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The first preliminary ruling requested by the Portuguese Constitutional Court - 2020, what a year!

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Il 9 dicembre 2020 la Corte costituzionale portoghese ("PCC") ha sottoposto alla Corte di giustizia dell'Unione europea ("CGUE") la sua prima questione pregiudiziale. In una causa che avrebbe comportato la necessità di bilanciare diverse norme del Trattato, quali il diritto tributario dell'UE antidiscriminatorio (articolo 110 TFUE) e la tutela dell'ambiente (articolo 191 TFUE), la CPC ha riconosciuto la sua natura di corte contro le cui decisioni non esiste un ricorso giurisdizionale nazionale e ha sottoposto la questione alla Corte di giustizia dell'Unione europea. Questa sentenza va letta in combinato disposto con la sentenza nella causa n. 422/2020 del 15 luglio 2020, in cui il CPC ha riconosciuto alla CGUE la competenza esclusiva di interpretare e valutare la validità del diritto dell'UE, dichiarando di conseguenza la sua incompetenza a farlo. Dopo aver riassunto i fatti principali della causa, il presente articolo si propone di analizzare le sue conseguenze sul rapporto tra la CPC e la CGUE.

On 9th December 2020, the Portuguese Constitutional Court ('PCC') referred its first question for preliminary ruling to the Court of Justice of the European Union ('CJEU'). In a case allegedly entailing the need to balance different Treaty rules such as anti-discriminatory EU tax law (Article 110 TFEU) and environmental protection (Article 191 TFEU), the PCC acknowledged its nature as a court against whose decisions there is no judicial remedy under national law and referred the matter to the CJEU. This ruling shall be read in combination with the judgment in Case no. 422/2020 of 15th July 2020, where the PCC recognized the CJEU's exclusive competence to interpret and assess the validity of EU law, consequently declaring its lack of jurisdiction to do so. After summarizing the main facts of the case, this article aims at analysing its consequences for the relationship between the PCC and the

CJEU.

1. Circumstances of the case

A Portuguese company selling second-hand cars imported from other Member States sought before CAAD (a national arbitral tribunal for tax issues) the partial annulment of a tax assessment notice and the reimbursement by the Portuguese Tax Authority (AT) of part of the amounts paid under the Vehicle Tax Code (VTC). It argued that Article 11 of said Code was in breach of Article 110 TFEU and should therefore be disapplied by the national tribunal.

Pursuant to Article 110 TFEU, ‘no Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products’.

Under Article 11 of the VTC, pertaining to the taxable value of second-hand cars imported from other Member States, depreciation is only applied to the cylinder component used to calculate the value of a used vehicle. Differently, when it comes to national vehicles, depreciation is also applied to the environmental component. Second-hand imported vehicles are thus subject to a less favourable tax treatment when compared to similar national ones, allegedly contravening Article 110 TFEU.

The Arbitral Tribunal decided in favour of the Claimant, finding that the internal tax calculation of second-hand cars was in breach of anti-discriminatory EU tax law (Article 110 TFEU). Accordingly, it refused to apply the national provision at stake.

2. Appeal before the Constitutional Court

AT filed an appeal before the PCC, on the grounds that the appealed decision refused to apply a national provision due to its incompatibility with an international treaty (Article 70 (1) (i) of the Law of the Constitutional Court - Law no. 28/82, 15th November).

To uphold its appeal, AT argued that Article 110 TFEU should be read in

combination with Article 191 TFEU, which provides for environmental protection. According to the appellant, Article 11 of the VTC is based on the polluter-pays principle and seeks to discourage consumers from buying vehicles with high carbon dioxide emissions. Consequently, since it also attempts to comply with EU objectives, namely Article 191 TFEU, it should not be deemed contrary to EU law.

3. The Decision

The PCC recalled its findings in Case no. 422/2020, restating its full recognition of the principle of primacy of EU law and the stemming exclusive competence of the CJEU to interpret and assess the validity of EU law, through the preliminary ruling procedure instituted by Article 267 TFEU.

