

Case C-596/23 [Pohjanri] ⁱ**Request for a preliminary ruling****Date lodged:**

26 September 2023

Referring court:

Helsingin hallinto-oikeus (Finland)

Date of the decision to refer:

26 September 2023

Applicant:

B UG

Other party to the proceedings:

Veronsaajien oikeudenvaltvontayksikkö

**HELSINGIN
HALLINTO-OIKEUS (HELSINKI ADMINISTRATIVE COURT)
INTERIM DECISION**

[...]

26 September 2023 [...]

Subject matter

Request to the Court for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union

Applicant

B UG

Other party to the case

Veronsaajien oikeudenvaltvontayksikkö

Contested decision

Assessment to excise duty by the tax authority of 1 June 2021 [...]

ⁱ The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

Issue

- 1 In the main proceedings pending before the hallinto-oikeus (Administrative Court), which concern excise duty on alcoholic beverages, the issue to be decided is whether the tax authority was entitled to levy taxes on alcohol and alcoholic beverages, as well as a tax surcharge, from a company established in Germany on the grounds that the company was subject to taxation in Finland as a distance seller because it was involved in organising the transport of the alcoholic beverages sold via its website.
- 2 It needs to be determined in the present case whether a requirement set out in national travaux préparatoires that the vendor must pay excise duty on distance sales if it directs the purchaser on its website to use a particular transport company is incompatible with Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC. The proceedings concern in particular the interpretation of Article 36(1) of Directive 2008/118/EC.

Subject matter of the proceedings and facts of importance for the decision

- 3 B UG ('the company'), established in Germany, operated a website called [...], through which customers could purchase various brands of alcoholic beverages of low or high alcoholic strength in an online shop. Finnish [...] could be chosen as the language of the website.
- 4 On 20 April 2020, the customs authority seized a consignment of alcoholic beverages in Finland, dispatched from Germany to Finland by the company and destined for private individual A, which contained various alcoholic beverages. The consignment was seized on the basis of Paragraph 103 of the Valmisteverotuslaki (Law on excise duty) to determine whether the provisions of the Law on excise duty had been observed when the alcoholic beverages were imported.
- 5 The tax authority asked A, who had placed the order on the company's website, for information on the ordering procedure and the way transport had been organised. According to A's observations of 25 June 2020, the transport services of companies X, Y and Z were promoted when the order was placed in the company's online shop. When the order was placed on the company's website, the weight of the order and the carriage charge were updated every time products were added to the basket. Following payment for the alcohol order, a prompt to organise transport appeared on the website and, according to A, the page contained direct links to the websites of transport providers. A chose company X to transport the order. By clicking on the link 'X', A was redirected straight to X's website, where A entered his own contact details but no information about his order, such as the order number. A paid the carriage portion directly to X on X's website.

- 6 The tax authority submitted a screenshot of B UG's website dated 16 June 2020 showing explanations of the delivery arrangements [...]. Those explanations include the following:

'Mode of delivery

Customers are required to arrange transport to Finland themselves. Enter your address details. You will then receive additional information on organising transport. We recommend the following transport companies:

X from EUR 26.00'

- 7 The tax authority also submitted a screenshot dated 24 June 2020 showing delivery terms contained on the company's website [...], which include the following:

'Delivery terms

We sell all our products in Germany free warehouse.

We do not organise transport; customers are responsible for that themselves. You may, for example, use the services of X. Once you add the products you are ordering to your basket, X's carriage calculator will display the price of transporting them both as a parcel and as a pallet delivery.

[...]

Journey time

Parcels arrive in Finland 5-7 days after collection. Parcels are collected from us on weekdays. You will receive tracking numbers from X that will enable you to follow the journey of your parcels.

Pallet deliveries arrive in Finland approximately 7-10 days after collection. X collects pallets 2-3 times a week.

You can also obtain a quote for transport from a different transport company.

Please inform us whether you will collect the beverages yourself or a transport company will collect them. Once you have let us know, we will start processing the order.

[...]

Taxes in Finland

Customers themselves are responsible for paying the applicable taxes. Information on this can be found on the websites of the customs authority or Valvira (National Supervisory Authority for Welfare and Health).'

