



Reports of Cases

OPINION OF ADVOCATE GENERAL
COLLINS
delivered on 14 July 2022¹

Case C-332/21

Quadrant Amroq Beverages SRL

v

Agenția Națională de Administrare Fiscală – Direcția Generală de Administrare a Marilor Contribuabili

(Request for a preliminary ruling from the Tribunalul București (Regional Court, Bucharest, Romania))

(Reference for a preliminary ruling – Excise duty – Directive 92/83/EEC – Article 27(1)(e) – Ethyl alcohol – Exemptions – Production of flavours for the preparation of non-alcoholic beverages with an alcohol strength not exceeding 1.2% volume – Recognition by the Member State of destination of an exemption granted by the Member State of production – Conditions imposed by the Member State of destination)

I. Introduction

1. This request for a preliminary ruling from the Tribunalul București (Regional Court, Bucharest, Romania) has arisen in the context of an action by Quadrant Amroq Beverages SRL ('the applicant') seeking the annulment of decisions of the Agenția Națională de Administrare Fiscală – Direcția Generală de Administrare a Marilor Contribuabili (National Tax Administration Office – Directorate-General for the Administration of Large-scale Taxpayers, Romania) to reject its claims for the reimbursement of excise duties paid pursuant to the national law transposing Article 27(1)(e) of Directive 92/83/EEC.²

2. The applicant purchased flavours for use for the preparation of soft drinks in Romania from a producer in Ireland. It had understood that the ethyl alcohol used to produce the flavours had been released for consumption in Ireland and had been exempted from excise duty under the Irish legislation implementing Article 27(1)(e) of Directive 92/83. That provision of EU law exempts from excise duty ethyl alcohol 'used for the production of flavours for the preparation of ... non-alcoholic beverages with an alcohol strength not exceeding 1.2% vol.' Ireland exempts ethyl alcohol that is intended for use, or that has already been used, in the production of such flavours. Romania exempts only ethyl alcohol that is intended for use in the production of flavours.

¹ Original language: English.

² Council Directive of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages (OJ 1992 L 316, p. 21).

3. The present Opinion considers the scope of the exemption granted by Article 27(1)(e) of Directive 92/83, the circumstances in which a Member State of destination must recognise an exemption that another Member State has granted under that provision and the extent to which a Member State to which goods are dispatched may impose procedural requirements on traders that have obtained the benefit of that exemption.

II. Legal context

A. *European Union law*

1. *Directive 92/83*

4. Directive 92/83 contains provisions to harmonise the structures of excise duties on alcohol and alcoholic beverages.

5. Under Article 19(1) thereof, Member States are to apply excise duty to ethyl alcohol in accordance with Directive 92/83.

6. The first indent of Article 20 of Directive 92/83 defines ethyl alcohol as:

‘all products with an actual alcoholic strength by volume exceeding 1.2% volume which fall within CN codes 2207 and 2208, even when those products form part of a product which falls within another chapter of the CN,

...’

7. Under Article 27(1)(e) of Directive 92/83:

‘Member States shall exempt the products covered by this Directive from the harmonised excise duty under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse:

...

(e) when used for the production of flavours for the preparation of foodstuffs and non-alcoholic beverages with an alcohol strength not exceeding 1.2% vol.’

2. *Directive 2008/118*

8. Article 7(1) of Directive 2008/118/EC³ states:

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

³ Council Directive of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC (OJ 2009 L 9, p. 12).

9. Article 7(2) of Directive 2008/118 defines ‘release for consumption’ as follows:

- ‘(a) the departure of excise goods, including irregular departure, from a duty suspension arrangement;
- (b) the holding of excise goods outside a duty suspension arrangement where excise duty has not been levied pursuant to the applicable provisions of Community law and national legislation;
- (c) the production of excise goods, including irregular production, outside a duty suspension arrangement;
- (d) the importation of excise goods, including irregular importation, unless the excise goods are placed, immediately upon importation, under a duty suspension arrangement.’

B. Romanian law

10. The Commission’s written observations set out the following provisions of Romanian law.

11. Article 206⁵⁸ of Legea nr. 571 din 22 decembrie 2003 privind Codul fiscal (Law No 571/2003 of 22 December 2003 establishing the Tax Code),⁴ in force until 31 December 2015, the wording of which is reproduced in Article 397(1)⁵ of Legea nr. 227 din 8 septembrie 2015 privind codul fiscal (Law No 227 of 8 September 2015 establishing the Tax Code), applicable from 2016⁶ (‘the Tax Code’), provides:

‘(1) Ethyl alcohol and the other alcoholic products referred to in Article 206²(a) are exempt from excise duty when they are:

...

