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CREEPING EXTENSION OF EU COMPETENCES OR TEXTBOOK EXCEPTION THAT PROVES THE RULE? SOME REMARKS ON C-591/17., AUSTRIA V GERMANY CASE *

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1. Introduction

The case is one of the recent and of the benchmarks of the Court of Justice of the European Union (hereinafter referred to as: CJEU) that was followed by intense political debates, high-level legal argumentation, and expectations based on the national competences and the equal treatment from both – Austrian and German – sides, all across the European Union (hereinafter referred to as: EU).

The case is a landmark one from several aspects. First, this is an infringement procedure, the rarer version when a Member State (hereinafter referred to as: MS) sues another MS for the breach of obligations arising from EU law.[1] Secondly, the case is unique from the point of differences in the opinion of the Advocate General *Nils Wahl* and the reasoning of the CJEU. Thirdly, the judgement might be categorized as a *borderline* case of *collision*. Both the AG and the CJEU had to examine the EU competences in the light of the principle of subsidiarity declared in Article 5(3) of the Treaty on European Union (TEU) and Protocol (No 2) on the application of subsidiarity and proportionality regarding the tax-sovereignty of the MSs. The reasoning of the AG and the CJEU is altering and in a significant sense. This difference highlights the values of the scientific reasoning and perspective and the pragmatic one. Both argumentations are convincing besides being controversial. AG *Wahl* applied a clear scientific analysis wrapped in wise reasoning. The CJEU has *solved* the case by following a pragmatic aspect, using the discriminatory-reference as a *Trump-card* of constituting the legal base, which usually overwrites national interests. Last, but not least, the decision – arising from the abovementioned significances – is a newborn textbook example for the *creeping extension of Union competences*, too.

* Due to the fact that in the Member States of the EU consumers are able to purchase the infrastructural fees online, the digital aspect of the topic is also relevant. This research was supported by the project nr. EFOP-3.6.2-16-2017-00007, titled *Aspects on the development of intelligent, sustainable and inclusive society: social, technological, innovation networks in employment and digital economy*. The project has been supported by the European Union, co-financed by the European Social Fund and the budget of Hungary.

1 It is very rare for a Member State to bring infringement proceedings against another Member State. The present action is the seventh of a total of eight in the history of the Court (see for the first six, Press Release No 131/12; the eighth case is pending: Slovenia v Croatia, C-457/18).

Within the frames of this paper, we emphasize the different perspectives of the AG and the Court. This paper aims to present the importance of uniform legal interpretation, especially in today's innovative societies. The European Union intends to modernize the integration from a technological and a legal point, too. The objective is to reach social welfare and economic progress within a modern and quite flexible legal system of harmonized rules and a well-functioning internal market. The guarantee for the well-functioning (border- and obstacle-less) internal market is one the one hand, the adequate share of competences between the EU and the MSs.

On the other hand, the provision of equal treatment to the nationals of other MSs who intend to live cross-border lifestyles and by this, to accomplish the market in practice. Thus, it is not that simple to cross the appropriate line between the sovereignty and competences of a state and its obligation for the equal treatment (which means non-discrimination in practice). The field of taxation belongs to MSs competence. However, the MSs shall ensure equal treatment in all circumstances and this is the *edge of the room-maneuver* for the freedom of the MSs to exercise their full powers with full power. Besides, the CJEU has already started to slowly, creepingly extend its competences regarding the interpretation of EU law. By the unique interpretation, the Court fills the legal acts with content and able to (trans)form law, not just the *Common European Law,* but also – by having an indirect impact – the national laws, too. This is called, the *creeping extension of Union competences.* We find significant to examine the differences of the reasoning of the AG and the Court which could be found in the perspective and methodology. Since the CJEU has maybe the most relevant role in the transformation of European law and its tendencies, it might be interesting to see how the Court *forms the law.* In the case of *Austria v Germany,* the controversial argumentation of the relevant actors is very thoughtful. Well, does the case provide the *main rule* or an *extraordinary exception that proves the rule*?

