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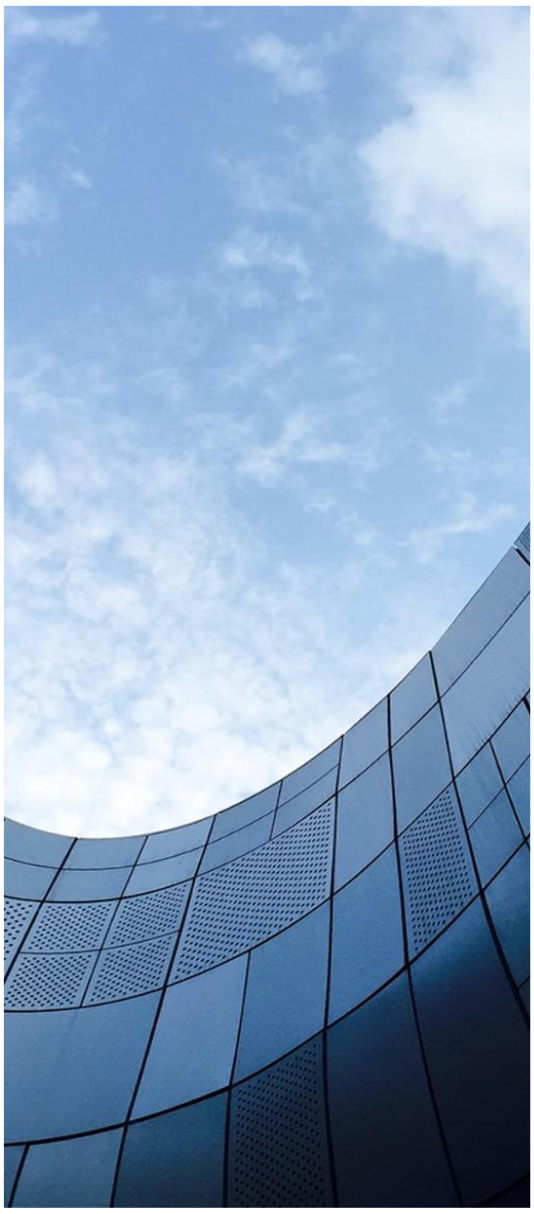
The CJEU confirms compliance with EU law of the tax on the value of electricity production

Legal Flash

March 3, 2021

The Court of Justice of the European Union issued a judgment on March 3, 2021 (case C-220/19) stating that the tax on the value of electricity production does not infringe EU law.



Key aspects

- The tax on the value of electricity production ("IVPEE") is not an indirect tax and, therefore, cannot infringe Directive 2008/118/EC of December 16, 2008, concerning the general arrangements for excise duty, under which Member States are permitted, subject to fulfillment of certain conditions, to establish indirect taxes on products on which a harmonized tax is already levied as in the case of electricity.

- The fact that the IVPEE is levied on the production of electricity from renewable energy and may have the aim of raising revenue does not give rise to an infringement of Directive 2009/28/EC, of April 23, 2009, which seeks to promote electricity production from renewable energy sources.

- The fact that the IVPEE does not apply to electricity producers located in other Member States that incorporate electricity into the Spanish electricity system does not constitute a state aid contrary to the internal market for electricity, nor does it violate the principle of non-discriminatory network access.

The Court of Justice of the European Union has published its *Judgment of March 3, 2021 (ECLI:EU:C:2021:163)*, on case C-220/19, Promociones Oliva Park S.L., in response to a request for a preliminary ruling made by the High Court of Justice of the Valencia region by *ruling of February 22, 2019 (Rec. 1491/2017)* on the compliance with EU law of the tax on the value of electricity production.

Background

Since it was introduced in 2012 by Act 15/2012, of December 27, on fiscal measures for energy sustainability, the IVPEE has raised doubts about its compatibility with the Spanish Constitution and EU law.

After the Constitutional Court rejected all unconstitutionality claims under its *ruling of June 20, 2018*, in which it refused to admit for consideration a question of unconstitutionality raised by the Supreme Court, the doubts about the legality of the IVPEE subsequently focused on its compliance with EU law.

In this context, the High Court of Justice of the Valencia region ("TSJ of Valencia"), in its ruling of February 22, 2019, submitted to the Court of Justice of the European Union (CJEU) a request for a preliminary ruling, now resolved by the EU court in its judgment of March 3, 2021.

