Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

18 July 2013*

(Excise duty — Directive 92/12/EEC — Articles 7 to 9 — Directive 2008/118/EC — Articles 32 to 34 — Intra-Community movement of products subject to excise — Regulation (EEC) No 3649/92 — Articles 1 and 4 — Simplified accompanying document — Copy 1 — 'Cash & carry' business — Products released for consumption in a Member State and held for commercial purposes in another Member State or products acquired by private individuals for their own use and transported by them — Spirits — No obligation on the supplier to check)

In Case C-315/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Højesteret (Denmark), made by decision of 26 June 2012, received at the Court on 29 June 2012, in the proceedings

Metro Cash & Carry Danmark ApS

v

Skatteministeriet,

THE COURT (Eighth Chamber),

composed of E. Jarašiūnas, President of the Chamber, C. Toader (Rapporteur) and C. G. Fernlund, Judges,

Advocate General: E. Sharpston,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 10 April 2013,

after considering the observations submitted on behalf of:

— Metro Cash & Carry Danmark ApS, by E. Lego Andersen and H. Peytz, advokater,

— the Danish Government, by V. Pasternak Jørgensen, acting as Agent, assisted by D. Auken, advokat,

— the Greek Government, by I. Pouli and G. Papagianni, acting as Agents,

— the Portuguese Government, by L. Inez Fernandes and A. Cunha, acting as Agents,

— the European Commission, by W. Mölls and C. Barslev, acting as Agents,

* Language of the case: Danish.

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 7 to 9 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 (OJ 1992 L 76, p. 1), as amended by Council Directive 92/108/EEC of 14 December 1992 (OJ 1992 L 390, p. 124) ('Directive 92/12'), of Articles 32 to 34 of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12 (OJ 2008 L 9, p. 12), and of the provisions of Commission Regulation (EEC) No 3649/92 of 17 December 1992 on a simplified accompanying document for the intra-Community movement of products subject to excise duty which have been released for consumption in the Member State of dispatch (OJ 1992 L 369, p. 17).

2 The request has been made in proceedings between Metro Cash & Carry Danmark ApS ('Metro') and the Skatteministeriet (Ministry of Taxation) concerning the latter's decision to impose an obligation on Metro to ensure that it received copy 1 of the simplified accompanying document provided for in Regulation No 3649/92 in the course of the sale of products subject to excise duty, in this case spirits, to customers who are registered for value added tax ('VAT') in Sweden.

Legal context

European Union law

Directive 92/12

3 Directive 92/12 establishes general arrangements for products subject to excise duty, in particular provisions on the holding, movement and monitoring of such products.

4 The fourth to eighth recitals in the preamble to Directive 92/12 read as follows:

'Whereas, in order to ensure the establishment and functioning of the internal market, chargeability of excise duties should be identical in all the Member States;

Whereas 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;

Whereas 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;

Whereas 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;

Whereas products subject to excise duty purchased by persons who are not approved warehousekeepers or registered or non-registered traders and dispatched or transported directly or indirectly by the vendor or on his behalf must be subject to excise duty in the Member State of destination.'

5 Article 6(1) of that directive lays down the principle that excise duty is to become chargeable at the time of release for consumption or when shortages are recorded which must be subject to excise duty and it defines release for consumption as being any departure, including irregular departure, from a suspension arrangement.

6 Article 7 of that 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.

2. To that end, without prejudice to Article 6, where products already released for consumption as defined in Article 6 in one Member State are delivered, or intended for delivery in another Member State or used in another Member State for the purposes of a trader carrying out an economic activity independently or for the purposes of a body governed by public law, excise duty shall become chargeable in that other Member State.

3. Depending on all the circumstances, the duty shall be due from the person making the delivery or holding the products intended for delivery or from the person receiving the products for use in a Member State other than the one where the products have already been released for consumption, or from the relevant trader or body governed by public law.

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. The person, trader or body referred to in paragraph 3 must comply with the following requirements:

(a) before the goods are dispatched, make a declaration to the tax authorities of the Member State of destination and guarantee the payment of the excise duty;

(b) pay the excise duty of the Member State of destination in accordance with the procedure laid down by that Member State;

(c) consent to any check enabling the administration of the Member State of destination to satisfy itself that the goods have actually been received and that the excise duty to which they are liable has been paid.

6. The excise duty paid in the first Member State referred to in paragraph 1 shall be reimbursed in accordance with Article 22(3).

…’

7 Under Article 8 of Directive 92/12, 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 is to be charged in the Member State in which they are acquired.

