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Energy Taxation Directive: studies on the taxation of energy products for "reasons of environmental policy" in European Union law – commentary on the *Endesa Generación* Judgment

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ABSTRACT: Since the Energy Taxation Directive came into force in 2003, the Court of Justice of the European Union has yet to rule on the conditions under which a tax on energy products used to produce electricity can be considered to be levied "for reasons of environmental policy." With reference to the particularities of European Union tax law, in particular the prerogatives of the Member States in the field of taxation, this article aims to explore the case law of the CJEU, especially the content of the Endesa Generación Judgment, and to contextualise it both, in light of European Union law and in regard to the close correlation between the application of the tax policies of the Member States and the environmental protection policies of European Union law.

KEYWORDS: European Union tax law – Energy Taxation Directive – European Union law – environmental protection – environmental policy.

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1. Introduction

In the current context of the climate crisis, concern for environmental preservation has mobilised various fields of study and a series of legal instruments that aim to safeguard environmental protection and achieve the objectives set for the pursuit of climate neutrality within the framework of a socially just ecological transition.[1]

One of these instruments is tax law. Here, we will focus on the question of how such environmental taxation can be used by governments not only to increase revenue, but also to meet the objective of climate neutrality in the face of the externalities caused by the energy sector. In addition, we will consider how an environmental tax behaves in the sphere of European Union (EU) law.

This legal order is the product of the sum of the law created by itself [the constitutive treaties and the Charter of Fundamental Rights of the European Union (CFREU)], the constitutional pluralism of the Member States (national constitutions of the Member States) and the rules stemming from international treaties, thus forming a block of jusfundamentality[2] that guides both the Court of Justice of the European Union (CJEU) – organically European court –, and the national courts (functionally European courts) when interpreting and applying EU law.[3]

Taking this into account, this text examines the Energy Taxation Directive (ETD),[4] specifically in the context of a reference for a preliminary ruling made by

[1] This text is part of a discussion centred on the climate and ecological crises, with the European Union's (EU) legal framework at its core. In this context, the European Green Deal, a new roadmap of initiatives drawn up by the European Commission that will enable climate neutrality by 2050, growth decoupled from resource use and a just transition, ensuring that no one is left behind. For more information, see European Commission, "European Green Deal", Brussels, 11.12.2019, COM(2019) 640 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52019DC0640. The European Climate Law, established by Regulation (EU) 2021/1119 and aimed at a regime to achieve climate neutrality. In other words, it is an offshoot of the European Green Deal and, according to Article 1 of this Regulation, "*establishes a scheme for the irreversible and gradual reduction of anthropogenic greenhouse gas emissions by sources and enhancement of removals by sinks regulated under Union law; sets a binding Union climate neutrality objective by 2050 with a view to achieving the long-term temperature objective set out in Article 2(1)(a) of the Green Deal; and establishes a binding Union climate neutrality objective by 2050 with a view to achieving the long-term temperature objective set out in Article 2(1)(a) of the Green Deal. It also sets a binding Union target for the net domestic reduction of greenhouse gas emissions for 2030.*" For further developments, see https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32021R1119. There is also "Fit for 55" which is a "*set of proposals aimed at reviewing and updating EU legislation and creating new initiatives with the aim of ensuring that EU policies are in line with climate objectives*" and which aims to ensure that a fair and socially just transition maintains and strengthens the innovation and competitiveness of EU industry, while ensuring a level playing field with economic operators from third countries and supporting the EU's leading position "*in the global fight against climate change.*" For more information, see https://www.consilium.europa.eu/en/policies/green-deal/fit-for-55-the-eu-plan-for-a-green-transition/. Furthermore, under "Fit for 55" there is the proposal to revise the Energy Taxation Directive (ETD), which entered into force in 2003 and is already obsolete on several points, as it does not reflect current EU climate and energy policy frameworks or the EU's legal commitment to a reduction of at least 55 % of greenhouse gas emissions by 2030 and a climate-neutral continent by 2050. For further development, see https://www.consilium.europa.eu/en/infographics/fit-for-55-energy-taxation/.

[2] See Alessandra Silveira, *Princípios de Direito da União Europeia Doutrina e Jurisprudência* (Lisbon: Quid Juris Sociedade Editora, 2011), 80.

[3] See Alessandra Silveira, *Princípios de Direito da União Europeia Doutrina e Jurisprudência*, 79.

[4] Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, accessed on 20 January 2024, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003L0096.

a Member State to the CJEU, with the aim of obtaining a correct interpretation of European provisions and avoiding any violations of the provisions of the Treaties when applying national taxation to energy products for "*reasons of environmental policy.*" This is the CJEU judgment *Endesa Generación* of 22 June 2023, case C-833/21.

2. Endesa Generación judgment dispute

We justify the choice of the *Endesa Generación* judgment, because the CJEU had not yet ruled on the issue in question. In addition, the relevance of the subject is related to the reflection on how taxation on energy products can have an impact on reducing negative effects on the environment and, at the same time, encourage society as a whole to change its behaviour.

