Provisional text

JUDGMENT OF THE COURT (Fifth Chamber)

24 February 2021 (*)

(Reference for a preliminary ruling – Directive 76/308/EEC – Articles 6 and 8 and Article 12(1) to (3) – Mutual assistance for the recovery of certain claims – Excise duty payable in two Member States for the same transactions – Directive 92/12/EC – 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 – 'Duplication of the tax claim' relating to the excise duties – Review carried out by the courts of the Member State in which the requested authority is situated – Refusal of the request for assistance made by the competent authorities of another Member State – Conditions)

In Case C-95/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Corte suprema di cassazione (Court of Cassation, Italy), made by decision of 23 May 2018, received at the Court on 6 February 2019, in the proceedings

Agenzia delle Dogane

v

Silcompa SpA,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, M. Ilešič (Rapporteur), E. Juhász, C. Lycourgos and I. Jarukaitis, Judges,

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Italian Government, by G. Palmieri, acting as Agent, and by A. Grumetto, avvocato dello Stato,

– the Spanish Government, by S. Jiménez García, acting as Agent,

– the Swedish Government, by H. Shev, H. Eklinder, C. Meyer-Seitz, J. Lundberg and A. Falk, acting as Agents,

– the European Commission, by C. Perrin and F. Tomat, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 October 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of 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 (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'), in conjunction with Article 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 (OJ 1992 L 76, p. 1), as amended by Council Directive 92/108/EEC of 14 December 1992 (OJ 1992 L 390, p. 124) ('Directive 92/12').

2 The request has been made in proceedings between the Agenzia delle Dogane (Customs Agency, Italy) ('the Agency') and Silcompa SpA, a company established in Italy which produces ethyl alcohol, concerning two payment notices adopted in respect of the recovery of excise duties, on the basis of a request for assistance submitted to the Agency by the Greek customs authority pursuant to Article 6(1) of Directive 76/308/EEC, relating to the sales of ethyl alcohol made by Silcompa to Greece between 1995 and 1996 under duty suspension arrangements.

Legal context

EU law

Directive 76/308

3 According to the seventh recital, Directive 76/308 aims, inter alia, to give a limitative definition of the particular circumstances in which the requested authority may refuse requests for assistance drawn up by the applicant authority.

4 According to the tenth recital of that directive, where, during the recovery procedure in the Member State in which the requested authority is situated, the claim or the instrument authorising its enforcement issued in the Member State in which the applicant authority is situated is contested, the person concerned must bring the action contesting the claim before the competent body of the latter Member State, and the requested authority must suspend any enforcement proceedings which it has begun until a decision is taken by the aforementioned body.

5 That directive is applicable, pursuant to Article 2(f) thereof, to all claims relating to excise duties on, inter alia, alcohol and alcoholic beverages.

6 Article 6 of that directive 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.'

7 Article 7(1) and (2) of Directive 76/308 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.'

8 Article 8 of that directive is worded as follows:

'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.'

9 Article 12(1) to (3) of the directive provides:

'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. Should the requested authority deem it necessary, and without prejudice to Article 13, that authority may take precautionary measures to guarantee recovery in so far as the laws or regulations in force in the Member State in which it is situated allow such action for similar claims.

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.'

Directive 92/12

10 The fourth recital of Directive 92/12 states that, in order to ensure the establishment and functioning of the internal market, chargeability of excise duties should be identical in all the Member States.

11 In accordance with Article 3(1) thereof, that directive is applicable on EU level inter alia to alcohol and alcoholic beverages.

12 Article 4 of that directive 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;

…'

13 Article 5(1) of that directive provides:

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

14 Pursuant to Article 6(1) and (2) of Directive 92/12:

'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;

(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. …'

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

16 Under Article 15(3) and (4) of that directive:

‘3. The risks inherent in … movement [within the European Union] 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 on 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.’

17 According to Article 18(1) of that directive:

‘… all products subject to excise duty moving under duty-suspension arrangements between Member States, including those moving by sea or air directly from one [EU] 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. …’

18 The first and third subparagraphs of Article 19(1) of Directive 92/12 provide:

‘The tax authorities of the Member States shall be informed by traders of deliveries dispatched or received by means of the document or a reference to the document specified in Article 18. This document shall 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,

– one copy for the competent authorities of the Member State of destination.

