OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 22 May 2014 (1)

Case C-426/12

X

(Request for a preliminary ruling from the Gerechtshof 's-Hertogenbosch (Netherlands))

(Directive 2003/96/EC — Community framework for the taxation of energy products and electricity — Dual use energy products)

1. Council Directive 2003/96/EC (2) introduced a regime imposing minimum harmonised levels of taxation on all energy products and electricity. (3) Certain energy products, including those classified as having a dual use, are expressly excluded from the Directive's scope. In this request for a preliminary ruling from the Gerechtshof 's-Hertogenbosch (Regional Court of Appeal, 's-Hertogenbosch (Netherlands)), the Court is asked for guidance as to the meaning of the term 'dual use' for the purposes of that directive. The referring court also wishes to know whether national legislators are constrained by an EU concept of what constitutes dual use if they choose to introduce domestic measures in order to tax such energy products.

Legislation

Directive 2003/96

2. The following recitals in the preamble to Directive 2003/96 are relevant:

'(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.

(6) In accordance with Article 6 of the Treaty, environmental protection requirements must be

integrated into the definition and implementation of other Community policies.

(7) As a party to the United Nations Framework Convention on Climate Change, the Community has ratified the Kyoto Protocol. The taxation of energy products and, where appropriate, electricity is one of the instruments available for achieving the Kyoto Protocol objectives.

…

(22) Energy products should essentially be subject to a Community framework when used as heating fuel or motor fuel. To that extent, it is in the nature and the logic of the tax system to exclude from the scope of the framework dual uses and non-fuel uses of energy products as well as mineralogical processes. Electricity used in similar ways should be treated on an equal footing.'

3. Article 1 of the Directive requires Member States to impose taxation on energy products and electricity in accordance with its provisions.

4. Article 2(1)(b) of the Directive read together with Article 2(5) provides that for the purposes of that directive, the term 'energy products' applies, inter alia, to products 'falling within CN codes 2701, 2702 and 2704 to 2715'. (4) Coal can be classified under CN codes 2701, 2702 or 2704.

5. Certain uses of energy products fall outside the Directive's scope. (5) Those instances are listed in Article 2(4)(b) which states:

'This Directive shall not apply to:

…

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

– energy products used for purposes other than as motor fuels or as heating fuels,

– dual use of energy products

An energy product has a dual use when it is used both as heating fuel and for purposes other than as motor fuel and heating fuel. The use of energy products for chemical reduction and in electrolytic and metallurgical processes shall be regarded as dual use,

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

– electricity, when it accounts for more than 50% of the cost of a product …

– mineralogical processes …'

6. Article 4(1) provides that Member States must apply the minimum levels of taxation prescribed by the Directive to energy, products such as coal, listed in Article 2.

7. Article 9(1) states that the minimum levels of taxation applicable to heating fuels must be fixed as set out in Annex I Table C of the Directive. (6)

8. Member States were required to transpose the Directive into national law by 31 December 2003 and to apply those provisions from 1 January 2004. (7) The national transposition measures must contain a reference to the Directive or be accompanied by such a reference upon their official publication. (8)

National legislation

9. The Wet belastingen op milieugrondslag (the Law introducing taxes for the protection of the

environment) ('the Wbm') imposes a charge to tax on coal products falling within CN codes 2701, 2702 and 2704 used for heating purposes. (9) Tax is charged upon delivery of the products to the taxpayer concerned. An exemption from tax is provided where there is 'dual use' of such products. (10) Dual use covers the use of coal products both as heating fuel and for purposes other than as motor fuel and heating fuel. (11) A tax exemption applies in respect of the dual use of coal; and the competent national authorities reimburse tax paid where coal is not used as fuel or there is dual use of the coal products in question. (12)

10. The referring court explains that the parliamentary documents detailing the legislative history of Article 20 of the Wbm indicate that the purpose of including a definition of the term 'dual use' in Article 20(e) is to ensure that the national legislation is aligned to the Directive. (13)