- (e) used for the production of food flavourings intended for the preparation of food or non-alcoholic beverages with an alcohol content not exceeding 1.2% volume.’

12. The detailed rules for the implementation of Article 206⁵⁸ [of the Tax Code] provide:

‘...

(13) In all the situations referred to in Article 206⁵⁸(1) of the Tax Code, exemption from excise duty shall be granted only to the user, on condition that the supply is made directly from a tax warehouse.

(14) When a user makes intra-Community purchases of ethyl alcohol with a view to using it for the purposes referred to in Article 206⁵⁸(1)(b) to (i) of the Tax Code, that user must also be a registered consignee.

...

⁴ *Monitorul Oficial al României*, Part I, No 927 of 23 December 2003.

⁵ Those provisions appear in the national case file.

⁶ *Monitorul Oficial al României*, Part I, No 688 of 10 September 2015.

(16) An exemption shall be granted directly:

- (a) in the situations referred to in Article 206⁵⁹(1)(d),(f), (g) and (h) of the Tax Code;
- (b) in the situations referred to in Article 206⁵⁸(1)(a), (b), (c) and (e) of the Tax Code, for authorised warehouse keepers operating within an integrated system. “Integrated system” means the use of ethyl alcohol and other alcoholic products by warehouse keepers for the production of finished products intended for consumption as such, without being subject to any further changes. ...

(17) In all situations involving direct exemption, the exemption shall be granted on the basis of an end-user authorisation. That authorisation shall be issued to all users who purchase products that are exempt from excise duty.

...

(34) In all situations involving direct exemption, the prices for delivery of the products shall not include excise duty, and the movement of those products must be accompanied by a printed copy of the electronic administrative document referred to in paragraph 91.

...

(37) In the situations referred to in Article 206⁵⁸(1)(a), (b), (c), (e) and (i) of the Tax Code, an exemption shall be granted indirectly. The prices for delivery of the products shall include excise duty, after which economic operators who are users may request compensation or reimbursement of excise duty under the provisions of the [Codul de procedură fiscală (Code of Fiscal Procedure)].

(38) For the reimbursement of excise duty, users shall file with the territorial tax authority, on a monthly basis, on or by the twenty-fifth day of the month following the month in respect of which the reimbursement is sought, a claim for reimbursement of excise duty, accompanied by:

- (a) a copy of the invoice for the purchase of ethyl alcohol and/or other alcoholic product, in which the excise duty is highlighted separately;
- (b) proof that excise duty has been paid to the supplier, namely a payment document confirmed by the bank with whom the user has opened an account;
- (c) proof of the quantity used for the purpose in respect of which the exemption was granted, namely a summary of the quantities actually used and the documents relating thereto.’

13. .The detailed rules for the implementation of Article 397 of the Tax Code provide:

‘81. (1) In situations involving direct exemption, for the products referred to in Article 397(1) of the Tax Code, exemption from excise duty shall be granted only to the user, on condition that the supply is made directly from a tax warehouse, from the user’s own intra-Community purchases or from the user’s own import transactions.

(2) In situations involving indirect exemption, for the products referred to in Article 397(1) of the Tax Code, exemption from excise duty shall be granted only to the user, on condition that the supply is made directly from a tax warehouse, from a registered consignee or from the user’s own

import transactions. A registered consignee who delivers products which are to be used for a purpose exempt from excise duty shall highlight in the invoice the equivalent value of the excise duty paid to the State budget.

(3) When a user makes intra-Community purchases of ethyl alcohol with a view to using it for the purposes referred to in Article 397(1)(b) to (i) of the Tax Code, that user must also be a registered consignee.

(4) Where ethyl alcohol is imported from a third country with a view to its use for the purposes referred to in Article 397(1)(b) to (i) of the Tax Code, the importer must also be a user of the raw material.

82. (1) An exemption from excise duty shall be granted directly:

(a) in the situations referred to in Article 397(1)(d) and (f) of the Tax Code;

(b) in the situation referred to in Article 397(1)(b) of the Tax Code, only for the production of sanitary alcohol;

(c) in the situations referred to in Article 397(1)(a), (c) and (e) of the Tax Code.

(2) Only authorised warehouse keepers operating within an integrated system shall benefit from the direct exemption referred to in points (b) and (c) of paragraph 1. “Integrated system” means the use of ethyl alcohol and other alcoholic products, in the tax warehouse in which those products were produced, for the production of finished products which are to be consumed as such, without being subject to any further changes.

(3) In all situations involving direct exemption, the exemption shall be granted on the basis of an end-user authorisation.’

