

JUDGMENT OF THE COURT (First Chamber)

15 November 2007\*

In Case C-330/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Hovrätten för Övre Norrland (Sweden), made by decision of 22 August 2005, received at the Court on 6 September 2005, in criminal proceedings against

**Fredrik Granberg,**

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, A. Tizzano (Rapporteur), R. Schintgen, M. Ilešič and E. Levits, Judges,

Advocate General: V. Trstenjak,  
Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 23 November 2006,

\* Language of the case: Swedish.

after considering the observations submitted on behalf of:

- F. Granberg, by L. Lindström, advokat,
  
- the Swedish Government, by K. Norman and A. Kruse, acting as Agents,
  
- the Greek Government, by S. Spyropoulos, N. Dafniou, Z. Chatzipavlou and S. Trekli, acting as Agents,
  
- the Italian Government, by I.M. Braguglia, acting as Agent, and G. Albenzio, avvocato dello Stato,
  
- the Polish Government, by J. Pietras, acting as Agent,
  
- the Council of the European Union, by E. Karlsson, M.-M. Josephides and E. Karlsson, acting as Agents,
  
- the Commission of the European Communities, by W. Mölls and L. Ström van Lier, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 February 2007,

gives the following

## Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Articles 7(4) and 9(3) 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) ('the Directive') and on the validity of Article 9(3).
  
- 2 The request has been made in the course of criminal proceedings brought against Mr Granberg for illegally bringing into Sweden heating oil, which is a mineral oil within the meaning of Article 9(3) of the Directive.

### I — Legal context

#### *Community legislation*

- 3 The fifth to the seventh, twelfth and thirteenth recitals of the Directive state as follows:

'Whereas 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;

Whereas 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;

Whereas 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;

...

Whereas provision should be made, to ensure the collection of taxes at the rates laid down by Member States, for the establishment of a procedure for the movement of such goods under duty suspension;

Whereas in that respect provision should first be made for each consignment to be easily identified; whereas provision should be made for the tax status of the consignment to be immediately identifiable; whereas it is therefore necessary to provide for an accompanying document capable of meeting these needs, which may be either an administrative or commercial document; whereas the commercial document used must contain the essential elements which appear on the administrative document<sup>4</sup>.

<sup>4</sup> Article 3(1) of the Directive provides that the Directive is applicable, at a Community level, to mineral oils, alcohol and alcoholic beverages and to manufactured tobacco.

5 Article 6(1) of the Directive provides:

‘Excise duty shall become chargeable at the time of release for consumption ...

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.’

6 Article 7 of the Directive states:

‘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.

...

4. The products referred to in paragraph 1 shall move between the territories of the various Member States under cover of an accompanying document listing the main data from the document referred to in Article 18(1). The form and content of this document shall be established in accordance with the procedure laid down in Article 24 of this Directive.

...'

7 Article 8 of the Directive states:

'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.'

8 Article 9(3) of the Directive states:

'Member States may also provide that excise duty shall become chargeable in the Member State of consumption on the acquisition of mineral oils already released for consumption in another Member State if such products are transported using atypical modes of transport by private individuals or on their behalf. Atypical

transport shall mean the transport of fuels other than in the tanks of vehicles or in appropriate reserve fuel canisters and the transport of liquid heating products other than by means of tankers used on behalf of professional traders.’

9 Article 18 of the Directive provides:

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

2. In order to identify the goods and conduct checks, the packages should be numbered and the products described using the document referred to in paragraph 1. If need be, each container should be sealed by the consignor when the means of transport is recognised as suitable for sealing by the Member States of departure or the packages should be sealed by the consignor.

3. In cases where the consignee is not an authorised warehouse keeper or a registered trader and notwithstanding Article 17, the document referred to in paragraph 1 must be accompanied by a document certifying that excise duty has been paid in the Member State of destination or that any other procedure for collection of duty has been complied with in accordance with the conditions laid down by the competent authorities of the Member State of destination.

This document must give:

- the address of the office concerned of the tax authorities in the Member State of destination,
  
- the date and reference of payment or of the acceptance of the guarantee of payment by this office.

...'

*National law*

- <sup>10</sup> Section 4 of Chapter 1 of the Law on excise duty monitoring of the transport of alcohol, tobacco and mineral oil products (lag (1998:506) om punktskattekontroll av transporter m.m. av alkoholvaror, tobaksvaror och mineraloljeprodukter) ('the LPK') provides as follows:

'Person liable shall mean the person liable to excise duty in accordance with

...