11. The legislative history shows that:

'A new subsection of Article 20 contains the definition of dual use, which is in line with the definition in the Energy Taxation Directive. [(14)] By dual use is meant the use of coal, where the coal, in addition to its function as fuel, also has one or more other functions. The use of coal for chemical reduction and metallurgical processes is regarded as dual use. Situations in which only one product of the combustion of coal (for example, CO_2) is usefully applied, and the coal itself is used only as fuel, shall not be regarded as constituting dual use.' (15)

12. Furthermore, the documents detailing the legislative history of the Wijziging van de Wet belastingen op milieugrondslag en de Wet op de accijns (implementatie richtlijn Energiebelastingen) (Amendment of the Law introducing taxes for the protection of the environment and the Law on Excise Duties (implementation of the Energy Taxation Directive)), contain the statement:

'In the use of coal which has been processed into coking coal, where functions other than the fuel function are involved, the levy shall be waived. Other functions could include the raw material function and the reduction function. An example of such a use of coal is the production of pig iron.' (16)

Facts, procedure and the questions referred

13. X, the appellant in the main proceedings, produces sugar and products containing sugar from sugar beet. For the purposes of manufacturing sugar, X took delivery of coal (17) and paid the fuel tax due in accordance with the Wbm.

14. In the process of producing sugar from sugar beet there are a number of stages. (18) The first step involves the extraction of raw juice from the sugar beet. Next, the raw juice is purified, and then the thin juice obtained from the purification process is subject to evaporation and crystallisation which finally results in granulated sugar. That process also gives rise to a precipitate, a lime fertiliser by-product, which is used in the agricultural industry for maintaining the pH balance in soil. The precipitate is known as earth foam and consists mainly of calcium carbonate.

15. In order to purify the raw juice extracted from sugar beet the sugar processor requires lime-kiln gas. To obtain that gas limestone and coal are premixed and fed into a lime-kiln. The chemical reaction in the lime-kiln creates lime-kiln gas (a mixture of carbon dioxide (CO_2) derived from coal and the limestone itself and nitrogen derived from the air). The lime-kiln gas contains approximately 40% CO_2 and the gas should be free from impurities. Substances other than coal are not suitable for the production of the required 'pure' lime-kiln gas. At the same time the lime-kiln is used to produce quicklime. Through the heating of limestone (calcium carbonate consisting of approximately 97% $CaCO_3$) to a sufficiently high temperature (19) CO_2 is produced through the reaction of coals (which has a high carbon content consisting of approximately 85% C atoms) and oxygen (O_2) from the air. This reaction releases heat which is used to break down limestone into quicklime and carbon dioxide (dissociation).

16. In all sugar beet factories (in the Netherlands) the quicklime and CO_2 required for juice purification are produced on the premises in a lime-kiln.

17. Approximately 12% of the lime-kiln gas is discharged into the air. The remainder (88%) is used in the carbonatations. (20) After the lime-kiln gas has been used in the carbonatations, part of it is blown off (referred to as carbonatation exhaust gas). Approximately a quarter of the CO_2 used in the carbonatations is lost in this way. The remaining CO_2 is absorbed by the earth foam.

18. By letter of 7 March 2008, X requested a refund of EUR 97 114.23 in respect of fuel tax paid. The competent national authorities refused that request in a decision of 24 April 2008. X challenged that decision unsuccessfully at first instance. X subsequently lodged an appeal before the Gerechtshof 's-Hertogenbosch which has referred the following questions to the Court for a preliminary ruling:

'(1) Is there dual use within the meaning of Article 2(4)(b) of [the Directive] in the case where coal (products within CN codes 2701, 2702 and 2704) is used as heating fuel in a lime-kiln, while the carbon dioxide generated in that lime-kiln from the coal (and limestone) is used for the production of lime-kiln gas, which is subsequently used in, and is indispensable for, the purification of the raw juice obtained from sugar beet?

(2) Is there dual use within the meaning of Article 2(4)(b) of [the Directive] in the case where coal (products within CN codes 2701, 2702 and 2704) is used as heating fuel, while 66% of the carbon dioxide generated during the heating and taken up by the lime-kiln gas is absorbed, during the subsequent purification referred to above, by earth foam, which is sold as lime fertiliser to the agricultural sector?

