Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

9 June 2022*

(Request for a preliminary ruling – Taxation – Excise duties – Directive 2008/118/EC – Article 11 – Reimbursement of excise duty on excise goods released for consumption – Directive 2011/64/EU – point (b) of the first paragraph of Article 17 – Reimbursement of excise duty already paid, by means of tax markings, affixed to manufactured tobacco destroyed under administrative supervision – Obligation of Member States to adopt regulations providing for the reimbursement of excise duties on manufactured tobacco released for consumption and destroyed under customs supervision – None)

In Case C-55/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria), made by decision of 6 January 2021, received at the Court on 28 January 2021, in the proceedings

Direktor na Agentsia 'Mitnitsi'

v

'IMPERIAL TOBACCO BULGARIA' EOOD,

THE COURT (Tenth Chamber),

composed of I. Jarukaitis, President of Chamber, M. Ilešič (Rapporteur) and Z. Csehi, Judges,

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Direktor na Agentsia 'Mitnitsi', by P. Tonev,

– 'IMPERIAL TOBACCO BULGARIA' EOOD, by T. Nenov and D. Vuchkov, advokati,

– the Bulgarian Government, by M. Georgieva and L. Zaharieva, acting as Agents,

* Language of the case: Bulgarian.

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by V. Bozhilova and C. Perrin, acting as Agents,

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

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 11 of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC (OJ 2009 L 9, p. 12) and point (b) of the first paragraph of Article 17 of Council Directive 2011/64/EU of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco (OJ 2011 L 176, p. 24).

2 The request has been made in proceedings between the Direktor na Agentsia 'Mitnitsi' (Director of the Customs Authority, Bulgaria) ('the Director of the Authority') and 'IMPERIAL TOBACCO BULGARIA' EOOD, established in Bulgaria ('Imperial'), concerning the refund of excise duties.

Legal framework

European Union law

Directive 2008/118

3 According to recitals 8, 9 and 31 of Directive 2008/118 :

'(8) Since it remains necessary for the proper functioning of the internal market that the concept, and conditions for chargeability, of excise duty be the same in all Member States, it is necessary to make clear at [EU] level when excise goods are released for consumption and who the person liable to pay the excise duty is.

(9) Since excise duty is a tax on the consumption of certain goods, duty should not be charged in respect of excise goods which, under certain circumstances, have been destroyed or irretrievably lost.

…

(31) Member States should be able to provide that goods released for consumption carry tax markings …. The use of these markings or marks should not place any obstacle in the way of intra-[EU] trade.

Since the use of these markings or marks should not give rise to a double taxation burden, it should be made clear that any amount paid or guaranteed to obtain such markings or marks is to be reimbursed, remitted or released by the Member State which issued the marks if excise duty has become chargeable and has been collected in another Member State.

However, in order to prevent any abuse, Member States which issued such markings or marks should be able to make reimbursement, remittance or release conditional on the presentation of evidence that they have been removed or destroyed.'

4 Article 1(1) of that directive provides:

'This Directive lays down general arrangements in relation to excise duty which is levied directly or indirectly on the consumption of the following goods (hereinafter "excise goods"):

…

(c) manufactured tobacco covered by [Council Directive] 95/59/EC [of 27 November 1995 on taxes other than turnover taxes which affect the consumption of manufactured tobacco (OJ 1995 L 291, p. 40)], [Council Directive] 92/79/EEC [of 19 October 1992 on the approximation of taxes on cigarettes (OJ 1992 L 316, p. 8)] and [Council Directive] 92/80/EEC [of 19 October 1992 on the approximation of taxes on manufactured tobacco other than cigarettes (OJ 1992 L 316, p. 10)].'

5 Article 2 of Directive 2008/118 states:

'Excise goods shall be subject to excise duty at the time of:

(a) their production … within the territory of the [European Union];

(b) their importation into the territory of the [European Union].'

6 Article 4 of that directive provides:

'For the purpose of this Directive as well as its implementing provisions, the following definitions shall apply:

1. "authorised warehousekeeper" means a natural or legal person authorised by the competent authorities of a Member State, in the course of his business, to produce, process, hold, receive or dispatch excise goods under a duty suspension arrangement in a tax warehouse;

…

7. "duty suspension arrangement" means a tax arrangement applied to the production, processing, holding or movement of excise goods not covered by a customs suspensive procedure or arrangement, excise duty being suspended;

…

11. "tax warehouse" means a place where excise goods 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.'

