

Case C-509/22**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

27 July 2022

Referring court:

Corte suprema di cassazione (Italy)

Date of the decision to refer:

20 July 2022

Applicant:

Agenzia delle Dogane e dei Monopoli

Defendant:

Girelli Alcool Srl

Subject matter of the main proceedings

Appeal by the Agenzia delle dogane (Italian Customs Authority) against a decision of the Commissione tributaria regionale della Lombardia (Regional Tax Court, Lombardy, Italy) confirming on appeal the successful outcome of the action lodged by the company Girelli Alcool Srl seeking a rebate of the excise duty on a quantity of alcohol that was accidentally spilled.

Subject matter and legal basis of the request

With regard to Article 267 TFEU, the Corte di cassazione (Supreme Court of Cassation, Italy), the referring court, as the court of last instance, seeks clarification, having regard also to the case-law of the Court of Justice, on how the concept of ‘unforeseeable circumstances’ is to be understood in relation to the loss of excise goods when those goods are under duty suspension arrangements, as in the main proceedings, and the requirement for due care to have been exercised in order to exclude liability. The referring court also seeks clarification on the compatibility with EU law of domestic rules on ordinary negligence (which is

treated in the same way as unforeseeable circumstances and force majeure) and on the possibility of using a further general category of ‘slight negligence’.

Questions referred for a preliminary ruling

‘First, should the concept of unforeseeable circumstances giving rise to losses under duty suspension arrangements, within the meaning of Article 7(4) of Directive 2008/118/EC, be understood, in the same way as force majeure, as abnormal and unforeseeable circumstances extraneous to the authorised warehousekeeper, which, in spite of the exercise of all due care, were objectively outside the warehousekeeper’s control?

Furthermore, to exclude liability in the event of unforeseeable circumstances, is the care exercised in taking the necessary precautions to avoid the harmful act relevant, and if so, to what extent?

Subject to the first two questions, is a provision such as Article 4(1) of decreto legislativo 26 ottobre 1995 n. 504 (Legislative Decree No 504 of 26 October 1995), which equates ordinary negligence (by the same person or by third parties) with unforeseeable circumstances and force majeure, compatible with the provisions of Article 7(4) of Directive 2008/118/EC, which mentions no other conditions, particularly as regards the ‘fault’ of the perpetrator or active participant?

Lastly, can the expression ‘or as a consequence of authorisation by the competent authorities of the Member State’, also contained in Article 7(4), be understood as the possibility for the Member State to identify another general category (slight negligence) that might have a bearing on the definition of release for consumption in the event of destruction or loss of the product, or does that expression preclude a clause of that type, it having to be understood, rather, as referring to specific cases that are individually authorised or otherwise identified by precedents in which the objective elements are defined?’

Provisions of European Union law relied on

Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC, in particular recital 9 and Article 7(4) and (5):

‘4. The total destruction or irretrievable loss of excise goods under a duty suspension arrangement, as a result of the actual nature of the goods, of unforeseeable circumstances or force majeure, or as a consequence of authorisation by the competent authorities of the Member State, shall not be considered a release for consumption.

For the purpose of this Directive, goods shall be considered totally destroyed or irretrievably lost when they are rendered unusable as excise goods.

The total destruction or irretrievable loss of the excise goods in question shall be proven to the satisfaction of the competent authorities of the Member State where the total destruction or irretrievable loss occurred or, when it is not possible to determine where the loss occurred, where it was detected.

5. Each Member State shall lay down its own rules and conditions under which the losses referred to in paragraph 4 are determined.’

Case-law of the Court of Justice relied on

Judgment of 18 December 2007, *Société Pipeline Méditerranée et Rhône (SPMR)*, C-314/06, EU:C:2007:817, paragraphs 23, 25, 31, 37; judgment of 18 May 2017, *Latvijas Dzelzceļš VAS*, C-154/16, EU:C:2017:392, paragraph 61; judgment of 24 February 2021, *Silcompa*, C-95/19, EU:C:2021:128, paragraph 52; judgment of 24 March 2022, *Generální ředitelství cel*, C-711/20, EU:C:2022:215, paragraph 43.

