Reports of Cases

OPINION OF ADVOCATE GENERAL
PIKAMÄE
Delivered on 8 October 2020 [1]

Case C-95/19

Agenzia delle Dogane
v
Silcompa SpA

(Request for a preliminary ruling
from the Corte suprema di cassazione (Supreme Court of Cassation, Italy))

(Reference for a preliminary ruling – Excise duties – Directive 92/12/EEC – Articles 6 and 20 – Release of products for consumption – Falsification of the accompanying administrative document – Offence or irregularity committed in the course of movement of products subject to excise duty under a duty suspension arrangement – Irregular departure of products from a suspension arrangement – Determination of the Member State where the excise duty is chargeable – Directive 76/308/EEC – Articles 6, 8 and 12(1) to (3) – Mutual assistance – Excise duty subsequently levied on the same transactions in two Member States – Duplication of the claim relating to the excise duties – Power of review of the courts of the Member State where the requested authority is situated – Possible refusal of the request for assistance)

1. This reference for a preliminary ruling has been made in the context of a dispute between Agenzia delle Dogane (Customs Agency, Italy) ('the Agency') and Silcompa Spa, a company producing ethyl alcohol established in Italy, concerning a request for the recovery of excise duties addressed to that company under the assistance procedure provided for in Article 7(1) of Directive 76/308/EEC. [2]

2. By its question referred for a preliminary ruling, the Corte suprema di cassazione (Supreme Court of Cassation, Italy) asks, in essence, whether it is possible, in proceedings brought by a company against enforcement measures, aimed at recovering excise duty debts, issued in a Member State (in this instance Italy) at the request of another Member State (in this instance the Hellenic Republic), to verify the condition relating to the place where the irregularity or offence was committed during the movement of the products for which excise duty is due.

3. That question arises in a context in which, according to the referring court, both the Italian and Greek competent authorities claim recovery of a debt in respect of excise duties relating to the same taxed transactions.

1 Original language: French.

2 Council Directive of 15 March 1976 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures (OJ 1976 L 73, p. 18), as amended by Council Directive 2001/44/EC of 15 June 2001 (OJ 2001 L 175, p. 17) ('Directive 76/308'). Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures (OJ 2008 L 150, p. 28) had codified Directive 76/308 and the corresponding amending acts. Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures (OJ 2010 L 84, p. 1) repealed Directive 2008/55/EC with effect from 1 January 2012. However, in view of the date of the request for assistance at issue in the main proceedings, this reference for a preliminary ruling is examined in the light of the provisions of Directive 76/308.

4. With regards to its subject matter, the dispute concerns both the EU excise duty system and mutual assistance for the recovery of certain duties. The Court will thus have to consider the relationship between the provisions of, on the one hand, Directive 92/12/EEC on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products [3] and, on the other, Directive 76/308, the provisions of which are applicable *ratione temporis* in the present case. Although the present case is concerned with directives which have now been repealed, the question put by the referring court in its request for a preliminary ruling remains relevant, since Directives 2008/118 and 2010/24 are based, in essence, on the same principles as the aforementioned earlier directives.

I. Legal context

A. European Union law

1. Directive 92/12

5. In accordance with Article 3(1) thereof, Directive 92/12 is applicable to alcohol and alcoholic beverages.

6. Article 4 of Directive 92/12 provides:

'For the purpose of this Directive, the following definitions shall 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 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 6 of Directive 92/12 provides:

'1. 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;

3 Council Directive of 25 February 1992 (OJ 1992 L 76, p. 1), as amended by Council Directive 92/108/EC of 14 December 1992 (OJ 1992 L 390, p. 124) ('Directive 92/12'). Directive 92/12 was repealed with effect from 1 April 2010 by Council Directive 2008/118/EC of 16 December 2008 (OJ 2009 L 9, p. 12). However, in view of the date of the facts of the main proceedings, this reference for a preliminary ruling is examined by reference to the provisions of Directive 92/12.

(b) any manufacture, including irregular manufacture, of those products outside a suspension arrangement;

(c) any importation of those products, including irregular importation, where those products have not been placed under a suspension arrangement.

2. The chargeability conditions and rate of excise duty to be adopted shall be those in force on the date on which duty becomes chargeable in the Member State where release for consumption takes place or shortages are recorded. …'

8. The first subparagraph of Article 15(1) of Directive 92/12 provides that, in principle, 'the movement under a suspension system of excise duty of products subject to excise duty must take place between tax warehouses'.

9. In the words of Article 15(3) and (4):

'3. 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, or if need be, by a guarantee jointly and severally binding both the consignor and the transporter. …

…

4. Without prejudice to the provision of Article 20, the liability of the authorised warehousekeeper of dispatch and, if the case arises, that of the transporter may only be discharged by proof that the consignee has taken delivery of the products, in particular by the accompanying document referred to in Article 18 under the conditions laid down in Article 19.'

10. Article 18 of Directive 92/12 provides:

'Notwithstanding the possible use of computerised procedures, all products subject to excise duty moving under duty-suspension arrangements between Member States, including those moving by sea or air directly from one Community port or airport to another, shall be accompanied by a document drawn up by the consignor. This document may be either an administrative document or a commercial document. The form and content of this document, and the procedure to be followed where its use is objectively inappropriate, shall be established in accordance with the procedure laid down in Article 24.'

11. In the words of Article 20 of Directive 92/12:

'1. Where an irregularity or offence has been committed in the course of a movement involving the chargeability of excise duty, the excise duty shall be due in the Member State where the offence or irregularity was committed from the natural or legal person who guaranteed payment of the excise duties in accordance with Article 15(3), without prejudice to the bringing of criminal proceedings.

Where the excise duty is collected in a Member State other than that of departure, the Member State collecting the duty shall inform the competent authorities of the country of departure.

2. When, in the course of movement, an offence or irregularity has been detected without it being possible to determine where it was committed, it shall be deemed to have been committed in the Member State where it was detected.

3. Without prejudice to the provision of Article 6(2), when products subject to excise duty do not arrive at their destination and it is not possible to determine where the offence [or] irregularity was committed, that offence or irregularity shall be deemed to have been committed in the Member State of departure, which shall collect the excise duties at the rate in force on the date when the products were dispatched unless within a period of four months [proof is provided to the satisfaction] of the competent authorities of the correctness of the transaction or of the place where the offence or irregularity was actually committed. Member States shall take the necessary measures to deal with any offence or irregularity and to impose effective penalties.

4. If, before the expiry of a period of three years from the date on which the accompanying document was drawn up, the Member State where the offence or irregularity was actually committed is ascertained, that Member States shall collect the excise duty at the rate in force on the date when the goods were dispatched. In this case, as soon as evidence of collection has been provided, the excise duty originally levied shall be refunded.'

2. Directive 76/308

12. The purpose of Directive 76/308 is to eliminate obstacles to the establishment and functioning of the common market resulting from the territorial limitation of the scope of national provisions relating to recovery of, inter alia, excise duties.

13. According to Article 5(1) of that directive, the requested authority, at the request of the applicant authority, and in accordance with the rules of law in force for the notification of similar instruments or decisions in the Member State in which the requested authority is situated, is to notify to the addressee all instruments and decisions, including those of a judicial nature, which emanate from the Member State in which the applicant authority is situated and which relate to a claim and/or to its recovery.

14. Article 6 of Directive 76/308 provides:

'1. At the request of the applicant authority, the requested authority shall, in accordance with the laws, regulations or administrative provisions applying to the recovery of similar claims arising in the Member State in which the requested authority is situated, recover claims which are the subject of an instrument permitting their enforcement.

