

OPINION OF ADVOCATE GENERAL

JACOBS

delivered on 1 December 2005¹

1. In this reference for a preliminary ruling, the Netherlands Hoge Raad (Supreme Court) seeks guidance on the interpretation of Articles 7 to 9 of Council Directive 92/12/EEC,² which forms part of the legislation establishing the internal market.

2. Those provisions lay down rules as to where excise duty³ is to be charged, in various circumstances in which dutiable goods are moved between Member States; in general, it is chargeable in the Member State of final destination.

3. Article 8 however provides that excise duty on products 'acquired by private individuals for their own use and transported by them' is to be charged in the Member State of acquisition.

4. In the present case a private individual, resident in the Netherlands, has purchased duty-paid wine in France both for his own use and for that of other private individuals in the Netherlands, for whom he performed the service on a personal and non-profit-making basis. However, he did not transport the wine himself but engaged a transport company to do so.

5. The Netherlands tax authorities now wish to levy excise duty on the wine.

Relevant Community law

Directive 92/12

1 — Original language: English.

2 — 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 in particular by Council Directives 92/108/EEC of 14 December 1992 (OJ 1992 L 390, p. 124) and 94/74/EC of 22 December 1994 (OJ 1994 L 365, p. 46).

3 — 'Excise: A hateful tax levied upon commodities, and adjudged not by the common judges of property, but wretches hired by those to whom excise is paid.' (Samuel Johnson, *A Dictionary of the English Language*, London, 1755). For present purposes, it may be defined more prosaically as an indirect tax levied on mineral oils, alcohol and alcoholic beverages, and manufactured tobacco.

6. It is helpful, if somewhat laborious, to peruse the relevant parts of Directive 92/12 in some detail.

7. The fourth to eighth recitals in the preamble set out the following considerations:

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

... any delivery, holding with a view to delivery or supply for the purposes of a trader carrying out an economic activity independently or for the purposes of a body governed by public law, taking place in a Member State other than that in which the product is released for consumption, gives rise to chargeability of the excise duty in that other Member State;

... in the case of products subject to excise duty acquired by private individuals for their own use and transported by them, the duty must be charged in the country where they were acquired;

... to establish that products subject to excise duty are not held for private but for commercial purposes, Member States must take account of a number of criteria;

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

8. By virtue of Article 3(1), the directive applies at Community level to mineral oils, alcohol and alcoholic beverages, and manufactured tobacco.

9. Article 4 contains the following definitions:

‘(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 a] tax-warehousing arrangement;

...

- (c) *suspension arrangement*: a tax arrangement applied to the production, processing, holding and movement of products, excise duty being suspended;
- (d) *registered trader*: a natural or legal person without authorised warehouse-keeper status, authorised by the competent authorities of a Member State to receive, in the course of his business, products subject to excise duty from another Member State under duty-suspension arrangements. This type of trader may neither hold nor dispatch such products under excise duty-suspension arrangements;
- (e) *non-registered trader*: a natural or legal person without authorised warehouse-keeper status, who is entitled, in the course of his business, to receive occasionally products subject to excise duty from another Member State under duty-suspension arrangements. This type of trader may neither hold nor dispatch products under excise duty suspension arrangements. A non-registered trader must guarantee payment of excise duty to the tax authorities of the Member States of destination prior to the dispatch of the goods’.
10. Under Article 6(1), excise duty is to be chargeable at the time of release for consumption or when certain shortages are recorded; release for consumption of products subject to excise duty means:
- ‘(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’.
- ‘Importation’ for those purposes means entry of the product into the territory of the Community, in accordance with Article 5(1).
11. Article 7 provides, in so far as is relevant:
- ‘1. In the event of products subject to excise duty and already released for consumption in

one Member State being held for commercial purposes in another Member State, the excise duty shall be levied in the Member State in which those products are held.

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

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

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

- (a) before the goods are dispatched, make a declaration to the tax authorities of the Member State of destination and guarantee the payment of the excise duty;
- (b) pay the excise duty of the Member State of destination in accordance with the procedure laid down by that Member State;
- (c) consent to any check enabling the administration of the Member State of destination to satisfy itself that the goods have actually been received and that the excise duty to which they are liable has been paid.