8 Article 9 of that directive provides:

‘1. Without prejudice to Articles 6, 7 and 8, excise duty shall become chargeable where products for consumption in a Member State are held for commercial purpose in another Member State.

In this case, the duty shall be due in the Member State in whose territory the products are and shall become chargeable to the holder of the products.

2. To establish that the products referred to in Article 8 are intended for commercial purposes, Member States must take account, inter alia, of the following:

— the commercial status of the holder of the products and his reasons for holding them,

— the place where the products are located or, if appropriate, the mode of transport used,

— any document relating to the products,

— the nature of the products,

— the quantity of the products.

For the purposes of applying the content of the fifth indent of the first subparagraph, Member States may lay down guide levels, solely as a form of evidence. These guide levels may not be lower than:

…

(b) *Alcoholic beverages*

spirit drinks 10 l[itres]

…'

Regulation No 3649/92

9 Articles 1 and 4 of Regulation No 3649/92, which sets out the rules concerning the simplified accompanying document, read as follows:

'*Article 1*

If products subject to excise duty and already released for consumption in one Member State are intended to be used in another Member State for the purposes referred to in Article 7 of Directive 92/12/EEC, the person who is responsible for the intra-Community movement must draw up a simplified accompanying document. During the movement of those products from one Member State to another Member State the document must accompany the consignment during the movement and must be made available to the competent authorities of the Member States for control purposes.

…

Article 4

The simplified accompanying document shall be drawn up in three copies.

Copy 1 shall be kept by the supplier for fiscal control.

Copy 2 must accompany the goods during the movement and shall be kept by the recipient.

Copy 3 must accompany the goods and shall be returned to the supplier with a certificate of receipt which also indicates the further fiscal treatment of the goods in the Member State of destination given by the recipient if the supplier requires it in particular for reimbursement purposes. This copy shall be attached to any eventual application for reimbursement provided for in Article 22(3) of Directive 92/12/EEC.'

Directive 2008/118

10 Articles 32 to 34 of Directive 2008/118, which replace Articles 7 to 9 of Directive 92/12, provide:

'*Article 32*

1. Excise duty on excise goods acquired by a private individual for his own use, and transported from one Member State to another by him, shall be charged only in the Member State in which the excise goods are acquired.

2. To determine whether the excise goods referred to in paragraph 1 are intended for the own use of a private individual, Member States shall take account at least of the following:

(a) the commercial status of the holder of the excise goods and his reasons for holding them;

(b) the place where the excise goods are located or, if appropriate, the mode of transport used;

(c) any document relating to the excise goods;

(d) the nature of the excise goods;

(e) the quantity of the excise goods.

3. For the purposes of applying paragraph 2(e), Member States may lay down guide levels, solely as a form of evidence. These guide levels may not be lower than:

…

(b) for alcoholic beverages:

spirit drinks: 10 l,

…

Article 33

1. Without prejudice to Article 36(1), where excise goods which have already been released for consumption in one Member State are held for commercial purposes in another Member State in order to be delivered or used there, they shall be subject to excise duty and excise duty shall become chargeable in that other Member State.

For the purposes of this Article, "holding for commercial purposes" shall mean the holding of excise goods by a person other than a private individual or by a private individual for reasons other than his own use and transported by him, in accordance with Article 32.

2. The chargeability conditions and rate of excise duty to be applied shall be those in force on the date on which duty becomes chargeable in that other Member State.

3. The person liable to pay the excise duty which has become chargeable shall be, depending on the cases referred to in paragraph 1, the person making the delivery or holding the goods intended for delivery, or to whom the goods are delivered in the other Member State.

4. Without prejudice to Article 38, where excise goods which have already been released for consumption in one Member State move within the Community for commercial purposes, they shall not be regarded as held for those purposes until they reach the Member State of destination, provided that they are moving under cover of the formalities set out in Article 34.

5. Excise goods which are held on board a boat or aircraft making sea-crossings or flights between two Member States but which are not available for sale when the boat or aircraft is in the territory of one of the Member States shall not be regarded as held for commercial purposes in that Member State.

6. The excise duty shall, upon request, be reimbursed or remitted in the Member State where the release for consumption took place where the competent authorities of the other Member State find that excise duty has become chargeable and has been collected in that Member State.

Article 34

1. In the situations referred to in Article 33(1), excise goods 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 21(1).

The Commission shall, in accordance with the procedure referred to in Article 43(2), adopt measures establishing the form and content of the accompanying document.