C. Irish law

14. Section 77(a)(iii) of the Finance Act 2003 transposes Article 27(1)(e) of Directive 92/83 into the law of Ireland. It provides that:

‘Without prejudice to any other relief from excise duty which may apply, and subject to such conditions as the Commissioners may prescribe or otherwise impose, a relief from alcohol products tax shall be granted on any alcohol products which are shown to the satisfaction of the Commissioners:

(a) to be intended for use or to have been used in the production of –

...

(iii) flavours for the preparation either of foodstuffs or of beverages not exceeding 1.2% vol.

...’

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

15. On the basis of the order for reference, the opinion on the law of Ireland that the applicant was permitted to submit to the referring court and the applicant's written observations, the facts of and background to the dispute before the referring court are understood to be the following.

16. Concentrate Manufacturing Company Ireland (CMCI) is an Irish subsidiary of PepsiCo, a multinational company that produces foods and beverages. It uses 100% undenatured ethyl alcohol to manufacture flavours.⁷ These have an alcohol content of between 15% and 62% volume and are intended for the preparation of non-alcoholic beverages. CMCI produces the flavours in Ireland and sells them to another Irish subsidiary of PepsiCo, Pepsi Ireland. The latter company sold flavours to the applicant, which uses them to make soft drinks in Romania. CMCI ships the flavours directly from Ireland to the applicant in Romania.

17. According to the opinion on the law of Ireland, CMCI is an authorised warehouse keeper. It is also an authorised receiver, with authority to receive not more than 1 500 000 bulk litres of undenatured ethyl alcohol annually, free of duty, for use in the manufacture of soft drink concentrate. It receives that alcohol into its tax warehouse under duty suspension. The removal of that product from the tax warehouse to produce the flavours constitutes a release for consumption.⁸ That release for consumption would require the payment of excise duty were it not for the exemption under section 77(a)(iii) of the Finance Act 2003, which transposes Article 27(1)(e) of Directive 92/83.

18. The applicant explains that when it acquired the flavours from Pepsi Ireland, it had understood that the ethyl alcohol contained therein had already been released for consumption in Ireland, was exempt from excise duty under the Irish legislation transposing Article 27(1)(e) of Directive 92/83, and was no longer subject to duty suspension arrangements or any other administrative formalities related to excise duty. The applicant was nevertheless required to pay excise duty on the flavours when they entered Romania. It applied for a refund of excise duty under the national legislation implementing the exemption in Article 27(1)(e) of Directive 92/83. The refund was refused for substantive and procedural reasons. First, the applicant had not purchased ethyl alcohol for the production of flavours, but had purchased flavours, containing ethyl alcohol, for the preparation of non-alcoholic beverages. Second, the flavours had not been transferred from a tax warehouse and the applicant did not have the status of registered consignee ('the procedural requirements').

19. The applicant sought the annulment of the decisions of the Romanian National Tax Administration Office to reject its complaint and to refuse the reimbursement of excise duty.

20. In order to resolve that dispute, the referring court considered it necessary to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 27(1)(e) of [Directive 92/83] be interpreted as meaning that the exemption from excise duty covers only ethyl alcohol-type goods used for the production of flavours intended, in turn, for the production of non-alcoholic beverages with an alcohol strength not exceeding 1.2% volume, or as meaning that that exemption also covers ethyl alcohol-type goods already

⁷ The flavours are made from fruit or plant extracts. Since those extracts are insoluble in water, they are dissolved in alcohol to make a liquid concentrate. That concentrate is then diluted with water at a ratio of 1:1000 to produce soft drinks.

⁸ See Article 7 of Directive 2008/118, reproduced in points 8 and 9 of the present Opinion. The Court interpreted that provision in its judgment of 2 June 2016, *Polihim-SS* (C-355/14, EU:C:2016:403, paragraphs 46 to 55).

used for the production of certain favours of that kind which have been or are to be used for the production of non-alcoholic beverages with an alcohol strength not exceeding 1.2% volume?

