OPINION OF ADVOCATE GENERAL TRSTENJAK delivered on 27 February 2007 [1]

I — Introduction

1. In the reference for a preliminary ruling, the Hovrätten för Övre Norrland (Court of Appeal of Övre Norland) (Sweden) asks the Court four questions concerning the interpretation of Articles 7(4) and 9(3) of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, [2] as amended by Council Directive 92/108/EEC of 14 December 1992 [3] ('the Directive').

2. Mr Granberg has been prosecuted for bringing into Sweden, in three containers installed in the rear of a van, 3 000 litres of heating oil from Finland intended for personal use without complying with the requirements laid down by Swedish law, aimed at ensuring the payment of excise duty in Sweden.

II — Applicable Community law

3. The fifth to seventh recitals in the preamble to the Directive state:

'... any delivery, holding with a view to delivery or supply for the purposes of a trader carrying out an economic activity independently or for the purposes of a body governed by public law, taking place in a Member State other than that in which the product is released for consumption gives rise to chargeability of the excise duty in that other Member State;

... in the case of products subject to excise duty acquired by private individuals for their own use and transported by them, the duty must be charged in the country where they were acquired;

1 — Original language: French.
2 — OJ 1992 L 76, p. 1.
3 — OJ 1992 L 390, p. 124.

... to establish that products subject to excise duty are not held for private but for commercial purposes, Member States must take account of a number of criteria'.

4. Article 7 of the Directive provides:

'1. In the event of products subject to excise duty and already released for consumption in one Member State being held for commercial purposes in another Member State, the excise duty shall be levied in the Member State in which those products are held.

...

4. The products referred to in paragraph 1 shall move between the territories of the various Member States under cover of an accompanying document listing the main data from the document referred to in Article 18(1). The form and content of this document shall be established in accordance with the procedure laid down in Article 24 of this Directive.

...'

5. Article 8 of the Directive provides:

'As regards products acquired by private individuals for their own use and transported by them, the principle governing the internal market lays down that excise duty shall be charged in the Member State in which they are acquired.'

6. Article 9(3) of the Directive states:

'Member States may also provide that excise duty shall become chargeable in the Member State of consumption on the acquisition of mineral oils already released for consumption in another Member State if such products are transported using atypical modes of transport by private individuals or on their behalf. Atypical transport shall mean the transport of fuels other than in the tanks of vehicles or in appropriate reserve fuel canisters and the transport of liquid heating products other than by means of tankers used on behalf of professional traders.'

III — Relevant provisions of Swedish law

7. Section 1 of Chapter 4 of the Law on the taxation of energy ('the LSE') provides:

'Energy duty shall be payable by ...

5. anyone ... who imports or receives fuel in Sweden, from another Member State of the European Community.'

8. Section 1a of Chapter 4 of the LSE provides for a derogation from section 1(5) of Chapter 4:

'Duty shall not be due pursuant to section 1(5) ...

for fuel imported into Sweden for private use in the fuel tank of a vehicle, a vessel or an aircraft, or in reserve canisters with a maximum capacity of 10 litres'.

9. Section 6 of Chapter 1 of the Law on monitoring, in connection with excise duty, the transport, amongst other activities, of alcohol, tobacco and mineral oil products ('the LPK') specifies:

'Products subject to excise duty may be transported only if the requirements relating to the accompanying document, the guarantee [for payment of the tax], the guarantee certificate and the declaration which flow from the Laws referred to in section 2 or the provisions referred to in section 5a are fulfilled.'

10. Under section 1 of Chapter 5 of the LPK, anyone who intentionally imports products subject to excise duty in Sweden from a State belonging to the area covered by Community excise legislation in breach of section 6 of Chapter 1 of this Law, and who is thereby likely to seriously impede the exercise of fiscal controls relating to the movement of goods, is to be held guilty of the offence of unlawful movement of goods subject to excise duty and sentenced to a maximum of two years' imprisonment. If the offence is considered a minor one, the offender is punished by a fine.

IV — The main proceedings and the questions referred for a preliminary ruling

11. Mr Granberg was prosecuted by the Swedish authorities for bringing 3 000 litres of heating oil from Finland into Sweden on 7 December 2003, without declaring the movement to the tax authorities in advance, without lodging a guarantee for payment of the duty payable and without carrying an accompanying document or a certificate of lodging of the guarantee.

