Reports of Cases

OPINION OF ADVOCATE GENERAL
RANTOS
delivered on 5 September 2024[1]

Case C-137/23 [Alsen][i]

X

v

Staatssecretaris van Financiën

(Request for a preliminary ruling from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands))

(Reference for a preliminary ruling – Taxation – Directive 2003/96/EC – Taxation of energy products and electricity – Article 14(1)(c) – Exemption of energy products used as fuel for the purposes of navigation within EU waters – Gas oil used for the propulsion of a vessel not containing the required fiscal marker – Directive 95/60/EC – Fiscal marking of gas oils and kerosene – Excise duty – Directive 2008/118/EC – General arrangements for excise duty – Article 7(2) – Chargeability of excise duty – Release for consumption of excise goods – Holding of excise goods outside a duty suspension arrangement where excise duty has not been levied – Article 8(1) – Person liable to pay the excise duty that has become chargeable – Holder of the excise goods – Excise goods supplied by an authorised warehousekeeper – Gas oil not bearing the requisite fiscal marker – Principle of proportionality)

I. Introduction

1. Article 14(1)(c) of Directive 2003/96/EC[2] on the taxation of energy products and electricity provides, in essence, that Member States are to exempt from taxation, under conditions which they are to lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse, energy products supplied for use as fuel for the purposes of navigation within European Union waters, other than private pleasure craft.

2. Can gas oil used as fuel for commercial navigation within EU waters that does not contain the required minimum content of the chemical substance used as a fiscal marker, without however there being any evidence of excise evasion, avoidance or abuse, be a product eligible for

[1] Original language: French.

[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.

[2] Council Directive of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ 2003 L 283, p. 51).

exemption from taxation within the meaning of Article 14(1)(c) of that directive? That, in essence, is the question put by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands).

3. The reference for a preliminary ruling was made in proceedings between a natural person, who is the owner of a motor tanker and a boatmaster ('the appellant in the main proceedings' or 'the party concerned'), and the Staatssecretaris van Financiën (State Secretary for Finance, Netherlands), concerning a tax adjustment notice issued against him relating to the taxation for excise duty purposes of gas oil used as fuel for the purposes of navigation within EU waters not meeting the requirements with regard to fiscal marking.

II. Legal framework

A. European Union law

1. Directive 2003/96

4. Recitals 3 and 23 of Directive 2003/96 state:

'(3) The proper functioning of the internal market and the achievement of the objectives of other Community policies require minimum levels of taxation to be laid down at Community level for most energy products […]

…

(23) Existing international obligations and the maintaining of the competitive position of Community companies make it advisable to continue the exemptions of energy products supplied for air navigation and sea navigation, other than for private pleasure purposes, while it should be possible for Member States to limit these exemptions.'

5. Article 1 of the directive provides:

'Member States shall impose taxation on energy products and electricity in accordance with this Directive.'

6. Article 14(1) of the directive provides:

'… without prejudice to other Community provisions, Member States shall exempt the following from taxation under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse:

…

(c) energy products supplied for use as fuel for the purposes of navigation within Community waters (including fishing), other than private pleasure craft, and electricity produced on board a craft.

For the purposes of this Directive "private pleasure craft" shall mean any craft used by its owner or the natural or legal person who enjoys its use either through hire or through any other means, for other than commercial purposes …'

2. Directive 95/60/EC

7. The first three recitals of Directive 95/60/EC [3] read as follows:

'Whereas the Community measures envisaged by this Directive are not only necessary but also indispensable for the attainment of the objectives of the internal market; whereas these objectives cannot be achieved by Member States individually …;

Whereas Directive 92/82/EEC [4] lays down provisions in respect of the minimum rates of excise duty applicable to certain mineral oils and in particular to the different categories of gas oil and kerosene;

Whereas the proper functioning of the internal market now requires that common rules be established for fiscal marking of gas oil and kerosene which have not borne duty at the full rate applicable to such mineral oils used as propellant;'

8. Article 1 of Directive 95/60/EC provides:

'1. Without prejudice to national provisions on fiscal marking, Member States shall apply a fiscal marker in accordance with the provisions of this Directive to:

– all gas oil falling within CN code 2710 00 69 which has been released for consumption within the meaning of Article 6 of Directive [92/12] and has been exempt from, or subject to, excise duty at a rate other than that laid down in Article 5(1) of Directive [92/82];

– kerosene falling within CN code 2710 00 55 which has been released for consumption within the meaning of Article 6 of Directive [92/12] and has been exempt from, or subject to, excise duty at a rate other than that laid down in Article 8(1) of Directive [92/82].

2. Member States may allow exceptions to the application of the fiscal marker provided for in paragraph 1 on grounds of public health or safety or for other technical reasons, provided they take appropriate fiscal supervision measures.

…'

9. Article 2 of the directive states:

'1. The marker shall consist of a well-defined combination of chemical additives to be added under fiscal supervision before the mineral oils concerned are released for consumption …'

[3] Council Directive of 27 November 1995 on fiscal marking of gas oils and kerosene (OJ 1995 L 291, p. 46).

[4] Council Directive of 19 October 1992 on the approximation of the rates of excise duties on mineral oils (OJ 1992 L 316, p. 19). That directive was repealed and replaced by Directive 2003/96.

10. Article 3 of the directive provides:

‘Member States shall take the necessary steps to ensure that improper use of the marked products is avoided …

Member States shall provide that the use of the mineral oils in question in the cases mentioned in the first subparagraph is to be considered as an offence under the national law of the Member State concerned. Each Member State shall take the measures required to give full effect to all the provisions of this Directive and shall, in particular, determine the penalties to be imposed in the event of failure to comply with the said measures; such penalties shall be commensurate with their purpose and shall have adequate deterrent effect.’

3. Directive 2008/118/EC

11. Recital 8 of Directive 2008/118/EC[5] read as follows:

‘Since it remains necessary for the proper functioning of the internal market that the concept, and conditions for chargeability, of excise duty be the same in all Member States, it is necessary to make clear at [EU] level when excise goods are released for consumption and who the person liable to pay the excise duty is.’

12. Article 7(1) and (2) of the directive provided:

‘1. Excise duty shall become chargeable at the time, and in the Member State, of release for consumption.

2. For the purposes of this Directive, “release for consumption” shall mean any of the following:

(a) the departure of excise goods, including irregular departure, from a duty suspension arrangement;

(b) the holding of excise goods outside a duty suspension arrangement where excise duty has not been levied pursuant to the applicable provisions of [EU] and national legislation;

…’

13. Article 8(1) of the directive provided:

‘The person liable to pay the excise duty that has become chargeable shall be:

(a) in relation to the departure of excise goods from a duty suspension arrangement as referred to in Article 7(2)(a):

(i) the authorised warehousekeeper, the registered consignee or any other person releasing the excise goods … from the duty suspension arrangement and, in the case of irregular departure from the tax warehouse, any other person involved in that departure;

[5] Council Directive 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 recast and repealed with effect from 13 February 2023 by Council Directive (EU) 2020/262 of 19 December 2019 laying down the general arrangements for excise duty (OJ 2020 L 58, p. 4).

