OPINION OF ADVOCATE GENERAL TRSTENJAK delivered on 3 September 2009[1]

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1 — Original language: Slovene.

I – Introduction

1. The present reference for a preliminary ruling from the Østre Landsret (Eastern Regional Court) (Denmark) was made in the context of three cases between Dansk Transport og Logistik ('DTL') and the Skatteministeriet (Danish Ministry of Taxation) concerning the levying of customs duty, excise duty and value added tax (VAT) on cigarettes which, in three TIR operations for which DTL had issued TIR carnets and acted as guarantor, were unlawfully introduced into Danish territory and were detained and destroyed there by the customs and tax authorities.

2. In this reference for a preliminary ruling it is necessary, first of all, to determine the time and place at which customs duty, excise duty and VAT become chargeable on goods unlawfully introduced into the territory of the Community and to determine the Member State which is competent to levy customs duty and taxes. Secondly, the question arises under what conditions taking possession of and subsequently destroying unlawfully introduced goods can result in the extinction of customs duty, excise duty and VAT which is already chargeable. In examining both these subject areas, a distinction must be drawn between cases where the goods were taken into possession and destroyed in the first importing Member State and cases where the goods were taken into possession and destroyed only after they were introduced into another Member State.

II – Legislative framework

A – *Community law*

1. The Community Customs Code and the Implementing Regulation

3. Article 84 of the Community Customs Code [2] which applied at the material time states:

'1. In Articles 85 to 90

(a) where the term "procedure" is used, it is understood as applying, in the case of

2 — Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), as amended by Regulation (EC) No 955/1999 of the European Parliament and of the Council of 13 April 1999 amending Regulation No 2913/92 with regard to the external transit procedure (OJ 1992 L 119, p. 1) ('the Customs Code').

non-Community goods, to the following arrangements:

…

…

2. Customs warehouse means any place approved by and under the supervision of the customs authorities where goods may be stored under the conditions laid down.

— customs warehousing;

…’

…’

5. Article 202 of the Customs Code provides:

4. Article 98 of the Customs Code provides:

‘1. A customs debt on importation shall be incurred through:

‘1. The customs warehousing procedure shall allow the storage in a customs warehouse of:

(a) the unlawful introduction into the customs territory of the Community of goods liable to import duties

(a) non-Community goods, without such goods being subject to import duties or commercial policy measures;

…

For the purpose of this Article, unlawful introduction means any introduction in violation of the provisions of Articles 38 to 41 and the second indent of Article 177.

…

2. The customs debt shall be incurred at the moment when the goods are unlawfully introduced.

3. The customs authorities referred to in Article 217(1) are those of the Member State where the customs debt is incurred or is deemed to have been incurred in accordance with this Article.'

…'

6. Article 215 of the Customs Code provides:

7. Article 217(1) of the Customs Code provides:

'1. A customs debt shall be incurred:

— at the place where the events from which it arises occur,

— if it is not possible to determine that place, at the place where the customs authorities conclude that the goods are in a situation in which a customs debt is incurred,

'1. Each and every amount of import duty or export duty resulting from a customs debt, hereinafter called "amount of duty", shall be calculated by the customs authorities as soon as they have the necessary particulars, and entered by those authorities in the accounting records or on any other equivalent medium (entry in the accounts).

…'

8. Article 233 of the Customs Code provides:

'Without prejudice to the provisions in force relating to the time-barring of a customs debt and non-recovery of such a debt in the event of the legally established insolvency of the debtor, a customs debt shall be extinguished:

...

(c) where, in respect of goods declared for a customs procedure entailing the obligation to pay duties:

— the customs declaration is invalidated ...;

— the goods, before their release, are either seized and simultaneously or subsequently confiscated, destroyed on the instructions of the customs authorities, destroyed or abandoned in accordance with Article 182, or destroyed or irretrievably lost as a result of their actual nature or of unforeseeable circumstances or *force majeure*;

(d) where goods in respect of which a customs debt is incurred in accordance with Article 202 are seized upon their unlawful introduction and are simultaneously or subsequently confiscated.

In the event of seizure and confiscation, the customs debt shall, none the less for the purposes of the criminal law applicable to customs offences, be deemed not to have been extinguished where, under a Member State's criminal law, customs duties provide the basis for determining penalties or the existence of a customs debt is grounds for taking criminal proceedings.'

9. Article 454 of the Implementing Regulation [3] reads as follows:

'1. This Article shall apply without prejudice to the specific provisions of the TIR and ATA

3 — Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 1993 L 253, p. 1), as amended by Commission Regulation (EC) No 1662/1999 of 28 July 1999 (OJ 1999 L 197, p. 25).

Conventions concerning the liability of the guaranteeing associations when a TIR or an ATA carnet is being used.

2. Where it is found that, in the course of or in connection with a transport operation carried out under cover of a TIR carnet or a transit operation carried out under cover of an ATA carnet, an offence or irregularity has been committed in a particular Member State, the recovery of duties and other charges which may be payable shall be effected by that Member State in accordance with Community or national provisions, without prejudice to the institution of criminal proceedings.

3. Where it is not possible to determine in which territory the offence or irregularity was committed, such offence or irregularity shall be deemed to have been committed in the Member State where it was detected unless, within the period laid down in Article 455(1), proof of the regularity of the operation or of the place where the offence or irregularity was actually committed is furnished to the satisfaction of the customs authorities.

Where no such proof is furnished and the said offence or irregularity is thus deemed to have been committed in the Member State in which it was detected, the duties and other charges relating to the goods concerned shall be levied by that Member State in accordance with Community or national provisions.

If the Member State where the said offence or irregularity was actually committed is subsequently determined, the duties and other charges (apart from those levied, pursuant to the second subparagraph, as own resources of the Community) to which the goods are liable in that Member State shall be returned to it by the Member State which had originally recovered them. In that case, any overpayment shall be repaid to the person who had originally paid the charges.

…'

10. Article 867 of the Implementing Regulation provides:

'The confiscation of goods pursuant to points (c) and (d) of Article 233 of the Code shall not affect the customs status of the goods in question.'

11. Article 867a of the Implementing Regulation states:

'1. Non-Community goods which have been abandoned to the Exchequer or seized or confiscated shall be considered to have been entered for the customs warehousing procedure.

2. The goods referred to in paragraph 1 may be sold by the customs authorities only on the condition that the buyer immediately carries out the formalities to assign them a customs-approved treatment or use.

...'

2. Directive 92/12 [4]

12. Under Article 3(1) of Directive 92/12, the directive applies at Community level to mineral oils, alcohol and alcoholic beverages, and manufactured tobacco.

13. Article 5 of Directive 92/12 provides:

'1. 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 Community as defined in Article 2 or of their importation into that territory.

"Importation of a product subject to excise duty" shall mean the entry of that product into the territory of the Community, including the entry of such a product from a territory covered by Article 2(1), (2) and (3) or from the Channel Islands.

However, where the product is placed under a Community customs procedure on entry into the territory of the Community, importation shall be deemed to take place when it leaves the Community customs procedure.

4 — 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 96/99/EC of 30 December 1996 (OJ 1996 L 8, p. 12) ('Directive 92/12' or 'the Excise Duty Directive').

2. Without prejudice to national and Community provisions regarding customs matters, when products subject to excise duty:

— are coming from, or going to, third countries or territories referred to in Article 2(1), (2) and (3) or the Channel Islands and are placed under one of the customs suspensive procedures listed in Article 84(1)(a) of [the Customs Code] or in a free zone or a free warehouse,

the excise duty on them shall be deemed to be suspended.

…'

Release for consumption of products subject to excise duty shall mean:

…

(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. Excise duty shall be levied and collected according to the procedure laid down by each Member State, it being understood that Member States shall apply the same procedures for levying and collection to national products and to those from other Member States.'

14. Article 6 of Directive 92/12 provides:

'1. Excise duty shall become chargeable at the time of release for consumption or when shortages are recorded which must be subject to excise duty in accordance with Article 14(3).

15. Article 7(1) of Directive 92/12 provides:

'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.'

16. Article 8 of Directive 92/12 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.'

3. The Sixth VAT Directive

17. Article 2 of the Sixth VAT Directive[5] provides:

'The following shall be subject to value added tax:

1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;

2. the importation of goods.'

18. Article 7 of the Sixth VAT Directive provides:

'1. "Importation of goods" shall mean:

(a) the entry into the Community of goods which do not fulfil the conditions laid down in Articles 9 and 10 of the Treaty establishing the European Economic Community ...

...

5 — Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), as amended by Council Directive 2000/17/EC of 30 March 2000 amending Directive 77/388 on the common system of value added tax – transitional provisions granted to the Republic of Austria and the Portuguese Republic (OJ 2000 L 84, p. 24) ('the Sixth VAT Directive' or 'the Sixth Directive').

2. The place of import of goods shall be the Member State within the territory of which the goods are when they enter the Community.

3. Notwithstanding paragraph 2, where goods referred to in paragraph 1(a) are, on entry into the Community, placed under one of the arrangements referred to in Article 16(1)(B)(a), (b), (c) and (d), under arrangements for temporary importation with total exemption from import duty or under external transit arrangements, the place of import of such goods shall be the Member State within the territory of which they cease to be covered by those arrangements.

…'

19. Article 10 of the Sixth VAT Directive provides:

'1.

(a) "Chargeable event" shall mean the occurrence by virtue of which the legal conditions necessary for tax to become chargeable are fulfilled;

(b) The tax becomes "chargeable" when the tax authority becomes entitled under the law at a given moment to claim the tax from the person liable to pay, notwithstanding that the time of payment may be deferred.

…

3. The chargeable event shall occur and the tax shall become chargeable when the goods are imported. Where goods are placed under one of the arrangements referred to in Article 7(3) on entry into the Community, the chargeable event shall occur and the tax shall become chargeable only when the goods cease to be covered by those arrangements.

However, where imported goods are subject to customs duties, to agricultural levies or to charges having equivalent effect established under a common policy, the chargeable event shall occur and the tax shall become chargeable when the chargeable event for those Community duties occurs and those duties become chargeable.

…'

20. Article 16 of the Sixth VAT Directive provides:

'1. Without prejudice to other Community tax provisions, Member States may, subject to the consultations provided for in Article 29, take special measures designed to exempt all or some of the following transactions, provided that they are not aimed at final use and/or consumption and that the amount of value added tax due on cessation of the arrangements [or] situations referred to at A to E corresponds to the amount of tax which would have been due had each of these transactions been taxed within the territory of the country:

…

B. supplies of goods which are intended to be:

(a) produced to customs and, where applicable, placed in temporary storage;

(b) placed in a free zone or in a free warehouse;

(c) placed under customs warehousing arrangements or inward processing arrangements;

…'

B – *National law*

1. National customs law

21. The relevant Danish customs rules relating to the treatment of goods in connection with smuggling or attempted smuggling are to be found in Paragraph 83 the Customs Law then in force (Consolidated Law No 113 of 27 February 1996, as amended; 'the Danish Customs Law').

22. According to the referring court, the first sentence of Paragraph 83(1) of the Danish Customs Law provides that goods discovered in connection with smuggling or attempted smuggling, including goods on which a traveller evades or attempts to evade import

duties, are to be 'detained' by the State customs and tax authorities or by the police on behalf of the State customs and tax authorities. Furthermore, under the second sentence of Paragraph 83(1), smuggled goods or other goods in respect of which customs duties or taxes are evaded or an attempt is made to evade customs duties or taxes, at the expense of the public authorities, are to be 'detained or seized' by those authorities, subject to the rules on seizure in Chapter 75b of the Danish Code of Civil Procedure.

23. Paragraph 83(2) of the Danish Customs Law states:

'Where an amount of customs duty, tax or fine owed or the costs of proceedings are paid, goods which have been detained or seized shall be returned, subject to the general rules on imports, to the person from whom they were detained or seized, or to another person who proves that he is entitled to the goods. If the goods are not claimed within two months after the end of the month in which the case is definitively resolved, they shall be sold off by the State customs and tax authorities at a duly advertised public auction. Goods which, in the view of the [State] customs and tax authorities, are unmarketable or unsaleable may, however, be destroyed under customs supervision after the specified period has expired. The amount raised from the auction shall be used first to cover the costs incurred by the public authorities in storing and selling the goods and then the amount of customs duty, tax or fine owed and the costs of proceedings. Any surplus shall be paid to the owner, provided that he comes forward within three years after the auction and duly proves his ownership of the goods that have been sold off.'

2. National law governing excise duty

24. The Danish rules on tobacco tax are to be found in the Law on excise duty on tobacco (Consolidated Law No 635 of 21 August 1998, as amended; 'the Law on excise duty on tobacco').

25. According to the referring court, Paragraph 2(1) of the Law on excise duty on tobacco, which applied to the importation of cigarettes at that time, provided that the excise duty on goods for consumption in Denmark was to be paid at the latest when

the goods subject to the duty were received from abroad. Under Paragraph 12(1) of the Law on excise duty on tobacco, in the version which applied at that time, excise duty is to be paid on goods subject to duty imported from places outside the European Union.

26. However, the Law on excise duty on tobacco contains no detailed rules on excise duty treatment in connection with the smuggling or attempted smuggling of tobacco goods or with the seizure, confiscation or destruction of such goods.