(3) In the event that there is dual use within the meaning of Article 2(4)(b) of [the Directive]: having regard to the (literal) text of the opening words of Article 2(4) of [the Directive], is that directive not applicable, with the result that the appellant cannot rely (for the interpretation in national legislation of the concept of dual use as referred to in Article 20(e) of the Wbm) on the direct effect of that directive?

(4) In the event that there is dual use within the meaning of Article 2(4)(b) of [the Directive] and the latter is (consequently) inapplicable: in the case of the levying of a tax such as the present fuel tax, does [EU] law preclude a more restrictive interpretation of the concept of dual use under domestic law as compared with an interpretation in accordance with [the Directive]?'

19. Written observations were submitted by X, the Netherlands Government and the European Commission, all of whom made oral submissions at the hearing on 12 December 2013.

Assessment

20. Member States must impose at least the minimum levels of tax on energy products, such as coal, in accordance with the Directive. (21) In the sugar production process described by the referring court coal is used as heating fuel. Because the questions referred do not concern energy products used as motor fuel, I shall confine my assessment to the possible dual use of energy products where one use is as heating fuel.

Questions 1 and 2: dual use

21. By Questions 1 and 2, the referring court seeks to establish the meaning of 'dual use' in the second indent of Article 2(4)(b) of the Directive in relation to sugar production and the by-product, lime fertiliser, arising from that process. As those questions are closely linked I shall consider them together.

22. X submits that the scope of the EU concept of dual use is not defined in detail in the Directive. Although certain illustrative examples of dual use are given, those examples are not exhaustive. There is nothing in the Directive indicating whether the words dual use should be interpreted widely or narrowly. None the less that expression must be interpreted uniformly throughout the Member States.

23. According to X, dual use in the present context consists in using coal as heating fuel, on the one hand, in the production of a gas, CO_2, necessary as an integral part of the production process of both

sugar and the by-product, lime fertiliser, on the other hand. The CO_2 produced from burning coal plays an important role in the carbonatation process, the coal from which it is released is used for purposes other than producing heat. It therefore satisfies the EU definition of dual use. Without coal the production process of both sugar and lime fertiliser would not occur in the optimum manner. The Directive does not draw any distinction between using energy products as raw materials for producing end products, or as consumable material, or the useful application of such products. Nor does the Directive specify that the energy product in question must be used simultaneously for heating and for some other purpose in order to establish dual use. There is also nothing to indicate that the Directive's environmental protection objective should be determinative when interpreting the text.

24. Both the Netherlands Government and the Commission take the contrary position.

25. In their view, there is dual use under the Directive only when the energy generated by the product is itself used for something other than producing heat. That conclusion is confirmed by the recitals in the preamble to the Directive (in particular recitals 2 to 7 and 22). The use of energy products for heat gives rise to a charge to tax. It follows that when energy products are used solely to produce heat then they must be subject to tax in conformity with the Directive. Any other interpretation would undermine the functioning of the single market. That interpretation is confirmed by the *travaux préparatoires*. (22)

26. Coal is used in one stage of the sugar production process. The only chemical reaction involving that coal is with oxygen, producing heat used in order to dissociate limestone by breaking it down into quicklime and CO_2. In subsequent stages of the process it is not the coal itself that is used. Rather, it is the residue or the results of combustion that are subsequently used in manufacturing sugar and producing the resulting by-product, lime fertiliser.

27. Whilst it is true that coal is used simultaneously to produce heat and CO_2, both of which are important in producing sugar from sugar beet, to resolve the question at issue it is necessary to consider the use of the energy product itself rather than the purpose for which it is used. Here, coal is totally consumed by burning and that is the sole extent of its use.