Provisions of national law relied on

DECRETO LEGISLATIVO 26 ottobre 1995, n. 504, Testo unico delle disposizioni legislative concernenti le imposte sulla produzione e sui consumi e relative sanzioni penali e amministrative (Testo Unico sulle Accise – TUA), (Legislative Decree No 504 of 26 October 1995, Consolidated text of legislative provisions relating to duties on production and consumption and related criminal and administrative penalties (Consolidated Law on Excise Duty)), as amended by Article 1 of Decreto Legislativo, 29 marzo 2010, n. 48 (Legislative Decree No 48 of 29 March 2010).

‘Article 4

Rebates for losses, destruction and reductions in quantity

1. In the event of irretrievable loss or total destruction of goods under a duty suspension arrangement, a rebate of the relevant tax shall be granted if the taxable person can prove, in a manner deemed satisfactory by the tax authority, that the loss or destruction of the products occurred through unforeseeable circumstances or through force majeure. Except in the case of manufactured tobacco, ordinary negligence attributable to the taxable person or to third parties shall be treated in the same way as unforeseeable circumstances and force majeure.’

Succinct presentation of the facts and procedure in the main proceedings

- 1 Girelli Alcool Srl ('the company') owns an authorised ethyl alcohol warehouse and acts as a production facility for the denaturation of ethyl alcohol.
- 2 On 26 March 2014, while the tank in the ethyl alcohol denaturation plant was being filled in the presence of an official from the Italian Customs Authority, pure ethyl alcohol spilled onto the floor because an employee of the company had left a valve open.
- 3 Some of the product was recovered, but the rest was irretrievably lost.
- 4 The company therefore requested a rebate of the excise duty for the alcohol that had been accidentally spilled.
- 5 The Italian Customs Authority refused the rebate request on the grounds that the loss was not due to unforeseeable circumstances or force majeure, but to the carelessness and negligence of an employee of the company who had inadvertently left the tank valve open. On 3 October 2014, the Customs Authority issued a payment notice for the amount of EUR 17 476.24.
- 6 The company challenged the payment notice before the Commissione tributaria provinciale di Milano (Provincial Tax Court, Milan, Italy). It relied in particular on: (a) the non-existence of the chargeable event, since the product had not been released for consumption because it had been spilled; (b) the fact that the event giving rise to the loss could be regarded as an unforeseeable event; (d) in the alternative, the fact that the event giving rise to the loss could come within the scope of 'ordinary' negligence since it was caused by an employee's inattentiveness.
- 7 The Milan Provincial Tax Court upheld the appeal: in its view, the alternative plea was well-founded, since the employee's lack of care was not 'serious'.
- 8 The Italian Customs Authority challenged that ruling before the Lombardy Regional Tax Court, which upheld the ruling, also finding that the alcohol had been spilled (a) irretrievably, and therefore had not been released for consumption, and (b) as a result of unforeseeable circumstances, with the result that the conditions for granting the rebate had been fulfilled.
- 9 Accordingly, the Italian Customs Authority brought an appeal on a point of law before the referring court.

The essential arguments of the parties in the main proceedings

- 10 The Italian Customs Authority alleges infringement of Article 4 of the Consolidated Law on Excise Duty; it submits that the court of second instance was wrong to have categorised the negligent conduct of the company's employee

as unforeseeable circumstances and, in any event, to have considered the employee's negligence 'ordinary', such that the company was not liable.

- 11 In its view, it is theoretically possible to equate slight negligence with the absence of fault. However, it considers that it is crucial to employ a restrictive interpretation to the effect that relevant cases of slight negligence are truly minimal.
- 12 Moreover, according to the Customs Authority, since the activity carried out involved the processing of a highly flammable substance, it was necessary to refer to objective plant safety and operating standards based on technical criteria in order to determine fault.
- 13 The defendant points out, first, that there is no chargeable event for the excise duty, since the alcohol, having been irretrievably lost, was not released for consumption.
- 14 As regards liability, the company maintains that its employee's conduct amounted to ordinary negligence, and that Article 4(1) of the Consolidated Law on Excise Duty treats ordinary negligence in the same way as unforeseeable circumstances.
- 15 The company claims that the reference to 'ordinary negligence' in domestic legislation is compatible with Directive 2008/118, even though it is not expressly provided for in that directive, since, in its view, the directive allows Member States a certain amount of discretion.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 16 The Supreme Court of Cassation observes, first, that, in its case-law, as regards the concepts of unforeseeable circumstances and force majeure, two approaches are apparent.
- 17 The first approach is more subjective: an event for which the taxable person is not accountable constitutes a ground not involving fault; a specific event outside the parties' sphere of activities is unforeseeable, and the exonerating evidence consists in proving the absence of fault on the part of the taxable person – in other words, the loss could not have been foreseen or avoided by exercising the appropriate care in the light of the specific circumstances of the case.
- 18 The second approach consists in ascertaining that the criteria of unpredictability and unavoidability necessary for the circumstances to be considered unforeseeable at a purely objective level are met. This involves an assessment based on the standards of probability as to the regularity of the causal relationship, in which any diligent or negligent conduct of the taxable person is irrelevant.