3. National law governing VAT

27. The relevant Danish rules on VAT are to be found in the Law on value added tax in force at the time (Consolidated Law No 422 of 2 June 1999, as amended; 'the Danish Law on VAT').

28. According to the referring court, under Paragraph 12(1) of the Danish Law on VAT which applied at the time, tax is to be paid on goods imported into the country from places outside the European Union. Paragraph 12(2) of that law provides that where goods are, on importation, stored in Copenhagen's Free Port, in a free warehouse or in a customs warehouse, the tax becomes chargeable only when the goods cease to be covered by one of these arrangements.

29. Under the first sentence of Paragraph 26 of the Danish Law on VAT, the tax becomes chargeable upon importation of the goods. However, under the second sentence of Paragraph 26, the tax becomes chargeable on goods under one of the arrangements referred to in Paragraph 12(2) thereof only when they cease to be covered by the arrangement concerned.

30. The Danish Law on VAT contains no detailed rules on tax treatment in connection with the smuggling or attempted smuggling of tobacco goods or on the seizure, confiscation or destruction of such goods.

C – *The TIR Convention*

31. The Customs Convention on the International Transport of Goods under Cover of TIR Carnets ('the TIR Convention') was signed in Geneva (Switzerland) on 14 November 1975. The European Economic Community approved the convention by Council Regulation (EEC) No 2112/78 of 25 July 1978 concerning the conclusion of the Customs Convention on the International Transport of Goods under Cover of TIR Carnets (TIR Convention) of 14 November 1975 at Geneva. [6] All the Member States have also acceded to that convention.

32. Under Article 4 of the TIR Convention, goods carried under the TIR procedure introduced by the convention are not to be subjected to the payment or deposit of import or export duties and taxes at customs offices en route.

33. For those facilities to be provided, Article 3 of the TIR Convention requires inter alia the transport operations to be performed under cover of a TIR carnet and that operations are guaranteed by associations approved in accordance with the provisions of Article 6 of that convention.

34. Under Article 6(1) of the TIR Convention, each Contracting Party may, under certain conditions, authorise associations to issue TIR carnets, either directly or through corresponding associations, and to act as guarantors.

35. Article 8 of the TIR Convention provides:

'1. The guaranteeing association shall undertake to pay the import or export duties and taxes, together with any default interest, due under the customs laws and regulations of the country in which an irregularity has been noted in connection with a TIR operation. It shall be liable, jointly and severally with the persons from whom the sums mentioned above are due, for payment of such sums.

2. In cases where the laws and regulations of a Contracting Party do not provide for payment of import or export duties and taxes as provided for in paragraph 1 above, the

6 — OJ 1978 L 252, p. 1.

guaranteeing association shall undertake to pay, under the same conditions, a sum equal to the amount of the import or export duties and taxes and any default interest.

3. Each Contracting Party shall determine the maximum sum per TIR carnet, which may be claimed from the guaranteeing association on the basis of the provisions of paragraphs 1 and 2 above.

4. The liability of the guaranteeing association to the authorities of the country where the [c]ustoms office of departure is situated shall commence at the time when the TIR carnet is accepted by the [c]ustoms office. In the succeeding countries through which goods are transported under the TIR procedure, this liability shall commence at the time when the goods enter these countries …

5. The liability of the guaranteeing association shall cover not only the goods which are enumerated in the TIR carnet but also any goods which, though not enumerated therein, may be contained in the sealed section of the road vehicle or in the sealed container. It shall not extend to any other goods.

6. For the purpose of determining the duties and taxes mentioned in paragraphs 1 and 2 of this Article, the particulars of the goods as entered in the TIR carnet shall, in the absence of evidence to the contrary, be assumed to be correct.

7. When payment of sums mentioned in paragraphs 1 and 2 of this Article becomes due, the competent authorities shall so far as possible require payment from the person or persons directly liable before making a claim against the guaranteeing association.'

III – Facts of the main proceedings and questions referred for a preliminary ruling

36. The referring court is hearing three cases relating to customs and excise law in connection with the smuggling of cigarettes in the course of TIR operations for which DTL, which is entitled to issue TIR carnets and act as the guarantor association in connection with TIR operations pursuant to an authorisation from the Danish customs and tax authorities under Article 6 of the TIR Convention, had issued the TIR carnets and acted as guarantor.

37. The first two smuggling attempts were made by sea and were discovered by the local customs and tax authorities on 2 May 2000 after the ferry from Klaipeda (Lithuania) had docked in Åbenrå (Denmark). In all, 537 200 West cigarettes were discovered in a first Lithuanian lorry and 431 000 Regal cigarettes in a second Lithuanian lorry, in both cases concealed in a false double bottom and double wall of the semi-trailer.

38. In the third smuggling attempt, 1 005 840 Prince cigarettes were transported to Denmark by land, through Poland and Germany. Those cigarettes were concealed in a Lithuanian lorry and were introduced for the first time into the customs territory of the Community when they crossed the border into Germany from Poland, without being detected by the German authorities. On 11 October 2000, the cigarettes were discovered in a cavity excavated in the feet of the transported pallets upon crossing the German-Danish border at Frøslev during a customs inspection by the Danish authorities. The seals of the lorry and the semi-trailer had not been broken before the customs inspection in Denmark. They were broken for the first time during the inspection.

39. In all three cases, the Danish authorities detained the cigarettes, which were not enumerated in the TIR carnets, and destroyed them following a lengthy storage period between November 2004 and March 2005. From the moment the cigarettes were seized, they did not leave the customs authorities' possession.

40. The Danish authorities made written demands to the holders of the TIR carnets, all Lithuanian undertakings, for the payment of customs duty, excise duty and VAT in respect of the detained cigarettes. The Lithuanian undertakings concerned did not comply with those demands for payment amounting to DKK 699 613,99 for the 537 200 West cigarettes, DKK 561 305,85 for the 431 000 Regal cigarettes, and DKK 1 349 719,60 for the 1 005 840 Prince cigarettes.

41. Against this background, the competent local customs and tax authorities in each case adopted three decisions against DTL, as the guaranteeing association under the TIR Convention. On the basis of the finding that DTL was liable for payment of customs duty, tobacco tax and VAT charged by the Danish authorities to the TIR carnet holders in connection with the smuggling of the cigarettes, DTL was ordered, in accordance with its maximum liabilities under the TIR carnets issued by it for those transport operations,

to pay a total of DKK 407 463 for the 537 200 West cigarettes (decision of 16 April 2002), DKK 407 463 for the 431 000 Regal cigarettes (decision of 30 May 2002), and DKK 376 643 for the 1 005 840 Prince cigarettes (decision of 4 February 2003). DTL paid the latter two amounts conditionally, but failed to pay the first sum.

42. DTL brought actions against those decisions before the Landsskatteret (Tax Court), which dismissed those actions and upheld the relevant decisions. DTL lodged an appeal against those rulings before the referring court, the Østre Landsret.

43. The Østre Landsret found that there was agreement between the Skatteministeriet and DTL in the three cases in the main proceedings that DTL did not belong to the group of persons which were directly liable for the amounts of customs duty and tax under customs and tax legislation. It was therefore common ground that any liability on the part of DTL arose solely from the TIR Convention, the conditions contained in the authorisation to be a guaranteeing association, and the TIR carnets used for the operations in question. The Skatteministeriet and DTL also agreed that DTL's liability was therefore similar to a guarantee in the sense that there could be no liability on the part of DTL if no claims for payment of customs duty, excise duty and VAT existed on the part of the person who was the principal debtor of the amounts of duty or tax under customs or tax legislation.

44. Against this background, the referring court has to decide in the three cases in the main proceedings whether, despite the detainment and subsequent destruction of the smuggled cigarettes, claims for payment of customs duty, excise duty and VAT have arisen against the Lithuanian undertakings in question and, if so, whether those claims were extinguished as a result of the destruction of the cigarettes. If the claims for payment of customs duty, excise duty and VAT are not extinguished, the Østre Landsret is also required to determine whether the Danish customs and tax authorities are competent to levy customs duty, excise duty and VAT.

45. In this connection, the Østre Landsret has expressed doubts as to the interpretation of the relevant provisions of the Customs Code, Directive 92/12 and the Sixth VAT Directive and referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Is the expression "seized and simultaneously or subsequently confiscated"

in point (d) of [the first paragraph of] Article 233 of the Customs Code to be interpreted as meaning that the provision covers situations where goods detained under the first sentence of Paragraph 83(1) of the [Danish] Customs Law on unlawful introduction are simultaneously or subsequently destroyed by the authorities without their having left the authorities' possession?

(2) Is the Excise Duty Directive to be interpreted as meaning that unlawfully introduced goods which are seized on importation and simultaneously or subsequently destroyed by the authorities are to be regarded as placed under "a suspension arrangement" with the effect that the excise duty is not incurred or is extinguished (see the first subparagraph of Article 5(2) and Article 6(1)(c) of the Excise Duty Directive, read in conjunction with Articles 84(1)(a) and 98 of the Customs Code, and Article 867a of the implementing provisions)?

Is the answer affected by whether or not a customs debt incurred on such unlawful introduction is extinguished under point (d) of [the first paragraph of] Article 233 of the Customs Code?

(3) Is the Sixth Directive to be interpreted as meaning that unlawfully introduced goods seized on importation and simultaneously or subsequently destroyed by the authorities are to be regarded as being placed under a "customs warehousing procedure" with the effect that the VAT debt is not incurred or is extinguished (see Articles 7(3), 10(3) and 16(1)(B)(c) of the Sixth Directive and Article 867a of the implementing provisions)?

Is the answer affected by whether or not a customs debt incurred on such unlawful introduction is extinguished under point (d) of [the first paragraph of] Article 233 of the Customs Code?

(4) Are the Customs Code, the implementing provisions and the Sixth Directive to be interpreted as meaning that the

customs authorities in the Member State where unlawful introduction of goods during a TIR operation is detected are competent to charge customs duty, excise duty and VAT on the operation where the authorities in another Member State, where the unlawful introduction into the Community occurred, did not detect the irregularity and consequently did not charge customs duty, excise duty and VAT (see Article 215 in conjunction with Article 217 of the Customs Code, Articles 454(2) and (3) of the implementing provisions then in force, and Article 7 of the Sixth Directive)?'

IV – Proceedings before the Court

46. The order for reference of 20 May 2008 was lodged at the Court of Justice on 28 May 2008. Written observations were submitted by the applicant, the Danish and the Netherlands Governments, and the Commission. At the hearing on 13 May 2009, oral argument was presented by the representatives of the applicant, the Danish and the Italian Governments, and the Commission.

V – Arguments of the parties

A – *First question*

47. With regard to the first question, DTL, the Netherlands Government and the Commission take the view that the detention and subsequent destruction of goods pursuant to the first sentence of Paragraph 83(1) of the Danish Customs Law are to be regarded, in principle, as seizure with subsequent confiscation for the purposes of point (d) of the first paragraph of Article 233 of the Customs Code. The Danish Government, on the other hand, takes the view that the destruction of goods does not come under the notion of 'confiscation' for the purposes of point (d) of the first paragraph of Article 233 of the Customs Code.

48. The *Danish Government* states that 'confiscation' for the purposes of point (d) of the first paragraph of Article 233 of the Customs Code cannot be equated with the destruction of goods pursuant to the first sentence of Paragraph 83(1) of the Danish Customs Law. Under Danish law and under the law of several other Member States, 'confiscation' always requires property to be transferred to the State. That requirement also applies to 'confiscation' for the purposes of the Customs Code. Because the Danish State is not the owner of the goods in question at any time

where goods are detained and subsequently destroyed under the first sentence of Paragraph 83(1) of the Danish Customs Law, that process cannot be regarded as 'confiscation' for the purposes of point (d) of the first paragraph of Article 233 of the Customs Code.

49. The Danish Government also points out that the second indent of point (c) of Article 233 of the Customs Code provides for the destruction of goods declared for a customs procedure entailing the obligation to pay duties as a separate criterion for extinction alongside seizure and simultaneous or subsequent confiscation of those goods. It follows that the confiscation and the destruction of goods cannot be treated as substantively equivalent. Furthermore, in Community law there is no general principle of customs and tax law according to which customs duties and taxes are to be paid only where the goods were released for consumption and this can be seen as a loss on the part of the authorities.

50. DTL, the Netherlands Government and the Commission, on the other hand, consider that confiscation for the purposes of point (d) of the first paragraph of Article 233 of the Customs Code exists where the owner's right of ownership of the goods is forfeited as a result of destruction by the authorities irrespective of whether the authorities themselves had acquired the right of ownership of those goods at any point in time.

51. According to *DTL*, the wording of point (d) of the first paragraph of Article 233 of the Customs Code makes clear that 'seizure' constitutes a measure which precedes 'confiscation', is less intrusive and is characterised in particular by the fact that possession and the power of disposal over the goods in question is temporarily withdrawn from the owner. 'Confiscation' of those goods exists from the point in time that the original owner forfeits his right of ownership of the seized goods, irrespective of whether his right of ownership has been lost as a result of an administrative act or as a result of a judicial decision. In the light of a teleological interpretation of point (d) of the first paragraph of Article 233 of the Customs Code, it cannot be relevant whether or not the State acquired ownership of the destroyed goods at any point in time.

