Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

13 June 2024*

(Reference for a preliminary ruling – Directive 2003/96/EC – Article 2(4)(b), third indent – Article 17(1)(a) – Excise duty – Taxation of energy products and electricity – Electricity used in electrolysis – Tax reductions on the consumption of energy products and electricity for energy-intensive businesses – Purchase of energy products and electricity – Actual cost of energy purchased – Distribution tariffs – Criteria for exemption – Principle of equality and non-discrimination)

In Case C-266/23,

REQUEST for a preliminary ruling under Article 267 TFEU from the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland), made by decision of 28 December 2022, received at the Court on 26 April 2023, in the proceedings

A. S.A.

v

Dyrektor Izby Administracji Skarbowej w Bydgoszczy,

other party:

Rzecznik Małych i Średnich Przedsiębiorców,

THE COURT (Tenth Chamber),

composed of Z. Csehi, President of the Chamber, M. Ilešič (Rapporteur) and D. Gratsias, Judges,

Advocate General: A. Rantos,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– A. S.A., by K. Rutkowski, radca prawny,

– the Dyrektor Izby Administracji Skarbowej w Bydgoszczy, by A. Kowalczyk-Markowska,

* Language of the case: Polish.

– the Polish Government, by B. Majczyna, acting as Agent,

– the Spanish Government, by I. Herranz Elizalde, acting as Agent,

– the European Commission, by A. Armenia and M. Owsiany-Hornung, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 17(1)(a) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ 2003 L 283, p. 51).

2 The request has been made in proceedings between A. S.A., a company incorporated under Polish law, and the Dyrektor Izby Administracji Skarbowej w Bydgoszczy (Director of the Tax Administration Chamber, Bydgoszcz, Poland) concerning the refusal to reimburse part of the excise duty paid by that company on electricity.

Legal context

European Union law

3 Recitals 2 to 5, 9, 11 and 24 of Directive 2003/96 state:

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

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

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

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

…

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

…

(11) Fiscal arrangements made in connection with the implementation of this Community framework for the taxation of energy products and electricity are a matter for each Member State to decide. In this regard, Member States might decide not to increase the overall tax burden if they consider that the implementation of such a principle of tax neutrality could contribute to the restructuring and the modernisation of their tax systems by encouraging behaviour conducive to greater protection of the environment and increased labour use.

…

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

4 The third indent of Article 2(4)(b) of that directive provides:

'This Directive shall not apply to:

…

(b) the following uses of energy products and electricity:

…

– electricity used principally for the purposes of chemical reduction and in electrolytic and metallurgical processes'.

5 Article 4 of that directive is worded as follows:

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

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

6 Article 8(2) of that directive provides:

'This Article shall apply to the following industrial and commercial purposes:

…

(c) plant and machinery used in construction, civil engineering and public works;

…'

7 Article 17(1) and (2) of Directive 2003/96 provides:

‘1. Provided the minimum levels of taxation prescribed in this Directive are respected on average for each business, Member States may apply tax reductions on the consumption of energy products used for heating purposes or for the purposes of Article 8(2)(b) and (c) and on electricity in the following cases:

(a) in favour of energy-intensive businesses

An “energy-intensive business” shall mean a business entity, as referred to in Article 11, where either the purchases of energy products and electricity amount to at least 3.0% of the production value or the national energy tax payable amounts to at least 0.5% of the added value. Within this definition, Member States may apply more restrictive concepts, including sales value, process and sector definitions.

“Purchases of energy products and electricity” shall mean the actual cost of energy purchased or generated within the business. Only electricity, heat and energy products that are used for heating purposes or for the purposes of Article 8(2)(b) and (c) are included. All taxes are included, except deductible VAT.

…

(b) where agreements are concluded with undertakings or associations of undertakings, or where tradable permit schemes or equivalent arrangements are implemented, as far as they lead to the achievement of environmental protection objectives or to improvements in energy efficiency.

2. Notwithstanding Article 4(1), Member States may apply a level of taxation down to zero to energy products and electricity as defined in Article 2, when used by energy-intensive businesses as defined in paragraph 1 of this Article.’

