Reports of Cases

OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 21 January 2021 [1]

Case C-279/19

The Commissioners for Her Majesty's Revenue and Customs
v
WR

(Request for a preliminary ruling from the Court of Appeal (United Kingdom))

(Reference for a preliminary ruling – Excise duties – Directive 2008/118/EC – Person liable to pay the excise duties – Person holding the goods intended for delivery – Person who participated in the irregularity – Notion – Transporter of the goods – Innocent agent)

1. In the present reference for a preliminary ruling, the Court of Appeal (United Kingdom) seeks an interpretation of Article 33(3) of Directive 2008/118/EC.[2] The reference arose in the context of an action between The Commissioners for Her Majesty's Revenue and Customs (HMRC) and WR, in relation to the lawfulness of the assessment to excise duty issued to WR for goods which WR transported illegally to the United Kingdom. In essence, the main question is whether a lorry driver (WR) who at the excise duty point was found to be in physical possession of goods in respect of which duty had not been paid is *strictly liable* to pay the duty under the Directive.

I. Legal framework

2. For the purposes of the present Opinion it is sufficient for me to refer to the EU and national legal framework, as cited in extenso in paragraphs 14 to 24 of the referring court's judgment dated 19 March 2019.[3]

II. The dispute in the main proceedings and the questions referred for a preliminary ruling

3. On 6 September 2013, a heavy goods vehicle ('HGV') being driven by WR – a self-employed worker – was stopped at Dover Easter Docks by the UK Border Agency (UKBA) officers. The HGV was loaded with 26 pallets of beer. WR produced to the UKBA Officers a Cargo Movement Requirement ('the CMR letter') which stated that the goods were covered by an Electronic Administrative Document with a stated ARC (Administrative Reference Code) number. The CMR also stated that the consignor was a bonded warehouse in Germany, and that the consignee was Seabrook Warehousing Ltd, a UK bonded warehouse. Accordingly, the documentation was prima facie consistent with the goods travelling in duty suspense under Article 4(7) of the Directive.

1 Original language: English.

2 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; hereafter 'the Directive').

3 [2019] EWCA Civ 465 ('the judgment of 19 March 2019').

4. However, the UKBA officials checked the EMCS system (Excise Movement and Control System) and established that the ARC stated on the CMR had already been used in relation to a previous consignment of beer to Seabrooks. Accordingly, the load was, contrary to the documentation, not in duty suspense. Thus, when the goods arrived into the United Kingdom, a UK duty point arose.

5. Therefore, HMRC issued WR with an assessment to excise duty in the amount of 22 779 pound sterling (GBP) (approximately EUR 25 200) pursuant to Regulation 13(1) and (2) of the Excise Goods (Holding, Movement and Duty Point Regulations) 2010, as well as a penalty in the amount of GBP 4 897.48 (approximately EUR 5 400) pursuant to Schedule 41 of the Finance Act 2008.

6. WR appealed against the excise assessment (and the penalty) to the First-tier Tribunal (Tax Chamber) (United Kingdom) ('FtT'), which made the following findings of fact: WR was an experienced lorry driver, who had been employed by a haulage company from 2009 to 2013 and regarded himself as self-employed since 2013 (registering as such with the tax authorities only in 2015). He was paid in cash with no deductions. Sometime in 2014 he agreed to work for a business he understood was called 'Kells' in return for GBP 250 per week based on two to three days' work and if he worked longer GBP 350 to GBP 360. There was no written contract and he was paid in cash in person or by the money being concealed at the lorry park for him to collect.

7. According to the FtT, WR would go to a lorry park and pick up an empty trailer, which he would take to a secure trailer park in Calais (France) and swap for a loaded trailer of goods to be brought into the United Kingdom. He would find the documentation for the load in a tube on the side of the trailer and would look at the documentation, which consisted of a CMR and Delivery Note to ascertain the nature of the goods he was carrying and their destination. In the world in which WR operated it was apparently not unusual for lorry drivers to be employed from time to time under such informal arrangements (whether circumstances justified that conclusion or not), those lorry drivers being paid in cash without any documentation to back up the arrangements, having no interest in the identity of those employing them and remaining off the radar as far as HMRC was concerned.