7 Chapter II of that directive, entitled 'Chargeability, reimbursement, exemption', consists of three sections. Section 1, entitled 'Time and place of chargeability', includes Articles 7 to 10 thereof.

8 According to Article 7 of that directive:

‘1. Excise duty shall become chargeable at the time, and in the Member State, of release for consumption.

2. For the purposes of this Directive, “release for consumption” shall mean any of the following:

(a) the departure of excise goods, including irregular departure, from a duty suspension arrangement;

…

4. The total destruction or irretrievable loss of excise goods under a duty suspension arrangement, as a result of the actual nature of the goods, of unforeseeable circumstances or *force majeure*, or as a consequence of authorisation by the competent authorities of the Member State, shall not be considered a release for consumption.

For the purpose of this Directive, goods shall be considered totally destroyed or irretrievably lost when they are rendered unusable as excise goods.

The total destruction or irretrievable loss of the excise goods in question shall be proven to the satisfaction of the competent authorities of the Member State where the total destruction or irretrievable loss occurred or, when it is not possible to determine where the loss occurred, where it was detected.

5. Each Member State shall lay down its own rules and conditions under which the losses referred to in paragraph 4 are determined.’

9 Article 11, included in Section 2, entitled ‘Reimbursement and remission’, of Chapter II of Directive 2008/118, provides:

‘In addition to the cases … provided for by the Directives referred to in Article 1, excise duty on excise goods which have been released for consumption may, at the request of a person concerned, be reimbursed or remitted by the competent authorities of the Member State where those goods were released for consumption in the situations fixed by the Member States and in accordance with the conditions that Member States shall lay down for the purpose of preventing any possible evasion or abuse.

…’

10 Article 15(2) of that directive provides:

‘The production, processing and holding of excise goods, where the excise duty has not been paid, shall take place in a tax warehouse.’

11 Article 39 of that directive provides:

‘1. Without prejudice to Article 7(1), Member States may require that excise goods carry tax markings … at the time when they are released for consumption in their territory …

…

3. Without prejudice to any provisions they may lay down in order to ensure that this Article is implemented properly and to prevent any evasion, avoidance or abuse, Member States shall ensure that tax markings … do not create obstacles to the free movement of excise goods.

Where such markings … are affixed to excise goods, any amount paid or guaranteed to obtain such markings or marks, apart from the fees for issuing them, shall be reimbursed, remitted or released by the Member State which issued them if excise duty has become chargeable and has been collected in another Member State.

The Member State which issued these markings or marks may nevertheless subject the reimbursement, remittance or release of the amount paid or guaranteed to the presentation of evidence, to the satisfaction of its competent authorities, that they have been removed or destroyed.

…'

Directive 2011/64

12 According to recitals 2, 15 and 16 of Directive 2011/64:

'(2) The [European] Union's fiscal legislation on tobacco products needs to ensure the proper functioning of the internal market and, at the same time, a high level of health protection, as required by Article 168 [TFEU], bearing in mind that tobacco products can cause serious harm to health and that the [European] Union is Party to the World Health Organisation's Framework Convention on Tobacco Control (FCTC). …

…

(15) … A certain degree of convergence between the tax levels applied in the Member States would help to reduce fraud and smuggling within the [European] Union.

(16) Such convergence would also help to ensure a high level of protection for human health. The level of taxation is a major factor in the price of tobacco products, which in turn influences consumers' smoking habits. Fraud and smuggling undermine tax induced price levels, in particular of cigarettes and fine-cut tobacco intended for the rolling of cigarettes, and thus jeopardise the achievement of tobacco control and health protection objectives.'

13 Article 1 of that directive provides:

'This Directive lays down general principles for the harmonisation of the structure and rates of the excise duty to which the Member States subject manufactured tobacco.'

14 According to Article 16(1) of that directive:

'At the final stage of harmonisation of the excise duty, at the latest the rules for collecting the excise duty shall be harmonised. During the preceding stage, the excise duty shall, in principle, be collected by means of tax stamps. …'

15 Article 17 of that directive is worded as follows:

‘The following may be exempted from excise duty or excise duty already paid on them may be refunded:

(a) denatured manufactured tobacco used for industrial or horticultural purposes;

(b) manufactured tobacco which is destroyed under administrative supervision;

(c) manufactured tobacco which is solely intended for scientific tests and for tests connected with product quality;

(d) manufactured tobacco which is reworked by the producer.