2. The facts of the case in a nutshell[2]

From 2015, Germany has put in place a legal framework for the introduction of a charge for the use by passenger vehicles of federal roads, including motorways: the 'infrastructure use charge'. By that charge, Germany intends to move in part from a system of financing by means of taxation to a system of financing based on the '*user pays*' and '*polluter pays*' principles. The revenue from that charge will be entirely allocated to financing the road infrastructure, the amount of which will be calculated on the basis of cylinder capacity, the type of engine and the emission standard of the vehicle.

Every owner of a vehicle registered in Germany will have to pay the charge, in the form of an annual vignette, of no more than €130. For vehicles registered abroad, payment of the charge will be required (of the owner or the driver) for use of the German motorways. In that regard, a 10 day vignette is available costing between €2.50 and € 25, 2 months costing between €7 and €50 and annual vignettes are available, at no more than a maximum of €130. In parallel, Germany has provided that, from the revenue from the infrastructure use charge, the owners of vehicles registered in Germany will qualify for relief from the motor

[2] This point used the Press Release No. 75/19., summary of the judgement in C-591/1. case. Available: https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-06/cp190075en.pdf

vehicle tax to an amount that is at least equivalent to the amount of the charge that they will have had to pay.

Austria considers that, on the one hand, the combined effect of the infrastructure use charge and the relief from motor vehicle tax for vehicles registered in Germany and, on the other, the structuring and application of the infrastructure use charge are contrary to EU law, in particular, the prohibition of discrimination on the grounds of nationality. Having brought the matter before the European Commission for an opinion, which was not delivered within the prescribed period, Austria brought infringement proceedings against Germany before the Court. In these proceedings, Austria is supported by the Netherlands, whereas Denmark supports Germany.

3. The argumentation of the AG

Advocate General *Wahl* used a scientifically supported, clear, logical, legally-based analysis, where he examined from sentence to sentence the essence and meaning of all the concepts (A) *indirect discrimination on the grounds of nationality through the combination of the measures at issue – in addition, the concept of discrimination, the nature of a measure and its capability to discriminate, & other issues; (B) indirect discrimination on grounds of nationality through the design of the infrastructure charge, (C) Breach of Art. 34 & 56. TFEU, (D) Breach of Art. 92 TFEU*. AG *Wahl* started his opinion with nominating the prohibition (in particular discrimination based on *nationality)* of non-discrimination as one of the few *commandments* of EU law. By placing non-discrimination to the first point of the opinion, the reader may have the impression that equal treatment and non-discrimination have a dominant role in the argumentation. Nevertheless, the focus was taken to the concept of discrimination. It is essence, function, the meaning of that in a scientifically supported manner.

AG's conclusion was a result of a clear analysis of the question of what discrimination is. Besides, under what circumstances can we talk about discrimination. What does it mean to have a comparable base in order to examine the alleged breach of the obligation for equal treatment? Alternatively, if the whole concept lacks' the essence (namely, the comparable base for examining the discrimination) from the beginning, we cannot move further to analyze the cumulative effect of the regulations. It is also important that even if a national regulation might be able to result in a kind of discrimination, there are some fields (such as direct taxation) where the Member States have the competence to legislate, and EU law could be only interpreted when the values or general principles are affected.

According to AG *Wahl,* the CJEU should dismiss the action brought by Austria against Germany as the fact that owners of vehicles registered in Germany benefit from tax relief on the German motor vehicle tax in an amount that corresponds to the amount of the charge do not constitute discrimination on the grounds of nationality.

AG *Wahl* considers in particular that Austria's arguments based on alleged discrimination on the grounds of nationality are premised on a fundamental misunderstanding of the concept of 'discrimination'. The AG concedes that the owners of domestic vehicles are mainly German nationals, whereas drivers of foreign vehicles are mostly of the nationality of other Member States. Thus, although the German legislation in question does not establish any express discrimination based on nationality, if the

arguments put forward by Austria were to be held well-founded, there would be indirect discrimination on the ground of nationality and, consequently, a breach of EU law.