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

...

...'

12. Under Article 8:

purposes, Member States must take account, inter alia, of the following:

‘As regards products acquired by private individuals for their own use and transported by them, the principle governing the internal market lays down that excise duty shall be charged in the Member State in which they are acquired.’

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

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

13. Article 9 provides, in so far as is relevant:

‘1. Without prejudice to Articles 6, 7 and 8, excise duty shall become chargeable where products [released⁴] for consumption in a Member State are held for commercial purpose in another Member State.

— any document relating to the products,

— the nature of the products,

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

— the quantity of the products.

2. To establish that the products referred to in Article 8 are intended for commercial

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

4 — This word, absent from the English version of the directive even after seven amendments and three corrigenda, appears necessary if the provision is to remain consistent with the French ‘mis à la consommation’, and indeed to make sense at all.

...

(b) Alcoholic beverages

...

wines (including a maximum of 60 l of sparkling wines)
90 l

...⁵

14. Article 10 provides:

‘1. Products subject to excise duty purchased by persons who are not authorised warehousekeepers or registered or non-registered traders and dispatched or transported directly or indirectly by the vendor or on his behalf shall be liable to excise duty in the Member State of destination. For the purposes of this Article, “Member State of destination” shall mean the Member State of arrival of the dispatch or transport.

⁵ — Article 9(3) concerns the very specific case, not directly relevant here, of mineral oils released for consumption in one Member State and transported using ‘atypical modes of transport’ by private individuals or on their behalf.

2. To that end, the delivery of products subject to excise duty already released for consumption in a Member State and giving rise to the dispatch or transport of those products to a person as referred to in paragraph 1, established in another Member State, and which are dispatched or transported directly or indirectly by the vendor or on his behalf shall cause excise duty to be chargeable on those products in the Member State of destination.

3. The duty of the Member State of destination shall be chargeable to the vendor at the time of delivery. However, Member States may adopt provisions stipulating that the excise duty shall be payable by a tax representative, other than the consignee of the products. Such a tax representative must be established in the Member State of destination and approved by the tax authorities of that Member State.

The Member State in which the vendor is established must ensure that he complies with the following requirements:

- guarantee payment of excise duty under the conditions set by the Member State of destination prior to dispatch of the products and ensure that the excise duty is paid following arrival of the products,

— keep accounts of deliveries of products. *Background and proposed amendments to Directive 92/12*

4. In the case referred to in paragraph 2, the excise duty paid in the first Member State shall be reimbursed in accordance with Article 22(4).

16. It is also helpful to view the provisions above in the light of the Commission's original proposal for a directive⁶ and its current proposal for amendments to Articles 7 to 10, appended to a report on the application of those articles.⁷

...'

15. Article 22(3) provides:

'In the cases referred to in Article 7, the Member State of departure is required to reimburse the excise duty paid only where the excise duty was previously paid in the Member State of destination in accordance with the procedure laid down in Article 7(5).

17. As the Commission explains in that report,⁸ the final wording of Articles 7 to 10 was the outcome of long and complex discussion in the Council. The original proposal had a single provision (Article 5) to cover all intra-Community movement of duty-paid products, making it possible to collect duty in a Member State other than that in which the products were 'consumed'.⁹ As it was anticipated that rates would be more closely harmonised, and as the general principles governing the single market already guaranteed private individuals the freedom to purchase, no provisions were proposed on purchases by such persons in other Member States. In the course of

6 — COM(90) 431 final of 7 November 1990.

7 — COM(2004) 227 final, Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Articles 7 to 10 of Directive 92/12/EEC and Proposal for a Council Directive amending Directive 92/12.

8 — Point 2.1, p. 6.

9 — By which, again, it may be presumed that 'released for consumption' is meant, in line with the French text (see also footnote 4 above).

However, Member States may refuse this request for reimbursement where it does not satisfy the correctness criteria they lay down.'

discussion, the Council realised the difficulty of achieving short-term harmonisation of rates, and focussed instead on the system for the movement and monitoring of excisable products, which then required clearer application rules.

