JUDGMENT OF THE COURT (Second Chamber)

18 December 2007 *

In Case C-314/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Cour de cassation (France), made by decision of 11 July 2006, received at the Court on 20 July 2006, in the proceedings

Société Pipeline Méditerranée et Rhône (SPMR)

v

Administration des douanes et droits indirects,

Direction nationale du renseignement et des enquêtes douanières (DNRED),

THE COURT (Second Chamber),

composed of C.W.A. Timmermans (Rapporteur), President of the Chamber, L. Bay Larsen, K. Schiemann, P. Kūris and C. Toader, Judges,

* Language of the case: French.

Advocate General: J. Kokott,
Registrar: M.-A. Gaudissart, Head of Unit,

having regard to the written procedure and further to the hearing on 21 June 2007,

after considering the observations submitted on behalf of:

— Société Pipeline Méditerranée and Rhône (SPMR), by H. Hazan, avocat,

— the French Government, by G. de Bergues and J.-C. Gracia, acting as Agents,

— the Italian Government, by I.M. Braguglia, acting as Agent, assisted by G. Albenzio, avvocato dello Stato,

— the Polish Government, by E. Ośniecka-Tamecka, acting as Agent,

— the Commission of the European Communities, by J.-P. Keppenne and W. Mölls, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 July 2007,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 14(1) 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 (JO 1992 L 76, p. 1), as amended by Council Directive 94/74/EC of 22 December 1994 (JO 1994 L 365, p. 46) ('Directive 92/12').

2 The reference was made in the context of proceedings between Société Pipeline Méditerranée et Rhône (SPMR) and the Administration des douanes et droits indirects (Customs and Indirect Taxes Administration) ('the administration') and the Direction nationale du renseignement et des enquêtes douanières (National Excise Information and Investigations Department) concerning excise duties claimed by the administration from SPMR in respect of fuel which escaped from an oil pipeline in which it was being transported under excise duty suspension arrangements, following leakages and the subsequent bursting of the pipeline.

Legal context

Community law

3 Under the first recital in the preamble to Directive 92/12, 'the establishment and functioning of the internal market require the free movement of goods, including those subject to excise duties'. The fourth recital in the preamble to that directive

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

4 Article 1(1) of Directive 92/12 'lays down the arrangements for products subject to excise duties and other indirect taxes which are levied directly or indirectly on the consumption of such products, except for value added tax and taxes established by the Community'.

5 Article 3(1) of that directive provides:

'This Directive shall apply at Community level to the following products as defined in the relevant Directives:

— mineral oils,

...'

6 Article 4 of the directive states that, for its purposes, the following definitions are to apply:

'(a) authorised warehousekeeper: a natural or legal person authorised by the competent authorities of a Member State to produce, process, hold, receive and dispatch products subject to excise duty in the course of his business, excise duty being suspended under tax-warehousing arrangement;

(b) tax warehouse: a place where goods subject to excise duty are produced, processed, held, received or dispatched under [excise] duty-suspension arrangements by an authorised warehousekeeper in the course of his business, subject to certain conditions laid down by the competent authorities of the Member State where the tax warehouse is located;

(c) suspension arrangement: a tax arrangement applied to the production, processing, holding and movement of products, excise duty being suspended;

...'

7 Article 5 of Directive 92/12 provides:

'1. The products referred to in Article 3(1) shall be subject to excise duty at the time of their production within the territory of the Community as defined in Article 2 or of their importation into that territory.

"Importation of a product subject to excise duty" shall mean the entry of that product into the territory of the Community ...

However, where the product is placed under a Community customs procedure on entry into the territory of the Community, importation shall be deemed to take place when it leaves the Community customs procedure.

2. Without prejudice to national and Community provisions regarding customs matters, when products subject to excise duty:

— are coming from, or going to, third countries ... and are placed under one of the customs suspensive procedures listed in Article 84(1)(a) of [Council] Regulation (EEC) No 2913/92 [of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1)] or in a free zone or a free warehouse,

— ...

the excise duty on them shall be deemed to be suspended.'

8 Article 6(1) of that directive states:

'Excise duty shall become chargeable at the time of release for consumption or when shortages are recorded which must be subject to excise duty in accordance with Article 14(3).

Release for consumption of products subject to excise duty shall mean:

(a) any departure, including irregular departure, from a suspension arrangement;

...'