Polish law

Law on Excise Duty

8 Article 30(7a) of the ustawa o podatku akcyzowym (Law on Excise Duty) of 6 December 2008 (Dz. U. 2009, No 3, item 11), in the version applicable to the dispute in the main proceedings), provides:

‘Electricity shall be exempt from excise duty if used:

1) for the purposes of chemical reduction;

2) in electrolytic processes;

3) in metallurgical processes;

4) in mineralogical processes.’

9 Article 31d(1), (2) and (11) of that law provides:

‘1. An energy-intensive business using electricity shall be exempt from excise duty in the form of a refund of part of the excise duty paid on electricity which it has used and which jointly fulfils the following conditions:

1) it carries on economic activities denoted by the following codes of the Polish Classification of Activities (PKD): [PKD codes],

2) it keeps accounts within the meaning of the provisions on accounting,

3) it does not enjoy, for that electricity, an exemption from excise duty under Article 30(7a).

…

2. An “energy-intensive business using electricity” shall be understood as an entity in which the share of the cost of electricity used in the value of the production sold in the tax year for which an application as referred to in paragraph 5 is submitted amounts to more than 3%. An energy-intensive business using electricity may not be smaller than a part of an undertaking, meaning an organisationally and financially separate group of tangible and intangible assets within an existing undertaking, including liabilities, used to perform specific economic tasks, which together could constitute an independent undertaking performing those tasks independently.

…

11. The amount of partially refunded excise duty may not exceed the amount of excise duty paid on the electricity used by an energy-intensive business during the tax year for which an application as referred to in paragraph 5 is submitted.’

The Law on Energy

10 Article 47(1) of the ustawa – Prawo energetyczne (Law on Energy) of 10 April 1997 (Dz. U. 1997, No 54, item 348), in the version applicable to the dispute in the main proceedings, states:

‘Energy companies holding concessions shall set tariffs for gaseous fuels and energy, which are to be subject to approval by the Chair of [the Urząd Regulacji Energetyki, (URE) (Energy Regulatory Office)], and propose the duration thereof. Energy companies holding concessions shall submit tariffs and amendments thereto to the Chair of the URE on their own initiative no later than two months before the expiry of the previous tariff or at the request of the Chair of the URE.’

The Law on renewable energy sources

11 Under Article 52(1) of the ustawa o odnawialnych zródłach energii (Law on renewable energy sources) of 20 February 2015 (Dz. U. 2015, item 478), in the version applicable to the dispute in the main proceedings:

'An electricity company, a final customer, an industrial customer and a commodity brokerage house or a brokerage house as referred to in paragraph 2 shall be obliged to:

1) obtain and submit to the Chair of the URE, for clearance purposes, a certificate of origin or a certificate of agricultural biogas origin which has been issued:
   a) for electricity or agricultural biogas, respectively, generated in a renewable energy source installation located in the territory of the Republic of Poland or situated in an exclusive economic zone, or
   b) on the basis of the Law on Energy or

2) make a compensation payment within the time limit laid down in Article 68(2) calculated in the manner set out in Article 56.'

Decree of the Minister for Energy on detailed rules for determining and calculating tariffs and statements of account in the electricity trade

12 Article 5(2) and (3) of the rozporządzenie Ministra Energii w sprawie szczegółowych zasad kształtowania i kalkulacji taryf oraz rozliczeń w obrocie energią elektryczną (Decree of the Minister for Energy on detailed rules for determining and calculating tariffs and statements of account in the electricity trade) of 29 December 2017 (Dz. U. 2017, item 2500), in the version applicable to the dispute in the main proceedings , is worded as follows:

'2 An electricity company performing economic activity relating to the transmission of electricity shall include in the tariff:

1) the rates of charges for the provision of electricity transmission services, hereinafter referred to as "rates of transmission charges";

…

3. An electricity company performing the commercial activity relating to electricity distribution shall include in the tariff:

…

2) the rates of charges for the provision of electricity distribution services, hereinafter referred to as "rates of distribution charges";

…'

13 Article 14(3) to (7) of that decree provides as follows:

‘3. Rates of distribution charges shall be calculated having regard to the division into rates arising from:

1) the distribution of electricity;

2) the use of the national electricity grid;

3) the readings from metering and billing systems and the ongoing monitoring thereof.

4. The rates of distribution charges referred to in point (2) of paragraph 3 shall be calculated as single-component rates, based on the costs of purchasing electricity transmission services from the electricity transmission system operator in so far as they concern use of the national electricity grid.