…

The Member States of destination may stipulate that the copy to be returned to the consignor for discharge should be certified or endorsed by its national authorities. …’

19 Article 19(2) and (3) of that directive is worded as follows:

‘2. When products subject to excise duty move under the duty-suspension arrangements to an authorised warehousekeeper or to a registered or non-registered trader, a copy of the accompanying administrative document or a copy of the commercial document, duly annotated, shall be returned by the consignee to the consignor for discharge, at the latest within 15 days following the month of receipt by the consignee.

…

3. The duty-suspension arrangements as defined in Article 4(c) shall be discharged by the placing of the products subject to excise duty under one of the arrangements referred to in Article 5(2) and subject to the conditions referred to therein, after the consignor has received the copy to be returned of the accompanying administrative document or a copy of the commercial document, duly annotated, in which it must be noted that the products have been placed under such an arrangement.’

20 Article 20 of that directive states:

‘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 from the date of dispatch of the products evidence is produced 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.’

Italian law

21 Mutual assistance for the recovery of excise duties is governed in Italian law, inter alia, by decreto legislativo n. 69 – 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/EC on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the EAGGF, and of agricultural levies and customs duties, and in respect of VAT and certain excise duties) of 9 April 2003 (Ordinary Supplement to GURI No 87 of 14 April 2003) (‘Legislative Decree No 69/2003’).

22 Article 5 of Legislative Decree No 69/2003, headed ‘Assistance for recovery of claims’, provides:

‘1. At the request of the applicant authority, the Ministero dell’economia e delle finanze [(Ministry of Economy and Finance, Italy)] 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 decreto del Presidente della Repubblica [n. 602 – Disposizioni sulla riscossione delle imposte sul reddito (Presidential Decree No 602 on rules on the collection of income tax) of 29 September 1973 (Ordinary Supplement to GURI No 268 of 16 October 1976)].

2. The applicant authority may make a request for recovery only if:

(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.

…’

23 Article 6 of that legislative decree, headed ‘Action contesting a claim’, provides:

‘1. A person who wishes to contest a claim or an instrument permitting its enforcement issued in the Member State in which the applicant authority is situated 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.’

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

24 Between 1995 and 1996 Silcompa sold ethyl alcohol to Greece under duty suspension arrangements.

25 In January 2000, following a check carried out by the Ufficio Tecnico di Finanza di Reggio Emilia (Technical Finance Office, Reggio Emilia, Italy) in the context of the administrative cooperation procedure provided for in Article 19 of Directive 92/12, 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 in order for the official documents to be drawn up and that the stamps of the Corinthian customs office (Greece) on the AADs, found at Silcompa’s premises, were false. As a result, the Agency issued three payment notices for the recovery of the unpaid excise duties, for a total amount of EUR 6 296 495.47.

26 Silcompa brought an action against those payment notices before the Tribunale di Bologna (District Court, Bologna, Italy), whose decision in favour of Silcompa was appealed against by the Agency before the Corte d’Appello di Bologna (Court of Appeal, Bologna, Italy). According to the referring court, at the date of the request for a preliminary ruling, the proceedings relating to that action were still ongoing.

27 In addition, after the Greek customs authorities sent a request for information to Silcompa in April 2001 in order to obtain clarification on the transactions regarding the consignments of alcohol in question, and after Silcompa replied to that request, those authorities informed the Agency, in February 2004, that the deliveries of the products sent by Silcompa to a Greek company should be considered irregular.

28 Thus, on 27 March 2004, the Ufficio delle Dogane di Reggio Emilia (Customs Office, Reggio Emilia, Italy) issued adjustment notice No 6/2004, which covered the Italian tax claims on which the payment notices issued in January 2000 were based, referred to in paragraph 25 above, and the additional tax adjustment of EUR 473 410.66, payable following the communication from the Greek administration in

February 2004. 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 to pay a total amount of EUR 1 554 181.23 in respect of the debt claimed by the Italian authorities.

