

ECJ Advocate General Opines that Unlawful Usage of Energy Constitutes a Supply of Goods for Consideration Subject to VAT (*Fluvius Antwerpenhort* (Case C-677/21) (VAT)) – Details

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On 12 January 2023, Advocate General (AG) Juliane Kokott of the Court of Justice of the European Union (ECJ) opined that the energy supply carried out by a distribution network operator to an illegal consumer should be subject to VAT. In the case of *Fluvius Antwerpen v. MX* (Case C-677/21) the AG analysed the consequences of "electricity theft" in terms of VAT, and whether a consumer who is acting unlawfully must bear VAT in the same way as a consumer who acts legally if their consumption of electricity is similar. Details of the opinion are summarized below.

(a) Facts. Fluvius Antwerpen (Fluvius) is a Belgian distribution network operator of electricity and gas governed by public law which filed a lawsuit against MX, an individual who benefitted from an unlawful supply of energy by consuming it without having a valid agreement with a commercial energy supplier. Concretely, Fluvius claimed from MX the payment for energy usage over the period of May 2017 to August 2019, even when this took place without a supply contract, based on a comparison between the meter reading at the start and at the end of the unlawful usage, in a sum equal to the undue advantage received plus the corresponding VAT quota.

(b) Issue. Belgian rules indicating that an amount of compensation should be charged in the event of unlawful usage and that VAT should be levied on that compensation were introduced in 2018. Unsure as to whether these rules are contrary to the [VAT Directive \(2006/112\)](#), the Magistrates' Court of Antwerp in Belgium (the referring court) decided to stay the proceedings and referred some questions to the ECJ seeking clarity concerning the following aspects:

1. the qualification of the undue consumption of electricity as a supply of goods for consideration, thus subject to VAT;
2. the eventual realization of an economic activity in terms of VAT by the distribution network operator, due to the existence of a legal obligation to supply energy which demands the payment of a compensation by the consumer and;
3. the qualification of a distribution network operator as a taxable person for VAT purposes as per article 13(1) of Directive 2006/112.

(See [ECJ Preliminary Ruling Request \(VAT\): Fluvius Antwerpen \(Case C-677/21\) – Vredegerecht te Antwerpen Submits Referral on Whether Unlawful Usage of Energy Constitutes Supply of Goods \(21 February 2022\)](#)).

(c) Advocate General's Opinion. Regarding the first aspect, the AG invoked ECJ case law concerning illegal activities and recalled that the principles of neutrality and of proportionality governing the EU VAT system along with the nature of the VAT as a consumption tax, are opposed to establish a difference between legal and illegal transactions. According to the AG, such a difference is only allowed when no competition exists between legal and illegal activities because there is no substitution relationship. In the AG's opinion, this exception cannot be applied in a case like the one at hand as the energy can be legally acquired. In addition, because not taxing with VAT an undue consumption of energy would imply treating more favourably an illegal consumer who "steals" energy over a consumer who has celebrated a valid agreement with a commercial energy supplier and pays for the energy effectively consumed.

Consequently, the AG considered that the undue energy consumption meets all the requirements foreseen by the VAT Directive (2006/112) for being deemed a transaction subject to VAT. Also, because in the case at hand, a legal direct relationship exists between the service rendered by the distribution network operator and the consideration entailed to receive (the indemnity). Such relationship has as special characteristic that is not of a contractual nature but determined by law.

In addition, the AG sustained that the same conclusion can be drawn in view of article 14(2)a of the VAT Directive 2006/112, as the obligation determined by law and applied by the distribution network operator (i.e. the supply of energy to someone who does not have a valid agreement with a commercial energy supplier) should be considered a transaction subject to VAT, as it occurs with the transfer of goods as a consequence of an expropriation procedure.

On the second aspect to be clarified, the AG pointed out that since the transaction has the obligation of compensating energy losses derived from the energy fraud, it bears a typical business risk derived from the realization of an economic activity in terms of VAT.

Lastly, on the third aspect and in view of article 13(1) of the VAT Directive 2006/112, the AG opined that the distribution network operator should be regarded as a body governed by public law, to which tasks with public interest are entrusted to. In this context, according to the AG, the third paragraph of the referred article 13(1) should be interpreted as providing a special rule established for guaranteeing that public bodies carrying out certain supplies to consumers (listed in Annex I of that directive) are considered as taxable persons for VAT purposes, except when the volume of such activities is negligible. This exception is considered a simplification method. However, as Fluvius is a distribution network operator who has already the condition of taxable person for VAT purposes, in the AG's opinion the referred special rule does not apply to Fluvius because any simplification method established in VAT Law should be applied and interpreted in a restrictive basis.

In this order of ideas, the AG proposed the ECJ to reply to the referred questions 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."

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