Member States shall determine the conditions and formalities to which the abovementioned exemptions or refunds are subject.’

16 Directive 2011/64 codified and repealed Directives 92/79, 92/80 and 95/59 with effect from 1 January 2011. In accordance with the second paragraph of Article 21 thereof, references to the repealed directives are to be construed as references to that directive.

Bulgarian law

17 Article 25 of the Zakon za aktsizite i danachnite skladove (Law on excise duties and tax warehouses, DV No 91 of 15 November 2005), in the version applicable to the dispute in the main proceedings (‘the ZADS’) provides:

‘(1) Until the excise goods are released for consumption, authorised warehousekeepers and registered persons are not liable for excise duty:

1. in the case of destruction under the supervision of the customs authorities of excise goods, including goods bearing an excise stamp, and in the case of the disposal and destruction of excise stamps under the conditions laid down in Article 64(21) and (22).

…’

18 Article 27 of ZADS states:

‘(1) On written request or on the initiative of the customs authorities, excise duties unduly paid or to be repaid shall be reimbursed or set off against public debts due from the person concerned, which have been collected by the [Agentsia ‘Mitnitsi’ (Customs Authority, Bulgaria)].

…’

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

19 Imperial is a licensed warehousekeeper with a tax warehouse in Sofia (Bulgaria). On 2 April 2019, it submitted to the Teritorialna direktsiya Yugozapadna kam Agentsiya 'Mitnitsi' (South-West Regional Directorate of the Customs Authority, Bulgaria) an application for reimbursement of excise duties in the total amount of 90 437.69 leva (BGN) (approximately EUR 46 300), relying on Article 27(1) of the ZADS.

20 In support of its claim for reimbursement, Imperial relied on the fact that the goods in question, which had been released for consumption, were tobacco products which it owned and which had been destroyed under customs supervision on 1 July 2016.

21 During an inspection, the customs authorities found that the goods to which the application related had been released for consumption by Imperial by means of excise tax documents attached to its application and that the excise duty on those goods had been paid. However, as the goods had already been released for consumption, those authorities considered that Imperial's application was unfounded and should not be granted.

22 According to the customs authorities, Article 25(1) of the ZADS, which provides that authorised warehousekeepers are not liable for excise duty in the event of the destruction under the supervision of the customs authorities of excise goods, including those carrying a tax marking, is only applicable in so far as those goods have not been released for consumption.

23 Furthermore, it would appear from an expert report that, in the present case, the authenticity of the tax markings affixed to the tobacco products was not checked, even though that is an essential stage in the destruction procedure. In addition, according to that report, some of the goods carried expired tax markings and were not included amongst the goods subject to the destruction procedure.

24 Imperial then lodged a complaint against that decision to refuse reimbursement with the Director of the Authority.

25 Since that complaint was rejected, Imperial brought an action before the Administrativen sad Sofia-grad (Sofia City Administrative Court, Bulgaria), reiterating its arguments that the decision to refuse reimbursement was unlawful.

26 By a judgment of 29 January 2020, the Administrativen sad Sofia-grad (Sofia City Administrative Court) annulled the decision of the Director of the South-West Regional Directorate of the Customs Authority. That is the judgment contested by the Director of the Authority before the referring court, the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria).

27 That court points out that until 1 January 2010, all versions of Article 25(1)(1) of the ZADS provided that authorised warehousekeepers and registered persons were not liable for excise duty, or that excise duty paid was to be reimbursed to them, in the event of destruction under the supervision of the customs authorities of excise goods, including goods carrying tax markings, as well as in the case of scrapping and destruction of tax markings.

28 The Zakon za izmenenie i dopalnenie na zakona za aktsizite i danachnite skladove (Law amending and supplementing the Law on excise duties and tax warehouses, DV No 95 of 1 December 2009) added to the aforementioned provision the condition concerning the absence of a release for consumption of excise goods.

29 Imperial claims that, in so doing, the Republic of Bulgaria has not correctly transposed the provisions of Directive 2008/118 as regards the possibility of reimbursement of excise duty paid on goods which have been released for consumption then, subsequently, destroyed in a proper manner and under customs supervision, since that approach is incompatible with the nature of excise duty, which constitutes a tax on consumption, as is moreover apparent from recital 9 of Directive 2008/118.