Content of the judgment

In its judgment, the CJEU replies to four questions referred for a preliminary ruling by the TSJ of Valencia. The Court's conclusions are summarized below, in three sections.

Nature of the IVPEE as a direct or indirect tax

First, the question is raised as to the possible infringement of Directive 2008/118/EC of December 16, 2008, concerning the general arrangements for excise duty, Article 1.2 of which permits Member States to establish indirect taxes on products on which a harmonized tax is already levied—as is the case of electricity tax—provided that those taxes have a specific purpose other than that of merely collecting revenue.

In relation to the nature of the IVPEE as a direct or indirect tax, the CJEU concludes that the legal design of the tax as a direct tax in Act 15/2012 complies with EU Law, thus refuting the arguments put forward by the TSJ of Valencia, which considered there were clear signs that the IVPEE was an indirect tax, such as: the fact that the taxpayer normally passes on the

financial burden of the tax to the final consumer of electricity, the quantification of the tax base adopting as a reference the gross income obtained by the taxpayer, and the application of a fixed tax rate.

In the opinion of the CJEU, the IVPEE cannot be classified as an indirect tax. First, because the act governing the IVPEE does not include a mechanism for legally passing on the tax and the fact that the greatest tax costs incurred by the electricity producer can be charged—by means of a price—to the final consumer of electricity does not make the tax an indirect tax. Second, because the IVPEE base is calculated in relation to the taxpayer's status as an electricity producer on the basis of the income obtained by the production of electricity irrespective of the quantity of electricity produced and incorporated into the electricity system.

Since the IVPEE is not an indirect tax, in the opinion of the CJEU, no infringement can be found of the power conferred by Directive 2008/118/EC on Member States to establish indirect taxes on products on which a harmonized tax is already levied, such as electricity tax.

The IVPEE does not infringe EU legislation relating to the promotion of the use of energy from renewable sources

Another aspect of the IVPEE that had caused the TSJ of Valencia to question its legality related to the possible incompatibility of the IVPEE with Directive 2009/28/EC, of the European Parliament and of the Council, of April 23, 2009, on the promotion of the use of energy from renewable sources. This directive provides that EU Member States must achieve in 2020 certain mandatory national targets for the overall share of energy from renewable sources in gross final consumption of energy, for which Member States are granted the power to establish investment aid, tax exemptions or reductions, and tax refunds, or to impose an obligation to use energy from renewable sources. The doubts arose because the IVPEE is levied on electricity production, whether from non-renewable energy or renewable energy, and because the IVPEE base is calculated according to the gross income obtained by the taxpayer without taking into account the costs incurred in producing the electricity, which could discourage electricity production from renewable sources.

The CJEU points out that this directive is not infringed because it does not prevent Member States from establishing taxes that are levied on electricity production from renewable sources, adding that the promotion of the use of renewable sources by investment aid and tax incentives is a power—rather than an obligation—of the Member States.

The IVPEE does not constitute a state aid, nor does it distort the internal market for electricity or network access

Finally, the CJEU was asked whether the IVPEE could constitute a state aid incompatible with the internal market for electricity and infringe Directive 2009/72/EC of the European Parliament and of the Council, of July 13, 2009, concerning common rules for the internal market in electricity. In the opinion of the TSJ of Valencia, the fact that the IVPEE is not levied on the incorporation of electricity into the Spanish grid by electricity producers located in other EU Member States could constitute a state aid favoring access by those producers to the national electricity grid and, therefore, restrict the internal market for electricity.

In this respect, the CJEU points out that the positive discrimination in favor of electricity producers belonging to other Member States cannot be classified as a state aid restricting the internal market for electricity because the revenue from IVPEE is not a method used by the state to finance the grant of a state aid. The CJEU also states that Directive 2009/72/EC, which establishes the principle of non-discriminatory network access, does not have the purpose of bringing the Member States' fiscal provisions closer together and, therefore, is not infringed by the IVPEE even if the tax applies more favorable tax treatment to electricity producers located in Member States other than Spain.

Effect on ongoing proceedings

Ongoing administrative or judicial proceedings will likely be resolved applying the CJEU's criteria.

Therefore, in the case of proceedings already before the courts, and given the risk of the court giving judgment ordering the payment of judicial costs, we consider it advisable to assess the possibility of withdrawing from these proceedings.

For additional information, please contact Cuatrecasas.