

Case C-711/20**Summary of the order for reference pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

31 December 2020

Referring court:

Nejvyšší správní soud (Supreme Administrative Court, Czech Republic)

Date lodged:

16 December 2020

Applicant:

TanQuid Polska Sp. z o. o.

Defendant:

Generální ředitelství cel

Subject matter of the main proceedings

The subject matter of the main proceedings is an appeal in cassation by the Generální ředitelství cel (General Customs Directorate, Czech Republic) ('Defendant') against the judgment of the Krajský soud v Českých Budějovicích (České Budějovice Regional Court, Czech Republic) of 12 September 2018 ('Regional Court judgment'), annulling the Defendant's decisions ('contested decisions') whereby the Defendant ruled that TanQuid Polska, Sp. z o. o. ('Applicant'), as the operator of a tax warehouse, infringed a suspension arrangement ('arrangement concerned'), and charged it excise duty.

Questions referred for a preliminary ruling

1. Are products that are subject to excise duty transported pursuant to a suspension arrangement within the meaning of Article 4(c) of Council Directive 92/12/EEC in a situation where a customs office of one Member State agreed to the movement of products under a duty-suspension arrangement from a tax

warehouse to a registered trader established in another Member State, even though the conditions for the movement of those products under the duty-suspension arrangement were objectively not met, it having been established at a subsequent stage of the procedure that the registered trader had no knowledge of the movement of the products, due to fraud by third parties?

2. Does the provision of an excise duty guarantee, as provided for by Article 15(3) of Council Directive 92/12/EEC, issued for a purpose other than the movement of products under a duty-suspension arrangement between a tax warehouse and a registered trader established in another Member State preclude the due commencement of movement under a duty-suspension arrangement, if the provision of the guarantee was recorded in the accompanying documents for the movement of the products under the duty-suspension arrangement for the registered trader and confirmed by the customs authority of the Member State?

Provisions of EU law relied on

Article 4(c), Article 6(1)(a), Article 13(a), Article 15(3) and (4), Article 20(1) of 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 ('the Directive').

Provisions of national law relied on

Under Paragraphs 25, 26, and 28 of Zákon č. 353/2003 Sb. o spotřebních daních (Law No 353/2003 on excise duties; 'the Law on excise duties'), selected products in the arrangement concerned may move between Member States only with an accompanying document, and the arrangement is infringed if, among other things, the products are not dispatched to the authorised consignee within a set period.

Succinct presentation of the facts and procedure in the main proceedings

- 1 The Applicant is a Polish trading company that operates a tax warehouse in Poland, from which mineral oils (selected products) subject to excise duty were dispatched in December 2009 and January 2010 to an authorised consignee, the Czech company EKOL GAS PB, s.r.o. ('EKOL GAS').
- 2 Evidence has shown, however, that EKOL GAS never traded with the Applicant and denied any contact with the Applicant. As a registered trader, EKOL GAS therefore had no knowledge of products being transported to it under the arrangement concerned.
- 3 The competent Czech customs authority established that the information in the accompanying documents dated 5 January 2010 was false, and that the 38 accompanying documents on the basis of which the mineral oils were dispatched

from the Applicant's tax warehouse and which were provided by the Polish customs administration were not submitted to the Czech customs authority, contrary to the Law on excise duties. The imprints of the stamps of the Czech customs authority confirming 35 of the accompanying documents had been forged. The imprints of the stamps used for the movement did not correspond to the stamps of EKOL GAS.

- 4 The mineral oils dispatched from the Applicant's tax warehouse were not accepted by EKOL GAS as the authorised consignee within the designated period and at the designated place, but were transported to an unknown person in the Czech Republic on the basis of fraudulent actions of third parties passing themselves off as EKOL GAS representatives without the knowledge of EKOL GAS.
- 5 According to the competent Czech customs authority, the Applicant infringed the arrangement concerned by moving selected products to the Czech Republic without them being duly accepted by the authorised consignee who would then declare and pay excise duty on those products. Hence, the competent authority assessed a liability to duty totalling CZK 10 207 850 for the Applicant, by adjustment notices of 3 March 2016.
- 6 The Applicant appealed against the adjustment notices, and the Defendant dismissed the appeal by the contested decisions. Those decisions were, however, annulled by the Regional Court judgment and the case was referred back. The Defendant submitted an appeal in cassation to the referring court against that judgment.