This is a case referred to the CJEU by the *Audiencia Nacional* (National High Court, Spain) for a preliminary ruling on the interpretation and real meaning of the provision laid down in the second sentence of Article 14(1)(a) of Directive 2003/96,[5] with regard to the exemption from taxation of energy products and electricity used to produce electricity, as well as electricity used to maintain electricity production capacity, "*for reasons of environmental policy.*"

The dispute concerns the preliminary question posed by the Spanish State as to whether *Endesa Generación S.A.U.* (then Endesa), the active party to the proceedings, is right to question the validity of a tax assessment relating to the application of a Spanish tax on coal, which was consumed by a thermal power station to produce electricity. The Member State is asking the CJEU for clarification on the *conditions* under which it can be considered that the creation of a tax on coal used to produce electricity, as provided for in national legislation, is due to "*reasons of environmental policy.*"

Firstly, we shall return to the facts that preceded this request for an interpretation of the rule. Endesa is a company that produces electricity and uses coal to do so. This coal was purchased through an associated company, which, in its tax plan, declared the benefit of exemption from coal tax on the lots of coal purchased that were intended for resale. In other words, the taxable event was consumption. However, a tax inspection was carried out at one of Endesa's thermal power stations and it was found that the coal purchased by it had to be taxed because it was intended for consumption to produce electricity. As a result, the tax authority considered that the taxable amount for coal tax should be determined according to the higher calorific value of the coal, regardless of the energy actually used to produce electricity. In addition, the coal that was declared by the company associated with the Endesa group, which had previously been reported as intended for resale, had actually been consumed to produce electricity, so it was this consumption that constituted the taxable event and made it subject to charge.[6]

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[5] Article 14(1)(a): "*In addition to the general provisions set out in Directive 92/12/EEC on exempt uses of taxable products, and without prejudice to other Community provisions, Member States shall exempt the following from taxation under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse: [...] energy products and electricity used to produce electricity and electricity used to maintain the ability to produce electricity. However, Member States may, for reasons of environmental policy, subject these products to taxation without having to respect the minimum levels of taxation laid down in this Directive. In such case, the taxation of these products shall not be taken into account for the purpose of satisfying the minimum level of taxation on electricity laid down in Article 10.*"

[6] Judgment CJEU *Endesa Generación*, 22 June 2023, Case C-833/21, ECLI:EU:C:2023:516, recital 19, accessed on 20 January 2024, https://curia.europa.eu/juris/document/document.jsf?text=&docid=274871&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=51230.

Given the circumstances, Endesa challenged before the *Tribunal Económico Administrativo Central* (Central Tax Tribunal, Spain) ('the TEAC') "*firstly, that the tax on coal is determined on the basis of the higher calorific value of the coal, secondly, that the 268,717,98 tonnes of coal that Carboex had declared to be exempt in 2011 were taxed because they were intended for resale and were then used by Endesa to produce electricity, thirdly, that the determination of the tax on coal is based on the higher calorific value of the coal, 98 tonnes of coal which Carboex had declared to be exempt in 2011 on the grounds that they were intended for resale and were then used by Endesa to produce electricity, thirdly, that the accounting stocks were determined by reference to 31 December 2012 and, fourthly, that this tax complies with EU law as regards consumption intended for the production of electricity.*"[7]

However, in response to Endesa's first challenge, the TEAC ruled that the higher calorific value of the coal had to be taken into account to determine the taxable amount of the coal tax; "*that taxing consignments of coal which had previously been declared exempt from the tax on coal on the ground that they were intended for resale did not constitute double taxation, since the purchaser intended them for self-consumption for the production of electricity, which constituted the chargeable event for that tax*"; "*that the alleged error in the declaration of coal stocks had not been demonstrated*"; however, "*the TEAC did not, however, rule on the compatibility with EU law of Law 15/2012,*[8] *which abolished the exemption from the tax on coal for the consumption of coal intended for electricity generation.*"[9]

By means of an administrative action before the *Audiencia Nacional* (National High Court, Spain), Endesa put forward the same pleas before the TEAC and requested that the CJEU be called upon to give a preliminary ruling on the conformity of Law 15/2012 with EU law. In that context, the referring court first questions whether the tax on coal pursues environmental policy objectives within the meaning of the second sentence of Article 14(1)(a) of Directive 2003/96 and raises "*doubts in that regard as to the compatibility with that directive of the tax on the consumption of coal used to produce electricity, by reason of, first, the fact that the tax on coal pursues a budgetary purpose deriving from the second additional provision of Law 15/2012, and, second, the fact that the structure of that tax does not reflect the environmental objective set out in the preamble to Law 15/2012, given that the revenues from that tax are not intended to reduce the environmental impact of the use of coal in electricity production.*"[10]

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[7] Judgment *Endesa Generación* – Opinion of the Advocate General Athanasios Rantos, delivered on 2 February 2023, recital 22, accessed on 20 January 2024, https://curia.europa.eu/juris/document/document.jsf?text=&docid=270135&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=295477.