8. According to the FtT, on 6 September 2013, WR picked up a consignment of beer destined for an excise warehouse: Seabrook, in the United Kingdom. WR therefore knew the consignment consisted of excise goods. Further to what is described in point 4 of the present Opinion, the Border Force officials seized the vehicle and excise goods. WR informed the person who had instructed him to collect the goods: 'Des', of what had happened and was picked up at Dover. He was paid his money for the week and had no further contact with Des.

9. The FtT held that WR was not a conspirator in relation to the smuggling attempt. He was under the control of the person(s) who organised the smuggling of the goods and it is those persons who had the de facto and legal right of control over the goods at the time that they were seized. WR had no personal interest in the goods, his only interest being to follow instructions for the collection and delivery of the goods and to be paid a modest fee for his services. Neither was he the owner of the vehicle. The identity of those behind the smuggling attempt and who knowingly participated in it cannot be ascertained. The only information that WR had was found in the documentation he collected when he picked up the goods and, on the face of it, this documentation was consistent with the movement of goods subject to a valid duty suspended arrangement. WR had no means of checking whether the ARC stated on the CMR had been used or not. There was nothing about the documents to cause him to question them and he did not have access to the EMCS system.

10. Accordingly, the FtT applied the case-law of the Criminal Division of the Court of Appeal [4] and ruled: (i) 'actual or constructive knowledge of [WR's] physical possession of smuggled goods might be sufficient to constitute "holding" ... and take such a person outside the status of "innocent agent"'; (ii) however, WR was an innocent agent and therefore cannot be said to have been 'holding' the goods nor 'making delivery of the goods' for the purposes of Regulation 13; and (iii) 'imposing liability on WR in the circumstances that we have found would raise serious questions of compatibility with the objectives of the legislation'. The FtT allowed WR's appeal and discharged the assessment to excise duty and the penalty.

11. HMRC appealed against that decision to the Upper Tribunal (Tax and Chancery Chamber). The Upper Tribunal dismissed HMRC's appeal stating, in essence, that there was no appeal against the FtT's findings of fact and so the appeal proceeded on the basis that WR had neither actual nor constructive knowledge of the smuggling attempt. It too essentially applied the innocent agent exception and upheld the FtT's decision.

12. HMRC appealed against that decision to the referring court (the Court of Appeal). That court dismissed HMRC's appeal against the Upper Tribunal's decision in respect of the penalty imposed under Schedule 41 to the Finance Act 2008. The referring court has doubts, however, about the validity of the Upper Tribunal's ruling and, in particular, about the question whether or not a HGV driver – who has no right to or interest in the goods he is transporting and who is unaware of or has no reason to believe that those goods are subject to excise duty – should pay those duties pursuant to Article 33(3) of the Directive.

13. It is against that background that the Court of Appeal (United Kingdom) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is a person ("P") who is in physical possession of excise goods at a point when those goods become chargeable to excise duty in Member State B, liable for that excise duty pursuant to Article 33(3) of Directive 2008/118 … in circumstances where that person:

(a) had no legal or beneficial interest in the excise goods;

(b) was transporting the excise goods, for a fee, on behalf of others between Member State A and Member State B; and

(c) knew that the goods he was in possession of were excise goods but did not know and did not have reason to suspect that the goods had become chargeable to excise duty in Member State B at or prior to the time that they became so chargeable?

(2) Is the answer to Question 1 different if P did not know that the goods he was in possession of were excise goods?'

III. Analysis

A. Brief summary of the arguments of the parties

14. Written observations were submitted to the Court by WR, the United Kingdom, the Netherlands and the Italian Governments as well as by the European Commission.

4 Judgment in *Taylor and Wood* v *R* [2013] EWCA Crim 1151.

15. WR (the defendant in the main proceedings) submits, in essence, that the two national tribunals qualified him correctly as an 'innocent agent', given that he had neither right to nor interest in the goods he was transporting on behalf of others, for a fee, and was unaware that tax had been evaded on the goods he was carrying; nor could it be said that he should have been so aware, and, therefore, should not be liable to pay those duties under Article 33(3) of the Directive. A decision that someone in WR's position is liable to excise duty would cause commercial chaos because it would mean that a delivery driver (say, working for DHL) who collected a case of wine from point A and delivered it to point B would (simply because he knew or should have known from the markings on the package that it contained wine) be liable to account for duty if it turned out that no duty had been paid on that case.