12. The product was transported in the rear of a van, in three containers of 1 000 litres each. That product was to heat Mr Granberg's house and garage and was therefore intended for his personal use.

13. Mr Granberg accepted the facts, but denied that he had committed an offence.

14. By judgment of 4 May 2004, the Haparanda tingorätt (District Court of Haparanda) found Mr Granberg guilty of illegally transporting products subject to excise duty. Mr Granberg appealed against that judgment to the Hovrätten för Övre Norrland.

15. According to that court, the applicable national laws are the LPK and the LSE. Any infringement of the LPK may give rise to criminal proceedings. The LPK refers to the Directive.

16. The Hovrätten för Övre Norrland has therefore decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does Article 9(3) of [the Directive] allow Member States generally to exempt heating oil from the application of Article 8 of the Directive, so that a Member State may provide that a private individual who purchases heating oil himself for his own use in another Member State where it was released for consumption and transports it himself to the Member State of destination must pay excise duty there, regardless of the mode of transport used to transport the heating oil?

(2) If the answer to Question 1 is in the affirmative, is Article 9(3) of the Directive compatible with the fundamental principles in the Treaty on free movement of goods and the principle of proportionality, in the light of the fact that the purpose of Article 9(3) of the Directive appears to be to deter private

individuals from transporting mineral oils by providing for a derogation from the principle that, where goods are purchased by private individuals for their own use and transported by them, excise duty is to be charged in the Member State in which they are acquired, and is such a purpose compatible with the legal basis on which the Council relied for the Directive, or is Article 9(3) invalid?

(3) If the answer to Question 1 is in the negative, does the transport by a private individual of 3 000 litres of heating oil in three "intermediate bulk containers", which can, as such, be approved for the commercial transport of dangerous goods including liquids, loaded on board a van constitute an atypical mode of transport within the meaning of Article 9(3) of the Directive?

(4) Is it compatible with Article 7(4) of the Directive for a Member State's legislation to provide that a private individual, who purchases heating oil himself, for his own use, in another Member State where it was released for consumption and moves it himself to the Member State of destination by an atypical mode of transport within the meaning of Article 9(3) of the Directive, must lodge a guarantee for payment of excise duty and carry a simplified accompanying document and a certificate of the lodging of a guarantee for excise duty when the goods are moved?'

17. The referring court points out in addition that there are six other similar cases pending before it.

V — Observations submitted to the Court

18. The Swedish, Greek, Italian and Polish Governments, the Council of the European Union and the Commission of the European Communities submitted written observations. Mr Granberg made his position known at the hearing.

A — *The first question*

19. The referring court asks whether Article 9(3) of the Directive permits the exclusion from the scope of Article 8 of the Directive of all transport by a private individual of

heating oil acquired for his own use from one Member State to another, thereby making it subject to payment of excise duty in the Member State of consumption.

20. According to the Polish Government, the Council and the Commission, Article 9(3) of the Directive does not allow that generally.

21. The Commission explains that it is only when the mode of transport is atypical that excise duty can be levied in the Member State of destination. Conversely, if the mode of transport can be considered normal, the excise duty cannot be levied in the Member State of destination. 'Atypical modes of transport' within the meaning of Article 9(3) of the Directive must be understood to be all modes of transport other than those which are specified. Thus, the second sentence of the provision specifies that the derogation for which it provides does not apply when fuel is transported in fuel tanks of vehicles or when it is transported in appropriate reserve fuel canisters. The third situation specified, relating to the case at issue, concerns the 'transport of liquid heating products other than by means of tankers used on behalf of professional traders'.

22. The Council adds that, as Article 9(3) of the Directive constitutes an exception to the general rule laid down in Article 8 of the Directive, it must be interpreted restrictively. If the Community legislature's intention had been to permit the exclusion of all transport of mineral oils by private individuals from the scope of Article 8 of the Directive, it would have clearly expressed this. In such a case, the wording of Article 9(3) of the Directive would not include the second sentence and would read as follows:

'Member States may also provide that excise duty shall become chargeable in the Member State of consumption on the acquisition of mineral oils already released for consumption in another Member State if such products are transported by private individuals.'