9 Article 12 provides:

'The opening and operation of tax warehouses shall be subject to authorisation from the competent authorities of the Member States.'

10 Under Article 13:

'An authorised warehousekeeper shall be required to:

(a) provide a guarantee, if necessary, to cover production, processing and holding and a compulsory guarantee to cover movement, subject to Article 15(3) ...

(b) comply with the requirements laid down by the Member State within whose territory the tax warehouse is situated;

...

(e) consent to all monitoring and stock checks.

...'

11 Article 14 provides:

'1. Authorised warehousekeepers shall be exempt from duty in respect of losses occurring under suspension arrangements which are attributable to fortuitous events or *force majeure* and established by the [authorities] of the Member State concerned. They shall also be exempt, under suspension arrangements, in respect of losses inherent in the nature of the products during production and processing, storage and transport. Each Member State shall lay down the conditions under which these exemptions are granted. These exemptions shall apply equally to the traders referred to in Article 16 during the transport of products under excise duty suspension arrangements.

2. ...

3. Without prejudice to Article 20, the duty on shortages other than the losses referred to in paragraph 1 and losses for which the exemptions referred to in paragraph 1 are not granted shall be levied on the basis of the rates applicable in the Member States concerned at the time the losses, duly established by the competent authorities, occurred, or if necessary at the time the shortage was recorded.'

12 Article 15(3) states:

'The risks inherent in intra-Community movement shall be covered by the guarantee provided by the authorised warehousekeeper of dispatch, as provided for in Article 13 ...

If mineral oils subject to excise duty are transported within the Community by sea or by pipeline, Member States may relieve authorised warehousekeepers of ... the obligation to provide the guarantee referred to in the first subparagraph.

...'

National law

13 Article 158 C of the French Code des douanes (Customs Code), which transposes Article 14(1) of Directive 92/12 into French law, provides:

'Losses of products placed under tax warehousing arrangements for the storage of petroleum products are not subject to duty if it is proven to the authority:

1. that they are caused by fortuitous events or *force majeure*;

2. or that they are inherent in the nature of the products. The Minister for Budgets may for this purpose lay down by order a maximum lump sum of tax-free losses in respect of each type of product and each mode of transport.'

The main proceedings and the questions referred for a preliminary ruling

14 SPMR, an authorised warehousekeeper, operates a pipeline through which hydrocarbons are transported under excise duty suspension arrangements to Switzerland. SPMR noticed leakages and, subsequently, on 1 January 1997, that the pipeline had burst. SPMR applied for an exemption from excise duties claimed by the administration in respect of the 795 201 litres of petroleum products allegedly lost, under Article 158 C of the Code des douanes. Considering that the conditions

for relying on *force majeure* had not been fulfilled, the administration continued to claim excise duties in respect of the amounts lost, deducting only those amounts corresponding to pollutants recovered from the soil.

15 The administration filed proceedings against SPMR for payment before the Tribunal d'instance de Neuilly-sur-Seine (District Court of Neuilly-sur-Seine). However, it held that that action was time-barred.

16 Sitting as an appeal court, the Cour d'appel de Versailles (Court of Appeal of Versailles), by judgments of 17 December 2002 and 23 March 2004, overturned the decision at first instance, finding that the administration's application was admissible and that SPMR could not plead *force majeure*, which is characterised by the existence of circumstances which are unforeseen, unavoidable and caused by factors extraneous to the authorised warehousekeeper.

17 SPMR appealed against those judgments to the Cour de cassation (Court of Cassation). It complained, in particular, of the appeal court's decision that SPMR could not rely on 'fortuitous events' or '*force majeure*' for the purposes of Article 158 C of the Code des douanes and, accordingly, of its finding that SPMR was obliged to pay the duties and taxes on the petroleum products lost. In that regard, it relied on two pleas in law in support of its appeal.

18 First, SPMR claimed that, by requiring that the losses of petroleum products be caused by circumstances which were unforeseen and extraneous to it, and by refusing to investigate whether SPMR could have avoided the leakages and the bursting of the pipeline which led to those losses, the Cour d'appel infringed Article

158 C of the Code des douanes. SPMR submits, on the contrary, that unavoidability alone is the determining factor for 'fortuitous events' or '*force majeure*' within the meaning of that provision.