- 19 With regard to excise duty more specifically, the Supreme Court of Cassation appears to consider an assessment of the care exercised by the taxable person irrelevant for the concept of unforeseeable circumstances (or force majeure).
- 20 The referring court clarifies that the request for a preliminary ruling concerns the interpretation of Article 7(4) of Directive 2008/118 and, in particular, whether or not the exemption provided for therein can still be recognised if the event that caused the irretrievable loss of the excise goods was due to carelessness on the part of the warehousekeeper or his employee, even if categorised as slight negligence.
- 21 The question whether the concept of unforeseeable circumstances (and of force majeure), for the purposes of EU law, also includes negligent conduct – and if it does not, whether it is compatible with EU law on excise duty for the Italian legislature to equate ordinary negligence on the part of the taxable person or third parties with unforeseeable circumstances and force majeure – is decisive for the purposes of the referring court being able to give judgment.
- 22 The referring court refers to the case-law of the Court of Justice on the interpretation of the concept of force majeure and unforeseeable circumstances with regard to the rules on excise duty, and notes that the concept of unforeseeable circumstances appears to fulfil the same criteria as force majeure.
- 23 According to the referring court, the Court of Justice clearly developed the concept of force majeure in *Société Pipeline Méditerranée et Rhône (SPMR)*. As for unforeseeable circumstances, *Latvijas Dzelceļš VAS* provides a uniform concept accompanied by a strictly causal link, albeit one qualified by the criterion of proportionality (‘without making unreasonable sacrifices’).
- 24 Furthermore, an examination of the overall framework of Directive 2008/118 does not reveal situations in which emphasis is placed on the degree of ‘fault’ of the perpetrator so as to avoid liability. By contrast, the judgments in *Silcompa* and *Generální ředitelství cel* emphasise the warehousekeeper’s objective liability.
- 25 The framework provided by EU law thus appears to be based solely on the conditions of unforeseeable circumstances and force majeure, which, in the light of the abovementioned case-law of the Court of Justice, require an objective element (‘abnormal and unforeseeable circumstances’) and a subjective element (‘obligation to take appropriate steps without making unreasonable sacrifices’). This seems incompatible with conduct such as that characterised by fault, in which both unpredictability and the necessary exercise of due care are lacking.
- 26 In the light of those considerations, the referring court questions whether the provision contained in Article 4(1) of the Consolidated Law on Excise Duty, which treats slight negligence in the same way as unforeseeable circumstances and force majeure, identifies a condition – linked to the individual and subjective criterion of the care exercised – that is supplementary to unforeseeable circumstances and force majeure and which would amount to a tax exemption in

the event of spillage or loss that would be additional to and separate from the provisions of EU law.

- 27 The referring court also asks whether the case envisaged in Article 4(1) of the Consolidated Law on Excise Duty is compatible with Article 7(4) of Directive 2008/118, which provides that destruction or loss which does not constitute a release for consumption may also occur ‘as a consequence of authorisation by the competent authorities of the Member State’.
- 28 That expression could allow a Member State (in this case Italy) to identify further general categories for tax rebates. On the other hand, when the provision is read in its entirety, that expression seems to have a concluding and residual value. It should therefore refer to other specific events, which are not identifiable a priori but involve factual elements that, after undergoing a concrete assessment by the competent authority, might justify the adoption in individual cases (subject to ‘authorisation’) of an order to destroy the goods. To that effect, recital 9 of Directive 2008/118 uses the term ‘circumstances’, which seems to refer to specific and identifiable factual elements and not to provisions of a general and essentially indeterminate nature.
- 29 The referring court notes in that respect that the grounds for exemption, since they derogate from the ordinary taxation regime, must be subject to a rigorous and restrictive interpretation.
- 30 The referring court acknowledges that the Court of Justice has not yet ruled on that particular aspect, which should be clarified in order to identify a concept of chargeability that is uniform and valid for the entire territory of the Union.