3. Points 1 to 5 or 7 of the first subparagraph of Section 1 of Chapter 4 or Section 2 of the Law (1994:1776) on the taxation of energy (lag (1994:1776) om skatt på energi) ('the LSE').

11 Section 1 of Chapter 4 of the LSE provides:

'Energy duty shall be payable by ...:

...

5. anyone ... who imports or receives fuel in Sweden, from another Member State of the European Community;

...'

12 Section 1a of Chapter 4 of the LSE provides:

'Duty shall not be due pursuant to Section 1(5),

...

3. for fuel imported into Sweden for private use in the fuel tank of a vehicle, a vessel or an aircraft, or in reserve canisters with a maximum capacity of 10 l.'

13 Section 6 of Chapter 1 of the LPK states:

'Products subject to excise duty may be transported only if the requirements relating to the accompanying document, the guarantee [for payment of the tax], the guarantee certificate and the declaration which flow from the Laws referred to in section 2 or the provisions referred to in section 5a are fulfilled.'

- 14 Under section 1 of Chapter 5 of the LPK, anyone who intentionally imports products subject to excise duty into Sweden from a State belonging to the area covered by Community excise legislation in breach of section 6 of Chapter 1 of the LPK, and who is thereby likely to seriously impede the exercise of fiscal controls relating to the movement of goods, is to be held guilty of the offence of unlawful movement of goods subject to excise duty and sentenced to a maximum of two years' imprisonment. If the infraction is considered a minor one, the offender is punished by a fine.

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

- 15 On 7 December 2003 Mr Granberg, travelling in a van coming from Finland, was stopped at the Swedish customs office in Övertorneå. The customs authorities found 3 000 l of Finnish heating oil in the vehicle. That oil was transported in a covered hold and contained in three intermediate bulk quantity containers ('IBC'). They were of a type used in the trade for the transport of hydraulic oil amongst other

things. The oil was to be used to heat Mr Granberg's home and was thus intended for his private use. Applying section 1 of Chapter 4 of the LSE, read together with section 4 of Chapter 1 of the LPK, the goods concerned were regarded as subject to the payment of excise duty.

16 Mr Granberg was prosecuted by the Swedish authorities for seriously impeding the exercise of fiscal controls, in so far as he had not made the declaration to the competent customs officials prior to transporting the oil, had not lodged a guarantee for payment of the duty payable and was not carrying a certificate of the lodging of the guarantee nor a simplified accompanying document. By decision of 4 May 2004, the Haparanda tingsrätt (District Court of Haparanda) convicted him and sentenced him to a fine for unlawful transport of goods subject to excise duty.

17 He appealed against that judgment to the Hovrätten för Övre Norrland (Court of Appeal of Övre Norrland). He accepts the facts but denies he has committed an offence. He claims that by imposing excise duty on all imports of heating oil, without making an exception for imports conducted other than by way of 'atypical' modes of transport within the meaning of Article 9(3) of the Directive, the Swedish legislature has not transposed — or, at least, has incorrectly transposed — the provisions of that directive.

18 It is in those circumstances that the Hovrätten för Övre Norrland decided to stay proceeding and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does Article 9(3) of [the Directive] allow Member States generally to exempt heating oil from the application of Article 8 of the Directive, so that

[legislation of] a Member State may provide that a private individual who himself purchases heating oil for his own use in another Member State where it was released for consumption and transports it himself to the Member State of destination must pay excise duty there, regardless of the mode of transport used to transport the heating oil?

- (2) If the answer to Question 1 is in the affirmative, is Article 9(3) of [the Directive] compatible with the fundamental principles in the EC Treaty on free movement of goods and the principle of proportionality, in the light of the fact that the purpose of Article 9(3) of the Directive appears to be to deter private individuals from transporting mineral oils by providing for a derogation from the principle that where goods are purchased by private individuals for their own use and transported by them excise duty is to be charged in the Member State in which they are acquired, and is such a purpose compatible with the legal basis which the Council [of the European Union] relied on for the Directive, or is Article 9(3) of the Directive invalid?
  
- (3) If the answer to Question 1 is in the negative, does the transport by a private individual of 3 000 litres of heating oil in three “[IBC]”, which can as such be approved for the commercial transport of dangerous goods including liquids, in the hold of a covered van constitute transport by an atypical mode of transport within the meaning of Article 9(3) of the Directive?
  