19 Secondly, SPMR claimed that it is also able to take advantage of the exemption provided for by Article 158 C because the losses of petroleum products transported in the defective pipeline were inherent in the — liquid — nature of those products. The fact that the administration agreed not to levy duty on the pollutants recovered from the soil implies, as they were liquid, that those products which it was not possible to recover, due to the nature of the soil, should not have duty levied on them either.

20 After stating that the Code de douanes transposes Directive 92/12 into French law and referring to the case-law of the Court of Justice to the effect that the term '*force majeure*' does not have the same scope in the various spheres of application of Community law and its meaning must be determined by reference to the legal context in which it is to operate, the Cour de cassation decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must the concept of *force majeure* giving rise to losses to products under duty suspension arrangements, within the meaning of Article 14(1) of ... Directive 92/12 ... be interpreted as meaning unforeseeable and unavoidable circumstances extraneous to the authorised warehousekeeper who seeks to rely on those circumstances in support of its application for exemption from duty, or is it sufficient that the authorised warehousekeeper could not have avoided those circumstances?

(2) Can losses of part of products which have escaped from a pipeline due to their liquid nature and to the characteristics of the ground on which they spilled,

which hindered their recovery and led to the levying of duty on them, be regarded as inherent in the nature of the products within the meaning of Article 14(1) of Directive 92/12?'

The questions referred for a preliminary ruling

Question 1 concerning 'force majeure' within the meaning of the first sentence of Article 14(1) of Directive 92/12

21 It is necessary to point out that the Community legal order does not, in principle, aim to define concepts on the basis of one or more national legal systems unless there is express provision to that effect (Case 64/81 *Corman* [1982] ECR 13, paragraph 8; Case C-296/95 *EMU Tabac and Others* [1998] ECR I-1605, paragraph 30; Case C-103/01 *Commission* v *Germany* [2003] ECR I-5369, paragraph 33). In so far as Article 14(1) of Directive 92/12 provides, in its third sentence, that each Member State is to lay down the conditions under which the exemptions provided for in the first sentence of that provision are granted, that reference to national law does not affect the meaning or scope of the term *'force majeure'* which appears in the first sentence.

22 Indeed, according to the fourth recital in the preamble to Directive 92/12, chargeability of excise duties should be identical in all the Member States in order to ensure the establishment and functioning of the internal market. Inasmuch as the meaning of *'force majeure'* is a factor which is liable to be relevant, in appropriate cases, to determining whether duties are chargeable, it necessarily takes on an independent character and the uniformity of its interpretation in all the Member States must be ensured.

23 According to settled case-law established in various contexts, for example agricultural regulations or the rules on time-limits for bringing an action laid down by Article 45 of the Statute of the Court of Justice, *force majeure* is not limited to absolute impossibility but must be understood in the sense of abnormal and unforeseeable circumstances, extraneous to the operator concerned, the consequences of which, in spite of the exercise of all due care, could not have been avoided (see, to that effect, Case C-195/91 P *Bayer* v *Commission* [1994] ECR I-5619, paragraph 31, and Case C-208/01 *Parras Medina* [2002] ECR I-8955, paragraph 19 and the case-law cited).

24 It follows from this that, as the Court has already noted, *'force majeure'* contains both an objective element relating to abnormal circumstances extraneous to the trader and a subjective element involving the obligation, on that person's part, to guard against the consequences of the abnormal event by taking appropriate steps without making unreasonable sacrifices (see, to that effect, *Bayer*, paragraph 32, and the order in Case C-325/03 P *Zuazaga Meabe* v *OHIM* [2005] ECR I-403, paragraph 25).

25 However, it is also settled case-law that, since *force majeure* does not have the same scope in the various spheres of application of Community law, its meaning must be determined by reference to the legal context in which it is to operate (see, Case C-124/92 *An Bord Bainne and Inter-Agra* [1993] ECR I-5061, paragraph 10, and Case C-263/97 *First City Trading and Others* [1998] ECR I-5537, paragraph 41).

26 Consequently, it is necessary to examine whether, in relation to *'force majeure'* within the meaning of the first sentence of Article 14(1), the general scheme and purpose of Directive 92/12 requires the constituent elements of *'force majeure'*, as derived from the case-law cited at paragraph 23 of the present judgment, to be interpreted and applied in a particular way.