- (2) Must Article 27(1)(e) of [Directive 92/83], in the context of the objectives and general scheme of that directive, be interpreted as meaning that, once ethyl alcohol-type goods intended to be marketed in another Member State have already been released for consumption in a first Member State, exempt from excise duty as they are used to obtain flavours intended to be used for the production of non-alcoholic beverages with an alcohol strength not exceeding 1.2% volume, the Member State of destination must treat them in an identical manner within its territory?
- (3) Must Article 27(1)(e) and 27(2)(d) of [Directive 92/83], and the [principles] of effectiveness and [proportionality], be interpreted as authorising a Member State to impose procedural requirements, which make the application of the exemption subject to the user having the status of registered consignee and of authorised warehouse keeper, on the seller of excise goods, despite the fact that the Member State in which those goods were acquired does not impose an obligation relating to the status of tax warehouse keeper on the economic operator which markets them?
- (4) In the light of Article 27(1)(e) of [Directive 92/83], do the principles of proportionality and effectiveness, in the context of the objectives and general scheme of that directive, preclude the exemption provided for therein from being denied to the taxable person of a Member State of destination who has received ethyl alcohol-type goods and who relied on the fact that those goods were deemed to be exempt on the basis of an official interpretation of those provisions of that directive by the tax authorities of the Member State of origin, given consistently and over a long period of time and transposed into national law and applied in practice, but which subsequently turns out to be incorrect, in the event that, given the circumstances, it is possible to exclude any possibility of fraud or evasion of excise duty?’

21. The applicant, Ireland, the Republic of Poland, Romania and the European Commission submitted written observations.

IV. Admissibility

22. Romania challenges the admissibility of the request for a preliminary ruling because it considers that the referring court has not provided the Court with the information required by Article 94(c) of the Rules of Procedure of the Court of Justice.⁹

23. According to the Court’s settled case-law, the procedure provided for in Article 267 TFEU is an instrument of cooperation between the Court and the national courts, whereby the former provides the latter with the points of interpretation of EU law that they need in order to decide disputes before them.¹⁰

⁹ As reflected in the Recommendations of the Court of Justice of the European Union to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (OJ 2012 C 338, p. 1).

¹⁰ See, to that effect, judgments of 5 July 2012, *Geistbeck* (C-509/10, EU:C:2012:416, paragraph 47 and the case-law cited), and of 20 June 2013, *Impacto Azul* (C-186/12, EU:C:2013:412, paragraph 26 and the case-law cited).

24. It is also settled case-law that the need to provide an interpretation of EU law which will be of use to the national court makes it necessary for that court to define the factual and legal context of the questions it is asking or, at the very least, to explain the factual circumstances on which those questions are based. The order for reference must also set out the precise reasons why the national court is unsure as to the interpretation of EU law and considers it necessary to refer a question to the Court for a preliminary ruling.¹¹

25. It is true that the order for reference is far from perfect and that there are a number of gaps and discrepancies in the presentation of the facts. For example, it makes no reference to any of the relevant provisions of Romanian law, although they appear in the Commission's written observations.

26. Nevertheless, in my view, the referring court has set out sufficiently clearly the reasons that led it to refer questions to the Court on the interpretation of EU law. Moreover, the order for reference contains sufficient information to give the Court and interested persons entitled to submit observations a sufficiently clear understanding of the factual and legal context of the main proceedings, as evidenced by the number of participants in the written procedure. Nor does the lack of clarity as regards the nature of the procedural requirements imposed by the Romanian authorities appear to prevent the Court from furnishing a useful answer to the third question. I therefore recommend that the Court accept and answer the present request for a preliminary ruling.

V. Legal analysis

A. *The first question*

27. By its first question the referring court wishes to know whether the exemption in Article 27(1)(e) of Directive 92/83 applies to ethyl alcohol intended to be used to produce flavours for the preparation of non-alcoholic beverages with an alcohol strength not exceeding 1.2% volume only or whether it also applies to ethyl alcohol that has already been used to produce those flavours.¹²

28. The Romanian National Tax Administration Office takes the view that that exemption applies only to ethyl alcohol intended to be used to produce flavours for the preparation of non-alcoholic beverages with an alcohol strength not exceeding 1.2% volume. On that basis it refused to refund the excise duty the applicant had paid on the entry of the flavours into Romania. Romania supports that position. The applicant, Ireland, the Republic of Poland and the Commission all take the view that the exemption created by Article 27(1)(e) of Directive 92/83 also applies to ethyl alcohol that had been used to produce the flavours.

29. Article 20 of Directive 92/83 defines 'ethyl alcohol' as 'all products with an alcoholic strength by volume exceeding 1.2% volume which fall within CN codes 2207 and 2208, even when those products form part of a product which falls within another chapter of the CN.' The opinion on the law of Ireland notes that the ethyl alcohol incorporated into the flavours in question was, at

¹¹ Judgment of 18 April 2013, *Mulders* (C-548/11, EU:C:2013:249, paragraph 28 and the case-law cited).