- 8 In a tax assessment of 21 August 2020, the tax authority imposed on B UG tax on alcohol and alcoholic beverages, a tax surcharge and penalty interest totalling EUR 1 645.83 for the alcoholic beverages seized on 20 April 2020. On the basis of the information obtained in the course of the procedure, it established that the goods had been dispatched or transported directly or indirectly to Finland by the company or on its behalf. In the view of the tax authority, the company was therefore operating as a distance seller and was required to pay excise duty in Finland.
- 9 B UG lodged an objection to the tax assessment with the tax authority.
- 10 In its decision of 1 June 2021, the tax authority dismissed B UG's objection.
- 11 B UG contested the tax authority's decision of 1 June 2021 before the Helsingin hallinto-oikeus (Helsinki Administrative Court). It sought, *inter alia*, the annulment of the tax authority's decision and the withdrawal of all tax claims imposed on it in respect of alcohol and alcoholic beverages.

Summary of the main arguments of the parties

- 12 *B UG* considers that it should not be regarded as a distance seller in the present matter. Neither was it actually involved in organising the movement of the excisable goods, it argues, nor did it direct the purchaser on its website to use a particular transport company or bring the purchaser and the transport company together. The contractual relationship was established, it submits, between the transport company and the purchaser. It claims that ownership of the goods and the risks attaching to them were transferred from the seller to the purchaser in Germany, when the seller handed over the goods to the transport company chosen by the purchaser. *B UG* argues that three transport companies were mentioned on its website as examples and that the website clearly stated that customers decide on a service provider independently. It submits that some 20 different transport companies have collected goods from its warehouse and it cannot be considered to have directed its customers to use a particular transport company. The carriage calculator on the website serves, it says, only as an aid to enable customers to estimate the transport capacity and the possible transport costs.
- 13 *B UG* further states that it passed on no information to the transport company and that no information was exchanged between itself and the transport company. The link on its website to the transport company's website does not mean, it argues, that it was involved in organising the transport of the goods. Moreover, its website contains links to more than one transport company. *B UG* submits that its website expressly states that customers themselves are responsible for paying the applicable taxes in Finland and that further information can be found on the websites of the Finnish customs authority and Valvira (a Finnish authority). In *B UG*'s view, it was known to the customer at the time of purchase that he would have to pay taxes in Finland for the goods delivered to Finland. Given the price charged to the customer, it argues, it is obvious that the customer must have

understood that the price of the goods did not include the taxes applicable in Finland.

- 14 The *Veronsaajien oikeudenvallontayksikkö (Tax Recipients Legal Services Unit, Finland)* has submitted that a distance sale is a sale in which a private individual acquires alcoholic beverages released for consumption in another Member State and dispatched or transported to Finland directly or indirectly by the distance seller or on its behalf. It cites the travaux préparatoires for the Law on excise duty (HE 263/2009 vp) as establishing that a sale is considered a distance sale if the vendor directs the purchaser on its website to use a particular transport company. It states that a distance seller which has no tax representative in Finland must declare the goods to the tax authority before dispatching them to Finland and provide security for payment of the applicable taxes. It submits that the provisions of the Law on excise duty are consistent with those of Directive 2008/118/EC. B UG, it argues, directed the purchaser on its website to engage particular transport companies and thereby involved itself in the transport arrangements. It submits that B UG is a distance seller and therefore a taxable person. It claims that B UG failed to fulfil its obligation to notify the tax authority of the dispatch of the goods and to provide the associated security.

National law and travaux préparatoires

National provisions in force in 2020

- 15 Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC was transposed in Finland by the national Law on excise duty (182/2010). The Law on excise duty is applicable in the main proceedings in the version in force in 2020. The principles governing the levying of the tax payable to the State on alcohol and alcoholic beverages and the amount of the tax are also laid down in the relevant Laki alkoholi- ja alkoholijuomaverosta (Law on the taxation of alcohol and alcoholic beverages) (1471/1994).
- 16 Under the second subparagraph of Paragraph 1 of the Law on excise duty (182/2010), the law applies to the levying of excise duty on, inter alia, alcohol and alcoholic beverages unless otherwise provided for in the relevant *lex specialis*.
- 17 Under Paragraph 6(11) of the Law on excise duty (182/2010), a *distance sale* within the meaning of that law is a sale in which a person other than an authorised warehousekeeper or a registered consignee or a temporarily registered consignee, established in Finland and not engaged in an independent economic activity, has acquired excise goods released for consumption in another Member State, which are dispatched or transported to Finland directly or indirectly by the distance seller or on its behalf.