- (4) Is it compatible with Article 7(4) of [the Directive] for a Member State’s legislation to provide that a private individual, who purchases heating oil himself for his own use in another Member State where it was released for consumption and moves it himself to the Member State of destination by atypical mode of transport within the meaning of Article 9(3) of the Directive,

must lodge a guarantee for payment of excise duty and carry a simplified accompanying document and a certificate of the lodging of a guarantee for excise duty when the goods are moved?’

## **The questions referred for preliminary rulings**

### *The first question*

- 19 By its first question, the referring court asks, in essence, whether Article 9(3) of the Directive allows heating oil, acquired in another Member State by a private individual for his own use and transported by him to the Member State of consumption, to be subject, generally, to excise duty in that Member State of consumption, whatever the means of transport used.

### Observations submitted to the Court

- 20 The Polish Government, the Council and the Commission of the European Communities propose that that question be answered in the negative.
- 21 They submit that Article 9(3) of the Directive allows a Member State to exclude heating oil brought into its territory by a private individual for his own use from the scope of Article 8 of the Directive only when that individual uses a mode of transport which is ‘atypical’ within the meaning of Article 9(3).

- 22 According to the Polish Government and the Council, as that provision constitutes an exception to the general rule established in Article 8 of the Directive, it must be interpreted strictly. In that regard, the Council states that, if the Community legislature had wished to allow Member States to exclude all transport of heating oil by a private individual from the scope of Article 8, it would have clearly expressed that wish.
- 23 In contrast, the Swedish, Greek and Italian Governments consider that the Member States may exclude liquid heating products transported by private individuals from the scope of Article 8 of the Directive, and consequently, impose excise duty on those products subject to excise duty in the Member State of consumption, irrespective of the mode of transport chosen.
- 24 The Swedish Government submits principally that it is clear from the wording of Article 9(3) of the Directive that there is no possibility for a private individual to transport heating oil by a 'typical' mode of transport and therefore to be exempt from the payment of excise duty in the Member State of consumption. The objective of that provision is to allow Member States to prohibit, generally, the transport of heating oil by private individuals.
- 25 The Greek and Italian Governments, for their part, submit that liquid heating oil products, given their special nature, have been excluded by the Community legislature from the scope of Article 8 of the Directive. In contrast to other products subject to excise duty, such as tobacco and alcoholic drinks, heating oils are not normally transported by private individuals for their private use. It is therefore possible to presume that that type of product is transported only for business purposes.

## Reply of the Court

- 26 As the Court has already stated, the purpose of the Directive is to lay down a number of rules on the holding, movement and monitoring of products subject to excise duty, in particular so as to ensure that chargeability of excise duties is identical in all the Member States (Case C-296/95 *EMU Tabac and Others* [1998] ECR I-1605, paragraph 22; Case C-325/99 *van de Water* [2001] ECR I-2729, paragraph 39; Case C-395/00 *Cipriani* [2002] ECR I-11877, paragraph 41; and Case C-5/05 *Joustra* [2006] ECR I-11075, paragraph 27).
- 27 In that regard, Article 8 of the Directive established the general principle that excise duties on products purchased by private individuals for their own use and transported by them are payable in the Member State where they were acquired (see, to that effect, *Joustra*, paragraphs 31 and 33).
- 28 However, as regards the purchase of mineral oils which have already been released for consumption in a Member State, Article 9(3) of the Directive allows an exception to the general principle set out in Article 8 of that directive, thus providing that excise duties may also be imposed in another Member State, to which those oils have been transported for consumption.
- 29 The Member States may, nevertheless, avail of that option only if certain conditions are satisfied. Thus, the mineral oils on which the excise duties have been imposed in accordance with Article 9(3) must be transported by private individuals or on their behalf 'using atypical modes of transport', which are defined by that provision as 'the transport of fuels other than in the tanks of vehicles or in appropriate reserve fuel canisters and the transport of liquid heating products other than by means of tankers used on behalf of professional traders'.