¹² The first question refers to flavours that have been used for the preparation of non-alcoholic beverages with an alcohol strength not exceeding 1.2% volume. However, the referring court does not mention soft drinks being traded or moved from Ireland to Romania.

the time when Directive 92/83 was adopted, classifiable within CN code 2207; the flavours themselves fell within CN code 2208.¹³ The flavours come within the definition of ethyl alcohol in the first indent of Article 20 of Directive 92/83 and are subject to excise duty.¹⁴

30. Under Article 27(1)(e) of Directive 92/83 products covered by that directive are exempt from harmonised excise duty ‘when used for the production of flavours ...’.¹⁵ It is thus the use to which the ethyl alcohol is put that determines the application of the exemption.¹⁶ However, the text of that provision is not free from ambiguity: it may be interpreted as meaning ‘when intended to be used for the production of flavours’ or ‘when it has been used for the production of flavours’.¹⁷

31. Recourse must therefore be had to the other interpretative criteria that the Court usually employs, that is to say, to the purpose and the context of the provision under analysis.¹⁸

32. The Republic of Poland and the Commission point out that the objective of the exemptions in Article 27 of Directive 92/83 is to neutralise the impact of excise duties on ethyl alcohol when it is used as an intermediate product in other commercial or industrial products.¹⁹ That product is a ‘flavour for the preparation of non-alcoholic beverages with an alcohol strength not exceeding 1.2% volume’.

33. If the interpretation put forward by Romania were to prevail, it would mean that ethyl alcohol intended for the production of such flavours would be exempt from excise duty, whereas ethyl alcohol already incorporated in those flavours would not. That interpretation would give rise to the absurd result that, having been exempt from duty at the stage when it is intended for use in the production of flavours, once the ethyl alcohol has been used to produce those flavours, it would again become subject to excise duty. Such an outcome would certainly not achieve the objective of neutralising the impact of excise duties on alcohol used for the production of flavours for the preparation of non-alcoholic beverages with an alcohol strength not exceeding 1.2% volume.

¹³ Products falling within CN code 2207 are: ‘undenatured ethyl alcohol of an alcoholic strength by volume of 80% vol. or higher; ethyl alcohol and other spirits, denatured, of any strength’; products falling within CN code 2208 are: ‘undenatured ethyl alcohol of an alcoholic strength by volume of less than 80% vol.; spirits, liqueurs and other spirituous beverages; compound alcoholic preparations of a kind used for the manufacture of beverages’ (Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1)).

The Court interpreted Article 20 of Directive 92/83 in its judgment of 12 June 2008, *Gourmet Classic* (C-458/06, EU:C:2008:338, paragraphs 34 to 40).

¹⁴ See point 6 of the present Opinion.

¹⁵ It does not appear from the order for reference that the referring court has doubts about the nature of the product purchased by the applicant. Nor do any of the written observations contest that the product the applicant acquired is a flavour (itself a product with an alcoholic strength exceeding 1.2% volume) for the preparation of non-alcoholic beverages with an alcoholic strength not exceeding 1.2% volume.

¹⁶ See, by analogy, judgment of 9 December 2010, *Repertoire Culinaire* (C-163/09, EU:C:2010:752, paragraph 49 and the case-law cited).

¹⁷ This is also the case for other language versions of that directive, for example: in German: ‘zur Herstellung ... verwendet werden’; in Spanish: ‘cuando se utilicen’; in French: ‘utilisés pour la production’; in Dutch: ‘wanneer zij gebruikt worden’; in Italian: ‘impiegati per la produzione’; in Portuguese: ‘sejam utilizados’.

¹⁸ ‘In accordance with settled case-law, for the purpose of interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part’ (judgment of 3 September 2020, *Niki Luftfahrt* (C-530/19, EU:C:2020:635, paragraph 23 and the case-law cited)).

¹⁹ Judgments of 9 December 2010, *Repertoire Culinaire* (C-163/09, EU:C:2010:752, paragraph 48 and the case-law cited), and of 15 October 2015, *Biovet* (C-306/14, EU:C:2015:689, paragraph 21 and the case-law cited).

34. A purposive and contextual interpretation of Article 27(1)(e) of Directive 92/83 therefore supports the position taken by the applicant, Ireland, the Republic of Poland and the Commission. That position is also supported by the non-binding guidelines issued by the Commission's Committee on Excise Duty,²⁰ which considered the application of the exemption in Article 27(1)(e) on a number of occasions.

