COURT OF JUSTICE
OF THE EUROPEAN UNION

EN

Fact sheet

Excise duty

Foreword

Excise duty refers to indirect taxes that are based on the consumption or use of certain products. Unlike value added tax (VAT), which is a general *ad valorem* tax, excise duty is a doubly specific tax in that it is levied only on certain products, namely alcoholic beverages, manufactured tobacco and energy products, and it is not based on the value of those products, but rather on the quantities of the products consumed (litres of alcohol or fuel, number of cigarettes, etc.).

In order to ensure the proper functioning of the internal market and to avoid distortions of competition within the European Union, excise duties have been harmonised at European level in accordance with Article 113 of the Treaty on the Functioning of the European Union.

Secondary legislation was adopted in the mid-1990s, before being recast at the end of the 2000s. Specific directives harmonise the tax bases (definition of categories of products, of the manner in which excise duty is to be calculated – for example, by hectolitre, by alcohol content, by number of items etc. – and possible exemptions) and the minimum rates applicable to the different products concerned. A general directive organises the common arrangements applied to the production, holding and movement of such products.

The Court has ruled on numerous occasions on aspects of the operation of the excise duty regime, whether it be the specific taxation arrangements for the products concerned or the common arrangements for the holding and movement of such products.

Accordingly, the Court has, in often technical cases, clarified the scope of excise duty in order to determine on a case-by-case basis whether or not specific products are subject to taxation. It has also ruled on the structure of those taxes on several occasions, in particular as regards the application of different rates and exemptions laid down by the legislation.

The Court's case-law also encompasses the rules on chargeability and payment of excise duty.

Going beyond excise duty in the strict sense, the Court has also specified the conditions in which Member States are able to levy other indirect taxes on products subject to excise duty.

List of acts referred to

General arrangements for products subject to excise duty

Council **Directive 92/12/EEC** of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1).

Council **Directive 92/108/EEC** of 14 December 1992 amending Directive 92/12/EEC on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products and amending Directive 92/81/EEC (OJ 1992 L 390, p. 124).

Council **Directive 96/99/EC** of 30 December 1996 amending Directive 92/12/EEC on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1997 L 8, p. 12).

Council **Directive 2008/118/EC** of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC (OJ 2009 L 9, p. 12).

Commission **Regulation (EEC) No 3649/92** of 17 December 1992 on a simplified accompanying document for the intra-Community movement of products subject to excise duty which have been released for consumption in the Member State of dispatch (OJ 1992 L 369, p. 17).

Special arrangements for products subject to excise duty

Council **Directive 95/59/EC** of 27 November 1995 on taxes other than turnover taxes which affect the consumption of manufactured tobacco (OJ 1995 L 291, p. 40).

Council **Directive 2011/64/EU** of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco (OJ 2011 L 176, p. 24).

Council **Directive 92/83/EEC** of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages (OJ 1992 L 316, p. 21).

Council **Directive 92/84/EEC** of 19 October 1992 on the approximation of the rates of excise duty on alcohol and alcoholic beverages (OJ 1992 L 316, p. 29).

Council **Directive 2003/96/EC** of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ 2003 L 283, p. 51).

Council **Directive 92/81/EEC** of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils (OJ 1992 L 316, p. 12).

Council **Directive 92/82/EEC** of 19 October 1992 on the approximation of the rates of excise duties on mineral oils (OJ 1992 L 316, p. 19).

Customs rules

Council **Regulation (EEC) No 2913/92** of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1).

Commission **Regulation (EEC) No 2454/93** of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 1993 L 253, p. 1).

Regulation (EC) No 955/1999 of the European Parliament and of the Council of 13 April 1999 amending Council Regulation (EEC) No 2913/92 with regard to the external transit procedure (OJ 1999 L 119, p. 1).

Commission **Regulation (EC) No 1662/1999** of 28 July 1999 amend[ing] Regulation (EEC) No 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 1999 L 197, p. 25).

Council **Regulation (EEC) No 2658/87** of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1).

Commission **Regulation (EEC) No 2587/91** of 26 July 1991 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the common customs tariff (OJ 1991 L 259, p. 1).

Common system of value added tax

Sixth Council **Directive 77/388/EEC** of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1).

Mutual assistance for the recovery of certain tax claims

Council **Directive 76/308/EEC** of 15 March 1976 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures (OJ 1976 L 73, p. 18).

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1. Harmonisation of excise duty on manufactured tobacco

1.1. Scope of excise duty applied to manufactured tobacco

Judgment of 6 April 2017, Eko-Tabak (C-638/15, EU:C:2017:277)

(Reference for a preliminary ruling – Directive 2011/64/EU – Article 2(1)(c) – Article 5(1)(a) – Definitions of 'smoking tobacco', 'tobacco which has been cut or otherwise split' and 'industrial processing')

The South Bohemian Region Customs Office (Czech Republic) ordered the confiscation of a number of products belonging to Eko-Tabak on the ground that these constituted smoking tobacco within the meaning of the national Law on excise duties and, accordingly, were subject to excise duty.

Eko-Tabak brought an action against that decision before the Krajský soud v Českých Budějovicích (Regional Court of České Budějovice, Czech Republic), arguing that the definition of smoking tobacco under the national law broadened excessively the list of manufactured tobacco products set out in Directive 2011/64. Eko-Tabak takes the view that its product – dried, flat, irregular, partly stripped leaf tobacco and/or parts thereof which have undergone primary drying and controlled dampening, which contain glycerine – must be further processed in order to be smoked (simple processing by means of crushing or hand-cutting). It is not therefore smoking tobacco.

After Eko-Tabak's action had been dismissed, it brought an appeal before the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic). That court has doubts as to whether products such as those at issue in the main proceedings constitute manufactured tobacco to which Directive 2011/64 applies. If the answer to that question is in the negative, the referring court seeks to establish whether Articles 2 and 5 of the directive preclude a Member State from imposing duty on such products.

The Court holds that Article 2(1)(c) and Article 5(1) of Directive 2011/64 must be interpreted as meaning that dried, flat, irregular, partly stripped leaf tobacco and/or parts thereof which have undergone primary drying and controlled dampening, which contain glycerine and which are capable of being smoked after simple processing by means of crushing or hand-cutting, fall within the definition of 'smoking tobacco' for the purpose of those provisions.

It is apparent from the wording of Article 5(1)(a) of Directive 2011/64 that that provision requires that two cumulative conditions are met, namely, first, that the tobacco be cut or

otherwise split, twisted or pressed into blocks and, secondly, that it is capable of being smoked without further industrial processing.

In that regard, there being no definition of the words ‘cut’ and ‘split’ in that directive, it is necessary, in order to determine the scope of those words, to refer to their usual and everyday accepted meanings. Those words, the usual meaning of which is very wide, refer, inter alia, as regards the first, to the result of the process of removing a part or a piece of something with a sharp instrument, and, as regards the second, to the result of the process of breaking up or dividing something.

Consequently, in so far as the products at issue in the main proceedings consist, according to the information provided by the referring court, of tobacco leaves which have been partly stripped, those products must be regarded as tobacco which has been cut or otherwise split within the meaning of Article 5(1)(a) of Directive 2011/64.

Concerning the concept of ‘industrial processing’ used in Article 5(1)(a), this commonly refers to the transformation, usually on a large scale and by a standardised process, of raw materials into tangible goods.

It follows from the case-law of the Court of Justice, in essence, that simple handling intended to make an unfinished tobacco product capable of being smoked, such as merely inserting a roll of tobacco into a cigarette tube, is not ‘industrial processing’.

In those circumstances, manufactured tobacco which is ready, or can easily be made ready, by non-industrial means, to be smoked must be considered to be capable of being smoked without further ‘industrial processing’ within the meaning of Article 5(1)(a) of Directive 2011/64.

In the present case, as is apparent from the order for reference, the products at issue in the main proceedings have undergone primary drying and controlled dampening, contain glycerine and are capable of being smoked after simple processing by means of crushing or hand-cutting. Subject to verification by the referring court, it therefore appears that those products also satisfy the condition that they are capable of being smoked without further industrial processing and, therefore, fall within the definition of ‘smoking tobacco’ laid down in Article 5(1)(a) of Directive 2011/64.

In those circumstances, as they do not constitute fine-cut tobacco for the rolling of cigarettes within the meaning of Article 2(1)(c)(i) of that directive, such products must then be regarded as falling within the definition of ‘other smoking tobacco’ within the meaning of Article 2(1)(c)(ii) of that directive.

2.1. Structure of excise duty applied to manufactured tobacco

Judgment of 4 March 2010, Commission v France (C-197/08, EU:C:2010:111)
Judgment of 4 March 2010, Commission v Austria (C-198/08, EU:C:2010:112)
Judgment of 4 March 2010, Commission v Ireland (C-221/08, EU:C:2010:113)

(Failure of a Member State to fulfil obligations – Directive 95/59/EC – Taxes other than turnover taxes which affect the consumption of manufactured tobacco – Article 9(1) – Free determination, by manufacturers and importers, of the maximum retail selling prices of their products – National legislation imposing a minimum retail selling price for cigarettes – National legislation prohibiting the sale of tobacco products 'at a promotional price which is contrary to public health objectives' – Concept of 'national systems of legislation regarding the control of price levels or the observance of imposed prices' – Justification – Protection of public health – World Health Organisation Framework Convention on Tobacco Control)

(Failure of a Member State to fulfil obligations – Directive 95/59/EC – Taxes other than turnover taxes which affect the consumption of manufactured tobacco – Article 9(1) – Free determination, by manufacturers and importers, of the maximum retail selling prices of their products – National legislation imposing a minimum retail selling price for cigarettes and a minimum retail selling price for fine-cut tobacco – Justification – Protection of public health – World Health Organisation Framework Convention on Tobacco Control)

(Failure of a Member State to fulfil obligations – Directive 95/59/EC – Taxes other than turnover taxes which affect the consumption of manufactured tobacco – Article 9(1) – Free determination, by manufacturers and importers, of the maximum retail selling prices of their products – National legislation imposing a minimum retail selling price for cigarettes – Justification – Protection of public health – World Health Organisation Framework Convention on Tobacco Control)

Directive 95/59 provided that manufacturers and importers of manufactured tobacco are free to determine the maximum retail selling price for each of their products. According to the Commission, the legislation of three Member States, which imposes minimum prices corresponding to a certain percentage of the average prices of the manufactured tobacco concerned (95% in the case of France, 92.75% for cigarettes and 90% for fine-cut tobacco in the case of Austria and 97% in the case of Ireland), undermines the freedom of manufacturers and importers to determine the maximum retail selling prices of their products and, correspondingly, free competition.

The Commission then brought proceedings before the Court, because it took the view that the national legislation at issue was contrary to Directive 95/59.

The Member States had attempted to justify their legislation by invoking the Framework Convention of the World Health Organisation (WHO) and the provisions of Article 30 EC in order to justify an infringement of Article 9(1) of Directive 95/59/EC with reference to the objective of protection of health and life of humans.

The Court rules, in a similar manner in its three judgments, that a Member State fails to fulfil its obligations under Article 9(1) of Directive 95/59, as amended by Directive 2002/10, where it adopts and maintains in force legislation by which the public authorities fix minimum prices for the retail sale of manufactured tobacco, and where such a system does not make it possible to ensure, in any event, that the minimum price imposed does not impair the competitive advantage which could result for some producers and importers of tobacco products from lower cost prices. Such a system, which furthermore fixes the minimum price by reference to the average price on the market, is likely to eliminate price differences between competing products and to cause prices to converge around the price of the most expensive product. That system therefore undermines the freedom of producers and importers to determine their maximum retail selling price, guaranteed by the second paragraph of Article 9(1) of Directive 95/59.

In addition, the World Health Organisation Framework Convention on Tobacco Control cannot affect the compatibility or otherwise of such a system with Article 9(1) of Directive 95/59 since that Convention imposes no actual obligation on the Contracting Parties with regard to price policies for tobacco products, and merely describes possible approaches by which to take account of national health objectives concerning tobacco control. Article 6(2) of the Convention provides only that the Contracting Parties are to adopt or maintain measures which ‘may include’ implementing tax policies and, ‘where appropriate’, price policies, concerning tobacco products.

Lastly, Member States may not rely on Article 30 EC in order to justify an infringement of Article 9(1) of Directive 95/59 with reference to the objective of protection of health and life of humans. Article 30 EC cannot be understood as authorising measures other than the quantitative restrictions on imports and exports and the measures having equivalent effect envisaged by Articles 28 EC and 29 EC.

The fact remains that Directive 95/59 does not prevent the Member States from taking measures to combat smoking, which forms part of the objective of protecting public health.

In this regard, fiscal legislation is an important and effective instrument for discouraging consumption of tobacco products and, therefore, for the protection of public health, given that the objective of ensuring that a high price level is fixed for those products may adequately be attained by increased taxation of those products, the excise duty increases sooner or later being reflected in an increase in the retail selling price, without undermining the freedom to determine prices.

2. Harmonisation of excise duty on alcoholic beverages

2.1. Scope of excise duty applied to alcoholic beverages

Judgment of 13 March 2019, B. S. (Malt in the composition of beer) (C-195/18, EU:C:2019:197)

(Reference for a preliminary ruling – Taxation – Excise duties on alcohol and alcoholic beverages – Directive 92/83/EEC – Article 2 – Definition of 'beer' – Beverage produced from wort obtained from a mixture containing more glucose than malt – Combined Nomenclature – Heading 2203 (beer made from malt) or 2206 (other fermented beverages))

The applicant produced an alcoholic beverage which he stated to be a mixture of beer and non-alcoholic beverages. The main ingredient of the wort from the intermediate product used for making that beverage was glucose syrup, not malt (100 hectolitres of wort was obtained from 134.9 litres of malt extract, 1 708.2 litres of glucose syrup, 9 litres of citric acid, 2.4 litres of ammonium phosphate, yeast nutrient and water).

In respect of that production, he sent the competent customs office each month an excise duty declaration describing the beverage manufactured by him as a 'mixture of beer' within Combined Nomenclature (CN) position 2203 and non-alcoholic beverages and applying the rate of excise duty for beer.

The head of the customs office contested those declarations, taking the view that the beverage manufactured should be classified under CN heading 2206 as a beverage based on fermented beverages other than beer and on non-alcoholic beverages, and should therefore be subject to a higher rate of excise duty. The head of the customs office stated as justification that the main ingredient used for making the intermediate product was glucose syrup, not malt, and that the product could not therefore be classified under CN heading 2203, which refers to 'beer made from malt'.

In that dispute, the applicant was convicted for misleading the Polish tax authorities as to the nature of the beverage produced by him, leading to a reduction of the excise duty for which he was liable. The applicant therefore appealed to the referring court against that decision.

According to the referring court, to determine whether the applicant has committed a criminal offence, it is essential to know whether the beverage manufactured by him was rightly classified by him as a 'mixture of beer', falling within CN heading 2203, and non-alcoholic beverages, or whether it is a beverage based on a fermented beverage other than beer and non-alcoholic beverages.

In those circumstances, the referring court decided to stay the proceedings and to refer to the Court the question, in essence, whether Article 2 of Directive 92/83 must be interpreted as meaning that an intermediate product intended to be mixed with non-alcoholic beverages, obtained from a wort containing less malt ingredients than non-

malt ingredients and to which glucose syrup is added before the fermentation process, may be classified as 'beer made from malt' within CN heading 2203.