2. For this purpose any claim in respect of which a request for recovery has been made shall be treated as a claim of the Member State in which the requested authority is situated, except where Article 12 applies.'

15. Article 7(1) and (2) of that directive provides:

'1. The request for recovery of a claim which the applicant authority addresses to the requested authority must be accompanied by an official or certified copy of the instrument permitting its enforcement, issued in the Member State in which the applicant authority is situated and, if appropriate, by the original or a certified copy of other documents necessary for recovery.

2. The applicant authority may not make a request for recovery unless:

(a) the claim and/or the instrument permitting its enforcement are not contested in the Member State in which it is situated, except in cases where the second subparagraph of Article 12(2) is applied;

(b) it has, in the Member State in which it is situated, applied appropriate recovery procedures available to it on the basis of the instrument referred to in paragraph 1, and the measures taken will not result in the payment in full of the claim.'

16. Article 8 of that directive states:

'1. The instrument permitting enforcement of the claim shall be directly recognised and automatically treated as an instrument permitting enforcement of a claim of the Member State in which the requested authority is situated.

2. Notwithstanding the first paragraph, the instrument permitting enforcement of the claim may, where appropriate and in accordance with the provisions in force in the Member State in which the requested authority is situated, be accepted as, recognised as, supplemented with, or replaced by an instrument authorising enforcement in the territory of that Member State.

Within three months of the date of receipt of the request for recovery, Member States shall endeavour to complete such acceptance, recognition, supplementing or replacement, except in cases where the third subparagraph is applied. They may not be refused if the instrument permitting enforcement is properly drawn up. The requested authority shall inform the applicant authority of the grounds for exceeding the period of three months.

If any of these formalities should give rise to contestation in connection with the claim and/or the instrument permitting enforcement issued by the applicant authority, Article 12 shall apply.'

17. In the words of Article 12(1) to (3) of Directive 76/308:

'1. If, in the course of the recovery procedure, the claim and/or the instrument permitting its enforcement issued in the Member State in which the applicant authority is situated are contested by an interested party, the action shall be brought by the latter before the competent body of the Member State in which the applicant authority is situated, in accordance with the laws in force there. This action must be notified by the applicant authority to the requested authority. The party concerned may also notify the requested authority of the action.

2. As soon as the requested authority has received the notification referred to in paragraph 1 either from the applicant authority or from the interested party, it shall suspend the enforcement procedure pending the decision of the body competent in the matter, unless the applicant authority requests otherwise in accordance with the second subparagraph. …

Notwithstanding the first subparagraph of paragraph 2, the applicant authority may in accordance with the law, regulations and administrative practices in force in the Member State in which it is situated, request the requested authority to recover a contested claim, in so far as the relevant laws, regulations and administrative practices in force in the Member State in which the requested authority is situated allow such action. If the result of contestation is subsequently favourable to the debtor, the applicant authority shall be liable for the reimbursement of any sums recovered, together with any compensation due, in accordance with the laws in force in the Member State in which the requested authority is situated.

3. Where it is the enforcement measures taken in the Member State in which the requested authority is situated that are being contested the action shall be brought before the competent body of that Member State in accordance with its laws and regulations.'

B. Italian law

18. Mutual assistance for the recovery of excise duties is governed in Italy, inter alia, by decreto legislativo n. 69, recante 'Attuazione della direttiva 2001/44/CE relativa all'assistenza reciproca in materia di recupero di crediti connessi al sistema di finanziamento del FEOGA, nonché ai prelievi agricoli, ai dazi doganali, all'IVA ed a talune accise' (Legislative Decree No 69 on the 'Implementation of Directive [2001/44] on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the [European Agricultural Guidance and Guarantee Fund (EAGGF)], and of agricultural levies and customs duties, and in respect of [value added tax (VAT)] and certain excise duties') of 9 April 2003[4] ('Legislative Decree No 69/2003').

19. Article 5 of Legislative Decree No 69/2003, entitled 'Assistance for recovery of claims', provides:

'1. At the request of the applicant authority, the Minister for Economy and Finance shall, on the basis of the instruments permitting enforcement which it has received, take steps to recover claims as referred to in Article 1 arising in the Member State in which the applicant authority is situated, in accordance with current legislation governing the recovery of similar claims arising within the national territory. The instruments permitting enforcement, which shall have direct and immediate effect, shall be included in the lists referred to in Presidential Decree No 602 of 29 September 1973.

2. The applicant authority may not make a request for recovery unless:

(a) the claim and/or the instrument permitting its enforcement are not contested in the Member State in which the applicant authority is situated, unless an intention has been clearly expressed to proceed in any event with the recovery of the claim in the event that it is contested;

(b) it has initiated the recovery procedure in the Member State in which it is situated and the measures taken will not result in the payment of the claim in full.

3. The request shall include:

(a) the name or company name, the address or registered office, and any other relevant information relating to the identification of the natural or legal persons concerned and/or of third parties holding their assets;

(b) the name, address and any other relevant information relating to the identification of the applicant authority;

(c) a reference to the instrument permitting enforcement on the basis of which recovery is sought, issued in the Member State in which the applicant authority is situated;

(d) the nature and the amount of the claim, including the principal, the interest and any penalties, fines and costs payable, indicated in the currencies of the Member States in which both the applicant authority and the requested authority are situated;

(e) the date of notification of the instrument permitting enforcement to the addressee by the applicant authority and/or by the requested authority;

(f) an indication of the date from which and the period during which recovery is possible under the provisions in force in the applicant Member State;

4 GURI No 87, 14 April 2003.

(g) a declaration that the claim and the instrument permitting enforcement are not contested in the applicant State, or of the intention, in the event that the claim is contested, to recover the claim. In any event, the request must contain a declaration that the recovery procedure has been initiated in the applicant Member State but will not result in the payment of the claim in full;

(h) any other relevant information.

4. As soon as any relevant information relating to the matter which gave rise to the request for recovery comes to the knowledge of the applicant authority it shall forward that information to the requested authority.

5. The request for recovery of a claim shall be accompanied by the original or a certified copy of the instrument permitting enforcement issued in the other Member State and by such other documents as may be regarded as useful for the purposes of recovering the claim. The request, the instrument permitting enforcement and any other documents shall be accompanied by translations into Italian.

6. With regard to payment of the sums due, after the applicant authority has been heard, the debtor may be granted a further period within which to pay or be allowed to pay by instalments, within the limits and subject to the conditions laid down by current national provisions. Interest for late payment shall apply in accordance with current national provisions, and shall accrue as from the date of receipt of the instrument permitting recovery. Any sums received by way of interest accruing on delayed payment or payments made by way of instalments, or late payment interest, shall be passed to the applicant authority.

7. The Ministry of Economy and Finance shall recover the claim from the debtor and retain any costs linked to recovery which apply to similar claims under national law.

8. With regard to the recovery of claims as referred to in this decree, the provisions of Presidential Decree No 602 of 29 September 1973, as amended, and of Legislative Decree No 46 of 26 February 1999, as amended, shall apply in so far as they are compatible.

9. Where recovery poses a specific problem, entails a very large amount by way of costs or relates to the fight against organised crime, the applicant authority and the requested authority may agree specific reimbursement arrangements specific to the case in question.

10. The Ministry of Economy and Finance shall inform the applicant authority of the steps taken following the request for recovery of a claim.'