52. The argument derived by the Danish Government from a textual comparison of the criteria for extinction under the second indent of point (c) and point (d) of the first paragraph of Article 233 of the Customs Code is also incorrect. The reason for which express provision is made regarding the destruction of goods on the instructions of the customs authorities before their release as a criterion for extinction in the second indent of point (c) is that in that provision criteria

for extinction are laid down both with and without seizure by the competent authorities, whilst point (d) of the first paragraph of Article 233 of the Customs Code covers only situations with preceding seizure. Because the destruction of goods on the instructions of the customs authorities before their release for the purposes of the second indent of point (c) of Article 233 of the Customs Code can take place in principle only in cases without preceding seizure by the customs authorities, that criterion for extinction does not allow the converse conclusion drawn by the Danish Government in connection with the interpretation of point (d) of the first paragraph of Article 233 of the Customs Code.

53. The *Commission* takes the view that the criterion for extinction under point (d) of the first paragraph of Article 233 of the Customs Code is satisfied where goods have been seized and subsequently destroyed upon their unlawful introduction into the customs territory without having left the possession of the authorities in the meantime. The aim of levying import duties is to protect Community production in connection with the common commercial policy. In the light of a teleological interpretation of point (d) of the first paragraph of Article 233 of the Customs Code, it cannot therefore be relevant whether the State acquired ownership of the goods or whether there was a transfer of property to the tax authorities. The criterion for extinction under point (d) of the first paragraph of Article 233 of the Customs Code is to be regarded as satisfied if a judicial decision or an administrative act results in the importer definitively being deprived of physical control and his rights to the goods concerned are forfeited, provided that at the same time those goods are definitively prevented from entering the economic networks as a result of that State action.

54. The Commission rejects the textual comparison of the second indent of point (c) of Article 233 and point (d) of the first paragraph of Article 233 of the Customs Code put forward by the Danish Government as substantively inaccurate for the same reasons as those cited by DTL. The Commission stresses that the criterion for extinction under point (d) of the first paragraph of Article 233 of the Customs Code requires the goods in question to be seized 'upon their unlawful introduction'. That criterion for extinction can therefore apply only where the smuggled goods have been seized on crossing an external border of the Community and at the latest when they leave the first border customs office.

55. The *Netherlands Government* points out, first of all, that the term 'detention' is not used in the Customs Code. However, it is clear from the order for reference that detention within the meaning of the Danish Customs Law is a less intrusive measure than seizure with subsequent confiscation for the purposes of point (d) of the first paragraph of Article 233 of the Customs Code. Whilst detention is a temporary measure which has

no effects on the right of ownership and the goods can also be returned at the end of the detention, seizure with subsequent confiscation requires a transfer of ownership to the customs authorities.

56. Nevertheless, the Netherlands Government also concludes that the criterion for extinction under point (d) of the first paragraph of Article 233 of the Customs Code is satisfied if, under Danish customs law, goods could be destroyed by the competent (customs) authorities or on their instructions without their prior confiscation. The destruction of goods goes beyond mere confiscation, with the result that in such a case a reasonable interpretation of Community customs law would require the application of the criterion for extinction under point (d) of the first paragraph of Article 233 of the Customs Code.

57. The *Italian Government* stresses, lastly, that the grounds for extinction of the customs debt contained in Article 233 of the Customs Code must be given a strict interpretation, to the effect that seizure with confiscation of smuggled goods can result in the extinction of the customs debt only where it takes place before the goods go beyond the first customs office situated at the external border of the Community. This also applies to the smuggling of goods in the course of TIR operations, as the provisions of the TIR Convention must be interpreted consistently with the Customs Code.

B – *Second question*

58. With regard to the second question, the legal assessments proposed by DTL, the Danish Government, the Netherlands Government and the Commission are markedly different. In its oral submissions, the Italian Government essentially endorsed the position taken by the Commission.

59. According to the *Danish Government*, seizure with subsequent destruction of unlawfully introduced goods never leads to the suspension of excise duty liability under Article 5(2) of Directive 92/12. In support of that argument, the Danish Government first of all refers to the wording of the first indent of Article 5(2) of Directive 92/12, according to which goods must be placed under one of

the customs suspensive procedures listed in Article 84(1)(a) of the Customs Code in order for the excise duty on them to be deemed to be suspended. It follows that the goods must be subject to such a procedure even on importation, which is not the case in the event of seizure of unlawfully introduced goods. This literal interpretation of the first indent of Article 5(2) of Directive 92/12 is supported by Article 6(1)(c) of that directive, which also refers to any importation of the products, including irregular importation, where those products 'have not been placed under a suspension arrangement'.

60. Even if the first indent of Article 5(2) of Directive 92/12 were to be interpreted to the effect that excise duty is also deemed to be suspended on goods which were placed under a customs suspensive procedure only after importation, this would not result in a suspension of the excise duty in the event of seizure of smuggled goods. The application of Article 867a of the Implementing Regulation to goods which were seized after importation only means that those unlawfully introduced goods did not change their customs status. However, Article 867a of the Implementing Regulation does not alter the fact that if the goods have been seized the customs authorities can continue to make claims for payment of customs duty against the customs debtor (in the present case the holder of the TIR carnet) and, alternatively, against DTL, as the guaranteeing association under the TIR Convention. Such an interpretation is supported in particular by Article 876a(2) of the Implementing Regulation, which infers – at least implicitly – that the customs debt continues to exist even if the smuggled goods have been seized. This interpretation of Article 867a of the Implementing Regulation is also supported by the fact that the opposite view would lead to unreasonable protection of those who carry out irregular importation or other customs debtors, including the guaranteeing association. The customs debt and the excise duty incurred could in principle then be suspended indefinitely, until the debtor in question considers it appropriate to pay the customs duty.

61. *DTL* claims that the assessment made in point (d) of the first paragraph of Article 233 of the Customs Code regarding the extinction of the customs debt in the case of seizure with simultaneous or subsequent confiscation of unlawfully introduced goods should also be taken as the basis for the interpretation of the suspensive event under Article 5(2) of Directive 92/12. No excise duty can therefore be incurred on goods in respect of which the customs debt is extinguished pursuant to

point (d) of the first paragraph of Article 233 of the Customs Code.

62. Against this background, DTL argues that goods which have been detained and subsequently destroyed upon their importation pursuant to the first sentence of Paragraph 83(1) of the Danish Customs Law, without having left the possession of the authorities, are to be deemed to have been entered for a customs warehousing procedure under Article 867a of the Implementing Regulation. Because the customs warehousing procedure is one of the procedures listed in Article 84(1)(a) of the Customs Code, the suspensive event laid down in the second indent of Article 5(2) is to be regarded as having occurred in cases like those in the main proceedings. Such suspension of tax is cancelled only where the goods leave the Community customs procedure. Furthermore, excise duty is incurred under Article 6(1) of Directive 92/12 only where the goods are released for consumption. If the goods seized upon their unlawful introduction are destroyed, they are not released for consumption, with the result that the suspension of the excise duty liability can no longer be cancelled and it therefore ceases to apply. It is a basic principle of the Community rules on customs duties and taxes that customs duties and taxes are payable only if the authorities have suffered a loss in the sense that the goods are released for consumption. This basic principle is expressed inter alia in Articles 206 and 233(d) of the Customs Code and in Article 14 of Directive 92/12.

63. The *Commission* argues that in answering the second question a distinction must be drawn between the goods incurring excise duty liability under Article 5(1) of Directive 92/12 and the subsidiary question of the incurrence of the tax debt under Article 6(1) of that directive.

64. Under the first subparagraph of Article 5(1) of Directive 92/12, products coming under that directive are subject to excise duty at the time of their importation into the territory of the Community, where under the second subparagraph 'importation' means the entry of those products into the Community. In this context, the notion of the 'entry' of the goods is to be interpreted in the same way as 'introduction' in point (d) of the first paragraph of Article 233 of the Customs Code. Excise duty liability therefore arises in principle when the goods concerned are brought across the customs border. If, however, the goods were placed under a Community

customs procedure upon their introduction into the Community, their introduction is deemed to have taken place, under the third subparagraph of Article 5(1) of Directive 92/12 only when they have left the Community customs procedure.

65. The latter provision is to be read in conjunction with Article 867a of the Implementing Regulation, under which non-Community goods which have been seized or confiscated are to be considered to have been entered for the customs warehousing procedure. Because that customs warehousing procedure – based on a legal fiction – is a Community customs procedure within the meaning of the third subparagraph of Article 5(1) of Directive 92/12, goods which were seized by the authorities upon their introduction into the Community are considered not to have been imported for the duration of the seizure. If the seized goods were subsequently destroyed, they disappeared before they left the Community customs procedure, with the result that the excise duty liability did not arise at any time.

66. This interpretation is consistent with the aim of Directive 92/12 and also ensures that seizure with simultaneous or subsequent confiscation of smuggled goods in the case of unlawful introduction into the Community produces the same result in customs and excise law.

67. If, on the other hand, the goods were seized only after their unlawful introduction into the customs territory and therefore only after going beyond the first customs office situated inside the customs territory of the Community, they are subject to excise duty pursuant to Article 5(1) of Directive 92/12. Furthermore, the excise duty liability has also effectively arisen as a result of the irregular importation under Article 6(1)(c) of Directive 92/12 without the subsequent seizure being able to result in the suspension of tax pursuant to Article 5(2) of that directive.

68. The *Italian Government* essentially supports these arguments put forward by the Commission. Under Article 5(1) of Directive 92/12 in conjunction with Article 867a of the Implementing Regulation, no excise duty liability arises if the goods were seized and subsequently destroyed before going beyond the first customs office at the external border of the Community. If, on the other hand, the goods were seized and destroyed after going

beyond the first border customs office, there is a risk that those goods will end up forming part of the economic network of the Community and the excise duty debt will become due irrespective of whether the smuggled goods were subsequently seized and destroyed.

69. In the view of the *Netherlands Government*, the suspension arrangement under Article 5(2) of Directive 92/12 is to be seen against the background that some time may pass between excise duty liability arising in respect of the goods and the tax debt effectively being incurred. In the context of that arrangement, excise duty becomes due only once the goods have been released for consumption. Accordingly, Article 5(2) of Directive 92/12 provides that excise duty on products is to be deemed to be suspended where they are placed under one of the customs suspensive procedures listed in Article 84(1)(a) of the Customs Code. However, the smuggling of goods cannot be regarded as such a customs suspensive procedure, with the result that the goods seized upon their unlawful introduction which were simultaneously or subsequently confiscated are not under a customs suspensive procedure and duty is not therefore suspended.

70. With regard to goods which were seized upon their unlawful introduction into the customs territory of the Community, excise duty can therefore be levied in accordance with the provisions applicable to the customs debt. If the goods were discovered and seized at an internal border only after their unlawful introduction into the customs territory of the Community, they have already been released for consumption, with the result that excise duty can be levied.

C – *Third question*

71. With regard to the third question, the opinions expressed by DTL, the Danish Government, the Netherlands Government and the Commission are markedly different and cover a broad range of possible answers. In its oral submissions, the Italian Government essentially endorsed the position taken by the Commission.

72. *DTL* reiterates, first of all, that point (d) of the first paragraph of Article 233 of the Customs Code is to be interpreted to the effect that the customs debt is extinguished if goods which have been seized or taken into possession by the customs authorities pursuant to

the first sentence of Paragraph 83(1) of the Danish Customs Law are destroyed. DTL believes it natural and proper to interpret the provisions of the Sixth VAT Directive consistently with the provisions of the Customs Code, with the result that under the circumstances described no claim for payment of VAT can arise in respect of unlawfully introduced cigarettes if they have been seized or taken into possession and subsequently destroyed by the authorities upon their importation without having left the possession of the authorities. The two sets of rules must be consistent in this respect.

73. DTL further states that under Article 10(3) of the Sixth VAT Directive the chargeable event occurs and the tax becomes chargeable when the goods are imported. If goods are entered for a customs warehousing procedure when they are introduced into the Community, the chargeable event occurs and the tax becomes chargeable only when the goods cease to be covered by the customs warehousing procedure. Because goods which have been seized or taken into possession and then destroyed by the authorities upon importation pursuant to the first sentence of Paragraph 83(1) of the Danish Customs Law, without having left the possession of the authorities, are to be regarded as being placed under a customs procedure under Article 867a of the Implementing Regulation, no VAT can be levied in the cases before the referring court in accordance with Article 10(3) of the Sixth VAT Directive.

74. The *Danish Government* states that, under the first subparagraph of Article 10(3) of the Sixth VAT Directive, the chargeable event occurs and the tax becomes chargeable in respect of non-Community goods which are placed under one of the arrangements referred to in Article 7(3) on entry into the Community only when the goods cease to be covered by those arrangements. Article 7(3) mentions the arrangements referred to in Article 16(1)(B)(a), (b), (c) and (d) of the directive, that is to say, the 'customs warehousing procedure'. Article 16(1)(B) refers, for a more precise meaning of 'customs warehousing procedure', to the 'Community customs provisions in force'.

75. The only possible basis for the view that the cigarettes have been placed under a customs warehousing procedure is Article 867a of the Implementing Regulation. In the view of the Danish Government, however, that provision cannot mean that goods which have been detained can be regarded as having been placed under a customs suspension procedure within the meaning of the abovementioned provisions of the Sixth VAT Directive,

irrespective of whether or not the goods were destroyed after being seized.