The Court holds that Article 2 of Directive 92/83 includes under the description of 'beer' not only any product falling within CN heading 2203 ('Beer made from malt') but also any product containing a mixture of beer with non-alcoholic drinks falling within CN heading 2206 ('Other fermented beverages (for example, cider, perry, mead); mixtures of fermented beverages and mixtures of fermented beverages and non-alcoholic beverages, not elsewhere specified or included'), in either case with an actual alcoholic strength by volume exceeding 0.5% vol. There is no doubt that the product at issue – a mixture of an intermediate alcoholic product, obtained by fermentation, and non-alcoholic beverages – cannot be classified within CN heading 2203. Classification as 'beer' could be accepted only if the intermediate alcoholic product can itself be classified as 'beer made from malt' within the meaning of CN heading 2203; it does not appear to be disputed that the end product has an alcohol content exceeding 0.5% vol.

In this regard, the Court applies its settled case-law according to which the decisive criterion for the tariff classification of goods is to be sought in their objective characteristics and properties as defined in the wording of the relevant CN heading and the explanatory notes drawn up by the Commission as regards the CN and by the World Customs Organisation (WCO) as regards the Harmonised System (HS). In order for any classification of 'beer made from malt' to be able to be accepted in respect of the intermediate product in this case, the Court finds that, of course, malt must be used as an ingredient of the product, but that neither the CN nor the explanatory note to the HS lays down its percentage. Moreover, the explanatory note expressly provides that certain quantities of unmalted cereals may be used for preparing the wort, without requiring the proportion of those non-malt ingredients to be smaller than that of malt ingredients, and that adding glucose syrup is not prohibited. Furthermore, the explanatory note, in which there is a divergence in the language versions, expressly recognises the possibility of flavourings being added to the wort during fermentation, which does not preclude ipso facto the product at issue from being classified as 'beer made from malt'. It is further necessary that the objective characteristics and properties, in particular the organoleptic characteristics of the product, correspond to those of beer. With regard to a point of fact, it is for the national court to establish whether or not the intermediate alcoholic product mixed with non-alcoholic beverages in order to obtain the end product corresponds to beer (in particular on account of the visual resemblance or specific taste). It is only if these conditions are met that the product may be classified with CN heading 2203 and the excise duty on beer.

Judgment of 9 December 2010, Répertoire Culinaire (C-163/09, EU:C:2010:752)

(Directive 92/83/EEC – Harmonisation of the structures of excise duties on alcohol and alcoholic beverages – Article 20, first indent, and Article 27(1)(e) and (f) – Cooking wine, cooking port and cooking cognac)

Répertoire Culinaire, a London food wholesaler, imported from France cooking wine, port and cognac, liquors to which the manufacturer added salt and pepper so that they can be used only in the preparation of foods and are unfit for consumption as beverages.

The United Kingdom tax authorities nevertheless took the view that those products had to be subject to excise duty on alcohol and therefore seized those goods on their importation.

Répertoire Culinaire was in dispute with the United Kingdom authorities over the restoration of those goods.

Although the Court had affirmed the liability to excise duty of cooking wine once already in the judgment of 12 June 2008, *Gourmet Classic* (C-458/06, EU:C:2008:338), the referring court requested the Court, by its first question, to clarify whether Article 20, first indent, of Directive 92/83 must be interpreted as meaning that the definition of 'ethyl alcohol' in that provision applies to cooking wine and cooking port and to reconsider its legal assessment in that case.

The third question sought to identify on what legal basis an exemption of cooking liquors should be granted.

By its fourth question, the referring court wished to know what obligations arise for the Member State of importation from the fact that cooking liquors have already been exempted from excise duty in the Member State of manufacture before being released into movement within the European Union.

Lastly, the second question sought to ascertain what are the arrangements for the application of the exemption where the Member State has opted for a excise duty refund model. Such a refund is possible in the United Kingdom only under very narrow conditions.

The Court rules, first, that Article 20, first indent, of Directive 92/83 must be interpreted as meaning that the definition of ethyl alcohol in that provision applies to cooking wine and cooking port.

The fact that cooking wine and cooking port are, as such, regarded as edible preparations falling within chapter 21 of the combined nomenclature annexed to Regulation No 2658/87, as amended by Regulation No 2587/91, and that they are unsuitable for consumption as beverages does not affect the fact that Article 20 of Directive 92/83 is applicable to the ethyl alcohol contained in them.

Second, the Court holds that an exemption from the harmonised excise duty for cooking wine, cooking port and cooking cognac used for the production of foodstuffs falls under Article 27(1)(f) of Directive 92/83.

Such products could fall under Article 27(1)(e) of that directive only if they were used for the production of flavours for the preparation of foodstuffs and non-alcoholic beverages.

Third, the uniform application of the provisions of Directive 92/83 requires that the imposition or not of excise duty on a product and the exemption from duty of a product in a Member State must, as a rule, be recognised by all the other Member States. Any other interpretation would compromise the attainment of the objective of Directive 92/83 and would be likely to hinder the free movement of goods.

Thus, if products such as cooking wine, cooking port and cooking cognac, which have been treated as not being subject to excise duty or as being exempted from that duty under Directive 92/83 and released for consumption in the Member State of manufacture, are intended to be put on the market in another Member State, the latter must treat those products in the same way in its territory, unless there is concrete, objective and verifiable evidence that the first Member State has failed to apply the provisions of that directive correctly or that, in accordance with Article 27(1) thereof, it is justifiable to adopt measures to combat any evasion, avoidance or abuse which may arise in the field of exemptions and to ensure the correct and straightforward application of such exemptions.

Lastly, fourth, the Court rules that Article 27(1)(f) of Directive 92/83 must be interpreted as meaning that the exemption contained in that provision may be made conditional on compliance with conditions laid down by national legislation, that is to say, the restriction of the persons authorised to make a claim for recovery, a four-month period for bringing such a claim and the establishment of a minimum amount of repayment, only if it is apparent from concrete, objective and verifiable evidence that those conditions are necessary to ensure the correct and straightforward application of the exemption in question and to prevent any evasion, avoidance or abuse. It is for the national court to ascertain whether that is true of the conditions laid down by that legislation.

First, the exemption of products covered by Article 27(1) of that directive is the rule and refusal is the exception, and, second, the power granted to Member States by that provision to lay down conditions for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse cannot detract from the unconditional nature of the obligation imposed by that provision to grant exemption.

Judgment of 19 April 2007, Profisa (C-63/06, EU:C:2007:233)

(Directive 92/83/EEC – Harmonisation of structures of excise duties on alcohol and alcoholic beverages – Article 27(1)(f) – Alcohol contained in chocolate products – Exemption from the harmonised excise duty)

UAB Profisa, which imports into Lithuania chocolate products containing ethyl alcohol, claimed the exemption provided for by Directive 92/83.

The Lithuanian Customs Administration refused to grant Profisa that exemption on the ground that although the Lithuanian law on excise duty exempted from duty ethyl alcohol intended for use in the manufacture of chocolate products, it did not permit such exemption for finished imported chocolate products.

Profisa challenged that decision before the administrative court of first instance, which dismissed its action. Profisa then appealed to the Vyriausiasis administracinis teismas (Supreme Administrative Court, Lithuania), which, concerned at the divergence between the Lithuanian version of Article 27(1)(f) of Directive 92/83, in the light of which the Lithuanian law had been drafted, and the other versions of that text, made reference to the Court for a preliminary ruling.

The Court recalls its settled case-law according to which the need for a uniform interpretation of the provisions of Community law makes it impossible for the text of a provision to be considered in isolation, but requires, on the contrary, that it be interpreted and applied in the light of the versions existing in the other official languages.

Article 27(1)(f) of Directive 92/83 places an obligation on Member States to exempt from the harmonised excise duty alcohol and alcoholic beverages when used directly or indirectly as an ingredient in the production of foodstuffs, provided, however, that they do not contain, in the case of chocolates, more than 8.5 litres of pure alcohol per 100 kg of the product and, in all other cases, more than 5 litres of pure alcohol per 100 kg of the product. No part of that text, except in its Lithuanian version, refers to the place of use of the alcohol for the production of the product concerned.

Where there is divergence between the various language versions of a Community text, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part.

In this case, Article 27(1)(f) of Directive 92/83 should be understood as imposing an obligation on Member States to exempt from harmonised excise duty ethyl alcohol imported into the customs territory of the European Union and contained in chocolate products intended for direct use, where the alcohol content does not exceed 8.5 litres for every 100 kilograms of the chocolate products.

The place where the ethyl alcohol is used for the production of the products is irrelevant in this regard.

Judgment of 29 June 2000, Salumets and Others (C-455/98, EU:C:2000:352)

(Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Sixth Directive – Tax on importation – Scope – Contraband importation of ethyl alcohol)

The dispute in the main proceedings was between the Finnish Customs Administration and natural persons prosecuted for offences of smuggling ethyl alcohol.

The defendants claimed to fall outside the scope of the directives on excise duty, relying on the case-law concerning the importation of narcotic drugs, according to which no customs debt or liability to turnover tax arises on the unlawful importation or supply of narcotic drugs, except products which fall within the scope of Community law in so far as they are within legal and controlled economic channels with a view to their use for medical and scientific purposes. [1]

The Finnish Government and the Governments of the Member States which submitted observations, however, relied on the judgments in which the Court had held that VAT was due normally where goods marketed unlawfully compete with products marketed in lawful economic channels, such as counterfeit perfumes, [2] the unlawful operation of games of chance [3] or the unlawful export of computer systems. [4]

Hearing this dispute, a Finnish court asked the Court, inter alia, whether the provisions of Directives 92/12 and 92/83 applied to contraband importation of ethyl alcohol from non-member countries. In particular, that court was uncertain whether the unlawful importation of ethyl alcohol ought not to be treated in the same way as the unlawful supply of narcotic drugs and the importation of counterfeit currency.

The Court states, first of all, that although unlawful importations or supplies of goods which by their very nature and because of their special characteristics cannot be lawfully marketed or introduced into economic channels, such as narcotic drugs and counterfeit currency, are not subject to the taxes and customs duty normally payable under the Community rules, the principle of fiscal neutrality precludes a generalised differentiation between lawful and unlawful transactions, except where all competition between a lawful economic sector and an unlawful sector is precluded.

As regards ethyl alcohol imported as contraband from a non-member country, the marketing of that product is not prohibited by its very nature or because of its special characteristics. Nor may ethyl alcohol ethyl alcohol be regarded as a product which is outside economic channels, as competition may be established between the contraband product and the product traded in lawful economic channels in that there is a lawful market in alcohol which is precisely the target of contraband products.

Consequently, Directives 92/12 and 92/83 must be interpreted as meaning that their provisions on liability to tax and tax debts apply also to contraband importation into Community customs territory of ethyl alcohol from non-member countries.

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1 The defendants in the main proceedings refer to the judgments of 5 February 1981, *Horvath* (50/80, EU:C:1981:34); of 26 October 1982, *Wolf* (221/81, EU:C:1982:363); of 28 February 1984, *Einberger* (294/82, EU:C:1984:81); of 5 July 1988, *Mol* (269/86, EU:C:1988:359); and of 5 July 1988, *Vereniging Happy Family Rustenburgerstraat* (289/86, EU:C:1988:360). This case-law was confirmed and extended in cases concerning the importation of counterfeit currency (judgment of 6 December 1990, *Witzemann* (C-343/89, EU:C:1990:445).

2 Judgment of 28 May 1998, *Goodwin and Unstead* (C-3/97, EU:C:1998:263).

3 Judgment of 11 June 1998, *Fischer* (C-283/95, EU:C:1998:276).

4 Judgment of 2 August 1993, *Lange* (C-111/92, EU:C:1993:345).

2.2. Structure of excise duty applied to alcoholic beverages

Judgment of 17 June 1999, Socridis (C-166/98, EU:C:1999:316)

(Internal taxation – Article 95 of the EC Treaty (now, after amendment, Article 90 EC) – Directives 92/83/EEC and 92/84/EEC – Different taxation of wine and beer)

Société Critouridienne de Distribution (Socridis) sought relief from excise duty which it had had to pay between May and December 1993 on quantities of beer. It argued in this regard that Directives 92/83 and 92/84 were incompatible with the second paragraph of Article 95 of the EC Treaty (now, after amendment, Article 90 EC) because, in its view, they introduced a system of taxation authorising discriminatory and anti-competitive practices which indirectly favour wine production to the detriment of beer production.

It argued in this respect that prior to harmonisation of excise duty by Directives 92/83 and 92/84, wine and beer were taxed in France on a common basis (volume) and at similar rates (19.50 French francs (FRF)/hl (approximately EUR 3/hl) for beer and FRF 22/hl (approximately EUR 3.35/hl) for wine). It asserted that the abovementioned directives had fixed a minimum rate of excise duty based on EUR 1.87 per degree/hectolitre for beer, whereas for wine, taxation was to be based solely on volume and at a minimum rate of 0.

Since the directives had thus established a different structure and different excise duties for wine and beer, this resulted in a difference in taxation at national level which constituted discrimination. The result of the harmonisation sought by those directives in the Member State concerned was that the way in which beer was taxed had to be altered by introducing the criterion of alcohol content and that taxation on beer was much higher than taxation of wine.

The question was therefore whether or not such discrimination, authorised by the directives, was contrary to Article 95 of the EC Treaty (now, after amendment, Article 90 EC) and, if so, whether that finding could affect the validity of the directives. The referring court thus asked the Court to assess the validity of those two directives from the point of view of Article 95 of the EC Treaty (now, after amendment, Article 90 EC).

The Court held that Directives 92/83 and 92/84 merely require Member States to apply a minimum excise duty on beer. Consequently, the Member States retain a sufficiently wide margin of discretion to ensure that the relationship of the taxes on wine and beer excludes any protection for domestic production within the meaning of Article 95 of the EC Treaty (now, after amendment, Article 90 EC).

The intention of the Community legislature in adopting Directives 92/83 and 92/84 was not to harmonise taxation as between wine and beer. Under the powers expressly conferred on it by Article 99 of the EC Treaty (now Article 93 EC), and in order to ensure

the establishment and operation of the internal market, the Council was seeking to harmonise, first, national legislation on excise duty applicable to wine and, secondly, that relating to excise duty on beer. Furthermore, the Community institutions are free to introduce harmonisation gradually or in stages. It is not therefore incompatible with Article 99 of the EC Treaty (now Article 93 EC) for the Council to adopt directives which merely require Member States to apply a minimum excise duty on beer.

Judgment of 2 April 2009, Glückauf Brauerei (C-83/08, EU:C:2009:228)

(Harmonisation of the structures of excise duties – Directive 92/83/EEC – Article 4(2) – Small independent brewery which is legally and economically independent of any other brewery – Criteria of legal and economic independence – Possibility of being subject to indirect influence)

Glückauf is a company which operates a brewery. The share capital of Glückauf is held by Menz GmbH, which holds 3%, and Innstadt, which holds 48%. The share capital of the latter company is held by Menz GmbH (30.7%) and Ottakringer (49%). Ottakringer is a subsidiary of Getränke Holding AG, whose share capital is held by the Wenckheim family (65%) and the Menz family (16%).

The Hauptzollamt (Principal Customs Office, Germany) initially classified Glückauf as a brewery which was independent of Innstadt and Ottakringer and applied in respect of it, in accordance with national legislation, a reduced rate of duty to beer. However, the Hauptzollamt subsequently took the view that Glückauf was economically dependent on Ottakringer and claimed from it, by an amended assessment, the difference between the amount due under the reduced rate of duty and that due under the normal rate of duty.