16. Next, Article 38 of the Directive, which imposes liability for excise duty arising as a result of an irregularity in a movement of excise goods on 'any person who participated in the irregularity', should be interpreted as intending to refer to someone that knew or should have known of the irregularity.

17. Furthermore, nothing in the Directive says that tax should be collected from those who have no interest in the goods that have been moved and who do not know (and had no reason to believe) that the goods had outstanding duty on them. Such an interpretation would not be appropriate and necessary to secure the aims pursued by the Directive and would therefore breach the principle of proportionality.

18. The United Kingdom and the Netherlands Governments as well as the Commission submit, in essence, that Article 33(3) of the Directive should be interpreted as requiring that the person 'holding the goods' at the moment when excise duty is due – such as WR – be liable for those duties.

19. The Italian Government arrives at an analogous conclusion, but seeks instead to rely on Article 38 of the Directive.

B. Assessment

1. Preliminary remarks

20. I consider that it is appropriate to answer the two questions together in so far as the referring court wishes essentially to know whether a lorry driver such as WR should be liable to pay the excise duty, in particular, on the basis of Article 33(3) of the Directive, where that person has no interest in the goods and does not know or have any reason to suspect that the goods have become chargeable to excise duty.

21. For the reasons explained below, I have come to the conclusion that the position expounded by all the parties (save for WR) is correct. Therefore, the above question must be answered in the affirmative: a lorry driver such as WR here is strictly liable to pay the excise duty.

22. I shall examine, in particular, the objective of the measure, the wording of the relevant provisions and the possible analogies with other legislative frameworks.

23. Indeed, according to the Court's settled case-law, in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objective pursued by the rules of which it is part.[5] Similarly, the meaning and scope of terms for which EU law provides no definition must be determined by reference to their usual meaning in everyday language, while account is also taken of the context in which they occur and the purposes of the rules in question.[6]

2. The purpose of Directive 2008/118 and the objective of the relevant provisions

24. The main purpose of the Directive is to lay down rules on the holding, movement and monitoring of goods subject to excise duty, in order to ensure that excise duties are charged in the same way in all the Member States.[7] That harmonisation should result in a seamless system under which excise duty is paid systematically before goods are released for free circulation – to allow the free movement of the goods while ensuring that the correct tax debt is, in fact, collected by the national authorities – and which prevents situations of double taxation of transactions between Member States.

25. In the present case, the goods were not being moved under duty suspension, since the documentation was false (the excise goods were transported under the cover of a CMR containing a false ACR code).

26. It follows from the order for reference that the goods at issue have already been released for consumption, as a consequence of the invalidity of the document intended to prove that those goods circulated under the system of suspension of excise duties and were held for commercial purposes, and therefore gave rise to immediate liability for excise duty at the moment of their arrival in the United Kingdom.

27. With the purpose of the Directive (stated in point 24 of the present Opinion) in mind, the legislation identifies a series of persons who are liable for payment of duty.

28. Under Article 33(3) of the Directive, the persons liable to pay duty are thus: (a) the person making the delivery of goods; (b) the person holding the goods (in the purely objective sense of having physical possession of them); or (c) the person to whom the goods are delivered in the second Member State. In the case of an irregularity, Article 38(3) of the Directive provides that duty is payable by 'the person who guaranteed payment thereof in accordance with Article 34(2)(a) or Article 36(4)(a)' and by 'any other person who has participated in the irregularity'.

29. As far as the aims of the Directive are concerned, as I will explain in the section below, the *broad wording* of the provisions at issue, which concern a series of persons potentially liable for the duties without any order of priority being established, and who are jointly liable, seeks to guarantee that the tax debt is paid effectively and for that purpose *someone must be held responsible*. The Court has endorsed this view in its case-law.[8]

30. Article 8(2) of the Directive provides applies the *principle of joint and several liability*: 'Where several persons are liable for payment of one excise duty debt, they shall be jointly and severally liable for such debt.'

5 Judgments of 26 January 2012, *ADV Allround* (C-218/10, EU:C:2012:35, paragraph 26) and of 19 July 2012, *A* (C-33/11, EU:C:2012:482, paragraph 27 and the case-law cited).