However, the two groups of persons (Germans and other EU citizens) who were compared by Austria, are not comparable concerning the measures criticized. They are not in a comparable situation, because German users of the infrastructure are German taxpayers as well, while foreign drivers are only the users of the infrastructure built and maintained by Germans, but do not pay any tax in Germany. The non-German EU citizens who might be the users of the German infrastructure are the taxpayers (or tax beneficiaries) of other MSs, due to the fact that they have registered their vehicles outside the territory of Germany.

Secondly, Austria could not point to any less favorable treatment that the measures at issue grant to drivers of foreign vehicles. Drivers of foreign vehicles are not, and can never be, in a situation that is less favorable than that in which owners of domestic vehicles find themselves. In order to be allowed to drive on German motorways, the former is to pay only the infrastructure charge and are not obliged to pay for the yearly rate: they can opt for a vignette of shorter duration, depending on their actual need. Consequently, when both measures are considered together – as Austria asked the CJEU to do so – there is no less favorable treatment for foreign drivers. The German regulation in question is proportionate as users of the infrastructure can choose the tickets provided for a shorter period of time, while German users have to pay the yearly[3] amount. If Germany were obliged to abolish tax advantages, the owners of domestic vehicles would have been subject to a disproportionate amount of taxation had they been subject to both the infrastructure charge and the motor vehicle tax.

The Advocate General admits that the amount of the motor vehicle tax to be paid by owners of domestic vehicles will be lower than in the past, thanks to the tax relief. However, even if the tax relief had the effect of '*zeroing*' the motor vehicle tax (which is not the case), any foreign driver would be required to pay for using German motorways an amount that would be payable by owners of domestic vehicles.

Therefore, the AG concluded and proposed for the CJEU to dismiss the action, order the Republic of Austria to bear its costs and pay those incurred by the Federal Republic of Germany, and order the Kingdom of Denmark and the Kingdom of the Netherlands to bear their costs.

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[3] For example, in Hungary, we can decide whether we intend to use the motorway. We might use the main roads instead which are not burdened with extra fees. If a Hungarian or foreign citizen opts to choose the motorway, they have the opportunity to choose from several types of tickets depending on the category of the vehicle and the period of time. Hungarian people are not obliged to purchase the yearly ticket. See: https://e-autopalyamatrica.hu/?gclid=CjwKCAiA58fvBRAzEiwAQW-hzayqTFEKUcj-PSy0XmaqGvleelatwnotUGXwBBF85uNBpHujhLAH8BoCKIUQAvD_BwE (30 November 2019)
The same situation is applied e.g. in Slovakia. See: https://eznamka.sk/en (downloaded: 30 November 2019)

4. The reasoning of the CJEU

The CJEU used a different base − a more pragmatic one − to reach its conclusion. Due to our experiences, it is very rare that the CJEU and the AG have such diverse argumentation and conclude so differently from each other.

The CJEU used a pragmatic approach by examining the cumulative effect of different measures. The CJEU based its argumentation on the effect of taxation, and infrastructural fee applied together, and did not agree with the AG on the comparable base of the groups of people. This is important in our view as without comparing two groups to see whether they are in the same situation, or not, we have to analyze if they can be compared. If they have the features to be compared, or not. The AG started by that. The Court hypotised that the groups are comparable as they use the German infrastructure, and even if both groups pay for that, the foreign EU citizens cannot ask it back as tax relief.

Thus, the CJEU found that the effects of the manners examined from the "*result side*" are discriminatory, due to their cumulative impact. The CJEU concluded that as the national laws of which determines the infrastructure charge and the other that includes the tax relief are so connected both by the time (of legislation, then modification) and by the sum, that it is not justifiable to value them separately. (Thus, the subjective aim and the objective content of the national regulations perform a unit and have a cumulative effect on the equal treatment.)