…

(b) in relation to the holding of excise goods as referred to in Article 7(2)(b): the person holding the excise goods and any other person involved in the holding of the excise goods;

…'

4. Implementing Decision 2011/544/EU

14. Recital 1 of Implementing Decision 2011/544/EU [6] provided that 'for the proper functioning of the internal market, and in particular to prevent tax evasion, Directive 95/60/EC provides for a common marking system to identify gas oils, falling within CN code 2710 00 69, and kerosene, falling within CN code 2710 00 55, which have been released for consumption exempt from excise duty, or subject to a reduced excise duty rate.'

15. Article 1 of that decision provided:

'The common fiscal marker provided for by Directive 95/60/EC for the marking of all gas oils falling within CN codes 2710 19 41, 2710 19 45, and 2710 19 49, as well as of kerosene falling within CN code 2710 19 25, shall be Solvent Yellow 124, as specified in the Annex to this Decision.

Member States shall fix a marking level of at least 6 mg and not more than 9 mg of marker per litre of mineral oil.'

B. Netherlands law

16. Article 66(1)(a) of the Wet van 31 oktober 1991, houdende vereenvoudiging en uniformering van de accijnswetgeving (Law of 31 October 1991 on the simplification and unification of excise legislation [7]) ('the Law on excise duty'), in the version applicable to the dispute in the main proceedings, constitutes, inter alia, the implementation of the exemption provided for in Article 14(1)(c) of Directive 2003/96.

17. Article 7(2) and Article 8(1)(b) of Directive 2008/118 were transposed into Netherlands law by Article 2(1)(b) and Article 51, respectively, of the Law on excise duty, in the version applicable at the material time.

III. The dispute in the main proceedings, the questions referred and the procedure before the Court of Justice

18. The appellant in the main proceedings, who resides in Germany, is the owner of a tanker which he uses to transport mineral oils on behalf of third parties by inland waterway within the EU in return for payment ('the tanker'). The tanker is fitted, both at the stern and at the bow, with bunker tanks used to hold fuel intended for its propulsion.

[6] Commission Implementing Decision of 16 September 2011 on establishing a common fiscal marker for gas oils and kerosene (OJ 2011 L 241, p. 31). The decision was adopted on the basis, inter alia, of Article 2(2) of Directive 95/60. It was repealed and replaced by Commission Implementing Decision (EU) 2022/197 of 17 January 2022 establishing a common fiscal marker for gas oils and kerosene (OJ 2022 L 31, p. 52).

[7] Stb. 1991.

19. On 7 June 2016, during an inspection carried out while the tanker was on the Amsterdam-Rhine Canal (Netherlands), inspectors from the Belastingdienst/Douane (Tax and Customs Administration, Netherlands) took samples of the gas oil stored in the bunker tanks. During the inspection, the party concerned provided the inspectors with proofs of purchase, by which he sought to establish that he had recently arranged for the gas oil to be delivered on board by what are known as bunker stations (that is to say, fuelling stations for vessels) belonging to fuel suppliers. One of the stations was located in Millingen aan de Rijn (Netherlands) and the other in Emden (Germany).

20. An analysis of the samples carried out by the laboratory of the customs administration indicated, in particular, the presence of a quantity of 'Solvent Yellow 124' of 5 grams per 1 000 litres and 4.4 grams per 1 000 litres, respectively, that is, a quantity lower than the minimum content of 6 grams per 1 000 litres required by Netherlands law for the release of gas oil for consumption exempt from excise duty for use as fuel for the propulsion of vessels.

21. On 30 January 2017, the Inspecteur van de Belastingdienst/Douane (Inspector of the Tax and Customs Administration) ('the Inspector'), taking the view that the gas oil in the tanker's bunker tanks did not satisfy all the conditions required for the application of the excise duty exemption, notified the party concerned of his intention to impose a tax adjustment notice on the latter, on the grounds, first, that the 'Solvent Yellow 124' content of the gas oil was lower than the minimum required and, second, that the party concerned was holding the gas oil as the owner and boatmaster of the tanker, and that the excise duty due on it had not been levied in accordance with the provisions of the applicable EU or national law. After the party concerned had submitted his observations, the Inspector issued a tax adjustment notice relating, inter alia, to the excise duty payable in respect of the gas oil that had been found to be present in the bunker tanks.

22. By judgment of 19 November 2019, the Gerechtshof Arnhem-Leeuwarden (Court of Appeal, Arnhem-Leeuwarden, Netherlands), ruling on the appeal brought by the Inspector against a judgment of the rechtbank Gelderland (District Court, Gelderland, Netherlands), held that such a tax adjustment had been correctly imposed on the party concerned on the ground, inter alia, that the gas oil used did not satisfy the essential condition for ensuring the correct and straightforward application of the exemption provided for in Article 66(1)(a) of the Law on excise duty ('the provision at issue'), as well as for preventing evasion, namely the addition of the quantity of legally prescribed 'Solvent Yellow 124' as a means of identification, and that, therefore, that gas oil was not eligible for such an exemption.

23. The appellant in the main proceedings brought an appeal in cassation before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), the referring court, against the judgment of the Gerechtshof Arnhem-Leeuwarden (Court of Appeal, Arnhem-Leeuwarden).

24. The referring court points out that Article 66(1)(a) of the Law on excise duty, which transposes into Netherlands law Article 14(1)(c) of Directive 2003/96, makes the benefit of the exemption from excise duty subject to certain conditions. Under Netherlands legislation, gas oil must contain between 6 and 9 grams of 'Solvent Yellow 124' per 1 000 litres as an identification marker.

25. The referring court takes the view that the question which arises in the present case is whether the obligation, deriving from Directive 95/60, that gas oil subject to a reduced rate of excise duty must contain a certain 'Solvent Yellow 124' content must be regarded as a substantive

condition, or as a formal requirement unrelated to the actual use of the product concerned, so that compliance with it would be irrelevant for the purposes of the exemption from excise duty laid down in Article 14(1)(c) of Directive 2003/96.

26. In order to resolve the dispute before it, that court states that it must determine whether the mere fact that 'Solvent Yellow 124', as a fiscal marker prescribed by EU law, is not present in sufficient quantity in the gas oil used and consumed for the purposes of navigation within EU waters means that the competent authority is required to disregard the obligation that, pursuant to Article 14(1)(c) of Directive 2003/96, requires Member States to exempt that product from excise duty, even where there is no evidence that the boatmaster may be involved in evasion, avoidance or abuse.