28. The Netherlands puts forward two illustrations in its written observations in support of its position. An example of chemical reduction for the purposes of the Directive is where coal is used in the production of iron from ore. In that process coal is used as (i) a heating substance and (ii) as a reducing agent. When coal is heated to a sufficiently high temperature it causes the reducing agent added to the iron ore furnace to separate the metal from the oxides. The pig iron obtained from that process contains 4% carbon which is derived from the coal used in the production process. In the production of pig iron coal is thus used both as heating fuel and as a reducing agent. Furthermore, unlike the sugar production process where there is no carbon in the final product, carbon is found in the pig iron resulting from smelting iron ore. Coal therefore has a dual use in the smelting. Another example of dual use is where electricity is used in zinc smelting. In that process electricity is used to convert zinc concentrates (ores containing zinc) into pure zinc. There are two processes, the electrolysis process and the pyrometallurgical process. Electrolysis works by passing an electric current through a zinc sulphate solution. This causes the separation of zinc from the oxides to which it is attached. Electricity is also used to produce heat for the purpose of electrolysis in refining zinc.

29. As I understand it all parties accept the referring court's description of the sugar production process. It is common ground that coal is used in that process as heating fuel in order to break down limestone and to produce CO_2. In that respect, the Netherlands and the Commission are right to point out that the issue for examination is whether the coal, rather than the CO_2, is subject to dual use. The question is whether they are both also right to submit that, in order for there to be dual use within the meaning of the Directive, the energy product itself should be used in *one process* (rather than in subsequent processes) to give rise to a chemical reaction apart from that resulting in combustion (that is, the reaction resulting from use as heating fuel).

30. The Netherlands states in its written observations that the referring court considers that coal is used only to produce heat (although at the hearing the Netherlands explained that coal is used to

produce simultaneously both heat and CO_2). I do not read the order for reference as containing a finding of fact that coal is used only to produce heat. Rather, I understand the referring court to be indicating that lime-kiln gas containing a certain amount of CO_2 is produced through the reaction of coal with oxygen from the air. That reaction releases heat which is then used to break down (or dissociate) limestone, generating more CO_2. (23) That finding suggests to me that coal is used for two purposes in a lime-kiln, as a raw material to produce CO_2 and as heating fuel.

31. The question is whether using coal for two purposes — to produce both heat and CO_2 — constitutes dual use within the meaning of the Directive.

32. I consider that the wording of the directive is wide enough for such a use of coal to qualify as 'dual use'.

33. A definition of dual use energy products is contained in the second indent of Article 2(4)(b) itself. An energy product has a 'dual use' when it is used both as heating fuel and for purposes other than as heating fuel. The difficulty is the absence of wording that defines those 'other' purposes. The text is silent as to whether the energy product must be used simultaneously to provide heat and for purposes other than as heating fuel; whether 'dual use' also covers sequential procedures in a manufacturing process, for example where an energy product is used first to create a particular chemical reaction and then to provide heat. (Here, coal is used simultaneously for heating and to produce CO_2 and it is therefore unnecessary to decide whether sequential procedures fall within the concept of 'dual use'.) The Directive merely lists a number of examples, including the use of energy products for chemical reduction and in electrolytic and metallurgical processes. There are no words of limitation suggesting that the examples set out are exhaustive. Nor is it clear whether the legislator was focussing on *purpose* ('for chemical reduction') or on *process* ('in electrolytic and metallurgical processes'): indeed, both appear to have been envisaged.

34. That view is supported by recital 22 in the preamble to the Directive, which explains that energy products are essentially subject to tax when used as heating fuel. It is in the nature and the logic of the tax system to exclude from the scope of taxation dual uses and non-fuel uses of such products. The recital refers to dual uses in general which suggests that the examples of dual use set out in the second indent of Article 2(4)(b) of the Directive are simply indicative.

35. The illustrative examples describe a range of different processes. It may indeed be correct that carbon is found in pig iron when coal is used as a reducing agent in the production process and that the carbon content gives rise to the brittleness of pig iron. However, it is not the case that where electricity is used in zinc smelting, the electricity itself is found in the end product and that it provides particular properties to the zinc which has been separated from its oxides and deposited onto cathodes. It seems to me that those examples do not show that the legislator intended there to be dual use only where a particular result is obtained from using the energy product (for example, that it forms part of the end product of the process in question). Moreover, even in the example put forward by the Netherlands coal itself is not found in pig iron; rather it is the element derived from coal, carbon, that forms part of the end product.