Following an unsuccessful challenge to that assessment, Glückauf brought an action against the amended assessment before the Thüringer Finanzgericht (Finance Court of Thuringia, Germany), the referring court. It claimed that the criterion of economic independence allowing classification as a ‘small brewery’ within the meaning of Article 4(2) of Directive 92/83 ought to be interpreted in the light of the objective pursued by that directive and of the conduct of the relevant companies on the market. The existence of economic dependence could not be asserted, in the present case, unless the companies which were linked by a joint shareholding of a third party appeared and acted on the market as a single company.

The referring court decided to stay the proceedings in order to ask the Court, in essence, whether, for the purposes of applying the reduced rate of duty to beer, the condition laid down in Article 4(2) of Directive 92/83, that a brewery must be legally and economically independent of any other brewery, is to be interpreted as meaning that the criterion of economic independence, between legally independent breweries, concerns solely the conduct of those breweries in the market, or whether that criterion

is no longer satisfied where an individual has the possibility of exercising de facto influence over the business activities of those breweries.

The Court answers that Article 4(2) of Directive 92/83 must be interpreted as meaning that a situation characterised by the existence of structural links in terms of shareholdings and voting rights, and which results in a situation in which one individual, performing his duties as manager of a number of the breweries concerned, is able, independently of his actual conduct, to exercise influence over the taking of business decisions by those breweries, prevents them from being considered economically independent of each other.

Directive 92/83 seeks to prevent the benefits of a reduction of excise duty on beer from being granted to breweries the size and capacity of which could cause distortions in the internal market. In those circumstances, the criteria of legal and economic independence, laid down in Article 4(2) of that directive, seek to ensure that any form of economic or legal dependence between breweries results in exclusion from the tax advantage represented by the reduced rate of duty on beer.

In that context, the concept of a 'brewery which is legally and economically independent of any other brewery', within the meaning of Article 4(2) of that directive, implies ascertaining whether, as between the breweries concerned, there is a relationship of legal dependency at the level of, in particular, management of the breweries or the holding of share capital or voting rights, or even a relationship of economic dependence, such as to affect the capacity of those breweries to take business decisions independently.

Moreover, the purpose of the independence criterion is to ensure that the reduced rate of duty actually benefits those breweries the size of which represents a handicap, and not those which belong to a group. In those circumstances, in order to include, in the application of Article 4(2) of Directive 92/83, only breweries which are genuinely legally and economically independent, it is necessary to ensure that the condition of independence is not circumvented by purely formal means and, in particular, by legal arrangements between allegedly independent breweries which form, in reality, an economic group the production of which exceeds the limits prescribed in Article 4 of Directive 92/83.

As regards the possible effects of the conduct of the breweries concerned in the market for the purposes of determining their economic independence, Article 4(2) of Directive 92/83 concerns the legal and economic structures of breweries without referring expressly to the conduct of those breweries in the market. Furthermore, the presence of breweries on distinct markets with separate ranges of products cannot allow for the finding that they are economically independent of one another. Such a circumstance may, on the contrary, result from the existence of a deliberate strategy decided at the group level, and designed to avoid or reduce internal competition between them.

Judgment of 4 June 2015, Brasserie Bouquet (C-285/14, EU:C:2015:353)

(Reference for a preliminary ruling – Taxation – Directive 92/83/EEC – Excise duty – Beer – Article 4 – Small independent breweries – Reduced rate of excise duty – Conditions – No operation under licence – Production in accordance with a process of a third party and authorised by it – Authorisation to use the trade marks of that third party)

A French undertaking, Brasserie Bouquet, sold beer it brewed itself. It carried on its beer production activity on the basis of a 'Contrat d'affiliation au Cercle des 3 brasseurs' (Membership contract for the Circle of the Three Brewers) concluded with ICO 3B SARL, permitting it to use the trade marks and the commercial designation 'LES 3 BRASSEURS' and that company's know-how.

The Court, which was requested to give a preliminary ruling in a dispute concerning the refusal by the Customs Administration to apply the reduced rate of excise duty provided for by national legislation for small independent breweries, was essentially required to determine whether, for the purposes of applying the reduced rate of excise duty on beer, the condition laid down in Article 4(2) of Directive 92/83 according to which a brewery must not operate under licence is not met if the brewery concerned makes its beer in accordance with such a membership contract.

In answering that question, the Court holds that, for the purposes of the applying the reduced rate of excise duty to beer, the condition laid down in Article 4(2) of Directive 92/83 according to which a brewery must not operate under licence is not met if the brewery concerned makes its beer in accordance with an agreement pursuant to which it is authorised to use the trade marks and production process of a third party.

Directive 92/83 seeks to prevent the benefits of a reduction of excise duty on beer from being granted to breweries the size and capacity of which could cause such distortions.

Article 4(2) of Directive 92/83 requires, as a consequence, that small breweries – the annual beer production of which is less than 200 000 hectolitres – should be genuinely autonomous from any other brewery both as regards their legal and economic structure, and as regards their production structure, where they use physically separate premises and do not operate under licence.

Thus, the requirement not to operate under licence is one of the requirements aiming to ensure that the small brewery concerned is genuinely independent from any other brewery. It follows that the notion of 'operat[ing] under licence' must be interpreted so that it includes beer making subject to any form of authorisation which results in that small brewery not being completely independent of the third party which has given it that authorisation. Such is the case as regards an authorisation to exploit a patent, a trade mark or a production process belonging to that third party.

Judgment of 10 April 2014, Commission v Hungary (C-115/13, EU:C:2014:253)

(Failure of a Member State to fulfil obligations – Duties on alcohol and alcoholic beverages – Directive 92/83/EEC – Setting rates of excise duty – Customised production of ethyl alcohol in a distillery subject to a rate of excise duty equal to 0 – Exemption from excise duty for the production of ethyl alcohol by private individuals)

EU law, namely Directive 92/83, as amended by the act concerning the conditions of accession of Bulgaria and Romania to the European Union (OJ 2005 L 157, p. 203) and Directive 92/84, requires Member States to apply excise duty on ethyl alcohol, for alcoholic beverages other than wine and beer, of a minimum amount of EUR 550 per hectolitre of pure alcohol. However, Hungary is authorised to apply a reduced rate of excise duty on alcohol manufactured by distilleries from fruit supplied by fruit growers for the personal use of the latter. The preferential rate of excise duty cannot be less than 50% of the standard national rate of excise duty on alcohol. Moreover, application of that rate is limited to 50 litres of alcohol per year per fruit-growers' household.

The Hungarian legislation provided that the excise duty on spirits manufactured in a distillery on behalf of a fruit grower (subcontracted distillation) was set at 0 Hungarian florins (HUF) up to a maximum of 50 litres per year, which amounted to a total exemption. In addition, spirits manufactured by a private person in his own distillery were exempted from excise duty up to a maximum annual volume of 50 litres when the spirits were intended for the personal consumption of the household.

The main reason for these advantageous arrangements was the traditional nature of the production of 'pálinka' (spirit produced from fruit).

The Commission took the view that Hungary had not complied with EU rules on excise duties on alcoholic beverages and brought infringement proceedings before the Court of Justice. According to the Commission, the provisions of EU law allow no scope for an exemption regime for private distillation and preclude a zero rate being fixed for subcontracted distillation.

The Court notes that Directive 92/83 on excise duty on alcoholic beverages determines the cases in which those drinks may be exempted from excise duty or made subject to reduced rates of duty. The directive does not allow Member States to introduce preferential rules whose scope goes beyond what is permitted by the European legislature. The Court further notes that the Hungarian legislation, which provides a total exemption for spirits manufactured from fruit supplied by fruit growers, up to the amount of 50 litres per year, exceeds the maximum 50% reduction which the directive permits Hungary to give. Similarly, national rules exempting spirits manufactured by private individuals from excise duty are contrary to the directive, since the directive does not provide for such an exception to the normal rate.

In addition, the Court responds to the twofold argument raised by the defendant Government that the production of spirits is a centuries-old tradition and that the

preservation of such a tradition is considered to be the fundamental objective of the Hungarian Government, and the argument that the same practice of exemption from excise duty for small quantities of spirits exists in other Member States. In this regard, a national tradition cannot be generally accepted to justify a discretionary derogation from the obligations arising from the directive.

The Court thus declares that Hungary has failed to fulfil its obligations under EU legislation relating to excise duties on alcoholic beverages.

Judgment of 5 October 2004 (Full Court), Commission v Greece (C-475/01, EU:C:2004:585)

(Failure of a Member State to fulfil obligations – Infringement of the first paragraph of Article 90 EC – Excise duty on alcohol and alcoholic beverages – Application to ouzo of a rate lower than that applied to other alcoholic beverages – Compliance of that rate with a directive which was not challenged within the time-limit laid down in Article 230 EC)

Directive 92/83 provided for a reduced rate of excise duty in respect of certain types of product, including ouzo (Article 23(2)). The law which transposed the directive into the Greek legal system fixed the basic rate of excise duty at approximately 294 000 Greek drachma (GRD) (approximately EUR 860) per 100 litres of pure alcohol. A reduction of 50% of the basic rate (approximately GRD 147 000 (approximately EUR 430) per 100 litres of pure alcohol) was applied to ouzo.

The Commission considered that this differential was incompatible with the prohibition under Article 90 of the EC Treaty on imposing taxation on products of other Member States in excess of that imposed on similar domestic products and commenced the procedure for failure to fulfil obligations.

In this judgment, the Court dismisses the action brought by the Commission. It points out, first of all, that Greece, in fixing a lower rate for ouzo, relied on Article 23(2) of Directive 92/83 and complied with that provision. The Commission's action, which seeks directly to challenge the rate of excise duty that Greece was authorised to apply to ouzo on that basis therefore indirectly amounts to a challenge to the lawfulness of that provision. In this regard, the Court holds that measures of the Community institutions are in principle presumed to be lawful and accordingly produce legal effects until such time as they are withdrawn, annulled in an action for annulment or declared invalid following a reference for a preliminary ruling or a plea of illegality.

By way of exception to that principle, measures tainted by an irregularity whose gravity is so obvious that it cannot be tolerated by the Community legal order must be treated as having no legal effect, even provisional, that is to say they must be regarded as legally non-existent. The purpose of this exception is to maintain a balance between two fundamental, but sometimes conflicting, requirements with which a legal order must comply, namely stability of legal relations and respect for legality.

The gravity of the consequences attaching to a finding that a measure of a Community institution is non-existent means that, for reasons of legal certainty, such a finding must be reserved for quite extreme situations.

However, neither Directive 92/83 as a whole nor Article 23(2) thereof can be regarded as a non-existent measure. Moreover, that directive has not been withdrawn by the Council and Article 23(2) thereof has not been annulled or declared invalid by the Court. In those circumstances, Article 23(2) of Directive 92/83 produces legal effects which are presumed to be lawful.

The Court concludes that a Member State which has done no more than maintain in force national rules adopted on the basis of Article 23 of Directive 92/83, which allows a reduced rate of excise duty to be applied in respect of certain types of product, and which comply with that provision, has not failed to fulfil its obligations under Community law.

3. Harmonisation of excise duty on energy products

3.1. Scope of excise duty applied to energy products

Judgment of 4 June 2015, Kernkraftwerke Lippe-Ems (C-5/14, EU:C:2015:354)

(Reference for a preliminary ruling – Article 267 TFEU – Interlocutory procedure for review of constitutionality – Examination of whether a national law complies with both EU law and with the Constitution of the Member State concerned – Discretion enjoyed by a national court to refer questions to the Court of Justice for a preliminary ruling – National legislation levying a duty on the use of nuclear fuel – Directives 2003/96/EC and 2008/118/EC – Article 107 TFEU – Articles 93 EA, 191 EA and 192 EA)

In 2010, Germany adopted a law on excise duty on nuclear fuel (Kernbrennstoffsteuergesetz). That law introduced, for the period from 1 January 2011 to 31 December 2016, a duty on the use of nuclear fuel for the commercial production of electricity, payable by nuclear power station operators.

Kernkraftwerke Lippe-Ems, which operates the Emsland nuclear power station in Lingen (Germany) and which, in June 2011, used fuel assemblies in the nuclear reactor of its power station, is liable for duty in excess of EUR 154 million.

Kernkraftwerke Lippe-Ems challenged the duty before the Finanzgericht Hamburg (Finance Court, Hamburg, Germany). In its view, the German duty on nuclear fuel is incompatible with EU law.

The Finanzgericht Hamburg (Finance Court, Hamburg) decided to ask the Court whether Directive 2003/96 on the taxation of energy products and electricity, Directive 2008/118

and Article 107 TFEU or the provisions of the Euratom Treaty preclude a Member State from introducing a duty on the use of nuclear fuel for the commercial production of electricity.

The Court replies that such a duty is not contrary to EU law. With regard to the compatibility of that duty with the European excise duty regime in particular, the Court explains that Article 14(1)(a) of Directive 2003/96 and Article 1(1) and (2) of Directive 2008/118 are to be interpreted as not precluding national legislation which levies a duty on the use of nuclear fuel for the commercial production of electricity. Article 14 of Directive 2003/96 sets out an exhaustive list of the exemptions which the Member States must apply in connection with the taxation of energy products and electricity and defines clearly the products covered by the exemption.

With regard to first of those provisions, Article 2(1) of Directive 2003/96 defines energy products for the purposes of that directive by drawing up an exhaustive list of the products covered by that definition by reference to the codes of the combined nomenclature. As it does not appear on that list, nuclear fuel does not constitute an energy product for the purposes of Directive 2003/96 and it is not, therefore, covered by the exemption laid down in Article 14(1)(a) of that directive (exemption for energy products subject to harmonised excise duty and used to produce electricity). Nor can the exemption in question be applied by analogy. Moreover, if the operation of Articles 2(1) and 14(1)(a) of Directive 2003/96 is not to be radically changed, any inconsistency between national legislation and EU policy on reduction of CO_2 emissions cannot, contrary to the clear intention of the EU legislature, justify interpreting those provisions as being applicable to products other than energy products and electricity within the meaning of that directive.

The Court thus recognises, in essence, that a duty can be levied at the same time on the consumption of electricity and on the source from which that energy is produced which is not an energy product within the meaning of the directive.

With regard to Article 1(1) and (2) of Directive 2008/118, a tax introduced by national law which is not levied directly or indirectly on the consumption of electricity covered by Directive 2003/96, or that of any other excise product does not fall within Article 1(1) or (2) of Directive 2008/118 and cannot therefore constitute either an excise duty on electricity or another indirect tax on that product for the purpose of the directive.

That is the case for a duty which, first, is payable when fuel assemblies or individual fuel rods are used for the first time in a nuclear reactor, starting a self-sustaining chain reaction, for the commercial production of electricity and is levied on the electricity producer and, second, is calculated on the basis of the amount of nuclear fuel used, a common rate being applied to all types of such fuel, although the amount of electricity produced by the reactor of a nuclear power station is not directly commensurate with the amount of nuclear fuel used, but may vary according to the nature and properties of the fuel used and the yield level of the reactor concerned, and that duty could be levied

on the basis that a self-sustaining chain reaction has been started, without any electricity having necessarily even been produced or, as a consequence, consumed.

The Court thus observes that it is not apparent that a direct and inseverable link exists between the use of nuclear fuel and the consumption of electricity produced in the reactor of a nuclear power plant.