23. In contrast, the Swedish, Greek and Italian Governments consider that the Member States may exclude any transport by private individuals of mineral oils from the scope of Article 8 of the Directive and therefore make these products subject to payment of excise duty in the Member State of destination.

24. According to the Swedish Government, there is no possibility under Article 9(3) of the Directive for a private individual to transport mineral oils by a typical mode of transport, since a private individual cannot

transport such a product in tankers used on behalf of professional traders, which means that those Member States which wish to do so have the possibility of removing the product from the scope of Article 8 of the Directive.

25. Those three governments state in addition that that possibility of exclusion arises from the special nature of mineral oils which, for reasons of safety and environmental protection, should not normally be transported by private individuals.

27. As to the first part of the second question, the Commission considers inter alia that Article 9(3) of the Directive complies with the principle of free movement of goods and cites, in that respect, paragraph 32 of the judgment in *De Danske Bilimportører*, according to which 'the scope of Article 28 EC does not extend to the obstacles to trade covered by other specific provisions of the Treaty, and obstacles of a fiscal nature or having an effect equivalent to customs duties, which are covered by Articles 23 EC, 25 EC and 90 EC, do not fall within the prohibition laid down in Article 28 EC'. [4] The Commission also states that Article 9(3) of the Directive does not call into question the free movement of goods since, as set out in response to the first question, it permits private individuals to transport, for their own use, heating oil free of excise duty by means of a 'not atypical mode of transport'.

B — *The second question*

26. If the answer to the first question is in the affirmative, the referring court asks, first, whether Article 9(3) of the Directive is compatible with the principles of free movement of goods and proportionality and, secondly, whether the objective of preventing private individuals from transporting mineral oils by levying excise duty in the Member State of consumption, as a derogation from the general rule of Article 8, is compatible with the legal basis for the Directive.

28. As to the second part of the question, the Hovrätten för Övre Norrland, in its reference for a preliminary ruling, states that the Directive refers in particular to Article 93 EC, [5] which does not appear to permit the

4 — Case C-383/01 [2003] ECR I-6065.

5 — 'The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market within the time-limit laid down in Article 14.'

adoption of measures aimed at increasing transport safety, whereas, according to a Commission report, Article 9(3) of the Directive is aimed at avoiding the risks linked to the private transport of mineral oils. [6] The referring court thus raises the question of the validity of that provision.

29. According to the Greek and Italian Governments and to the Council, Article 9(3) of the Directive is valid. Even if Article 9(3) of the Directive takes account of requirements linked to transport safety, this is only a complimentary objective in relation to the main, fiscal, purpose of the Directive. According to case-law, the act must be founded on a legal basis related to its main purpose.

30. The Swedish and Greek Governments explain in addition that tax harmonisation carried out by directives on excise duties is only partial. They are limited essentially to classifying products according to objective considerations, defining the conditions under which excise duty is payable, organising a system for the movement of products subject to excise duty, determining the taxable base for excise duties and setting the minimum rates.

6 — The referring court mentions the Report of the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Articles 7 to 10 of Directive 92/12/EEC (COM(2004) 227 final).

C — *The third question*

31. If the answer to the first question is in the negative, the referring court asks whether the transport by a private individual of 3 000 litres of heating oil in three containers loaded on board a van constitutes an atypical mode of transport within the meaning of Article 9(3) of the Directive.

32. The Polish Government, the Council and the Commission consider that such transport is atypical. The Swedish and Greek Governments do not consider it necessary, in view of the replies which they have given to the previous questions, to answer that question. Mr Granberg has not stated his position.

D — *The fourth question*

33. By that question, the referring court asks whether Article 7(4) of the Directive permits a Member State to require a private individual, transporting heating oil for his own use from one Member State to another using an atypical mode of transport, to lodge a guarantee for payment of excise duty and, at the time of that transport, to carry a simplified accompanying document.

34. The Commission states that Article 7(1) of the Directive, which defines the products concerned by Article 7(4), covers only products 'held for commercial purposes'. Consequently, Article 7(4) does not concern products acquired for one's own use.