20. Article 6 of Legislative Decree No 69/2003, headed 'Action contesting a claim', provides:

'1. A person who wishes to contest a claim or an instrument permitting its enforcement issued in the applicant Member State shall apply to the competent authority in that State, in accordance with the current law of that State. In such a case, the Ministry of Economy and Finance, upon receiving notification of the contested claim from the applicant authority or from the person concerned, shall, unless the applicant authority requests otherwise, suspend the enforcement procedure until the competent authority has given its decision. In the event that the procedure for the recovery of the contested claim is nevertheless proceeded with following the request of the applicant authority, and the outcome of the dispute is favourable to the debtor, the applicant authority shall be liable for the reimbursement of any sums recovered, together with any other sums due, in accordance with Italian law. If a court rules on the dispute in favour of the applicant authority and permits the recovery of the claim in the same State, the enforcement procedure shall recommence on the basis of that court's decision.

2. A person who wishes to contest measures in the enforcement procedure shall apply to the competent authority, in accordance with national law.

3. The Member State in which the applicant authority is situated shall remain liable to the Member State in which the requested authority is situated for any costs and any losses incurred as a result of actions held to be unfounded, as far as either the substance of the claim or the validity of the instrument issued by the applicant authority are concerned.'

II. The facts of the main proceedings and the question referred for a preliminary ruling

21. During 1995 and 1996 Silcompa sold ethyl alcohol to Greece under duty suspension arrangements, within the meaning of Article 4(c) of Directive 92/12. It is apparent from the file submitted to the referring court and lodged at the Court Registry ('the national file') that that sale took place through an intermediary, a natural person, for the benefit of various Greek companies.

22. In January 2000, following a check carried out by the Ufficio Tecnico di Finanza di Reggio Emilia (Technical Finance Office, Reggio Emilia, Italy), it was established that the accompanying administrative documents ('the AADs') relating to the consignments of alcohol dispatched by Silcompa had never been received by the Greek customs authority for the usual certificates and that the stamps of the Corinthian customs office on the AADs, found at Silcompa's premises, were false. In January 2000 the Agency therefore issued three payment notices [5] for the recovery of the unpaid excise duties, in a total amount of EUR 6 296 495.47. Silcompa brought an action against those payment notices before the Tribunale di Bologna (District Court, Bologna, Italy), whose judgments [6] in favour of Silcompa were the subject of appeals by the Agency before the Corte d'Appello di Bologna (Court of Appeal, Bologna, Italy).

23. It is apparent from the national file that in April 2001 the Greek customs authority sent Silcompa a request for information in order to obtain clarification on the transactions between Silcompa, the intermediary and the Greek companies. Silcompa replied to that request and received no further communication from the Greek authorities.

24. In February 2004, the Greek customs authority informed the Agency that shipments made by Silcompa to a Greek undertaking were considered irregular. Thus, on 27 March 2004, the Technical Finance Office, Reggio Emilia, issued adjustment notice No 6/2004,[7] which covered both the Italian tax claims arising from the payment notices issued in January 2000, referred to in point 22 of this Opinion, and the additional tax adjustment of EUR 473 410,66, payable following that communication from the Greek administration. Silcompa challenged adjustment notice No 6/2004 before the Commissione tributaria Provinciale di Reggio Emilia (Provincial Tax Commission, Reggio Emilia, Italy). That procedure led to the conclusion, in September 2017, of a settlement agreement between the Agency and Silcompa, under which Silcompa was responsible for a total of EUR 1 554 181.23 in respect of the debt claimed by the Italian authorities ('the settlement agreement'). [8]

5 Payment Notices Nos 5/2000, 15/2000 and 18/2000.

6 Judgments delivered on 12 April and 8 September 2010.

7 Paragraphs 8 to 10 of the observations of the Italian Government.

8 Silcompa submitted a request for simplified settlement of the dispute pursuant to Article 5 bis of decreto legge n. 193/2016 (Decree-Law No 193/2016). The Italian Government states, in its reply to questions put by the Court, that Silcompa has paid in full the amount indicated in the settlement agreement.

25. In January 2005, in relation to the same intra-Community supplies, the Athens customs office issued 'excise duty payment notices' relating to the unlawful consumption on Greek territory of ethyl alcohol shipped by Silcompa to 'letterbox' companies. That finding was based, according to the statements of the parties before the referring court,[9] on earlier criminal investigations that had resulted in a judgment at first instance of a Greek court[10] which had confirmed that the goods in question had reached Greek operators and been fraudulently released for consumption.

26. On 31 January 2005, the Greek tax authorities submitted a request for assistance to the Italian Republic, under Article 7 of Directive 76/308, for recovery of claims against the Italian Treasury amounting to EUR 10 280 291.66 ('the Greek authorities' claims').

27. On 13 September 2005, the Agency notified Silcompa, pursuant to Article 5 of Legislative Decree No 69/2003, of two payment notices[11] whereby it requested payment on an amicable basis of the sums set out[12] in respect of the Greek authorities' claims. Silcompa brought an action against those two payment notices before the Commissione tributaria provinciale di Roma (Provincial Tax Court, Rome, Italy), which dismissed that action as inadmissible.[13] On appeal by Silcompa, the Commissione tributaria regionale di Roma (Regional Tax Court, Rome, Italy), by judgment of 22 April 2010,[14] upheld the action on the grounds that the Greek authorities had failed to serve the necessary preliminary documents and had failed to state sufficient reasons for those payment notices.

28. The Agency therefore lodged an appeal on a point of law before the referring court; it put forward three grounds of appeal, only the second[15] and third[16] of which, according to the referring court, are relevant for the purposes of this reference for a preliminary ruling.

29. Silcompa, on the other hand, argues, in its defence, that the excise claims relating to the facts on which the Agency has already relied are invalid, that the facts complained of are identical and, therefore, the tax claim has been duplicated.

30. In that regard, the referring court observes that, in the present case, the Italian tax authorities and the Greek tax authorities each consider, on the basis of separate and autonomous findings, that the place where the infringement was committed is their own State. The claims asserted by the Greek authorities appear to be based on a criminal judgment, while the claims asserted by the Italian authorities are based on the finding that the AADs were false. However, the excise claims are 'alternative', since, as is apparent from Article 20 of Directive 92/12, there can be only one place where the offence was committed and there can be only one tax liability.

9 See the statement of appeal produced by the Agency, which is in the file submitted to the referring court and lodged at the Court Registry, p. 8.

10 According to that appeal, the judgment in question was judgment No 98424/2001 of the Regional Court, Athens.

11 Payment notice RP 05/14, for an amount of EUR 10 280 291.66, and payment notice RP 05/12, for an amount of EUR 64 218.25, both of 1 September 2005. The dates of those payment notices appear in the national file submitted to the Court.

12 According to the Italian Government, those notices indicated the payments issued by the Piraeus and Athens customs authorities.

13 Judgment No 501/41/07 of 3 December 2007.

14 Judgment No 45/37/10.

15 In the main proceedings, by its second ground of appeal, the Agency takes issue with the Regional Tax Court, Rome for having infringed Article 12 of Directive 76/308 and Article 6 of Legislative Decree No 69/2003. In that regard, the Agency alleges, in essence, that with regard to mutual assistance between Member States, complaints relating to the claim and to the instrument permitting enforcement – in particular the Greek authorities' alleged failure to notify the preliminary acts – must be raised before the national authority making the claim, namely the Greek competent authority.