- 18 Under Paragraph 6(12) of the Law on excise duty (182/2010), a *distance seller* is a vendor which sells goods to Finland in accordance with point (11).
- 19 Under the first subparagraph of Paragraph 72 of the Law on excise duty (495/2014), no excise duty is levied on goods released for consumption in another Member State when they are acquired by a private individual for his own use and transported by that private individual to Finland.
- 20 Where a private individual acquires excise goods from another Member State for his own use neither under Paragraph 72 nor by way of distance selling and the goods are transported to Finland by another private individual or a professional trader, the taxable person is, under the first subparagraph of Paragraph 74 of the Law on excise duty (182/2010), the private individual who acquired the goods. Any person involved in the transport of the goods or in possession of the goods in Finland is also liable for the tax payable by the private individual who acquired the goods, as if it were his own tax liability.
- 21 Under the first subparagraph of Paragraph 79 of the Law on excise duty, excise duty is levied on goods sold to Finland by way of distance selling. Under the second subparagraph of that provision, the distance seller is taxable. If the distance seller has a tax representative, the tax representative is liable for the tax instead of the distance seller. The distance seller is liable for the excise duty payable by the tax representative as if it were his own tax liability. Under the third subparagraph of the same provision, excise duty becomes payable when the excise goods are handed over in Finland. Excise duty is to be paid in accordance with the provisions in force on the day when the goods are handed over in Finland.

Travaux préparatoires relating to Paragraph 74 of the Law on excise duty

- 22 In the government bill for the Law on excise duty (HE 263/2009 vp, p. 46), the detailed reasons relating to Paragraph 74 of the law contain the following:

‘The provision would govern cases where a private individual acquires excise goods from another Member State for his own use neither under Paragraph 72 nor by way of distance selling. In such cases, the private individual would not bring the goods to Finland himself; they would be transported by another private individual or by a professional trader. This means that a private individual would, for example, acquire goods from another Member State online and arrange for the transport of those goods to Finland himself without the vendor, or anyone else acting on its behalf, being involved in organising the transport.

[...]

Taxes would be levied on the goods irrespective of whether they were imported into Finland by a professional trader – such as a transport company or a postal service – or by another private individual. The essential difference to distance selling would be that the vendor or a person acting on its behalf could not be

involved in any way in transporting the goods or in organising transport. If, in contrast, the vendor were for example to direct the purchaser on its website to use particular transport companies, that would constitute distance selling, in which the distance seller or its tax representative would be required to pay the excise duty in the Member State of destination.’

Relevant provisions of EU law

- 23 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), which was in force at the time of the occurrences material to the decision, is applicable in the present proceedings.
- 24 Under Article 7(1) of Directive 2008/118/EC, excise duty becomes chargeable at the time of release for consumption and in the Member State where that occurs.
- 25 Under Article 32(1) of Directive 2008/118/EC, excise duty on excise goods acquired by a private individual for his own use, and transported from one Member State to another by him, shall be charged only in the Member State in which the excise goods are acquired.
- 26 Article 36 of Directive 2008/118/EC provides as follows in respect of distance sales:

‘1. Excise goods already released for consumption in one Member State, which are purchased by a person, other than an authorised warehousekeeper or a registered consignee, established in another Member State who does not carry out an independent economic activity, and which are dispatched or transported to another Member State directly or indirectly by the vendor or on his behalf shall be subject to excise duty in the Member State of destination.

For the purposes of this Article, “Member State of destination” shall mean the Member State of arrival of the consignment or of transport.