27. The referring court notes that, in the present case, during the inspection carried out, first, the gas oil in the bunker tanks did not contain a sufficient quantity of 'Solvent Yellow 124' and, second, the party concerned produced proofs of purchase to establish that he had recently, on two occasions, had gas oil delivered to him on board the tanker by fuel suppliers authorised to supply gas oil exempt from excise duty in the Netherlands and Germany, respectively, and, third, no facts or circumstances have come to light, even subsequently, which would lead to the conclusion that the party concerned has been involved in any evasion, abuse or avoidance of excise duty.

28. If the Court were to hold that, in such circumstances, the party concerned cannot benefit from the exemption provided for in Article 14(1)(c) of Directive 2003/96, the question would then arise as to whether it is the fuel supplier or the boatmaster who is to be regarded as the person liable to pay the excise duty. The referring court takes the view that, if it were to be held that excise duty is chargeable only on release for consumption, within the meaning of Article 7(2)(a) of Directive 2008/118, that is to say, on the departure of excise goods from a duty suspension arrangement, then the boatmaster cannot be regarded as being the person liable to pay excise duty. On the other hand, if the Court were to hold that excise duty is payable on the basis of the holding referred to in Article 7(2)(b) of that directive, the holder of the excise goods could be designated, pursuant to Article 8(1)(b) thereof, as the person liable to pay the excise duty that has become chargeable.

29. That being so, the principle of proportionality could lead to those provisions being interpreted as precluding the competent national authorities from recovering excise duty that has become chargeable from the owner of the vessel or the boatmaster, pursuant to Article 8(1)(b) of Directive 2008/118, rather than from the fuel supplier, pursuant to Article 8(1)(a)(i) thereof. Where a boatmaster has obtained supplies from an operator who, with the authorisation of the competent national authorities, supplies gas oil exempt from excise duty, and where the boatmaster had no reason to doubt that the gas oil had been supplied exempt from duty in accordance with the applicable provisions of EU and national law, it might be disproportionate to recover the duty from the boatmaster rather than from the fuel supplier.

30. In those circumstances the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 14(1)(c) of Directive [2003/96] be interpreted as meaning that the tax exemption laid down in that provision applies to energy products which are known to be used for the propulsion of vessels in navigating the inland waterways of the European Union, even where those energy products (gas oil in this case) do not, during that use, contain the required

minimum content of the marker Solvent Yellow 124, [8] if the tax authorities do not have one or more indications that the owner or operator of the vessel or his or her representative on board the ship (the boatmaster) is involved in excise evasion, avoidance or abuse in respect of the gas oil being held?

(2) If Question 1 is answered in the negative, must Article 7(2) of Directive [2008/118] be interpreted as meaning that, where it is established that the bunker tank of an inland waterway vessel exclusively contains gas oil originating from a fuel supplier which, with the authorisation of the tax authorities, may release that gas oil for consumption exempt from excise duty, the mere fact that the gas oil does not contain the required minimum content of the marker Solvent Yellow 124 means that the excise duty became chargeable only at the time of that earlier release for consumption on the basis of Article 7(2)(a) of that directive?

(3) If Question 2 is answered in the negative and Article 7(2)(b) of Directive [2008/118] is thus also applicable in the case referred to therein, does the EU law principle of proportionality preclude excise duty which has become chargeable pursuant to Article 7(2)(b) of Directive [2008/118] from being levied on the boatmaster holding the excise goods, in accordance with Article 8(1)(b) of that directive, even if that person had no reason to doubt that the gas oil was being supplied exempt from excise duty in accordance with EU and national law?

(4) Is it relevant for the answer to Question 3 that the boatmaster does not perform his or her duties in an employment relationship but is also the owner of the vessel?'

31. Written observations have been submitted by the Netherlands and Spanish Governments and by the European Commission. Those parties, as well as the appellant in the main proceedings, also presented oral arguments at the hearing held on 16 May 2024.

IV. Analysis

A. The first question

32. By its first question, the referring court asks, in essence, whether Article 14(1)(c) of Directive 2003/96 must be interpreted as meaning that the exemption provided for by that provision applies to an energy product about which it is common ground that it is used as fuel for the purposes of navigation within EU waters, where that product does not contain, during that use, the minimum marker content required by EU law, and there is no evidence of evasion, avoidance or abuse of the excise duty due on the product in question.

33. Before examining that question, it is appropriate briefly to recall the general principles of the arrangements for the taxation of fuels used for the purposes of navigation introduced by Directive 2003/96 and to provide some clarification regarding the link existing between the tax exemption scheme introduced by Directive 2003/96 and the fiscal marking system provided for by Directive 95/60.

8 On the basis of Article 1 of Directive 95/60, read together with Article 3 thereof, and Article 1 of Implementing Decision 2011/544.

1. Preliminary observations

(a) The conditions for the exemption provided for in Article 14(1)(c) of Directive 2003/96

34. It should be noted at the outset that, under Article 1 of Directive 2003/96, Member States are required to tax energy products in accordance with that directive, such taxation also including excise duty.

35. It should be noted, in the first place, that both the general scheme and the purpose of Directive 2003/96 are based on the principle that energy products are taxed *in accordance with their actual use*.[9] In the present case, it follows from Article 14(1)(c) of the directive that the exemption laid down in that provision is subject to the condition that the gas oil be supplied for use as fuel for the purposes of navigation for commercial purposes within EU waters.[10]

36. In the second place, it should be pointed out that Article 14(1) of the directive provides that Member States are to grant the exemption under conditions which they are to lay down in their national legislation for the purpose of ensuring the correct and straightforward application of that exemption and of preventing any tax evasion, avoidance or abuse. However, while EU law expressly permits Member States to lay down further conditions for exemption, those conditions must be in conformity with EU law.[11]

37. In the third place, it should be noted that the Court has emphasised the *unconditional* nature of an obligation to grant an exemption provided for by Directive 2003/96.[12] More specifically, according to the case-law of the Court, legislation of *a Member State* that makes the application of the exemption laid down by Article 14(1)(c) of the directive conditional on compliance with *formal requirements* unrelated to the actual use of the energy products concerned, or to the substantive requirements of that provision, calls in question the unconditional nature of the obligation to exempt laid down by that provision and infringes the principle of proportionality.[13] It follows that, while Member States may provide for a financial penalty to be imposed for non-compliance with *formal requirements*, such non-compliance cannot call into question entitlement to the mandatory exemption provided for if the *substantive conditions* relating to its application are fulfilled.[14]

9 See judgment of July 13 2017, *Vakarų Baltijos laivų statykla* (C-51/16, 'the judgment in *Vakarų Baltijos laivų statykla*', EU:C:2017:537, paragraph 42 and the case-law cited).

10 That exemption is designed to facilitate trade within the European Union, particularly the movement of goods and the freedom to provide services capable of taking place within EU waters. By that exemption, the EU legislature intended to promote the equality of certain tax conditions under which the transport undertakings or other services which ply those waters operate. See, in that regard, the judgment in *Vakarų Baltijos laivų statykla* (paragraph 33 and the case-law cited). Furthermore, it is clear from recital 23 to Directive 2003/96 that that exemption is based on compliance with existing international obligations and the maintenance of the competitive position of companies in the EU.