35. The Committee on Excise Duty first proposed that Member States grant the exemption where the flavours had been used to prepare non-alcoholic beverages subject to monitoring mechanisms established by the Member States.²¹ The intra-Community circulation of the flavours would be subject to the provisions of Directive 92/12/EEC.²²

36. However, on further reflection, the Committee on Excise Duty took account of the fact that the flavours are used predominantly as concentrates for the preparation of soft drinks. Since they cannot be consumed undiluted, the alcohol can be regarded as denatured. The flavours are relatively expensive, costing more than the cheapest alcohol marketed in the majority of Member States. Finally, it is expensive to purify flavours in order to extract ethyl alcohol therefrom. In the light of these characteristics, the committee could reasonably conclude that the grant of the exemption at the time of the production of the flavours would not give rise to a risk of tax evasion. It therefore proposed that the exemption in Article 27(1)(e) of Directive 92/83 should apply from that time.²³

37. In guidelines adopted at its meeting on 12-14 November 2003, the Committee on Excise Duty noted that it had been agreed almost unanimously that, for the purpose of the intra-Community circulation of flavours with CN codes 1302 1930, 2106 9020 and 3302,²⁴ the exemption in Article 27(1)(e) of Directive 92/83 was to apply from the time those products are produced or imported.²⁵

38. The deliberations of the Committee on Excise Duty also support the conclusion that, contrary to the position adopted by Romania, the exemption covers ethyl alcohol that has been used for the production of flavours.

39. In the light of the foregoing, I propose that the Court answer the first question as follows:

Article 27(1)(e) of Directive 92/83 is to be interpreted as meaning that the exemption from excise duty covers both ethyl alcohol that is intended for use, and ethyl alcohol that has already been used, in the production of flavours that are intended for the preparation of non-alcoholic beverages with an alcohol strength not exceeding 1.2% volume.

²⁰ Article 43(1) of Directive 2008/118 provides that the Commission shall be assisted by a committee referred to as the 'Committee on Excise Duty'.

²¹ See p. 3 of CED No 364 rev 1 of 22 January 2003.

²² Council Directive 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 Regulation (EC) No 807/2003 of 14 April 2003 adapting to Decision 1999/468/EC the provisions relating to committees which assist the Commission in the exercise of its implementing powers laid down in Council instruments adopted in accordance with the consultation procedure (unanimity) (OJ 2003 L 122, p. 36).

²³ See pp. 4 and 5 of CED No 364 rev 1 of 22 January 2003.

²⁴ The CN codes refer to the Combined Nomenclature at the date of the adoption of the guidelines, that is, 12-14 November 2003. The codes are referred to in order to address the fact that the flavours mentioned in Article 27(1)(e) of Directive 92/83 are not accurately identified by CN codes. This lack of accuracy was deemed to be the only source of a risk of tax evasion (see p. 4 of CED No 364 rev 1 of 22 January 2003).

²⁵ See p. 1 of CED No 458 of 19 November 2003.

B. The second question

40. By its second question, the referring court wishes to ascertain whether Article 27(1)(e) of Directive 92/83 is to be interpreted as meaning that, if ethyl alcohol is released for consumption in a Member State and deemed exempt from excise duty since it has been used for the production of flavours for the preparation of non-alcoholic beverages with an alcohol strength not exceeding 1.2% volume, other Member States must treat the ethyl alcohol contained in those flavours in an identical manner. The applicant, Ireland and the Commission are of the view that an exemption granted by a Member State where a product is manufactured must be recognised by any Member State to which that product is dispatched. Romania observes that that cannot be the case in all circumstances. The Republic of Poland made no observations on this question.

41. In the light of my proposed response to the first question, Member States are required to exempt from excise duty ethyl alcohol that has already been used in the production of flavours that are intended for the preparation of non-alcoholic beverages with an alcohol strength not exceeding 1.2% volume.

42. Furthermore, in its case-law on the interpretation of Article 27(1)(f) of Directive 92/83, which applies by analogy to Article 27(1)(e), the Court emphasises that, as a rule, all Member States must recognise a decision by a Member State to impose excise duty on a product or to exempt it therefrom. Any other interpretation would both compromise the attainment of the objective of Directive 92/83 and hinder the free movement of goods.²⁶ In my view, it would also be contrary to the principle of sincere cooperation between Member States contained in Article 4(3) TEU.²⁷

43. Where, therefore, flavours have been released for consumption in the Member State of production under national legislation transposing Article 7 of Directive 2008/118 and that Member State has applied the exemption to those flavours under its legislation transposing Article 27(1)(e) of Directive 92/83,²⁸ the Member State of the destination of those products must treat them in the same way upon their arrival on its territory, unless there is good reason to believe that the exemption was granted unlawfully.²⁹ In the light of the answer I propose that the Court should give to the first question, it has not been shown in the present proceedings that the Member State where the flavours were produced and released for consumption applied the exemption in Article 27(1)(e) of Directive 92/83 incorrectly.

44. I therefore propose that the Court answer the second question as follows:

Article 27(1)(e) of Directive 92/83 is to be interpreted as meaning that, once ethyl alcohol has been released for consumption in a Member State and that Member State has correctly applied the exemption from excise duty under that provision, the Member State of destination must treat it in an identical manner within its territory.