[8] Law 15/2012 on fiscal measures for sustainable energy. The objective of this law is to adapt the tax system to a more efficient and environmentally friendly use of energy and to sustainable development, the values that inspire this tax reform, and as such, in line with the basic principles governing the EU's tax, energy and, of course, environmental policy. The law also amends Law 38/1992 on excise duty. Under the terms of article 77 of Law 38/1992, as amended by Law 15/2012: «*1. The release for consumption of coal within its territorial scope is subject to the tax. 2. For the purposes of the preceding paragraph, the following transactions shall be regarded as "release for consumption". a) The first sale or supply of coal within the territory after production or extraction, import or intra-Community acquisition of coal. Further sales or supplies made by undertakings intending to resell the coal and to whom the exemption provided for in Article 79(1) of this Law was applicable at the time when they acquired it shall also be considered to be a first sale or supply. (b) Self-consumption of coal. For the purposes of this provision, the use or consumption of coal by producers or extractors, importers, intra-Community purchasers or undertakings as referred to in the preceding paragraph shall be regarded as self-consumption. 3. Coal shall be presumed to have been released for consumption where taxable persons do not provide proof of use of the coal produced, imported or acquired.*»

[9] Judgment CJEU *Endesa Generación*, recital 21.

[10] Judgment CJEU *Endesa Generación*, recital 25.

In this sense, the CJEU is tasked with interpreting and clarifying under which conditions a tax on energy products used to produce electricity, within the meaning of the second sentence of Article 14(1)(a) of Directive 2003/96, can be considered to be levied for "*reasons of environmental policy*", in light of the following questions for a preliminary ruling: (1) Is the Spanish legislation that provides for a tax on coal used for electricity generation compatible with Article 14(1)(a) of Directive 2003/96/EC when, despite stating that its aim is to protect the environment, such aim is not reflected in the structure of the tax and the tax levied is used to finance the costs of the electricity system? (2) Is it possible to consider that the environmental aim is given concrete expression in the structure of the tax, given that the tax rates are set according to the calorific value of coal used for electricity generation? (3) Is the environmental aim achieved by simply taxing certain non-renewable energy products and not taxing the use of such products when they are considered less harmful to the environment?

3. Notes on European Union tax law and the legal foundations of the *Endesa Generación* Judgment

EU tax law has some peculiar characteristics that are inherent to it,[11] due to the EU's integration process and its own obstacles. Without going into the matter further, as it is not the specific subject of this text, it can be argued that tax law does not only regulate European taxes.[12] There are very few of them, because the Union has limited powers in the field of taxation, since it is the prerogative of the Member States. In other words, during the integration process (which is still ongoing), the Member States agreed to harmonise[13] the rules for taxing goods and services in order to ensure the smooth functioning of the Single Market.[14]

[11] "*The contribution of tax policy to Community objectives has increasingly been linked to the development of the Internal Market, to EMU and to closer economic integration. (...) What type of EU tax policy would be compatible with or indeed support Member States' efforts to reform their taxation systems- Clearly, such a policy must, as a priority, serve the interests of citizens and business wishing to avail themselves of the four freedoms of the Internal Market (the free movement of persons, goods and capital, and the freedom to provide services). It must, therefore, focus on the removal of tax obstacles to the exercise of those four freedoms.*" Excerpts from the Communication from the European Commission, "Tax policy in the European Union - Priorities for the years ahead", Brussels, 10.10.2001, COM(2001) 0260 final, accessed on 20 January 2024, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52001DC0260.

[12] For further development, see João Sérgio Ribeiro, "Fiscalidade", in *Direito da União Europeia - Elementos de Direito e Políticas da União*, ed. Alessandra Silveira, Mariana Canotilho, Pedro Madeira Froufe (Coimbra: Almedina, 2016), 613-646, 615.

[13] Articles 110 to 113 of the Treaty on the Functioning of the European Union (TFEU), harmonisation of legislation on turnover taxes, excise duties and other indirect taxes; Articles 114 to 118 of the TFEU, taxes with an indirect effect on the establishment of the internal market, tax provisions not being subject to the ordinary legislative procedure; Articles 45 to 66 of the TFEU, provisions relevant to tax policy, concerning the free movement of persons, services and capital; and Articles 107 to 107 of the TFEU, provisions relevant to the environment; and Articles 107 to 107 of the TFEU, provisions relevant to the free movement of persons, services and capital. Articles 45 to 66 TFEU, provisions relevant to tax policy, concerning the free movement of persons, services and capital; Articles 191 and 192 TFEU, provisions relevant to the environment; and Articles 107 to 109 TFEU, provisions reactive to competition.