11 See the judgment in *Vakarų Baltijos laivų statykla* (paragraph 43 and the case-law cited).

12 See the judgment in *Vakarų Baltijos laivų statykla* (paragraph 44 and the case-law cited).

13 See the judgment in *Vakarų Baltijos laivų statykla* (paragraph 51).

14 See judgment of 27 June 2018, *Turbogás* (C-90/17, EU:C:2018:498, paragraph 44 and the case-law cited).

(b) The fiscal marking system introduced by Directive 95/60

38. It should be noted at the outset that the requirement for fiscal marking reflects the obligation incumbent on Member States under Directive 95/60. More specifically, the first indent of Article 1(1) of that directive provides that Member States are to apply a fiscal marker, in particular to gas oil released for consumption exempt from excise duty.

39. It also follows from the directive that the aim of the fiscal marker is precisely to ensure the *proper functioning of the internal market and, in particular, to prevent the improper use of such gas oil, thereby preventing tax evasion*.[15] Furthermore, although those objectives are not expressly mentioned among those referred to in Directive 95/60, it follows from the case-law of the Court that the fiscal marking of gas oil which is exempt from tax or is taxed at a reduced rate is designed to facilitate checks by the tax authorities of a Member State of the actual payment of the appropriate excise duty in the Member State in which that gas oil is released for consumption,[16] thus enabling those authorities to monitor the correct application of the exemption provided for in Article 14(1)(c) of Directive 2003/96.

40. It should also be noted that Article 2(1) of Directive 95/60 provides that the marker is to consist of a defined combination of chemical additives which, in principle, must be *added* under fiscal supervision before the product is released for consumption. Article 1 of Implementing Decision 2011/544 provided for the use of 'Solvent Yellow 124' as the common fiscal marker for the marking of gas oil at the time of the facts of the main proceedings. Under that provision, the marking level was to be between 6 mg and 9 mg per litre of mineral oil, while, under Article 4 of Directive 95/60, Member States also had the option of adding a colour or national marker.[17]

2. Compliance of the provision at issue with EU law

(a) Is the fiscal marking system a 'substantive' or 'formal' condition?

41. It must be determined, first, whether the requirement of fiscal marking (as laid down by EU law and transposed into national law by the provision at issue) constitutes a 'substantive' or 'formal' condition according to Directive 2003/96 and the case-law of the Court, a clarification which is of particular importance in determining whether the exemption provided for in Article 14(1)(c) thereof is applicable in the present case.

42. If it were established that the fiscal marking requirement, transposed into national law by the disputed provision, constitutes a substantive condition, failure to comply with it would entail refusal to grant the exemption provided for in Article 14(1)(c) of Directive 2003/96. If, on the other hand, it were to be established that this is a formal requirement (thus having no connection with the actual use of the product concerned), compliance or non-compliance with it would be irrelevant for the purposes of applying the excise duty exemption provided for by this provision, in the sense that entitlement to the exemption should be deemed to have been acquired if, in the absence of a finding of fraud or abuse, the substantive conditions were met, without non-compliance with the formal requirements being able to call it into question.

15 See, to that effect, the first and third recitals of Directive 95/60 and recital 1 of Implementing Decision 2011/544.

16 See judgment of 17 October 2018, *Commission* v *United Kingdom* (C-503/17, EU:C:2018:831, paragraph 53).

17 It is apparent from the order for reference that, pursuant to that provision, Netherlands law requires gas oil to be coloured red in a clearly visible and permanent manner.

43. First, it should be noted, that fiscal marking is not a requirement imposed solely by national law, but is an obligation incumbent on the Member States pursuant to EU law, and more specifically Directive 95/60, read together with Implementing Decision 2011/544, which establishes a common marking system to identify, inter alia, gas oil released for consumption exempt from excise duty.[18]

44. Second, it follows from the foregoing analysis set out in points 35 to 39 of the present Opinion that there is a link between the fiscal marking system provided for by Directive 95/60 and the substantive conditions required by Article 14(1)(c) of Directive 2003/96, which lays down the rules on exemption from taxation for energy products. The purpose of the fiscal marking system is to supplement Directive 2003/96 and to ensure correct and uniform application of the exemption, as required by Article 14(1)(c) thereof, while at the same time preventing tax evasion, in order to guarantee the collection of excise duty.

45. Third, it should be noted that, because it is added to excise-exempt fuel, that fiscal marker constitutes an essential and 'inseparable' characteristic of that product, exclusively connected with the use for which the exemption from excise duty was introduced. By adopting the fiscal marking system, the EU legislature did not, in my view, intend to add any further formal requirements to (the many) already existing, since petroleum products are already heavily regulated. The introduction of that obligation is based on the observation that it is extremely difficult for the tax authorities to establish, in the absence of that instrument, whether the petroleum product subject to random checks and present in the tanks of a merchant vessel is exempt or not.[19] Moreover, the high tax burden on fuels in many Member States, and the resulting significant price differential between excise-duty-exempt and non-exempt fuels, provides a strong incentive for illicit transactions, which are particularly difficult to detect, while the resulting profits can be substantial.

46. It follows that the circumstances at issue in the main proceedings differ from those that gave rise to the judgment in *Vakarų Baltijos laivų statykla* mentioned by the referring court, which concerned an infringement of the formal conditions laid down by Lithuanian law for the purposes of applying the exemption provided for in Article 14(1)(c) of Directive 2003/96.[20] As has been established in points 43 to 45 of the present Opinion, in contrast to the Lithuanian system with which the abovementioned judgment is concerned, the condition relating to fiscal marking of gas oil is not only provided for by EU law but it is also directly linked to the substantive condition of the exemption, namely the actual use of the gas oil for the propulsion of vessels, and is therefore of fundamental importance in ensuring the correct and straightforward application of the exemption from excise duty.

47. Although it follows from the foregoing analysis that, contrary to the submissions of the appellant in the main proceedings, the fiscal marking system provided for by the national legislation at issue in the main proceedings does not constitute a formal requirement unconnected with the actual use of the energy product covered by the exemption – but, in view of its characteristics, it is more akin to a substantive condition – that finding alone does not enable the first question referred to be answered. It still has to be established whether the

[18] See points 38 and 39 of the present Opinion.

[19] See points 54 to 59 of the present Opinion.

[20] Thus, in that case, the Court held that the conditions imposed by the national legislation were unrelated to the actual use of the energy products in question and were in no way necessary to ensure the correct and straightforward application of the exemption laid down by the abovementioned provision to prevent evasion, avoidance or abuse. See, in particular, the judgment in *Vakarų Baltijos laivų statykla* (paragraph 51).

requirement of a fiscal marking is necessary in order to ensure the correct and straightforward application of the exemption laid down by Article 14(1)(c) of Directive 2003/96 in a situation such as that at issue in the main proceedings, that is to say, where, first, it is not disputed that the boatmaster satisfied the substantive conditions for benefiting from the exemption provided for in that provision and, second, the tax or customs authorities had no evidence to support the finding that the owner or operator of the vessel was involved in evasion or abuse in relation to excise duty in respect of the gas oil held.

