Case note

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Non-discrimination and free movement in a Member State to Member State fiscal dispute: Case C-591/17 *Austria v. Germany*

Case C-591/17 *Austria v. Germany*, EU:C:2019:504

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Abstract

In its judgement in the case of *Austria v. Germany*, the Court of Justice of the EU found the new German motorway financing scheme to be in breach of EU law, namely Articles 18, 34, 56 and 92 TFEU. This decision is noteworthy in several regards. It is a snub for the Commission, which had previously decided to terminate its infringement procedure against Germany. It provides guidance for Member States wishing to reform some of their tax arrangements according to the 'user pays' and 'polluter pays' principles. Finally, it raises interesting questions regarding the application of Article 34 TFEU to fiscal measures.

Keywords

Article 18 TFEU, Article 259 TFEU, Article 34 TFEU, Article 56 TFEU, fiscal measures, freedom of movement, non-discrimination, 'user pays' and 'polluter pays' principles

1. Background to the case

After a political campaign marked by populism, the German government presented a legislative proposal aimed at charging foreigners for the use of German motorways without increasing the burden on German citizens. The law was passed in 2015 and prompted howls of indignation on the part of other Member States, namely Austria and the Netherlands.[1] The Commission opened an

1. J. Quatremer, 'La Cour de justice européenne rappelle à la Commission qu'elle est gardienne des Traités et non des intérêts allemands', *Liberation Blog Les Coulisses de Bruxelles* (2019), http://bruxelles.blogs.liberation.fr/2019/06/23/la-cour-de-justice-europeenne-rappelle-la-commission-quelle-est-gardienne-des-traites-et-non-des-interets-allemands/.

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infringement procedure in 2015 for breach of Articles 18, 34, 45, 56 and 92 TFEU. It then quickly decided to bring proceedings before the Court of Justice.

Much to Austria's surprise, the Commission decided to terminate the procedure after the adoption of certain amendments to the legislation at issue. It later admitted that the move was partly politically motivated,[2] which led caustic observers to write that the Juncker Commission had preferred to serve the German national interests rather than fulfilling its duties as the guardian of the Treaties.[3]

Austria did not yield and used the procedure contained in Article 259 TFEU, which enables a Member State to bring an action for infringement of EU law against another. This provision is rarely used, as Member States usually prefer that the Commission bring an action in their stead under Article 258 TFEU.[4] In the present case, after the Commission failed to issue the reasoned opinion provided for in Article 259 TFEU, Austria decided to take the case to the Court for breaches of Articles 18, 34, 56 and 92 TFEU.[5]

It is noticeably only the fifth time in the Court's history that such an action proceeds to judgment,[6] which makes the present decision particularly interesting from a procedural point of view. The judgment of the Court in the case *Spain v. United Kingdom*[7] may well have been a 'judicial snub' for Spain,[8] but this one is undoubtedly humiliating for the Commission. While Advocate General Wahl is right that the legal analysis carried out by the Court with respect to national measures cannot be based on declarations of politicians,[9] one can only imagine how hard it might be to sell judges on the idea that a national legislation is compatible with EU law when it has been publicly advertised as a means of discriminating against foreigners.

Two measures are at stake in the present case. First, the InfrAG provides for the levy of a charge for the use of federal roads, including motorways, on vehicles weighing less than 3.5 tons (hereinafter, the 'infrastructure use charge').[10] Pursuant to its provisions, owners of vehicles registered in Germany (hereinafter, 'German vehicles'), on the one hand, must pay the charge upfront every year simply by virtue of the fact that their vehicle is registered. Owners or drivers of vehicles registered abroad (hereinafter 'foreign vehicles'), on the other hand, must only pay the charge from the moment of their first use of federal roads after the crossing of the German border. While owners of German vehicles must buy an annual vignette regardless of their actual use of motorways,