²⁶ Judgment of 9 December 2010, *Repertoire Culinaire* (C-163/09, EU:C:2010:752, paragraphs 41 and 42).

²⁷ See, for example, Opinion of Advocate General Saugmandsgaard Øe in *A-Rosa Flussschiff* (C-620/15, EU:C:2017:12, point 60).

²⁸ See also point 36 of the present Opinion, referring to the proposal of the Committee on Excise Duty that the exemption in Article 27(1)(e) of Directive 92/83 would apply from the time of production of the flavours in question.

²⁹ See, by analogy, judgment of 9 December 2010, *Repertoire Culinaire* (C-163/09, EU:C:2010:752, paragraphs 43 and 44 and the case-law cited).

C. *The third question*

45. By its third question the referring court wishes to ascertain whether Article 27(1)(e) and Article 27(2)(d) of Directive 92/83, and the principles of effectiveness and proportionality, permit a Member State to impose procedural requirements on a trader in excise goods that had obtained the benefit of an exemption from excise duty in the Member State where those goods had been produced and released for consumption.

46. The applicant explains that, in the context of intra-EU acquisitions, Romanian law requires that in order to benefit from an exemption under Article 27(1)(e) of Directive 92/83, the flavours must be transferred from an authorised warehouse keeper to a registered operator or to a registered recipient. Since it acquired the flavours from an Irish company, which sold them after they had been released for consumption in accordance with Irish law, the applicant asserts that it is unable to meet those conditions. The relevant invoices did not show that excise duty had been paid on the goods, nor did they indicate that a duty suspension arrangement applied to them. The opinion on the law of Ireland states that the Irish company from which the applicant acquired the flavours was not under any obligation under Irish or EU law to be an authorised warehouse keeper as it did not hold, process, produce or dispatch excise goods.

47. Ireland considers that no procedural requirements can be imposed on traders in the circumstances set out in the order for reference. According to the Commission, procedural requirements can be imposed only in the circumstances permitted by the Court's case-law. The Republic of Poland and Romania consider that the procedural requirements in question are permitted and justified since they have the objective of ensuring the correct and straightforward application of the exemption and of preventing any evasion, avoidance or abuse. In particular, Romania considers that if the flavours were allowed to circulate outside duty suspension arrangements³⁰ there is a risk that they would be converted into alcoholic beverages for consumption on which excise duty would not be paid.

48. The first two questions seek the interpretation of Article 27(1)(e) of Directive 92/83 only. Since the order for reference makes no further reference to Article 27(2)(d), or to the national legislation that implements that provision, or to the circumstances in which that provision might apply to the dispute in the main proceedings, I consider that the third question can be answered by reference to Article 27(1)(e) of Directive 92/83 alone.

49. Article 27(1), read in conjunction with the twenty-second recital to Directive 92/83, provides that the Member States shall lay down conditions for the purpose of ensuring the correct and straightforward application of the exemptions under that provision and of preventing any evasion, avoidance or abuse. Conditions laid down by Member States by virtue of that power cannot go beyond what is necessary to attain the objective set out in that provision.³¹ In the circumstances which gave rise to the dispute before the referring court, it would appear that the exercise of that power is limited to verifying that the flavours are in fact used for the preparation of non-alcoholic beverages with an alcohol strength not exceeding 1.2% volume.

³⁰ Romania refers to Articles 17 to 20 in Chapter IV of Directive 2008/118, which address the movement of excise goods under suspension of excise duty.

³¹ See judgment of 9 December 2010, *Repertoire Culinaire* (C-163/09, EU:C:2010:752, paragraph 51).

50. Moreover, when exercising their power to lay down the conditions for the exemption from excise duty provided for in Article 27(1)(e) of Directive 92/83, Member States must comply with the general principles of law which form part of the legal order of the European Union. These include, *inter alia*, the principles of proportionality and of effectiveness.³²

51. The principle of proportionality requires that consideration be given to whether the procedural requirements exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by Article 27(1)(e) of Directive 92/83. When there is a choice between several appropriate measures, recourse must be had to the least onerous and the disadvantages caused thereby must not be disproportionate to the aims pursued.³³

52. The principle of effectiveness requires that national procedural rules should not render impossible or excessively difficult the exercise of rights conferred by EU law.³⁴

53. It is for the national court, before which the dispute in the main proceedings is pending and which must assume responsibility for its final judicial decision, to determine whether the rules that the Romanian fiscal authorities seek to apply meet the requirements described in points 50 to 52 of the present Opinion. The following considerations may assist the referring court in the discharge of that task.