27 In that regard, it is clear from the first and fourth recitals in the preamble to Directive 92/12 that that directive seeks to ensure the establishment and functioning of the internal market for products subject to excise duty and, for that purpose, establishes general arrangements under which the chargeability of duties is to be identical in all Member States.

28 Under Article 5(1) of Directive 92/12, the products referred to in Article 3(1) of that directive, including mineral oils, are to be subject to excise duty at the time of their production within the territory of the Community or of their importation into that territory. Whilst the chargeable event is the production within or importation into that territory of the products concerned, that duty becomes chargeable, for the purposes of Article 6(1) of that directive, only at the time of release for consumption or when shortages are recorded which must be subject to excise duty in accordance with Article 14(3) of that directive. Release for consumption of products subject to excise duty within the meaning of Article 6(1) also means any departure, including irregular departure, from a suspension arrangement.

29 Article 14(3) of Directive 92/12 provides that, without prejudice to Article 20 of that directive, the duty on shortages other than the losses referred to in Article 14(1) of that directive and losses for which the exemptions referred to in Article 14(1) are not granted shall be levied on the basis of the rates applicable in the Member States concerned at the time the losses, duly established by the competent authorities, occurred or, if necessary, at the time the shortage was recorded.

30 It follows from a combined reading of all the provisions referred to in the two preceding paragraphs that mineral oils are subject to excise duty on the basis of their production within or their importation into the territory of the Community alone and that excise duties are, as a rule, also chargeable on shortages and losses in

respect of which exemptions have not been granted by the competent authorities. The exemption provided by the first sentence of Article 14(1) of Directive 92/12 for losses attributable to *force majeure* constitutes a derogation from that general rule, which must therefore, as the Advocate General pointed out at point 43 of her Opinion, be interpreted strictly.

31 The interpretation of *force majeure* chosen by the Court in other areas of Community law, referred to at paragraph 23 of this judgment, must then also be applied in the context of the first sentence of Article 14(1) of Directive 92/12. An authorised warehousekeeper can, therefore, claim the benefit of the exemption provided for by that provision only if he is able to demonstrate that there are abnormal and unforeseeable circumstances, extraneous to him, the consequences of which, in spite of the exercise of all due care, could not have been avoided.

32 In that regard, it should however be stated that, as the Commission of the European Communities submits, applying those conditions in the context of the first sentence of Article 14(1) of Directive 92/12 is not to lead to the imposition of absolute liability on the authorised warehousekeeper for losses of products which are subject to a suspension arrangement.

33 In particular, the requirement that the circumstances must be extraneous to the authorised warehousekeeper is not limited to those circumstances which are extraneous to him in a material or physical sense. Instead that requirement must be interpreted as referring to circumstances which are objectively outside the authorised warehousekeeper's control or situated outside his sphere of responsibility (see, regarding the latter aspect, by analogy, Case 145/85 *Denkavit* [1987] ECR 565, paragraph 16).

34 With regard to the facts of the main proceedings, it is apparent from the file submitted to the Court that SPMR claims before the national courts that the leakages affected the pipeline in question and its subsequent bursting, resulting in losses in respect of which that undertaking claims an exemption, are attributable to corrosive cracking, a process which was unknown at the material time and, therefore, incapable of being detected with the technical devices then available.

35 Even if the person operating an installation is, in principle, responsible for its technical defects, it is not possible to exclude corrosion of the type described in the preceding paragraph from being considered *force majeure* within the meaning of the first sentence of Article 14(1) of Directive 92/12, in so far as its occurrence was in no way foreseeable, in view of the state of technical knowledge then available and, therefore, inasmuch as the authorised warehousekeeper had no possibility of checking it. It is for the national courts to investigate whether those conditions are fulfilled in the main proceedings.

36 Regarding the requirement that the authorised warehousekeeper must show necessary diligence, SPMR and the Commission submit that that condition is fulfilled where it is established that the trader concerned complied with the technical regulations applicable.

37 Although compliance with the technical requirements concerning the quality, construction, maintenance and operation of a pipeline may be considered to be a necessary condition for a finding of diligence, that compliance is not, in itself, decisive. Sufficient diligence requires, in addition, continuous action aimed at identifying and assessing potential risks and the ability to take appropriate and effective steps in order to avoid them.