2. Opinion of Advocate General Wahl in Case C-591/17 *Austria v. Germany*, EU:C:2019:99, para. 26.
3. J. Quatremer, 'La Cour de justice européenne rappelle à la Commission qu'elle est gardienne des Traités et non des intérêts allemands', *Liberation Blog Les Coulisses de Bruxelles* (2019), http://bruxelles.blogs.liberation.fr/2019/06/23/la-cour-de-justice-europeenne-rappelle-la-commission-quelle-est-gardienne-des-traites-et-non-des-interets-allemands/.
4. L. Burgorgue-Larsen, 'L'identité de l'Union européenne au cœur d'une controverse territoriale tricentenaire: Quand le statut de Gibraltar réapparaît sur la scène judiciaire européenne', 43 *Revue trimestrielle de droit européen,* (2007), p. 25.
5. Case C-591/17 *Austria v. Germany*, EU:C:2019:504.
6. On a total of eight cases. See Case C-141/78 *France v. United Kingdom*, EU:C:1979:225; Case C-388/95 *Belgium v. Spain*, EU:C:2000:244; Case C-145/04 *Spain v. United Kingdom*, EU:C:2006:543; Case C-364/10 *Hungary v. Slovakia*, EU:C:2012:630; and the pending case C-457/18 *Slovenia v. Croatia*.
7. Case C-145/04 *Spain v. United Kingdom*, EU:C:2006:543.
8. L. Burgorgue-Larsen, 43 *RTDeur* (2007), p. 25.
9. Opinion of Advocate General Wahl in Case C-591/17 *Austria v. Germany*, para. 70.
10. See Case C-591/17 *Austria v. Germany*, para. 5-11.

several types of vignettes are available to drivers of foreign vehicles: a 10-day vignette, a 2-month vignette or an annual vignette.

Second, the KraftStG provides for a tax relief applicable to the motor vehicle tax payed by owners of German vehicles (hereinafter, the 'tax relief') which is equivalent to the amount of the annual infrastructure use charge paid by these owners.[11]

Austria claimed that the two measures combined would offset the effect of the new charge for German owners and relied on four grounds of complaint for breach of EU law. The judgment of the Grand Chamber of the Court upheld three of them, widely opposing Advocate General Wahl's Opinion. The findings regarding the first and third grounds of complaint – respectively, Articles 18, and 34 and 56 TFEU – are particularly worth analyzing.

The first ground of complaint concerns an infringement of Article 18 TFEU resulting from the combined effect of the infrastructure use charge and the tax relief. Austria asserts that the measures at issue ought to be assessed jointly under EU law because of their indissoluble link, both in terms of time and substance, and that their combination results in the infrastructure use charge being effectively levied only on drivers of foreign vehicles.[12]

The third ground of complaint concerns an infringement of Articles 34 and 56 TFEU. Austria claims that the German measures constitute restrictions on the free movement of goods and the freedom to provide services, in that such measures may have effects on the cross-border supply of goods and on the provision of services by and to non-residents.[13]

2. Judgment

This section summarizes the main findings of the Court which will be further analyzed in Section 3 and focuses on the first and third grounds of complaints.

Regarding the first ground of complaint the Court considered whether the two German measures at issue should be assessed jointly. It noted that both measures were introduced on the same date and amended on very close dates, and that the tax relief is dependent on the commencement of the collection of the new infrastructure use charge. It continued that the relief benefitting German vehicles corresponds at least to the amount of the charge, which is moreover payable in the same way as the motor vehicle tax.[14] The Court thus found that there was a sufficiently close connection between the measures to justify a joint assessment under EU law.

The Court then identified a difference in treatment between German vehicles and foreign vehicles, given that all vehicles using German motorways are subject to the infrastructure use charge, but only German vehicles qualify for the relief providing, at the very least, compensation for that charge.[15] The Court said the overall financial burden would only rest on owners of foreign vehicles, which amounts to unequal treatment with regard to the use of motorways. Even if this difference in treatment is not based on nationality, the Court considered that it will affect foreign nationals more strongly since the vast majority of foreign vehicles are owned by foreign nationals, whereas the vast majority of German vehicles are owned by Germans.[16]

11. Ibid., para. 12-13.
12. Ibid., para. 24-27.
13. Ibid., para. 111-112.
14. Ibid., para. 44-46.
15. Ibid., para. 48-49.
16. Ibid., para. 51.