16 By its third ground of appeal, the Agency claims that there has been an infringement of Article 3 of Legge n. 212 del 2000 (Law No 212/2000), in that the Regional Tax Court, Rome considered that the statement of reasons for the payment notice, which did not take account of the parallel procedures initiated in Italy for the recovery of the excise duties on the same transactions, was insufficient. In that regard, the referring court seeks to ascertain whether, when the enforcement procedure initiated in the context of mutual assistance between Member States in relation to the recovery of excise duties is contested, the question of the possible 'duplication of the claim for payment of excise duty' owing to the simultaneous initiation, by both the applicant Member State and the requested Member State of a claim based on the same taxable events may be examined.

31. In that context, Silcompa might be required to pay the same amounts twice, by way of excise duties and penalties, which, in particular in view of the considerable amounts involved, would impose a heavy financial burden in addition to duplicating legal costs.

32. The referring court observes that, although under Article 20(4) of Directive 92/12, in certain circumstances the excise duty originally levied (in another State) is to be refunded if the place of the offence is subsequently ascertained, that provision also states that such a finding must be made 'before the expiry of a period of three years from the date on which the accompanying document was drawn up', a period which in the present case expired long ago.

33. The referring court then asks whether, even in the context of the procedure relating to the enforcement measures, provided for in Article 12(3) of Directive 76/308, implementing the request for assistance on the basis of Article 6(1) of that directive, the existence of the conditions referred to in Article 20 of Directive 92/12, such as the place where the irregularity or offence was committed, may be examined, at least in circumstances such as those in question, where the same request is made both by the authorities of the Member State where the applicant authority is situated ('the applicant Member State') and those of the Member State where the requested authority is situated ('the requested Member State'), as the procedures relating to those requests are pending in the latter State.

34. According to the referring court, the verification in question does not seem to relate to the claim or the foreign instrument forming the subject matter of the action, or to call them into question, as provided for in Article 12(1) of Directive 76/308, but, on the contrary, concerns the condition and the basis of the lawfulness of the requests for assistance and, consequently, of all the enforcement measures. In particular, the main proceedings relate solely to the question whether, for the purposes of recovery under the cooperation arrangements, the assessment by the requested Member State of its entitlement to the claim itself is relevant and whether such a parameter is capable of being assessed before the courts.

35. In those circumstances, the Corte suprema di cassazione (Supreme Court of Cassation) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is Article 12(3) of [Directive 76/308], read in conjunction with Article 20 of [Directive 92/12], to be interpreted as meaning that, in proceedings brought against enforcement measures for the collection of excise duty, the court may examine (and if so within what limits) the question of the place (of actual release for consumption) where the irregularity or offence was actually committed where, as in the present case, the same claim, based on the same export transactions, is made, independently, against the taxable person by both the applicant State and the requested State and, in the requested State, proceedings are pending, contemporaneously, both in respect of the national claim and the action for the collection of duties for the other State, and would the court's finding in that regard invalidate the request for assistance and consequently all the enforcement measures?'

III. The procedure before the Court

36. Written observations were lodged by the Italian, Spanish and Swedish Governments and by the European Commission.

37. On 22 October 2019, the Court sent a request for information to the referring court concerning the factual and legal framework of the dispute in the main proceedings.

38. In its answer of 18 December 2019, received at the Court on 31 December 2019, the referring court replied to the Court.

39. Owing to the health crisis connected to the spread of the Covid-19 virus, the hearing set for 26 March 2020 was cancelled and, by decision of 1 April 2020, was replaced with questions to the parties for a written response. The Italian, Spanish and Swedish Governments and the Commission responded to the questions within the period prescribed by the Court.

IV. Analysis

A. Scope of the question referred

40. It should be observed, as a preliminary point, that, according to the Court's settled case-law, in the procedure laid down by Article 267 TFEU providing for cooperation with the national courts, it is for the Court to provide the referring court with an answer which will be of use to it and enable it to determine the case before it and that, with that in mind, the Court may have to reformulate the question submitted to it.[17]

41. In the present case, two proceedings relating to the recovery of two tax claims concerning the same transactions subject to excise duty and asserted by both the Italian and Greek administrative authorities are pending before the Italian courts. On the one hand, the claim asserted by the Italian authorities originates in the Agency's finding, in January 2000, that the goods shipped to Greece never reached the Greek customs authority and that the Greek customs stamps placed on the AADs were false. On the other hand, the claims asserted by the Greek authorities were based on the finding by those authorities that the products in question had actually been released for consumption, probably irregularly, on Greek territory, on the basis of which those authorities sent, in January 2005, requests for recovery of the claims to the Agency, pursuant to the relevant national provisions transposing Directive 76/308.

42. The question submitted by the referring court seeks to ascertain whether the conditions for the application of Article 20 of Directive 92/12, namely the conditions relating to the place where the offence or the irregularity was actually committed, may be examined by the court of the Member State in which the requested authority is situated which is hearing an action against the enforcement measures for recovery of a claim pursuant to Article 12(3) of Directive 76/308, where that enforcement entails, for the company concerned, a double imposition of excise duty on the same goods.[18]

43. It is apparent from the request for a preliminary ruling and from the answer to the questions of 18 December 2019[19] that the referring court has doubts as to the sufficiency of the reasoning of the act that formed the basis of the recovery procedure in Italy pursuant to Directive 76/308 and the need to assess the duplication of the claim in respect of the excise duties.

44. In those circumstances, by its question, the referring court must be understood to be asking, in essence, whether Article 12(3) of Directive 76/308, in conjunction with Article 20 of Directive 92/12, must be interpreted as precluding a court of the Member State where the requested authority is situated from verifying whether the enforcement of requests to recover claims in respect of excise

17 Judgment of 25 July 2018, *Dyson* (C-632/16, EU:C:2018:599, paragraph 47 and the case-law cited).

18 It should be noted, as the Commission observes, that the administrative procedures relating to the payment notices which are the subject matter of the main proceedings cannot be regarded as 'parallel' (paragraph 13 of the request for a preliminary ruling), since those notices were issued five years after the payment notices addressed to Silcompa in 2000 by way of Italian claims. In addition, subject to the formalities to be completed in accordance with Italian law, the case relating to the Italian claims seems to be closed, since Silcompa paid the claims in full under the settlement agreement (see point 24 of this Opinion).

19 See, in particular, paragraph 5.

duties, submitted to that authority pursuant to Article 6 of Directive 92/12, has the effect that a company is taxed twice for the same transactions and the same products, when that authority has itself previously recovered a claim in respect of those transactions, which is the subject of court proceedings in that State.

45. The key element of the question submitted by the referring court is the possible double imposition of the same excise duties by the Member State of dispatch and by the Member State of destination of the products in question. Thus, it is appropriate to begin the analysis by examining the rules in Directive 92/12 and to recall, in particular, certain rules relating to the chargeability of the excise duty for the purposes of that directive (Title B). While Directive 92/12 lays down, in a way, material rules relating to the power to impose excise duties, the *exercise* of that power, under the procedural rules, is governed, in particular, by Directive 76/308 (Title C).

B. The chargeability of excise duty under Directive 92/12

46. In order to ensure the establishment and functioning of the internal market,[20] Directive 92/12 aims to harmonise the material rules on the holding, movement and monitoring of products subject to excise duties, in order to ensure that the chargeability of excise duties is identical in all the Member States. That harmonisation makes it possible, in principle, to avoid double taxation in relations between Member States.[21] It is that objective that is pursued by Articles 6 and 20 of that directive, which lay down general and specific rules relating to the chargeability of excise duty. However, that objective is undermined if the Greek and Italian authorities are, in the present case, successively competent to levy excise duties on the same transaction.