36. Furthermore, Article 2(4)(b) refers to the use of the energy product for 'purposes other than …'. That wording suggests that the purpose for which the energy product is used (in addition to producing heat) is (or at least may be) a relevant factor.

37. Finally, Article 2(4)(b) lists five ways in which the use of energy products falls outside the scope of the Directive. That list is heterogeneous. The first indent of Article 2(4)(b) covers energy products used for purposes other than as heating fuel. Dual use products are listed in the second indent of that provision, with illustrations identifying both process and purpose. The third indent of Article 2(4)(b) refers to electricity used principally for the purposes of chemical reduction. The fourth indent mentions electricity when it accounts for more than 50% of the cost of a product. The fifth indent covers mineralogical processes. There is nothing in the wording or scheme of Article 2(4)(b) itself to suggest that the energy product in question must always be used in a particular way or that certain types of use might be excluded from the words 'for purposes other than as … heating fuel'.

38. I conclude that the wording of the second indent of Article 2(4)(b) is wide enough to include energy products used as here for two purposes, namely to generate heat and to release CO_2.

39. An examination of the aims of the Directive does not suggest a different conclusion.

40. The Directive has three main objectives: introducing a regime imposing a minimum rate of taxation on energy products; (24) ensuring the proper functioning of the internal market by reducing differences in national levels of energy taxation; (25) and improving environmental protection, in particular by reducing CO_2 emissions in accordance with the Kyoto Protocol. (26) However, the recitals to the Directive do not offer any express explanation of the meaning of the term 'dual use' in the context of those objectives.

41. The *travaux préparatoires* (27) indicate that excluding energy products used other than as heating products from the Directive's scope '… means that products used in industry for chemical reduction purposes or as raw materials will not be taxed'. (28) The text of what subsequently became recital 22 and the first and second indents of Article 2(4)(b) were introduced when the proposal was in Council, although the wording of the first indent of Article 2(4)(b) had been included in the Commission's original proposal. (29)

42. There is nothing in the *travaux préparatoires* indicating that the energy product in question cannot be used simultaneously to produce heat and as the raw material from which another substance is derived, that other substance being necessary to the production process in question.

43. Furthermore, it seems to me that the words 'purposes other than as … heating fuel[s]', which appear in both the first and second indents of Article 2(4)(b), should logically be construed in the same way in both provisions.

44. It would seem inconsistent with the scheme of the Directive if an energy product that is used solely as a raw material in a production process fell outside the scope of the Directive by virtue of the first indent of Article 2(4)(b), while the same product could be brought within that scope by virtue of the second indent, on the ground that it was used simultaneously as heating fuel. Thus, if an energy product is a raw material for the purposes of the first indent of Article 2(4)(b), it should be classified as having a dual use within the second indent when it is used both as heating fuel and as a raw material.

45. The question then arises whether coal, as well as being used as heating fuel, is also a raw material in the production process here at issue.

46. I understand from the referring court's explanation of the sugar production process that the dissociation of limestone into quicklime and CO_2 is caused by heat. Presumably that heat can be generated by energy products other than coal. However, the referring court points out that the limestone and the coal are premixed and fed into the lime-kiln and that other substances are not suitable for producing the 'pure' lime-kiln gas that is required. That finding suggests to me that coal is necessary in order to produce lime-kiln gas that has the properties necessary in the sugar production process at issue. It also indicates that coal is used as a raw material in that production process for two purposes, both as heating fuel and in order to produce CO_2. That would amount to dual use.

47. As regards the Directive's aim of improving environmental protection, the goal of the Kyoto Protocol is to lower overall emissions from six greenhouse gases including CO_2. (30) From the referring court's explanation of the sugar production process I understand that most of the CO_2 generated is not emitted, but rather that a large part is absorbed into the by-product, lime fertiliser. (31) An interpretation of dual use as covering coal used for heat and to generate CO_2 in that context is not necessarily inconsistent with the Directive's environmental aims.