Even though the Court acknowledged that Germany decided, with respect to its federal transport infrastructure, to move from a system of financing by means of taxation to a system of financing based on the 'user pays' and 'polluter pays' principles[17], it disagreed that the measures at stake were a reflection of such movement.[18]

In that regard, the Court first objected to Germany's argument that the tax relief aims at avoiding a disproportionate tax burden since the owners of vehicles registered in Germany are already contributing to the financing of the infrastructure by means of the motor tax.[19] It said that Germany had only stated in general terms that its road infrastructure is financed from taxation and found that it had not established 'that the compensation granted to those owners, in the form of a relief from that tax in an amount at least equivalent to the amount of the infrastructure use charge, does not exceed that contribution and is therefore appropriate'.[20]

Second, the Court considered that the design of the new infrastructure use charge is at odds with the objective pursued by Germany of moving to another system of financing. Owners of German vehicles must pay the infrastructure use charge regardless of their use of the infrastructure, which they are later compensated for. Therefore, only owners and drivers of foreign vehicles are subjected to the 'user pays' and 'polluter pays' principles.[21]

As regards justification, the Court observed that no justification could be found in the Eurovignette Directive. It added that Germany failed to establish the appropriateness of its measures for the achievement of any of the legitimate objectives put forward, those being the protection of the environment, the change in the system for financing road infrastructure and the preservation of the coherence of the national tax system.[22] The Court logically concluded that Germany breached Article 18 TFEU.

Regarding the third ground of complaint the Court proceeded in a similar fashion and assessed the measures jointly.[23]

In this respect, as regards the free movement of goods, even though the infrastructure use charge is not levied on goods as such, the Court considered it nonetheless capable of affecting goods delivered using vehicles entering Germany.[24] As the German measures discriminate between German and foreign vehicles, they also discriminate between the goods delivered using German vehicles and those delivered using foreign vehicles.[25] The increase in transport costs due to the infrastructure charge is liable to affect the competitiveness of imported goods. Consequently, according to the Court, the effects of the German measures cannot be deemed too uncertain and indirect to infringe Article 34 TFEU.[26]

As regards the free movement of services, the Court followed a very similar reasoning. It found that 'the infrastructure use charge is liable, because of the relief from motor vehicle tax that is part of the national measures at issue, either to increase the cost of services supplied in Germany by

17. Ibid., para. 61.
18. Ibid., para. 65.
19. Ibid., para. 66 -67.
20. Ibid., para. 67.
21. Ibid., para. 68.
22. Ibid., para. 70-78.
23. Ibid., para. 124 and 140.
24. Ibid., para. 125.
25. Ibid., para. 126.
26. Ibid., para. 127, 130-131.

those service providers, or to increase the cost for those service recipients inherent in travelling into Germany in order to be supplied with a service there'.[27]

Since Germany did not rely on any ground capable of justifying such restrictions, the Court ruled that the national measures at issue constitute restrictions on the free movement of goods and on the freedom to provide services, contrary to Articles 34 and 56 TFEU, respectively.[28]

3. Comment

A. A blow to the European Commission's credibility

The outcome of the present judgment clearly shows that the Commission failed to fulfil its fundamental mission of ensuring the application of the Treaties and overseeing the application of Union law.[29] In this respect, it should be noted that the Commission inexplicably strayed from its standard practice in the framework of Article 259 TFEU proceedings and did not take part in the proceedings before the Court, which is unheard of.

It is unclear whether the Commission remained silent for fear of contradicting itself, arguing that EU law was breached while having previously closed the infringement procedure against Germany, or for fear that it would antagonize Berlin. Nevertheless, it bluntly admitted that the termination of the infringement procedure was aimed at obtaining Germany's support for the establishment of a single European legal framework for a common European road pricing system.[30] While all previous judgments in cases brought under Article 259 TFEU had confirmed the Commission's position,[31] this one sheds an awkward light on the political motives that may interfere with the conduct of its infringement policy.

It has been argued that this judgment may encourage Member States to use Article 259 TFEU, which could undermine mutual trust and 'lead to ongoing suspicions' amongst them,[32] a view that is not shared by the authors. This case is a useful reminder that Commission's decisions under Articles 258 and 259 TFEU may be successfully challenged in court, but there is no reason to think that it should significantly alter Member State reluctance to resort to Article 259 TFEU. The way the Commission handled this case was fortunately exceptional, the procedure shows that Austria only referred to this provision as a last resort, and, as we shall see, the measures at issue were clearly discriminatory.

If anything, this case may adversely affect the trust Member States place in the Commission and weaken its enforcement power. It may also reinforce the rampant and unfortunate feeling among EU citizens that the EU institutions are excessively attentive to German interests, even if, ultimately, it shows that the EU institutional set-up stood the test, since the contested measures were ultimately struck down.