6 See, to that effect, judgment of 13 December 2012, *BLV Wohn- und Gewerbebau* (C-395/11, EU:C:2012:799, paragraph 25 and the case-law cited).

7 See judgment of 5 April 2001, *van de Water* (C-325/99, EU:C:2001:201, paragraph 39).

8 Judgments of 5 April 2001, *van de Water* (C-325/99, EU:C:2001:201, paragraphs 41 and 42) and of 3 July 2014, *Gross* (C-165/13, EU:C:2014:2042, paragraphs 25 and 26).

31. It follows from this principle that *each debtor* is liable for the *total amount* of the debt and that the creditor remains, in principle, free to request the payment of that debt from one or several debtors as he or she so chooses.[9]

32. I consider that the EU legislature's choice to apply the principle of joint and several liability is consistent with the scheme of the Directive *to ensure that the excise duty debt is in fact collected*. This follows from recitals 15, 19 and 20 of the Directive and the importance of that point was also emphasised in the *van de Water* case.[10]

33. Furthermore, as is clear from recital 8, the directive harmonised not only the notions of chargeable goods and the place at which duty becomes chargeable, but also the range of persons liable for excise duty. Therefore, where a person is physically in possession of the excise goods that have been released for consumption, that person is liable for the duty payable, irrespective of whether he or she knows or ought to know that the goods are chargeable to duty.

34. Indeed, the inherent purpose of joint and several liability is to increase the authorities' means of redress and thus to strengthen the effective recovery of excise duty debts[11] as well as the protection of the European Union's own resources.

35. I consider (as does the Netherlands Government) that that purpose (point 24 of the present Opinion) would be compromised if the tax authorities were required to demonstrate that the person liable for the excise duty also knows that the excise duty on the goods in question is payable. Such a requirement would render the collection of the tax debt considerably more difficult in practice.

36. Indeed, the requirement of knowledge actually promotes the evasion of excise duty. Transactions giving rise to excise duty often involve networks in which trade, transport and reselling take place and in which a number of persons each have their own individual (small) role to play. It is therefore entirely possible that someone – such as a lorry driver – who has no personal knowledge and is just a small link in the complete chain must nevertheless still be able to be held liable, since otherwise no effective taxation is possible.

37. As the United Kingdom Government added, to import a knowledge requirement into the concept of 'holding' or 'making the delivery' in Article 8(1)(b) and Article 33(3) of the Directive would undermine its object and purpose. It would create a means by which excise duty could be evaded relatively easily. Thus, an individual found in physical possession of chargeable goods, could – such as WR has done here – simply fail to identify the person who had employed him or her to transport the goods or any other details concerning ownership of the goods (either wilfully or because he or she had been given false details).

38. Again, this would make it difficult to combat fraud and abuse, whereas the scheme of the Directive itself and recitals require that *the national authorities must ensure that the tax debt is in fact collected* (see point 32 of the present Opinion).

39. The argument raised by WR in relation to the example of a DHL driver (in point 15 of the present Opinion)[12] can be easily dismissed. A person making a delivery for DHL would not be liable, but DHL – the undertaking itself – would. As the Netherlands Government pointed out, WR is to be regarded as self-employed and thus as an entrepreneur who accepted to work without any written

9 See judgment of 18 May 2017, *Latvijas Dzelzceļš* (C-154/16, EU:C:2017:392, paragraph 85).

10 See judgment of 5 April 2001 (C-325/99, EU:C:2001:201, paragraph 41) and Opinion of Advocate General Ruiz-Jarabo Colomer in *van de Water* (C-325/99, EU:C:2000:614, point 27).

11 See, in this regard, also judgment of 18 May 2017, *Latvijas Dzelzceļš* (C-154/16, EU:C:2017:392, paragraph 88).

12 This argument was already made by practitioners in the past. See Snell, C., 'Whose duty is it anyway?', *No 5 Chambers Commercial & Chancery Bulletin*, Winter 2015/2016, pp. 8-9.

contract and to be paid in cash. Entrepreneurship involves entrepreneurial risk and that includes an entrepreneur being personally responsible for the persons with whom he or she does business and from whom he or she accepts commissions. Furthermore, an entrepreneur can protect himself or herself against such risks through insurance or by assigning those risks contractually to the clients.