76. The *Netherlands Government* puts forward arguments along similar lines and stresses that Article 16(1)(B) of the Sixth VAT Directive does also refer to goods being placed under a customs warehousing procedure, but the Customs Code makes no provision for unlawfully introduced goods to be entered for a customs warehousing procedure. Furthermore, entering goods for such a procedure is conditional upon authorisation being issued by the customs authorities under Article 85 of the Customs Code, which was evidently not granted in the cases to be determined by the referring court. In this connection, Article 867a of the Implementing Regulation merely constitutes an implementing provision which cannot therefore derogate from the clear stipulations of the Customs Code. Lastly, Article 867a of the Implementing Regulation cannot apply if goods are 'detained'.

77. In the opinion of the Netherlands Government, in the event of the unlawful introduction of goods across an external border of the Community, VAT may be levied in accordance with the rules of customs law. If the customs debt expires pursuant to point (d) of the first paragraph of Article 233 of the Customs Code, the VAT debt is also extinguished (Article 10(3) of the Sixth VAT Directive). If, on the other hand, unlawfully introduced goods were transported across an internal border of the Community and subsequently discovered and seized, the VAT debt arose, pursuant to Article 7(2) of the Sixth VAT Directive, in the Member State within the territory of which the goods were when they entered the Community.

78. The *Commission* also draws a distinction, in its proposed answer to the third question, between the cases in the main proceedings in which the goods were unlawfully introduced across an external border of the Community and the case in the main proceedings in which the goods unlawfully introduced into the territory of the Community were transported across an internal border of the Community.

79. The Commission infers from Article 2 in conjunction with Article 7(1)(a) and (2) and Article 10(3) of the Sixth VAT Directive that VAT becomes chargeable in principle once the goods in question have been introduced into the Community. The first Member State into which the goods are imported is entitled to levy the tax in that case. If, however, the goods were placed under a customs arrangement on entry into the Community, the chargeable event occurs and the tax becomes chargeable, under Article 10(3) of the Sixth VAT Directive, only when the goods cease to

be covered by that arrangement. The words 'on entry into the Community' have the same meaning as 'upon their unlawful introduction' within the meaning of Article 233 of the Customs Code and 'at the time … of their importation' within the meaning of Article 5(1) of Directive 92/12.

80. In this context, goods which were seized by the customs authorities before they went beyond the first customs office situated inside the customs territory of the Community were placed under a customs arrangement under Article 867a of the Implementing Regulation. If those goods were destroyed following seizure, VAT can no longer therefore become chargeable. If, on the other hand, goods were seized by the customs authorities after they had gone beyond the first customs office situated inside the customs territory of the Community, they are not placed under a customs arrangement on their entry into the Community. In those circumstances, the chargeable event has occurred and the tax has become chargeable and VAT is therefore due in principle.

D – *Fourth question*

81. All the parties to the proceedings agree that the fourth question concerns only the case in the main proceedings in which the cigarettes unlawfully introduced into the Community were seized by the Danish authorities after they had crossed the German-Danish border.

82. *DTL* argues that, in such a case, it is not the Danish customs and tax authorities which are competent to levy customs duty, excise duty and VAT, but the authorities of the country into which the goods were first imported, even if the latter did not discover the unlawful importation.

83. From a customs law perspective, under Article 217 in conjunction with Article 215(3) of the Customs Code, it is for the customs authorities of the Member State where the customs debt is incurred or is deemed to have been incurred to calculate and enter in the accounting records the customs debt. Those authorities also levy the duty. For TIR operations, Article 454 of the Implementing Regulation is also relevant, confirming the fundamental competence of the authorities of the State in which the goods were unlawfully introduced into the Community.

84. According to DTL, the same must be true of the levying of excise duty and VAT. This

follows directly from Article 454(2) of the Implementing Regulation, which concerns recovery of duties and other charges which may be payable. As far as VAT is concerned, DTL also refers to Article 7(2) of the Sixth VAT Directive, under which the place of import of goods is the Member State within the territory of which the goods are when they enter the Community. The first Member State into which the goods were imported is therefore competent to levy VAT.

85. The *Danish Government* takes the view that the Danish customs and tax authorities are competent to levy customs duty, excise duty and VAT in a case such as the one at issue here if the irregularity was detected in Denmark.

86. The question of competence must be answered in parallel in relation to customs duty, excise duty and VAT. Neither Article 215 in conjunction with Article 217 of Customs Code nor Article 454 of the Implementing Regulation or Article 7 of the Sixth VAT Directive can mean that the customs debt and the claims for payment of tobacco tax and VAT are deemed to have been incurred in the Member State in which the unlawful importation into the Community took place but was not discovered. The claims arose in the Member State in which the irregularity was detected.

87. In support of its argument, the Danish Government refers to the principles of the TIR procedure. The basic principle behind the TIR procedure is that in a TIR road transport operation under a customs seal a free 'corridor' is created from the customs office of departure to the customs office of destination. TIR operations are conducted as external Community transit procedures, which means that the goods must be presented to the customs authorities only at the customs office of destination and not upon importation into the Community. Having regard to Articles 4 and 5 of the TIR Convention, if it is found in the course of an inspection at an internal border of the Community that the goods transported under a seal do not correspond to the goods indicated in the TIR carnet, it must be assumed that an offence or irregularity has been committed within the Community. It must therefore be assumed that in such a case the unlawful introduction took place at the internal border, with the result that the customs duty, excise duty and VAT become chargeable in the Member State in question. This solution is also necessary for reasons of efficiency, because the authorities which discover an irregularity in the course of a TIR road transport operation are best placed to penalise such irregularities and to collect the duties and taxes owed with a view

to protecting the economic interests of the Community.

88. The *Netherlands Government* distinguishes between the competence to levy excise duty and the competence to levy customs duty and VAT. The authorities of the subsequent Member State into which the goods are imported are competent to levy excise duty if the unlawful importation of the goods was not detected in the first Member State into which they were imported. On the other hand, the customs duty and the VAT must be levied by the authorities of the first Member State into which the goods were imported. With regard to the customs debt this solution follows from Article 202(2) in conjunction with Article 215 of the Customs Code, and with regard to the VAT debt from Article 7(2) of the Sixth VAT Directive.

89. The *Commission* also takes the view that in a case like the one in the main proceedings at issue, the authorities of the first Member State into which the goods were imported are competent to levy customs duties under Article 215 in conjunction with Article 217(1) of the Customs Code and Article 454(2) of the Implementing Regulation. Under Article 7(2) of the Sixth VAT Directive, those authorities are also competent to levy VAT.

90. As regards the levying of excise duty, the Commission states that – unless the referring court concludes that the seized cigarettes were intended for the individual's own use – excise duty is payable in accordance with Articles 7 and 9 of Directive 92/12 in the Member State in which the unlawfully introduced goods were ultimately discovered.

91. In the view of the Commission, this finding that in principle the Member State in which the unlawfully introduced goods were discovered has fiscal sovereignty as regards excise duty does not mean, however, that that Member State may also levy the excise duty. Although under Article 6(2) of Directive 92/12 excise duty is to be levied and collected according to the procedure laid down by each Member State, the requirements of Community law must be observed. In particular, the Member States are required to comply with Community law and its general principles in the exercise of their powers, including the principle of proportionality. If unlawfully introduced goods were seized and subsequently destroyed after they had crossed an internal border of the Community without having left the possession of the authorities, there is no real danger that those goods will be released for consumption in the territory of that Member State. As a result of the destruction of those goods, the possibility of their release for consumption in that Member State is completely ruled out. Because excise duty

is to be regarded as a tax linked to the territory of each Member State according to the scheme of Directive 92/12, in such a case it would be inconsistent and would go beyond the aim pursued by the law on excise duty – which has been partially harmonised – if excise duty is also actually levied. In such a case, the levying of excise duty by that Member State would be disproportionate. This does not mean that the Member States cannot impose any penalty for the unlawful introduction of goods subject to excise duty from another Member State. However, according to the Commission, the levying of excise duty by the Member State which detected the irregularity and then destroyed the goods is disproportionate in a case like the one at issue here.

92. In the opinion of the *Italian Government*, in a case like the one at issue the first Member State into which the goods were imported is competent both to recover the customs debt and to levy VAT and excise duty. Nevertheless, the subsequent Member State into which they were imported is also competent to levy excise duty with the result that there is a concurrent competence in this area. In this connection, the Italian Government rejects the arguments put forward by the Commission regarding the disproportionality of the levying of excise duty by the subsequent Member State into which the goods were imported, on the ground that the question of competence is a formal and not a substantive matter.

VI – Legal assessment

A – *First question*

1. General remarks

93. By its first question, the referring court is seeking an interpretation of the terms 'seized and simultaneously or subsequently confiscated' within the meaning of point (d) of the first paragraph of Article 233 of the Customs Code. According to the order for reference, the Court is being asked in particular to clarify whether detention of smuggled goods in accordance with the first sentence of Paragraph 83(1) of the Danish Customs Law constitutes seizure for the purposes of point (d) of the first paragraph of Article 233 of the Customs Code and whether the subsequent destruction of the smuggled goods by the Danish authorities may be equated with confiscation of those goods within the meaning of that provision.

94. However, the answer to the first part of the first question, which asks whether detention under the first sentence of Paragraph 83(1) of the Danish Customs Law is equivalent to

seizure for the purposes of point (d) of the first paragraph of Article 233 of the Customs Code, requires an interpretation of national law for which the Court has no jurisdiction. Nevertheless, the Court can, by means of an interpretation of the element 'seizure' within the meaning of point (d) of the first paragraph of Article 233 of the Customs Code, provide the referring court with all the necessary information to enable that court itself to determine in the main proceedings whether the detention of the smuggled cigarettes in the specific case under the first sentence of Paragraph 83(1) of the Danish Customs Law has the characteristics of seizure within the meaning of point (d) of the first subparagraph of Article 233 of the Customs Code.

95. With regard to the interpretation of the terms 'seized and simultaneously or subsequently confiscated' within the meaning of point (d) of the first paragraph of Article 233 of the Customs Code, it is also pointed out that the definition of those terms comes under Community law. It is necessary to point out that the Community legal order does not, in principle, aim to define concepts on the basis of one or more national legal systems unless there is express provision to that effect. [7] Against this background, the arguments put forward by the Danish Government regarding the legal concept of confiscation in the different national legal orders of the Member States are not relevant. The substance of the terms 'seized and simultaneously or subsequently confiscated' within the meaning of point (d) of the first paragraph of Article 233 of the Customs Code must be fleshed out on the basis of a schematic and teleological interpretation of this ground for extinction.

96. The Court gave such a schematic and teleological interpretation of point (d) of the first paragraph of Article 233 of the Customs Code in its judgment of 2 April 2009 in *Elshani*. [8] That judgment can also provide important indications for the answer to the first question.

2. The judgment in *Elshani*

97. In *Elshani*, the Court had to rule in particular on the interpretation of the word sequence 'upon their unlawful introduction' within the meaning of point (d) of the first paragraph of Article 233 of the Customs Code. It stressed that the criterion for extinction under point (d) of the first paragraph of Article 233 of the Customs Code was a ground for the extinction of the customs debt which must be narrowly construed. [9] The purpose of that provision is to avoid the imposition of duty on goods which were duly intercepted

7 — See Case C-314/06 *Société Pipeline Méditerranée et Rhône* [2007] ECR I-12273, paragraph 21; Case C-103/01 *Commission* v *Germany* [2003] ECR I-5369, paragraph 33; and Case C-296/95 *EMU Tabac and Others* [1998] ECR I-1605, paragraph 30.

8 — Case C-459/07 [2009] ECR I-2759, paragraph 30.

9 — Ibid., paragraph 30.

by the authorities on their introduction into the Community, and consequently could not have been placed on the market and therefore did not constitute a threat, in terms of competition, to Community production. [10]

98. In the light of these general requirements, in *Elshani* the Court interpreted 'unlawful introduction' within the meaning of point (d) of the first paragraph of Article 233 of the Customs Code as meaning that that process is completed once the goods go beyond the first customs office situated inside the customs territory of the Community. [11]

99. This strict interpretation of the element of unlawful introduction [12] was justified in particular by a reference to the risk, in terms of competition, emanating from the presence of goods introduced unlawfully into the customs territory of the Community. Once those goods have gone beyond the area in which the first customs office inside the customs territory is situated, there is less likelihood that the customs authorities will, fortuitously, discover those goods in the course of spot checks. From that point in time, there is a very high risk that those goods will end up forming part of economic networks. [13] It is at the customs offices, strategically located at the entry points along the external borders, that the authorities are best placed to exercise a strict level of control over goods entering the customs territory of the Community, in order to avoid both unfair competition affecting Community producers and the loss of tax revenues which results from fraudulent importations. [14]

100. In the view of the Danish Government, however, the assessment on which the judgment in *Elshani* is based cannot be applied to cases of smuggling of goods in the course of goods transport operations with TIR carnets. In this connection, it observes in particular that in TIR operations the goods do not have to be presented to the authorities at the customs office (of transit) at the Community's external border, but only at the customs office of destination. If smuggled goods were discovered and seized in the course of a TIR operation at the (internal) border of a

10 — Ibid., paragraph 29. See also the Opinion of Advocate General Mengozzi in Case C-459/07 *Elshani* [2009] ECR I-2759, point 51, and the Opinion of Advocate General Tizzano in Case C-337/01 *Hamann International* [2004] ECR I-1791, point 50.