35. In addition, the Commission refers in particular to paragraph 23 of the judgment in *EMU Tabac and Others*,[7] according to which '[it] is apparent from the third, fifth, sixth and eleventh recitals in its preamble [that] the Directive draws a distinction between, on the one hand, goods held for commercial purposes, in respect of which accompanying documents are required for transportation purposes, and, on the other hand, products held for personal use'.

36. The Commission adds that, while a Member State which has the right to levy excise duty in accordance with Article 9(3) of the Directive also has the right to have recourse to control measures to check that the excise duty has actually been paid, that right cannot result from Article 7(4) of the Directive.

37. On the other hand, according to the Swedish and Polish Governments, it follows from Article 9(3) that any atypical transport is carried out for commercial purposes. Those governments consider that private individuals should not transport heating oil and that, consequently, any transport of heating oil, even if carried out by a private individual for his own use, must be considered to be of a commercial nature and, therefore, subject to the requirements of Article 7(4) of the Directive.

VI — Preliminary observations

38. The difficulties associated with the harmonisation of excise duties on mineral oils have been great, owing to the very importance of the products at issue for the economies of the Member States and to the fact that those products (petrol, diesel oil, domestic oil, aviation fuel) have close and important links with other sectoral policies.

39. Together with Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils,[8] the Directive at issue in the present proceedings lays down appropriate rules for organising the tax system for trade in products subject to excise duty in an area without internal borders.

7 — Case C-296/95 [1998] ECR I-1605.

8 — OJ 1992 L 316, p. 12.

40. Article 8 of the Directive lays down the general principle according to which excise duty on products acquired by private individuals for their own use and transported by them is charged in the Member State of acquisition.

41. Article 9(3) of the Directive leaves Member States the possibility, under certain conditions, of derogating from that principle, by providing for excise duty to be charged in the Member State of consumption.

42. However, that provision might be deleted at the Commission's initiative. [9]

43. Nevertheless, on the basis of existing written law, Article 9(3) of the Directive must be applied literally, even if that application leads to a restriction of the free movement of goods [10] which did not exist before the Directive and which would no longer exist after the deletion of that provision.

VII — Assessment

A — *The first question*

44. Answering the first question requires a careful reading of each of the terms used in Article 9(3) of the Directive, to be read in connection with Article 8 which provides that, as regards products acquired by private individuals for their own use and transported by them, 'excise duty shall be charged in the Member State in which they are acquired'.

45. Article 9(3) of the Directive provides for an exception to Article 8, namely that 'Member States may also provide that excise duty shall become chargeable in the Member State of consumption on the acquisition of

9 — Proposal for a Council Directive amending Directive 92/12 (COM(2004) 227 final), which states: 'Article 9(3) is deleted. The Commission is not convinced of the need to retain a tax provision allowing Member States to derogate from the general principle of free movement applicable to movements carried out by private individuals. Although there may be a safety problem associated with the transport of mineral oils, a provision derogating from that general principle would not provide a satisfactory legal solution to the problem. Any stricter national or Community rules that may be applied to the transport of mineral oil must be kept completely separate from the principle of the taxation to be applied to such movement. If there is a failure to comply with certain safety standards, an offence should be recorded, but should have no impact on excise duties.'

10 — In particular because a private individual who pays the excise duty in the Member State of acquisition under Article 8 of the Directive and who is required to pay excise duty in the Member State of consumption as he falls within Article 9(3) of the Directive cannot benefit from the system of reimbursement in the case of double taxation provided for by Article 22 of the Directive, since, under that article, this possibility is available — subject to very strict requirements — only 'at the request of a trader in the course of his business'.

mineral oils already released for consumption in another Member State if such products are transported using atypical modes of transport by private individuals or on their behalf'. [11]

46. Article 9(3) of the Directive gives a definition of the term 'atypical mode of transport': 'Atypical transport shall mean the transport of fuels other than in the tanks of vehicles or in appropriate reserve fuel canisters and the transport of liquid heating products other than by means of tankers used on behalf of professional traders.'

47. Thus, Article 9(3) of the Directive gives a definition *a contrario* of typical transport. Typical transport is, first, the transport of fuels in the tanks of vehicles or in appropriate reserve fuel canisters and, secondly, the transport of liquid heating products by means of tankers used on behalf of professional traders.