48. For the sake of good order it is helpful to consider whether any useful principles can be derived from EU environmental law which might be applied by analogy. The terms 'residue' and 'by-product' have been examined by the Court in the context of environmental law, in particular when interpreting the Waste Framework Directive. (32) In my view, those concepts do not apply by analogy here. First, the

main proceedings concern the use of coal, which is not a by-product or a residue; rather it is used in the production process in question. Second, we are not concerned with the classification of the CO_2; thus whether that is considered to be a by-product or residue of combustion is irrelevant. Third, the environmental case-law on the meaning of the words 'waste' and 'discard' as used in the Waste Framework Directive arises in a very different context. The wording, scheme and objectives of that measure are not the same as the Directive at issue in the present proceedings. Accordingly, I do not find the environmental case-law to be of assistance here.

49. To summarise: it seems to me that there is dual use for the purposes of the second indent of Article 2(4)(b) of the Directive where coal is used both to generate CO_2 and as heating fuel necessary for the dissociation of limestone in order to release lime-kiln gases for the purposes of purifying the raw juice obtained from sugar beet. If coal has a dual use in that process, it must necessarily also have dual use in relation to the lime fertiliser arising as a by-product from that process.

Questions 3 and 4: whether dual use is an EU concept

50. Question 3 seeks to ascertain whether, if the use of coal in sugar production constitutes dual use for the purposes of the second indent of Article 2(4)(b), the Directive applies when interpreting domestic laws, such as those at issue in the main proceedings, that impose a charge to tax on such energy products. Question 4 asks whether, if the Directive does not apply, EU law precludes the use by the national legislator of a more restrictive notion of dual use?

51. By Questions 3 and 4 the referring court essentially wishes to know whether the Directive gives rise to an EU concept of dual use and if so to what extent that concept should be taken into account when interpreting the relevant provisions in national legislation (the Wbm).

52. X states in its written observations that certain neighbouring Member States do not impose energy taxes on sugar production either because that process falls outside the relevant energy tax regime, (33) or because coal is considered to be a dual use product. (34) X submits that the Netherlands Government's interpretation of dual use is out of step with the EU notion of dual use and that Member States must apply that notion in their domestic law.

53. Neither the Commission nor the Netherlands make any observations concerning the concept of dual use energy products that is applied in other Member States. Nor is that issue raised by the referring court. I do not think that the Court needs to assess the position in other Member States in order to address Questions 3 and 4 and, in the absence of full information and any debate between the parties regarding the position in other Member States, I shall not take the limited material available into account in my assessment.

54. Article 2(4) expressly states that '[t]he Directive shall not apply to … dual use of energy products'. Thus, it is plain that such products fall outside the scope of the Directive and the minimum harmonised rate of tax does not apply to them. Member States are therefore in principle competent to tax such energy products provided that they exercise their competence consistently with EU law, in particular Articles 30 and 110 TFEU. (35)

55. The Directive introduces a minimum harmonisation regime. In that context the EU legislator has chosen to place dual use energy products outside its scope. Member States are therefore free to make provision for increased environmental protection by, for example, imposing a charge to tax on all dual use products, or by choosing to target particular dual use products. Alternatively, Member States may choose to mirror the Directive by not taxing such products at all.

56. The referring court explains that the term 'dual use' has been used by the national legislator in Article 20(e) of the Wbm specifically in order to align that measure with the Directive. The question therefore arises as to whether there is an EU concept of dual use that X may invoke in the main proceedings; and in that respect does the Court's judgment in *Leur-Bloem* (36) apply?