30 In that context, the referring court notes that the parties to the main proceedings have already been in a dispute arising from similar circumstances. At the end of that dispute, which fell within the scope of Article 25(1)(1) of the ZADS in its version prior to the 2009 amendment, Imperial succeeded in its case, following a judgment of 17 July 2014 of the Varhoven administrativen sad (Supreme Administrative Court) based, inter alia, on the relevant provisions of Articles 7 and 11 of Directive 2008/118 and of Article 17 of Directive 2011/64.

31 However, the referring court states that the reference to Article 7(1) and (4) of Directive 2008/118, which was made in the judgment of 17 July 2014, is problematic for it in so far as that provision defines the time and place at which the debt is incurred and, more specifically, the time of 'release for consumption', elements that are not relevant in the present case.

32 In those circumstances, the Varhoven administrativen sad (Supreme Administrative Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Are Article 11 of [Directive 2008/118] and point (b) of the first paragraph of Article 17 of [Directive 2011/64] to be interpreted as imposing on Member States an obligation to adopt rules for the reimbursement of excise duty, including on manufactured tobacco that has been released for consumption and destroyed under customs supervision?

(2) If the first question is answered in the affirmative, can the persons concerned rely on the direct effect of the provisions of the directives and the principles of EU law where a Member State has failed to comply with its obligation to adopt such rules?

(3) If the first two questions are answered in the affirmative, does the direct effect of the abovementioned provisions confer entitlement, on the basis of the facts established in the present case, to reimbursement of the excise duty paid on the basis solely of the request and without any further formal requirements?'

Admissibility of the request for a preliminary ruling

33 Invoking several inaccuracies in the referring court's presentation of the facts and national law, the Director of the Authority and the Bulgarian Government claim that the reference for a preliminary ruling is inadmissible, since it does not contain the factual and legal elements necessary to answer the questions in a meaningful way.

34 However, in the present case, the referring court has clearly explained, in its order for reference, the factual and regulatory context of the dispute in the main proceedings and has given a minimum explanation of the reasons for the choice of the provisions of EU law which it seeks to interpret, as well as the link which it establishes between those provisions and the national legislation applicable to the dispute before it, which enables the Court to give a useful answer to the questions referred (see, by analogy, judgment of 9 September 2021, *Toplofikatsia Sofia and Others*, C-208/20 and C-256/20, EU:C:2021:719, paragraph 19 and the case-law cited).

35 Consequently, the reference for a preliminary ruling is admissible.

Consideration of the questions referred

The first question

36 By its first question, the referring court asks, in essence, whether Article 11 of Directive 2008/118 and point (b) of the first paragraph of Article 17 of Directive 2011/64 must be interpreted as requiring Member States to provide for the reimbursement of excise duty in respect of excise goods, including manufactured tobacco, destroyed under customs supervision, which have already been released for consumption.

37 As a preliminary point, it should be recalled that Directive 2008/118 repealed and replaced, with effect from 1 April 2010, Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1). However, since the relevant provisions of Directive 92/12 are in essence identical in scope to those of Directive 2008/118, the case-law of the Court relating to the former directive is also applicable to Directive 2008/118 (see, by analogy, judgments of 2 April 2020, *GVC Services (Bulgaria)*, C-458/18, EU:C:2020:266, paragraph 34 and the case-law cited, and of 16 September 2020, *Mitteldeutsche Hartstein-Industrie*, C-528/19, EU:C:2020:712, paragraph 22 and the case-law cited).

38 Article 1(1) of Directive 2008/118 seeks to lay down the general arrangements for excise duties imposed directly or indirectly on the consumption of excise goods, including manufactured tobacco, which is covered by Directive 2011/64, in particular, as is clear from recital 8 of Directive 2008/118, in order to ensure that the concept, and conditions for chargeability, of excise duty are identical in all Member States (see, by analogy, judgment of 24 February 2021, *Silcompa*, C-95/19, EU:C:2021:128, paragraph 44 and the case-law cited).

39 The taxable event, within the meaning of Directive 2008/118, is constituted, in accordance with Article 2 thereof, by the production in the territory of the European Union of excise goods or by their importation into that territory (see, to that effect, judgment of 24 February 2021, *Silcompa*, C-95/19, EU:C:2021:128, paragraph 46 and the case-law cited).

40 Under Article 7(1) of Directive 2008/118, excise duty becomes chargeable, inter alia, at the time of release for consumption of the excise goods and in the Member State in which that release takes place. Under Article 7(2)(a) of that directive, that concept also includes any departure, including irregular departure, of excise goods from a duty suspension arrangement, as defined in Article 4(7) of that directive (see, to that effect, judgment of 24 February 2021, *Silcompa*, C-95/19, EU:C:2021:128, paragraph 47 and the case-law cited).