[14] For more information, see https://www.europarl.europa.eu/factsheets/pt/sheet/92/politica-fiscal-geral, accessed on 20 January 2024.

In this sense, EU tax law covers the real European taxes,[15] direct taxation, which are taxes levied on the income, assets and capital of individuals (through the case law of the CJEU) and companies, and indirect taxation, which are taxes that are not levied on income or assets.[16]

In the field of *soft law*, we would highlight two documents from the European Commission: the Communication's "*Tax Policy in the European Union - Priorities for the years ahead*",[17] which details the EU's current tax policy and objectives, focusing on removing tax obstacles and safeguarding the four freedoms of the Internal Market (free movement of persons, goods, capital and services), serving the interests of citizens and businesses; and the document "*Taxation - Promoting the internal market and economic growth: towards simple, fair and efficient taxation in the European Union*", which summarises how the EU acts in the tax field, in a wide variety of areas (CJEU case law, the financial sector, taxation of natural and legal persons, the economy, the digital, in the fight against tax evasion and fraud).

To sum up, although taxation remains the responsibility of the Member States, they must always take into account compliance with EU rules and the proper functioning of the Single Market when implementing their tax policies.

In terms of secondary legislation, particularly indirect taxation, we find it relevant to highlight Directive 2003/96/EC (Energy Taxation Directive), which deals with the regulation of energy at EU level, covering the taxation of energy products (electricity, natural gas, and coal).[18] It is arguably one of the main mechanisms for safeguarding fundamental economic freedoms in the proper functioning of the Energy Union,[19] for generating revenue[20] and, currently, as a catalyst for responses to climate change, encouraging the energy transition to renewable energies and changing behaviour in the production and consumption of energy and products. While the proposal to revise[21] this Directive does not materialise, the CJEU, when called upon by the Member States to rule on the correct interpretation of European provisions, plays a decisive role in the uniform application of EU law[22] and in establishing harmonisation that is consistent with the reality in question.

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[15] Taxes levied on officials, customs duties under the Common Tariff and production levies in the sugar sector. For more information, see João Ribeiro, "Fiscalidade", 615.

[16] Value-added tax (VAT), excise duties, import duties and taxes on energy products and other environmental taxes. See https://www.europarl.europa.eu/factsheets/en/sheet/92/politica-fiscal-geral, accessed on 20 January 2024.

[17] European Commission, "Tax policy in the European Union - Priorities for the years ahead", Brussels, 10.10.2001, COM(2001) 0260 final https://eur-lex.europa.eu/legal-content/PT/TXT/?uri=CELEX%3A52001DC0260, accessed on 20 January 2024.

[18] Article 15(1)(h) of Directive 2003/96.

[19] For more information, https://www.consilium.europa.eu/pt/policies/energy-union/#explained, accessed on 20 January 2024.

[20] In the EU-27, energy taxes account for more than three quarters of total environmental taxes. The share of energy taxes and carbon pricing in environmental taxes in the EU-27 amounts to 330 billion euros, according to 2019 data presented by the European Court of Auditors, https://www.eca.europa.eu/pt/publications?did=60760, accessed on 20 January 2024.

[21] For more information, see https://www.consilium.europa.eu/en/infographics/fit-for-55-energy-taxation/, accessed on 20 January 2024.

[22] Alessandra Silveira, *Princípios de Direito da União Europeia. Doutrina e Jurisprudência* (Lisbon: Quid Juris Sociedade Editora, 2011), 36; Maria de Fátima de Castro Tavares Monteiro Pacheco, "O Sistema de Protecção dos Direitos Fundamentais na União Europeia – Entre a Autonomia e o Compromisso", *Julgar*, no. 14 (2011): 23, http://julgar.pt/wp-content/uploads/2014/07/01-JULGAR-F%C3%A1tima-Pacheco-O-sistema-de-protec%C3%A7%C3%A3o-dos-direi.pdf, accessed on 20 January 2024. See Ana Maria Guerra Martins e Fausto de Quadros, *Contencioso da União Europeia* (Coimbra: Edições Almedina SA, 2009), 227.

The *Endesa Generación* judgment is an example of one of these pronouncements and is a scenario characterised by the connection between taxation, energy and environmental protection. According to the description of the above-mentioned dispute, the CJEU begins its ruling by recalling Recitals 3 to 5 of Directive 2003/96, and emphasises that the main objective of this directive is "*to promote the proper functioning of the internal market in the energy sector by avoiding, in particular, distortions of competition*"[23] by establishing a harmonised taxation system for energy products and electricity, under which taxation is the rule. In this sense, with regard to the production of electricity, the directive is clear when it states that Member States must tax the electricity produced, and that, correspondingly, the energy products used to produce it must be exempt from taxation, in order to avoid the double taxation of electricity.