Judgment of 20 September 2017, Elecdey Carcelen and Others (C-215/16, C-216/16, C-220/16 and C-221/16, EU:C:2017:705)

(References for a preliminary ruling – Environment – Electricity generated by wind power – Directive 2009/28/EC – Promotion of the use of energy from renewable sources – Subparagraph (k) of the second subparagraph of Article 2 – Aid scheme – Subparagraph (e) of the second subparagraph of Article 13(1) – Administrative charges – Directive 2008/118/EC – General arrangements for excise duty – Article 1(2) – Other indirect taxes for specific purposes – Directive 2003/96/EC – Taxation of energy products and electricity – Article 4 – Minimum rate of taxation on energy – Levy imposed on turbines designed to produce electricity)

The applicant companies operate wind turbines designed to produce electricity in the territory of the Autonomous Community of Castile-La Mancha (Spain). They paid, in the tax year relating to 2011 and 2012, a levy established by national law consisting of a quarterly fixed-rate amount which varied according to the size of the wind farm and according to the power of the turbines, irrespective of the quantity of electricity generated by it.

Taking the view that that levy was unconstitutional and incompatible with EU law, those applicants requested the competent authorities to rectify the self-assessments submitted to that effect and to refund the amounts paid.

In this context, the Tribunal Superior de Justicia de Castilla-La Mancha (High Court of Justice of Castile-La Mancha, Spain) asked the Court about the legal regime governing the levy in question.

In this judgment, the Court rules, with regard to the application of the excise duty regime, that Article 4 of Directive 2003/96 must be interpreted as not precluding national legislation, such as that at issue in the cases in the main proceedings, which provides for the application of a levy on wind turbines designed to produce electricity, since that levy does not tax energy products or electricity within the meaning of Article 1 and Article 2(1) and (2) of that directive and, therefore, does not fall within its scope.

There is no connection between, on the one, hand, the operative event for the levy at issue in the cases in the main proceedings and, on the other, the actual production of electricity by wind turbines.

On the basis of the characterisation made, Article 1(2) of Directive 2008/118 must be interpreted as not precluding national legislation, such as that at issue in the cases in the

main proceedings, which provides for the application of a levy on wind turbines designed to produce electricity, since that levy does not constitute a tax imposed on the consumption of energy products or electricity and, therefore, does not fall within the scope of that directive.

Judgment of 10 June 1999, Braathens (C-346/97, EU:C:1999:291)

(Directive 92/81/EEC – Harmonisation of the structures of excise duties on mineral oils – Mineral oils supplied for use as aviation fuel for purposes other than private pleasure flying – Exemption from the harmonised duty)

The Swedish tax administration required the airline Braathens to pay an environmental protection tax provided for by national law on domestic commercial aviation and calculated on fuel consumption and emissions of hydrocarbons and nitric oxide.

After lodging a complaint with the tax authorities, which was rejected, Braathens appealed to the referring court. That court made reference to the Court of Justice in order to ascertain, first, whether the tax at issue is contrary to Article 8(1)(b) of Directive 92/81, second, whether that provision can be considered to have direct effect and, third, whether it is possible to subdivide the tax into one part which is in conformity with Community law and another which is not.

First, the Court holds that Article 8(1) of Directive 92/81 precludes the collection of an environmental protection tax which is levied on domestic commercial aviation and is calculated by reference to data on fuel consumption and emissions of hydrocarbons and nitric oxide during an average flight by the type of aircraft used.

A national tax of this type, which is levied on consumption of the fuel itself as there is a direct and inseverable link between fuel consumption and the polluting substances emitted in the course of such consumption, is incompatible with the harmonised tax system introduced by Directives 92/12 and 92/81. To allow the Member States to levy another indirect tax on products which, as in this case, must be exempted from harmonised excise duty under Article 8(1)(b) of Directive 92/81 would render that provision entirely ineffective.

Second, the Court holds that the obligation imposed by Article 8(1)(b) of Directive 92/81 to exempt from the harmonised excise duty mineral oils supplied for use as fuel for the purpose of air navigation other than private pleasure flying is sufficiently clear, precise and unconditional to be able to be relied on by individuals before national courts with a view to contesting national rules that are incompatible with that obligation.

Judgment of 13 July 2017, Vakarų Baltijos laivų statykla (C-151/16, EU:C:2017:537)

(Reference for a preliminary ruling – Directive 2003/96/EC – Taxation of energy products and electricity – Article 14(1)(c) – Exemption of energy products used as fuel for the purpose of navigation within European Union waters and to produce electricity on board a craft – Fuel used by a ship to sail from the place where it was built to the port of another Member State for the purpose of taking on its first commercial cargo)

Vakarų Baltijos laivų statykla, a Lithuanian company engaging in the construction of seagoing vessels ('the Lithuanian company'), concluded a contract to build a cargo ship for an Estonian company. This included the purchase of fuel which was poured directly into the fuel tanks, and the payment of the excise duty in respect of that fuel. Following the delivery of the ship, the client arranged for it to sail, without cargo, from the port of Klaipeda (Lithuania) to the port of Straslund (Germany), where it took on its first commercial cargo, which it then transported for consideration to Santander (Spain).

The Lithuanian company requested the State Tax Inspectorate to refund the excise duty which it had paid for the purposes of the delivery of the fuel to its Estonian client's ship. The State Tax Inspectorate refused to accede to that request on the ground that, at the time of the delivery of the fuel at issue to the client, the Lithuanian company did not satisfy the formal and substantive conditions under national law and did not have the necessary licence allowing it to supply fuel to ships.

The decision refusing a refund was annulled by the Mokestinių ginčų komisija prie Lietuvos Respublikos Vyriausybės (Commission on Tax Disputes attached to the Government of the Republic of Lithuania). The State Tax Inspectorate brought annulment proceedings against that decision and its action was allowed before the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius, Lithuania). The Lithuanian company then appealed on a point of law to the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court, Lithuania), the referring court, which asks about the necessary interpretation of Article 14(1)(c) of Directive 2003/96 and the possibility of refusing the exemption under that provision on the basis of purely formal considerations.

First, the Court takes the view that Article 14(1)(c) of Directive 2003/96 must be interpreted as meaning that the exemption laid down by that provision applies to fuel used to sail a ship, without cargo, from a port of a Member State, in the present case that where that ship was built, to a port of another Member State in order to take on cargo to be transported to a port of a third Member State.

Second, it interprets Article 14(1)(c) of Directive 2003/96 as precluding legislation of a Member State, such as that at issue in the main proceedings, which excludes the application of the exemption laid down by that provision on the ground that the supply of energy products for a ship was carried out without complying with the formal

requirements laid down by that legislation, even though that supply is in accordance with all the conditions for application laid down by that provision.

3.2. Structure of excise duty applied to energy products

Judgment of 2 June 2016, ROZ-ŚWIT (C-418/14, EU:C:2016:400)

(Reference for a preliminary ruling – Excise duties – Directive 2003/96/EC – Differentiated rates of excise duty for motor fuels and heating fuels – Condition for the application of the rate for heating fuels – Submission of a monthly list of statements that the products purchased are for heating purposes – Application of the rate of excise duty laid down for motor fuels where that list is not submitted – Principle of proportionality)

During the period from 1 March to 31 December 2009, ROZ-ŚWIT, a Polish company, made a series of heating fuel sales consisting of amounts of light fuel oil. It was found that those sales had been confirmed and that there was no doubt that the purchasers had confirmed the purchase and consumption of that fuel for heating purposes. However, ROZ-ŚWIT had not submitted, within the specified period, a list of statements from the purchasers as provided for by the Polish legislation on excise duty.

As that legislation provides, in the event of non-compliance with the requirement to submit a list of statements from purchasers within the time-limit, for an excise duty rate for motor fuel to be applied to a product used as heating fuel, that rate of excise duty was applied to the sales made by ROZ-ŚWIT, established by a notice of additional assessment issued by the Naczelnik Urzędu Celnego we Wrocławiu (Head of the Wrocław Customs Office, Poland).

ROZ-ŚWIT brought an appeal against that notice of additional assessment before the Director of the Wrocław Customs Chamber, arguing that the failure to present lists of statements from purchasers constituted merely a formal error, while the actual intended use of the fuel in question for heating purposes was not in doubt.

That appeal having been dismissed, ROZ-ŚWIT brought an action before the Wojewódzki Sąd Administracyjny we Wrocławiu (Regional Administrative Court, Wrocław, Poland).

That court asks, in essence, whether Directive 2003/96 and the principle of proportionality must be interpreted as precluding national legislation under which, first, sellers of heating fuel are required to submit, within a prescribed time-limit, a monthly list of statements from purchasers that the products purchased are for heating purposes and, secondly, where such a list is not submitted within the prescribed time-limit, the excise duty rate laid down for motor fuel is applied to the heating fuel sold, even though it has been established that the intended use of that product for heating purposes is not in doubt.

The Court rules that Directive 2003/96 and the principle of proportionality must be interpreted as not precluding national legislation under which sellers of heating fuel are required to submit, within a prescribed time-limit, a monthly list of statements from purchasers that the products purchased are for heating purposes. They do not preclude national legislation under which, if a list of statements from purchasers is not submitted within a prescribed time-limit, the excise duty applicable for motor fuels is applied to the heating fuel sold, even though it has been found that the intended use of that product for heating purposes is not in doubt.

On the one hand, having regard to the discretion which Member States have as to the measures and mechanisms to adopt in order to prevent tax avoidance and evasion connected with the sale of heating fuels and since a requirement to submit to the competent authorities a list of statements from purchasers is not manifestly disproportionate, it must be held that such a requirement is an appropriate measure to achieve such an objective and does not go beyond what is necessary to attain it.

On the other hand, a provision of national law under which, in the event of failure to submit a list of statements from purchasers within the time-limit, the excise duty applicable for motor fuels is automatically applied to heating fuels even if those fuels are used as such, runs counter to the general scheme and purpose of Directive 2003/96, which are based on the principle that energy products are taxed in accordance with their actual use. In addition, such an automatic application of the excise duty applicable to motor fuels in the case of non-compliance with the requirement to submit such a list infringes the principle of proportionality. The application of the rate of excise duty provided for motor fuels to heating fuels because of the infringement of that requirement, where there is no doubt as to the intended use of those products, goes further than is necessary to prevent tax avoidance and evasion.

Judgment of 27 November 2003, Commission v Finland (C-185/00, EU:C:2003:639)

(Failure of a Member State to fulfil its obligations – Directives 92/81/EEC and 92/82/EEC – Rates of excise duties on mineral oils – Fiscal control – Use of gas oil as motor fuel)

In this case concerning an action brought for failure to fulfil obligations against the Republic of Finland, the Commission applied to the Court for a declaration that, by maintaining in force its national legislation which allows the use of less heavily taxed gas oil (domestic fuel oil) as motor fuel, the Republic of Finland has failed to fulfil its obligations under Article 8(2) and (3) of Directive 92/81 and Article 5(1) of Directive 92/82.

First, the Commission submits that, although the Finnish legislation imposes a rate of excise duty on gas oil used as motor fuel which is higher than the minimum rate set in Article 5(1) of Directive 92/82, that legislation cannot, however, be regarded as being

consistent with that provision, since it does not guarantee in all circumstances that the gas oil is in fact taxed at the rate laid down in it.

The Finnish system permits the use of less heavily taxed gas oil as motor fuel and is based on the obligation imposed on owners or users of motor vehicles to give prior notification to the tax authorities of their intention to use domestic fuel oil as motor fuel and subject to payment of a surcharge and/or a fuel levy, which are not levied in accordance with the quantity of domestic fuel oil used and are not therefore excise duties.

Second, the Commission argues that the Republic of Finland has failed to implement adequate and effective checks on the distribution of gas oil and its use for the purposes mentioned in Article 8(2) and (3) of Directive 92/81, such as use in agriculture, forestry and public works, provisions which seek to ensure that gas oil is put only to the uses for which it is taxed.

In this judgment the Court rules that national legislation which, by introducing for that purpose a surcharge and/or a fuel level which are chargeable subject to prior notification and which are not excise duties, allows the use of less heavily taxed gas oil as motor fuel cannot be regarded as complying with Article 5(1) of Directive 92/82, which requires that the gas oil used as motor fuel be taxed at the minimum rate of excise duty provided for in that article.

Although Article 5(1) of Directive 92/82 imposes on Member States the obligation to guarantee that mineral oils used as motor fuel are taxed at the minimum rate of excise duty set down by that provision, Article 8(2) and (3) of Directive 92/81 sets out certain sectors in which the use of mineral oils as motor fuel may be subject to exemptions or a reduced rate of excise duty, provided that they are subject to fiscal control.

A Member State which maintains in force legislation on the use of gas oil putting in place a mechanism of fiscal control which does not allow the objective pursued by those provisions to be attained has failed to fulfil its obligations under those provisions, since that mechanism cannot effectively prevent mineral oils intended for other purposes and therefore less heavily taxed from being used as motor fuel or guarantee that gas oil used as motor fuel is in fact taxed at the minimum rate of excise duty laid down by those provisions.

II. Harmonisation of the rules on chargeability and payment of excise duty

1. Chargeability of excise duty

Judgment of 29 June 2017, Commission v Portugal (C-126/15, EU:C:2017:504)

(Failure of a Member State to fulfil obligations – Excise duty on cigarettes – Directive 2008/118/EC – Chargeability – Place and time duty falls due – Tax markings – Free movement of goods subject to excise duty – Temporal limit on the marketing and sale of packets of cigarettes – Principle of proportionality)

In this case, an action for failure to fulfil obligations had been brought before the Court seeking a declaration that, by subjecting packets of cigarettes to a prohibition on marketing and sale to the public at the end of the third month of the year following that which appears on the marking affixed, the Portuguese Republic had failed to comply with its obligations under the first paragraph of Article 9 of Directive 2008/118 and with the principle of proportionality.

The Court holds that, by providing that cigarettes released for consumption in a given year may no longer be marketed or sold to the public after the end of the third month of the following year, where there is no increase in the excise duty on those products taking effect the following year, a Member State fails to fulfil its obligations under Article 9, first paragraph, of Directive 2008/118 and the principle of proportionality.

The prevention of possible tax evasion, avoidance and abuse is an objective pursued by Directive 2008/118, as is clear from recital 31 and Article 11 and Article 39(3), first paragraph thereof. The release for consumption in excessive quantities of packets of cigarettes at the end of the year, in anticipation of a future increase in the rate of excise duty, constitutes a form of abuse that the Member States are entitled to prevent by the appropriate measures. Since Article 9, first paragraph, of Directive 2008/118 refers to the national law in force on the date on which the excise duties fall due, in order to determine the conditions of chargeability and the rate of excise duty, such a right recognised to the Member States necessarily implies that they have the possibility to adopt such measures.

However, in the exercise of the powers conferred on them by EU law, the Member States must comply with the general principles of law among which are, in particular, the principle of proportionality. Under that principle, the Member States must employ means which, whilst enabling them effectively to attain the objective pursued by their domestic laws, are the least detrimental to the objectives and the principles laid down by the relevant EU legislation. A measure which is intended to prevent the release for consumption in excessive quantities of packets of cigarettes at the end of the year in anticipation of an increase in excise duty is appropriate to achieve legitimate objectives

that are combating tax evasion and tax avoidance and the protection of public health. It also helps to ensure healthy competition. In so far as such a measure applies in all cases, including in the case in which the rate of excise duty decreases or stays the same, it does not appear necessary to achieve the objectives pursued. They could be achieved in a manner which is less restrictive and just as appropriate if the measure applied only in the case of an increase in the rate of excise duty on cigarettes.