29 In addition, in January 2005, in relation to the same export transactions within the European Union, the Athens customs office (Greece) issued two 'excise duty payment notices', submitting that the unlawful release for consumption on Greek territory of ethyl alcohol shipped by Silcompa to 'letterbox' companies had been established. According to the statements of the parties to the main proceedings, the Athens customs office acted on the basis of the criminal investigations that had resulted in a judgment at first instance which confirmed that Silcompa's goods had reached Greek operators and been fraudulently released for consumption.

30 On 31 January 2005, the Greek tax authorities made a request for assistance to the Agency, pursuant to Article 6(1) of Directive 76/308, as amended by Directive 76/308, for the recovery of claims relating to the excise duties in question.

31 On 13 September 2005, the Agency, as the competent requested authority, notified Silcompa, pursuant to Article 5 of Legislative Decree No 69/2003, of two amicable payment notices for the sums of EUR 10 280 291.66 (notice RP 05/14) and EUR 64 218.25 (notice RP 05/12), which form the subject matter of the dispute in the main proceedings.

32 The action brought by Silcompa against those payment notices was dismissed as inadmissible at first instance by the Commissione tributaria provinciale di Roma (Provincial Tax Court, Rome, Italy), before being upheld by the Commissione tributaria regionale del Lazio (Regional Tax Court, Lazio, Italy), hearing the appeal brought by Silcompa, in which it claimed that the Greek authorities had failed to serve the necessary 'preliminary documents' and had failed to state sufficient reasons for those payment notices, in so far as they did not refer to the procedures which had been initiated, in parallel, in Italy concerning recovery of excise duties in respect of the same export transactions.

33 The Agency consequently brought an appeal on a point of law before the Corte suprema di cassazione (Supreme Court of Cassation, Italy).

34 The referring court questions, in particular, whether, in an action concerning the enforcement procedure initiated in the context of mutual assistance for the recovery of claims relating to excise duties, there is a 'possible duplication of the tax claim' in so far as requests based on the same events giving rise to liability for excise duty were brought at the same time in both the Member State in which the applicant authority is situated and the Member State in which the requested authority is situated.

35 While conceding that, under Article 12 of Directive 76/308, where the dispute concerns enforcement measures in the Member State in which the requested authority is situated, the action is to be brought before the competent body of that Member State, whereas, where the dispute concerns the claim or the instrument permitting its enforcement the action is to be brought before the competent body of the Member State in which the applicant authority is situated, the referring court notes that, in accordance with Article 20(4) of Directive 92/12, the duties originally collected in a Member State are to be refunded if the Member State in which the offence or irregularity was actually committed is ascertained. Nevertheless, under that provision, the Member State in which the offence or irregularity was actually committed must be ascertained before the expiry of a period of three years from the date on which the AAD was drawn up, a time limit which, in the present case, expired long ago.

36 In that regard, the referring court wonders, in particular, whether, in the context of the recovery procedure provided for in Article 12(3) of Directive 76/308, which seeks to implement a request for assistance made on the basis of Article 6(1), the conditions referred to in Article 20 of Directive 92/12, such as the place where the offence or irregularity was actually committed, should also be examined, at least in the particular

circumstances of the case in the main proceedings. In fact, according to the referring court, the matter to be examined does not seem to relate to the claim or foreign instrument, as provided for in Article 12(1) of Directive 76/308, but relates to the lawful basis of the request for assistance and, as a result, of all the measures enforcing that claim.

37 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 authority] and the [requested authority] 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?'

The procedure before the Court

38 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.

39 On 31 December 2019, the referring court replied to that request for information.

40 The hearing, which had been scheduled for 26 March 2020 was, on account of the health crisis and the uncertainties it led to regarding when the Court might be able to resume its judicial activities under normal conditions, cancelled and the questions which had been asked for an oral response were converted into questions for a written response. The Italian, Spanish and Swedish Governments and the European Commission responded to the questions within the period prescribed by the Court.