2. The persons referred to in Article 33(3) shall comply with the following requirements:

(a) before the goods are dispatched, submit a declaration to the competent authorities of the Member State of destination and guarantee payment of the excise duty;

(b) pay the excise duty of the Member State of destination in accordance with the procedure laid down by that Member State;

(c) consent to any checks enabling the competent authorities of the Member State of destination to satisfy themselves that the excise goods have actually been received and that the excise duty chargeable on them has been paid.

The Member State of destination may, in situations and under conditions which it lays down, simplify or grant a derogation from the requirements specified in point (a). In such cases, it shall notify the Commission, which shall inform the other Member States.'

Danish law

11 The relevant provisions of Directive 92/12 and of Directive 2008/118 were transposed by Consolidating Law No 1239 governing duty on beer, wine and fruit wine etc. (Law governing duty on spirits) [lovbekendtgørelse nr. 1239 om afgift af øl, vin og frugtvin m.m (spiritusafgiftsloven)] of 22 October 2007, and by Law No 1385 amending, inter alia, the Las governing duty on spirits (lov nr. 1385 om ændring af bl.a. spiritusafgiftsloven) of 21 December 2009.

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

12 It is apparent from the order for reference that Danish excise duties on spirits are significantly lower than the corresponding Swedish duties. The Danish excise duties, as on 1 January 2012, were 150 Danish kroner (DKK) per litre, whereas the Swedish duties, as on the same date, were equivalent to approximately DKK 424.14 per litre. This means that there is a financial incentive to purchase spirits on which Danish excise duty has been paid and to import them into Sweden. Spirits are not subject to Swedish excise duties if they are acquired by private individuals in Denmark for their own use and are transported by them. If they are acquired for commercial use, by contrast, Swedish excise duties apply.

13 Metro conducts a business in Denmark selling a broad range of goods, including spirits, to Danish customers or customers from other Member States. The business model used, 'cash and carry', consists of customers taking the goods down from shelves in the store themselves and placing them in shopping trolleys, which they then take to the check-out counter where they pay for the goods in cash ('cash'). After payment, customers can take the products away and make their own arrangements for further transport ('carry').

14 Purchases can be made at Metro only on presentation, at the checkout-counter, of a machine-readable card ('the Metro card') which is issued on request to Danish undertakings registered in the Det Centrale Virksomhedsregister (Central Business Register). In the case of Swedish customers, Metro issues that card only to undertakings which are registered for VAT in Sweden. A customer who is issued several Metro cards may make those cards available to other individuals who can use those cards for their own purchases. This applies to both Danish and Swedish customers. Metro has over 250 000 registered customers and has issued over 700 000 Metro cards.

15 The person making the purchase is not subject to any requirement to provide proof of identity or of his capacity as a trader or as a representative of the undertaking to which the Metro card was issued. Metro does not carry out checks at the check-out counter to verify whether the goods are being purchased for commercial use or whether goods are solely or additionally purchased for private use.

16 The sale of spirits is always subject to Danish VAT and Danish excise duties regardless of the customer's nationality.

17 It appears from a request for assistance made on 12 February 2007, justified on the basis of the risk of fraud in the catering sector, that the Skatteverket (Swedish Tax Agency) had sought information from the Danish customs and tax administration concerning purchases made by Swedish customers at Metro 2003 and 2004. The information received had been used in inspections carried out in a number of Swedish restaurants following which, in all cases, the operators of the restaurants received notices of assessment and had their licence withdrawn.

18 The Skatteministeriet subsequently adopted a decision under which Metro was required to receive copy 1 of the simplified accompanying document during the sale of spirits to Swedish customers.

19 The action brought by Metro against that decision was dismissed by the Østre Landsret (Eastern Regional Court, Denmark) by judgment of 19 March 2010.

20 On 11 May 2010, Metro appealed against that judgment to the Højesteret.

21 In those circumstances the Højesteret decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Are Directive 92/12 and Regulation No 3649/92 to be interpreted as meaning that a trader in a Member State who, in circumstances such as those arising in the main proceedings, sells goods subject to excise duty which have been released for consumption in that Member State and which are supplied at the vendor's place of business to a purchaser who is resident in another Member State, without the vendor assisting in the provision or arrangement of transport, must carry out (i) a check to determine whether the purchase of the goods which are subject to duty is made with a view to their importation into that second Member State and (ii) a check to determine whether the goods are to be imported for private or commercial use?

(2) If Question 1 is answered in the affirmative, must the trader, at the time of the sale of goods subject to excise duty in circumstances such as those arising in the main proceedings, when carrying out the checks referred to, apply rules of presumption as to the purchaser's intention with regard to the goods purchased?