11 — *Elshani*, cited in footnote 8, paragraph 38.

12 — In his Opinion in *Elshani*, cited in footnote 10, point 58, Advocate General Mengozzi rejected such a strict interpretation of the criterion of unlawful introduction as an implementation of Article 233 of the Customs Code in a 'punitive' spirit. In contrast, he proposed that the expression 'upon their unlawful introduction' in point (d) of the first paragraph of Article 233 of the Customs Code should be interpreted as covering the timespan from crossing the border to the moment when the unlawfully introduced goods reach their first destination in the Community customs territory.

13 — *Elshani*, cited in footnote 8, paragraph 32.

14 — Ibid., paragraph 33.

subsequent Member State into which they were imported, the 'unlawful introduction' did not take place in the first Member State into which they were imported, having regard to the special characteristics of the TIR procedure, but in the Member State in which the goods were discovered, with the result that the customs debt was also incurred there.

101. These arguments put forward by the Danish Government are not convincing.

102. If goods are introduced into the Community under the TIR procedure, the TIR carnet is generally inspected at the customs office (of transit) at the external border of the Community and at the same time it is checked whether the foreign customs seals are still intact. For that purpose, the means of transport together with the cargo and the relevant TIR carnet have to be presented to the customs authorities. In this context, the customs authorities are able to exercise fully their powers of inspection. If there are suspicions of fraud, customs seals have been violated or it is feared that the TIR carnet has been falsified, the customs authorities will automatically inspect the goods. Consequently, it must also be assumed in cases of smuggling of goods in the course of TIR operations that, once those goods have gone beyond the area in which the first customs office inside the customs territory of the Community is situated, there is less likelihood that the customs authorities will, fortuitously, discover those goods in the course of spot checks. In cases of smuggling in the course of TIR operations too, from that point in time there is a very high risk that those goods will end up forming part of the economic networks of the Community.

103. In my opinion, it must therefore also be assumed in the case of smuggling of goods in the course of TIR operations that 'unlawful introduction' within the meaning of point (d) of the first paragraph of Article 233 of the Customs Code exists once the goods have gone beyond the first customs office situated inside the customs territory of the Community.

3. The criterion for extinction under point (d) of the first paragraph of Article 233 of the Customs Code requires seizure at an external border of the Community

104. With a view to obtaining an answer to the first question, it can be inferred from *Elshani*, first of all, that seizure with simultaneous or

subsequent confiscation within the meaning of point (d) of the first paragraph of Article 233 of the Customs Code can result in the extinction of the customs debt only where the seizure takes place at an external border of the Community and in particular before the goods leave the territory in which the first external border customs office is situated.

4. Seizure and confiscation within the meaning of point (d) of the first paragraph of Article 233 of the Customs Code

105. In view of the different situations underlying the three cases in the main proceedings pending before the referring court, the criterion for extinction of the customs debt under point (d) of the first paragraph of Article 233 of the Customs Code can therefore be relevant only in the two cases in which the cigarettes were transported by sea from Lithuania to Denmark and were discovered and detained by the local customs and tax authorities immediately after the ferry had docked in Denmark. Only in those two cases did the detention take place at an external border of the Community – as it was at that time.

106. In the case in which the cigarettes had been transported to Denmark by land, through Poland and Germany, on the other hand, the smuggled goods were unlawfully introduced into the customs territory of the Community at the Polish-German border. Subsequent detention and destruction of those goods at the German-Danish internal border did not therefore take place 'upon their unlawful introduction' and consequently can no longer fall within the material scope of point (d) of the first paragraph of Article 233 of the Customs Code.

107. It is possible to infer from *Elshani* the general guiding principle for the interpretation of the elements 'seizure' and 'confiscation' within the meaning of point (d) of the first paragraph of Article 233 of the Customs Code that that provision must be narrowly construed, in the sense that the customs debt is to be extinguished only if the goods seized at an external border of the Community did not constitute a threat, in terms of competition, to Community production.

108. An interpretation of point (d) of the first paragraph of Article 233 of the Customs Code based on wording and sentence structure also suggests that a logical distinction must be drawn in connection with 'seizure with simultaneous or subsequent confiscation' between the seizure and the confiscation of the goods in question, even though those two actions may in practice take place at the same time.

109. This conceptual distinction between the seizure and the confiscation of goods can be explained by the fact that, from a practical point of view, protecting Community production against smuggled goods requires both the physical interception of the goods in question by the competent authorities and the legal withdrawal of the owner's power of disposal over the smuggled goods.

110. Against this background, 'seizure' of the goods within the meaning of point (d) of the first paragraph of Article 233 of the Customs Code must be construed as a material action by the competent authorities to assume actual physical control, by which the goods are taken into possession and are physically prevented from entering the economic networks of the Member States. The simultaneous or subsequent confiscation of those seized goods then means that the de facto protection of Community production created by the seizure is legally cemented by irrevocably withdrawing the power of disposal over the seized goods from the original owner or the person holding the power of disposal. [15]

15 — See Witte, P., *Zollkodex – Kommentar*, 4th edition, Beck, Munich, 2006, Article 233, paragraph 15 et seq., who defines seizure as a temporary security measure and confiscation as the permanent withdrawal of the power of disposal over goods. See also Schwarz, D. and Wockenfoth, K., *Zollrecht*, 3rd edition, 4th supplement/November 1994, Cologne etc., § 233, paragraph 8 et seq., who define seizure as the compulsory taking into possession of property ordered by an administrative act, which results in the establishment of State control over the objects. Seizure, in contrast with confiscation, is characterised by the fact that the legal status changes.

111. In the light of the above arguments, the referring court will therefore be required to consider, in making its decision, whether the competent authorities took possession of the smuggled cigarettes upon their detention in the sense that they acquired actual control over those goods and thereby effectively prevented them from entering the economic networks of the Member States until the time of final confiscation.

112. In the light of the above considerations, the second part of the first question – whether the destruction by the authorities of detained goods constitutes confiscation within the meaning of point (d) of the first paragraph of Article 233 of the Customs Code – must be answered in the affirmative.

113. The main point in dispute between the parties in this connection is whether confiscation of goods under point (d) of the first paragraph of Article 233 of the Customs Code requires not only the original owner's right of ownership to be forfeited as a result of a court decision or some other State action, but also that the State acquires or has acquired ownership of the confiscated goods, at least for a short time.

114. In my opinion, 'confiscation' within the meaning of point (d) of the first paragraph of Article 233 of the Customs Code does not necessarily require the State to have acquired ownership of the goods in question at any point in time. It is crucial only that the power of disposal over the goods has been withdrawn irrevocably from the original owner. In principle, 'confiscation' within the meaning of that provision therefore requires the original owner's right of ownership to be forfeited, but not a change of ownership to the State. In accordance with that provision, the relevant factor is not that the State acquires real rights to the goods in question, but that as a result of the State action the goods are prevented definitively from entering economic networks.

115. Because where goods are destroyed under State supervision the goods are prevented definitively from entering economic networks, such destruction is to be regarded as 'confiscation' within the meaning of point (d) of the first paragraph of Article 233 of the Customs Code even if the State has not acquired a real right to those goods prior to their destruction.

116. The Danish Government objects to this assessment, claiming that the second indent of point (c) of Article 233 of the Customs Code lays down rules concerning the destruction of declared goods on the instructions of the authorities as a distinct criterion for extinction in addition to seizure with confiscation of such goods. The Danish Government concludes that destruction of goods must constitute a ground for extinction of the customs debt which is different from seizure with confiscation of goods.

117. This wording-based argument put forward by the Danish Government is not convincing.

118. First of all, it should be pointed out that the criterion for extinction under point (d) of the first paragraph of Article 233 of the Customs Code applies only to goods which have been seized by the competent authorities and therefore intercepted and taken into physical possession upon their unlawful introduction. The grounds for extinction under the second indent of point (c) of Article 233 of the Customs Code, on the other hand, apply in general to goods declared for a customs procedure entailing the obligation to pay duties. Accordingly, the latter provision contains not only grounds for extinction of the customs debt in respect of declared goods seized before their release, but also in respect of declared goods over which the customs authorities have not acquired actual physical control. The first category of grounds for extinction covers seizure with confiscation of those goods; the latter category covers the destruction of the

declared goods on the instructions of the customs authorities.

119. Against this background, it is clear that the distinction between the ground for extinction of seizure with confiscation of declared goods and the ground of destruction of such goods on the instructions of the customs authorities in the second indent of point (c) of Article 233 of the Customs Code is not based on a difference in the meaning of the words 'confiscation' and 'destruction' of goods. Rather, in the context of the second indent of point (c) of Article 233 of the Customs Code too, the 'confiscation' of seized goods generally requires the forfeiture of the original owner's right of ownership of the confiscated goods, which can be effected both by a change in ownership to the State and through the destruction of the goods. Because destruction of declared, but not seized, goods on the instructions of the authorities was intended to result in the extinction of the customs debt, that ground for extinction was expressly regulated in the second indent of point (c) of Article 233 of the Customs Code as a distinct criterion for extinction.

120. In summary, it therefore follows from both a teleological and a schematic interpretation of the criterion for extinction under point (d) of the first paragraph of Article 233 of the Customs Code that the destruction of seized goods by the competent authorities is to be construed as 'confiscation' of those goods within the meaning of that provision.

5. Conclusion

121. In the light of the foregoing, the answer to the first question must be that 'seizure' within the meaning of point (d) of the first paragraph of Article 233 of the Customs Code requires physical control to be acquired by the national authorities upon unlawful introduction into the Community, by which the goods are taken into possession pending their confiscation. The 'confiscation' of goods within the meaning of that provision requires the irrevocable forfeiture of the power of disposal of the owner or of the person holding the power of disposal, irrespective of whether this is connected with a change of ownership to the State.

B – *Second question*

1. General remarks

122. By its second question, the referring court is essentially seeking to ascertain whether seizure with simultaneous or subsequent confiscation of smuggled goods pursuant to the first subparagraph of Article 5(2) and Article 6(1)(c) of Directive 92/12 in conjunction with Article 84(1)(a) and Article 98 of the Customs Code and Article 867a of the

Implementing Regulation means that those goods are to be deemed to have been placed under excise duty suspension arrangements.

123. The referring court also asks whether the answer is affected by whether or not a customs debt incurred on unlawful importation is extinguished under point (d) of the first paragraph of Article 233 of the Customs Code.

124. In order to answer the second question, it is first necessary to clarify the distinction made by the legislature between the chargeable event for excise duty under Article 5(1) of Directive 92/12 and the chargeable event under Article 6(1) of that directive. [16]

125. Under the first subparagraph of Article 5(1) of Directive 92/12, the products coming under that directive are subject to excise duty at the time of their production within the territory of the Community or of their importation into that territory. However, the occurrence of that chargeable event for excise duty means only that an excise duty debt *may arise*. For such an excise duty debt *actually to arise* in a specific case, there must also be a chargeable event covered by Article 6(1) of Directive 92/12. Under the first subparagraph of Article 6(1), excise duty becomes 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) of the directive. The second subparagraph of Article 6(1) then lists the various cases covered by release for consumption of products subject to excise duty. The suspension procedure provided for in Article 5(2) of Directive 92/12 means in this connection that the incurrence of the tax debt in relation to goods subject to excise duty is suspended until a chargeable event occurs. [17]

126. Against this background, it is clear that in formulating the second question the referring court focuses on the chargeable event under Article 6(1) in conjunction with Article 5(2) of Directive 92/12 and asks specifically whether unlawfully introduced cigarettes which are seized on 'importation' and simultaneously or subsequently confiscated are to be deemed to have been placed under 'a suspension arrangement', without distinguishing between 'importation' across an external

16 — See Friedrich, K., 'Das neue Verbrauchsteuerrecht ab 1993', *Der Betrieb* 1992, p. 2000 et seq.; Birk, D. (ed.), *Handbuch des Europäischen Steuer- und Abgabenrechts*, Herne/Berlin, 1995, p. 731 et seq.

17 — It is a feature of the suspension arrangement that the excise duty on the products covered by it is not yet payable, although the chargeable event for taxation purposes has already taken place (see Case C-395/00 *Cipriani* [2002] ECR I-11877, paragraph 42).

border of the Community and the subsequent 'importation' across an internal border.

127. However, according to the documents before the Court, in two of the three cases in the main proceedings the cigarettes were taken into possession at – what was at the time – an external border of the Community with the result that the primary focus for those proceedings should not be the question of the consequences of those goods being taken into possession in terms of the tax debt arising under Article 6(1) of Directive 92/12, but the preliminary question of the effects of goods being taken into possession on the chargeable event for excise duty under Article 5(1) of Directive 92/12. Importation across an external border of the Community constitutes 'importation into the Community territory' within the meaning of Article 5(1) of Directive 92/12, with the result that in analysing the consequences, in terms of excise duty, of the seizure of smuggled goods at the external borders of the Community it must be established, first of all, whether the goods have become liable for excise duty under Article 5(1) of the directive despite seizure with simultaneous or subsequent confiscation. Only if that is the case is it possible to ask the question whether a tax debt arises pursuant to Article 6(1) and whether duty is suspended pursuant to Article 5(2) of Directive 92/12.

