates that the requirement of a specific purpose in Article 1(2) of the General Arrangements Directive could also be served by means of the structure of the tax. In particular, the taxable item or tax rate should be selected in such a way as to guide behaviour of taxpayers in direction that facilitates the achievement of the explicit specific purpose.

When it comes to the fulfilment of the requirement of a specific purpose through designing the tax so that it would dissuade taxpayers to behave in a less undesired way, some ambiguity as to the content of the law still remains. Since a carbon tax on fuel is a market-based environmental policy instrument, its environmental impact is a result of its effect on relative prices. Thus, from an economic viewpoint, it would be logical to require the levy to have a verifiable *de facto* impact in attaining the specific purpose—regardless whether the explicit purpose of imposing it has been an incentive or a fiscal one. If this guideline was applied, Member States could design the carbon tax on fuel as either an incentive environmental levy or a fiscal environmental levy, as long as there would be a verifiable *de facto* reduction on CO₂ emissions from the combustion of the fuel.

Nevertheless, it might be that only a carbon tax on fuel that would be designed as an incentive environmental levy, and that would have a verifiable *de facto* environmental impact, would qualify. It might also be that a carbon tax on fuel that, indeed, would be designed as an incentive environmental levy, but which, because of inelastic demand for fuel, would have no significant environmental impact, would qualify. From an economic perspective, both cases would be irrational, because an identical levy in all other respects, besides the explicit purpose of being a fiscal environmental levy instead of an incentive one, would not qualify.

The Eurovignette Directive, as it stands today, precludes Member States from imposing CO₂ differentiated road tolls on HDVs on the road infrastructures that are subject to the EU road charging system.

In principle, Member States may apply road tolls on other vehicles and road infrastructures than those covered by the Eurovignette Directive. However, in practice, there are potential problems regarding compliance with EU

primary law if a road toll that, to its design, deviates from the scheme of the Eurovignette Directive is imposed.

If a Member State wants to follow the model of the Eurovignette Directive, the road toll should comprise of an infrastructure-cost charge and/or of an external-cost charge.

Of the CJEU's case law follows, that there is a direct and inseverable link between the consumption of carbon-based fuel and the CO₂ emissions which are emitted in course of such consumption. Thus, at least the part of the national CO₂ differentiated road toll consisting of the external-cost charge should be characterised as related to an excise good, *i.e.* motor fuel.

Furthermore, the question whether a CO₂ differentiated road toll consisting of partly an infrastructure-cost charge, partly an external-cost charge should be viewed as a single levy or as two separate levies is of great importance for whether Article 1(2) or 1(3) of the General Arrangements Directive should apply. If the national CO₂ differentiated road toll was to be divided into two separate levies for the purposes of the General Arrangements Directive, the infrastructure-cost charge, would, potentially, fall within the scope of Article 1(3)(b) of the General Arrangements Directive. The external-cost charge, in turn, would be a levy on CO₂ emissions and thus, in effect, a levy on the consumption of the motor fuel itself for the purposes of the General Arrangements Directive. In case of dividing the road toll into two separate levies, Article 1(2) of the General Arrangements Directive would apply to the external-cost charge, provided that the road toll should be characterised as an indirect tax.

In essence, payment of the road toll confers the road user the right to drive with a motor vehicle on the road infrastructures that are subject to the road tolling regime. With regard to the principle of unity of supply, it could, on the one hand, be argued that an external-cost charge, when combined with an infrastructure-cost charge, should ultimately be reduced to a component on the basis of which the price of the right to use the road infrastructures would be determined in an individual case. Nevertheless, the amount of the external-cost charge, as opposed to the amount of the infrastructure-cost charge, is not dependent only on the distance driven but also on the CO₂ emitted. Consequently, if different fuel, or similar vehicle using fuel with lower carbon content, was used instead, the amount of the infrastructure-cost charge would remain unchanged, while the amount of the external-cost charge would change. Accordingly, the external-cost charge lacks such connection to the infrastructure-cost charge, which would make the principle of unity of supply applicable. Of that follows that the CO₂ differentiated road toll should be viewed as two separate levies for the purposes of the General Arrangements Directive. Therefore, on condition that the road toll would be characterised as an indirect tax, Article 1(2) of

the General Arrangements Directive should apply to the external-cost charge.

According to the general scheme, excise duties become chargeable when the product subject to it is released for consumption. As the relevant excise good with regard to a CO₂ differentiated road toll is motor fuel, the relevant time of chargeability is the time of release for consumption of the motor fuel. Supposing the national CO₂ differentiated road toll would rely on a declaration-based system where information on how the vehicles have been used on the road infrastructures would be obtained afterwards, based on the kilometres driven, chargeability of the road toll, and thus, in effect, chargeability of the external-cost charge, would occur when the vehicle would be used on the road infrastructures that would be subject to road tolling. Vis-à-vis chargeability, it is thus evident that the times of occurrence would not coincide. Consequently, the external-cost charge would not comply with the general scheme of excise duty.

In conclusion, Member States wishing to impose levies on CO₂ emissions from motor vehicles are thus today, in practice, left with the option to impose a carbon tax on fuel that complies with Article 1(2) of the General Arrangements Directive.

It is of interest to observe that the Commission is currently preparing for a proposal to revise the Eurovignette Directive. Among other things, the Commission's intention is to enable differentiation of road tolls on the basis of CO₂ emissions. At the moment, there is no standardised way of measuring and monitoring CO₂ emissions from HDVs in the EU. Without such standardisation, it is not possible to introduce CO₂ emissions as an external-cost element into the calculation of the external-cost charge of the Eurovignette Directive. However, the Commission has since 2009 been developing, in cooperation with industry stakeholders, VECTO, which is a simulation tool tailored to measure whole vehicle combination's CO₂ emissions. VECTO is expected to be the backbone of the future fuel consumption monitoring and CO₂ certification procedures for HDVs in the EU. In addition, it could also be used as basis for calculation of a CO₂ differentiated external-cost charge for the purposes of EU road charging legislation.

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