(3) If Question 1 is answered in the affirmative, are Directive 92/12 and Regulation No 3649/92 to be interpreted as meaning that a vendor, as referred to in Question 1, in circumstances such as those arising in the main proceedings, must refuse to accede to a purchaser's wish to purchase goods subject to excise duty if the purchaser does not offer to present copy 1 of the simplified accompanying document referred to in Article 4 of Regulation No 3649/92, if the intention in making the purchase is to use the dutiable goods for commercial purposes in the purchaser's home country? An answer to this question is also requested in the event that rules of presumption, as referred to in Question 2, are to be applied.

(4) Do the entry into force of Directive 2008/118 and the repeal of Directive 92/12 give rise to a change in the legal position as regards the implications of Directive 92/12 in relation to the answers to Questions 1 to 3?

(5) Is the phrase products acquired by private individuals for their own use in Article 8 of Directive 92/12 and Article 32(1) of Directive 2008/118 to be interpreted as meaning that it covers, or can cover, purchases of goods subject to excise duty in circumstances such as those arising in the main proceedings? If the answer to that question is in the negative, must the purchases then come under Article 7 of Directive 92/12 and/or Article 33 of Directive 2008/118?'

Consideration of the questions referred

The first question

22 By its first question the national court asks, in essence, whether Articles 7 to 9 of Directive 92/12 and Articles 1 and 4 of Regulation No 3649/92 must be interpreted as meaning that a trader, such as the trader at issue in the main proceedings, must check whether purchasers from other Member States intend to import products subject to excise duty into another Member State and, where relevant, whether such importation is for private or commercial use.

23 As a preliminary point, it must be noted that, according to settled case-law, the purpose of Directive 92/12 is to lay down a number of rules on the holding, movement and monitoring of products subject to excise duty, in particular so as to ensure that chargeability of excise duties is identical in all the Member States (see Case C-5/05 *Joustra* [2006] ECR I-11075, paragraph 27 and the case-law cited).

24 In this respect, as is apparent inter alia from the fifth and sixth recitals in its preamble, Directive 92/12 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.

25 Under Article 1 of Regulation No 3649/92, if products subject to excise duty and already released for consumption in one Member State are intended to be used in another Member State for the purposes referred to in Article 7 of Directive 92/12, the person who is responsible for the intra-Community movement must draw up a simplified accompanying document.

26 In accordance with Article 4 of that regulation, the simplified accompanying document is to be drawn up in three copies of which copy 1 is to be kept by the supplier for fiscal control.

27 It follows from reading Articles 1 and 4 of Regulation No 3649/92 together that copy 1 of the simplified accompanying document must be kept by the supplier only where that document was drawn up by the 'person who is responsible for the intra-Community movement', referred to in Article 1, who must, therefore, give copy 1 to the supplier where that person declares that the products subject to excise duty, having already been released for consumption in one Member State, are to be held for commercial purposes in another Member State.

28 Nothing in those provisions leads to the conclusion that a supplier such as Metro, to the extent that it is not the 'person who is responsible for the intra-Community movement' under Article 1 of Regulation No 3649/92, must check whether the conditions are met for the person responsible to draw up the simplified accompanying document and to give copy 1 thereof to it so that the supplier can keep it.

29 As the Commission points out in its observations, that responsible person is the person referred to in Article 7(5) of Directive 92/12, which refers to Article 7(3) of that directive.

30 In accordance with Article 7(3), depending on all the circumstances, the duty is to be due from the person making the delivery or holding the products intended for delivery or from the person receiving the products for use in a Member State other than the one where the products have already been released for consumption, or from the relevant trader or body governed by public law.

31 In this case, it is not disputed that, under the 'cash & carry' system established by Metro, it is the customer himself who arranges transport of the products purchased which may be for private or commercial use and, where the customer is Swedish, for use not in Sweden but in Denmark.

32 It follows from this, first, that a trader such as Metro, as a supplier who does not arrange delivery of the products sold, cannot be considered to be the 'person making the delivery' within the meaning of Article 7(3) of Directive 92/12.

33 Next, such a trader cannot be considered to be the person 'holding the products intended for delivery' within the meaning of Article 7(3), in so far as its self-service wholesale business does not make it possible for it to guarantee the commercial use of the products sold to Swedish customers or that those products will actually be delivered into Sweden.

34 That interpretation is borne out by Article 33(3) of Directive 2008/118 which replaces Article 7(3) of Directive 92/12. The new text now contains a reference to Article 33(1), clearly establishing a link between holding for the purposes of delivery and the application of that Article 33 which, like Article 7 of Directive 92/12, refers to products 'released for consumption in one Member State' and 'held for commercial purposes in another Member State'.