2. In the case referred to in paragraph 1, the excise duty shall become chargeable in the Member State of destination at the time of delivery of the excise goods. The chargeability conditions and rate of excise duty to be applied shall be those in force on the date on which duty becomes chargeable.

The excise duty shall be paid in accordance with the procedure laid down by the Member State of destination.

3. The person liable to pay the excise duty in the Member State of destination shall be the vendor.

However, the Member State of destination may provide that the liable person shall be a tax representative, established in the Member State of destination and

approved by the competent authorities of that Member State, or, in cases where the vendor has not respected the provision of paragraph 4(a), the consignee of the excise goods.’

The need for a preliminary ruling

- 27 The issue to be clarified in the present case is whether B UG was involved in such a way in the transport of the alcoholic beverages sold to Finland and released for consumption in Germany that the company must be regarded in Finland as liable for excise duty in its capacity as a distance seller of the goods.
- 28 It is undisputed that the private individual who acquired the goods in Germany purchased them for his own consumption. The private individual paid the transport costs for the goods he purchased from the company directly to the transport company responsible for transporting them.
- 29 In the view of the hallinto-oikeus (Administrative Court), the case-law of the Court gives no answer to the question of how the expression ‘dispatched or transported to another Member State directly or indirectly by the vendor or on his behalf’ in Article 36(1) of Directive 2008/118/EC is to be interpreted.
- 30 In the main proceedings before the hallinto-oikeus (Administrative Court), the matter to be assessed is, in particular, whether the vendor was directly or indirectly involved in the transport of the goods to another Member State within the meaning of Article 36(1) of Directive 2008/118/EC if, on the vendor’s website through which excise goods were sold to a purchaser established in another Member State, various transport companies were named and information was provided on the transport costs arising for the purchaser. The vendor’s website also contained a link to the transport company’s website, to which information about the goods to be transported was transmitted without the intervention of the purchaser.
- 31 Directive 2008/118/EC has been repealed by the recast Council Directive (EU) 2020/262 of 19 December 2019 laying down the general arrangements for excise duty. Article 44(1) of the recast Directive (EU) 2020/262 now in force corresponds to Article 36(1) of Directive 2008/118/EC.
- 32 In the absence of any case-law of the Court on the question of law described above, and because, in the view of the hallinto-oikeus (Administrative Court), clarification of Article 36 of Directive 2008/118/EC concerning distance selling is necessary for the uniform application of both Directive 2008/118/EC and the current Directive (EU) 2020/262 in the various Member States, the following questions are referred to the Court of Justice for a preliminary ruling.
- 33 The company and the Veronsaajien oikeudenvälontayksikkö (Tax Recipients Legal Services Unit, Finland) have had the opportunity to submit observations on whether a request for a preliminary ruling should be made to the Court.

Hallinto-oikeus (Administrative Court) interim order to request a preliminary ruling from the Court of Justice of the European Union

- 34 The hallinto-oikeus (Administrative Court) stays the proceedings and asks the Court of Justice under Article 267 of the Treaty on the Functioning of the European Union for a preliminary ruling on the interpretation of the provisions of Directive 2008/118/EC concerning distance selling. Seeking a preliminary ruling is necessary for deciding the case pending before the hallinto-oikeus (Administrative Court).

Questions referred for a preliminary ruling

1. Does Directive 2008/118/EC, in particular Article 36 thereof concerning distance selling, preclude an interpretation of national law according to which a vendor of excise goods established in another Member State is regarded as involved in the transport of the goods to the Member State of destination and liable for excise duty in the Member State of destination from distance sales solely because the vendor, on its website, directs the purchaser to use a particular transport company?

2. Did the vendor of excise goods dispatch or transport goods to another Member State directly or indirectly within the meaning of Article 36(1) of Directive 2008/118/EC and was it subject to duty from distance sales within the meaning of the directive if the vendor's website recommended particular transport companies and gave information on the transport costs arising for the purchaser and the transport costs were charged by a transport company to which the information on the goods to be transported had been transmitted without the intervention of the purchaser? Is the fact that the purchaser concluded a separate contract for the carriage of the goods with the transport company mentioned on the vendor's website of relevance to the assessment of that question?

[...]