38 In addition, neither the fact that, under Article 12 of Directive 92/12, the opening and operation of tax warehouses — for example, a pipeline in circumstances such as those in the main proceedings — are subject to authorisation from the competent authorities of the Member States, nor the fact that an authorised warehousekeeper is subject to the requirements listed in Article 13 of that directive, in particular that of consent to all monitoring, nor the fact that it may be inferred — from the second paragraph of Article 15(3) of the directive, concerning possible relief for transport of mineral oils by pipeline from the obligation to provide a guarantee to cover the risks inherent in intra-Community movement — that the Community legislature considers transportation by pipeline to be safe, are relevant factors for determining whether the conditions for *force majeure* are fulfilled. As the Advocate General stated at points 46 and 47 of her Opinion, first, the authorisation of the authorised warehousekeeper and the monitoring to which he is subject, as provided by Article 13, merely seek to ensure that he is sufficiently reliable for the purposes of the tax suspension procedure and, secondly, the grant of authorisation for the opening and operation of tax warehouses by the competent authorities of the Member States does not make them jointly liable for the excise duty on the products which are lost owing to a technical defect in the authorised means of transport.

39 Lastly, the contention that excise duty is not due in respect of lost products on the ground that they have never been released for consumption, as required by Article 6(1) of Directive 92/12 as a condition for chargeability of the tax, is unsustainable. As set out at paragraph 30 of this judgment, mineral oils are subject to excise duty on the basis of their production within or their importation into the territory of the Community alone and excise duties are, in principle, also chargeable on shortages and losses for which exemptions have not been granted by the competent authorities. It follows that release for consumption is not the determining factor for whether tax liability arises.

40 In the light of the foregoing, the answer to the first question referred by the national court must be that '*force majeure*' within the meaning of the first sentence of Article 14(1) of Directive 92/12 refers to abnormal and unforeseeable circumstances extraneous to the authorised warehousekeeper, the consequences of which, despite

the exercise by him of all due care, could not have been avoided. The requirement that the circumstances must be extraneous to the authorised warehousekeeper is not limited to those circumstances which are outside his control in a material or physical sense, but refers also to circumstances which are objectively outside the authorised warehousekeeper's control or situated outside his sphere of responsibility.

Question 2, concerning 'losses inherent in the nature of the products' within the meaning of the second sentence of Article 14(1) of Directive 92/12

41 By its second question, the national court seeks to know whether losses of part of petroleum products which leaked from a pipeline, caused by the fact that those products were in a liquid state and the type of soil they spilled on hindered their recovery, are to be regarded as 'inherent in the nature of the products' within the meaning of the second sentence of Article 14(1) of Directive 92/12.

42 According to its wording, that provision applies only to losses inherent in the nature of the products occurring during particular operations which are set out in an exhaustive list, which includes transport. Whilst 'losses inherent in the nature of the products' may, as the Italian Government has pointed out, include losses which are termed 'technical', they cannot be extended to cover accidental losses.

43 Moreover, since the exemption provided for such natural losses is separate from that provided for by the first sentence of Article 14(1) Directive 92/12 for losses which are attributable to 'fortuitous events' or *'force majeure'*, the first exemption cannot

be interpreted broadly so as to cover situations where the conditions for claiming that exemption are not actually fulfilled.

44 The answer to the second question referred for a preliminary ruling must therefore be that losses of part of petroleum products which escaped from a pipeline, caused by the fact that those products were in a liquid state and the type of soil they spilled on prevented their recovery, cannot be regarded as 'inherent in the nature of the products' within the meaning of the second sentence of Article 14(1) of Directive 92/12, as amended by Directive 94/74.

Costs

45 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 (Second Chamber) hereby rules:

1. **'*Force majeure*' within the meaning of the first sentence of Article 14(1) 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 94/74/EC of 22 December 1994, refers to abnormal and**

unforeseeable circumstances extraneous to the authorised warehousekeeper, the consequences of which, despite the exercise by him of all due care, could not have been avoided. The requirement that the circumstances must be extraneous to the authorised warehousekeeper is not limited to those circumstances which are outside his control in a material or physical sense, but refers also to circumstances which are objectively outside the authorised warehousekeeper's control or situated outside his sphere of responsibility.

2. **Losses of part of petroleum products which escaped from a pipeline, caused by the fact that those products were in a liquid state and the type of soil they spilled on prevented their recovery, cannot be regarded as 'inherent in the nature of the products' within the meaning of the second sentence of Article 14(1) of Directive 92/12, as amended by Directive 94/74.**

[Signatures]