54. As regards the objective of ensuring the correct and straightforward application of the exemption and of preventing any evasion, avoidance or abuse, account must be taken of the following facts: (i) the flavours had been released for consumption in the Member State where they were produced; (ii) that same Member State had correctly applied the exemption to the flavours; (iii) the Committee on Excise Duty considered that the grant of the exemption at the time of production of the flavours did not give rise to a risk of tax evasion;³⁵ and, (iv) there is no indication that the applicant sought to obtain the benefit of the exemption fraudulently.

55. As for the application of the principles of proportionality and of effectiveness, the referring court should consider the applicant's assertion that it is unable to comply with the procedural requirements since the flavours were both manufactured and released into free circulation in the Member State that granted the exemption.

56. In the circumstances of the case pending before the referring court, it would appear that the application of the procedural requirements upon which the Romanian authorities insist is very likely to lead to the applicant being unlawfully deprived of its entitlement to benefit from an exemption from excise duty correctly granted by another Member State. In that context, the referring court should bear in mind the Court's case-law to the effect that non-compliance with purely formal conditions, unnecessary to ensure that the substantive requirements as to the actual use of the products concerned are met, cannot call into question the applicant's right to benefit from the mandatory exemption in Article 27(1)(e) of Directive 92/83.³⁶

³² See, by analogy, judgments of 13 July 2017, *Vakarų Baltijos laivų statykla* (C-151/16, EU:C:2017:537, paragraph 45 and the case-law cited), and of 7 November 2019, *Petrotel-Lukoil* (C-68/18, EU:C:2019:933, paragraph 56 and the case-law cited).

³³ See judgment of 9 March 2010, *ERG and Others* (C-379/08 and C-380/08, EU:C:2010:127, paragraph 86 and the case-law cited).

³⁴ See judgment of 18 October 2012, *Pelati* (C-603/10, EU:C:2012:639, paragraphs 23 and 25 and the case-law cited).

³⁵ See the considerations referred to in point 36 of the present Opinion.

³⁶ See, by analogy, judgments of 27 September 2007, *Collée* (C-146/05, EU:C:2007:549, paragraph 31); of 13 July 2017, *Vakarų Baltijos laivų statykla* (C-151/16, EU:C:2017:537, paragraph 46 and the case-law cited); and of 7 November 2019, *Petrotel-Lukoil* (C-68/18, EU:C:2019:933, paragraph 59 and the case-law cited).

57. I therefore propose the Court answer the third question as follows:

Article 27(1)(e) of Directive 92/83, and the principles of effectiveness and proportionality, permit a Member State to impose procedural requirements on a trader in excise goods that had obtained the benefit of an exemption from excise duty in the Member State where those goods had been produced and released for consumption only where those procedural requirements are strictly necessary to ensure the correct and straightforward application of the exemption in question and to prevent any evasion, avoidance or abuse. When imposing such procedural requirements, Member States must comply with general principles of EU law, including the principles of proportionality and of effectiveness.

D. The fourth question

58. The fourth question appears to be based upon the supposition that the Member State where the flavours were produced applied the exemption in Article 27(1)(e) of Directive 92/83 incorrectly. Should the Court answer the first question from the referring court in the manner proposed in the present Opinion, the fourth question would be based on an erroneous hypothesis, such that it does not require an answer.

VI. Conclusion

59. In the light of the foregoing, I propose that the Court reply to the questions posed by the Tribunalul București (Regional Court, Bucharest, Romania) as follows:

- (1) Article 27(1)(e) of Council Directive 92/83/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages is to be interpreted as meaning that the exemption from excise duty covers both ethyl alcohol that is intended for use, and ethyl alcohol that has already been used, in the production of flavours that are intended for the preparation of non-alcoholic beverages with an alcohol strength not exceeding 1.2% volume.
- (2) Article 27(1)(e) of Directive 92/83 is to be interpreted as meaning that once ethyl alcohol has been released for consumption in a Member State and that Member State has correctly applied the exemption from excise duty under that provision, the Member State of destination must treat it in an identical manner within its territory.
- (3) Article 27(1)(e) of Directive 92/83, and the principles of effectiveness and proportionality, permit a Member State to impose procedural requirements on a trader in excise goods that had obtained the benefit of an exemption from excise duty in the Member State where those goods had been produced and released for consumption only where those procedural requirements are strictly necessary to ensure the correct and straightforward application of the exemption in question and to prevent any evasion, avoidance or abuse. When imposing such procedural requirements, Member States must comply with general principles of EU law, including the principles of proportionality and of effectiveness.