1. General observations relating to the chargeability of excise duty

47. It should be observed, first, that, in accordance with Article 5(1) of Directive 92/12, the chargeable event for the purposes of that directive consists in the production, in the territory of the European Union, of products subject to excise duty or their importation into that territory. Second, since those duties constitute taxes on consumption, their chargeability should be as close as possible to the final consumer.[22] To that end, Article 6(1) of Directive 92/12 provides that excise duty on products subject to such duty, such as alcohol, is to become chargeable, in particular, at the time of their release for consumption.[23]

48. There is generally a period of time between the occurrence of the taxable event and the point at which the excise duty becomes chargeable. It is precisely during that period that the suspension arrangement defined in Article 4(c) of Directive 92/12 – as the tax arrangement applied, in particular, to the production of products, whereby excise duty is suspended – is applicable.[24] Under that

20 See, in particular, the fourth recital of Directive 92/12; see also judgments of 2 April 1998, *EMU Tabac and Others* (C-296/95, EU:C:1998:152, paragraph 22); of 5 April 2001, *Van de Water* (C-325/99, EU:C:2001:201, paragraph 39); and of 29 April 2004, *Commission* v *Germany* (C-240/01, EU:C:2004:251, paragraph 36).

21 Judgments of 30 May 2013, *Scandic Distilleries* (C-663/11, EU:C:2013:347, paragraphs 22 and 23); of 3 July 2014, *Gross* (C-165/13, EU:C:2014:2042, paragraph 17); and of March 2015, *Prankl* (C-175/14, EU:C:2015:142, paragraph 20). In addition, the desire to avoid double taxation is apparent from Article 8 of Directive 92/12, which authorises private individuals, in certain circumstances, to transport products to another Member State without paying duty, and from Article 22 of that directive, which provides for reimbursement by the Member State of departure in the cases referred to in Articles 7 and 10 of that directive.

22 As regards the principles underlying Directive 92/12, see Opinion of Advocate General Ruiz-Jarabo Colomer in *Van de Water* (C-325/99, EU:C:2000:614). See also, in legal literature, Berlin, D., *Politique fiscale, Commentaire J. Mégret*, vol. I, Éditions de l'Université de Bruxelles, 2012.

23 As the Commission emphasises, it is necessary to distinguish the release of products for consumption from the consumption of those products.

24 Judgment of 5 April 2001, *Van de Water* (C-325/99, EU:C:2001:201, paragraph 31).

arrangement, to which the products in question in the main proceedings were subject, the excise duty becomes chargeable only at the time when the products depart from that arrangement and are released for consumption. Thus, the excise duty on the products covered by that arrangement is not yet chargeable, although the taxable event has already occurred. [25]

49. A general rule follows from Article 4(b) and Article 11(2) of Directive 92/12, under which the production, processing or holding of products subject to excise duty and placed under a suspension arrangement can take place only in a tax warehouse duly authorised by the Member State in which those products are situated. Under Article 15 of that directive, the movement of products subject to excise duty under suspension arrangements can take place only between tax warehouses, the authorised warehousekeeper having a central role in the context of the procedure for the movement of those products. [26]

50. Thus, the provisions of Directive 92/12, taken as a whole, lay down a uniform scheme for products subject to excise duty imposed by the Member States, based on the principle that excise duties are chargeable only once. Compliance with the rules on the holding, movement and monitoring of products subject to excise duty is an indispensable condition of the attainment of the objectives of Directive 92/12. However, it cannot be precluded that, in practice, those rules will be disregarded, and it is for that reason that the legislature laid down the specific rules found in Directive 92/12.

2. The scope of Article 20 of Directive 92/12

51. According to legal literature, the cases most likely to involve fraud are those where the offence or irregularity is committed during the movement of products subject to the suspension arrangement. [27] Since the offence or irregularity may take place in each State in which the products move, Article 20 of Directive 92/12 aims to prevent conflicts of jurisdiction between Member States seeking to tax the products that were subject to the offence or irregularity. [28] Thus, the Court has already held that that provision determines the Member State that alone is entitled to levy excise duties where an offence or irregularity has been committed in the course of a movement, such as an improper departure from a suspension arrangement. [29]

52. In particular, paragraphs 1 and 2 of Article 20 of Directive 92/12 both refer to the situation in which an offence or irregularity has been committed *in the course of movement*. Paragraph 1 concerns, in particular, the situation in which the place of that offence or irregularity is known, whereas paragraph 2 relates to the situation in which an offence or irregularity has been detected without it being possible to determine the place where it was committed. In that case, the infringement is to be deemed to have been committed in the Member States where it was detected. [30]

25 Judgments of 12 December 2002, *Cipriani* (C-395/00, EU:C:2002:751, paragraph 42); of 29 April 2010, *Dansk Transport og Logistik* (C-230/08, EU:C:2010:231, paragraph 78), and of 28 January 2016, *BP Europa* (C-64/15, EU:C:2016:62, paragraph 22).

26 See judgment of 2 June 2016, *Kapnoviomichania Karelia* (C-81/15, EU:C:2016:398, paragraphs 31 and 32), as regards the system of liability established by Directive 92/12 for all the risks inherent in the movement of products subject to excise duty under such an arrangement. That warehousekeeper is therefore designated as liable for the payment of excise duties in cases where an offence or an irregularity involving the chargeability of such duties has been committed in the course of the movement of those products.

27 See, in that regard, Berlin, D., *Jurisclasseur Europe Traité*, Vol. No 1650, 'Fiscalité indirecte', 1 January 2016, paragraph 56.

28 Opinion of Advocate General Mischo in *Cipriani* (C-395/00, EU:C:2002:209, point 74).

29 Judgments of 12 December 2002, *Cipriani* (C-395/00, EU:C:2002:751, paragraph 43), and of 13 December 2007, *BATIG* (C-374/06, EU:C:2007:788, paragraph 44).

30 That interpretation finds support in the *travaux préparatoires* of Directive 2008/118, which explain the logic of Article 20 of Directive 92/12. See Proposal for a Council Directive concerning the general arrangements for excise duty (COM/2008/0078 final).

53. Article 20(3) of Directive 92/12 states that when products subject to excise duty do not arrive at their destination and it is not possible to determine where the offence or irregularity was committed, that offence or irregularity is to be deemed to have been committed in the Member State of departure, which is therefore entitled to collect the excise duties.[31] Thus, that provision governs the situation in which the products in question do not arrive at their destination. In that case, it is the State of departure that is declared competent.

54. Although paragraphs 2 and 3 of Article 20 contain the abovementioned presumptions, Article 20(4) of Directive 92/12 sets out a 'corrective' mechanism where, subsequently, the presumption falls owing to factual circumstances that make it possible to establish the jurisdiction of a Member State other than the one designated in application of that presumption. For that purpose, paragraph 4 states that if, before the expiry of a period of three years from the date on which the AAD was drawn up, the Member State where the offence or irregularity was actually committed is ascertained,[32] it is for that Member State to collect the excise duty payable.