27. Ibid., para. 144.
28. Ibid., para. 133-134, 148-149.
29. Article 17(1) TEU.
30. Opinion of Advocate General Wahl in Case C-591/17 *Austria v. Germany*, para. 26.
31. L. Burgorgue-Larsen, 43 *RTDeur* (2007), p. 25.
32. N. 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), https://europeanlawblog.eu/2019/06/27/the-courts-judgement-in-c-591-17-austria-v-germany-or-why-the-german-light-vehicle-vignette-system-is-discriminatory/.

B. The application of Article 18 TFEU and the freedom of movement provisions

The application of Articles 18, 34 and 56 TFEU to the present case is noteworthy in two regards: the combined application of the general and specific non-discrimination provisions and the application of Article 34 TFEU to fiscal measures.

In the first regard, it is settled case law that Article 18 TFEU ‘is intended to apply independently only to situations governed by EU law in respect of which the FEU Treaty lays down no specific rules on non-discrimination’,[33] such as free movement rules. In *U*, the Court decided for instance to set aside Article 18 when considering a Belgian law requiring Belgian residents to register their vehicles in Belgium to be able to drive them in the country.[34] It explicitly relied on the fact that the principle of non-discrimination was implemented by Article 45 TFEU.[35] This is in contrast with the present judgment, where the Court applied both Article 18 TFEU and the more specific provisions of Articles 34 and 56 TFEU.

This probably stems from the procedural differences between references for preliminary rulings and actions for infringement. It is settled case-law that ‘the justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute’.[36] In *U*, Mr. U fell within the scope of Article 45 TFEU and an answer from the Court on the compatibility of the contested Belgian law with Article 18 TFEU would not have helped the resolution of the dispute at issue.[37] The Court was entitled to set aside this part of the preliminary question. On the contrary, in the framework of an action for infringement, the Court must consider all the potential situations that may arise to determine whether the national measure at issue breaches EU law. In the present case, the Court may have deemed necessary to cover potential situations that may not fall within the scope of Articles 34, 56 and 92 TFEU.

The application of these provisions does not alter the outcome of the present case. As we shall see, the same reasoning is at the heart of every ground of judgment.[38] As the Court found the national measures to be discriminatory, it logically found that they infringed not only Article 18 TFEU, but also Articles 34, 56 and 92 TFEU, provisions which provide for a specific expression of the general principle of non-discrimination contained in Article 18 TFEU.

In the second regard however, it must be noted that, beyond the case at hand, the application of Article 34 TFEU to measures of a fiscal nature raises serious questions, which are unfortunately left totally unaddressed by the Court and the Advocate General.

In this respect, it must be recalled that, in *Brzezinski*, the Court ‘appeared to rule out entirely the application of Article 34 TFEU to fiscal situations’[39] when it said that ‘[t]he scope of [A]rticle [34 TFEU] does not extend to the obstacles to trade covered by other specific provisions and obstacles of a fiscal nature or having an effect equivalent to customs duties, which are covered by Articles

33. Case C-591/17 *Austria v. Germany*, para. 39; see inter alia Case C-384/08 *Attanasio Group*, EU:C:2010:133, para 37; Case C-296/15 *Medisanus*, EU:C:2017:431, para. 62; Case C 420/15 *U*, EU:C:2017:408, para. 16.
34. Case C-420/15 *U*, para. 16.
35. Ibid.
36. Case C-72/15 *Rosneft*, EU:C:2017:236, para. 194.
37. See Case C 420/15 *U*, para. 13.
38. See Case C-591/17 *Austria v. Germany*, para. 126, 143.
39. C. Barnard, *The Substantive Law of the EU* (5th edition, OUP, 2016), p. 67.

[28, 30 and 110 TFEU], do not fall within the prohibition laid down in Article [34 TFEU].'[40] Even prior to this case, it was abundantly clear from the case law that taxes or charges directly applicable to goods, such as excise duties, do not fall within the scope of Article 34 TFEU.

This may stem from the fact that the scope of Article 34 TFEU extends way beyond the mere discriminatory tax arrangements precluded by Article 110 TFEU. National measures whose effect is to hinder access of foreign products originating to the market of a Member State constitute measures having equivalent effect to a quantitative restriction on imports.[41] Since taxes are liable to hinder market access, even if they do not discriminate, they may inherently constitute such measures. Therefore, if the Court examined national fiscal measures under Article 34 TFEU, it would run the risk of frequently having to assess their proportionality, a predicament for Member State fiscal autonomy.