The question referred for a preliminary ruling

41 By its question, the referring court asks, in essence, whether Article 12(3) of Directive 76/308, read in conjunction with Article 20 of Directive 92/12, must be interpreted as meaning that, in the context of an action disputing enforcement measures taken in the Member State where the requested authority is situated, the competent body of that Member State may refuse to grant the request to recover excise duties submitted by the competent authority of another Member State, as regards goods which irregularly departed from a suspension arrangement, for the purposes of Article 6(1) of Directive 92/12, based on the same export transactions which are already the subject of excise duty recovery in the Member State in which the requested authority is situated.

42 In the present case, on the basis of the irregularities which occurred during the same series of export transactions under excise duty suspension arrangements dating from 1995 and 1996, the authorities of the two Member States, namely the Italian Republic and the Hellenic Republic, consider themselves to have the right, under Article 20 of Directive 92/12, to claim the excise duties on those transactions.

43 In that context, it should be noted, as a preliminary point, that Directive 76/308 was repealed and codified by 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), which was in turn repealed and replaced by 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). Moreover, Directive 92/12 was repealed and replaced by 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). However, in view of the date of the facts of the main proceedings, this reference for a preliminary ruling will be examined by reference to the provisions of Directives 76/308 and 92/12.

44 As regards, in the first place, Directive 92/12, that directive seeks to establish a certain number of rules regarding the holding, movement and monitoring of products subject to excise duty, such as alcohol and alcoholic beverages, within the meaning of Article 3(1) of that directive, in order, as is apparent inter alia from the fourth recital thereof, to ensure that the chargeability of excise duty is identical in all the Member States. That harmonisation makes it possible, in principle, to avoid double taxation in relations between Member States (see, to that effect, judgment of 5 March 2015, *Prankl*, C−175/14, EU:C:2015:142, paragraph 20 and the case-law cited).

45 In that regard, Article 20 of Directive 92/12 seeks, inter alia, to establish the Member State which has the exclusive right to collect excise duties on the products concerned where, in the course of a movement, an offence or infringement has been committed (see, to that effect, judgments of 12 December 2002, *Cipriani*, C−395/00, EU:C:2002:751, paragraph 46, and of 13 December 2007, *BATIG*, C−374/06, EU:C:2007:788, paragraph 44).

46 Products subject to excise duty become taxable for the purposes of Directive 92/12, in accordance with Article 5(1) thereof, upon their being produced within the territory of the European Union or imported into that territory (judgment of 5 April 2001, *Van de Water*, C−325/99, EU:C:2001:201, paragraph 29).

47 By contrast, pursuant to Article 6(1) of Directive 92/12, excise duty becomes chargeable, inter alia, at the time of release for consumption of products subject to excise duty. Under point (a) of the first subparagraph of Article 6(1) of that directive, that concept also covers any departure, including irregular departure, from a suspension arrangement, defined in Article 4(c) of that directive (see, to that effect, judgments of 5 April 2001, *Van de Water*, C−325/99, EU:C:2001:201, paragraphs 30, 31, 34 to 36; of 12 December 2002, *Cipriani*, C−395/00, EU:C:2002:751, paragraphs 42 and 43; and of 13 December 2007, *BATIG*, C−374/06, EU:C:2007:788, paragraph 29).

48 In accordance with Article 4(c) of Directive 92/12, the suspension arrangement is the tax arrangement applied to the production, processing, holding and movement of products, excise duty being suspended.

49 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 the products subject to excise duty, that arrangement postpones the chargeability of excise duty until one of the conditions of chargeability, such as the one described in paragraph 47 above, is met (see, by analogy, judgment of 28 January 2016, *BP Europa*, C−64/15, EU:C:2016:62, paragraph 22 and the case-law cited).

50 Pursuant to Article 15(1) of Directive 92/12, the movement of products subject to excise duty under suspension arrangements is to take place, in principle, between tax warehouses, defined in Article 4(b) of that directive, and to be operated by authorised warehousekeepers, within the meaning of Article 4(2) thereof.

51 Under Article 15(4) of that directive, without prejudice to Article 20 thereof, the liability of the authorised warehousekeeper of dispatch 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 of the same directive under the conditions laid down in Article 19 thereof.