55. A number of conclusions may be drawn from the abovementioned provisions of Directive 92/12, taken together. In the first place, the excise duties become chargeable not only when products are released for consumption but also upon their departure, including irregular departure, from a suspension arrangement. As Advocate General Ruiz-Jarabo Colomer has emphasised, 'if dutiable activities (importation or manufacture) take place outside a suspension arrangement or if departure from the arrangement occurs at a time other than the time of release for consumption, the [EU] legislature treats those situations in the same way as a release for consumption, thereby causing them to trigger chargeability and preventing the goods subject to excise duty from avoiding tax'.[33]

56. In the second place, since the products subject to excise duty can be released for consumption only once, the place of the offence or irregularity committed in the course of movement can be only one single place. That conclusion is underscored by the fact that the offence or irregularity committed in the course of the movement of products is treated as the release of those products for consumption and by the existence of a 'corrective' mechanism in Article 20(4) of Directive 92/12. Thus, while, in practice, a number of successive offences or irregularities may take place in different Member States in the course of the movement of a single product subject to excise duties (the multiple offence or irregularity hypothesis), only the first of those offences or irregularities, namely the one that had the consequence of discharging the products in the course of movement from the excise duties suspension arrangement, has legal value for the purposes of Article 20 of Directive 92/12, since such an offence or such an irregularity had the effect of releasing the products, in all likelihood, for consumption.

3. The 'corrective' mechanism in Article 20(4) of Directive 92/12

57. Article 20(4) of Directive 92/12 establishes a 'corrective' mechanism whereby if, before the expiry of a period of three years *from the date on which the AAD was drawn up*,[34] the Member State where the offence or irregularity was actually committed is ascertained, that Member State is to collect the excise duty at the rate in force on the date when the goods were dispatched. In that case, as soon as evidence of collection has been provided, the excise duty originally levied is to be refunded. In so far as

31 Judgment of 12 December 2002, *Cipriani* (C-395/00, EU:C:2002:751, paragraph 47).

32 The Court has consistently held that individuals are entitled to obtain a refund of charges levied in a Member State in breach of Community provisions. That right is the consequence and the complement of the rights conferred on individuals by Community provisions as interpreted by the Court. The Member State in question is therefore required, in principle, to refund charges levied in breach of Community law (judgment of 2 October 2003, *Weber's Wine World and Others*, C-147/01, EU:C:2003:533, paragraph 93 and the case-law cited).

33 Opinion of Advocate General Ruiz-Jarabo Colomer in *Van de Water* (C-325/99, EU:C:2000:614, point 38).

34 In that regard, Article 19 of Directive 92/12 provides that the AAD is to be drawn up in quadruplicate, one copy to be kept by the consignor, one copy for the consignee, one copy to be returned to the consignor for discharge and one copy for the competent authorities of the Member State of destination. The AAD is therefore drawn up at the time of dispatch of the products.

Article 20(1) to (3) contains the presumptions examined above, paragraph 4 of that article contains a mechanism covering cases where the actual situation diverges from the presumed situation. However, in view of the principle of legal certainty, that mechanism is applicable only within three years from the date on which the AAD was drawn up.

58. Thus, Article 20(4) lays down two cumulative conditions: the offence or irregularity must have been committed in a different Member State from that in which the excise duty was paid, and not more than three years must have elapsed since the AAD was drawn up. It thus follows from the structure of Article 20(4) of Directive 92/12 that compliance with that period must be examined only if the Member State where the offence or irregularity was actually committed is ascertained and is different from the Member State originally determined.

4. The application of the principles described above to the present case

59. From the outset, it should be observed that examination of the jurisdiction of the Italian and Greek authorities is complicated by the fact that the request for a preliminary ruling is short on detail about the factual and legal situations in question. Furthermore, in the absence of specific details, it is not possible to identify the precise problem of interpretation that might be raised in relation to Directive 92/12. Thus, although it is for the referring court to carry out the necessary factual verifications and to apply them to the dispute before it, the fact nonetheless remains that it is for the Court to interpret EU law in the light of the factual and legal situation as described by the referring court, in order to provide that court with such guidance as will assist it in resolving the dispute before it.[35]

60. It should be borne in mind, first, that in the cases relating to the claims asserted by the Italian authorities and referred to in point 22 of this Opinion, it is apparent from the request for a preliminary ruling that the Agency considered that the offence or irregularity consisted in the failure to discharge the suspension arrangement, since the AADs received by Silcompa relating to the shipments of the products concerned had been falsified by the affixing of a false Greek customs stamp. Thus, the Agency considered that the falsification of the AADs constituted an offence or irregularity committed in Italy and, consequently, an irregular departure from the suspension arrangement, which meant that the excise duties were chargeable in Italy.[36] In January 2000, the Agency therefore issued the relevant payment notices. Second, in the cases relating to the debts claimed by the Greek authorities and forming the basis of the payment notice contested in the main proceedings (referred to in points 26 and 27 of this Opinion), it must be assumed that the Greek authorities in all likelihood established their jurisdiction on the basis of Article 6(1)(a) of Directive 92/12, since the products were released for consumption, irregularly, in Greece, although that must be verified by the referring court.[37]

61. It follows from the foregoing that, since the Italian authorities established that the products in question shipped by Silcompa under the excise duty suspension arrangement did not reach their destination, in Greece, and that the relevant AADs had been falsified, those products left that arrangement because of an offence or irregularity committed in the course of the movement of products subject to excise duty, within the meaning of Article 20 of Directive 92/12. It thus appears that, under paragraph 1 of that article, the Agency was justified in collecting the tax debt by applying the relevant provisions of national law. As already stated above, the structure of Article 20 of Directive 92/12 is based, as a whole, on the concept that an offence or irregularity committed in the course of a

35 Judgment of 9 November 2006, *Chateignier* (C-346/05, EU:C:2006:711, paragraph 22).

36 The file submitted to the Court does not make clear, however, which provision of Directive 92/12 was applied in order to substantiate the view that the excise duty was chargeable in Italy. Since the first subparagraph of Article 20(1) of Directive 92/12 provides that the authorised warehousekeeper is to be responsible for payment of the excise duty where an offence or irregularity has been committed in the course of a movement of products under the duty-suspension arrangements, it must be assumed that that provision was applied in the present case.

37 It is true that the request for a preliminary ruling is not particularly precise about the provisions of Directive 92/12 that were applied by the Greek authorities. That element must therefore be verified by the referring court.

movement of products subject to excise duties constitutes a release of those products for consumption that can happen only once for the same products. In spite of that rule, the Agency, in 2005, accepted the request for assistance submitted by the Greek authorities with a view to collecting the excise duty claims issued by the Greek authorities with respect to the same company and relating to the same products.

62. In the present case, the Court has no specific information on which to assess whether the offence or irregularity was committed in a Member State other than Italy. The unlawful marketing, on Greek territory, of the ethyl alcohol dispatched by Silcompa, which led to the criminal proceedings in Greece, must indeed be regarded as an offence or irregularity in respect of the products in question, but, in the light of the facts of the main proceedings and the general structure of Directive 92/12, it is only a consequence of the offence or irregularity previously committed in Italy.

63. In those circumstances, I am of the view that, having regard to that determination to be carried out by those authorities or courts, the analysis of the second condition set out in Article 20(4) of Directive 92/12, namely the question as to at what point the three-year period for the purposes of the application of the 'corrective' mechanism established in that provision begins to run, is of no relevance in the context of the present preliminary ruling proceedings. As I have already stated, that period must be examined only if the Member State where the offence or irregularity was actually committed is ascertained and is different from the Member State originally determined, which does not appear to be the case in the main proceedings.

64. In that context, the question arises whether and how the referring court, as the court of the requested Member State, may review the presence of a possible duplication of claims relating to excise duties by two authorities of two different Member States.