18. The Commission summarises as follows the various difficulties encountered in the application of the provisions:¹⁰

‘... the resulting legislative structure was less than congruous. There are three provisions which apply to one particular situation, namely to excisable products held for commercial purposes in a Member State other than where the products were purchased, and all three provisions have the same aim, i.e. to ensure that excise duty is paid in the other Member State. What is more, none of the three provisions clearly establishes its scope. As a result, certain types of movement may be covered by several different provisions each requiring the completion of different formalities’.

19. In so far as is relevant, the following amendments are proposed to the provisions set out above.

20. The proposed new Article 7(1) contains a definition of ‘commercial purposes’, which are deemed to be ‘all purposes other than personal use by private individuals’.

21. The proposed new Article 8 reads:

‘Excise duty on products acquired by private individuals for personal use and transported from one Member State to another by them shall be charged in the Member State in which the products are acquired.’

As regards products other than manufactured tobaccos acquired by private individuals, the provisions of the first subparagraph [sic] shall also apply in cases where the products are transported on their behalf.

Taxation in the Member State of acquisition also applies to products dispatched by one private individual to another without any payment, direct or indirect.’

22. In Article 9, it is proposed to delete paragraph 1 and the list of specific minimum guide levels.

¹⁰ — Point 3.2, p. 9.

The Man in Black

23. On 2 April 1998, the Court delivered judgment in *EMU Tabac and Others* (*The Man in Black*).¹¹

24. The Man in Black Ltd was a United Kingdom subsidiary of a Luxembourg company, which solicited and supplied orders for tobacco products from private individuals resident in the United Kingdom. The Man in Black purchased the products in Luxembourg and had them imported into the United Kingdom by a private carrier in the name and on behalf of the individuals concerned, in return for a fee. Each purchase was limited to a quantity not exceeding the minimum guide levels in Article 9(2) of Directive 92/12.

25. The question arose whether such an arrangement could be covered by Article 8 of the directive, so that excise duty was chargeable only in Luxembourg and not in the United Kingdom.

26. The Court concluded that the conditions in Article 8 must make it possible to

establish that the goods concerned are held for strictly personal purposes,¹² and that the provision is not applicable where the purchase and/or transportation of goods subject to duty are effected through an agent.¹³ It was moreover clear that at no point did the Community legislature intend Article 8 to apply in the event of the involvement of an agent.¹⁴ The situation in issue appeared rather to fall under both Article 7 and Article 10 of the directive.¹⁵ Article 10 is concerned with the objective nature of the transaction rather than its legal form; since, in particular, The Man in Black was a subsidiary of the vendor and solicited orders from private individuals rather than acting at their instigation, the goods in question were dispatched or transported directly or indirectly by or on behalf of the vendor in the sense contemplated by Article 10.¹⁶

27. In its ruling, the Court held that Directive 92/12 'must be interpreted as not precluding the levying of excise duty in Member State A on goods released for consumption in Member State B, where the goods were acquired from a company, X, for the use of private individuals in Member State A, through a company, Y, acting in return for payment as agent for those

11 — Case C-296/95 [1998] ECR I-1605.

12 — Paragraph 26 of the judgment.

13 — Paragraph 37.

14 — Paragraph 40.

15 — Paragraph 43.

16 — Paragraphs 46 to 49.

individuals, and where transportation of the goods from Member State B to Member State A was also arranged by company Y on behalf of those individuals and effected by a professional carrier charging for his services’.

30. Mr Joustra himself, in a document appended to the order for reference, explains that the practice originated when a number of food and wine enthusiasts tasted and bought wine from vineyards they visited on holiday in France. Faced with difficulties in carrying the wine home themselves (some did not have their own vehicle, or had no room in it), they decided to have it all transported by a Netherlands transport undertaking. Since then, they have continued the practice, but have decided that it is more efficient to group their orders together.

Background and proceedings in the present case

28. Mr B.F. Joustra and some 70 other private individuals have formed a group called the Cercle des Amis du Vin (‘the circle’).

31. It appears that the wine in question has all been released for consumption in France, where excise duty has been paid on it; that no member receives a quantity of wine or sparkling wine greater than those in the minimum guide levels in Article 9(2) of Directive 92/12; and that all the wine is for the members’ own personal use.