5. The rates of distribution charges referred to in point (3) of paragraph 3, hereinafter referred to as “subscription rates”, shall be calculated as single-component rates.

6. Subscription rates shall be differentiated with regard to the length of the payment period.

7. The rates of transmission or distribution charges referred to in point (1) of paragraph 1 and in point (1) of paragraph 3, hereinafter referred to as “network rates”, shall be calculated as two-component rates broken down by component:

1) a fixed network rate – calculated per unit of contracted power and, for a household electricity customer, calculated with reference to the metering and billing system;

2) a variable network rate – calculated per unit of electricity taken from the grid at the point of supply.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 In 2016, A. benefited from the exemption from excise duty on electricity used for electrolysis in the course of its activities.

15 Taking the view that it should also have benefited from a tax exemption as an energy-intensive business for the rest of the energy it used in that context and that the actual cost of the energy purchased should include the distribution costs and the costs of acquiring the certificates of origin of electricity, as required by Polish law, A. corrected its excise declaration for 2016 and asked the Naczelnik Urzędu Skarbowego w Toruniu (Director of the Toruń Tax Office, Poland) to reimburse it the amount of excise duty paid which, in its view, constituted an overpayment.

16 By decision of 8 February 2018, the Director of the Toruń Tax Office refused to repay that amount. On appeal brought by A. against that decision, the Director of the Bydgoszcz Tax Administration Chamber upheld that decision by decision of 14 May 2018.

17 A. brought an action against the decision of 14 May 2018 before the Wojewódzki Sąd Administracyjny w Bydgoszczy (Regional Administrative Court, Bydgoszcz, Poland), which dismissed the action, finding, first, that the legislature had excluded the possibility of simultaneously benefiting from the two exemptions provided for in Article 30(7a) and Article 31d(1)(3) of the Law on Excise Duty. The exemption provided for by the latter provision is open to an energy-intensive business only if it does not benefit from the exemption provided for in Article 30(7a) of that law, in the present case the exemption relating to electricity used in electrolytic processes.

18 Furthermore, the exemption provided for in Article 31d(1)(3) of that law applies to the whole of the undertaking concerned and to all the energy used by it, and not only to the share of energy used for electrolysis.

19 In the second place, the Wojewódzki Sąd Administracyjny w Bydgoszczy (Regional Administrative Court, Bydgoszcz) stated that charges and costs, such as distribution costs, other than the cost of purchasing electricity are not part of that purchasing cost, even though they must be borne in order to purchase and use electricity. In addition, that court stated, inter alia, that in order for the amounts payable in respect of costs connected with the purchase of electricity to be classified as a 'tax', there must be an obligation to pay those amounts and the competent authorities must be able to bring an action against the persons liable for payment of those amounts in the event of failure to comply with that obligation.

20 A. brought an appeal on a point of law before the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland), the referring court, which is uncertain as to the interpretation of Article 17(1)(a) of Directive 2003/96.

21 In those circumstances, the Naczelny Sąd Administracyjny (Supreme Administrative Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'(1) Can Article 17(1)(a) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity … be understood as meaning that only the purchase price of the electricity itself, to the exclusion of any additional charges, for example a distribution charge, which must be borne under the legislation in force in a Member State in order to purchase electricity, must be included in the actual cost of the energy purchased?

(2) Must Article 17(1)(a) of Directive 2003/96 be interpreted as precluding the exclusion of an exemption from excise duty on the purchase of electricity for an energy-intensive business [Article 31d(1) of the Law on excise duty] in the event that that business benefits from an object-specific exemption from excise duty under national legislation (Article 30(7a) of the Law on excise duty), when that business demonstrates that, in relation to the same energy, it does not benefit from those two exemptions simultaneously, and assuming that the total amount of the exemptions does not exceed the amount of excise duty paid for the same period of time?'

Consideration of the questions referred

The first question

22 It should be noted as a preliminary point that, according to settled case-law, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to decide the case before it. To that end, the Court should, where necessary, reformulate the questions referred to it (judgment of 7 August 2018, *Smith*, C-122/17, EU:C:2018:631, paragraph 34 and the case-law cited).