C. Directive 76/308 on mutual assistance

1. The legal context of the analysis

65. Although the creation of an internal market has enabled undertakings to take full advantage of the economic area offered within that market, the national tax authorities, for which borders still exist, were provided, in the 70s, with a number of legal instruments concerning assistance to ensure greater efficiency in the sphere of taxation.[38] Directive 76/308 thus aims to implement the principle of mutual confidence, by facilitating the collection of debts between Member States.[39] The implementation of the system of mutual assistance established by that directive depends on the existence of such confidence between the national authorities concerned.[40]

66. That directive provides, first, for three separate and particular forms of mutual assistance which the requested authority is required to provide at the request of the applicant authority, namely a request for information,[41] a request to notify to the addressee the documents relating to a claim which emanate from the Member State where the applicant authority is situated[42] and a request to recover claims which are the subject of an instrument permitting their enforcement.[43] Second, Directive

38 Berlin, D., 'Synthèse – Droit fiscal de l'Union européenne', *JurisClasseur Europe Traité*, 1 May 2019, paragraph 49.

39 See Michel, V., 'Juridiction compétente pour le contrôle des mesures de recouvrement', Revue Europe, No 3, March 2010, commentary No 109, and also Maitrot de la Motte, A., *Droit fiscal de l'Union européenne*, Bruylant, 2016, paragraph 479 et seq.

40 See judgment of 26 April 2018, *Donnellan* (C-34/17, EU:C:2018:282, paragraphs 40 and 41).

41 Under Article 4 of Directive 76/308. As regards the exchange of information, see Fernández Marín, F., 'The Right of Defence and the exchange of tax information ruled by EU law', *Studi Tributari Europei*, vol. 8, 2018, p. II, p. 25-95.

42 Under Article 5 of Directive 76/308.

43 Under Article 6 of Directive 76/308.

76/308 contains specific provisions relating to the determination of jurisdiction between the applicant Member State and the requested Member State for the request in question. The case in the main proceedings concerns the request for assistance relating to recovery, since the Greek authorities made such a request of the Agency.

(a) The division of powers provided for in Article 12 of Directive 76/308

67. Article 12 of Directive 76/308 provides for a division of powers between the bodies of the applicant Member State and those of the requested Member State to hear disputes relating to the claim, the instrument permitting its enforcement or the enforcement measures. As regards such disputes, the choice of the competent body of the Member State to which a party must make application depends on whether the complaint relates, on the one hand, to the claim or the instrument permitting its enforcement or, on the other, to the recovery measures. As Advocate General Bobek has observed, Directive 2010/24, which succeeds Directive 76/308, provides, as a general rule, for the application of the *lex auctoritatis* rule, according to which the acts carried out by the authorities of a Member State (and hence their validity) are governed by the law of that Member State.[44] It follows that the competent body of each Member State examines the legality only of acts carried out by and measures adopted by the authorities of that Member State in the light of the legislation of that State.[45]

68. Thus, according to Article 12(1) of Directive 76/308, when the claim or the instrument permitting its enforcement is contested in the course of the recovery procedure, the action is to be brought before the competent body of the applicant Member State. If, on the other hand, it is the recovery measures taken in the Member State in which the requested authority is situated that are being contested, the action is to be brought, pursuant to Article 12(3) of Directive 76/308, before the competent body of that Member State.[46]

69. In order to ensure that the interested party is able to make full use in the course of the recovery procedure of its right to contest the claim or the instrument permitting its enforcement, Article 12(2) of Directive 76/308 provides that, pending the decision of the competent body of the applicant Member State, the requested authority is to suspend the enforcement procedure as soon as it has been informed that a case concerning the contestation of the claim or the instrument permitting its enforcement is pending.

70. As is apparent from the Court's case-law, the division of powers described in this Opinion is the corollary of the fact that the claim and the instrument permitting its enforcement are established on the basis of the law in force in the Member State in which the applicant authority is situated, while, for enforcement measures in the Member State in which the requested authority is situated, the latter authority applies, pursuant to Articles 5 and 6 of Directive 76/308, the provisions which its national law lays down for corresponding measures.[47] Furthermore, it follows from Article 8(1) of that directive that the instrument permitting enforcement of the claim is to be directly recognised and automatically treated as an instrument authorising enforcement of a claim of the Member State where the requested authority is situated, which to my mind constitutes an expression of the principle of mutual confidence. It follows from that division of powers that, in principle, the requested authority cannot question the validity and the enforceability of the act or the decision in respect of which assistance with a view to recovery is requested by the applicant authority. However, the case-law has rendered that principle less rigid.

44 Opinion of Advocate General Bobek in *Metirato* (C-695/17, EU:C:2018:944, point 40).

45 Opinion of Advocate General Bobek in *Metirato* (C-695/17, EU:C:2018:944, point 43).

46 See also the 10th recital of Directive 76/308, where it is stated that the action contesting the claim must be brought before the competent body of the Member State in which the applicant authority is situated and that the requested authority must suspend any enforcement proceedings which it has begun until a decision is taken by that competent body.

47 Judgments of 14 January 2010, *Kyrian* (C-233/08, EU:C:2010:11, paragraph 40), and of 14 March 2019, *Metirato* (C-695/17, EU:C:2019:209, paragraph 34).

(b) The possibility for the national authorities to refuse to grant mutual assistance

71. As it is apparent from Article 8(1) of Directive 76/308 that the instrument permitting enforcement of the claim is to be directly recognised and automatically treated as an instrument permitting the enforcement of a claim of the Member State in which the requested authority is situated, it also follows from Article 6 of that directive that the requested authority 'shall' recover such claims, since that directive provides for the automatic implementation of that recovery by the requested authority. Furthermore, no specific provision allows a recovery request to be refused.[48] In the absence of such provisions, the Court's case-law has established a basis on which the national authorities and bodies may, exceptionally, refuse to grant assistance in relation to recovery where such assistance is contrary to the public policy of that State.

72. In that regard, in its judgment in *Kyrian*,[49] the Court held that it 'cannot be ruled out that, *exceptionally*, the bodies of the Member State in which the requested authority is situated will be authorised to review whether the enforcement of the instrument is liable, in particular, to be contrary to *the public policy of that last mentioned State* and, where appropriate, to refuse to grant assistance in whole or in part or to make it subject to fulfilling certain conditions'.[50] According to the Court, 'it is hard to imagine that an instrument permitting the enforcement of the claim would be enforced by that Member State if that enforcement were liable to be contrary to [its] *public policy*'.[51] In a subsequent judgment, the judgment in *Donnellan*,[52] the Court applied that principle and authorised such a refusal where the implementation of the provisions of the directive on mutual assistance led to an infringement of fundamental rights owing to failure to notify the person concerned, namely Article 47 of the Charter of Fundamental Rights of the European Union.[53] In doing so, the Court applied its standard case-law on the limitation of the principle of mutual confidence[54] in a context in which the application of that principle led to a possible infringement of fundamental rights.

73. Nonetheless, in the present case, the Court is required to determine whether there are grounds for refusing such a request for assistance where it is established that there is a duplication of a tax claim relating to excise duties.[55] Where the Member State applies EU law, may such a duplication constitute a ground for refusing a request for assistance relating to the collection of tax? In that regard, before examining the hypothesis of a possible breach of public policy or fundamental rights, I consider it appropriate to ascertain whether the answer to that question may not arise from the relevant provisions of secondary law.