57. The present case is, in my view different from the situation before the Court in *Leur-Bloem*. The question in that case was whether the Court was competent to interpret provisions of national legislation

which in effect applied EU legislation to situations to which that EU legislation was not required to be applied. That question occurred in the specific context of interpreting the term 'exchange of shares' in Article 2(d) of the Merger Directive. (37) The Court observed in *Leur-Bloem* that the referring court considered that the concept of merger by exchange of shares, taken in its (then) Community context, needed to be interpreted in order to resolve the dispute before it, that that concept was contained in Directive 90/434, that it had been incorporated into the domestic law transposing the Directive and that it had been extended to similar, purely internal, situations. (38)

58. In the present matter, the referring court explains that the national legislator had certain aims when transposing the Directive into national law. Those aims appear to be, first, to ensure that the scope of the exclusion of dual use products from the prescribed minimum levels of taxation is not broader than that permitted by the Directive; (39) and, to impose a charge to tax on certain dual use energy products by applying a narrower definition of that term than that used in the Directive. (40) Unlike the position in *Leur-Bloem*, here the referring court therefore expresses doubts as to whether an EU concept of dual use has been transposed into national law.

59. Subject to verification by the referring court, it seems to me that the national legislator took account of the term 'dual use' in the Directive in establishing the scope of the national measure at issue and ensured that it was not *broader* than the EU concept of dual use. However, the national legislator then went further and decided to impose tax on certain dual use products by adopting a narrower concept of that term.

60. In so far as dual use energy products are outside the scope of the Directive, Member States are in principle free to tax such products. Member States may not use a broader definition of 'dual use' than the EU concept — if they do so, they unlawfully exclude energy products that fall within the scope of the Directive and should be subject to the harmonised levels of taxation set out in Annex I thereto.

61. They can, however, apply a more restrictive definition of dual use and choose to tax dual use energy products, provided they exercise their competence consistently with EU law. (41) If a Member State chooses to apply such a narrower definition, a taxpayer cannot invoke the broader EU concept of dual use in order to obtain exoneration from a charge to tax imposed under national law.

Conclusion

62. In the light of all the foregoing considerations, I suggest that the Court should answer the request for a preliminary ruling from the Gerechtshof 's-Hertogenbosch to the following effect:

There is dual use within the meaning of the second indent of Article 2(4)(b) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, where coal (products within CN codes 2701, 2702 and 2704) is used as heating fuel in a lime-kiln in order to generate carbon dioxide for the production of lime-kiln gas, which is subsequently used for the purification of the raw juice obtained from sugar beet, that process giving rise to the precipitate, the by-product earth foam.

Member States may apply a more restrictive definition of dual use and choose to tax dual use energy products, provided they exercise their competence consistently with EU law. If a Member State chooses to apply such a narrower definition, a taxpayer cannot invoke a broader EU concept of dual use in order to obtain exoneration from a charge to tax imposed under national law.

---

1 – Original language: English.

---

2 – Of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ 2003 L 283, p. 51) ('the Directive').

---

3 – The Directive does not state whether electricity is, or is not, an energy product. However, it follows from Article 2(2) that electricity falls within the Directive's scope.

4 – See Commission Regulation (EC) No 2031/2001 of 6 August 2001 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 2001 L 279, p. 1). For the sake of good order it may be helpful to bear in mind that the CN code contains a general description of each product which is in certain cases further subdivided into more specific descriptions of particular products. Thus, the general description of products falling within CN code 2701 is 'Coal — briquettes, ovoids and similar solid fuels manufactured from coal'; and that code includes, inter alia, anthracite (CN code 2701 11). CN code 2702 includes lignite. CN code 2704 includes coke and semi-coke of coal, of lignite or of peat. See further, footnote 17 below.

5 – See further point 37 below.

6 – Coal and coke (CN codes 2701, 2702 and 2704) comprise item 6 in the table.

7 – Article 28(1) and (2).

8 – Article 28(3).

9 – Article 20 read together with Article 21.

10 – Article 26.

11 – Article 20(e).

12 – Article 26(3).

13 – *Kamerstukken II*, 2003/04, 29 758, No 3, Explanatory Note, pp. 7 and 8.

14 – I.e., Directive 2003/96/EC.

15 – *Kamerstukken II*, 2003/04, 29 758, No 3, Explanatory Note, p. 32.

16 – *Kamerstukken II*, 2003/04, 29 207, No 3, p. 12.