1.1. Chargeability in the case of departure of excise goods from a duty suspension arrangement

Judgment of 2 June 2016, Polihim-SS (C-355/14, EU:C:2016:403)

(Reference for a preliminary ruling – Indirect taxation – Excise duties – Directive 2008/118/EC – Chargeability of excise duties – Article 7(2) – Concept of 'departure of excise goods from a duty suspension arrangement' – Taxation of energy products and electricity – Directive 2003/96/EC – Article 14(1)(a) – Use of energy products to produce electricity – Purchase and resale by an intermediate purchaser of energy products located in a tax warehouse – Direct delivery of energy products to an operator for the production of electricity – Indication of the intermediate purchaser as the 'consignee' of the products in the tax documents – Infringement of the requirements of national law as regards exemption from excise duty – Refusal of exemption – Proof of the use of the products in circumstances permitting exemption from excise duty – Proportionality)

Polihim is an authorised warehousekeeper which manages a tax warehouse in Lukovit (Bulgaria) in which it is authorised to manufacture energy products and store them under a duty suspension arrangement.

Under a three-party contract concluded between Polihim, Petros Oyl OOD and TETS Bobov dol EAD, Polihim sold heavy fuel oils to Petros Oyl, which sold them on to TETS Bobov dol, the end-user exempt from excise duty for the purposes of Bulgarian legislation. Those heavy fuel oils were delivered directly by Polihim to TETS Bobov dol from its tax warehouse. TETS Bobov dol used the heavy fuel oils to produce electricity within the meaning of Article 14(1)(a) of Directive 2003/96.

During a tax inspection of Polihim, the Bulgarian customs authorities found that that company had declared that it had made eight releases for consumption of heavy fuel oils under CN code 2710 19 64 to Petros Oyl but stated that it was not liable for any excise duty in that regard since those goods were intended for use in the production of electricity within the meaning of the Bulgarian Law on excise duty.

Being of the view that Petros Oyl, which had been declared by Polihim as the consignee of the goods at issue in the main proceedings, did not have the status of end-user exempt from excise duty within the meaning of national legislation and that, accordingly, the removal of those goods from Polihim's tax warehouse had given rise to

an excise debt owed by Polihim, the Bulgarian customs authorities issued a document finding that there had been an administrative offence.

Polihim submitted its written objections to that document, arguing that those goods, once removed from its tax warehouse, had been delivered directly by it to TETS Bobov dol, a company which produces electricity and holds the status of end-user exempt from excise duty.

By decision of 27 May 2013, the Customs Director of Svishtov (Bulgaria) rejected those objections and imposed fines on Polihim corresponding, in respect of each release for consumption, to twice the amount of the unpaid excise duty under the national Law on excise duty. The rate of excise duty taken into consideration in calculating those fines was that applicable to energy products used for purposes other than as motor fuel or as heating fuel.

Polihim brought an action against that decision before the Rayonen sad de Lukovit (District Court, Lukovit, Bulgaria), which varied the decision of 27 May 2013, reducing the amount of the fines imposed.

Polihim lodged an appeal on a point of law against that judgment before the Administrativen sad Pleven (Administrative Court, Pleven, Bulgaria), the referring court. That court asks, in particular, firstly, whether Article 7(2) of Directive 2008/118 is to be interpreted as meaning that the sale of excise goods within a tax warehouse, without those goods having physically left that tax warehouse, constitutes a release for consumption of those goods. Secondly, that court asks whether Article 14(1)(a) of Directive 2003/96, read in conjunction with Article 7 of Directive 2008/118, must be interpreted as precluding a refusal by the national authorities to exempt from excise duty energy products which, after having been sold by an authorised warehousekeeper to an intermediate purchaser, are sold on by that purchaser to an end-user who satisfies all the requirements under national law to benefit from an exemption of excise duty on those products and to whom those products are delivered directly by that authorised warehousekeeper from his tax warehouse, on the sole ground that the intermediate purchaser, declared by that warehousekeeper as the consignee of those products, does not satisfy those requirements.

The Court answers, first, that Article 7(2) of Directive 2008/118 must be interpreted as meaning that the sale of excise goods held by an authorised warehousekeeper in a tax warehouse does not bring about their release for consumption until the time at which those goods are physically removed from that tax warehouse. Since excise duty is, as is recalled in recital 9 to Directive 2008/118, a tax levied on consumption and not on sale, the time at which it becomes chargeable must be very closely linked with the consumer.

In this regard, Article 7(1) defines the time at which excise duty becomes chargeable as the time of release for consumption of the excise goods. Furthermore, it is clear from Article 7(2)(a) of that directive that, for the purposes thereof, ‘release for consumption’ is to be understood, in particular, as the departure of excise goods, including irregular

departure, from a duty suspension arrangement. Therefore, the departure of excise goods from a duty suspension arrangement refers to the physical departure of those goods from the tax warehouse and not their sale.

Such an interpretation corresponds to the objectives pursued by that directive. Since excise duty is a tax on consumption and not on sale, the time at which it becomes chargeable must be very closely linked with the consumer. Accordingly, so long as the goods in question remain in the tax warehouse of an authorised warehousekeeper, there can be no consumption, even if those goods have been sold by that authorised warehousekeeper.

Furthermore, the reference, in particular, to the possibility of an irregular departure of excise goods from a duty suspension arrangement cannot be understood other than as meaning the physical removal of goods from such an arrangement.

Lastly, in so far as excise goods under a duty suspension arrangement are to be held by an authorised warehousekeeper in a tax warehouse, excise duties are not chargeable so long as the goods concerned are held by the authorised warehousekeeper in its tax warehouse.

Second, the Court holds that Article 14(1)(a) of Directive 2003/96, read in conjunction with Article 7 of Directive 2008/118, must be interpreted as precluding a refusal by the national authorities to exempt from excise duty energy products which, after having been sold by an authorised warehousekeeper to an intermediate purchaser, are sold on by that purchaser to an end-user who satisfies all the requirements under national law to benefit from an exemption of excise duty on those products and to whom those products are delivered directly by that authorised warehousekeeper from his tax warehouse, on the sole ground that the intermediate purchaser, declared by that warehousekeeper as the consignee of those products, does not have the status of end-user authorised under national law to receive energy products exempt from excise duty.

Although making exemption from excise duty subject to the declaration, on the tax documents, of a consignee satisfying the conditions laid down in national law to receive exempt energy products must be regarded as enabling the objective of facilitating monitoring of the application of exemptions from excise duty to be achieved, by reducing the risk of a use of the products which does not give entitlement to an exemption, such refusal, which is made without it being checked whether the basic requirements necessary for those products to be used for purposes giving entitlement to exemption are met at the time of their removal from the tax warehouse, goes beyond what is necessary to ensure the correct and straightforward application of those exemptions and to prevent any evasion, avoidance or abuse.

Judgment of 24 February 2021, Silcompa (C-95/19, EU:C:2021:128)

(Reference for a preliminary ruling – Directive 76/308/EEC – Articles 6 and 8 and Article 12(1) to (3) – Mutual assistance for the recovery of certain claims – Excise duty payable in two Member States for the same transactions – Directive 92/12/EC – Articles 6 and 20 – Release of products for consumption – Falsification of the accompanying administrative document – Offence or irregularity committed in the course of movement of products subject to excise duty under a duty suspension arrangement – Irregular departure of products from a suspension arrangement – 'Duplication of the tax claim' relating to the excise duties – Review carried out by the courts of the Member State in which the requested authority is situated – Refusal of the request for assistance made by the competent authorities of another Member State – Conditions)

Between 1995 and 1996 Silcompa SpA, a company established in Italy which produces ethyl alcohol, sold ethyl alcohol to Greece under duty suspension arrangements. [5]

In 2000, following a check, it was established that the accompanying administrative documents ('the AADs') relating to the consignments of alcohol dispatched by Silcompa had never been received by the Greek customs authority in order for the official documents to be drawn up and that the stamps of the customs office on the AADs were false. Therefore, the Italian customs authority ('the Agency') issued three payment notices for the recovery of the unpaid excise duties.

In 2004, the Agency was informed by the Greek customs authorities that the deliveries of the products sent by Silcompa to a Greek company should be considered irregular. Accordingly, an adjustment notice, which covered the Italian tax claims and an additional tax adjustment, was issued. The procedure initiated against that notice led to the conclusion, in 2017, of a settlement agreement between the Agency and Silcompa.

In 2005, in relation to the same export transactions within the European Union, the Greek customs authorities issued two excise duty payment notices on account of the unlawful release for consumption on Greek territory of ethyl alcohol shipped by Silcompa. In addition, the Greek tax authorities made a request for assistance to the Agency for the recovery of claims relating to the excise duties in question. The Agency, as the competent requested authority, therefore notified Silcompa of two amicable payment notices.

The appeal brought by Silcompa, after its action against those payment notices was dismissed, was upheld by the Commissione tributaria regionale del Lazio (Regional Tax Court, Lazio, Italy). Hearing an appeal on a point of law brought by the Agency, the Corte suprema di cassazione (Supreme Court of Cassation, Italy) decided to request a preliminary ruling from the Court of Justice.

[5] Under this tax arrangement, the excise duty on the products subject to excise duty is not yet payable, despite the fact that the chargeable event for taxation purposes has already taken place. The arrangement postpones the chargeability of excise duty until one of the conditions of chargeability is met.

The Court thus ruled that, in the context of an action disputing enforcement measures taken in the Member State in which the requested authority is situated, the competent body of that Member State may refuse to grant the request to recover excise duties submitted by the competent authority of another Member State in respect of goods which irregularly departed from a suspension arrangement, where that request is based on the facts relating to the same export transactions which are already subject to excise duty recovery in the Member State in which the requested authority is situated. [6]

The Court notes that the unlawful marketing on Greek territory of ethyl alcohol shipped by Silcompa may constitute, on the one hand, an offence or irregularity in respect of the products in question and, on the other, a consequence of the offence or irregularity previously committed in Italy. In relation to such a determination, which is a matter for the referring court, there are two possibilities.

In the first possibility, where there were several offences or irregularities committed in several Member States, two or more of those States consider that they have the right to collect the excise duty. Thus, in a situation involving an irregular departure from the suspension arrangement, which occurred in one Member State, followed by an actual release for consumption of products subject to excise duty in another Member State, that State cannot also collect excise duties as regards the same export transactions. That release for consumption may happen only once. It follows that, even though a number of successive offences or irregularities may take place in different Member States, only the offence or irregularity which made the products in the course of movement leave the excise duties suspension arrangement must be taken into account for the purposes of the recovery of those duties since such an offence or irregularity released the products for consumption. [7]

The second possibility is that the authorities of one Member State relied on one of the presumptions provided for determining where the offence or irregularity was committed [8] and the authorities of another Member State ascertain that the offence or irregularity was actually committed in their Member State. [9] In such a situation, those authorities apply the corrective mechanism allowing the latter Member State to collect the excise duty within three years from the date on which the AAD was drawn up. [10] Once that period has passed, only the Member State which relied on one of those presumptions may successfully recover the excise duty.

As regards the rules on mutual assistance for the recovery of claims relating to excise duty, the Court highlights, first of all, the existence of a division of powers between the authorities of the Member State where the applicant authority is situated, which apply

6 Article 6(2) and Article 20 of Directive 92/12.
7 Articles 6 and 20 of Directive 92/12.
8 Article 20(2) and (3) of Directive 92/12.
9 Under Article 20(2) and (3) of Directive 92/12, those presumptions are provided for in two scenarios: the first concerns the situation where it is not possible to determine where the offence or irregularity was committed and the second the situation where products subject to excise duty do not arrive at their destination and it is not possible to determine where the offence or irregularity was committed.
10 Article 18(1) and Article 19(1) of Directive 92/12.

their national law to the claim and the instrument permitting enforcement, and the authorities of the Member State where the requested authority is situated, which apply their national law to the enforcement measures. [11] In accordance with this principle of mutual trust, the instrument permitting enforcement is to be directly recognised and automatically treated as an instrument permitting enforcement of a claim of the Member State in which the requested authority is situated. It follows that the authorities of the latter Member State cannot call into question the assessment of the requesting Member State as regards the place where the irregularity or offence was committed, since such an assessment comes within its jurisdiction alone. Second, the Court finds that the instrument permitting enforcement of the claim cannot be enforced in the Member State in which the requested authority is situated if such enforcement leads to a situation in which the excise duties on essentially the same transactions regarding the same products are levied twice. Consequently, it is necessary to allow the competent authority of that Member State to refuse to enforce that instrument in order to prevent the coexistence of two final decisions to tax the same products, one based on the irregular departure of those products from the suspension arrangement and the other based on their subsequent release for consumption. Lastly, the Court concludes that that interpretation cannot be called into question by its case-law, according to which the EU legislature has not established prevention of double taxation as an absolute principle, [12] since it is part of the specific factual context which concerned the situation of an unlawful departure from the suspension arrangement on account of the theft of the products to which tax markings had already been affixed in the 'Member State of departure', tax markings having an intrinsic value which distinguishes them from straightforward documents representing the payment of a sum of money to the tax authorities in the Member State in which those markings were issued.

Judgment of 29 April 2010, Dansk Transport og Logistik (C-230/08, EU:C:2010:231)

(Community Customs Code – Articles 202, 215(1) and (3), 217(1) and point (d) of the first paragraph of Article 233 – Concept of goods which are 'seized and simultaneously or subsequently confiscated' – Regulation implementing the Customs Code – Article 867a – Directive 92/12/EEC – Articles 5(1) and (2), 6, 7(1), 8 and 9 – Sixth VAT Directive – Articles 7, 10(3) and 16(1) – Unlawful introduction of goods – Transport of goods with a TIR carnet – Seizure and destruction – Determination of the Member State in which the customs debt is incurred and VAT and excise duty become chargeable – Extinction of the customs and tax debt)

A Danish court referred a question to the Court of Justice for a preliminary ruling in a dispute concerning the levying of customs duty, excise duty and VAT on cigarettes which were unlawfully introduced in transport operations performed under cover of a TIR carnet. After being detained immediately, the cigarettes were destroyed. The question

[11] Article 12(1) and (3) of Directive 76/308.
[12] Judgment of the Court of Justice of 13 December 2007, *BATIG* (C-374/06, *EU:C:2007:788*, paragraph 55).

asked was, in essence, whether the customs and tax debt in respect of the smuggled goods still exists and may be recovered when the goods have been detained, seized or destroyed.

The Court holds that the third subparagraph of Article 5(1) and Article 6(1) of Directive 92/12, as amended by Directive 96/99, must be interpreted as meaning that goods seized by the local customs and tax authorities on their introduction into the territory of the European Union and simultaneously or subsequently destroyed by those authorities, without having left their possession, must be regarded as not having been imported into the European Union, with the result that the chargeable event for excise duty on them does not occur. Where goods are seized after their unlawful introduction into that territory, namely once they have gone beyond the area in which the first customs office inside that territory is situated, and simultaneously or subsequently destroyed by those authorities, without having left their possession, the excise duty on them is not to be deemed 'to have been placed under a suspension arrangement' for the purposes of the first subparagraph of Article 5(2) and Article 6(1)(c) of that directive, read in conjunction with Articles 84(1)(a) and 98 of Regulation No 2913/92, as amended by Regulation No 955/1999, and Article 867a of Regulation No 2454/93, as amended by Regulation No 1662/1999, with the result that the chargeable event for excise duty on those goods occurs and, consequently, the excise duty on them becomes chargeable.