29. Each year, in the name of the circle but on behalf of himself and the other members as individuals, he orders wine in France — apparently from producers visited by members of the circle whilst on holiday there — and arranges for a Netherlands transport company to collect it and deliver it to his home, where he keeps it in his garage until the other members have collected their shares.

32. Mr Joustra pays for the wine and the transport and is reimbursed by each of the other members for the cost of the individual consignment and a proportionate part of the transport costs. He thus performs the service on a personal basis, and not with any view to making a profit.

33. It appears that for 1997 Mr Joustra applied for and was granted the status of non-registered trader.¹⁷ Apparently in that capacity he declared in that year that he had received 13.68 hl of still wine and 1.44 hl of sparkling wine from France.¹⁸ The Netherlands tax authorities levied NLG 1 997 (EUR 906.20) in excise duty on the consignment.

34. Mr Joustra has challenged that levy before the Netherlands courts. The regional appeal court, the *Gerechtshof te 's-Hertogenbosch*, found in his favour, on the ground that while the wine was in his garage he was not holding it for commercial purposes, and thus not for any purpose other than personal use within the meaning of the Netherlands law implementing Directive 92/12.

35. The tax authorities have appealed to the Hoge Raad, arguing that the *Gerechtshof* had misconstrued the notion of commercial purposes in Articles 7 and 9 of the directive. In their submission, only goods which are held by individuals for their personal requirements and which they have themselves transported fall outside the scope of that term.

36. The Hoge Raad now seeks a preliminary ruling on the following questions:

- (1) Must Article 8 of Directive 92/12 be construed as meaning that excise duty may not be levied other than in the Member State of acquisition in the case where an individual purchases goods subject to excise duty personally and for his own use in one Member State and has them transported by a transport undertaking to another Member State?
- (2) Must Article 8 of Directive 92/12 be construed as meaning that excise duty may not be levied other than in the Member State of acquisition where, as in the present case, individuals arrange for goods subject to excise duty to be purchased in one Member State by another individual who is acting neither in a business capacity nor with a view to making a profit and who arranges for the goods to be transported on behalf of the purchasers by a transport undertaking to another Member State?
- (3) If the answer to (one of) those questions should be in the negative: must Articles 7 and 9 of Directive 92/12 be construed as meaning that, if an individual arranges for goods subject to excise duty which have been released for consumption in one Member State to

17 — See Article 4(e) of the directive, quoted in point 9 above.

18 — An average, if there were 70 recipients, of under 20 litres of still wine and just over 2 litres of sparkling wine each.

be transported by a third party operating on his behalf to another Member State, where they are intended for his own personal requirements and for the personal requirements of others whom that individual also represents, that individual holds in that other Member State those goods subject to excise duty, that is to say, both those intended for his own use and those intended for the use of those other individuals, for commercial purposes within the terms of Articles 7 and 9 of the Directive, even if he is not acting commercially or with a view to making a profit?

- (4) If the answer to Question 3 should be in the negative, does it follow from any other provision of Directive 92/12 that the individual referred to in Question 3 owes excise duty in the other Member State?

38. All six Member States agree that the words 'transported by them' should be interpreted strictly, so that Article 8 of Directive 92/12 does not apply where goods are not transported personally by the individuals concerned. They further agree that in the situation described the goods are held for 'commercial purposes' within the meaning of Articles 7 and 9, and that the fourth question does not call for an answer.

39. The Commission differs only in its approach to the first question, which in the circumstances of the main proceedings relates to the wine ordered by Mr Joustra for his own use and delivered to his home by a transporter engaged by him: in such circumstances, the Commission considers that Article 8 should apply, provided that the individual concerned himself arranges for the transport as if he were the carrier, but that Member States may refuse to apply it in the event of abuse.

40. The various considerations put forward may be summarised as follows.

Submissions to the Court

37. Written observations have been submitted by the Italian, Netherlands, Polish, Portuguese, Swedish and United Kingdom Governments and by the Commission. No hearing has been requested and none has been held.