41 According to Article 4(7) of Directive 2008/118, the duty suspension arrangement is a tax arrangement applicable to the production, processing, holding or movement of excise goods not covered by a customs suspensive procedure or arrangement, excise duty being suspended.

42 It is a feature of that arrangement that the excise duty on the products covered by it is not yet payable, despite the fact that the chargeable event for taxation purposes has already taken place. Consequently, as regards excise goods, that system operates by postponing the chargeability of that duty until one of the conditions of chargeability is met (see, to that effect, judgment of 24 February 2021, *Silcompa*, C-95/19, EU:C:2021:128, paragraph 49 and the case-law cited).

43 Moreover, Article 1 of Directive 2011/64 lays down the general principles for the harmonisation of the structures and rates of excise duty to which Member States subject manufactured tobacco.

44 In accordance with the Court's settled case-law, when interpreting a provision of EU law, account must be taken not only of its wording but also of its context and the objectives pursued by the rules of which it forms part. The origins of a provision of EU law may also provide information relevant to its interpretation (judgments of 2 September 2021, *CRCAM*, C-337/20, EU:C:2021:671, paragraph 31 and the case-law cited, and of 6 October 2021, *Conacee*, C-598/19, EU:C:2021:810, paragraph 20 and the case-law cited).

45 In the first place, with regard to the wording of the provisions mentioned in the first question referred for a preliminary ruling, it is should be noted that, according to Article 11 of Directive 2008/118, excise duty applicable to excise goods which have been released for consumption may, at the request of an interested party, be reimbursed by the competent authorities of the Member State in which the goods in question were released for consumption, in situations defined by the Member States and in accordance with the conditions laid down by them, with a view to the prevention of any possible form of evasion or abuse.

46 Furthermore, under the first paragraph of Article 17 of Directive 2011/64, the excise duty already paid on, inter alia, manufactured tobacco destroyed under administrative supervision may be refunded.

47 Therefore, Article 11 of Directive 2008/118 refers generally to the reimbursement of excise duty on excise goods that have been released for consumption, while Article 17 of Directive 2011/64 applies to four specific cases, including the destruction of manufactured tobacco under administrative supervision, without specifying whether or not it has been released for consumption.

48 As regards, more specifically, point (b) of the first paragraph of Article 17 of Directive 2011/64, it should be noted that, although it refers to a situation involving the participation of the administrative authorities of a Member State, its wording does not allow the conclusion to be drawn that such participation automatically gives rise to an entitlement to reimbursement, since the conditions and formalities for that reimbursement must always be determined by the Member State concerned.

49 It follows from a combined reading of those two provisions, first, that they provide only for an option as regards the reimbursement of excise duty on certain categories of goods and, secondly, that they leave Member States a wide margin of discretion as regards the power to define the

situations, conditions and formalities to which such reimbursements are subject, including in a situation in which the goods, carrying tax markings, are destroyed under administrative supervision after being released for consumption.

50 In the second place, that interpretation of Article 11 of Directive 2008/118 and point (b) of the first paragraph of Article 17 of Directive 2011/64 corresponds to the objectives pursued by those two directives.

51 As is clear from recitals 2, 15 and 16 of Directive 2011/64, the European Union's tax legislation applicable to tobacco products aims to ensure the proper functioning of the internal market and a high level of health protection, as provided for in Article 168 TFEU, while at the same time combating fraud and smuggling within the European Union.

52 Since the cigarette market is particularly conducive to the development of illegal trade (judgment of 2 June 2016, *Kapnoviomichania Karelia*, C-81/15, EU:C:2016:398, paragraph 37 and the case-law cited), the Member States may, under Article 39(1) of Directive 2008/118 and Article 16(1) of Directive 2011/64, require, inter alia, that manufactured tobacco carry tax markings when it is released for consumption on their territory. Tax markings have an intrinsic value which distinguishes them from straightforward documents representing the payment of a sum of money to the tax authorities of the Member State in which the markings were issued (see, to that effect, judgment of 24 February 2021, *Silcompa*, C-95/19, EU:C:2021:128, paragraph 83 and the case-law cited).

53 It follows, in that regard, from the second subparagraph of Article 39(3) of Directive 2008/118 that any amount paid or guaranteed with a view to obtaining tax markings, with the exception of their issue costs, is reimbursed by the Member State which issued them only if the excise duty has become chargeable and has been collected in another Member State, which was not the case here.