128. Although it is not for the Court to assess the facts of the dispute in the main proceedings, it can none the less provide the referring court with any useful guidance on the specific characteristics of those facts that will make it easier for the latter to resolve the dispute in the main proceedings. [18] Accordingly, in answering the second question, I will examine both the consequences, in terms of excise duty, of seizure with simultaneous or subsequent destruction of goods on importation across an external border of the Community and the effects of such seizure with destruction on introduction across an internal border, distinguishing between the chargeable event for excise duty under Article 5(1) of Directive 92/12 and the chargeable event under Article 6(1) of that directive.

2. Seizure at an external border of the Community with simultaneous or subsequent destruction

129. Under the second subparagraph of Article 5(1) of Directive 92/12, 'importation of a product' means the entry of that product

18 — It is settled case-law that, notwithstanding the division of jurisdiction between the national court and the Court of Justice in the preliminary ruling procedure under Article 234 EC, in the event of questions having been improperly formulated, the Court is free to extract from all the factors provided by the national court, and in particular from the statement of grounds contained in the reference, the elements of Community law requiring an interpretation having regard to the subject-matter of the dispute. See, with regard to the procedural power of the Court to clarify or reformulate questions in preliminary ruling proceedings under Article 234 EC, Case 83/78 *Pigs Marketing Board* [1978] ECR 2347, paragraph 26.

into the territory of the Community. Directive 92/12 does not make any express provision regarding the exact meaning of the 'entry' process and the point in time from which that process is completed. Because this notion of 'entry' of the goods influences the incurrence of excise duty liability, the crucial factor for a teleological interpretation of the notion of importation is the point in time from which excise duty liability is to arise in the light of the objectives of Directive 92/12.

130. In this respect, it should be pointed out, first of all, that excise duty is an indirect tax on consumption which may have a dual purpose: first, to provide revenue and, second, to discourage the consumption of certain products. [19] The Court has consistently held that in this context the levying of excise duty is also intended to ensure that there is no competition between a lawful economic sector and an unlawful sector. It is thus intended to prevent smuggled goods coming under Directive 92/12 being sold much more cheaply than the legal goods. [20] The Court has also pointed out, in that context, that the cigarette market particularly lends itself to the development of unlawful trade. [21]

131. In the light of those requirements, goods should generally be regarded as subject to excise duty under Article 5(1) of Directive 92/12 at the latest from the time their entry into the economic network of the Community is immediately impending or takes place, whereby in the case of smuggling of goods across the external borders of the Community the acute threat to the lawful economic sector is to be treated in the same way as entry into the economic network.

132. The judgment in *Elshani*, in which the Court considered the interpretation of the expression 'unlawful introduction' within the meaning of the Customs Code, offers extremely useful indications for determining when that threat occurs in the case of smuggling of goods. In that judgment, the Court pointed out that the risk of smuggled goods forming part of the economic networks of the Member States increases substantially from the time that those goods have gone undiscovered beyond the area in which the first

19 — See the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-325/99 *van de Water* [2001] ECR I-2729, point 25.

20 — Against this background, in Case C-455/98 *Salumets and Others* [2000] ECR I-4993, paragraph 19, and the case-law cited, the Court pointed out that the illegal importation of goods is not subject to taxation if, owing to the special characteristics of those goods, any competition between a lawful economic sector and an unlawful sector is precluded.

21 — See Case C-374/06 *BATIG* [2007] ECR I-11271, paragraph 34.

customs office inside the customs territory of the Community is situated. [22]

133. In my opinion, Article 5(1) of Directive 92/12 is also to be interpreted as meaning that 'importation' of smuggled goods exists from the time when those goods have gone beyond the area in which the first customs office inside the customs territory of the Community is situated. From that point in time, those goods are introduced definitively into the Community, with the result that they are subject to excise duty within the meaning of Article 5(1) of Directive 92/12.

134. It follows that 'importation' of smuggled goods giving rise to excise duty liability within the meaning of Article 5(1) of Directive 92/12 exists from the point in time when the goods have gone beyond the area in which the first customs office inside the customs territory of the Community is situated. If smuggled goods covered by Directive 92/12 were seized and simultaneously or subsequently destroyed by the authorities before leaving the first customs office situated inside the customs territory of the Community, it must be assumed that those goods were not imported, with the result that the chargeable event for the purposes of Article 5(1) of Directive 92/12 did not occur and the goods are not therefore subject to tax. In the absence of tax liability, a tax debt also cannot arise under Article 6(1) in such a case.

3. Seizure upon introduction across an internal border with simultaneous or subsequent confiscation

(a) Under point (c) of the second subparagraph of Article 6(1) of Directive 92/12, smuggled goods are to be regarded as released for consumption from the time when they are unlawfully introduced into the Community

135. If smuggled goods covered by Directive 92/12 are seized and simultaneously or subsequently confiscated at an internal border of the Community and not therefore in the first Member State into which they were imported, but in a subsequent Member State, those goods are already subject to excise duty as a result of the preceding introduction into the territory of the Community pursuant to Article 5(1) of Directive 92/12. [23] That excise duty

22 — *Elshani*, cited in footnote 8, paragraph 32.

23 — See point 134 of this Opinion.

liability applies for the entire customs territory of the Community and arises from the time when the goods were introduced into the territory of the Community, without subsequent seizure being able to cancel or suspend that excise duty liability for the goods. In such a case, it is therefore only necessary to clarify whether the seizure with simultaneous or subsequent confiscation of the goods subject to excise duty at an internal border has repercussions on tax becoming chargeable under Article 6(1) of Directive 92/12.

136. Unlike the chargeable event for excise duty arising under Article 5(1) of Directive 92/12, as a result of which the products are subject to excise duty in the entire Community, the result of the chargeable event arising under Article 6(1) of that directive is in principle only the incurrence of a tax debt in a specific Member State in accordance with the conditions in force on the date on which duty becomes chargeable in that Member State. The Member State in which the excise duty debt ultimately arises is ascertained under Directive 92/12 in principle on the basis of the country-of-destination principle. [24] As a rule, the products subject to excise duty are transported to the country of destination under a suspension arrangement, where their subsequent departure from the suspension arrangement pursuant to point (a) of the second subparagraph of Article 6(1) of Directive 92/12 results in the incurrence of the tax debt.

137. In the case of smuggled goods, in derogation from the general rule, release for consumption does not depend primarily on the country-of-destination principle. Rather under point (c) of the second subparagraph of Article 6(1) of Directive 92/12, any irregular importation of products subject to excise duty is regarded as release for consumption where those products have not been placed under a suspension arrangement.

138. In this connection, the term 'importation' within the meaning of point (c) of the second subparagraph of Article 6(1) of Directive 92/12 is to be construed in the same way as the notion of importation under Article 5(1) of Directive 92/12. [25] This means that irregular importation takes place once

24 — See, on this subject, Takacs, P., *Das Steuerrecht der Europäischen Union*, Vienna, 1998, p. 460 et seq.

25 — A different, opposite interpretation of the notion of importation under point (c) of the second subparagraph of Article 6(1) of Directive 92/12, according to which that notion of importation is primarily not geared to the introduction of the goods into the territory of the Community, but to the introduction of goods into the territory of any Member State, with the result that such 'importation' would take place when any internal border was crossed, is precluded by the schematic finding that importation under point (c) of the second subparagraph of Article 6(1) of Directive 92/12 is regarded as release for consumption. It would be incompatible with the overall scheme of Directive 92/12 if each time smuggled goods crossed an internal border 'importation' and therefore a fresh release for consumption were assumed to have taken place.

the goods go beyond the area in which the first customs office inside the territory of the Community is situated.

139. As a result of such irregular 'importation', the smuggled goods are released for consumption, with a result that the excise duty debt is incurred in respect of the smuggled goods subject to excise duty under point (c) of the second subparagraph of Article 6(1) of Directive 92/12.

(b) Under Article 7(1) of Directive 92/12, excise duty is levied in respect of products introduced unlawfully into the Community for commercial purposes in the Member State in which those products are held at the time of seizure

140. The fact that under point (c) of the second subparagraph of Article 6(1) of Directive 92/12 the excise duty debt in respect of smuggled goods subject to excise duty arises in the Member State in which the goods were introduced into the Community does not mean, however, that it is also certain in which Member State the excise duty is ultimately to be levied. Rather, pursuant to Article 7(1) of Directive 92/12, when an internal border of the Community is crossed the power to levy duty is passed on to the Member State into which the smuggled goods are further introduced, unless those goods are for the individual's own use.

141. Article 7(1) of Directive 92/12 provides in particular that excise duty must be levied on products subject to excise duty and released for consumption in one Member State and then introduced into another Member State for commercial purposes in the Member State in which those products are held. [26] As the Court stated in *Meiland Azewijn*, [27] the excise duty is therefore chargeable in the Member State where the product is to be used rather than the State where it is released for consumption.

142. In *Joustra*, [28] the Court gave a particularly broad interpretation to the element 'for

26 — Whilst Article 7 of Directive 92/12 concerns the intra-Community trade in goods subject to excise duty which are intended for delivery, Article 9 of that directive makes provision for 'non-delivery' cases. In this connection, in his Opinion in Case C-5/05 *Joustra* [2006] ECR I-11075, points 65 to 68, Advocate General Jacobs rightly pointed out that Articles 7 and 9 of Directive 92/12 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. In this context Article 9 is 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.

27 — Case C-292/02 [2004] ECR I-7905, paragraph 35.

28 — Case C-5/05 *Joustra* [2006] ECR I-11075, paragraph 29.

commercial purposes' within the meaning of Article 7 of Directive 92/12. In this connection, the Court found in particular that for the application of the directive, products which are not held for private purposes must necessarily be regarded as being held for commercial purposes.

143. In the light of this case-law, goods unlawfully introduced into the Community which are introduced across an internal border from the first Member State into another Member State in the course of an international goods transport operation are generally held 'for commercial purposes' in the latter Member State. However, it is for the referring court to assess, having regard to the abovementioned case-law, whether the 1 005 840 cigarettes which were seized at the German-Danish border in the third case in the main proceedings ultimately entered Denmark for commercial purposes.

144. If smuggled goods which are subject to excise duty have been introduced across an internal border of the Community for commercial purposes, under Article 7(1) of Directive 92/12 the Member State in which the smuggled goods were discovered and seized by the authorities is competent to levy the excise duty.

145. This interpretation is also consistent with the spirit and purpose of Directive 92/12. Article 7 of Directive 92/12 is intended to ensure that excise duty in respect of goods transported for commercial purposes is incurred in the Member State in which the end consumer resides. [29] It is not relevant in this connection whether the end consumer actually consumes the goods subject to excise duty. [30]

146. In the case of smuggled goods, it will generally be almost impossible to ascertain the place of residence of the targeted end consumers. Nevertheless, it is clear that the risk of their uncontrolled entry into economic networks and therefore of sale to end consumers becomes particularly acute once the smuggled goods go beyond the area in which the first customs office inside the territory of the Community is situated. That danger applies to the entire Community territory, but can be attributed to the first Member State into which the goods were imported before another internal border is crossed, with the

29 — That provision is consistent with the dual purpose of excise duty: first, to provide revenue and, second, to discourage the consumption of certain products (see point 130 of this Opinion). Under Article 7 of Directive 92/12, any intra-Community trade which concerns goods subject to excise duty with a commercial purpose entails the payment of excise duty in the Member State of destination (see Birk, D., cited in footnote 16, p. 722, paragraph 14).

30 — See also Advocate General Kokott in her Opinion in Case C-314/06 *Société Pipeline Méditerranée et Rhône* [2007] ECR I-12273, point 48, who rightly points out that the factual basis for taxation does not require that products subject to excise duty were in fact used for the purpose envisaged.

result that the excise duty is chargeable in the first Member State in accordance with point (c) of the second subparagraph of Article 6(1) of Directive 92/12. If those smuggled goods are subsequently introduced into another Member State for commercial purposes across an internal border of the Community, the danger emanating from the goods subject to excise duty shifts to the next Member State into which they are imported which, on the basis of a teleological interpretation of Directive 92/12, also justifies a shift in the right to levy excise duty.

147. This shift in the power to levy duty under Article 7(1) of Directive 92/12 takes places once the smuggled goods have physically crossed the internal border. Consequently, seizure with simultaneous or subsequent confiscation at an (internal) border crossing also cannot prevent the excise duty having already become chargeable when the goods were seized, with the Member State concerned being entitled to levy the duty.

148. I therefore conclude that under Article 5(1) in conjunction with point (c) of the second subparagraph of Article 6(1) and Article 7(1) of Directive 92/12 excise duty became chargeable in respect of goods introduced unlawfully into the Community for commercial purposes – which will have to be ascertained by the referring court – which were discovered and seized by national authorities after crossing an internal border of the Community in the next Member State into which they were imported once the goods physically crossed the internal border, with the result that seizure with simultaneous or subsequent confiscation of smuggled goods after they have crossed the internal border cannot prevent excise duty becoming chargeable, with the Member State concerned being entitled to levy the duty.

(c) Seizure with simultaneous or subsequent confiscation of smuggled goods at an internal border of the Community does not result in duty being suspended under Article 5(2) of Directive 92/12

149. Seizure with simultaneous or subsequent confiscation of goods unlawfully introduced into the Community at an internal border of the Community cannot prevent excise duty becoming chargeable in the next Member State into which they were imported. Nevertheless, it must still be clarified whether the excise duty on the goods must be deemed to be suspended as a result of the seizure pursuant to Article 5(2) of Directive 92/12.