Furthermore, the Court finds that Article 6(1) and Article 7(1) of Directive 92/12, as amended by Directive 96/99, must be interpreted as meaning that it is the authorities in the Member State in which the goods, unlawfully introduced into the European Union, were discovered then seized that are competent to recover the excise duty, provided that those goods are held for commercial purposes. It is for the national court to determine whether that condition is satisfied in the dispute before it.

Judgment of 28 January 2016, BP Europa (C-64/15, EU:C:2016:62)

(Reference for a preliminary ruling – Taxation – General arrangements for excise duty – Directive 2008/118/EC – Occurrence of an irregularity during a movement of excise goods – Movement of goods under a duty suspension arrangement – Goods missing on delivery – Levying of excise duty in the absence of proof of destruction or loss of the goods)

In January 2011, BP Europa dispatched 2.4 million litres of gas oil by ship from a tax warehouse in the Netherlands to a tax warehouse in Germany. The transport was carried out as a movement of excise goods under a duty suspension arrangement. Following the delivery, the owner of the tax warehouse in Germany found that 4 854 litres of gas oil were missing from the amount dispatched and notified the customs authorities thereof. The German tax authority then levied energy tax on the amount of missing gas oil. BP Europa challenges that decision.

Hearing the dispute, the Bundesfinanzhof (Federal Finance Court, Germany) asks the Court, in essence, which are the chargeability rules to which, on application of Directive 2008/118, goods moving under a duty suspension arrangement are subject when it is found, on delivery, that there are shortages compared to the quantities at the point of despatch. In particular, it asks whether, under Article 20(2) of Directive 2008/118, the discovery of missing products on delivery of the product in a situation such as that at issue in the main proceedings ends the duty suspension arrangement for excise goods. In addition, the German court asks the Court whether the provisions of Directive 2008/118 preclude a national transposing law not expressly stating that the irregularity governed by Article 10(2) of Directive 2008/118 must have given rise to the release for consumption of the goods concerned.

The Court rules that Article 20(2) of Directive 2008/118 must be interpreted as meaning that the movement of excise goods under a duty suspension arrangement ends, for the purpose of that provision, when the consignee of those goods finds, on unloading in full from the means of transport carrying the goods in question, that there are shortages of the goods in comparison with the amount which should have been delivered to him.

The wording of Article 20(2) of Directive 2008/118 refers to the goods themselves without making any reference to the means by which they are transported. It is therefore the actual receipt of the goods, as such, by their consignee which must be taken into account in order to determine the time of their delivery and not the mere transport to the consignee of their content, whatever that may be.

Article 20 of that directive is part of Chapter IV thereof, entitled ‘Movement of excise goods under suspension of excise duty’. That chapter includes the provisions of Article 19(2)(c) of that directive, in accordance with which the consignee must consent to any check enabling the competent authorities of the Member State of destination to satisfy themselves that the goods in question have actually been received. The EU legislature thus intended to make the actual receipt of the goods the element determining the conditions under which the movement of those goods under a duty suspension arrangement must be assessed at the time of their delivery. No other provision of that chapter calls for a different interpretation.

In addition, by specifying when the movement of excise goods under a duty suspension arrangement ends, the provisions of Article 20(2) of Directive 2008/118 seek to define the time when such goods are deemed to have been released for consumption and to determine, in consequence, the time when the tax on those goods becomes chargeable.

Furthermore, since excise duty is a tax on consumption, as stated in recital 9 of Directive 2008/118, based on the amount of goods offered for consumption, the point at which the duty becomes chargeable must be fixed in such a manner that the amount of goods concerned can be measured precisely.

The Court adds that the combined provisions of Article 7(2)(a) and Article 10(2) of Directive 2008/118 must be interpreted as meaning that the situations which they

govern are outside that referred to in Article 7(4) of that directive and that the fact that a provision of national law transposing Article 10(2) of Directive 2008/118 does not expressly state that the irregularity governed by that provision of the directive must have given rise to the release for consumption of the goods concerned cannot prevent the application of that national provision to the discovery of shortages, which of necessity entail such a release for consumption.

Article 10(2) and Article 7(2)(a) of Directive 2008/118 refer to a situation where an irregularity, found during a movement of excise goods under a duty suspension arrangement, has given rise to the release for consumption of those goods by their removal from that arrangement. Accordingly, a national provision transposing Article 10(2) of Directive 2008/118 cannot, in principle, provide that such an irregularity is deemed to have occurred in the Member State in which and at the time when the irregularity was detected, without making that presumption subject to the condition that that irregularity gave rise to the release for consumption of the goods in question.

The finding of shortages on delivery of excise goods under a duty suspension arrangement reveals a situation which is, of necessity, in the past where the missing goods did not form part of that delivery and the movement of which did not, accordingly, end in accordance with Article 20(2) of Directive 2008/118. In consequence, that situation constitutes an irregularity within the meaning of Article 10(6) of that directive. An irregularity of that type of necessity gives rise to a removal from the duty suspension arrangement and, as a result, a release for consumption as presumed under Article 7(2)(a) of that directive.

Furthermore, the irregularity governed by Article 10(2) of Directive 2008/118 concerns a situation other than that covered by Article 7(4) of that directive, that is to say, 'the total destruction or irretrievable loss of excise goods'. Accordingly, if proof is provided of such total destruction or irretrievable loss of excise goods under a duty suspension arrangement, in that situation, there cannot be a release for consumption within the meaning of Article 7(2)(a) of Directive 2008/118, nor, as a result, can Article 10(2) of that directive apply. Thus, situations governed by those provisions are indeed outside those covered by Article 7(4) of that directive.

Lastly, the Court holds that Article 10(4) of Directive 2008/118 must be interpreted as meaning that it applies not only where the total amount of goods moving under a duty suspension arrangement failed to arrive at its destination, but also where only a part of those goods failed to arrive at its destination.

The very wording of Article 10(4) of Directive 2008/118 in no way reserves the application of that provision to the sole case where the total amount of the goods moving under a duty suspension arrangement failed to arrive at the destination. Article 10(4) of Directive 2008/118 falls within a context in which the EU legislature intended to cover all situations of irregularity, including, accordingly, those affecting only a part of the movement.

1.2. Chargeability in the case of acquisition of products subject to excise duty by private individuals

Judgment of 2 April 1998 (Full Court), EMU Tabac and Others (C-296/95, EU:C:1998:152)

(Council Directive 92/12/EEC on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products – Member State in which duty is payable – Purchase through an agent)

EMU Tabac, a Luxembourg retailer of tobacco products, and The Man in Black Limited are subsidiaries of the Enlightened Tobacco Company. The companies have set up and operate a scheme which enables residents of the United Kingdom, 'without leaving the comfort of their own armchairs', to obtain tobacco products purchased from EMU in Luxembourg.

The purpose of the scheme is to avoid paying United Kingdom excise duty, which is considerably higher than the duty payable in Luxembourg. Customers, using The Man in Black as an agent, place orders for cigarettes, the maximum per order being 800 cigarettes. The agent undertakes to transport the goods from Luxembourg to the United Kingdom and to pay the retailer (EMU Tabac) and the carrier the sums due to them, on which it takes a commission.

In the course of 1995, the Commissioners of Customs and Excise detained certain quantities of tobacco products when they were imported into Dover, as they are authorised to do by United Kingdom legislation when excise duty is payable.

In judicial review proceedings against the United Kingdom customs authorities, the two companies claimed that, where goods had been imported for the personal use of private individuals who had paid excise duty on them in the Grand Duchy of Luxembourg, they were exempt from duty in the United Kingdom and thus their detention by the customs authorities was illegal.

The Court of Appeal (United Kingdom) requested the Court of Justice to give a preliminary ruling on a number of questions concerning the interpretation of the Community directive on the general arrangements for products subject to excise duty.

The Court answers that Directive 92/12 must be interpreted as not precluding the levying of excise duty in Member State A on goods released for consumption in Member State B, where the goods were acquired from a company, X, for the use of private individuals in Member State A, through a company, Y, acting in return for payment as agent for those individuals, and where transportation of the goods from Member State B to Member State A was also arranged by company Y on behalf of those individuals and effected by a professional carrier charging for his services.

In arriving at this conclusion, the Court highlights, first, the distinction established by the directive between, on the one hand, goods held for commercial purposes and, on the other hand, goods held for personal use. Under the directive, to establish that goods on which duty is chargeable for the purposes of Article 8 are held for strictly personal purposes, they must have been acquired by private individuals for their own use and transported by them. In addition, the Court notes that where the Community legislature intended the directive to apply in the event of the involvement of an agent, it did so by means of an express provision. In this case, none of the language versions expressly provides for such involvement.

The Court states in this regard that the need for a uniform interpretation of acts adopted by the Community institutions makes it impossible for the text of a provision to be considered in isolation but requires, on the contrary, that it should be interpreted and applied in the light of the versions existing in the other official languages. All the language versions must, in principle, be recognised as having the same weight and this cannot vary according to the size of the population of the Member States using the language in question.

The Court concludes that Article 8 of Directive 92/12, which provides that, as regards products acquired by private individuals for their own use and transported by them, excise duty is to be charged in the Member State in which they are acquired, is not applicable where the purchase and/or transportation of goods subject to duty is effected through an agent. Thus, where goods from one Member State are carried to another Member State on the instructions of a trader acting in return for payment who has previously solicited customers in that latter State and has arranged for importation of the goods, it must be held that excise duty is chargeable in that latter Member State.

Lastly, the Court points out that the directive provides expressly that, in such a case, excise duty paid in the Member State where the goods were purchased is to be reimbursed, in order avoid duty being charged twice over.

Judgment of 23 November 2006, Joustra (C-5/05, EU:C:2006:733)

(Tax provisions – Harmonisation of laws – Directive 92/12/EEC – Excise duties – Wine – Articles 7 to 10 – Determination of the Member State in which duties are chargeable – Acquisition by a private individual for his own use and that of other private individuals – Transport to another Member State by a transport undertaking – Arrangements applicable in the Member State of destination)

Each year, Mr Joustra ordered wine in France for his own use and that of the other members of the group to which he belonged. The wine ordered by Mr Joustra was released for consumption in France and excise duty was paid in that Member State. On his instructions, that wine was then collected by a Netherlands transport company which transported it to the Netherlands and delivered it to Mr Joustra's home, where the wine

was stored for a few days before being delivered to the other members of the group. Mr Joustra paid for the wine and the transport and each member of the group then reimbursed him for the cost of the quantity of wine delivered to that member and a share of the transport costs calculated in proportion to that quantity. The quantity of wine delivered to each member did not exceed the maximum quantities laid down by Directive 92/12, as amended by Directive 92/108, as a guideline for determining whether the products are intended for commercial purposes, namely 90 litres of wine, of which no more than 60 litres may be sparkling wine. Mr Joustra did not engage in that activity on a commercial basis or with a view to making a profit.

The Netherlands tax authorities levied excise duty of EUR 906.20 on that wine.

Mr Joustra disputed liability for that excise duty. Directive 92/12 exempts products acquired by private individuals for their own use and transported by them from excise duty in the Member State of importation. In his view, the words 'transported by them' in the directive do not prevent it from being interpreted as meaning that the charging of excise duty in the Member State of destination is precluded where an individual himself purchases, in another Member State, products subject to excise duty and arranges for those products to be transported, under his instructions and on his account, to the Member State of destination by a third party.

Hearing this dispute, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) sought an interpretation of that notion from the Court of Justice.

The Court holds that Directive 92/12 must be construed as meaning that where a private individual who is not operating commercially or with a view to making a profit acquires in one Member State, for his own personal requirements and those of other private individuals, products subject to excise duty which have been released for consumption in that Member State and arranges for them to be transported to another Member State on his behalf by a transport company established in that other State, Article 7 of that Directive, and not Article 8 thereof, is applicable, with the result that excise duty is also to be levied in that other State.

For the application of Directive 92/12, products which are not held for private purposes and do not therefore come under Article 8 of the directive must necessarily be regarded as being held for commercial purposes and thus come within the scope of Article 7 of the directive. For Article 8 to apply, the products in question must have been transported personally by the private individual who purchased them. Under Article 7(6) of the directive, the excise duty paid in the first Member State is, in such a case, to be reimbursed in accordance with Article 22(3) of the directive.

Judgment of 14 March 2013, Commission v France (C-216/11, EU:C:2013:162)

(Failure of a Member State to fulfil obligations – Council Directive 92/12/EEC – Excise duties – Tobacco products acquired in one Member State and transported to another Member State – Purely quantitative assessment criteria – Article 34 TFEU – Quantitative restrictions on imports)

An action for failure to fulfil obligations was brought before the Court against France, requesting a declaration that the use of a purely quantitative criterion to assess whether the holding by private individuals of manufactured tobacco from another Member State is of a commercial nature, that criterion being applied per individual vehicle (and not per person), and in respect of all of the tobacco products in aggregate (two kilograms per individual vehicle), was contrary to Directive 92/12 and Article 34 TFEU.

The Court rules, first of all, that a Member State which uses such a criterion in respect of all of the tobacco products in aggregate has failed to fulfil its obligations under Directive 92/12 and, specifically, under Articles 8 and 9 thereof.

Article 9(2) of the directive sets out a number of criteria for the purposes of establishing whether products are held for commercial purposes. Specifically, as is apparent from the actual wording of the first subparagraph of Article 9(2), to establish whether products are held for commercial purposes, Member States must take account, inter alia, of several factors, the quantity of the products held being just one of the factors listed amongst several others. Furthermore, as regards that factor, the second subparagraph of Article 9(2) provides that Member States may lay down guide levels, solely as a form of evidence. It follows that Article 9(2) of the directive does not allow Member States to determine that products are held for commercial purposes solely on the basis of a purely quantitative threshold for products held.

Furthermore, the Court states that, in expressly setting minimum thresholds for several distinct categories of tobacco products, Directive 92/12 permits the Member States to lay down weight-thresholds for all of the tobacco products held in aggregate, only on condition that each of those minimum thresholds is complied with.

Lastly, it holds that since the aim of Article 9(2) of Directive 92/12 is to specify the conditions under which excise duty is to become chargeable to the holder of the products pursuant to the second subparagraph of Article 9(1), the minimum guide thresholds laid down in the second subparagraph of Article 9(2) must be held to refer to that holder and, therefore, as applying per person.

Judgment of 18 July 2013, Metro Cash & Carry Danmark (C-315/12, EU:C:2013:503)

(Excise duty – Directive 92/12/EEC – Articles 7 to 9 – Directive 2008/118/EC – Articles 32 to 34 – Intra-Community movement of products subject to excise – Regulation (EEC) No 3649/92 – Articles 1 and 4 – Simplified accompanying document – Copy 1 – 'Cash & carry' business – Products released for consumption in a Member State and held for commercial purposes in

another Member State or products acquired by private individuals for their own use and transported by them – Spirits – No obligation on the supplier to check)

A Danish company, Metro, has wholesale stores reserved for traders operating on the 'cash and carry' system. With this distribution method, customers holding a card come to a point of sale to stock up on goods for which they pay in cash and for the further transport of which they make their own arrangements.

The dispute in the main proceedings concerned excise duties on spirits, which are much higher in Sweden than in Denmark. This means that there is a financial incentive to purchase spirits on which Danish excise duty has been paid and to import them into Sweden. Spirits are not subject to Swedish excise duties if they are acquired by private individuals in Denmark for their own use and are transported by them. If they are acquired for commercial use, by contrast, Swedish excise duties apply.

Following the adjustment for Swedish traders sourcing beverages in Denmark, the Swedish tax authorities had required Metro to receive from its Swedish customers the simplified accompanying document for products subject to excise duty and moving between States.