3. The wording of the relevant provisions

40. The persons liable to pay the excise duty, depending on the situations referred to in Article 33(3) of the Directive comprise the person who is making the delivery or the one holding the goods intended for delivery or the person to whom the goods are delivered.

41. To my mind, the wording of that provision is clear and at the same time particularly broad.

42. As pointed out by the United Kingdom Government, there is nothing in the Directive (as there was nothing in its predecessor, Directive 92/12/EEC[13]) that prevents Member States from charging anyone who holds excise goods for commercial purposes outside of duty suspension arrangements for the payment of the tax debt due, nor is there any requirement that in order to 'hold' the goods, a person has to have any particular knowledge about their duty status.

43. The normal meaning of the words 'holding' and 'making the delivery' of goods used in the Directive is clear: they require only physical possession of the goods. In view of the absence of divergence in this respect between the various language versions of the text, it may be concluded that the expression 'person … holding the goods' covers anyone who is in physical possession of them unless that interpretation is contradicted by the purpose of the provision or by general principles of law.

44. Had the EU legislature intended to require actual or constructive knowledge, it would have made express provision to that effect.

45. It is true that there is no definition of the word 'holding' in EU excise duty legislation. However, as was pointed out by the Commission, a contextual interpretation shows that there is such a definition in the customs legislation, a system that displays many parallels with excise legislation. Under Article 5(34) of the Union Customs Code,[14] "holder of the goods" means the person who is the owner of the goods or who has a similar right of disposal over them *or who has physical control of them*' (emphasis added).

46. The broad formulation of Article 33 of the Directive ensures that liability attaches to *anyone* who holds the goods until the duty has been paid, as stated by the Court in *Gross*.[15] That case concerned the interpretation of Article 7 of Directive 92/12 (the predecessor of Article 33 of the Directive), and in particular whether successive holders of goods, which had been released for consumption, could be liable for excise duty. After all, this is also supported by the purpose of the Directive, namely to ensure that the tax debt will in fact be collected.

47. The correctness of the Court's approach in *Gross* has been defended also in legal literature.[16]

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

14 Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ 2013 L 269, p. 1).

15 Judgment of 3 July 2014 C-165/13, EU:C:2014:2042.

16 See inter alia Rehberg, E., and Ring, N., 'Steuerschuld als „zweiter" Besitzer im Verbrauchsteuerrecht?', *EU-Umsatz-Steuerberater*, 2014, (issue 3), p. 51, and Bogaerts, D., 'Gross. Liability to excise duty. Products released for consumption in one Member State and held for commercial purposes in another Member State. Court of Justice', *Highlights & Insights on European Taxation*, 2014, nº 10, pp. 52-53.

48. As the UK Upper Tribunal has already correctly ruled in *B&M Retail Ltd v HMRC*[17] – a case which did not directly involve Article 33 of the Directive but concerned rather the interpretation of, and liability under, Article 7 of the Directive, but is still relevant here – 'in our view *Gross* provides clear authority that once excise goods in respect of which duty has not been paid are circulating within the Member State of their destination then the authorities of that Member State have the ability to choose which of sequential holders of the goods to assess, provided that there has not been a prior assessment. This is consistent with the underlying policy of the 2008 Directive … that it is the duty of the Member State concerned to ensure that duty is paid on goods that are found to have been released for consumption. The decision in the case is therefore consistent with the principle that it should be possible to assess a person found to be holding goods in respect of which duty has not been paid, even though there may have been a prior release for consumption of those goods within the same Member State, so long as there has been no prior assessment of the outstanding duty'.

49. I would cite here approvingly also the judgment of 19 March 2019 (paragraph 66) where the referring court ruled that 'we agree that the underlying policy of the 2008 Directive is … that it is the obligation of every Member State to ensure that duty is paid … It would be a distortion of the internal market were Member States not to take steps to ensure that goods in respect of which excise duty should have been paid cannot circulate freely within the single market alongside goods on which duty has been paid. As the Upper Tribunal further observed in *Davison and Robinson*,[18] in the absence of any relevant information relating to any prior release for consumption, HMRC must assess the person who it finds to be holding the goods in question, if that is the only excise duty point which can be established. We note HMRC's submission that where, as [WR] here, a driver is unable to identify the consignor, or the importer, or his employer, the only person who can be assessed for the duty is the driver himself. If he cannot be assessed in circumstances where HMRC or a Tribunal concludes that he was unaware that the goods were liable to duty, the opportunities for smuggling and fraud are manifestly greater. Accordingly, strict liability appears to have been an accepted feature of the regime under successive Directives, as explained initially … in *Greenalls*[19]'.