- 30 It must be pointed out that, as an exception to a general rule, the provision must be interpreted strictly (see, to that effect, inter alia, Case C-83/99 *Commission v Spain* [2001] ECR I-445, paragraph 19; Case C-5/01 *Belgium v Commission* [2002] ECR I-11991, paragraph 56; and Case C-43/04 *Stadt Sundern* [2005] ECR I-4491, paragraph 27).
- 31 It follows that, contrary to the claim of the Swedish Government, Article 9(3) of the Directive cannot be interpreted as also allowing the Member State of consumption to impose excise duty on any import of heating oil by a private individual for personal use, irrespective of the mode of transport used. A Member State cannot use the option provided for in that provision when the goods are transported by the private individual using a means of transport which does not fall within the meaning of 'atypical modes of transport' according to the definition in that provision, as noted in paragraph 29 of the present judgment.
- 32 The answer to the first question is therefore that Article 9(3) of the Directive does not allow Member States generally to impose excise duty in the Member State of consumption on heating oil acquired in another Member State by a private individual for his own use and transported by him to the Member State of consumption, irrespective of the means of transport used.

*The second question*

- 33 Given the reply to the first question there is no need to reply to the second question.



*The third question*

- 34 By its third question the referring court asks whether the transportation by a private individual of 3 000 l of heating oil in three IBC on board a van constitutes an atypical mode of transport within the meaning of Article 9(3) of the Directive.

Observations submitted to the Court

- 35 The Commission states that the various linguistic versions of Article 9(3) of the Directive are not absolutely identical on that point. It claims, therefore, that the provision should be interpreted in light of its content, the context of its adoption and the principle of strict interpretation of exceptions. Consequently, only the transport of heating oil carried out by a professional haulier on behalf of a private individual and by means of a tanker should be outside the concept of atypical mode of transport. In contrast, the transportation of such goods by a private individual, by means of an ICB, clearly comes within that concept.
- 36 The Italian and Polish Governments, while arriving at the same conclusion as the Commission, emphasise the clarity and precision of Article 9(3), the interpretation of which is not open to doubt.

Reply of the Court

- 37 As pointed out at paragraph 29 of this judgment, in accordance with the definition given in Article 9(3) of the Directive, atypical mode of transport should be understood as 'the transport of fuels other than in the tanks of vehicles or in

appropriate reserve fuel canisters and the transport of liquid heating products other than by means of tankers used on behalf of professional traders’.

38 It is clear from the very wording of that provision that any transport of liquid heating products which is not carried out by means of tankers must be considered as an atypical mode of transport.

39 Such an interpretation is also supported by the various linguistic versions of that provision. That is the case, in particular, for the expressions ‘tankrar’ in the Swedish version, ‘tankers’ in the English version, ‘autocisterne’ in the Italian version, and ‘cystern’ in the Polish version.

40 Therefore, it must be held that the transport of heating oil by a private individual using not a tanker, but merely a van, as is the case in the main proceedings, constitutes an atypical mode of transport within the meaning of Article 9(3) of the Directive. The fact that, in the present case, the oil was contained in three ICBs does not affect that finding.

41 Therefore, the answer to the third question is that the transport by a private individual of 3 000 l of heating oil in three IBC on board a van constitutes an atypical mode of transport within the meaning of Article 9(3) of the Directive.

*The fourth question*

- 42 By its fourth question, the referring court asks, in essence, whether Article 7(4) of the Directive allows a Member State to demand that a private individual, transporting heating oil for his own use by an atypical mode of transport, lodges a guarantee for payment of excise duty and, during transportation, carries proof of lodging of that guarantee as well as a simplified accompanying document.

## Observations submitted to the Court

- 43 The Commission observes that Article 7(1) of the Directive, which describes the products covered by paragraph 4 of that article, covers only products 'held for commercial purposes'. It considers, therefore, that the latter provision does not cover products purchased by private individuals for their own use and, as a result, is not applicable to the main proceedings. In that regard, it emphasises that it follows from the third, fifth, sixth and eleventh recitals of the Directive that it draws a clear distinction between, on the one hand, goods held for commercial purposes and whose transportation must be accompanied by documents, and, on the other hand, goods held for personal purposes, for which no document is required for their transportation to another Member State.
- 44 The Commission adds that no provision of the Directive provides that the products covered by Article 9(3) must travel under the cover of any particular document or are subject to the lodgement of a guarantee.