The CJEU found that the infrastructure use charge, in combination with the relief from motor vehicle tax enjoyed by the owners of vehicles registered in Germany, constitutes indirect discrimination on the grounds of nationality and is in breach of the principles of the free movement of goods and of the freedom to provide services. As regards the prohibition of discrimination on grounds of nationality, the Court found that the effect of the relief from motor vehicle tax enjoyed by the owners of vehicles registered in Germany is to offset entirely the infrastructure use charge paid by those persons, with the result that the economic burden of that charge falls, *de facto*, solely on the owners and drivers of vehicles registered in the other Member States.

It is indeed open to the Member States to alter the system for the financing of their road infrastructure by replacing a system of financing by means of taxation with a system of financing by all users, including the owners and drivers of vehicles registered in other Member States who use that infrastructure, so that all those users contribute equitably and proportionately to that financing. However, such alteration must comply with EU law, in particular, the principle of non-discrimination, which is not so in this case.

5. The significance of the judgement

By considering this case, the CJEU addressed the *legal order*.[4] The judgement provides a *de facto* solution. While the AG's opinion was rather a *de iure* one. The CJEU applied the

[4] Niels Kirst: The Court's judgement in C-591/17 (Austria v Germany), or why the German light-vehicle vignette system is discriminatory, European Law Blog, 2019, available at: https://europeanlawblog.eu/2019/06/27/the-courts-judgement-in-c-591-17-austria-v-germany-or-

overriding principle and obligation of non-discrimination[5] and highlighted a *kind of cumulative effect* of an infrastructure charge of the motorway and tax relief for domestic car holders'. According to the CJEU, the cumulative effect of the infrastructural charge and the tax relief amount to indirect discrimination on the grounds of nationality. In the following, we summarize the argumentation of AG *Wahl* and the CJEU.

The CJEU declared that "*the Federal Republic of Germany, by introducing the infrastructure use charge for passenger vehicles and by providing, simultaneously, a relief from motor vehicle tax in an amount at least equivalent to the amount of the charge paid, to the benefit of owners of vehicles registered in Germany, failed to fulfill its obligations under Articles 18, 34, 56 and 92 TFEU*".

Therefore, the infrastructure use charge, in combination with the relief from motor vehicle tax enjoyed by the owners of vehicles registered in Germany, constitutes indirect discrimination on the grounds of nationality and is in breach of the principles of the free movement of goods and of the freedom to provide services. As regards the prohibition of discrimination on grounds of nationality, the Court found that the effect of the relief from motor vehicle tax enjoyed by the owners of vehicles registered in Germany is to offset entirely the infrastructure use charge paid by those persons, with the result that the economic burden of that charge falls, de facto, solely on the owners and drivers of vehicles registered in the other Member States.

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In the case, it was not possible to agree with the argument of Germany, in particular, that relief motor vehicle tax for the owners of vehicles registered in that Member State is a reflection of movement to a system of financing of road infrastructure by all users, according to the '*user pays'* and '*polluter pays'* principles.

Having produced no details of the extent of the contribution of the charge to the financing of federal infrastructure, Germany has in no way established that the compensation granted to the owners of vehicles registered in Germany, in the form of relief from motor vehicle tax to an amount at least equivalent to the amount of the infrastructure use charge which they were required to pay, does not exceed that contribution and is therefore appropriate.

Furthermore, concerning owners of vehicles registered in Germany, the infrastructure use charge is payable annually without any opportunity to choose a vignette for a shorter period if that better corresponds to the frequency of his use of those roads. Those factors, coupled with relief from the motor vehicle tax to an amount that is at least equivalent to the amount paid concerning that charge, demonstrate that the movement to a system of financing based on the '*user pays'* and '*polluter pays'* principles affects the owners and drivers of vehicles registered in the other Member States exclusively, whereas the principle

why-the-german-light-vehicle-vignette-system-is-discriminatory/ (downloaded: 30 November 2019)

5 Article 18, TFEU

of financing by means of taxation continues to apply with respect to owners of vehicles registered in Germany. Moreover, Germany has not established how environmental or other considerations could justify the discrimination found to arise.