In favour of a strict interpretation of 'transported by them'

41. First, on its wording Article 8 of Directive 92/12 applies only to products

acquired by private individuals for their own use *and* transported by them. A strict interpretation was confirmed in *The Man in Black*. By contrast, as Advocate General Ruiz-Jarabo pointed out in his Opinion in that case,¹⁹ other provisions in the directive do provide explicitly for the intervention of another party. Article 9(3) for example speaks of 'atypical modes of transport by private individuals or on their behalf', while Article 10(1) refers to products 'dispatched or transported directly or indirectly by the vendor or on his behalf'.

customer and that Member States may refuse to apply the provision if the quantities involved exceed plausible levels of personal use.)

In favour of a more flexible interpretation of 'transported by them'

42. Second, it might be inferred from the proposal for a new version of Article 8²⁰ that the present wording necessarily excludes transport on behalf of the individual concerned.

43. Third, if Article 8 is to apply in situations in which the private individual does not personally accompany the goods, there may be opportunities for abuse. (The Commission considers however that the danger may be minimised if the application of Article 8 is made subject to the provisos that the transport must be arranged by the individual

44. First, there are circumstances in which private individuals employ others to carry modest quantities of duty-paid goods from one Member State to another for their own use, in which it seems inappropriate to impose a cumbersome process²¹ of paying duty in the second Member State and reclaiming it in the first. Household effects carried by a removal firm on a change of residence between Member States may include products such as wine; a tourist who has bought a few cases of local wine on holiday may be able to transport them home himself if travelling by car but not if flying; and it is common to send small personal gifts of dutiable goods by post or carrier.

19 — Point 34 et seq.

20 — See point 21 above.

21 — See Articles 7(5) and (6), and 22(3) of the directive, quoted in points 11 and 15 above.

45. Second, among those examples, removals of household effects were formerly exempted from excise duty pursuant to Article 1(1) of Directive 83/183,²² and small personal gifts were similarly exempted under Article 1(1) of Directive 74/651.²³ Those provisions ceased to apply from 31 December 1992, by virtue of Article 23(3) of Directive 92/12, but not with the intention of reintroducing excise duties on such movements; they simply no longer had any purpose as a result of the abolition of the principle of taxes on imports in relations between Member States.²⁴ It would be a retrograde step if Directive 92/12, intended to further the aims of the internal market, were interpreted so as to reintroduce excise duty barriers between Member States for private individuals.

46. Third, despite the broad formulation in the reasoning in *The Man in Black*,²⁵ the actual ruling was narrower. Like the underlying factual situation, it was limited to cases where the transport between Member State B and Member State A was not only effected by a professional carrier but was also arranged by the seller of the goods on the

purchaser's behalf. The present case on the other hand concerns a purchaser who himself arranges for the transport. The situation is one not of distance selling, as in *The Man in Black*, but of distance buying.

In favour of a broad interpretation of 'for commercial purposes'

47. First, the scheme of Articles 7 to 9 of Directive 92/12 is such that only two types of situation are envisaged. If transports of excisable goods do not fall within Article 8, they are necessarily for commercial purposes within the meaning of Articles 7 and 9.

48. Second, in order to determine whether products are intended for commercial purposes, Member States must take various criteria into account, including the quantity of the products and the mode of transport used. The quantity imported by Mr Joustra, or likely to be imported under any comparable arrangement, clearly exceeds the personal requirements of any reasonable individual and must therefore be regarded as commercial. Recourse to a professional transport

22 — Council Directive 83/183/EEC of 28 March 1983 on tax exemptions applicable to permanent imports from a Member State of the personal property of individuals (OJ 1983 L 105, p. 64).

23 — Council Directive 74/651/EEC of 19 December 1974 on the tax reliefs to be allowed on the importation of goods in small consignments of a non-commercial character within the Community (OJ 1974 L 354, p. 57).

24 — 20th recital in the preamble to Directive 92/12 (19th recital in the English and some other language versions, from which the 19th recital in the French and most other versions is strangely absent).

25 — See point 26 above.

undertaking moreover introduces an incontrovertibly commercial element into the transaction.

49. Third, the system set up by Directive 92/12 involves monitoring commercial movements of excisable goods by means of an accompanying administrative document, absent when private individuals move such goods. The possibility that large quantities of goods could be moved by individuals in consolidated consignments, with no accompanying document, would undermine that system and could render controls ineffective.