The action brought by Metro against that decision was dismissed by the Østre Landsret (Eastern Regional Court, Denmark). Metro then appealed against that judgment to the Højesteret (Supreme Court, Denmark), the referring court, which asked the Court, inter alia, whether Articles 7 to 9 of Directive 92/12 and Articles 1 and 4 of Regulation No 3649/92 must be interpreted as meaning that a trader must check whether purchasers from other Member States intend to import products subject to excise duty into another Member State and, where relevant, whether such importation is for private or commercial use.

The Court answers that Articles 7 to 9 of Directive 92/12, as amended by Directive 92/108, and Articles 1 and 4 of Regulation No 3649/92 must be interpreted as meaning that a trader is not required to check whether purchasers from other Member States intend to import products subject to excise duty into another Member State and, where relevant, whether such importation is for private or commercial use.

Under Article 1 of Regulation No 3649/92, if products subject to excise duty and already released for consumption in one Member State are intended to be used in another Member State for the purposes referred to in Article 7 of Directive 92/12, the person who is responsible for the intra-Community movement must draw up a simplified accompanying document. However, nothing in those provisions leads to the conclusion that a supplier, to the extent that it is not the 'person who is responsible for the intra-Community movement' under Article 1 of Regulation No 3649/92, must check whether the conditions are met for the person responsible to draw up the simplified accompanying document and to give copy 1 thereof to it so that the supplier can keep it.

Furthermore, in accordance with Article 7(3) of Directive 92/12, depending on all the circumstances, the duty is to be due from the person making the delivery or holding the products intended for delivery or from the person receiving the products for use in a Member State other than the one where the products have already been released for consumption, or from the relevant trader or body governed by public law. It follows from this, first, that a trader, as a supplier who does not arrange delivery of the products sold, cannot be considered to be the 'person making the delivery' within the meaning of Article 7(3). Such a trader cannot be considered to be the person 'holding the products intended for delivery' within the meaning of Article 7(3), in so far as its self-service wholesale business does not make it possible for it to guarantee the commercial use of the products sold to customers from another Member State or that those products will actually be delivered into that other Member State .

In addition, the Court holds that Articles 32 to 34 of Directive 2008/118 must be interpreted as not substantially amending Articles 7 to 9 of Directive 92/12, as amended by Directive 92/108, but reproduce the content of those articles while clarifying it.

Lastly, the Court rules that Article 8 of Directive 92/12, as amended by Directive 92/108, must be interpreted as being capable of covering the purchase of products subject to excise duty where those products are acquired by private individuals for their own use and are transported by them, which is for the competent national authorities to check on a case-by-case basis.

2. Payment of excise duty

Judgment of 15 June 2006, Heintz van Landewijck (C-494/04, EU:C:2006:407)

(Tax provisions – Harmonisation of laws – Directive 92/12/EEC – Excise duty – Tax stamps – Sixth VAT Directive – Articles 2 and 27 – Disappearance of excise stamps)

Landewijck operates a manufactured tobacco wholesale business in Luxembourg, in which it is an authorised warehousekeeper. Pursuant to the Netherlands Law on excise duty, the undertaking submitted two requests for excise stamps for manufactured tobacco to the Belastingdienst/Douane te Amsterdam (Amsterdam tax and customs authorities, Netherlands) and entrusted Securicor Omega with the delivery of those stamps to it. In the course of the supply, those stamps went missing.

Landewijck informed the Tax Inspector ('the Inspector') that the stamps had not been delivered to it, that they could not, therefore, be used and that Securicor Omega did not accept responsibility for their disappearance. The Inspector refused any request for the offsetting or reimbursement of the amount due or paid for the missing stamps. The complaint lodged against that decision was also dismissed by the Inspector. Finally, the appeal brought before the Gerechtshof te Amsterdam (Regional Court of Appeal,

Amsterdam, Netherlands) was declared unfounded. By an appeal on a point of law, the dispute was brought before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), the referring court.

The referring court referred to the Court of Justice several questions for a preliminary ruling by which it sought to ascertain, inter alia, whether a Member State could, without infringing Directive 92/12, preclude reimbursement of the amount of excise duty paid by the applicant company by means of the purchase of stamps, where the tax markings at issue disappeared before they could be affixed to the tobacco products released for consumption in national territory, even though it cannot be ruled out that they have used, or will use, the stamps by affixing them to tobacco products which have been put on the market unlawfully**.**

The Court explains that neither Directive 92/12 nor the principle of proportionality preclude Member States which have availed themselves of the option to require that products released for consumption in their territory must carry tax markings from adopting legislation which does not provide for reimbursement of the amount of excise duty paid, where the excise stamps disappeared before having been affixed to the tobacco products, if that disappearance is not attributable to force majeure or to an accident and if it is not established that the stamps have been destroyed or rendered permanently unusable, which thereby places the financial responsibility for the loss of tax stamps on the purchaser.

A national law which allowed the purchaser of excise stamps to obtain reimbursement simply by claiming that they had gone missing would be likely to encourage abuse and evasion. The prevention of abuse and evasion is precisely one of the objectives pursued by Community law. Accordingly, national rules which place the financial responsibility for the loss of those stamps on the purchaser where tax stamps go missing contribute to the achievement of the aim of preventing the fraudulent use of those stamps.

Judgment of 13 December 2007, BATIG (C-374/06,* EU:C:2007:788*)

(Preliminary reference – Tax provisions – Harmonisation of laws – Directive 92/12/EEC – Products subject to excise duty – Tax markings – Irregular departure from a suspension arrangement – Theft – Release for consumption in the Member State of the theft – Non-reimbursement of the tax markings of a Member State already affixed to the stolen products)

Tuxedo GmbH received tax markings from the Hauptzollamt (Principal Customs Office, Germany) for cigarettes manufactured in Ireland by P.J. Carroll & Co. Ltd (‘Carroll’) and intended for the German market. Tuxedo sent those tax markings to Carroll which affixed them to individual packets of cigarettes. The packets were then dispatched to a commercial partner established in the Netherlands under intra-community duty suspension arrangements. All of the cigarettes were stolen from the port of Dublin (Ireland).

Because the cigarettes departed from the suspension arrangement in Ireland, Carroll paid excise duty to the Irish customs authorities in accordance with the European rules.

Tuxedo then applied to the Hauptzollamt for reimbursement of the tax markings obtained. That application was refused, and the refusal upheld, by the Hauptzollamt. An action was therefore brought before the Finanzgericht Düsseldorf (Finance Court, Düsseldorf, Germany), the referring court.

The question raised was whether Directive 92/12 precludes the legislation of a Member State which excludes the reimbursement of the amount paid to obtain tax markings issued by that Member State when those markings have been affixed to products subject to excise duty before being released for consumption in that Member State, when those products have been stolen in another Member State, involving the payment of excise duties in that other Member State, and when evidence has not been furnished that the stolen products will not be marketed in the Member State which issued those markings.

The Court states at the outset that the theft of tobacco products circulating under suspension of excise duties constitutes an irregular departure from a suspension arrangement within the meaning of Article 6(1)(a) of Directive 92/12, so that the excise duty becomes chargeable in the Member State in which the goods were stolen in accordance with Article 20(1) of that directive.

It then concludes that Directive 92/12, as amended by Regulation No 807/2003, [13] does not preclude the legislation of a Member State which excludes the reimbursement of the amount paid to obtain tax markings issued by that Member State when those markings have been affixed to products subject to excise duty before being released for consumption in that Member State, when those products have been stolen in another Member State, involving the payment of excise duties in that other Member State, and when evidence has not been furnished that the stolen products will not be marketed in the Member State which issued those markings.

According to the Court, the possibility of obtaining a refund for the tax markings simply by claiming that the products on which they were affixed have gone missing would be likely to encourage abuse and evasion. In the circumstances covered by that legislation, there is a real risk that the stolen products might be marketed in the Member State which issued the tax markings. Since those products carry tax markings of that State, those products may be introduced with ease onto the official market for tobacco products in that State, thus depriving it of tax revenue to which it is entitled. Even in the absence of any fraud on the part of the economic operator holding the goods, the fact that the excise duty has been paid in another Member State has no bearing on that risk.

[13] Council Regulation (EC) No 807/2003 of 14 April 2003 adapting to Decision 1999/468/EC the provisions relating to committees which assist the Commission in the exercise of its implementing powers laid down in Council instruments adopted in accordance with the consultation procedure (unanimity) (OJ 2003 L 122, p. 36).

Under Article 22(1) and (2) of Directive 92/12, when products released for consumption in a first Member State and thus carrying a tax marking of that Member State are intended to be consumed in another Member State and are dispatched to that Member State, it is necessary that the destruction of the tax marks of the first Member State be certified by the tax authorities of that State. By that provision, the Community legislature favoured the prevention of abuse and fraud to the detriment of the principle that taxation should occur in only one Member State. It would be paradoxical if the reimbursement of the tax markings affixed to the products subject to excise duty were authorised in the situation covered by the legislation at issue, in which no control of the destination of the stolen products is possible, whereas Article 22(2)(d) of Directive 92/12 makes the reimbursement of the excise duty contingent on the finding that the marks proving payment of that duty have been destroyed, in circumstances in which the risk of abuse and fraud is lower.

Judgment of 2 June 2016, Kapnoviomichania Karelia (C-81/15, EU:C:2016:398)

(Reference for a preliminary ruling – Taxation – General arrangements governing excise duty – Directive 92/12/EEC – Manufactured tobacco moving under an excise duty suspension arrangement – Liability of the authorised warehousekeeper – Whether Member States may make the authorised warehousekeeper jointly and severally liable for the payment of sums corresponding to the financial penalties imposed on those engaged in smuggling – Principles of proportionality and legal certainty)

Karelia, a Greek company active in the manufacture of tobacco products, was to export cigarettes, placed under a suspension arrangement, into Bulgaria (before its accession to the European Union). However, the cigarettes never reached their destination, the very existence of the purchasing company having been called into question. Since no proof of departure of the cargo had been produced, the guarantee which Karelia had provided to cover payment of excise duty was retained. In addition, the customs authorities issued a measure attributing liability for payment in respect of the smuggling and, accordingly, fixed additional charges to be paid and increased the excise duty.

Karelia was declared jointly and severally liable in civil law for payment of those sums. It takes the view, however, that there is no legal connection between it and the perpetrator of the smuggling offences. The Greek legislation makes liable all persons who are known to have participated in a customs offence, while the fact that the persons jointly liable in civil law did not know that it was the intention of the persons identified as the primary perpetrators to commit the offence will not release the former from their liability.

The question asked by the referring court concerns the extent of the liability of the warehousekeeper as provided for in Directive 92/12, as amended by Directive 92/108, that is to say, whether that operator, which may be held liable for excise duty, may also be held liable for the other financial consequences, including the financial penalties

imposed on the perpetrators of smuggling offences, when it is not the owner of the goods in question and it has no contractual relationship in the form of agency with the perpetrators of the offence.

The Court rules, first of all, that it is apparent from the scheme of Directive 92/12, as amended by Directive 92/108, and, in particular, from Articles 13, 15(3) and (4) and 20(1) thereof, that the legislature conferred a central role on the authorised warehousekeeper in the context of the procedure for movement of products subject to excise duty under a suspension arrangement.

Directive 92/12 imposes on the authorised warehousekeeper a system of liability for all risks inherent in the movement of products subject to excise duty under such an arrangement, and that warehousekeeper is, consequently, designated as liable for the payment of excise duties in cases where an irregularity or offence has been committed involving the chargeability of such duties in the course of the movement of those products. That liability is thus strict and is based not on the proven or presumed fault of the warehousekeeper, but on his participation in an economic activity.

However, it cannot be inferred from Article 20(3) of Directive 92/12, under which Member States are required to take the necessary measures to deal with any offence or irregularity and to impose effective penalties, that Member States are required to impose additional criminal liability on the authorised warehousekeeper in respect of any irregularity committed during the release for movement of products subject to excise duty.

In the first place, that provision specifies neither the appropriate penalties nor the categories of persons to be held liable in respect of them.

In the second place, the system of liability for risk provided for in Directive 92/12 stops at responsibility for the payment of excise duties. Thus, that directive does not impose a system of joint and several liability such as to render the authorised warehousekeeper liable for payment of the sums corresponding to the financial penalties imposed on the perpetrators of a smuggling offence.

Next, the Court holds that Directive 92/12, as amended by Directive 92/108, read in the light of the general principles of EU law, in particular the principles of legal certainty and proportionality, must be interpreted as precluding national legislation – which permits, inter alia, the owners of products moving under excise duty suspension arrangements to be declared jointly and severally liable for payment of sums corresponding to the financial penalties imposed in the event of the commission of an offence during the movement of those products under excise duty suspension, where the owners are linked to the perpetrators of the offence by a contractual relationship making them their agents – under which the authorised warehousekeeper is declared jointly and severally liable for payment of those sums, with no possibility for him to escape that liability by providing proof that he had nothing whatsoever to do with the acts of the perpetrators of the offence, even if, under national law, that warehousekeeper was neither the owner

of those products at the time when the offence was committed nor linked to the perpetrators of that offence by a contractual relationship making them his agents.

Where the increased liability of the authorised warehousekeeper, bearing in mind that it did not retain ownership of the smuggled goods and was not linked to the smugglers by a contractual relationship making them its agents, is not expressly provided for either by Directive 92/12 or by the provisions of national law, the penalties that could be imposed on such an authorised warehousekeeper under such legislation do not appear sufficiently certain and foreseeable for the interested parties for the view to be taken that they meet the requirements of legal certainty, this, however, being a matter for that court to verify.

Furthermore, so far as concerns the measures aimed at preventing tax evasion, it has already been held, in relation to value added tax, that the sharing of the risk, following fraud committed by a third party, will not be compatible with the principle of proportionality if a tax regime imposes the entire responsibility for the payment on suppliers, regardless of whether or not they were involved in the fraud committed by the purchaser.

In addition, national measures which bring about, de facto, a system of strict joint and several liability go beyond what is necessary to preserve the public exchequer's rights. Imposing responsibility for paying VAT on a person other than the person liable to pay that tax, even where that person is an authorised tax warehousekeeper bound by the specific obligations referred to in Directive 92/12, without allowing him to escape liability by providing proof that he had nothing whatsoever to do with the acts of the person liable to pay the tax, must be considered contrary to the principle of proportionality. It would clearly be disproportionate to hold that person unconditionally liable for the shortfall in tax caused by acts of a third party over which he has no influence whatsoever.

Compliance with those same requirements is necessary with regard to a measure such as the attribution to the authorised warehousekeeper of liability for the financial consequences of smuggling offences.

III. Indirect taxes other than excise duty on products subject to excise duty

Judgment of 24 February 2000, Commission v France (C-434/97, EU:C:2000:98)

(Action for failure to fulfil obligations – Directive 92/12/EEC – Specific tax levied on beverages with a high alcohol content)

A contribution levied on tobacco and alcoholic beverages known as the 'social security contribution', which was introduced on the ground of the health risks involved in immoderate use of those products, existed under French legislation. It applied, inter alia, to beverages having an alcohol content greater than 25% by volume. With regard to alcoholic beverages, the amount of the special contribution is fixed at FRF 1 (approximately EUR 0.15) per decilitre or fraction of a decilitre. The Commission brought an action for failure to fulfil obligations against the French Republic, taking the view that the scope and tax base of the 'social security contribution' were not compatible with the structure of excise duties on alcohols and alcoholic beverages, as defined by Directive 92/12.