52 Thus, the EU legislature gave a central role to the authorised warehousekeeper in the context of the procedure for movement of products subject to excise duty and placed under a suspension arrangement, which results in liability for all the risks inherent in that movement. That warehousekeeper is, consequently, 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. That liability is, moreover, objective and based not on the proven or presumed fault of the warehousekeeper, but on his participation in an economic activity (see, to that effect, judgment of 2 June 2016, *Kapnoviomichania Karelia*, C−81/15, EU:C:2016:398, paragraphs 31 and 32).

53 In the event that an irregularity or offence has been committed in the course of movement involving the chargeability of excise duty, Article 20(1) of Directive 92/12, in principle, confers on the Member State in which the offence or irregularity was committed the right to collect the excise duties.

54 However, if it is not possible to determine where the offence or irregularity was committed, Article 20(2) and (3) provides for presumptions as regards determining that place, to the effect that it is to be deemed to be the Member State where the offence or infraction was detected or, when products subject to excise duty do not arrive at their destination and it is not possible to determine where the offence of irregularity was committed, it is to be deemed to be the 'Member State of departure'.

55 Moreover, as the Commission noted and the Advocate General stated in point 54 of his Opinion, Article 20(4) of Directive 92/12 provides for a 'corrective' mechanism that allows the Member State in which the offence or irregularity was actually committed to be determined before the expiry of a period of three years from the date on which the AAD was drawn up, in accordance with Article 18(1) and Article 19(1) of that directive. In that case, as soon as evidence of collection has been provided, the excise duty originally levied on the basis of Article 20(2) and (3) of that directive is to be refunded.

56 Accordingly, the corrective mechanism provided for in Article 20(4) of Directive 92/12 does not concern the situation in which there is a conflict of competency between a Member State where the offence or irregularity was committed in the course of a movement of products subject to excise duty involving the chargeability of excise duty, on the one hand, and a Member State where, subsequently, release for consumption of those products took place, on the other, but rather, as the Advocate General noted, in essence, in point 63 of his Opinion, it concerns the situation in which it is clear that the place where the offence or irregularity was actually committed is a different Member State from that which was originally determined.

57 In the present case, as is apparent from the order for reference, in January 2000 the Italian customs authority detected the failure to discharge the suspension arrangement, within the meaning of Article 19(3) of Directive 92/12, inasmuch as the AADs which Silcompa had received in respect of the deliveries of the products sent were irregular, since the stamps of the Corinthian customs office (Greece) affixed to those AADs were false.

58 However, the order for reference does not state whether, for the purpose of recovering the excise duty, those customs authorities were in fact able to establish that the irregularity consisting in the affixing of false Greek customs stamps had been committed in Italy, in order to rely on Article 20(1) of Directive 92/12, or whether they had to apply one of the presumptions provided for in Article 20(2) and (3) of that directive.

59 Moreover, as the Advocate General noted in point 62 of his Opinion, 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 ethyl alcohol shipped by Silcompa must indeed be regarded as an offence or irregularity in respect of the products in question, but it could also be considered to be only a consequence of the offence or irregularity previously committed in Italy, which is a matter for the referring court to determine.

60 In relation to such a determination, there are two possibilities.

61 The first possibility is that there were several offences or irregularities.

62 In such a case, in a situation where several offences or infractions were consecutively committed in several Member States, two or more Member States consider that they have the right, under Directive

92/12, to collect the excise duty arising from an offence or irregularity that was committed in their respective territories.

63 Nevertheless, the Court has ruled that it cannot reasonably be claimed that the EU legislature intended to favour the prevention of abuse and evasion by generally allowing, in cases where products subject to excise duty are unlawfully transported, all the transit Member States to levy excise duty (see, to that effect, judgment of 5 March 2015, *Prankl*, C−175/14, EU:C:2015:142, paragraph 27).

64 Equally, in a situation involving an irregular departure from the suspension arrangement, which occurred in one Member State, leading, in accordance with Article 6(1)(a) of Directive 92/12, to a release for consumption of products subject to excise duty, and, subsequently, an actual release for consumption in another Member State, it cannot be accepted that the latter may also collect excise duties in so far as regards the same export transactions.