23 In that regard, it is apparent from the order for reference that the questions referred for a preliminary ruling are based on an assessment made by the referring court to the effect that additional charges such as the distribution tariffs, to which it refers, cannot constitute 'taxes' within the meaning of Article 17(1)(a) of Directive 2003/96.

24 Therefore, in order to provide a useful answer to the referring court, it must be considered that, by its first question, that court asks, in essence, whether Article 17(1)(a) of Directive 2003/96 must be interpreted as meaning that the actual cost of the energy purchased, within the meaning of that provision, must include only the purchase price of the energy itself, to the exclusion of additional charges, which cannot constitute 'taxes' within the meaning of that provision, such as the compulsory distribution tariffs for that energy borne, under national legislation, at the time of the purchase of that energy.

25 First, it should be recalled that, in accordance with the second paragraph of Article 17(1)(a) of Directive 2003/96, 'purchases of energy products and electricity' means the 'actual cost of the energy purchased or generated within the business'.

26 It is apparent, in that regard, from that provision that that cost includes only electricity, heat and energy products used for heating or for the purposes of Article 8(2)(b) and (c) of that directive. Furthermore, it is apparent from the second paragraph of Article 17(1)(a) of that directive that all taxes, with the exception of deductible VAT, are included in the actual energy costs.

27 It is therefore necessary to examine whether the electricity distribution tariffs laid down by the national legislation must be regarded as falling within the concept of 'actual cost of the energy purchased [by a] business', within the meaning of the first sentence of the second subparagraph of Article 17(1)(a) of Directive 2003/96.

28 It should be borne in mind that, in determining the scope of a provision of EU law, it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part (judgment of 16 November 2023, *Tüke Busz*, C-391/22, EU:C:2023:892, paragraph 34).

29 As regards, in the first place, the wording of the first sentence of the second subparagraph of Article 17(1)(a) of Directive 2003/96, it should be noted that that provision refers to the 'actual cost of energy purchased or generated within the business'. The concept of 'actual cost' is not, moreover, defined either by that provision or by other provisions of Directive 2003/96.

30 In accordance with its usual meaning in everyday language, that concept must be understood as corresponding to any cost necessarily associated with the purchase of energy referred to in that provision. That interpretation is supported by an examination of the different language versions of that same provision, which set out, in a uniform manner, the concept of 'actual cost', in particular in the Polish- ('*rzeczywisty koszt*'), Spanish- ('*coste real*'), German- ('*tatsächlichen Kosten*'), English- ('*actual cost*'), Italian- ('*costo effettivo*') and Romanian- ('*costul real*') language versions. In that regard, all those versions refer to the costs actually incurred which are necessary for the purchase of electricity.

31 The referring court states that the payment of distribution tariffs to the energy supplier is compulsory for the purchase of that energy and that their amount is determined on the basis of specific legal provisions.

32 In the second place, that interpretation is supported by the context of the first sentence of the second subparagraph of Article 17(1)(a) of Directive 2003/96. In that regard, first, while the legislature made clear that the term 'energy' used therein includes 'only electricity, heat and energy products that are used for heating purposes or for the purposes of Article 8(2)(b) and (c)' of that directive, the provision at issue does not, however, limit the scope of the term 'actual cost' to the price of the energy which the business concerned must pay to purchase it.

33 Secondly, it must be stated that, where the EU legislature wished to exclude costs associated with the purchase of energy from the concept of 'actual costs', it expressly excluded them. The third sentence of the second subparagraph of Article 17(1)(a) of Directive 2003/96 states that 'actual costs' include 'all taxes', 'except deductible VAT'.

34 Lastly, it should be noted, in the third place, that the literal interpretation of the third sentence of the second subparagraph of Article 17(1)(a) of Directive 2003/96, set out in paragraphs 29 to 32 of the present judgment, namely a broad interpretation of the concept of 'actual costs', within the meaning of that provision, is compatible with the main objective of the legislation of which it forms part, namely promoting the proper functioning of the internal market in the energy sector, in particular, by avoiding distortions of competition (see, to that effect, judgment of 30 January 2020, *Autoservizi Giordano*, C-513/18, EU:C:2020:59, paragraph 30 and the case-law cited).