50. Indeed, I cannot but agree with the analysis in *Greenalls*, where Lord Hoffmann said in his judgment (with which the majority of the House of Lords agreed) in paragraph 4 that 'the [1992] Directive was adopted as part of the creation of a single market without fiscal frontiers. The main purpose of the Directive was to have a single set of rules for determining the moment at which duty became payable, so as to avoid a situation in which duty could be levied on the same goods in different countries'. In that judgment, the House of Lords held that a warehouse company was strictly liable for duty on vodka manufactured which had been released for export from the company's tax warehouse but at some stage fraudulently diverted. Citing the judgment in *van de Water* (C-325/99, EU:C:2001:201), Lord Hoffmann noted (at paragraph 7) that the identity of the person or persons liable to pay duty after the goods were 'released for consumption' was a matter which was left to Member States to decide for themselves. Under the relevant regulation, the words 'released for consumption' were not qualified by any words such as 'lawfully'. Lord Hoffmann therefore concluded that the warehouse company was strictly liable.

51. Similarly, I believe that any holder of goods such as WR must be considered strictly liable.

52. I agree with the referring court when it also states in paragraphs 67 and 68 of its judgment of 19 March 2019 that 'this policy is, to our eyes, reflected in the terms of the Directive and the Regulations. We agree … that the natural meaning of the words "holding" or "making delivery" of goods does not impute any requirement that the person is aware of the tax status of the goods. Although fairness and proportionality are, of course, cornerstones of EU law, as they are of the common law, they do not invariably exclude the imposition of strict liability. We consider that there

17 [2016] UKUT 429 (TCC) [2016] STC 2456.

18 *Davison and Robinson Ltd v HMRC* [2018] UKUT 437 (TCC).

19 *Greenalls Management Ltd v Customs and Excise Commissioners* [2005] UKHL 34.

is very considerable force in the argument that, given the policy underlying the Directive, the imposition of strict liability on a driver in these circumstances does not offend the principles of fairness or proportionality … What is taxed are usually objective events or transactions without regard to the state of mind of the taxpayer'.

53. As the Netherlands Government pointed out, that literal interpretation of Article 33(3) of the Directive is confirmed by the scheme of that directive. The requirement of knowledge is only laid down by the Directive in the case of an irregularity during a movement of excise goods under a duty suspension arrangement within the meaning of Article 8(1)(a)(ii) thereof. That too is supported by the judgment in *Gross*.[20] It follows from that case-law that Article 33(3) should not be interpreted in a manner which would 'render more uncertain the collection of excise duty due upon the crossing of an EU border'.

54. Indeed, in practice, a guarantee will always be required in the case of such a movement (in most cases from the consignor of the excise goods). In such a case, the collection of excise duty is guaranteed. For those reasons, the EU legislature opted, in Article 8(1)(a)(ii) of the Directive, to limit the liability of other persons who participated in the irregular departure to those who were aware or should reasonably have been aware of the irregular nature of the departure.

55. In cases where the aforementioned guarantee is lacking because there was no requirement for such a guarantee – as in the present case – the inclusion of the knowledge requirement by the legislature was not considered desirable. Hence, the EU legislature did not include the knowledge requirement in Article 33(3) of the Directive.

56. So far as concerns the facts underlying the case in the main proceedings – based on the approach taken by the national tax authorities – the present case does not concern an irregular departure from duty suspension covered by Article 7(2) of the Directive but rather an irregular holding of goods for commercial purposes in a Member State other than that in which duty has been paid, giving rise, according to the national tax authorities, to liability for duty under Article 33 of that directive.

57. However, as the Commission pointed out, the situation is essentially the same: goods in respect of which there is liability to duty are being held outside duty suspension, so duty is immediately payable. Movements of taxed goods between Member States need not take place under duty suspension but are nevertheless made subject to a broadly analogous regime. Indeed, from the perspective of the Member State of destination there is no difference between, on the one hand, goods which have been removed irregularly from duty suspension in another Member State and brought there and, on the other, goods on which duty has been paid in another Member State and then brought there. In either case, there is an immediate liability to duty.