65 As the Advocate General stated in point 56 of his Opinion, in accordance with the general scheme of Directive 92/12, release for consumption of products subject to excise duty may happen only once. It follows that, 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, only the first of those offences or irregularities, namely the one that had the consequence of making the products in the course of movement leave the excise duties suspension arrangement, must be taken into account for the purposes of applying Article 20 of Directive 92/12, since such an offence or such an irregularity had the effect of releasing the products for consumption within the meaning of Article 6 thereof.

66 The second possibility is that the authorities of one Member State relied on one of the presumptions of Article 20(2) and (3) of Directive 92/12 and the authorities of another Member State ascertain that the offence or irregularity was actually committed in their Member State. In such a situation, the authorities of those Member States are to apply the corrective mechanism set out in Article 20(4) of that directive, in compliance with the conditions set out in that respect, within three years from the date on which the AAD was drawn up in accordance with Article 18(1) and Article 19(1) of that directive.

67 Once that period of three years has passed, no Member State other than the Member State which relied on one of the presumptions provided for in Article 20(2) and (3) of Directive 92/12 may successfully claim the right provided for under Article 20(4) thereof.

68 In the second place, as regards Directive 76/308, it must be borne in mind, first, that that directive establishes common rules on mutual assistance in order to ensure the recovery of claims relating to certain levies, duties and taxes (see, to that effect, judgment of 18 October 2012, *X*, C−498/10, EU:C:2012:635, paragraph 44 and the case-law cited).

69 Under Article 2(f) thereof, that directive is applicable to excise duties, inter alia, on alcohol and alcoholic beverages.

70 Moreover, as regards the rules on mutual assistance for the recovery of claims relating, inter alia, to excise duty, it should be borne in mind that Article 12(1) and (3) of Directive 76/308 provides for a division of powers, between the bodies of the Member State where the applicant authority is situated and the bodies of the Member State where the requested authority is situated, to hear disputes relating to the claim, the instrument permitting its enforcement or the enforcement measures themselves, respectively (see, to that effect, judgment of 14 January 2010, *Kyrian*, C−233/08, EU:C:2010:11, paragraph 37).

71 That division of powers results from the fact that the claim and the instrument permitting enforcement are established on the basis of the law in force in the Member State in which the applicant authority is situated, whilst, for enforcement measures in the Member State in which the requested authority is situated, the latter applies, pursuant to Articles 5 and 6 of Directive 76/308, the provisions which its national law lays down for corresponding measures, that authority being the best placed to assess the legality of the measure

in the light of its national law (judgment of 14 January 2010, *Kyrian*, C−233/08, EU:C:2010:11, paragraph 40).

72 That is why, in accordance with Article 8(1) of Directive 76/308, the instrument permitting enforcement is to 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 (see, to that effect, judgment of 14 January 2010, *Kyrian*, C−233/08, EU:C:2010:11, paragraph 36).

73 That division of powers is also an expression of the principle of mutual trust between the national authorities concerned (see, by analogy, as regards Directive 2010/24, judgment of 26 April 2018, *Donnellan*, C−34/17, EU:C:2018:282, paragraphs 40 to 46).

74 It follows that, as the Advocate General stated in points 76 and 77 of his Opinion, the authorities of the requested Member State cannot call into question the assessment of the requesting Member State as regards the place where the irregularity or offence was committed, since such an assessment forms part of the very subject of the claim in respect of which recovery is sought by the requesting Member State and thus comes within its jurisdiction alone.

75 However, it should be noted, first, that Directive 76/308 and the case-law relating to it does not relate to a situation such as that at issue in the main proceedings in which two competing claims are made based, in essence, on the same export transactions – one established by a body of the Member State in which the requested authority is situated and the other established by a body of the Member State in which the requesting authority is situated and which benefits from national treatment in the first Member State. The rules on division of power in such a situation are provided for in Directive 92/12.

76 Second, it must be noted that the Court has held 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 State and, where appropriate, to refuse to grant assistance in whole or in part or to make it subject to fulfilling certain conditions (see, to that effect, judgments of 14 January 2010, *Kyrian*, C−233/08, EU:C:2010:11, paragraph 42, and of 26 April 2018, *Donnellan*, C−34/17, EU:C:2018:282, paragraph 47).