Assessment

Preliminary remark

50. As the Commission has pointed out, there is a possible discrepancy between certain findings of fact in the *Gerechtshof's* judgment, appended to the Hoge Raad's order for reference.

51. The Hoge Raad proceeds on the basis that the wine in issue was released for

consumption in France, where excise duty was paid on it. Those facts also appear in the *Gerechtshof's* judgment, from which however it also seems that, whatever may have been the case in other years, Mr Joustra was acting as a non-registered trader with regard to the disputed consignment in 1997. And if that was so, the wine should have been imported under a duty-suspension arrangement.

52. The assessment of Mr Joustra's situation will clearly differ according to whether he was acting as a private individual or as a non-registered trader. However, this Court cannot determine such questions of fact. Moreover, if Mr Joustra was acting as a non-registered trader the questions posed should not in principle arise, since the directive regulates the responsibilities of non-registered traders. I shall therefore proceed on the basis of the situation set out by the referring court.

Interpretation of Articles 6 to 10 of Directive 92/12

53. The issues in the present case turn essentially on the interpretation of the terms 'for their own use' and 'transported by them'

in Article 8 of Directive 92/12 and 'for commercial purpose[s]' in Articles 7 and 9.

54. Before addressing those points in the specific context of Mr Joustra's situation and the questions referred by the Hoge Raad, it seems appropriate to look at them more generally in the context of the system as a whole set up by the directive to determine the Member State in which excise duty is to be charged, that is to say of Articles 6 to 10.

55. In that system, Article 6 essentially lays down the general rule that duty is chargeable in the State in which goods are first released for consumption.

56. Articles 7 to 10 deal with cases in which, following such initial release for consumption and charging of excise duty, goods are transported to another Member State.

57. Thus, by way of exception to the general rule, Articles 7, 9 and 10 provide that if such goods are held for commercial purposes in the second Member State or, as the case may

be, are transported there by or on behalf of the vendor in the first Member State, then duty is chargeable in the second Member State and the duty previously levied in the first Member State is to be reimbursed.

58. Article 8, by contrast, does not derogate from the general rule, but confirms rather that it applies to goods acquired by private individuals for their own use and transported by them.

59. It therefore seems to me that Article 8 is not an essential provision in the scheme of Articles 6 to 10. If it were not there, goods acquired by private individuals for their own use and transported by them would still be subject to the general rule of taxation in the State of first release for consumption, since such goods cannot, on any interpretation, be said to be held for commercial purposes or to have been transported by or on behalf of the vendor.

60. As presently worded, Article 8 does not cover goods acquired by private individuals for their own use and transported on their behalf.

61. However, even if such goods were covered, as in the Commission's proposed amendment, it seems to me that the provision would still not be essential. Goods acquired by private individuals for their own use and transported on their behalf are by their very definition excluded from the scope of Articles 7, 9 and 10, and consequently fall within the general rule in Article 6, namely that duty is chargeable in the Member State of first release for consumption alone.

62. In order to reach that conclusion, it is not necessary to adopt a particularly strict or a particularly broad interpretation of the terms in issue. It is enough to note that (i) goods acquired for a private individual's own use and goods held for commercial purposes are mutually exclusive categories, and that (ii) where such an individual arranges for goods he has purchased to be delivered to his home, they are not transported by or on behalf of the vendor.

63. In that context, whether transport is effected by or on behalf of the vendor rather than the purchaser is a question which has been examined in *The Man in Black*.²⁶ In any event, it does not appear to be an issue in the present case.

64. The core meanings of goods acquired for a private individual's own use²⁷ and goods held for commercial purposes are plain and clearly contrasted. The precise dividing line between the two may not however be as clear in extreme cases. Where necessary, it seems preferable to define that line by reference to 'commercial purposes' rather than to 'own use', since the directive contains no specific assistance as to the contours of the latter term, but several indications as to the extent of the former.

65. Articles 7 and 9 overlap to the extent that they both concern goods held for commercial purposes, on which excise duty is to be charged in the Member State in which they are held.

66. Article 7(2) contains, in effect, a definition of such goods as being 'delivered, intended for delivery or used ... for the purposes of a trader carrying out an economic activity independently or for the purposes of a body governed by public law'. Article 9 contains no such definition, but Article 9(2) lists a number of factors to be

26 — See points 26 and 27 above.