54 Furthermore, it follows from Article 11 of Directive 2008/118 that the conditions for the reimbursement of excise duty on excise goods which have been released for consumption must prevent any possible fraud or abuse.

55 Member States therefore have a legitimate interest in taking appropriate measures to protect their financial interests, it being further specified that the fight against fraud, tax evasion and possible abuse is an objective pursued by Directive 2008/118, as is apparent from recital 31, Article 11 and the first subparagraph of Article 39(3) thereof (see, to that effect, judgment of 29 June 2017, *Commission* v *Portugal*, C-126/15, EU:C:2017:504, paragraph 59 and the case-law cited).

56 In the third place, as regards the context of Article 11 of Directive 2008/118 and point (b) of the first paragraph of Article 17 of Directive 2011/64, as is apparent from paragraphs 38 to 43 of the present judgment, those provisions form part of the general system of excise duty imposed directly or indirectly on the consumption of excise goods, including manufactured tobacco.

57 Since excise duty is, as recital 9 of Directive 2008/118 points out, a tax on consumption, the time at which it becomes chargeable must normally be very closely linked with the consumer (see, to that effect, judgment of 2 June 2016, *Polihim-SS*, C-355/14, EU:C:2016:403, paragraphs 50 and 51).

58 Furthermore, it follows from Article 4(1) of Directive 2008/118, read in conjunction with Article 15(2) thereof, that excise goods under a duty suspension arrangement are held by an authorised warehousekeeper in a tax warehouse. It follows that excise duty is not chargeable as

long as the goods concerned are held by the authorised warehousekeeper in its tax warehouse, since in that situation they cannot be regarded as having left a duty suspension arrangement within the meaning of Article 7(2)(a) of Directive 2008/118 (see, to that effect, judgment of 2 June 2016, *Polihim-SS*, C-355/14, EU:C:2016:403, paragraph 54).

59 Moreover, the case of total destruction or irretrievable loss of excise goods placed under a duty suspension arrangement, for a reason depending on the nature of the goods themselves, as a result of unforeseen circumstances or *force majeure* or following authorisation by the competent authorities of the Member State, as provided for in Article 7(4) of Directive 2008/118, concerns exclusively goods which have not been released for consumption.

60 When those goods leave the tax warehouse, the excise duty becomes definitively chargeable. Consequently, where an economic operator who has acquired tax markings is unable to prove that those marks will not be used to dispose of excise goods in the Member State in which the marks were issued, that State has a legitimate interest in refusing to reimburse the amount paid (see, to that effect, judgment of 13 December 2007, *BATIG*, C-374/06, EU:C:2007:788, paragraph 35).

61 In the fourth place, it is clear from point 9.3 of the explanatory memorandum of the Proposal for a Council Directive amending Council Directives 72/464/EEC and 79/32/EEC on taxes other than turnover taxes which are levied on the consumption of manufactured tobacco, submitted by the Commission on 27 September 1990 (COM(1990) 433 final), which is the basis for Article 6a of Council Directive 72/464/EEC of 19 December 1972 on taxes other than turnover taxes which affect the consumption of manufactured tobacco (OJ 1972 L 303, p. 1), as amended by Council Directive 92/78/EEC of 19 October 1992 (OJ 1992 L 316, p. 5), the content of which was reproduced identically in Article 11 of Directive 95/59, before becoming the current Article 17 of Directive 2011/64, that the Member States were given the option of whether or not to apply the exemptions in the case of manufactured tobacco destroyed under administrative supervision.

62 In the light of the foregoing considerations, the answer to the first question is that Article 11 of Directive 2008/118 and point (b) of the first paragraph of Article 17 of Directive 2011/64 must be interpreted as meaning that those provisions do not require Member States to provide for the reimbursement of excise duty in respect of excise goods, including manufactured tobacco, destroyed under customs supervision, which have already been released for consumption.

The second and third questions

63 In view of the answer to the first question, there is no need to answer the second and third questions.

Costs

64 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 (Tenth Chamber) hereby rules:

Article 11 of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC and point (b) of the first paragraph of Article 17 of Council Directive 2011/64/EU of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco must be interpreted as meaning that those provisions do not require Member States to provide for the reimbursement of excise duty in respect of excise goods, including manufactured tobacco, destroyed under customs supervision, which have already been released for consumption.

[Signatures]