77 On account of the national treatment to be given, under Articles 6 and 8 of Directive 76/308, to the claim in respect of which a request for recovery has been made and to the instrument permitting enforcement of that claim, it is hard to imagine that such an instrument would be enforced in the Member State in which the requested authority is situated if that enforcement were liable to be contrary to the public policy of that State (see, to that effect, judgments of 14 January 2010, *Kyrian*, C−233/08, EU:C:2010:11, paragraph 43, and of 26 April 2018, *Donnellan*, C−34/17, EU:C:2018:282, paragraph 48).

78 Equally, despite that national treatment, it is hard to imagine that the instrument permitting enforcement of the claim would be enforced in the Member State in which the requested authority is situated if that enforcement were liable to lead to a situation in which the excise duties on essentially the same transactions regarding the same products are levied twice, in infringement of Directive 92/12.

79 In order to prevent such a situation arising, it is necessary to allow the competent authority of that Member State to refuse to enforce that instrument.

80 To take a contrary approach would be tantamount to allowing, in the same national system, two final decisions to tax the same products subject to excise duty – one based on the irregular departure of those products from the suspension arrangement and the other based on their subsequent release for consumption – to coexist.

81 Since it is clear from the order for reference that the proceedings based on the irregular departure from the suspension arrangement and the procedure concerning the request for assistance are still pending, the referring court should, in principle, initially stay the proceedings regarding the request for assistance until a

decision is taken in the proceedings regarding the irregular departure from the suspension arrangement and, subsequently, it is only if there is, in the requested Member State, a definitive judicial decision to tax the same products subject to excise duty as those referred to in the enforcement instrument of the requesting Member State, that that court may refuse to grant assistance.

82 That interpretation cannot be called into question by the fact that, in paragraph 55 of the judgment of 13 December 2007, *BATIG* (C−374/06, EU:C:2007:788), the Court held that, although Directive 92/12 seeks to harmonise the procedures for collecting excise duty by pursuing a double objective of effectively levying excise duties in a single Member State, which is the Member State in which the products are released for consumption, it must be noted that the Community legislature has not established prevention of double taxation as an absolute principle.

83 Such considerations are part of the specific factual context of the case giving rise to that judgment, which concerned the situation of an unlawful departure from the suspension arrangement on account of the theft of the products to which tax markings had already been affixed in the 'Member State of departure', tax markings having, as is apparent from paragraph 32 of that judgment, an intrinsic value which distinguishes them from straightforward documents representing the payment of a sum of money to the tax authorities in the Member State in which those markings were issued (see, to that effect, judgment of 5 March 2015, *Prankl*, C−175/14, EU:C:2015:142, paragraphs 28 and 29).

84 In the light of the foregoing considerations, the answer to the question referred is that Article 12(3) of Directive 76/308, read in conjunction with Article 20 of Directive 92/12, must be interpreted as meaning that, in the context of an action disputing enforcement measures taken in the Member State in which the requested authority is situated, the competent body of that Member State may refuse to grant the request to recover excise duties submitted by the competent authority of another Member State in respect of goods which irregularly departed from a suspension arrangement, for the purposes of Article 6(1) of Directive 92/12, where that request is based on the facts relating to the same export transactions which are already subject to excise duty recovery in the Member State in which the requested authority is situated.

Costs

85 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 (Fifth Chamber) hereby rules:

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 Article 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 (OJ 1992 L 76, p. 1), as amended by Council Directive 92/108/EEC of 14 December must be interpreted as meaning that, in the context of an action disputing enforcement measures taken in the Member State in which the requested authority is situated, the competent body of that Member State may refuse to grant the request to recover excise duties submitted by the competent authority of another Member State in respect of goods which irregularly departed from a suspension arrangement, for the purposes of Article 6(1) of Directive 92/12, where that request is based on the facts relating to the same export transactions which are already subject to excise duty recovery in the Member State in which the requested authority is situated.

[Signatures]

* Language of the case: Italian.