150. In my opinion, this question must also be answered in the negative.

151. In this connection, it is necessary to clarify in particular whether the legal fiction introduced by Article 867a of the Implementing Regulation, under which non-Community goods which have been seized or confiscated are to be considered to have been entered for the customs warehousing procedure, ultimately means that duty must always be deemed to be suspended, with the result that the excise duty debt does not arise or is extinguished as a result of the subsequent destruction of the goods. This conclusion seems reasonable to the referring court, in that the wording of its question refers expressly to the interaction of the first subparagraph of Article 5(2) and Article 6(1)(c) of Directive 92/12 in conjunction with Article 84(1)(a) and Article 98 of the Customs Code and Article 867a of the Implementing Regulation.

152. The point of reference for the question thus worded is that under the first indent of Article 5(2) of Directive 92/12 when products subject to excise duty are placed under one of the customs suspensive procedures listed in Article 84(1)(a) of the Customs Code the excise duty on them is to be deemed to be suspended. In view of the fact that customs warehousing is among the procedures listed in Article 84(1)(a) of the Customs Code and that non-Community goods which have been seized are to be considered to have been entered for the customs warehousing procedure under Article 867a of the Implementing Regulation, the referring court would like to ascertain whether smuggled goods seized by the competent authorities are necessarily placed under a customs suspensive procedure and the excise duty on them is therefore to be deemed to be suspended pursuant to the first indent of Article 5(2) of Directive 92/12.

153. Such an interpretation of the relevant provisions would fail to recognise the precedence and the relationship between the Implementing Regulation and the Customs Code and Directive 92/12. Such an interpretation cannot be adopted.

154. The Implementing Regulation was adopted by the Commission in execution of the implementing powers conferred on it by the Council in the Customs Code. It follows that the Customs Code, as the basic regulation, takes precedence over the Implementing Regulation, with the result that in the event of inconsistencies the Implementing Regulation,

as the subordinate rule, is to be interpreted in the light of the provisions of the Customs Code, as the higher-ranking rule. [31]

155. In view of this basic rule of the hierarchy of Community legislation, in his Opinion in *Elshani*, Advocate General Mengozzi rightly rejected the argument put forward by the Polish Government that Article 867a of the Implementing Regulation means that a customs debt never arises in the case of seizure of smuggled goods upon their unlawful introduction. The Polish Government had argued in particular that under Article 867a of the Implementing Regulation non-Community goods which have been seized are to be considered to have been entered for the customs warehousing procedure and are therefore placed under a customs suspensive procedure. Because Article 867a of the Implementing Regulation is to be regarded as a *lex specialis* in relation to the rules contained in the Customs Code governing the creation and the extinction of a customs debt, in cases where that provision applies a customs debt does not even arise. [32]

156. This argument put forward by the Polish Government was refuted inter alia by pointing out that such an interpretation would ultimately mean attributing to an implementing provision (Article 867a) the effect of precluding the application of a 'primary' rule – point (d) of the first paragraph of Article 233 of the Customs Code. [33] Against this background, in *Elshani* [34] the Court also disregarded Article 867a of the Implementing Regulation and the relevant arguments put forward by the Polish Government in this respect.

157. In just the same way as Article 867a of the Implementing Regulation cannot cancel the chargeable customs event under Article 202 of the Customs Code in the case of seizure with simultaneous or subsequent confiscation of smuggled goods by virtue of the interaction with Article 84(1) of the Customs Code, that provision of the Implementing Regulation cannot preclude the effect of the chargeable event under point (c) of the second subparagraph of Article 6(1) in conjunction with Article 7(1) of Directive 92/12 by virtue of the interaction with Article 84(1)(a) of the Customs Code and the first subparagraph of Article 5(2) of Directive 92/12.

158. I therefore conclude that seizure with simultaneous or subsequent confiscation of goods unlawfully introduced into the

31 — Schmidt, G., *Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft – Kommentar* (eds H. von der Groeben and J. Schwarze), Vol. 4, 6th edition, Article 249, paragraph 24, p. 778.

32 — Opinion of Advocate General Mengozzi in *Elshani*, cited in footnote 10, point 28.

33 — Ibid., point 35.

34 — Cited in footnote 8.

Community at an internal border of the Community does not mean that duty on those goods is to be deemed to be suspended from the time of their seizure.

4. The relationship between the extinction of the customs debt under point (d) of the first paragraph of Article 233 of the Customs Code and the creation or the extinction of chargeability of excise duty

159. By its second question, the referring court is also seeking clarification as to whether the creation or the extinction of chargeability of excise duty is affected by whether or not a customs debt incurred on unlawful importation under point (d) of the first paragraph of Article 233 of Customs Code is extinguished.

160. As I explained in my examination of the consequences, in terms of excise duty, of seizure of unlawfully introduced goods at an external border of the Community, [35] in cases where the chargeable customs event arises under point (d) of the first paragraph of Article 233 of the Customs Code, no excise duty debt arises. Where the criterion for extinction under point (d) of the first paragraph of Article 233 of the Customs Code is not satisfied and the goods were therefore seized only after unlawful introduction, the goods are subject to excise duty under Article 5(1) of Directive 92/12 and duty becomes chargeable pursuant to point (c) of the second subparagraph of Article 6(1) of that directive. I cannot therefore see any case where the criterion for extinction under point (d) of the first paragraph of Article 233 of the Customs Code would be satisfied and excise duty would become chargeable.

161. There is therefore no need to give any further answer to the second part of the second question.

5. Conclusion

162. In the light of the foregoing, the answer to the second question must be that, under Article 5(1) of Directive 92/12, unlawfully introduced goods are subject to excise duty only once they have gone beyond the area in which the first customs office inside the customs territory of the Community is situated. Seizure with the destruction of the goods before that point in time precludes the creation of excise duty liability. Once they have gone beyond that area, unlawfully introduced goods are subject to excise duty and at the

35 — See point 129 et seq. of this Opinion.

same time the excise duty debt arises under Article 6(1) of that directive, without subsequent confiscation with destruction being able to result in the extinction or the suspension of the tax debt.

C – *Third question*

1. General remarks

163. By its third question, the referring court would like to ascertain, first of all, whether the legal fiction introduced by Article 867a of the Implementing Regulation, under which non-Community goods which have been seized or confiscated are to be considered to have been entered for the customs warehousing procedure, ultimately means that goods seized upon their unlawful importation are always placed under a customs warehousing arrangement, with the result that under Article 10(3) in conjunction of Article 7(3) and Article 16(1)(B) of the Sixth VAT Directive the chargeable event does not occur and tax does not become chargeable.

164. Because importation within the meaning of Article 10(3) of the Sixth VAT Directive requires 'entry into the Community', whilst it is clear from the documents before the Court that in one of the three cases in the main proceedings the cigarettes were taken into possession on 'importation' across an internal border of the Community, it is also necessary in answering the first part of the third question, in my opinion, to examine both the consequences, in terms of VAT, of seizure with simultaneous or subsequent destruction of goods on importation across an external border of the Community and the consequences of such seizure with destruction on the further introduction of the goods across an internal border. [36]

165. By its third question, the referring court would like to ascertain, secondly, whether the answer to the first part of that question is affected by whether or not a customs debt in respect of those goods is extinguished under point (d) of the first paragraph of Article 233 of the Customs Code.

2. Seizure with simultaneous or subsequent confiscation of smuggled goods at an external border of the Community

166. Under Article 2(2) of the Sixth VAT Directive, 'importation' is subject to VAT. According to Article 7(1)(a) of that directive,

36 — With regard to the division of jurisdiction between the national court and the Court of Justice in the preliminary ruling procedure under Article 234 EC, see point 128 of this Opinion, and the case-law cited.

such importation means the 'entry into the Community' of the relevant goods. The element 'importation' for the purposes of the Sixth VAT Directive therefore means entry of goods into the territory of the Community.

167. In this regard, the Sixth VAT Directive contains a fairly complicated provision by which the chargeable event and chargeability of import taxes are linked to the events giving rise to the customs debt. [37]

168. This link is made, first of all, by the second sentence of the first subparagraph of Article 10(3) of the Sixth VAT Directive, which states that where the imported goods are placed under an arrangement of the kind referred to in Article 7(3) – in conjunction with Article 16(1)(B)(a), (b), (c) and (d) – the chargeable event shall occur and the tax shall become chargeable only when the goods cease to be covered by those customs arrangements. Secondly, the second subparagraph of Article 10(3) of the Sixth VAT Directive provides that where imported goods are subject to customs duties, to agricultural levies or to charges having equivalent effect established under a common policy, the chargeable event shall occur and the tax shall become chargeable when the chargeable event for those Community duties occurs and those duties become chargeable.

169. In this context, the Court has already made clear in *Einberger*, [38] in examining the applicability of the Sixth VAT Directive to the illegal importation of drugs, that the chargeable event for customs duty and the chargeable event for VAT are essentially the same in such cases. [39] The Court stressed the parallel purposes of the two provisions and pointed out that the two charges display comparable essential features since they arise from the fact of importation of goods into the Community and the subsequent distribution thereof through the economic channels of the Member States. [40]

170. In view of this parallel nature of the chargeability of customs duty and VAT, Article 10(3) of the Sixth VAT Directive is to be interpreted to the effect that the chargeable event for VAT occurs and the VAT becomes chargeable in respect of goods

37 — See Voß, R., 'J – Steuerrecht', *Handbuch des EU-Wirtschaftsrechts* (ed. M. Dauses), Vol. II, paragraph 202 (EL 23).

38 — Case 294/82 [1984] ECR 1177. See also Case C-343/89 *Witzemann* [1990] ECR I-4477, paragraph 18.

39 — *Einberger*, cited in footnote 38, paragraph 13.

40 — Ibid., paragraph 17 et seq.

unlawfully introduced into the Community only once the goods have gone beyond the area in which the first customs office inside the territory of the Community is situated.

171. If the goods coming under the Sixth VAT Directive were seized before going beyond the first customs office situated inside the territory of the Community and were simultaneously or subsequently destroyed by the authorities, it must therefore be assumed that the chargeable event under Article 2(2) in conjunction with Article 7 and Article 10(3) of the Sixth VAT Directive does not occur and, as a result, no VAT becomes chargeable.

3. Seizure with simultaneous or subsequent confiscation of smuggled goods at an internal border of the Community

172. If smuggled goods coming under the Sixth VAT Directive are seized and simultaneously or subsequently confiscated by the authorities of the next Member State of import at an internal border of the Community, the chargeable event for VAT has already occurred and VAT has already become chargeable under Article 2(2) in conjunction with Article 7 and Article 10(3) of the Sixth VAT Directive. By its third question, the referring court is seeking clarification whether the legal fiction introduced by Article 867a of the Implementing Regulation, under which non-Community goods which have been seized or confiscated are to be considered to have been entered for the customs warehousing procedure, ultimately means that in such a case the VAT which has already become chargeable is extinguished.

173. The point of reference for this question is that under the second sentence of the first subparagraph of Article 10(3) in conjunction with Article 7(3) and Article 16(1)(B) of the Sixth VAT Directive, goods which are placed under a customs warehousing arrangement on entry into the Community are subject to VAT only when the goods cease to be covered by that arrangement. Because non-Community goods which have been seized are to be considered, under Article 867a of the Implementing Regulation, to have been entered for the customs warehousing procedure, the referring court is seeking to ascertain whether the seizure of smuggled goods and their simultaneous or subsequent destruction prevent the chargeable event for VAT from occurring and VAT becoming chargeable in respect of those goods.

174. In my opinion, this question must also be answered in the negative.

175. If goods are discovered at an external border of the Community upon their unlawful introduction and are subsequently seized and confiscated, the chargeable event for VAT does not occur and no VAT becomes chargeable. [41] In this case, the question of the possible effects of the fiction introduced in Article 867a of the Implementing Regulation on the chargeable event for VAT no longer therefore arises.

176. If, on the other hand, goods unlawfully introduced into the Community are discovered and subsequently seized and confiscated by the competent national authorities after they cross an internal border of the Community, the suspensive arrangement provided for in the second sentence of the first subparagraph of Article 10(3) of the Sixth VAT Directive can no longer apply, because according to the wording of that provision a suspension of the occurrence of the chargeable event or of tax becoming chargeable requires the goods to be subject to one of the relevant customs arrangements *on entry into the Community*. That is precluded in principle in the case of goods unlawfully introduced into the Community which are seized when they cross an internal border.

177. It should also be reiterated that Article 867a of the Implementing Regulation cannot cancel the chargeable customs event under Article 202 of the Customs Code in the case of seizure with simultaneous or subsequent confiscation of smuggled goods. [42] In view of the abovementioned link between the chargeable event for tax and the chargeable customs event in Article 10(3) of the Sixth VAT Directive, it is also precluded that Article 867a of the Implementing Regulation could prevent VAT becoming chargeable in a case where the customs debt has arisen.

178. I therefore conclude that seizure with simultaneous or subsequent confiscation of goods unlawfully introduced into the Community at an internal border of the Community does not result in the extinction of the chargeable event which has already occurred and the VAT which has already become chargeable.

4. The relationship between the extinction of the customs debt under point (d) of the first paragraph of Article 233 of the Customs Code and the creation or the extinction of the chargeability of VAT

179. By the second part of its third question, the referring court is also seeking clarification whether, under the conditions described

41 — See point 171 of this Opinion.