(b) Refusal to grant the exemption laid down in Article 14(1)(c) of Directive 2003/96 as a consequence of failure to comply with the fiscal marking requirement

48. It should be noted, as a preliminary point, that the application of the exemption laid down by the provision at issue is subject to the presence in sufficient quantity of the fiscal marker, a requirement which is regarded, by national law, as an essential condition for ensuring the correct and straightforward application of the exemption and for preventing tax evasion, avoidance and abuse. The referring court asks, in that regard, whether gas oil which has not been placed under an excise duty suspension arrangement and which does not contain the prescribed minimum content of 'Solvent Yellow 124', but which has been shown to be used for the propulsion of a navigation vessel within EU waters, may benefit from the exemption referred to in Article 14(1)(c) of Directive 2003/96.

49. On that point, as is apparent from both the written and oral submissions of the parties to the main proceedings, two different interpretations may be envisaged.

50. One interpretation, advocated by the Netherlands and Spanish Governments, is that Article 14(1)(c) of Directive 2003/96 does not preclude a national provision which makes the tax exemption subject to the condition that the gas oil bears the fiscal marking required by EU law. The condition relating to the fiscal marking of the gas oil is, in fact, directly linked to the substantive condition for the exemption, namely the actual use of the gas oil for the propulsion of vessels, and is not only appropriate but also essential for combating tax evasion and ensuring the correct application of the exemption from excise duty. The fact that the gas fuel was in fact used to propel the vessel and the absence of tax evasion are irrelevant in that regard, since the public interest requires the system for monitoring the application of exemptions to function properly.

51. *A contrario*, the second interpretation envisaged, supported by the Commission and the appellant in the main proceedings, is that since the vessel concerned satisfies the substantive conditions for benefiting from the exemption provided for in Article 14(1)(c) of that directive (namely that the gas oil in question was actually supplied for use as fuel for the purposes of navigation within EU waters), that exemption cannot be refused if the tax authorities do not have evidence to support the conclusion that there has been evasion, avoidance or abuse in relation to the gas oil held. In their view, in the present case, the determining factor is that the gas oil in question is actually used to propel the vessel, even if that gas oil does not meet the marking requirements of EU law. [21]

52. Like the referring court, it could be asked whether national legislation which removes the right to the exemption provided for in Article 14(1)(c) of the directive, even where the tax and customs authorities have not established fraudulent use of the mineral oils exempted from excise

[21] Those parties consider, moreover, that the requirement that the fuel must contain a minimum quantity of fiscal marker does not help to prevent fraud, since the use of incorrectly marked fuel cannot affect the application of that exemption.

duty, and there is no dispute that the substantive condition relating to the actual use of the gas oil in question has been met, goes beyond what is necessary to ensure the correct and straightforward application of that exemption and to prevent evasion, avoidance or abuse and, thus deprives that directive of its effectiveness.

53. It must be acknowledged, however, as established in points 41 to 47 of the present Opinion, that fiscal marking is not a mere formal condition laid down by national law but an essential and indispensable requirement introduced into EU law in order to ensure the correct and straightforward application of the exemption provided for in Article 14(1)(c) of Directive 2003/96 and, in particular, to prevent tax evasion, avoidance and abuse. Since the arrangements for levying excise duty and granting exemptions from it established by that directive are based, as a whole, on the principle that energy products are taxed *in accordance with their actual use*, it is my view that to make the application of the exemption at issue subject to the presence in sufficient quantity of the fiscal marker is the principal, if not the only, means available to the tax and customs authorities of the Member States in order to verify the use of the products concerned and thus to prevent the improper use of mineral oils benefiting from an exemption from, or a reduced rate of, excise duty.

54. To restrict the conditions for granting the exemption provided for in Article 14(1)(c) of Directive 2003/96 to compliance with the sole condition relating to use as fuel for the purposes of navigation within EU waters, and to the verification of that condition by the tax authorities would, in my view, risk undermining the very effectiveness of Directive 95/60. The interpretation advocated by the Commission and the appellant in the main proceedings seems, moreover, to disregard both the risks of tax evasion and abuse which may arise at a later stage in the supply of fuel (which is precisely what the fiscal marking system is designed to combat), and the difficulty (or the virtual impossibility) that the customs authorities would face in carrying out their checks in the absence of a presumption, such as that established by national law in the present case.

55. The purpose of fiscal marking is to enable the customs authorities to carry out instant checks at any time, particularly at a later stage in the supply of gas oil. To that end, use of the fiscal marker enables those authorities to verify whether the purchaser of the gas oil supplied under the excise exemption is using it for a purpose other than that permitting the exemption, or whether that user has subsequently supplied it to users who then use it for other purposes. However, failure to comply with the marking requirement facilitates or, at the very least, enables tax avoidance. [22]

56. It is precisely for these reasons that the specific marking of exempt fuel was introduced. The use of the marking, which alters, even if only slightly, the chemical composition and (coloured) appearance of the product, makes it, according to the will of the EU legislature, a 'new' type of fuel, different from the fuel taxed normally, so that the use of the marking is not a formal requirement for the purposes of the exemption, but a substantive condition thereof, since there is no practical way of proving the actual use of the fuel. If this were not the case, the exemption obligation would not be respected by the Member States, since the exemption would unduly extend to non-exempt products and, above all, the main objective of the European Union's regulations, which is to encourage only certain supplies of fuel, could not be achieved under undistorted conditions of competition. In other words, if these provisions were interpreted in such a way as to shift the burden of proof of the irregularity of the transaction onto the national

[22] At the hearing, the Netherlands Government mentioned two examples of tax evasion that had been established by the customs authorities that concerned vessels benefiting in principle from the tax exemption. The authorities mentioned, first of all, cases where boatmasters take exempt gas oil from their bunkers and then sell it to boatmasters who use it for (private) pleasure purposes. Next, they mentioned a case of evasion which involved the mixing of tax-exempt marked gas oil with pure gas oil.

tax authorities, without any substantial assistance through the fiscal marking system, other than a 'prima facie case' requiring multiple additions, it would be very easy to distort competition in a key sector for the functioning of the market, namely that of commercial maritime transport.

57. Furthermore, the interpretation suggested by the Commission and the appellant in the main proceedings would, in essence, limit the scope of the customs authorities' inspections to those vessels which, prima facie, are not eligible for the exemption, such as those used for private purposes, and would render any inspections of commercial vessels eligible for exemption pointless, since those vessels could, in any case, and notwithstanding the occurrence of evasion (which the customs authorities can only prove with great difficulty), rely on the event giving rise to the exemption, that is the use as fuel for commercial navigation in EU waters, without the customs authorities being able to intervene. Moreover, the Commission's argument that, in the absence of fraudulent elements, the use of fuel that does not bear the required fiscal marking should have no impact on its exemption, is a mere statement of principle.