However, the Court highlights the possible relativisation of double taxation when "*Directive 2003/96 does not exclude all risk of double taxation, since a Member State, in accordance with the second sentence of Article 14(1)(a) of that directive, may, for reasons of environmental policy.*"[24] Not least because the directive itself, in Recitals 6, 7, 11 and 12, calls on Member States to take environmental protection into account when implementing the framework for taxing energy products and electricity.

Here, we take a moment to emphasise the importance of the CJEU's reasoning in interpreting the European standard on the basis of the principle of integration. This principle is set out in Article 11 of the TFEU and determines that "*environmental protection requirements must be integrated into the definition and implementation of Union policies and activities, in particular with a view to promoting sustainable development*",[25/26] characterising the mainstreaming of the environment in the application of all EU policies, whether legislative or administrative, which even if their main objective is not the environment, take into account their environmental effects.[27]

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[23] Judgment CJEU *Endesa Generación*, recital 30.

[24] Judgment CJEU *Endesa Generación*, recital 32.

[25] José Casalta Nabais explains, when referring to environmental law, "*(...) this young sector of law, in addition to raising relatively new problems, ends up intersecting, in the manner of a median, the entire broad and diverse field of law, mobilising all its branches, albeit in substantially different terms, for the protection of the environment*" (freely translated by the Author of this article). For further details, see José Casalta Nabais, "Tributos com fins ambientais", in *El Tributo y su Aplicación. Perspectivas para el Siglo XXI (En Homenaje al L Aniversario del Instituto Latinoamericano de Derecho Tributario)*, vol. III (Madrid/ Barcelona/Buenos Aires: Marcial Pons, 2008) 2043-2070, 2044.

[26] Alexandra Aragão explains that "*the principle of integrating the environment into other policies stems from the recognition that there are no human activities that can be said to be totally innocuous in environmental terms*" (freely translated by the Author of this article). See Alexandra Aragão, "Ambiente", in *Direito da União Europeia - Elementos de Direito e Políticas da União*, ed. Alessandra Silveira, Mariana Canotilho, Pedro Madeira Froufe (Coimbra: Almedina, 2016), 1099. Reference used in Nataly Carvalho Machado, "O princípio da solidariedade no Pacto Ecológico Europeu: implicações na integração europeia", (Master's dissertation, University of Minho, 2023), https://hdl.handle.net/1822/86098, accessed on 20 January 2024.

[27] Alexandra Aragão explains that «*'to take into account' is to weigh up appropriately, in accordance with the legal balancing criteria enshrined in European law to weigh up environmental aspects against other extra-environmental aspects, particularly economic and social aspects*». "Ambiente", 1101. Ludwig Krämer stresses that «*the provision states that environmental considerations be fully taken into account in the elaboration and implementation of other Union policies. It is based in the concept that environmental requirements and, subsequently, environmental policy cannot be seen an isolated green policy which groups specific actions on the protection of water, air, soil, fauna and flora. Rather, the environment is affected by ither policies such as on transport, energy, and agriculture, for example, art 11 TFEU therefore calls for a permanent, continuous "greening" of all Union policies*». See Ludwig Krämer, *EU Environmental Law* (London: Sweet and Mawell, 2012), 20. Reference used in Nataly Carvalho Machado, "O princípio

Thus, the CJEU confirms that, given the permission of a Member State to derogate from the mandatory exemption from taxation of energy products used for the production of electricity, provided for in the second sentence of Article 14(1)(a) of Directive 2003/96, the "*power to tax energy products used for the production of electricity for reasons of environmental policy accordingly constitutes a derogation from the principle of single taxation of electricity*."[28]

However, the heart of the matter is what *are the conditions* under which a derogation from the exemption from a tax on energy products used to produce electricity can be considered "*for reasons of environmental policy*." This question posed by the referring court is linked to the question of whether it can use the criteria on the concept of "*specific reasons*"[29] to define such conditions in the question to the CJEU.

The CJEU explains: "*Under Article 1(2) of Directive 2008/118, Member States may levy other indirect taxes on excise goods under two conditions. First, such taxes must be levied for specific purposes and, second, those taxes must comply with the EU tax rules applicable for excise duty or value added tax as far as determination of the tax base, calculation of the tax, chargeability and monitoring of the tax are concerned*."[30] Given that the Audiencia Nacional, at the time of the order for reference, mentioned only to the first requirement (these taxes must be levied for specific reasons), the CJEU confirms its case law and clarifies that the specific reasons include *"a purpose other than a purely budgetary purpose*."