Yet, in the present case, if the Court does not apply Article 34 TFEU to measures directly applicable to goods, the infrastructure use charge is not levied on goods as such,[42] it plainly applies this provision to indirect obstacles of a fiscal nature. It is a novelty that could have far-reaching consequences for Member States.[43] While it is true that this case is concerned with a discriminatory tax arrangement, which may explain the Court's sweeping approach, this decision nonetheless paves the way for the application of Article 34 TFUE to non-discriminatory fiscal measures, following the Court's lead in the field of services.[44]

Given that neither the Court, nor the Advocate General, made any reference to previous case law,[45] it is hard to draw definitive conclusions on the matter. It is however regrettable that the present judgement does not offer adequate judicial predictability in this highly sensitive area. On the contrary, it makes the case law of Court regarding the application of free movement provisions to fiscal measures even more obscure than it already was.[46]

C. The discrimination between German and foreign vehicles

Moving on to the central part of the judgement, it is particularly interesting to observe the contrast between the Opinion of Advocate General Wahl and the judgment of the Court.

The assessment of the comparability of the situations is a key step is any discrimination case. As Advocate General Wahl pointed out, 'to establish a case of discrimination, it is necessary, first of all, to find a suitable "comparator"'.[47] That is particularly true here, since the establishment of a discrimination is instrumental in the Court's reasoning not only under Article 18 TFEU, but also under Articles 34, 56 and 92 TFEU.

40. Case C-313/05 *Brzezinski*, EU:C:2007:33, para. 50 – on this judgment see the similar analysis contained in L. Woods and P. Watson, *EU Law* (12th edition, OUP, 2014), p.375. It has not always been the case, see Case 45/87 *Commission v. Ireland*, EU:C:1988:435, para. 16, where the Court considered that the scope of Article 34 TFEU covered measures falling within the scope of Article 110 TFEU.
41. Case C-110/05 *Commission v. Italy*, EU:C:2009:66, para. 37.
42. Case C-591/17 *Austria v. Germany*, para. 125.
43. There is, to the knowledge of the authors, no case post-*Brzezinski* which would point in that direction.
44. See Case C-98/14 *Berlington Hungary e.a.*, EU:C:2015:386, para. 33-43.
45. Case C-591/17 *Austria v. Germany*, para. 126, 143.
46. See Case C-98/14 *Berlington Hungary e.a.*, para. 33-43; Case C-544 and 543/03 *Mobistar*, EU:C:2005:518, para. 35; Case C-48/15 *NN (L) International*, EU:C:2016:356, para. 4; see the discussion by C. Barnard, *The Substantive Law of the EU*, p. 425-426.
47. Opinion of Advocate General Wahl in Case C-591/17 *Austria v. Germany*, para. 43.

In this respect, it is necessary to determine which measures are to be taken into consideration in order to compare owners of German and foreign vehicles. Advocate General Wahl considered that, when comparing the two categories with respect to their use of the German motorways, the infrastructure use charge and the tax relief could not be both taken into account. He believed that owners of German vehicles benefit from the tax relief as German taxpayers while owners of foreign vehicles may be subject to other taxes in their own country, but will never be required to pay the German motor vehicle tax.[48] He concluded that these two categories are not comparable in light of both measures considered jointly.[49] It may be inferred from this reasoning that, when comparing the two categories of vehicles, one should also take into account taxes incurred by foreign vehicles. This would make little legal and practical sense.

Proceeding nevertheless to compare the two categories, the Advocate General found that owners of foreign vehicles are not, and can never be, in a situation less favourable than that in which owners of domestic vehicles find themselves.[50] He argues that even if the tax relief fully compensated for the motor vehicle tax, owners of German vehicles would still have to pay a higher or equivalent amount of money, all things considered, since they must pay the entire annual infrastructure use charge anyway.[51] A crucial aspect of the Advocate General's reasoning is thus that the motor vehicle tax and the corresponding relief should be assessed jointly. As he put it, 'there can be no tax relief without a tax in the first place'.[52]

The Court plainly disagreed. It is clear from paragraph 48 of the judgment that it did not include the motor vehicle tax in its analysis. It considered that the tax relief compensates owners of German vehicles for the infrastructure use charge and that the fact that these owners are, in addition, subject to the motor vehicle tax did not affect its findings as to the existence of a discrimination.[53]

The Court said that the tax relief is inherently linked to the infrastructure use charge.[54] The link between the tax relief and the motor vehicle tax however appears to be purely artificial. In a way, this tax relief could have been applied to any other tax. That is why it is not relevant to incorporate the motor vehicle tax into the comparison of the two categories of drivers.