35 In the light of the foregoing considerations, the answer to the first question referred is that Article 17(1)(a) of Directive 2003/96 must be interpreted as meaning that the actual cost of the energy purchased, within the meaning of that provision, must include additional charges, which cannot constitute 'taxes' within the meaning of that provision, such as the compulsory distribution tariffs for that energy borne, under national legislation, when purchasing that energy.

The second question

36 By its second question, the referring court asks, in essence, whether Article 17(1)(a) of Directive 2003/96 must be interpreted as precluding national legislation which provides that an exemption from excise duty on the purchase of electricity is to be refused to an energy-intensive business, within the meaning of that provision, where that business benefits, in respect of that electricity, from an exemption from excise duty reserved for electricity used in electrolytic processes, even if that business shows that, for the same energy, it would not benefit from those two exemptions at the same time and that the total amount of those exemptions does not exceed the amount of excise duty paid in respect of the same period.

37 As a preliminary point, it should be noted that, according to the third indent of Article 2(4)(b) of Directive 2003/96, that directive does not apply, inter alia, to electricity used principally for the purposes of chemical reduction and in electrolytic and metallurgical processes. Therefore, it is apparent from the wording of that article that the electricity at issue does not fall within the scope of that directive.

38 Under Article 4 of that directive, Member States must tax the energy products falling within the scope of that directive, namely, motor fuels, heating fuels and electricity, applying levels of taxation which may not be less than the minimum levels of taxation prescribed by the directive (judgment of 31 March 2022, *Commission* v *Poland (Taxation of energy products)*, C-139/20, EU:C:2022:240, paragraph 39).

39 Moreover, it follows from recital 3 and Article 4 of that directive that the directive has not fully harmonised the rates of excise duty on energy products and electricity, but merely sets harmonised minimum levels of taxation.

40 According to the settled case-law of the Court, minimum harmonisation does not prevent the Member States from retaining or adopting more stringent measures, provided, however, that those measures are not liable to seriously compromise achievement of the result prescribed by the directive in question (see, to that effect, judgment of 7 July 2016, *Muladi*, C-447/15, EU:C:2016:533, paragraph 43 and the case-law cited).

41 By providing for a harmonised system of taxation of energy products and electricity, Directive 2003/96 seeks, as is clear from recitals 2 to 5 and 24 thereof, to promote the proper functioning of the internal market in the energy sector, in particular by avoiding distortions of competition (see judgment of 30 January 2020, *Autoservizi Giordano*, C-513/18, EU:C:2020:59, paragraph 30 and the case-law cited).

42 However, that directive provides for the possibility for Member States to introduce differentiated rates of taxation, exemptions from taxation or tax reductions in excise duties. The EU legislature has therefore left a certain margin of discretion to the Member States in the field of exercise duties (see, to that effect, judgment of 30 January 2020, *Autoservizi Giordano*, C-513/18, EU:C:2020:59, paragraph 26).

43 In accordance with Article 17(1)(a) of that directive, provided the minimum EU levels of taxation prescribed in that directive are respected on average for each business, Member States may apply tax reductions on the consumption of electricity in favour of energy-intensive businesses (judgment of 18 January 2017, *IRCCS – Fondazione Santa Lucia*, C-189/15, EU:C:2017:17, paragraph 47).

44 The level of taxation of energy products and electricity covered by that directive may go down to zero when those products and electricity are used by energy-intensive businesses (judgment of 31 March 2022, *Commission* v *Poland (Taxation of energy products)*, C-139/20, EU:C:2022:240, paragraph 42).

45 In that regard, it should be noted that the tax advantages in favour of energy-intensive businesses, provided for in Article 17(1)(a) of Directive 2003/96, are optional for the Member States (see judgment of 9 September 2021, *Hauptzollamt B (Optional tax reduction)*, C-100/20 REC, EU:C:2021:716, paragraph 24).

46 It also follows from that provision that the Member States remain free to restrict the benefit of tax reductions for energy-intensive businesses to those in one or more industrial sectors (judgment of 18 January 2017, *IRCCS – Fondazione Santa Lucia*, C-189/15, EU:C:2017:17, paragraph 49).

47 That directive, in accordance with recitals 9 and 11, gives Member States a certain discretion to define and implement policies appropriate to their national circumstances and states that the arrangements made in connection with the implementation of that directive are a matter for each Member State to decide (see, to that effect, judgment of 18 January 2017, *IRCCS – Fondazione Santa Lucia*, C-189/15, EU:C:2017:17, paragraph 50).