17 – The referring court mentions coking coal and anthracite in its order for reference. I shall use the generic term 'coal' to cover all products that are covered by the relevant CN codes, including both coke and anthracite.

18 – The Gerechtshof 's-Hertogenbosch's order for reference contains a helpful and detailed technical account, which I summarise in points 14 to 17 of this Opinion.

19 – The chemical equation for producing quicklime and lime-kiln gas is as follows: $CaCO_3$ + heat → CaO + CO_2. When a substance is heated the heat (a form of energy) gives the particles energy to move which, if strong enough, breaks the bonds between the particles that hold the substance together.

20 – Carbonatation is a chemical reaction in which calcium hydroxide reacts with carbon dioxide and forms insoluble calcium carbonate. The chemical reaction is: $Ca(OH)_2 + CO_2 \rightarrow CaCO_3 + H_2O$. The term 'carbonatation' is also used to denote the process of purifying the raw juice extracted from the sugar beet.

21 – Articles 1, 4(1) and 9(1).

22 – See point 41 and footnote 27 below.

23 – See point 15 above.

24 – Recital 2.

25 – Recitals 3 to 5.

26 – Recitals 6 and 7.

27 – The *travaux préparatoires* include the Commission's proposal for a new directive on the taxation of energy products, COM(97) 30 final of 12 March 1997 and Council documents 13062/02 of 17 October 2002, 13422/02 of 29 October 2002, 14200/02 of 13 November 2002, 14862/02 ADD 1 of 27 November 2002 and 15354/02 of 9 December 2002. Document 14200/02 seems especially pertinent. It introduced proposals for, inter alia, what later became recital 22, Article 2(4)(b) and Article 14 of Directive 2003/96. The Court has previously looked at the *travaux préparatoires* in order to determine the purpose of EU legislation; see for example, Case C-449/93 *Rockfon* EU:C:1995:420, paragraphs 30 to 34. The Council documents are accessible on http://register.consilium.europa.eu.

28 – COM(97) 30 final, p. 6. That exclusion from the scope of the Directive was set out in Article 13 of the original proposal. There was no exception at that stage for dual use products. See further Press release IP/03/1456 'Energy products are taxed only when used as fuel or for heating, and not when used as raw materials, or in chemical reductions or in electrolytic or metallurgical processes'.

29 – See Document 14200/02, where the text of a joint statement from the Commission and the Council, to be added to the Council's minutes, expressly confirmed that it is in the nature and the logic of the tax system to exclude from the scope of the framework dual uses and non-fuel uses of energy products. Member States would then be able to take measures to tax or not to tax those uses. However, such a declaration cannot be used for the purpose of interpreting a provision of secondary legislation where, as in the present case, no reference is made to the content of the declaration in the wording of the provision in question and it does not, therefore, have any legal significance: see Case C-292/89 *Antonissen* EU:C:1991:80, paragraph 18, and more recently, Case C-545/11 *Agrargenossenschaft Neuzelle* EU:C:2013:169, paragraph 52 and the case-law cited.

30 – The five other gasses are: methane; nitrous oxide; sulphur hexafluoride; hydrofluorocarbons (HFCs) and perfluorocarbons (PFCs).

31 – See point 17 above.

32 – Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39) ('the Waste Framework

Directive'): in particular Articles 1(a) and 2(1)(b).

---

33 – According to X, in the case of Belgium and the United Kingdom.

---

34 – According to X, in the case of France and Germany.

---

35 – Joined Cases C-145/06 and C-146/06 *FendtItaliana* EU:C:2007:411, paragraphs 41 and 42.

---

36 – Case C-28/95 *Leur-Bloem* EU:C:1997:369, paragraphs 31 and 32. See more recently, Case C-522/12 *Isbir* EU:C:2013:711, paragraphs 25, 28 and 30.

---

37 – Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (OJ 1990 L 225, p. 1) ('the Merger Directive').

---

38 – *Leur-Bloem*, EU:C:1997:369, cited in footnote 36 above, paragraph 31.

---

39 – See point 10 above.

---

40 – See point 11 above.

---

41 – See point 54 above.