However, the Court emphasises that "*since every tax necessarily pursues a budgetary purpose, the mere fact that a tax is intended to achieve a budgetary objective cannot, in itself, suffice - if Article 1(2) of Directive 2008/118 is not to be rendered meaningless - to preclude that tax from being regarded as having, in addition, a specific purpose*"[31] and that the predetermined allocation of the proceeds of a tax that is justified for the purpose of financing the exercise of a Member State's powers cannot be considered as a sufficient element to support the concept of "*specific purpose*", as this would result in the purpose of Article 1(2) of Directive 2008/118 being rendered meaningless.[32]

Hence, the CJEU clarifies that "*a tax the revenue from which is used in a predetermined allocation must itself be intended to achieve the specific purpose stated, so that there is a direct link between the use of the revenue and the purpose of the tax in question*."[33] And it goes further by making the first part of the explanation conditional, by stating that "*in the absence of such a mechanism for the predetermined allocation of revenue, a tax on excise goods can be regarded as pursuing a specific purpose within the meaning of Article 1(2) of Directive*

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da solidariedade no Pacto Ecológico Europeu: implicações na integração europeia", (Master's diss., University of Minho, 2023).

[28] Judgment CJEU *Endesa Generación*, recital 35.

[29] Concept already developed in the case law of the CJEU in the judgment of 5 March 2015, *Statoil Fuel' Retail*, C-553/13, EU:C:2015:149, recital 37, and in Order of 7 February 2022, *Vapo Atlantic*, C-460/21, EU:C:2022:83, recital 23.

[30] Judgment CJEU *Endesa Generación*, recital 37.

[31] Judgment CJEU *Endesa Generación*, recital 39.

[32] Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty. Article 1(2) Member States may levy other indirect taxes on excise goods for specific purposes, provided that those taxes comply with the Community tax rules applicable for excise duty or value added tax 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. Remember that this directive has been repealed by the current Council Directive (EU) 2020/262 of 19 December 2019 laying down general arrangements for excise duty, https://eur-lex.europa.eu/legal-content/pt/TXT/?uri=CELEX%3A32020L0262, accessed on 20 January 2024.

[33] Judgment CJEU *Endesa Generación*, recital 41.

2008/118 only if it is designed, so far as its structure is concerned, and particularly the taxable item or the rate of tax, in such a way as to guide the behaviour of taxpayers in a direction which facilitates the achievement of the stated specific purpose, for example by taxing the goods in question heavily in order to discourage their consumption."[34]

However, the CJEU's position already begins by confirming that the mandatory prohibition on the taxation of energy products and electricity used upstream for the production of electricity in the first sentence of Article 14(1)(a) of Directive 2003/96 must be considered one of the general rules of the directive and the derogation from this mandatory exemption provided for in the same Article; the second sentence must be interpreted restrictively, respecting the structure of the tax. In the same vein, the European Commission argued that "*the structure of the tax is a relevant element in this examination, insofar as that structure is actually likely to encourage the use of energy products that are less harmful to the environment*", although it maintained that "*there is no need to ascertain, in the context of the application of the second sentence of Article 14(1)(a), whether there is a direct link between the use of the revenue and the purpose of the taxation in question, within the meaning of the case-law relating to Article 1(2) of Directive 2008/118, in order to determine whether a Member State has derogated from the mandatory exemption of energy products 'for reasons of environmental policy.*"[35]

Continuing, after explaining that the tax regimes resulting from Directive 2003/96 and Directive 2008/118 do not overlap, since the former mentions the derogation from a mandatory exemption and the latter an additional tax to a tax to which the product subject to excise duty is already subject, the CJEU nevertheless considers that "'*reasons of environmental policy' within the meaning of the second sentence of Article 14(1)(a) of Directive 2003/96 may fall within the category of 'specific purposes', within the meaning of Article 1(2) of Directive 2008/118, in that a tax levied for such reasons pursues precisely the specific purpose of contributing to the protection of the environment.*"[36]

Responding to the questions referred for a preliminary ruling, the CJEU notes that, when answering the first question,[37] Spanish Law 15/2012 includes in its preamble the provision for harmonisation of the Spanish tax system and a more efficient use of energy that respects the environment and sustainability. However, the Court clarifies that the wording of the preamble is not enough. The grounds for derogating from the compulsory exemption from coal taxation must be confirmed by the effects that such taxation may have in reality. We explain: when creating the structure of the tax, the Spanish legislator must make it clear, for example, that the revenue from the tax will be used for purposes related to the modernisation of the energy sector to achieve the environmental objectives set by the Union; to tackle the reduction of greenhouse gas emissions; to boost efforts to achieve climate neutrality.