58. In addition, although it is true that Article 3 of Directive 95/60, which requires Member States to take steps against the improper use of marked fuels, does not refer to the improper use of unmarked or incorrectly marked fuels, and while the marking of fuel is an indicator of its exemption or eligibility for a reduced rate, the fact remains that objective of the directive is the proper functioning of the internal market and that it seeks, in particular, to prevent fraud without excluding certain types of vessel from inspections.[23] As has been stated in points 54 and 55 of the present Opinion, those objectives may be jeopardised by the irregular and fraudulent use of fuel by vessels which satisfy, in principle, the substantive conditions enabling them to benefit from the exemption provided for in Article 14(1)(c) of Directive 2003/96.

59. I therefore share the view expressed by the Netherlands and Spanish Governments that, if, when checks are carried out, the tax or customs authorities find that the gas oil concerned does not comply with the chemical content required as a fiscal marker, they may presume, initially, that there is a tax irregularity and may refuse the right to the exemption provided for under Article 14(1)(c) of Directive 2003/96, without being required to establish the existence of tax abuse or evasion. To require the tax and customs authorities, in addition to finding an irregularity as regards the prescribed minimum marker content, to establish proof of tax abuse, evasion or avoidance, by requiring, for example, that the origin of the gas oil concerned be traced, would undermine the fiscal marking system enshrined in EU law and would therefore be tantamount to imposing on them a *probatio diabolica* taking account, in particular, of the structure and characteristics of the markets in question.[24] I also believe that, as a general rule, the boatmaster is in a better position to provide proof of the legality of the operations he or she has carried out him or herself. That would not be the case, however, if the tax authorities, despite having in their hands a strong presumption (almost irrebuttable) of the invalidity of a given operation, could not be satisfied with it, but would be obliged to expose and decipher a series of transactions for which they would have to provide evidence, which in reality amounts to a *probatio diabolica*.

[23] Moreover, it does not follow from any provision of Directive 95/60 that checks by the customs authorities should be limited solely to vessels which do not benefit from the right to exemption, such as private pleasure craft.

[24] For example, when a boatmaster obtains supplies from several bunker stations located in different Member States, as in the present case, it is virtually impossible for the customs authorities to trace the origin of the gas oil.

60. The refusal to allow an exemption as a penalty would, moreover, have the deterrent effect as required by EU law in order to combat tax evasion and abuse and to ensure that the European Union does not lose the resources deriving from the effective collection of excise duty. [25] It is also clear from the case-law of the Court that Member States cannot be denied the possibility of attaining an objective such as combating tax evasion and tax avoidance by the introduction of simple rules which will be easily managed and supervised. [26]

(c) Possibility of rebutting the presumption established by national law

61. It should be noted from the outset that the first question referred for a preliminary ruling does not concern the burden of proof, or the forms of proof that may be used by a boatmaster, who has been refused the right to the exemption on the ground that the gas oil he or she held did not bear the fiscal marking required in order to assert that right. The order for reference addresses only indirectly the question whether, and by what means, it would be possible for the appellant in the main proceedings to demonstrate that he had made proper use of the gas oil concerned, [27] without commenting on whether the presumption established by national law constitutes a rebuttable or irrebuttable presumption, an issue which was discussed at the hearing. [28]

62. It should be borne in mind, in that regard, that the Court has already taken a position on irrebuttable presumptions in tax matters in its case-law, holding that, as opposed to a rebuttable presumption, a provision which presumes the existence of fraudulent conduct solely on the ground that the conditions that it lays down are satisfied, without allowing the economic operator concerned to rebut that presumption and prove the actual use of the product, goes beyond what is necessary to achieve the objective of combating tax evasion and avoidance. [29] Furthermore, it must be noted, that it is for the Member States, in the absence of harmonisation of EU legislation in the field of sanctions applicable where conditions laid down by arrangements under that legislation are not complied with, to choose the sanctions which seem to them to be appropriate, they must, however, exercise that power in accordance with EU law and its general principles and, consequently, in accordance with the principle of proportionality. [30]

63. It follows that the presumption in favour of the tax and customs authorities, which is intended to facilitate the monitoring carried out by them, should not deprive the person concerned of the opportunity to prove, subsequently, that the energy products at issue have been used or are intended to be used for the purposes set out in Article 14(1)(c) of Directive 2003/96 and that they were not supplied with the aim of fraudulently or wrongfully benefiting from the exemption. [31]

[25] See, to that effect, Article 3 of Directive 95/60.

[26] See judgment of 29 June 2017, *Commission* v *Portugal* (C-126/15, EU:C:2017:504, paragraph 84 and the case-law cited).

[27] The referring court states only that the Gerechtshof Arnhem-Leeuwarden (Court of Appeal, Arnhem-Leeuwarden) had left open the question of whether the party concerned could prove the origin of the gas oil in question, by means not only of the proof of purchase provided but also by means of the tanker's logbook.

[28] While the Netherlands Government did not take a direct position on that question at the hearing, the Commission argued that the way in which the provision at issue is applied by the Netherlands (administrative and judicial) authorities establishes an irrebuttable presumption that the gas oil concerned is not used in a compliant manner and therefore that there is evasion or abuse, without it being possible for the taxable person to adduce evidence to the contrary, which makes that presumption disproportionate and contrary to Article 14(1)(c) of Directive 2003/96.

[29] See judgment of 25 April 2024, *Bitulpetrolium Serv* (C-657/22, EU:C:2024:353, paragraph 30 and the case-law cited).

[30] See judgments of 26 April 2017 in *Farkas* (C-564/15, EU:C:2017:302, paragraph 59 and the case-law cited), and of 12 July 2001, *Louloudakis* (C-262/99, EU:C:2001:407, paragraph 67 and the case-law cited).

[31] See the judgment in *Vakarų Baltijos laivų statykla* (paragraph 46 and the case-law cited).

64. It must, however, be borne in mind that, since the directive does not govern how proof that energy products have been used for purposes giving rise to entitlement to exemption is to be adduced, it is for the Member States to lay down the detailed rules in that regard. [32] It is therefore for the national court to examine, first, the nature of the presumption established by national law and, second, whether, on the basis of the evidence adduced by the appellant in the main proceedings, he is entitled to the exemption provided for under Article 14(1)(c) of that directive. [33]

65. In the light of the foregoing considerations, the answer to the first question referred for a preliminary ruling should be that Article 14(1)(c) of Directive 2003/96 does not preclude a national provision which makes the application of the tax exemption subject to the condition that the gas oil has the minimum fiscal marker content established in accordance with Article 2(2) of Directive 95/60, provided that a party whose right to the exemption has been refused on the ground that the gas oil concerned did not bear the required fiscal marker has the opportunity to provide the national authorities with proof of the compliant use of that the gas oil.