In addition, it pointed out that this procedure is a consequence of the principles of sincere cooperation, mutual respect and a general manifestation of the dialogue that ought to prevail between national and EU courts.

Under Article 267, paragraph 2, TFEU, any national court or tribunal faced with a case raising questions pertaining to the interpretation or validity of EU law may refer a question to the CJEU. Differently, when such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the CJEU (Article 267, paragraph 3, TFEU).

Confirming its nature as a court against whose decisions there is no judicial remedy under national law and considering that the case at stake raised a question concerning the interpretation of Article 110 TFEU, the PCC concluded that the conditions for it to refer (its first) question for preliminary ruling to the CJEU were met.

After summarizing both the factual and legal frameworks for the reference for preliminary ruling, the PCC explained the reasons behind its interpretative doubts and pointed out that the application of Article 110 TFEU to the Portuguese Vehicle Tax Code had already been raised before the CJEU, both in the context of preliminary rulings and infringement procedures. However, the CJEU has not ruled yet on the environmental component specifically at stake in this case.

4. Comment

Focusing firstly on the consequences of this case for the tax regime at stake, should the CJEU confirm that Article 110 TFEU opposes a national provision such as Article 11 of the VTC, an amendment of the said Code is likely to occur. In fact, the tax reduction based on the cylinder component was introduced in the VTC following an infringement procedure brought by the European Commission and the subsequent CJEU's ruling. Likewise, the lack of an environmental component in Article 11 has led to another infringement procedure, currently pending before the CJEU (C-169/20). Therefore, this reference for preliminary ruling might urge the Portuguese legislator to foresee a tax reduction applicable to vehicles from other Member States concerning the environmental component.

From a broader perspective, 2020 has been a remarkable year for the relationship between the PCC and the CJEU.

In July, as we mentioned before, the PCC declined jurisdiction to rule on the validity of an EU provision in light of the equality principle enshrined in the Portuguese Constitution. At that instance, it recalled some of the basic principles of EU law, such as primacy and direct effect, evident in the paradigmatic *Costa v. Enel* and *Van Gend en Loos* judgments. As we pointed out back then, this could signal the PCC's willingness to resort to the preliminary ruling procedure.

Indeed, that is precisely what happened. Five months later, a preliminary ruling, the first one, was requested. This judgment thus follows the path initiated in July. Firstly, the PCC acknowledged its lack of jurisdiction to interpret and assess the validity of EU law, a matter falling under the exclusive competence of the CJEU. Subsequently, facing a case claiming for the interpretation of an EU law provision, it decided to stay the proceedings and refer a question for preliminary ruling to the CJEU.

The two judgments represent a remarkable advancement in the interplay between the two legal orders. Almost 30 years after the first reference for preliminary ruling was made by a Portuguese court - *Mecanarte Metalurgica da Lagoa v Alfândega do Porto* Case (C-348/89) -, the PCC finally took part of the judicial dialogue with the CJEU.

Indeed, the preliminary ruling procedure is a key element of the European

project. It enables the coexistence of multiple national legal orders with an international set of rules prevailing over the former, albeit without a hierarchy of courts being established. The preliminary ruling procedure thus assures uniform interpretation of EU law in all Member States and guarantees its useful effect.

The timing for this judgment could not be better, taking into account that the Portuguese Presidency of the Council is about to start. It is now time for Portugal to play a more active role in the process of European integration. The PCC, the guardian of the Portuguese Constitution, is thus showing its willingness to go a step further and to cooperate with the CJEU, assuring the correct interpretation and application of EU law within its jurisdiction.

Finally, since the question for preliminary ruling also concerns the interpretation of Article 191 TFEU, this case might also give the Court the opportunity to build on its case-law on environmental protection, undoubtedly a hot topic nowadays. As a final remark, we hope that this was the first of many chapters of the judicial cooperation between the PCC and the CJEU. If this is so, citizens' rights will indisputably be reinforced and EU's legitimacy will be enhanced.