As regards the free movement of goods, the Court found that the measures at issue were liable to restrict the access to the German market of goods from the other Member States. The infrastructure use charge to which, in reality, only vehicles that carry those goods are subject is liable to increase the costs of transport and, as a consequence, the price of those goods, thereby affecting their competitiveness. As regards the freedom to provide services, the Court finds that the national measures at issue are liable to restrict the access to the German market of service providers and service recipients from another Member State.

The infrastructure use charge is liable, because of the relief from motor vehicle tax, either to increase the cost of services supplied in Germany by those service providers or to increase the cost for those service recipients inherent in traveling into Germany in order to be supplied with a service there. However, contrary to what is claimed by Austria, the Court finds that the rules for the structuring and application of the infrastructure use charge are not discriminatory. This concerns the random inspections, any prohibition on continuing the journey using the vehicle concerned, the recovery *a posteriori* of the infrastructure use charge, the possible imposition of a fine, and the payment of a security.[6]

6. Concluding remarks: the implications of the case

To highlight the main differences between the argumentation of the CJEU and the opinion of the AG, we would conclude that the perspective of these actors is controversially altering, altering controversial. As the Advocate General uses a scientifically logical, analytical perspective, and the CJEU uses a more pragmatic (practical) one following its case-law and the practical effects of the case. This time, the CJEU did not follow the opinion of the AG. Both methods of the examination are convincing. The most interesting for us is that the CJEU and the AG used different approaches both for the method of analysis and the legal base of argumentation.

In this case, the CJEU faced serious questions related to state competences and their '*intangible borders*'. The Court examined whether there are any inter-relationship and impact assessments between car tax exemption or the infrastructural fee. The CJEU concluded in point 44 of the judgment, that the measures have cumulative effects, both temporally and materially, since the application of the car tax exemption is subject to the charging of an infrastructure charge in the German law. Secondly, the CJEU examined concerning the abovementioned – more economical aspect – the discrimination perspective of the case, too. In point 47 of the judgment, the CJEU concludes that it was necessary to ascertain whether the national measures at issue, assessed jointly, establish a difference in treatment on the ground of nationality. The CJEU also declared that *it must be recalled that the general principle of non-discrimination on the grounds of nationality, as enshrined in the first paragraph of Article 18 TFEU, prohibits not only direct discrimination on the grounds of nationality but also all indirect forms of discrimination which, by the*

[6] See the Press Release No. 75/19., summary of the judgement in C-591/1. case. Available: https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-06/cp190075en.pdf

application of other criteria of differentiation, lead in fact to the same result.[7] This is already a wide interpretation that might be used again and again, from a case-by-case basis, and might base the further development of the anti-discrimination law field. In point 41, the Court forms the legal base for its rule: *It follows that, in the present case, the national measures at issue can be examined having regard to the first paragraph of Article 18 TFEU only to the extent that they apply to situations which do not fall within the scope of such specific rules on non-discrimination laid down by the FEU Treaty.*

In our view, it is not disputed that, in respect of the costs of a vehicle, the tax and the toll are a cumulative burden on the taxable person, the scope of the two provisions is and the judgment, could be evaluated as the creeping extension of Union competences. This derivation, because of the cumulative effect of the combined treatment of the two separate taxes and the parafiscal infrastructural charge provision, establishes an infringement of the principle of *different treatment* based on nationality in Article 18 TFEU. Member State competence is primary, so tax sovereignty is severely impaired in the judgment in our view.

The CJEU also examined the German provision from an environmental point of view, on the basis of the polluter pays principle, and concluded that this principle would also be undermined by the exemption from motor vehicle tax, as it only applies to road users not registered in Germany.

Finally, it can be stated that this case also illustrates that the principle of differential treatment (TFEU 18) is very strong in EU tax law and, in the broad interpretation of the CJEU, must be examined in terms of its overall impact and its direct impact on taxation.

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[7] See, to that effect, judgment of 13 April 2010, *Bressol and Others*, C-73/08, EU:C:2010:181, paragraph 40.