48. Any transport which is not included in one of those typical transport categories is atypical transport.

49. Since the legislature has laid down atypical transport [12] as a condition for allowing the Member States the possibility of derogating from the general principle determining the place where excise duty is charged, it is clear that the legislature intended that that possibility should only be open for atypical transport alone. That is bolstered still further by the fact that the legislature has defined what the concept of atypical transport covers.

50. The Swedish Government asserts that no possibility exists for a private individual to transport heating oil by a typical mode of transport, as a private individual cannot transport heating oil in tankers used on behalf of professional traders, and considers, as a consequence, that the Member States can exclude all transport by private individuals of mineral oils from the scope of Article 8 of the Directive.

51. That argument should not be accepted, since Article 9(3) of the Directive, as a derogation from the general rule in Article 8, must be interpreted restrictively. [13]

11 — That exception appears to be clear. The maxim *interpretatio cessat in claris* (interpretation stops when the text is clear) applies.

12 — Article 9(3) of the Directive: 'if such products are transported using atypical modes of transport'.

13 — See, inter alia, Case C-399/93 *Oude Luttikhuis and Others* [1995] ECR I-4515, paragraph 23; Case C-83/99 *Commission* v *Spain* [2001] ECR I-445, paragraph 19; and Case C-5/01 *Belgium* v *Commission* [2002] ECR I-11991, paragraph 56.

52. Thus, even if no possibility were to exist for private individuals to transport heating oil in a typical way, [14] the first question should be answered in the negative, in other words, to the effect that, in the case of transport by a private individual of heating oil acquired for his own use, the Member States cannot generally exempt heating oil from the application of Article 8 of the Directive, as they can do that only in the case of atypical transport.

B — *The second question*

53. As the first question calls for an answer in the negative, the need to answer the second question should not arise.

C — *The third question*

54. It follows from the wording of Article 9(3) of the Directive that any transport of liquid heating products which is not carried out 'by means of tankers used on behalf of professional traders' must be considered an atypical mode of transport.

55. Consequently, the transport by a private individual of 3 000 litres of heating oil in three containers loaded on board a van must constitute an atypical mode of transport within the meaning of Article 9(3) of the Directive.

D — *The fourth question*

56. As the Commission states, Article 7(1) of the Directive defines the products affected by Article 7(4). They are only products 'held for commercial purposes'.

57. The Court has already held that, as is apparent in particular from the fifth and sixth recitals in its preamble, the Directive draws a distinction between, on the one hand, products held for commercial purposes, in respect of which accompanying documents are required for transportation purposes, and, on the other hand, products held for private purposes, in respect of which no document is required. [15]

14 — Moreover, it may be added, for example, that the hiring by a private individual of a tanker with a driver to transport heating oil acquired for his own use appears to come within the definition of typical transport.

15 — Case C-5/05 *Joustra* [2006] ECR I-11075, paragraph 28.

58. Consequently, Article 7(4) of the Directive does not appear to concern products acquired for private use and should not be capable of serving as a legal basis for a Member State to require the lodging of a guarantee for payment of excise duty and the carrying, at the time of transport, of proof that it has been lodged, in the case of transport of such products.

VIII — Conclusion

59. In the light of the foregoing, it is proposed that the Court reply in the following way to the questions asked by the Hovrätten för Övre Norrland:

(1) Article 9(3) of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, as amended by Council Directive 92/108/EEC of 14 December 1992, does not allow Member States generally to exempt heating oil from the application of Article 8 of the Directive and thus enable a Member State to provide that a private individual who purchases heating oil himself for his own use in another Member State where it was released for consumption and transports it himself to the Member State of destination must pay excise duty there, regardless of the mode of transport used to transport the heating oil.

(2) Having regard to the negative answer to the first question, it is not necessary to answer the second question.

(3) The transport by a private individual of 3 000 litres of heating oil in three containers loaded on board a van constitutes an atypical mode of transport within the meaning of Article 9(3) of the Directive.

(4) Article 7(4) of the Directive does not apply in the case of transport by a private individual of heating oil which he acquires himself for his own use in a Member State where it was released for consumption and which he moves himself to the Member State of destination by an atypical mode of transport within the meaning of Article 9(3) of the Directive.