58. It follows from all the foregoing considerations that the meaning of the word 'holding' in Article 33(1) and (3) of the Directive includes simple physical possession.

4. Article 38 of Directive 2008/118

59. I agree with the Netherlands and Italian Governments as well as with the Commission that argue, essentially, that the above is not the end of the matter in a case such as the one in the main proceedings. This is not a case where the movement of goods and the payment of duty took place in the normal way. It is a case in which there was an irregularity and, therefore, Article 38 of the Directive is also potentially relevant for the purpose of providing a useful answer to the questions

20 Judgment of 3 July 2014 (C-165/13, EU:C:2014:2042, paragraphs 24 to 27).

referred. Under Article 38, excise duty is due inter alia from 'any person who participated in the irregularity'. A person who transports goods and is in possession of them at the time when the irregularity takes place may be considered as 'participating' in the irregularity, even if only in a passive and inadvertent manner.

60. In any case, I believe that the potential relevance of Article 38 of the Directive to the present case does not alter my analysis above with regard to Article 33 thereof: a person in WR's situation is liable for payment of the excise duty.

61. Article 38(3) of the Directive identifies the persons liable to pay excise duty in the event of an irregularity. In addition to the person who guaranteed payment, it includes 'any person who participated in the irregularity'.

62. I agree with the Commission and the Netherlands Government that, in essence, a person who transports the goods participated in the irregularity. In any case, Article 38(3), like Article 33(3), of the Directive, does not require the debtor to be aware that the goods in question are still subject to excise duty.

63. That position is in accordance with the broad interpretation given by the Court in the judgment of 17 October 2019, *Comida paralela 12*[21] to the wording 'any person who participated in the irregularity' in Article 38(3) of Directive 2008/118.

64. I further agree with the Italian Government that in the present case, there can be no doubt that the words 'any person who participated in the irregularity' can apply to the lorry driver WR. He was a professional in a position to take all the precautionary measures necessary to avoid unwanted involvement in illegal smuggling. Indeed, strict liability is important not only to ensure that excise duty is paid by *someone*, but also as a deterrence against smuggling.

65. That interpretation is confirmed by Article 8(1)(a) and (b) of that directive and, furthermore, is entirely consistent with the general scheme established by the Directive, which is designed to ensure that there are no liability blindspots on the part of individuals who participate in the movement of excise goods.

66. As the Commission pointed out, the existence of a potential right of contribution is not, in the logic of the Directive, a necessary element of joint and several liability, though such a right may exist in the applicable national law. It is also open to the persons potentially liable for the payment of duty to make private law arrangements between themselves for contribution or indemnity. Nor is there any other provision or principle of Union law that requires the existence of such a right. As the Court observed in the order of 22 November 2001, *Michel* (C-80/01, EU:C:2001:632), the question as to whether the person liable to excise duty should have a right to reimbursement of the duty is left to the Member States.

67. Indeed, it follows from the Court's case-law that the interpretation of the Directive expounded in the present Opinion is without prejudice to the possibility, where provided for by national law, of a person such as WR who became liable for the excise duty in circumstances such as those in the main proceedings, to bring an action for a contribution or indemnity against another person liable for that excise duty.[22]

21 C-579/18, EU:C:2019:875, paragraphs 34 and 35.

22 See, to that effect, judgment of 17 October 2019, *Comida paralela 12* (C-579/18, EU:C:2019:875, paragraph 44).

IV. Conclusion

68. For those reasons, I propose that the Court should answer the questions referred for a preliminary ruling by the Court of Appeal (United Kingdom) as follows:

– The word 'holding' in Article 33(1) and (3) of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC, is to be interpreted as including simple physical possession such as the situation of WR in the case in the main proceedings.

– The same conclusion applies *mutatis mutandis* in relation to Article 38 of that directive, under which excise duty is due inter alia from 'any person who participated in the irregularity'. A person such as WR who transports goods and is in possession of them at the time when the irregularity takes place may be considered to 'participate' in the irregularity, even if only in a passive and inadvertent manner.