27 — Which must on any sensible interpretation include sharing with family or friends and the giving of personal gifts.

taken into account when establishing whether ‘products referred to in Article 8’ are intended for commercial purposes.

to take account of the evidentiary criteria listed in Article 9(2) when determining whether a situation meets that definition in the context of Article 7.

67. From that I draw in particular two conclusions.

70. I now turn to examine the Hoge Raad’s questions, in the light of those considerations.

68. First, Article 9 appears directly relevant only to goods which would otherwise fall within Article 8 — that is to say, goods acquired by private individuals and transported by them.²⁸ It can thus apply where the individuals concerned do not transport the goods themselves but arrange for their transport by another person only if Article 8 is interpreted so as to cover such situations.

Question 1

71. In terms of the facts of the present case, the first question concerns only the wine which Mr Joustra ordered and had delivered to his home for his own use. The Hoge Raad asks whether in such a situation Article 8 of Directive 92/12 precludes the levying of duty other than in the Member State of acquisition.

69. Second, however, Articles 7 and 9 must be interpreted coherently, so that the definition in Article 7(2) must be valid also in the context of Article 9, and it must be possible

72. Article 8 could apply to that situation only if the term ‘transported by them’ were interpreted so as to mean also ‘or on their behalf’.

28 — At least in so far as Article 9(1) and (2) are concerned, Article 9(3) (see footnote 5 above) concerns specific circumstances not in issue here, and might perhaps be best viewed as if it were a separate provision from the rest of Article 9.

73. On the one hand, such an interpretation seems difficult. The text of Article 8 is unambiguous — all the more so when compared with other provisions which refer explicitly to transport by or on behalf of the seller or buyer — and the existence of a proposed amendment which specifically introduces the words ‘on their behalf’ tends to confirm that — at least in the Commission’s view — they cannot be read into the present wording.

follows from Article 6 that excise duty may be levied only in the Member State of acquisition.

Question 2

74. On the other hand, it seems unnecessary. As I have explained above, goods which are neither held for commercial purposes (and they cannot be, if they are for the private individual’s own use) nor transported by or on behalf of the vendor, are subject to excise duty only in the Member State of first release for consumption, in accordance with Article 6 of Directive 92/12, exactly as would have been the case if Article 8 had applied.

76. In terms of the facts of the present case, the second question concerns the wine which Mr Joustra ordered on behalf of other members of the circle and had delivered to his home for them to collect there in exchange for reimbursement of the cost of the wine and transport. Again, the Hoge Raad asks whether Article 8 of Directive 92/12 precludes the levying of duty other than in the Member State of acquisition.

77. It follows from my analysis of the first question that Article 8 cannot apply to that situation either.

75. I am thus of the view that Article 8 does not apply in the circumstances set out in the Hoge Raad’s first question; however, since Articles 7, 9 and 10 do not apply either, it

78. It is also clear that Article 10 cannot apply, since the goods were not transported by or on behalf of the vendor.

79. However, since Mr Joustra cannot be said to have acquired the wine for his own use (it was specifically for the use of others), it is less easy to rule out the possibility that he held it ‘for commercial purposes’ within the meaning of Articles 7 and/or 9. I shall deal with that issue in the context of the third question.

Question 3

80. The Hoge Raad’s third question is essentially whether a private individual in Mr Joustra’s situation is to be regarded as holding either the wine acquired for his own use or the wine acquired for other private individuals for commercial purposes within the meaning of Articles 7 and/or 9 of Directive 92/12, even if he is not acting in a business capacity or with a view to making a profit.

81. I have already answered that question with regard to the wine which Mr Joustra acquired for his own use, which by definition cannot be regarded as held for commercial purposes. I shall therefore confine my further

examination to the wine which he acquired on behalf of the other members of the circle.

82. I have also indicated my view that Article 9 cannot apply directly where the goods in question are transported not by but on behalf of the purchaser;²⁹ by contrast, Article 7 can apply. For the purposes of that article, the question is whether the individual in question was acting as ‘a trader carrying out an economic activity independently’, and the evidentiary criteria listed in Article 9(2) may be taken into account in deciding whether that is so.

