

# ECJ Advocate General Opines on Unlawful Usage of Electricity and Whether it Constitutes Supply of Goods for Consideration: *Fluvius Antwerpen* (Case C-677/21) (VAT)

13 January 2023

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On 12 January 2023, Advocate General Juliane Kokott of the Court of Justice of the European Union (ECJ) gave her opinion in the case of *Fluvius Antwerpen v. MX* ([Case C-677/21](#)) on the consequences of "electricity theft" and whether an unlawful usage of electricity constitutes an assessable and taxable transaction for VAT purposes, regarded under the VAT Directive (2006/112) as a supply of goods - being the transfer of the right to dispose of tangible property as owner –, or as the transfer of the ownership of property, by order made by or in the name of a public authority, or in pursuance of the law.

In this case, the Advocate General concluded that legal and illegal supplies of electricity must be treated in the same way for VAT purposes. As a result, (i) the unlawful usage of electricity is considered a supply of goods for consideration if the remuneration to be paid pursuant to law is dependent on consumption as it would have been in the case of lawful usage; (ii) additional supplies of electricity that a distribution network operator makes can also be regarded as an economic activity; and (iii) negligible activities can only be present if the body governed by public law is not regarded as a taxable person on the basis of other activities.

Against this backdrop, the Advocate General proposed that the ECJ answer the questions referred to as follows:

- "1. Article 2(1)(a) read in conjunction with Article 14(1) of the VAT Directive must be interpreted as meaning that unlawful usage of energy is a supply of goods for consideration, if the remuneration that is payable pursuant to law is dependent on consumption.
2. Article 9(1) of the VAT Directive must be interpreted as meaning that, if a distribution network operator additionally supplies electricity, that can also be regarded as an economic activity on its part. That is the case if the supply, for example due to illegal electricity usage, constitutes a risk inherent in its economic activity as a distribution network operator.
3. Negligible activities within the meaning of the third subparagraph of Article 13(1) of the VAT Directive can only be present if the body governed by public law should not be regarded as a taxable person on the basis of other activities."

A more substantial report containing details of the Advocate General's reasoning will be published in due course.

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