B. The second question

66. Having regard to the answer which I propose to give to the first question referred, it is necessary to examine the second question, by which the referring court asks, in essence, whether Article 7(2) of Directive 2008/118 must be interpreted as meaning that, where it is established that the bunker tank of an inland waterway vessel contains exclusively gas oil originating from a supplier authorised to release that gas oil for consumption exempt from excise duty, the mere fact that the gas oil does not contain the required content of a chemical substance prescribed as a fiscal marker by EU law means that the excise duty became chargeable only at the time of that release for consumption.

67. It should first of all be noted that, under Article 7(1) of Directive 2008/118, excise duty becomes chargeable at the time of *release for consumption* of the goods concerned and in the Member State in which that release takes place.

68. In accordance with the objective, set out in recital 8 of the directive, of harmonising the time at which excise duty becomes chargeable and thus ensuring the proper functioning of the internal market through the free movement, within the European Union, of the goods concerned, [34] Article 7(2) of the directive lists the situations in which there is a *release for consumption* within the meaning of that directive. Under Article 7(2)(a) and (b) of Directive 2008/118, the concept of 'release for consumption' covers not only *the departure*, including irregular departure, of excise goods from a duty suspension arrangement, but also *the holding of such goods* outside a duty suspension arrangement where excise duty has not been levied pursuant to the applicable provisions of EU and national law.

[32] See judgment of 27 June 2018, *Turbogás* (C-90/17, EU:C:2018:498, paragraph 43 and the case-law cited).

[33] I consider it important to point out, in that regard, that proof of the purchase of fuel from an authorised warehousekeeper should not, on its own, be sufficient to rebut the existing presumption in so far as it does not exclude the possibility that evasion may take place at a later stage in the supply of fuel. By way of example, it is possible for a boatmaster, without any particular difficulty, to tranship part of the exempt fuel on private vessels that do not transport goods in EU waters, or to mix it with non-exempt fuel for subsequent unauthorised use. Other indications and evidence demonstrating the absence of irregular use of the fuel by the boatmaster must be taken into consideration by the customs authorities, such as the presence of other vessels with gas oil not bearing the required fiscal marker which may have obtained supplies from the same bunker stations, evidence that may indicate errors potentially made when that marker was added to the mineral oils.

[34] See judgment of 21 December 2023, *CDIL* (C-96/22, EU:C:2023:1025, paragraph 53 and the case-law cited).

69. It follows that the various forms of release for consumption referred to in those provisions, each of which gives rise to the chargeability of excise duty, could thus correspond, in the present case, either to the release for consumption of the gas oil by the two bunker stations under Article 7(2)(a) of that directive, or to the release for consumption of the gas oil by the appellant in the main proceedings, pursuant to Article 7(2)(b) thereof, since, as a boatmaster, the latter had the power of actual disposal in respect of that gas oil, even though excise duty had not yet been levied on it. [35]

70. It is precisely with regard to which of those two provisions must apply and, consequently, which person is liable to pay the excise duty in a situation such as that at issue in the main proceedings, that the referring court is uncertain. In particular, according to the referring court, it could be considered that the chargeable event had (already) occurred at the stage of the supply of the gas oil by the bunker stations pursuant to Article 7(2)(a) of Directive 2008/118, so that it is not certain that the boatmaster is the person who should be regarded as liable to pay excise duty. [36] The referring court thus considers that the answer to the second question referred for a preliminary ruling involves clarification of the way in which Article 7(2)(b) of the directive is linked to Article 7(2)(a) thereof.

71. It should be recalled that, in the present case, it is common ground that no excise duty was levied on the gas oil concerned (which had been delivered to the boatmaster under the excise duty exemption scheme) at a time prior to the check carried out by the Netherlands customs authorities. Furthermore, when it was found, during that check, that the gas oil concerned no longer satisfied the conditions required for the application of the exemption from excise duty and that, consequently, the gas oil concerned should be regarded as excise goods not under a duty suspension arrangement, the Netherlands authorities took the view that the excise duty had become chargeable to the boatmaster because he was holding a product on which excise duty had not been paid.

72. Such an approach is, in my view, consistent both with the wording of Article 7(2)(b) of Directive 2008/118, [37] in that the facts of the present case correspond to one of the situations covered by that provision, and with the policy underlying that directive, according to which it is the duty of each Member State to ensure that excise duty is paid on goods that are found to have been released for consumption.

73. That approach is, moreover, also supported by the case-law of the Court, according to which the mere holding of excise goods outside a duty suspension arrangement constitutes a release for consumption and gives rise to liability for excise duty, where excise duty has not yet been paid in respect of that product pursuant to the applicable provisions of EU and national legislation. [38] The basic principle underlying Article 7(2)(b) of Directive 2008/118 is that a product subject to excise duty which is held outside a suspension arrangement must at some point and in some way have been released for consumption within the meaning of Article 7(1) of that directive. [39]

35 See judgment of 5 April 2001, *Van de Water* (C-325/99, EU:C:2001:201, paragraph 42).

36 The referring court also refers to the case-law of the Court to the effect that release for consumption of products subject to excise duty may happen only once (see judgment of 24 February 2021, *Silcompa* (C-95/19, EU:C:2021:128, paragraph 65)).

37 That provision states that '*the holding of excise goods outside a duty suspension arrangement where excise duty has not been levied pursuant to the applicable provisions of [EU] law and national legislation*' is a type of release for consumption (emphasis added).

38 See, in that regard, judgment of 3 July 2014, *Gross* (C-165/13, EU:C:2014:2042, paragraph 25), and Opinion of Advocate General Tanchev in *Commissioners for Her Majesty's Revenue and Customs (Innocent agent)* (C-279/19, EU:C:2021:59, point 48).

39 See judgment of 8 February 2018, *Commission* v *Greece* (C-590/16, EU:C:2018:77, paragraph 48 and the case-law cited).

74. I am not persuaded by a more restrictive interpretation, according to which the status of person liable to pay duty would be limited to bunker stations, on the ground that they, as authorised warehousekeepers, play a central role in the movement of goods subject to excise duty and that the liability which they assume is a strict liability,[40] as the appellant in the main proceedings maintains. Quite apart from the fact that such an interpretation of Article 7(2) of Directive 2008/118 is not apparent from the actual wording of that provision, which expressly provides for several forms of *release for consumption* while Article 8(1) thereof provides for a number of *persons liable to pay* the excise duty,[41] such an interpretation would risk complicating the collection of the excise duty due.[42] It should be noted, moreover, that the central role which authorised warehousekeepers undeniably play in the context of the free movement of products subject to excise duty cannot rule out the responsibility of other parties involved in the economic chain, in particular at a later stage during which those warehousekeepers cannot exercise any control over the fuel concerned nor, therefore, the possibility which must be available to the tax authorities to recover the excise duty from those warehousekeepers in order to ensure the effective collection of the excise duty.