The situation would probably have been different, in the eyes of the Court, had Germany shown that the relief was introduced to avoid a double-burden situation. This would have been the case if the motor tax had partly or fully served the financing of the road infrastructure, something that Germany apparently failed to properly evidence.[55] In addition, as pointed out by the Court, Germany should have also shown that the compensation introduced by the tax relief was proportionate to the amount previously paid by German owners for the financing of federal roads through the motor tax. Germany failed again to provide adequate evidence.[56]

Finally, it would appear that Germany introduced a charge for foreign travelers using its motorways while trying to disguise it, one might say quite skillfully, as a reshuffle of the financing

48. Ibid., para. 49.
49. Ibid., para. 50.
50. Ibid., para. 53.
51. Ibid., para. 55.
52. Ibid., para. 57.
53. Case C-591/17 *Austria v. Germany*, para. 52.
54. Ibid., para. 44-46.
55. Ibid., para. 67.
56. Ibid.

system for federal roads. The Court was correct in not considering the motor vehicle tax in its entirety, but the brevity of this part of the judgement is nonetheless regrettable, as it leaves more questions than answers. The Court notably failed to engage with the Advocate General's arguments and only started unpacking his reasoning when answering to the arguments put forward by Germany.

D. The impact on Member State fiscal autonomy

Beyond the specific measures at stake, this judgement raises the broader question of the freedom of action of Member States when it comes to moving from a system of financing by means of taxation to a system of financing based on the 'user pays' and 'polluter pays' principles. Germany relied on that argument to defend its measures.

As the Court found, the German scheme at issue does not constitute a genuine move towards a system based on the aforementioned principles. German drivers need to pay the annual infrastructure charge regardless of their actual use of the motorways. Their contribution is based on the sole fact that they own a vehicle registered in Germany. The move to a user-based system therefore only concerns foreign drivers, while Germans continue in reality to pay for the roads through another form of general taxation.

But in the absence of any form of tax relief, would this specific feature of the infrastructure use charge make it incompatible with EU law? Nothing in the judgement allows to draw a definitive conclusion, even though the Court appears to view the design of the new charge quite negatively.

The authors argue that the present judgement should not be read as preventing Member States from altering their road infrastructure financing systems in order to make all users of these roads pay, including foreigners. Further, even though the Court's stance on this matter is all but clear, nothing under EU law should forbid a Member State to design a system in which its fiscal residents pay an annual charge disconnected from their actual use of the roads while foreign drivers pay a charge only when they use the roads, as long as the total amount paid by the latter does not exceed the amount paid by the former. Had Germany established a new system without any form of tax relief, it may have been considered compliant with EU law. Had Germany brought forward evidence showing that the tax relief constituted a measure designed to avoid a genuine double tax burden, its measures would have also been considered in line with EU law.

Conclusion

The judgment is a timely reminder that the European Union can count on the Court to ensure that fundamental rules of EU law, such as the principle of non-discrimination, are duly applied by Member States even when the Commission fails to enforce them.

The Court commendably sanctioned an infringement of the principle of non-discrimination: regardless of the intent of the German government, the foreseen reform of the financing of road infrastructure would have made the financial burden of the new charge rest solely on the owners of foreign vehicles.

Too much should not be read into this judgment. It does not prevent Member States from reshuffling their tax systems according to the 'user-pays' principle and requiring foreign nationals to contribute to the financing of their network infrastructures. The Court has provided useful, if unclear, guidance as to how to bring about such a change in compliance with EU law.

However, the application of the free movement of goods to fiscal measures does raise the question of a greater scrutiny of the Court over Member State fiscal arrangements with potential far-reaching consequences. It remains to be seen if the Court will strongly assert its competence in the very politically sensitive field that is taxation in the future.

Authors' note

The views expressed here are solely those of the writers and should not in any circumstances be regarded as stating an official position of the SGAE or the French Government.

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