83. An individual in Mr Joustra’s position is certainly carrying out an activity independently, and that activity has a clear economic dimension of a kind relevant to traders. He purchases goods on behalf of others, arranges and pays for their transport, and hands them over in return for payment. On the other hand, he neither makes nor seeks to make a profit.

29 — See point 68; but subject to the proviso in footnote 28.

84. However, an activity does not necessarily cease to be economic simply because there is no aim to make a profit. The service which someone such as Mr Joustra provides to other individuals on a not-for-profit basis competes directly with the services of traders who do seek to make a profit and who are thus subject to the requirements of Article 7 of the directive, so that excise duty is chargeable in the Member State of destination on the goods they provide. It does not seem compatible with the scheme of Articles 6 to 10 of the directive to allow private individuals to supply others with wine in such a way that those requirements are avoided, regardless of whether they seek to make a profit.

85. Therefore I reach the view that a private individual in Mr Joustra's situation is in principle to be regarded as holding the goods for commercial purposes within the meaning of Article 7, regardless of whether he seeks to make a profit.

86. Finally, I would point out if in the present case Mr Joustra was in fact acting as a non-registered trader,³⁰ it seems clear that the wine delivered to him but not for his

own use must be regarded as held by him for commercial purposes within the meaning of Article 7.

Question 4

87. The Hoge Raad's fourth question is essentially whether, if the situation of a private individual such as Mr Joustra falls neither within Article 8 nor within Articles 7 or 9 of Directive 92/12, any other provision of that directive requires him to pay excise duty in the Member State of delivery.

88. It follows from my analysis of the previous questions that no part of the wine which Mr Joustra purchased and had delivered to his home falls within the scope of Article 8 — or, consequently, of Article 9 — because he did not transport it personally but arranged for its transport.

89. Since it was Mr Joustra who himself took the initiative of arranging for that transport, Article 10, the only remaining provision of

30 — See points 33 and 50 to 52 above.

the directive under which duty could be charged in the Member State of delivery, cannot apply either. The condition for the application of that article is that the goods are dispatched or transported directly or indirectly by or on behalf of the vendor.

90. Consequently, the answer to the fourth question must be no.

Final remarks

91. The difficulties which have arisen in this case highlight very clearly some of the problems which the Commission seeks to remedy in its proposals for amending Directive 92/12.

92. Whilst I have sought to derive a workable interpretation from the present wording, it seems to me that revised legislation is an urgent necessity in order to deal clearly with those problems.

93. Another problem, not raised by the referring court but touched upon in the observations, is that of double duty.

94. Although the directive provides for reimbursement mechanisms, the Commission states that it is in practice impossible for private individuals to recover excise duty in one Member State when it has been levied again in another, a situation which it considers incompatible with the principles governing the internal market. The Swedish Government, on the other hand, submits that the levying of duty in two Member States is not incompatible with the purpose of the directive, which is to ensure the collection of duty and prevent fraud.

95. It seems to me that the Commission's approach is correct and that reimbursement procedures must be sufficiently certain, swift and easy of access as not to interfere with the right of individuals to transport excisable goods within the Community paying duty in only one Member State. To the extent that such an approach might not appear clear from the current wording of the directive, that too is a matter to be addressed by the legislature when considering amendments.

Conclusion

96. In the light of all the above considerations, I am of the opinion that the Court should answer the questions raised by the Hoge Raad as follows:

Where a private individual acquires and pays duty on excisable goods in one Member State and personally arranges for their transport, but does not himself transport them, to another Member State for his own use, that situation does not fall within the scope of Articles 7, 8, 9 or 10 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 so that, pursuant to Article 6 of the same directive, duty is chargeable only in the first Member State.

Where such an individual acquires and pays duty on excisable goods in one Member State and personally arranges for their transport, but does not himself transport them, to another Member State on behalf and for the use of other private individuals who defray his costs, that situation does not fall within the scope of Articles 8, 9 or 10 of Directive 92/12. The individual concerned is however in principle to be regarded as holding the goods for commercial purposes within the meaning of Article 7 of the same directive, regardless of whether he seeks to make a profit, so that duty is chargeable in the second Member State but the duty paid in the first Member State must be reimbursed in that State.