With regard to the second question for a preliminary ruling,[38] the CJEU clarifies that the "*gross calorific value*" of coal and coke is expressly referred to in Table C of Annex I to Directive 2003/96 and that even if the transposed Spanish

[34] Judgment CJEU *Endesa Generación*, recital 42
[35] Judgment CJEU *Endesa Generación*, recital 43.
[36] Judgment CJEU *Endesa Generación*, recital 45.
[37] Whether the derogation from the compulsory exemption from taxation of coal used for electricity production effectively sought to protect the environment, even if that purpose was not integrated into the structure of the tax (according to the referring Court).
[38] If it is possible to consider that the structure of the tax reflects the environmental objective announced in the preamble of Law 15/2012, insofar as the rates of excise duty are set according to the calorific value of the coal used to produce electricity.

version of the directive, especially Table C, does not refer to this calorific value, "*the fact that the Spanish legislature took it as its reference for the taxation of the use of coal does not lead to the conclusion that the tax on coal was not adopted for reasons of environmental policy.*"[39]

As for the third question,[40] the Court emphasises that once "*a tax discourages the consumption of a product harmful to the environment, it should be considered as contributing to the protection of the environment*"[41] and that Endesa has failed to demonstrate "*the absence of any real environmental objective of the derogation from the mandatory exemption from the taxation of coal used for the production of electricity.*"[42]

The CJEU concludes its reasoning in the following terms:

"*The second sentence of Article 14(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 national legislation providing for the taxation of coal used for the production of electricity meets the condition, set out in that provision, that* ***the tax must be introduced 'for reasons of environmental policy', where there is a direct link between the use of the revenue and the purpose of the tax in question or where that tax, without pursuing a purely budgetary purpose, in terms of its structure, including in particular the taxable item or the tax rate, is designed in such a way that it influences the behaviour of taxpayers in a manner that facilitates ensuring better protection of the environment****.*" (Our bold)

What the CJEU did in the *Endesa Generación* judgment was to clarify, for the first time in its case law, the background (*i.e.* legal conditions) that can be used to justify the derogation (expressly in the directive) from an exemption (specific and unconditional obligation) from tax on energy products and electricity used to produce electricity and electricity used to maintain the capacity to produce electricity, contained in the first sentence of Article 14(1)(a) of Directive 2003/96, "*for reasons of environmental policy.*" It did so by reconciling the tax and environmental aspects of EU law.

Firstly, by analysing the fact that the second sentence of the same directive cannot be interpreted in an extensive manner, when the exemption from the tax in question is subject to derogation "*for reasons of environmental policy*", and that the power to derogate must be accompanied by rules that are required when a tax is created, namely formalities for the structure of the tax in question, taking into account certain elements such as the characteristics and methods of application of the tax, as well as, in the specific case, the way in which the tax can influence the behaviour of taxpayers.

Secondly, by confirming that tax revenues from taxation "*for reasons of environmental policy*" and resulting from the derogation provided for in the second sentence of Article 14(1)(a) of Directive 2003/96, do not fall within the scope of that directive, since they are not taken into account when calculating the minimum levels of taxation for the purposes of the directive. However, the CJEU validates that the condition for creating such a tax must continue to be either a direct link between the

[39] Judgment CJEU *Endesa Generación*, recital 53.

[40] Whether the environmental objective is achieved by the simple fact that taxes are levied on certain non-renewable energy products and not on the use of those that are considered less harmful to the environment.

[41] Judgment CJEU *Endesa Generación,* recital 55.

[42] Judgment CJEU *Endesa Generación,* recital 56.

use of the revenue and the purpose of the tax in question, or as an instrument that can influence the behaviour of taxpayers in order to allow better protection of the environment, even if it does not have a purely budgetary purpose, and respecting the structure of the tax (taxable event, taxpayers, taxable amount)[43] when it was created. If the conditions are met, double taxation can be applied.

In this context, it is important to review the doctrine on what characterises the environmental nature of taxes. José Casalta Nabais teaches that:

> "*(....) what characterises the environmental nature of taxes is the primary ecological extra-fiscal objective or purpose, reflected in the preservation and improvement of the environment assumed by the legislator when creating and regulating them, as well as the actual possibility of pursuing this objective or purpose, and not the ecological destination of the revenue they provide. This is because, even when the revenue is linked to the realisation of an environmental protection activity, through the technique of earmarking revenue, it is a problem located downstream of the corresponding tax relations, and is truly part of the policy of realising expenditure and not that of obtaining tax revenue.*"[44]

Furthermore, and even though the judgement in question does not expressly mention environmental principles, it is worth highlighting the close correlation of European environmental policies not only with EU tax law, but also with the very process of building European integration. Furthermore, the principle of integration together with the principle of a high level of protection and improvement of the quality of the environment[45] must be integrated into the definition and implementation of all EU policies and measures, in particular to promote sustainable development, a structuring principle of EU law,[46] and the direct and indirect taxation applied by Member States when implementing their tax policies is no exception.

In fact, the small sample of CJEU case law that we bring here comes from the well-known formula, namely the dialogue between national judges and organically European judges, in which the CJEU is called upon to rule on the correct interpretation to be given to EU law. In this case, on the scope of the justification for derogating from the tax exemption for energy products "*for reasons of environmental policy*" (an autonomous concept of EU law, we can say) and from which arise the requirements for the uniform application of EU law[47] by all Member States when creating a tax for the above reasons.