In its view, first, the 'social security contribution' was levied on beverages having an alcohol content greater than 25% by volume. Article 20 of Directive 92/83 sets out a definition of ethyl alcohol which covers, inter alia, all alcoholic beverages falling within CN codes 2204 (wines), 2205 (vermouths) and 2206 (other fermented beverages) which have an actual alcoholic strength by volume exceeding 22% vol. Second, Article 21 of Directive 92/83 retains, as the tax base for excise duty on ethyl alcohol, the number of hectolitres of pure alcohol, whereas the 'social security contribution' is determined by reference to the volume of the beverage.

The Court rules that Article 3(2) of Directive 92/12, which is designed to allow the Member States to establish, in addition to the minimum excise duty fixed by Directive 92/83, other indirect taxes having a specific purpose, that is to say, a purpose other than a budgetary purpose, does not require Member States to comply with all rules applicable for excise duty or VAT purposes as far as determination of the tax base, calculation of the tax, and chargeability and monitoring of the tax are concerned. It is sufficient that the indirect taxes pursuing specific objectives should, on these points, accord with the general scheme of one or other of these taxation techniques as structured by the EU legislation.

Judgment of 9 March 2000, EKW and Wein & Co (C-437/97, EU:C:2000:110)

(Indirect taxation – Municipal beverage duty – Sixth VAT Directive – Directive 92/12/EEC)

The Evangelischer Krankenhausverein Wien ('EKW') operates a hospital cafeteria. On 6 December 1996, the Abgabenbehörde Wien (the tax recovery authority in Vienna) requested it to pay, pursuant to the Vienna tax legislation, 309 995 Austrian schilling (ATS) (approximately EUR 22 500) in respect of beverage duty on sales between January 1992 and October 1996. The EKW brought proceedings before the Austrian courts challenging those levies.

Wein & Co. is a wine-trading company established in Leonding, Upper Austria, from which the municipal authorities sought payment, pursuant to the Upper Austria tax legislation, of ATS 417 628 (approximately EUR 30 350) in respect of beverage duty owing for the period from 1 December 1994 to 31 March 1995. Wein & Co. also brought proceedings before the Austrian courts.

The Verwaltungsgerichtshof (Supreme Administrative Court, Austria) asks the Court whether such municipal provisions governing beverage duty are compatible with Community law, in particular with Sixth Directive 77/388 and Directive 92/12.

The Court answers, first, that the duty on alcoholic beverages and ice cream is compatible with Sixth Directive 77/388 and with Directive 92/12 and, second, that Directive 92/12 does preclude the maintenance of the Austrian tax charged on alcoholic beverages.

In reaching that conclusion, the Court holds, in the first place, that although Article 33 of Sixth Directive 77/388 precludes the maintenance or introduction of stamp duties or other types of taxes, duties or charges which have the essential characteristics of VAT, it does not preclude the maintenance or introduction of a tax which does not have those characteristics. Consequently, that provision does not preclude the maintenance of a tax provided for by the legislation of a Member State which is levied on the supply for consideration of ice cream (including fruits processed therein or added thereto) and of beverages, in each case including the containers and accessories sold with the products. That tax, which applies only to a limited category of goods, is not a general tax since it is not intended to apply to all economic transactions in the Member State concerned.

In the second place, Article 3(2) of Directive 92/12, under which the products listed in paragraph 1 of that article may be subject to indirect taxes other than excise duty if those indirect taxes pursue one or more specific purposes in the sense contemplated by that provision and comply with the tax rules applicable for excise duty and VAT purposes as far as determination of the tax base, calculation of the tax, and chargeability and monitoring of the tax are concerned, does preclude the maintenance of a tax provided for by the legislation of a Member State which is levied on the supply for consideration of alcoholic beverages and which, first, does not pursue a purpose other than a purely budgetary one and, second, does not accord with the general scheme, the rules relating

to excise duty on alcoholic beverages, since its amount is determined in relation to the value of the product and not on the basis of the product's weight, quantity or alcohol content, or the rules applicable for VAT purposes as far as the rules on calculation and chargeability are concerned.

In the case at issue, the Court holds that the reinforcement of municipal autonomy through the grant of a power to generate tax income constitutes a purely budgetary objective. Nor is there any connection with tourist infrastructures or the development of tourism; this duty, which is imposed on beverages irrespective of where they are consumed, is also levied in areas where there is little or no tourism. Lastly, direct sales of wine in Austria are exempt from beverage duty; it must therefore be questionable whether the duty at issue is intended to discourage the consumption of alcoholic beverages and to protect public health.

In the absence of the specific purpose of the duty on alcoholic beverages at issue, which, moreover, does not accord with the general scheme of the rules relating to excise duty on alcoholic beverages or those relating to VAT, that duty is declared incompatible with EU law.

Judgment of 10 March 2005, Hermann (C-491/03, EU:C:2005:157)

(Indirect tax – Directive 92/12/EEC – Local tax on the supply of alcoholic beverages for immediate consumption on the premises)

Volkswirt Weinschänken GmbH operated a restaurant in the city of Frankfurt am Main (Germany), in which it sold, among other things, beverages for immediate consumption on the premises. As the Satzung über die Erhebung einer Getränkesteuer im Gebiet der Stadt Frankfurt am Main (Local law on the levying of a beverage tax within the City of Frankfurt am Main) provided that the city is to levy a tax on beverages, the restaurant received a notice of assessment that the company challenged before the Verwaltungsgericht Frankfurt am Main (Administrative Court, Frankfurt am Main, Germany), which annulled the notice. An appeal was brought against that decision before the Hessischer Verwaltungsgerichtshof (Higher Administrative Court, Hesse, Germany), the referring court.

It was necessary to characterise the activity to which the notice of assessment related, that is, in a catering context, the supply for consideration of alcoholic beverages for immediate consumption on the premises within the meaning of Directive 92/12. The question referred for a preliminary ruling asked specifically whether that activity corresponds to ‘another indirect tax on products subject to excise duty’ for the purposes of Article 3(1) and (2) of Directive 92/12 or a tax on the supply of services relating to products subject to excise duty within the meaning of the second subparagraph of Article 3(3) of that directive.

While the answer was in the affirmative for the second case, it was asked whether a tax on the supply of services relating to products subject to excise duty must satisfy both the condition of not giving rise to border-crossing formalities in trade between Member States (first subparagraph of Article 3(3) of Directive 92/12) and the condition of being for 'specific purposes' (Article 3(2) of that directive).

The Court holds that a tax which is levied, in a catering context, on the supply for consideration of alcoholic beverages for immediate consumption on the premises must be considered to be a tax on the supply of services relating to products subject to excise duty which cannot be characterised as a turnover tax for the purposes of the second subparagraph of Article 3(3) of Directive 92/12.

In order to determine whether a tax applies to products subject to excise duty for the purposes of Article 3(2) of Directive 92/12 or, rather, to the services supplied in relation to such products for the purposes of the second subparagraph of Article 3(3), regard must be had to the predominant feature of the transaction on which it is imposed. A supply of alcoholic beverages in a catering context is characterised by an array of features and acts, of which the supply of the product itself is only one component and in which services predominate.

Furthermore, the Court holds that a tax on the supply of services relating to products subject to excise duty within the meaning of the second subparagraph of Article 3(3) of that directive must satisfy only the condition set out in the first subparagraph of that paragraph, namely that such 'taxes do not give rise to border-crossing formalities in trade between Member States'. The directive therefore does not require the taxes concerned to comply with the condition laid down in Article 3(2), namely that they be for a specific purpose.

Judgment of 27 February 2014, Transportes Jordi Besora (C-82/12, EU:C:2014:108)

(Indirect taxes – Excise duties – Directive 92/12/EEC – Article 3(2) – Mineral oils – Tax on retail sales – Concept of 'specific purpose' – Transfer of powers to the Autonomous Communities – Financing – Predetermined allocation – Health-care and environmental expenditure)

Spain had established a tax on retail sales of certain hydrocarbons ('IVMDH'). That tax was intended to finance the new powers transferred to the Autonomous Communities in the field of health and, where relevant, environmental expenditure. The IVMDH remained in force in Spain from 1 January 2002 to 1 January 2013, the date on which it was integrated into the harmonised excise duty on mineral oils. As final consumer, Transportes Jordi Besora SL, a haulage company established in the Autonomous Community of Catalonia, paid a total of EUR 45 632.38 in respect of the IVMDH payable for the tax years 2005 to 2008. Taking the view that the IVMDH was incompatible with Directive 92/12, that company sought a refund of the amount paid.

Against that background, the Tribunal Superior de Justicia de Cataluña (High Court of Justice of Catalonia, Spain) asked the Court of Justice whether specific indirect taxation on retail sales of certain hydrocarbons, which is levied on the consumption of those products, was compatible with Article 3(2) of Directive 92/12.

The Court rules that Article 3(2) of Directive 92/12 must be interpreted as precluding national legislation that establishes a tax on the retail sale of mineral oils, for such a tax cannot be regarded as pursuing a specific purpose within the meaning of that provision where that tax, intended to finance the exercise by the regional or local authorities concerned of their powers in the fields of health and the environment, is not itself directed at protecting health and the environment.

A specific purpose within the meaning of Article 3(2) of Directive 92/12 is a purpose other than a purely budgetary purpose. In addition, it has already been held the reinforcement of the autonomy of a regional or local authority through the grant of a power to generate tax income constitutes a purely budgetary objective that cannot, on its own, constitute a specific purpose in the sense contemplated by Article 3(2) of Directive 92/12.

However, since every tax necessarily pursues a budgetary purpose, the mere fact that this tax is intended to achieve a budgetary objective cannot, in itself, suffice – if Article 3(2) of Directive 92/12 is not to be rendered meaningless – to preclude that tax from being regarded as having, in addition, a specific purpose within the meaning of that provision. In this regard, the predetermined allocation of the proceeds of that tax to the financing by regional authorities of powers transferred to them by the State in the fields of health and the environment can constitute a factor to be taken into account for the purpose of establishing the existence of a specific purpose. However, such an allocation, which is merely a matter of internal organisation of the budget of a Member State, cannot, in itself, constitute a sufficient condition in that regard, since any Member State may decide to lay down, irrespective of the purpose pursued, that the proceeds of a tax be allocated to financing particular expenditure.

In order to be regarded as pursuing a specific purpose within the meaning of Article 3(2) of Directive 92/12, a tax must itself be directed at protecting health and the environment. This would, in particular, be the case where the proceeds of that tax had to be used for the purpose of reducing the social and environmental costs specifically linked to the consumption of the mineral oils on which that tax is imposed, so that there is a direct link between the use of the revenue and the purpose of the tax in question

Judgment of 25 July 2018, Messer France (C-103/17, EU:C:2018:587)

(Reference for a preliminary ruling – Harmonisation of fiscal legislation – Directive 92/12/EEC – Article 3(2) – Directive 2003/96/EC – Articles 3 and 18 – Taxation of energy products and electricity – Excise duties – Existence of another indirect tax – Conditions – National legislation providing for a contribution to the public electricity service – Definition of 'specific purposes' – Compliance with a minimum level of taxation)

Between 2005 and 2009, Messer France, formerly Praxair, paid the contribution au service public de l'électricité (public electricity service tax, 'CSPE').

Applied in France between 2003 and 2010, the CSPE was a levy paid by final consumers in their bills and collected by electricity suppliers, the amount of which was intended to offset the additional costs which suppliers were legally required to bear and which had a wide range of purposes: they ranged from production incentives for electricity generated from renewable sources and offsetting the higher costs of electricity generation in non-metropolitan areas to social purposes, such as the special pricing structure for electricity as a basic necessity and assistance for persons living in poverty.

Claiming that that tax was contrary to Article 3(2) of Directive 92/12 in so far as it did not serve a specific purpose within the meaning of that provision, the company submitted a claim for repayment of the CSPE to the competent ministry, which rejected it implicitly. The tribunal administratif de Paris (Administrative Court, Paris, France) and the cour administrative d'appel de Paris (Administrative Court of Appeal, Paris, France) also dismissed its actions.

The company therefore appealed on a point of law to the Conseil d'État (Council of State, France), putting forward a number of pleas in law regarding compliance of the CSPE with EU law, in particular Directive 92/12. The Conseil d'État referred to the Court a number of questions on the interpretation of Article 3(2) of Directive 92/12 and of Articles 3 and 18 of Directive 2003/96. In particular, the referring court asks, first, whether Article 3(2) of Directive 92/12 must be interpreted as meaning that maintenance of 'another indirect tax' presupposes the introduction of a harmonised excise duty and whether a tax such as that at issue in the main proceedings may be regarded as such an excise duty or whether its compatibility with Directives 92/12 and 2003/96 must, as the case may be, be assessed in the light of the conditions laid down in Article 3(2) of Directive 92/12 for determining the existence of other indirect taxes for specific purposes. The referring court asks, second, whether such a tax may be classified as 'another indirect tax' within the meaning of Article 3(2) of Directive 92/12, and, lastly, it asks about the arrangements for reimbursement of such a tax in the event that only some of the purposes pursued by the tax in question are classified as specific within the meaning of that provision.

First of all, the Court answers that Article 3(2) of Directive 92/12 must be interpreted as meaning that levying another indirect tax on electricity is not conditional on the

imposition of a harmonised excise duty and that, since a tax such as that at issue in the main proceedings does not constitute such an excise duty, its compatibility with Directives 92/12 and 2003/96 must be assessed in the light of the conditions laid down in Article 3(2) of Directive 92/12 for determining the existence of other indirect taxes for specific purposes.

Furthermore, Article 3(2) of Directive 92/12 must be interpreted as meaning that a tax such as that at issue in the main proceedings may be classified as 'another indirect tax' as regards its environmental objective, which is intended to finance additional costs resulting from the obligation to purchase green energy, but not as regards its objectives of territorial and social cohesion, such as the geographical price-balancing mechanism and the reduction in the price of electricity for low-income households, or as regards its purely administrative objectives, including the financing of costs inherent in the administrative operations of public authorities or institutions such as the Médiateur national de l'énergie (National Energy Ombudsman) and the Caisse des dépôts et consignations (Equalisation Fund), subject to verification by the referring court of compliance with the tax rules applicable for excise duty purposes.

In reaching that conclusion, the Court notes that Article 3(2) of Directive 92/12 allows Member States to introduce or maintain indirect taxes other than the excise duty instituted by that directive provided that, first, the tax pursues a specific purpose and, second, it complies with the tax rules applicable for excise duty or VAT purposes as far as determination of the tax base, calculation of the tax, chargeability and monitoring of the tax are concerned.

It also notes that that provision does not require Member States to comply with all rules applicable for excise duty or VAT purposes as far as determination of the tax base, calculation of the tax, and chargeability and monitoring of the tax are concerned. It is sufficient that the indirect taxes pursuing specific objectives should, on those points, accord with the general scheme of one or other of those taxation techniques as structured by EU legislation.

In addition, as regards the first of those conditions, the Court recalls, in the light of its case-law, that a specific purpose within the meaning of Article 3(2) of Directive 92/12 is a purpose other than a purely budgetary purpose.

Lastly, the Court holds that EU law is to be interpreted as meaning that the taxable persons concerned are entitled to partial reimbursement of a tax such as that at issue in the main proceedings in the proportion in which revenue raised from that tax was allocated to non-specific objectives, provided that that tax was not directly passed on by the taxable persons to their own customers, which is a matter to be determined by the referring court.

COURT OF JUSTICE
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