Regional Court judgment

- 7 According to the Regional Court, the fundamental condition for movement of the mineral oils under the arrangement concerned, according to which the movement must be between entities specified by law, was not met. EKOL GAS was, without its knowledge, represented by third parties who were not themselves an authorised consignee, which corresponds to a situation where the consignee of the selected products declared in the accompanying documents lacks the relevant authorisation. The situation in the present case does differ from a situation where conditions are breached during the – formally and materially – correctly initiated movement of mineral oils under the arrangement concerned (for example, by a failure to adhere to the set period for the movement of selected products). Hence, the situation concerned in the present case must be considered a release for free circulation as defined by the Law on excise duties.
- 8 The Regional Court pointed to similar conclusions reached by the Polish customs administration, which, by its decision of 26 October 2015, deemed BM Reflex, Sp. z o. o. ('BM Reflex') as the owner of the products moved, rather than the Applicant, liable for the excise duty imposed in relation to the dispatch of the mineral oils. According to the Polish customs administration, the conditions for

movement under the arrangement concerned had not been met, given that (i) the accompanying documents did not document the actual course of the transaction and (ii) the insurance guarantee provided by J&S ENERGY S.A ('J&S ENERGY') as the excise duty guarantee applied only to movement between tax warehouses and, for that reason, the deliveries were not covered by the excise duty guarantee. According to the administration, BM Reflex, not the Applicant, was liable to pay the tax.

Essential arguments of the parties in the main proceedings

- 9 The Applicant claims that the factual conditions for the initiation of movement under the arrangement concerned had not been met, as it is not possible to conclude that the selected products were intended for the consignee declared in the accompanying documents, which must not only be formally correct but must also correspond to reality. That was not the case in the matter at hand, as the other party, that is to say, an authorised consignee, did not objectively exist. The consignees were fraudulently acting individuals who did not have authorisation to receive the selected products and had intended, from the very start of the movement, to stamp the documents concerned fraudulently. Furthermore, no guarantee had been provided to secure the excise duty, which is a formal condition for the commencement of movement under the arrangement concerned. This situation must therefore be viewed as the movement of selected products released for free circulation in another Member State.
- 10 The Defendant disagrees with the conclusion that the selected products were dispatched and transported to the Czech Republic as products released for free circulation. The commencement of movement of selected goods under the arrangement concerned is not subject to consent or approval by the authorised consignee. Consent in the form of a stamp and signature of an authorised person is required only for the due completion of the movement under the arrangement concerned, which is also why the consignor of the selected products is liable for an infringement of the arrangement.
- 11 Customs authorities do not review accuracy, but only check whether all boxes of the accompanying documents have been completed and whether the dispatching tax warehouse and the authorised consignee hold valid authorisations. If that is the case and if, at the same time, the guarantee provided for by the Law on excise duties is produced, customs authorities issue their consent to the commencement of the movement. In a situation where an entity that holds a valid authorisation is listed as the consignee, the movement is commenced regardless of whether that entity was listed by the consignor in error or intentionally and of whether or not the consignee has any knowledge of the movement.
- 12 If goods are removed from the arrangement concerned pursuant to Article 15(4) of the Directive, even though an official document is subsequently fraudulently confirmed, the consequences of the removal from the arrangement concerned are

borne by the dispatching tax warehouse, which is, in such cases, obliged to provide a guarantee before commencement of the movement, as it is liable for the delivery of the selected products throughout their movement and until they are duly accepted by the authorised consignee specified in the accompanying documents.

Analysis of the questions referred

- 13 In general terms, the referring court points to the goal of the Directive – to avoid double taxation and disruption of free movement within the European Union, and refers to EU case-law, according to which goods should be taxed at the point of their final consumption and the chargeability of excise duties should be identical in all Member States, in order to ensure the establishment and functioning of the internal market .¹
- 14 If, in this case, the conditions for the commencement of movement under the arrangement concerned were not met, the products were, by the fact of their removal from storage, released for domestic consumption,² and hence should have been taxed in Poland. If the conditions were met, transport arrangements between Member States would have been initiated and the authorised warehouse keeper would have been obliged to pay tax in the Czech Republic only once infringement of the arrangements was discovered subsequently.
- 15 Given that the possibility of selected products escaping the supervision of the tax authorities is greater during the movement of those products under the arrangement concerned, the arrangement is subject to three conditions: (i) the movement must take place between authorised entities (authorised warehouse keeper and a registered trader); (ii) the products must be moved with an accompanying document (see recitals of the Directive); and (iii) a guarantee must be provided pursuant to Article 13(a) of the Directive.
- 16 In this case, the authorised warehouse keeper held a permit to operate a tax warehouse and itself set the conditions of carriage when it listed EKOL GAS, that is to say, a registered trader, as the consignee. According to the referring court, transport is initiated by an authorised warehouse keeper, as that is the entity which completes part A of the accompanying document.
- 17 According to the judgment of the Court of Justice of 2 July 2016, *Kapnoviomichania Karelia*, C-81/15, EU:C:2016:398, the authorised warehouse keeper is objectively liable for all movement infringements under the arrangement concerned at the place where the procedural infringement or irregularity occurred.

¹ Judgments of the Court of Justice of 30 May 2013, *Scandic Distilleries*, C-663/11, EU:C:2013:347, paragraphs 22 and 23, and of 18 December 2007, *Pipeline Méditerranée et Rhône*, C-314/06, EU:C:2007:817, paragraph 22.

² See Article 6(1)(a) in conjunction with Article 4(c) of the Directive.