48 It must be inferred from the foregoing that, although a Member State may, in the exercise of the discretion conferred on it by Directive 2003/96, exempt electricity used by energy-intensive businesses, it does not follow from any provision of that directive that it is obliged to do so.

49 In that regard, the second sentence of the first subparagraph of Article 17(1)(a) of that directive provides that, in defining their relevant policy, Member States may apply more restrictive concepts, including sales value, process and sector definitions.

50 It must be stated that, although that provision refers to certain criteria to which Member States may refer in order to define and implement their policy on tax reductions as regards energy-intensive businesses, it is apparent from the wording of that provision that the list of those criteria is not intended to be exclusive.

51 Thus, as is apparent from the request for a preliminary ruling, in accordance with Article 31d(1)(1) of the Law on Excise Duty, the Republic of Poland chose to introduce excise duty reductions for energy-intensive businesses engaged in certain economic activities designated by the codes of the Polish Classification of Activities.

52 Furthermore, it is also apparent from the request for a preliminary ruling that, where a company makes use of the exemption from excise duty on electricity used in electrolytic processes, provided for in Article 30(7a)(2) of the Law on Excise Duty, it is not entitled to benefit simultaneously from the exemption from excise duty for energy-intensive businesses provided for in Article 31d(1) of that law.

53 In the light of what has been set out in paragraphs 48 and 50 of the present judgment, the second sentence of the first subparagraph of Article 17(1)(a) of Directive 2003/96 cannot be interpreted as excluding the definition of a criterion such as that referred to in paragraph 52 of the present judgment for the establishment of a tax reduction such as that at issue in the main proceedings, provided that that criterion and its application are not discriminatory.

54 According to the Court's case-law, the Member States must exercise their discretion under, inter alia, Article 17 of Directive 2003/96, in compliance with EU law and its general principles and, in particular, in compliance with the principle of equal treatment. Moreover, that requirement applies both to the measures by which that discretion is exercised and to the application of those measures (see judgment of 9 September 2021, *Hauptzollamt B (Optional tax reduction)*, C-100/20 REC, EU:C:2021:716, paragraph 31 and the case-law cited).

55 In that regard, the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (judgment of 9 September 2021, *Hauptzollamt B (Optional tax reduction)*, C-100/20 REC, EU:C:2021:716, paragraph 32 and the case-law cited).

56 It is not apparent from the request for a preliminary ruling that the criterion laid down by the Polish legislation is discriminatory. It will therefore be for the referring court to ascertain whether that criterion is applied in a manner consistent with the principle of equal treatment.

57 In the light of the foregoing considerations, the answer to the second question referred for a preliminary ruling is that Article 17(1)(a) of Directive 2003/96 must be interpreted as not precluding national legislation which provides that an exemption from excise duty on the purchase of electricity is to be refused to an energy-intensive business, within the meaning of that provision, where that business benefits, in respect of that electricity, from an exemption from excise duty reserved for electricity used in electrolytic processes, even if that business shows that, for the same energy, it would not benefit from those two exemptions at the same time and that the total amount of those exemptions does not exceed the amount of excise duty paid in respect of the same period, provided that the criterion defined by the national legislation in that regard is designed and applied in accordance with the principle of equal treatment.

Costs

58 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Tenth Chamber) hereby rules:

1. **Article 17(1)(a) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity**

   must be interpreted as meaning that the actual cost of the energy purchased, within the meaning of that provision, must include additional charges, which cannot constitute 'taxes' within the meaning of that provision, such as the compulsory distribution tariffs for that energy borne, under national legislation, when purchasing that energy.

2. **Article 17(1)(a) of Directive 2003/96**

   must be interpreted as not precluding national legislation which provides that an exemption from excise duty on the purchase of electricity is to be refused to an energy-intensive business, within the meaning of that provision, where that business benefits, in respect of that electricity, from an exemption from excise duty reserved for electricity used in electrolytic processes, even if that business shows that, for the same energy, it would not benefit from those two exemptions at the same time and that the total amount of those exemptions does not exceed the amount of excise duty paid in respect of the same period, provided that the criterion defined by the national legislation in that regard is designed and applied in accordance with the principle of equal treatment.

[Signatures]