42 — See point 153 et seq. of this Opinion.

above, any extinction of the chargeability of VAT is affected by whether or not a customs debt incurred on unlawful introduction is extinguished under point (d) of the first paragraph of Article 233 of the Customs Code.

180. As I explained in my analysis of the consequences, in terms of VAT, of the seizure of smuggled goods at the external border of the Community, no VAT debt arises in cases where the criterion for extinction of the customs debt under point (d) of the first paragraph of Article 233 of the Customs Code is satisfied.[43] If the criterion for extinction under point (d) of the first paragraph of Article 233 of the Customs Code is not satisfied and the goods were therefore seized only after their unlawful introduction into the Community, the chargeable event for VAT has occurred and VAT has become chargeable.

181. In the light of these findings, I cannot see any case where the criterion for extinction under point (d) of the first paragraph of Article 233 of the Customs Code would be satisfied at the same time as the chargeable event for VAT occurs and VAT becomes chargeable. There is therefore no need to give any further answer to the second part of the third question.

43 — See point 166 et seq. of this Opinion.

5. Conclusion

182. In the light of the foregoing, the answer to the third question must be that with regard to unlawfully introduced goods the chargeable event for VAT under Article 2(2) in conjunction with Article 7 and Article 10(3) of the Sixth VAT Directive occurs only once those goods have gone beyond the area in which the first customs office inside the customs territory of the Community is situated. Seizure with destruction of the goods before that point in time prevents the chargeable event from occurring. By going beyond that area, the chargeable event occurs and tax becomes chargeable without a subsequent seizure with destruction of the goods being able to result in the extinction of the chargeability.

D – *Fourth question*

183. By its fourth question, the referring court is essentially seeking to ascertain which Member State is competent to levy customs duty, excise duty and VAT in respect of goods which have been unlawfully introduced into the Community in the course of a TIR operation but were discovered, seized and destroyed only once they had crossed an internal border of the Community, and not therefore in the first Member State into which they were imported, but in a subsequent Member State. This question concerns only the case in the main proceedings in which the cigarettes

were introduced into the Community by land across the Polish-German border and were subsequently discovered and seized by the Danish authorities at the German-Danish border.

1. Competence to recover the customs debt

184. In a case like the one at issue, where a national customs authority took possession of and destroyed smuggled goods which were unlawfully introduced into the customs territory of the Community across the border of another Member State, it is relatively simple to determine the Member State competent to recover the customs debt on the basis of the provisions of the Customs Code which were applicable at the time.

185. Under the first indent of Article 215(1) of the Customs Code, a customs debt is incurred at the place where the events from which it arises occur. In the case of the unlawful introduction of goods into the customs territory of the Community, the customs debt is incurred in the first Member State into which the goods were imported pursuant to Article 202 of the Customs Code.

186. Under Article 215(3), the customs authorities referred to in Article 217(1) – which are competent for entering the customs debt in the accounts – are those of the Member State where the customs debt is incurred. [44]

187. It therefore follows directly from the first indent of Article 215(1) in conjunction with Article 202, Article 215(3) and Article 217 of the Customs Code that the authorities of the Member State in which the goods were unlawfully introduced across the border into the customs territory of the Community are competent to recover the customs debt, even if the unlawfully introduced goods were first discovered and seized in another Member State.

44 — Article 215(3) of the Customs Code was revised by Regulation (EC) No 955/1999 of the European Parliament and of the Council of 13 April 1999 amending Council Regulation (EEC) No 2913/92 with regard to the external transit procedure (OJ 1999 L 119, p. 1). According to recital 8 in the preamble to the regulation, that revision was carried out with the specific aim of clarifying that the place where the customs debt is incurred determines the authority responsible for the entry into the accounts of the debt. In Case C-526/06 *Road Air Logistics Customs* [2007] ECR I-11337, paragraph 26, the Court made clear, in this connection, that Article 215 of the Customs Code does not lay down prior conditions for the incurrence of a customs debt, but the purpose of that provision is rather to determine territorial jurisdiction to recover the amount of the customs debt.

188. It is also clear from Article 454(2) and (3) of the Implementing Regulation that that distribution of competence also applies in connection with TIR operations. Consequently, the first Member State in which the offence or irregularity in connection with the unlawful introduction within the meaning of Article 202 of the Customs Code is committed, but not discovered, is also competent to levy customs duty in the case of smuggling of imported goods in the course of a TIR operation.

2. Competence to levy excise duty

189. As I have already explained, under Article 7 of Directive 92/12 excise duty must be levied in the Member State in which the products subject to excise duty introduced into another Member State for commercial purposes are held.[45] In the case of smuggling of imported goods in the course of an international goods transport operation, it would normally have to be assumed that the unlawfully introduced goods are held for commercial purposes in the territory of the Member State in which they were discovered and seized. Where that is the case, under Article 6(1) in conjunction with Article 7(1) of Directive 92/12 the authorities of the Member State in which the goods unlawfully introduced into the Community were discovered and seized are competent to levy excise duty.

190. If, on the other hand, the referring court concluded that the goods subject to excise duty which were smuggled in the course of an international goods transport operation were for the individual's own use, the first Member State into which the goods were imported remains competent to levy excise duty pursuant to Article 6 of Directive 92/12, even if the unlawfully introduced goods were only discovered in a subsequent Member State.

191. In the view of the Commission, the exercise by the subsequent Member State of the competence to levy duty under Article 6(1) in conjunction with Article 7(1) of the directive in a case where the unlawfully introduced goods were held in its territory for commercial purposes and were discovered there would breach the general principle of proportionality. In this regard, the Commission observes that under Article 6(2) of Directive 92/12 excise duty is to be levied

45 — See point 141 et seq. of this Opinion.

and collected according to the procedure laid down by each Member State, but in the exercise of those powers the Member States are required to observe the principle of proportionality. The Commission considers that principle to be breached if excise duty is levied on unlawfully introduced goods which were seized and subsequently destroyed even before going beyond the first customs office of the subsequent importing Member State situated at an internal border of the Community. In support of its arguments, the Commission relies in particular on *Louloudakis* [46] and *Heintz van Landewijck*. [47]

192. This argument put forward by the Commission is not convincing.

193. It should be pointed out, first of all, that in essence the Commission's arguments are not directed primarily, as it claims, against the national rules on the levying of excise duty laid down pursuant to Article 6(2) of Directive 92/12, but against the distribution among the Member States of the competences to levy duties stipulated by Article 6(1) in conjunction with Article 7(1) of Directive 92/12 in a case like the one at issue.

194. If the competent national authorities levy excise duty on goods unlawfully introduced into the Community which were discovered and seized at an internal border of the Community, they are essentially exercising the competence to levy duty accorded to them by Directive 92/12. In so far as the Commission claims that the exercise of that competence is disproportionate, it does not therefore have in view the national legislation relating to the non-harmonised conditions for assessing and paying the duty under Article 6(2) of Directive 92/12, but the distribution of the competence to levy duty laid down on a mandatory basis under Article 6(1) in conjunction with Article 7(1) of the directive. [48]

195. In this respect, the cases in the main proceedings at issue here differ in important

46 — C-262/99 [2001] ECR I-5547.

47 — C-494/04 [2006] ECR I-5381.

48 — As Advocate General Ruiz-Jarabo Colomer rightly summed up in his Opinion in *van de Water*, cited in footnote 19, points 48 and 49, Directive 92/12 identifies the products which, under Community law, are subject to excise duty, while establishing the time at which the chargeable event occurs and that at which the excise duty becomes chargeable. It also specifies the State in which the excise duty is to be levied and the person who must pay it. The Community legislature intended that the other chargeability conditions, the duty rate and the procedure for assessing and paying the duty should be those in force on the date on which duty became chargeable in the Member State concerned. It is therefore for each Member State to establish those conditions, rates and procedures, provided it complies with the criteria laid down in the directives on the harmonisation of duty rates and structures.

respects from the one which formed the basis of the judgment in *Louloudakis* [49] cited by the Commission. In that judgment, the Court was required to determine whether national legislation which provides for a series of non-harmonised penalties in the event of infringement of the arrangements laid down by a directive was compatible with the principle of proportionality. *Louloudakis* therefore concerned the assessment of the proportionality of national penalties for failure to observe the provisions of a directive, where those penalties had been freely chosen by the national legislature in the absence of Community harmonisation in that field. A provision laid down by the directive as such or the national implementing rules for such a provision were not examined, however.

196. This finding also holds for the judgment in *Heintz van Landewijck* [50] cited by the Commission. That judgment concerned inter alia the proportionality of the failure to reimburse excise duty where the tax stamps issued by the national authorities of a Member State had disappeared before they were used. Because Directive 2/12 did not contain any provisions relating to such a case, the provisions adopted by the Member States to determine the consequences of such a disappearance again concerned a non-harmonised area of the law relating to excise duty.

197. As I have already mentioned, in the case at issue, the Commission therefore objects to the exercise of the competences to levy duty laid down in Article 6(1) and Article 7(1) of Directive 92/12 as such.

198. As regards the exercise by the Member States of those competences laid down by Directive 92/12, the Court has consistently held that it follows from the scheme of the directive that the national authorities must ensure that the tax debt is in fact collected. [51] With respect to the interpretation of Directive 92/12, the authorities of the Member State which is competent to levy the excise duty incurred under Directive 92/12 are required in fact to collect the tax debt.

199. In view of the above arguments, I therefore conclude that the Member State in which the goods subject to excise duty which were unlawfully introduced into the Community are held for commercial purposes at the time

49 — Cited in footnote 46.

50 — Cited in footnote 47.

51 — *Cipriani*, cited in footnote 17, paragraph 46; order in Case C-80/01 *Michel* [2001] ECR I-9141, paragraph 21; and Case C-325/99 *van de Water* [2001] ECR I-2729, paragraph 41.

of seizure is competent under Article 5(1) in conjunction with Article 6(1) and Article 7(1) of Directive 92/12 to levy excise duty, even if those goods were seized and simultaneously or subsequently confiscated at the first customs office in the territory of that Member State.

3. Competence to levy VAT

200. In a situation like the one in the main proceedings, the Member State competent to recover the VAT debt can be determined on the basis of Article 7(2) in conjunction with Article 10(3) of the Sixth VAT Directive.

201. Article 7(2) of the Sixth VAT Directive provides, first of all, that the place of import is the Member State within the territory of which the goods are when they enter the Community. Secondly, the chargeable event occurring and the tax becoming chargeable are linked in Article 10(3) of the Sixth VAT Directive to the incurrence of the customs debt. [52]

52 — See point 167 et seq. of this Opinion.

202. I therefore conclude that in a case where goods unlawfully introduced into the Community are discovered and taken into possession in a Member State other than the first Member State into which they were imported, the chargeable event for VAT occurs and VAT becomes chargeable in the Member State in which the goods were unlawfully introduced into the Community. The authorities of that Member State are therefore also competent to levy VAT.

4. Conclusion

203. In the light of the foregoing, the answer to the fourth question must be that the Member State in which goods have been unlawfully introduced into the Community is competent to recover the customs debt and the VAT debt, even if those goods were introduced into another Member State and were only discovered and seized there. The Member State in which the goods unlawfully introduced into the territory of the Community are held for commercial purposes at the time of seizure is competent to recover the excise duty debt.

VII – Conclusion

204. In the light of the above statements, I propose that the Court answer the questions referred by the Østre Landsret as follows:

(1) 'Seizure' within the meaning of point (d) of the first paragraph of Article 233 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, as amended by Regulation (EC) No 955/1999 of the European Parliament and of the Council of 13 April 1999, requires physical control to be acquired by the national authorities upon unlawful introduction into the Community, by which the goods are taken into possession pending their confiscation. The 'confiscation' of goods within the meaning of that provision requires the irrevocable forfeiture of the power of disposal of the owner or of the person holding the power of disposal, irrespective of whether this is connected with a change of ownership to the State.

(2) Under Article 5(1) of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, as amended by Council Directive 96/99/EC of 30 December 1996, unlawfully introduced goods are subject to excise duty only once they have gone beyond the area in which the first customs office inside the customs territory of the Community is situated. Seizure with the destruction of the goods before that point in time precludes the creation of excise duty liability. Once they have gone beyond that area, unlawfully introduced goods are subject to excise duty and at the same time the excise duty debt arises under Article 6(1) of that directive, without subsequent confiscation with destruction being able to result in the extinction or the suspension of the tax debt.

(3) With regard to unlawfully introduced goods the chargeable event for value added tax under Article 2(2) in conjunction with Article 7 and Article 10(3) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, as amended by Council Directive 2000/17/EC of 30 March 2000, occurs only once those goods have gone beyond the area in which the first customs office inside the customs territory of the Community is situated. Seizure with destruction of the goods before that point in time prevents the chargeable event from occurring. By going beyond that area, the chargeable event occurs and tax becomes chargeable without a subsequent seizure with destruction of the goods being able to result in the extinction of the chargeability.

(4) The Member State in which goods have been unlawfully introduced into the Community is competent to recover the customs debt and the value added tax debt, even if those goods were introduced into another Member State and were only discovered and seized there. The Member State in which the goods unlawfully introduced into the territory of the Community are held for commercial purposes at the time of seizure is competent to recover the excise duty debt.