35 Finally, a reading of Article 7(2) and (3) of Directive 92/12 together shows that Metro, as an undertaking established in Denmark, the Member State where the products were released for consumption in the case in the main proceedings, does not come under the other scenarios provided for in Article 7(3) of the directive. Those scenarios concern only the traders or bodies governed by public law for whose purpose the products are used within a Member State other than that in which they have been released for consumption.

36 That conclusion is also supported by Article 33(3) of Directive 2008/118, which simplifies the provisions of Directive 92/12 by now referring only to the person 'to whom the goods are delivered in the other Member State'.

37 Consequently, it must be held that a trader such as Metro cannot be considered to be a 'person who is responsible for the intra-Community movement' within the meaning of Article 1 of Regulation No 3649/92, and does not have to check whether the conditions are met that would require the person responsible to draw up the simplified accompanying document and to give it to the trader so that the trader can keep it.

38 In the light of all of the foregoing considerations, the answer to the first question is that Articles 7 to 9 of Directive 92/12 and Articles 1 and 4 of Regulation No 3649/92 must be interpreted as meaning that a trader, such as the trader at issue in the main proceedings, is not required to check whether purchasers from other Member States intend to import products subject to excise duty into another Member State and, where relevant, whether such importation is for private or commercial use.

The second and third questions

39 In view of the answer which has been given to the first question, there is no need to adjudicate on the second and third questions.

The fourth question

40 By its fourth question the national court asks, in essence, whether Articles 32 to 34 of Directive 2008/118 must be interpreted as substantially amending Articles 7 to 9 of Directive 92/12 warranting, in circumstances such as those at issue in the main proceedings, a different answer to the first question.

41 The answer to that question is clear from the answer given to the first question and, in particular, from paragraphs 34 and 36 of this judgment.

42 It must be held that Articles 32 to 34 of Directive 2008/118 do not substantially amend Articles 7 to 9 of Directive 92/12 but reproduce the content of those articles while clarifying it.

43 Consequently, the answer to the fourth question is that Articles 32 to 34 of Directive 2008/118 must be interpreted as not substantially amending Articles 7 to 9 of Directive 92/12 in a manner which would warrant, in circumstances such as those at issue in the main proceedings, a different answer to the first question.

The fifth question

44 By its fifth question the national court asks, in essence, whether Article 8 of Directive 92/12 must be interpreted as being capable of covering the purchase of products subject to excise duty in circumstances such as those at issue in the main proceedings.

45 In this respect, it must be noted that, products which are not held for private purposes must necessarily be regarded as being held for commercial purposes (see *Joustra*, paragraph 29).

46 It is apparent from the wording of Article 7 of Directive 92/12 that it relates to the purchase of products subject to excise duty in circumstances such as those at issue in the main proceedings where those products are to be held in another Member State for commercial purposes.

47 However, as is apparent from the consideration of the first question, it is also possible that those products were acquired by private individuals, for their own use, and transported by them into Sweden. In those circumstances, those products come under Article 8 of Directive 92/12.

48 Consequently, the answer to the fifth question is that Article 8 of Directive 92/12 must be interpreted as being capable of covering the purchase of products subject to excise duty in circumstances such as those at issue in the main proceedings where those products are acquired by private individuals, for their own use and are transported by them, which is for the competent national authorities to check on a case-by-case basis.

Costs

49 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

1. **Articles 7 to 9 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 and Articles 1 and 4 of Commission Regulation (EEC) No 3649/92 of 17 December 1992 on a simplified accompanying document for the intra-Community movement of products subject to excise duty which have been released for consumption in the Member State of dispatch, must be interpreted as meaning that a trader, such as the trader at issue in the main proceedings, is not required to check whether purchasers from other Member States intend to import products subject to excise duty into another Member State and, where relevant, whether such importation is for private or commercial use.**

2. **Articles 32 to 34 of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC must be interpreted as not substantially amending Articles 7 to 9 of Directive 92/12 as amended by Directive 92/108 in a manner which would warrant, in circumstances such as those at issue in the main proceedings, a different answer to the first question.**

3. **Article 8 of Directive 92/12 as amended by Directive 92/108 must be interpreted as being capable of covering the purchase of products subject to excise duty in circumstances such as those at issue in the main proceedings where those products are acquired by private individuals, for their own use and are transported by them, which is for the competent national authorities to check on a case-by-case basis.**

[Signatures]