48 Article 4(3) of Directive 76/308 sets out grounds for challenge. However, that provision concerns the request for information, which is not the subject matter of the present case.

49 Judgment of 14 January 2010, *Kyrian* (C-233/08, EU:C:2010:11).

50 Judgment of 14 January 2010, *Kyrian* (C-233/08, EU:C:2010:11, paragraph 42), confirmed by the judgment of 26 April 2018, *Donnellan* (C-34/17, EU:C:2018:282, paragraph 47). Emphasis added.

51 Judgment of 14 January 2010, *Kyrian* (C-233/08, EU:C:2010:11, paragraph 43); confirmed by the judgment of 26 April 2018, *Donnellan* (C-34/17, EU:C:2018:282, paragraph 48). Emphasis added.

52 Judgment of 26 April 2018, *Donnellan* (C-34/17, EU:C:2018:282).

53 The Court has held, in particular, that Article 14(1) and (2) of Directive 2010/24 must be interpreted as not precluding an authority of a Member State from refusing to enforce a request for recovery concerning a claim relating to a fine imposed in another Member State on the ground that the decision imposing that fine was not properly notified to the person concerned before the request for recovery was made to that authority pursuant to that directive (judgment of 26 April 2018, *Donnellan*, C-34/17, EU:C:2018:282).

54 See, as concerns the limitation of the principle of mutual confidence, judgments of 21 December 2011, *N.S. and Others* (C-411/10 and C-493/10, EU:C:2011:865); of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198); and of 25 July 2018, *Minister for Justice and Equality (Deficiencies of the judicial system)* (C-216/18 PPU, EU:C:2018:586).

55 Unlike the judgments of 14 January 2010, *Kyrian* (C-233/08, EU:C:2010:11), and of 26 April 2018, *Donnellan* (C-34/17, EU:C:2018:282), the present case does not concern the procedures for notification, which seems, to my mind, to preclude the application of public policy within the meaning of that case-law.

2. The obligation for the bodies of the applicant Member State to verify the competence of the authorities of that State

74. In my view, the question referred for a preliminary ruling can be answered only in the negative.

75. As already stated in points 47 to 50 of this Opinion, it follows from the structure of Directive 92/12 that a product subject to excise duty can be released for consumption only once, since excise duties are chargeable when a product is released for consumption, irrespective of whether it is released lawfully or irregularly. For the purposes of such chargeability, under Article 20 of Directive 92/12, the departure of products from the excise duty suspension arrangement as a result of an offence or irregularity committed in the course of their movement is treated as the release of those products for consumption. However, as stated in point 56 of this Opinion, in accordance with that provision, only the first offence or irregularity resulting in the departure of the products in the course of movement from the excise duty suspension arrangement is considered to be relevant. Nonetheless, the existence of disputes concerning the determination of the place of such an offence or such an irregularity cannot be precluded in practice.

76. Therefore, in order to answer the question submitted by the referring court as to whether the court of the requested State may verify, in the context of the procedure relating to the examination of the lawfulness of the measures enforcing recovery, the determination of the place where the offence or irregularity was committed, it is appropriate, as regards the provisions of Directive 76/308 referred to in points 67 to 70 of this Opinion, to decide whether such a determination concerns the claim, the instrument permitting its enforcement or enforcement measures, within the meaning of Article 12 of Directive 76/308. In my view, the answer to that question may be inferred from the provisions of Directive 92/12 taken as a whole and, in particular, from Articles 6 and 20, the purpose of which, as I have already stated, is to determine the Member States' powers to levy excise duties on the products covered by that directive.

77. In particular, it follows from Articles 6 and 20 of Directive 92/12 that the jurisdiction of a Member State to levy excise duty on products, such as alcohol, is connected with (i) their release for consumption, under Article 6 of that directive, (ii) the place where the products, while in transit, left the duty suspension arrangement, in accordance with Article 20(1) to (3) of that directive, or (iii) the place where the offence or irregularity was actually committed and which is determined subsequently, in application of Article 20(4) of that directive. Having regard to the equivalence of the grounds of chargeability set out in Articles 6 and 20 and described above, the only conclusion which to my mind can be drawn is that the question relating to the place of release for consumption of the products subject to duty or to the place where the offence or irregularity was committed is, first and foremost, a substantive question relating to the actual existence of the tax debt.[56] Since Directive 92/12 makes the levying of the duty conditional, for a Member State, on a particular event occurring on its territory, it seems clear to me that a dispute relating to the determination of the place of an offence or irregularity, in accordance with Article 20 of that directive, must also be considered to be a question relating to the claim or the instrument permitting its enforcement, within the meaning of Article 12 of Directive 76/308. Thus, examination of that question cannot, having regard to the logic of that directive, come within the jurisdiction of the court of the requested Member State.

78. However, the situation described in the order for reference, namely the situation in which a company is charged the excise duties for a shipment of products twice, does not seem to be consistent with the structure of Directive 92/12 taken as a whole. Although the file submitted to the Court does not disclose any factors that would justify, in the present case, the requested Member State being entitled to refuse to comply with the request for assistance made of it by relying on an infringement of its public policy or of fundamental rights, within the meaning of the case-law referred

56 See, by analogy, with respect to the dichotomy between the existence of the tax debt and its recovery in the context of customs duties matters, judgment of 20 October 2005, *Transport Maatschappij Traffic* (C-247/04, EU:C:2005:628, paragraph 26 et seq.).

to in point 72 of this Opinion, the court of the requested Member State must not, however, (i) disregard the available information relating to a similar measure imposed on the same undertaking in that Member State, namely a Member State other than that which submitted the request relating to a transaction concerning the same products and (ii) enforce that request for assistance blindly and mechanically.

79. In that regard, the principle of mutual confidence, as given concrete expression by Directive 76/308, necessarily implies that all Member States are to comply, with all requisite diligence, with the requirements of EU law. In so far as, as it apparent from the file submitted to the Court, Silcompa brought an action relating to the tax claim concerning the excise duties imposed by the Greek authorities and associated with the same transactions and the same products as those that were already subject to taxation in Italy, it is for the Greek court hearing that action to ascertain whether the Greek authorities were competent to levy excise duty on the products in question, in so far as, on the basis of the information actually available, the products left the excise duty suspension arrangement, within the meaning of Article 3 and Article 20(1) of Directive 92/12, because of an offence or irregularity committed in Italy. It follows that, pending the verifications thus described by the court of the applicant Member State, the court of the requested state should, in accordance with Article 12(2) of Directive 76/308, suspend the procedure on the implementation of the request for assistance.

V. Conclusion

80. In the light of the foregoing considerations, I propose that the Court should answer the question for a preliminary ruling referred by the Corte suprema di cassazione (Supreme Court of Cassation, Italy) as follows:

Article 12(3) of Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures, as amended by Council Directive 2001/44/EC of 15 June 2001, read in conjunction with Articles 6 and 20 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, must be interpreted as meaning that the conditions relating to the place where the offence or irregularity was actually committed, within the meaning of Article 20 of Directive 92/12, cannot be examined by the court of the Member State in which the requested authority is situated, before which an action against measures to enforce recovery of a claim under Article 12(3) has been brought. However, as the double imposition of excise duty by more than one Member State in respect of the same products does not comply with the general structure of Directive 92/12, it is for the court of the Member State hearing an action relating to the tax claim concerning the excise duties associated with the same transactions and the same products as those that were already taxed in another Member State to verify whether the applicant authorities were competent to levy that excise duty.