45 In contrast, the Swedish and Polish Governments contend that it is clear from Article 9 of the Directive that any transportation by an atypical mode of transport is carried out for commercial purposes. The Swedish Government adds that the provision is based on the principle that private individuals should not be in a position to transport mineral oils. Therefore, any transportation of those products, even if carried out by a private individual for his own use, should be considered as being of a commercial nature, and therefore subject to the obligations set down in Article 7(4) of the Directive.

### Reply of the Court

46 First, the Court observes that Article 7(4) of the Directive, on the moving of products subject to excise duty under cover of an accompanying document, refers to Article 18(1) of that directive, which provides that all products subject to excise duty moving under duty-suspension arrangements between Member States are to be accompanied by a document drawn up by the consignor.

47 Article 18(3) of the Directive provides for the possibility that that document should be accompanied by another document certifying that excise duty has been paid in the Member State of destination or that any other procedure for collection of duty has been complied with in accordance with the conditions laid down by the competent authorities of the Member State of destination. In accordance with that provision the latter document must give the date and reference of payment or of the acceptance of the guarantee of payment by the tax authorities of the Member State of destination.

48 In view of the above, it must be held that Article 7(1) of the Directive, which lists the products which must move under the cover of an accompanying document such as that provided for in Article 7(4) of that article, covers only products held 'for commercial purposes'.

49 As the Court has already ruled, the Directive draws a distinction between, on the one hand, those products and, on the other hand, products held for private purposes, in respect of which no document is required (see, to that effect, *EMU Tabac and Others*, paragraph 23, and *Joustra*, paragraph 28).

50 As Article 8 provides that, for products held for private purposes, excise duty is payable in the Member State in which they were purchased, no document is required when they are transported to another Member State (see, to that effect, *EMU Tabac and Others*, paragraph 24).

51 Heating oil purchased by a private individual for his own use and transported by him using an atypical mode of transport is a product held for private purposes. Therefore, in light of the foregoing, Article 7(4) of the Directive does not require the product to move under the cover of an accompanying document in those circumstances.

52 However it cannot be inferred from that finding that a Member State cannot require movement of heating oil held for private purposes to take place under the cover of such a document.

53 Such a requirement may be necessary in the case of transport of mineral oils by an atypical mode of transport when the Member State of consumption, exercising the power provided for by Article 9(3) of the Directive, demands payment of the excise duties, so that it is in a position to monitor the tax status of those products.

- 54 As is clear from the thirteenth recital and Article 18 of the Directive, the purpose of the accompanying document is to identify the goods transported and to make the tax status of the consignment immediately identifiable.
- 55 Accordingly, a Member State of destination cannot be precluded from requiring, for that purpose, in cases of transport of heating oil by a private individual by atypical mode of transport, that that individual carries an accompanying document and a document confirming lodgement of a guarantee to ensure payment of the excise duties.
- 56 Having regard to the foregoing, the answer to the fourth question is that Article 7(4) of the Directive does not preclude the legislation of a Member State of destination in which excise duty is chargeable, as allowed under Article 9(3) of that directive, from imposing on any private individual who has personally acquired, for his own use, heating oil in another Member State where it has been made available for consumption, and transported the product himself to the Member State of destination by means of an atypical mode of transport, within the meaning of Article 9(3), to have lodged a guarantee to ensure payment of the excise duties and to have an accompanying document as well as a document confirming lodgement of the guarantee.

## **Costs**

- 57 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 (First Chamber) hereby rules:

1. **Article 9(3) of the Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, as amended by Council Directive 92/108/EEC of 14 December 1992, does not allow Member States generally to impose excise duty in the Member State of consumption on heating oil acquired in another Member State by a private individual for own use and transported by him to the Member State of consumption, irrespective of the means of transport used.**
  
2. **The transport by a private individual of 3 000 litres of heating oil in three ‘intermediate bulk containers’ on board a van constitutes an atypical mode of transport within the meaning of Article 9(3) of Directive 92/12, as amended by Directive 92/108.**
  
3. **Article 7(4) of Directive 92/12, as amended by Directive 92/108, does not preclude the legislation of a Member State of destination in which excise duty is chargeable, as allowed under Article 9(3) of that directive, from imposing on any private individual who has personally acquired, for his own use, heating oil in another Member State where it has been made available for consumption, and transported the product himself to the Member State of destination by means of an atypical mode of transport, within the meaning of Article 9(3), to have lodged a guarantee to ensure payment of the excise duties and to have an accompanying document as well as a document confirming lodgement of the guarantee of payment of the excise duties.**

[Signatures]