This liability ceases only upon proof that the registered trader has taken delivery of the products (Article 15(4) of the Directive). The consignee then completes part C of the accompanying document, which requires its signature and stamp. Hence, the consignee is involved only at the very end of the operation, as is apparent from Article 19(2) of the Directive. Its cooperation is not required in order for movement to commence.

- 18 Customs authorities examine whether movement is taking place between authorised entities and whether a guarantee has been provided to secure the tax, that is to say, only compliance with formal requirements, which transfers to the authorised warehouse keeper the responsibility for ensuring that the registered trader (the consignee) does indeed take delivery of the goods at a later stage.³ They then give consent to the commencement of the movement. The arrangement concerned thus allows for supervision of the importation of taxable products without imposing obstacles in the form of substantive document checks by customs authorities, which accords with the objective and purpose of the Directive.
- 19 The fact that customs authorities examine only the formal aspects of the accuracy of the data also follows from more recent EU legislation⁴ and from Polish law.⁵ The commencement of movement under a duty-suspension arrangement cannot be affected by a subsequent finding that third parties wrongfully passed themselves off as representing a registered trader. Release for domestic consumption can only take place if conditions for commencing movement have not been met, but such conditions cannot include the consent of the registered trader.
- 20 The Court of Justice has not yet dealt in its case-law with fraud in relation to the arrangement concerned. Certain similarities can be found in the case giving rise to the judgment of 12 December 2002, *Cipriani*, C-395/00, EU:C:2002:751. In that case, stamps of customs authorities confirming that goods had left the European Union at the beginning of their movement had been forged. In the Applicant's case, however, the stamps of the registered trader were forged, and only at the point when movement of the goods was to be completed. Furthermore, in the case referred to above, there was no specific registered trader or authorised warehouse keeper in another Member State to which the goods were to be delivered. It concerned only the movement of products intended for export to countries outside

³ The Court of Justice has ruled that a taxable person can legitimately be required to satisfy himself that the transaction which he is effecting does not result in his participation in tax evasion (judgment of 21 February 2008, *Netto Supermarkt*, C-271/06, EU:C:2008:105, paragraph 24) and applied that conclusion with respect to excise duty and the Directive in the abovementioned judgment in C-81/15.

⁴ See Article 20 of Council Directive 2008/118/EC of 16 December 2008.

⁵ Articles 41 and 41a of the Law on excise duties of 6 December 2008, Dz. U. 2009 Nr 3, poz. 11.

the European Union via one or more Member States. Furthermore, the core of the dispute – the rights of the defence - was different.

- 21 Another issue faced by the referring court is the nature and purpose of the guarantee⁶ paid to secure the excise duty. The guarantee was provided by the Polish company J&S ENERGY. It is evident that the guarantee was provided in order to secure movement of selected products, under the arrangement concerned, from the Applicant's tax warehouse to EKOL GAS. The Applicant has, however, questioned the purpose of the guarantee, claiming that no guarantee had been provided for movement of the products under the arrangement concerned, pursuant to Article 15(3) of the Directive, given that the guarantee was only provided for movement between tax warehouses, but not also for movement to a registered trader.
- 22 The tax security is valid in all EU Member States through which the products are moved (see Article 15(3) of the Directive). That is why the referring court is of the opinion that the customs authorities of another Member State cannot review the reason for the security or the authenticity of information listed in the accompanying documents.
- 23 On the basis of the information stated in the accompanying documents and the guarantee accepted in the present case, the Polish customs authorities authorised the movement of the products under the arrangement concerned to the registered trader, thereby declaring that all of the abovementioned conditions of that arrangement had been complied with. Thus, they gave the Applicant and the Czech customs authorities confidence that the guarantee had been duly paid and the conditions of the arrangement concerned duly met. Later in the proceedings (following judicial review by the Polish administrative courts), however, the Polish customs authorities suspended the excise duty assessment procedure with regard to the Applicant, as, according to them, the conditions of the arrangement concerned had not been met; among other things, a guarantee to secure the movement of the goods to a registered trader had not been provided.
- 24 When the goods reached the Czech Republic, however, a guarantee had been lodged and the national customs authorities, in accordance with the principles of legal certainty and faith in due process by the Polish authorities, assumed that it was correct. Hence, the Polish customs authorities created a situation not foreseen by the Directive or by the Law on excise duties. It is the view of the referring court that to approve the steps taken by the Polish customs authorities and attribute them to the parties to the original proceedings would be to deny the principle of the rule of law. If the Czech customs authorities were to deem the movement under the arrangement concerned not to have been duly commenced in view of an incorrectly lodged guarantee, they would defy the objectives of the Directive and the EU principles of sincere cooperation and legal certainty.

⁶ See recital 19 of the abovementioned Directive 2008/118.

- 25 Thus, in the case of both of the questions referred, the conditions laid down by EU case-law for not referring a question to the Court of Justice for a preliminary ruling have not been met.

WORKING DOCUMENT