75. In light of the foregoing, I am of the opinion that the tax authorities of a Member State may, on the basis of Article 7(2)(b) of Directive 2008/118, read together with Article 8(1)(b) of that directive, recover the excise duty payable from a boatmaster where it has been established, following a check carried out by those authorities, that that boatmaster is holding gas oil which does not bear the fiscal marker required in order to be able to benefit from the exemption in Article 14(1)(c) of Directive 2003/96, irrespective of the fact that the boatmaster had obtained that gas oil (which was found not to bear the requisite fiscal marker) from an authorised warehousekeeper.

C. The third and fourth questions

76. If, as I propose in the foregoing analysis, the Court were to hold that, in circumstances such as those at issue in the main proceedings, the boatmaster must be regarded as the person liable to pay excise duty, the referring court asks, first, whether such a solution is compatible with the principle of proportionality, given that that boatmaster had no reason to doubt that the gas oil was supplied to him in accordance with the provisions of EU and national law governing exemption from excise duty (*third question*) and, second, whether the fact that he was not performing his duties as an employee but was the owner of the vessel is relevant for the purposes of answering the third question (*fourth question*).

77. For the reasons set out below, I am of the opinion that those two questions, which I propose to examine together, should be answered in the negative.

[40] Failure to comply, at the time of release for consumption, with the legal provisions for the delivery of an excise product exempt from duty entails the obligation for the authorised warehousekeeper to pay the excise duty due under Article 7(2)(a) of Directive 2008/118.

[41] If the EU legislature had wished to provide for the *exclusive* liability of authorised warehousekeepers, it would have confined itself to the release for consumption provided for in Article 7(2)(a) of Directive 2008/118 without providing for other forms of release for consumption and other persons liable to pay excise duty in Article 8(1) thereof.

[42] Where several bunker stations in different Member States have been used, as in the present case, it would be impossible for the competent authorities to determine, a posteriori, in which of them the content of the 'Solvent Yellow 124' marker of the gas oil was incorrect.

78. As a preliminary point, it should be recalled that Article 8(1) of Directive 2008/118 defines the *person liable to pay* the excise duty that has become chargeable by reference to Article 7(1) of that directive. In relation to the holding of excise goods as referred to in Article 7(2)(b) of the directive, Article 8(1)(b) of the directive provides that *the person liable to pay the excise duty is the person holding the excise goods and any other person involved in the holding of the excise goods.* [43]

79. It should be noted, in that regard, that the EU legislature has adopted a broad formulation of the concept of 'person liable to pay' excise duty in that it encompasses a series of persons who are in different situations without establishing any order of priority, in order to ensure that someone is liable for paying the excise duty. Having regard to the objectives pursued by Directive 2008/118, which include combating any tax evasion, avoidance and abuse, the formulation chosen is itself also intended to ensure the effective collection of excise duty. [44]

80. It should also be emphasised that while Article 8(1)(b) of the directive does not contain any express definition of the concept of 'holding' (of goods), the Court has held that the concept does not require the person concerned to be the holder of a right or to have any interest in relation to the goods that that person holds, or that that person be aware or that he should reasonably have been aware that the excise duty is chargeable under that provision. [45] It follows that the fact that the boatmaster had no reason to doubt that the gas oil had been supplied exempt from excise duty in accordance with EU and national law does not in any way alter that conclusion. Similarly, and bearing in mind that he is a professional, the fact that the boatmaster is also the owner of the vessel is also irrelevant.

81. It is also clear from the case-law of the Court that the EU legislature's choice to identify several categories of persons liable to pay excise duty is without prejudice to the possibility, where provided for by national law, of a person who has, under that provision, paid the excise duty that has become due to bring an action for a contribution or indemnity against another person liable for that excise duty. [46] For the sake of completeness, it should be noted that the referring court points out that, although it was open to the boatmaster to bring an action on the basis of national law against that supplier after having paid the excise duty, the applicable procedure could be disproportionately long and onerous. It must, however, be stated that, through Directive 2008/118, the EU legislature intended only to harmonise the conditions under which excise duty is due and recovered (an element that is necessary for the proper functioning of the internal market), by providing, in particular, for joint and several liability between the various parties involved in the economic chain, without, however, laying down common rules concerning the system of actions for recourse, which remain subject exclusively to the rules of national law.

82. Having regard to the foregoing, I am of the opinion that the principle of proportionality does not preclude the excise duty that has become chargeable from actually being recovered under Article 8(1)(b) of Directive 2008/118 from the boatmaster as owner of the vessel, even if he or she had no reason to doubt that the gas oil had been supplied on exemption from excise duty in accordance with the applicable provisions of EU and national law.

[43] Article 8(2) of Directive 2008/118 provides that where several persons are liable for payment of one excise duty debt, they are to be jointly and severally liable for such debt.

[44] See, in that regard, judgment of 3 July 2014, *Gross* (C-165/13, EU:C:2014:2042, paragraphs 25 and 26).

[45] Judgment of 10 June 2021, *Commissioners for Her Majesty's Revenue and Customs (Innocent agent)* (C-279/19, EU:C:2021:473, paragraphs 28 to 31 and the case-law cited).

[46] See judgment of 10 June 2021, *Commissioners for Her Majesty's Revenue and Customs (Innocent agent)* (C-279/19, EU:C:2021:473, paragraph 35 and the case-law cited).

V. Conclusion

83. In the light of the foregoing considerations, I propose that the Court should answer the questions referred by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) as follows:

(1) Article 14(1)(c) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity does not preclude a national provision which makes the application of the tax exemption subject to the condition that the gas oil has the minimum fiscal marker content established in accordance with Article 2(2) of Council Directive 95/60/EC of 27 November 1995 on fiscal marking of gas oils and kerosene provided that a party whose right to the exemption has been refused on the ground that the gas oil concerned did not bear the required fiscal marker has the opportunity to provide the national authorities with proof of the compliant use of that gas oil.

(2) The tax authorities of a Member State may, on the basis of Article 7(2)(b) of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC, read together with Article 8(1)(b) thereof, recover the excise duty payable from a boatmaster where it has been established, following a check carried out by those authorities, that that boatmaster is holding gas oil which does not bear the fiscal marker required in order to be able to benefit from the exemption in Article 14(1)(c) of Directive 2003/96, irrespective of the fact that the boatmaster had obtained that gas oil (which was found not to bear the requisite fiscal marker) from an authorised warehousekeeper.

(3) The principle of proportionality does not preclude the excise duty that has become chargeable from actually being recovered under Article 8(1)(b) of Directive 2008/118 from the boatmaster as owner of the vessel, even if he or she had no reason to doubt that the gas oil had been supplied on exemption from excise duty in accordance with the applicable provisions of EU and national law.