Furthermore, in the above-mentioned judgment, the CJEU took the opportunity presented by an apparently technical issue restricted to the tax policy of a Member State to hand down a judgment that could have far-reaching consequences, particularly in terms of promoting the climate neutrality objectives set out in EU law.

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[43] For further development, see Nabais, "Tributos com fins ambientais", 2061.

[44] For further development, see José Casalta Nabais, "Da sustentabilidade fiscal", in *Sustentabilidade Fiscal em Tempos de Crise*, ed. José Casalta Nabais, Susana Tavares da Silva (Coimbra: Almedina, 2011), 11-59, 47.

[45] Article 3(3) of the Treaty on European Union and Article 37 of the Charter of Fundamental Rights of the European Union (CFREU).

[46] Alexandra Aragão, "*(...) it is one of the densest and most complex of our time and only a multifaceted approach and a holistic understanding can convey the intricate reality underlying sustainability as the end of European development (...), highlighting the potential of this European structuring principle.*" See Alexandra Aragão, "Ambiente", emphasising the potential of this structuring European principle" (freely translated by the Author of this article). See Alexandra Aragão, "Ambiente", 1097. Reference cited in Nataly Carvalho Machado, "The principle of solidarity in the European Green Deal: implications for European integration", 2023.

[47] See Alessandra Silveira, *Princípios de Direito da União Europeia. Doutrina e Jurisprudência*, 36.

In other words, the ruling represents confirmation of a legal model that must take into account minimally necessary and/or desirable tax harmonisation, as Member State must take into account not only national legislation and constitutional values, but also compliance with EU law. And let us not forget this is because it is up to all Member States, by virtue of the principle of loyal cooperation laid down in Article 4(3) of the TEU, to ensure that the rules deriving from the founding Treaties are respected and that the Union's objectives are realised.

And it could not be otherwise, because while taxation is a prerogative of the Member States, which have the flexibility to organise their own tax systems, they must also aim to eliminate tax obstacles to the proper functioning of the Single Market, safeguarding fundamental economic freedoms and, in this case, guaranteeing the integration of environmental and energy policies into tax policies, in order to encourage a change in the behaviour of taxpayers (those who produce and those who consume) in pursuit of environmental protection and climate neutrality.

4. Concluding remarks

References for a preliminary ruling to the CJEU are frequent and are limited to questions about the correct interpretation of EU law (whether or not it conflicts with national legislation) or clarification on how to apply national legislation in accordance with EU law, which can guarantee fundamental economic freedoms in particular. However, many of these requests are linked to other areas of law, such as environmental law. And it is in these interdisciplinary areas that the CJEU has the opportunity to associate tax and environmental aspects in its case law, ensuring a standard of tax harmonisation in environmental taxation that is compatible with EU law and that Member States must take into account when exercising their tax powers.

The interpretation made by the CJEU in the *Endesa Generación* judgment makes it possible to recognise a qualitative leap forward in binding Member States to the standard for defining the conditions for creating a tax "*for reasons of environmental policy*" arising from EU law. This is yet another harmonisation of environmental tax policy in the EU, the result of constant dialogue between national courts and the CJEU, which could act as a catalyst for achieving the climate objectives already outlined in the European Green Deal and defined in numerous legislative provisions.[48]

In other words: the Court's case law has concretised a uniform understanding in tax terms (and translated it to the national legislator) of the conditions required to characterise when a tax on energy products used to produce electricity, within the meaning of Article 14(1)(a), second sentence of Directive 2003/96, must be levied "*for reasons of environmental policy*." In particular, the CJEU confirms that the assumptions of these reasons must be linked to elements capable of discouraging the consumption of environmentally harmful products or encouraging the use of other products whose effects are, in principle, less harmful to the environment.

[48] «*In line with the European Green Deal, the European Climate Law set a 55 % GHG minimum net reduction (compared to 1990) as an intermediate target for 2030, up from the previous 40 % target. On 14 July 2021, the Commission published a set of proposals aiming to align climate, energy, transport and taxation policies with the new intermediate 2030 climate target, the so-called "Fit for 55" package. It also includes increased renewable energy and energy efficiency targets.*» Excerpt taken from the analysis document prepared by the European Court of Auditors, entitled "Energy taxation, carbon pricing and energy subsidies." For further details, see https://www.eca.europa.eu/pt/publications?did=60760, accessed on 20 January 2024.

However, the case law of the CJEU alone is not enough to meet the challenges posed by the climate and ecological crises, and not only are legislative revisions necessary, particularly of the Energy Taxation Directive,[49] but also the significant involvement of the Member States in the process of dealing with these crises. Furthermore, it is essential that the European Commission better monitors the application of national tax provisions in order to safeguard fundamental freedoms, avoid distortions in the Internal Market, and monitor each Member State's spending policy.

[49] A proposal to revise the Energy Taxation Directive is already underway. For further developments https://www.consilium.europa.eu/pt/infographics/fit-for-55-energy-taxation/, accessed on 20 January 2024.