Reports of Cases

OPINION OF ADVOCATE GENERAL
COLLINS
delivered on 28 September 2023 [1]

Case C-509/22

Agenzia delle Dogane e dei Monopoli
v
Girelli Alcool Srl

(Request for a preliminary ruling from the Corte suprema di cassazione (Supreme Court of Cassation, Italy))

(Reference for a preliminary ruling – Taxation – Excise duties – Directive 2008/118/EC – Article 7(4) – Chargeability of excise duties – Release of products for consumption – Exemption in the event of total destruction or irretrievable loss of excise goods under a duty suspension arrangement – Unforeseeable circumstances – Authorisation by the competent authorities of the Member State – Irretrievable loss resulting from a non-serious fault committed by an employee of the authorised warehousekeeper)

Introduction

1. This request for a preliminary ruling from the Corte suprema di cassazione (Supreme Court of Cassation, Italy) arises in the context of a refusal by the Agenzia delle Dogane e dei Monopoli (Customs and Monopolies Agency, Italy) ('the Customs Agency') to grant Girelli Alcool Srl ('Girelli'), an Italian company with an authorised ethyl alcohol warehouse and a denaturation and packaging plant, an exemption from excise duty for a quantity of pure ethyl alcohol that was irretrievably lost due to an error attributable to one of Girelli's employees.

2. The referring court seeks guidance on the interpretation of Article 7(4) of Directive 2008/118/EC. [2] It asks whether the concept of 'unforeseeable circumstances' should be interpreted in the same way as that of '*force majeure*' and whether it covers a situation where the irretrievable loss of excise goods is the result of negligence or a non-serious fault by an employee of an authorised warehousekeeper. It also questions the compatibility with that provision of national legislation which, for the purposes of obtaining an exemption from excise duty, equates a non-serious fault with unforeseeable circumstances and *force majeure*. Finally, the referring court inquires as to the scope of the authorisation that the competent authorities of Member States may grant under that provision.

[1] Original language: English.

[2] 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). With effect from 13 February 2023, Council Directive (EU) 2020/262 of 19 December 2019 laying down the general arrangements for excise duty (OJ 2020 L 58, p. 4) recast and repealed Directive 2008/118.

Legal framework

European Union law

3. According to recitals 8 and 9 of Directive 2008/118:

'(8) Since it remains necessary for the proper functioning of the internal market that the concept, and conditions for chargeability, of excise duty be the same in all Member States, it is necessary to make clear at [EU] level when excise goods are released for consumption and who the person liable to pay the excise duty is.

(9) Since excise duty is a tax on the consumption of certain goods, duty should not be charged in respect of excise goods which, under certain circumstances, have been destroyed or irretrievably lost.'

4. Article 1(1) of that directive provides:

'This Directive lays down general arrangements in relation to excise duty which is levied directly or indirectly on the consumption of the following goods (hereinafter "excise goods"):

…

(b) alcohol and alcoholic beverages covered by [Council Directive 92/83/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages (OJ 1992 L 316, p. 21)] and [Council Directive 92/84/EEC of 19 October 1992 on the approximation of the rates of excise duty on alcohol and alcoholic beverages (OJ 1992 L 316, p. 29)];

…'

5. Article 2 of Directive 2008/118 states:

'Excise goods shall be subject to excise duty at the time of:

(a) their production … within the territory of the [European Union];

(b) their importation into the territory of the [European Union].'

6. Chapter II of that directive, entitled 'Chargeability, reimbursement, exemption', contains Section 1, entitled 'Time and place of chargeability', in which Article 7 provides:

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

2. For the purposes of this Directive, "release for consumption" shall mean any of the following:

(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 [EU] 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.

…

4. The total destruction or irretrievable loss of excise goods under a duty suspension arrangement, as a result of the actual nature of the goods, of unforeseeable circumstances or *force majeure*, or as a consequence of authorisation by the competent authorities of the Member State, shall not be considered a release for consumption.

For the purpose of this Directive, goods shall be considered totally destroyed or irretrievably lost when they are rendered unusable as excise goods.

The total destruction or irretrievable loss of the excise goods in question shall be proven to the satisfaction of the competent authorities of the Member State where the total destruction or irretrievable loss occurred or, when it is not possible to determine where the loss occurred, where it was detected.

5. Each Member State shall lay down its own rules and conditions under which the losses referred to in paragraph 4 are determined.'

National law

7. Under Article 2(2) of decreto legislativo n. 504 – Testo unico delle disposizioni legislative concernenti le imposte sulla produzione e sui consumi e relative sanzioni penali e amministrative (Legislative Decree No 504, consolidated text of legislative provisions relating to duties on production and consumption and related criminal and administrative penalties) of 26 October 1995,[3] as amended by decreto legislativo n. 48 – Attuazione della direttiva 2008/118/CE relativa al regime generale delle accise e che abroga la direttiva 92/12/CEE (Legislative Decree No 48 implementing Directive 2008/118/EC concerning the general arrangements for excise duty and repealing Directive 92/12/EEC) of 29 March 2010,[4] 'excise duty shall be chargeable at the time when the product is released for consumption in the territory of the State'.

8. Article 4(1) of Decree No 504/1995 reads as follows:

'In case of irretrievable loss or total destruction of goods under a duty suspension arrangement, relief shall be granted where the person liable to pay the duty proves, in a manner deemed satisfactory by the tax authority, that the loss or destruction of the goods occurred as a result of unforeseeable circumstances or *force majeure*. With the exception of manufactured tobacco, facts constituting non-serious fault which are attributable to third parties or to the person liable

[3] Ordinary Supplement to GURI No 279 of 29 November 1995 ('Decree No 504/1995').

[4] GURI No 75 of 31 March 2010.

to pay the duty himself [or herself] shall be treated as unforeseeable circumstances and *force majeure*.'

9. Article 4(5) of Decree No 504/1995 provides that 'goods shall be considered totally destroyed or irretrievably lost when they are rendered unusable as excise goods'.

The facts of the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

10. On 26 March 2014, while a tank was being filled in Girelli's ethyl alcohol denaturation plant in the presence of a Customs Agency official, pure ethyl alcohol leaked through a valve in the tank that one of Girelli's employees had inadvertently left open and spilled onto the floor. Part of the product was recovered, the rest was irretrievably lost.

11. On 31 March 2014, Girelli applied to the Customs Agency, pursuant to Article 4(1) of Decree No 504/1995, for exemption from excise duty in respect of the quantity of pure ethyl alcohol that had been accidentally lost.

12. On 5 June 2014, the Customs Agency rejected that application on the ground that the loss was due to the carelessness and fault of an employee of Girelli, and not to unforeseeable circumstances or *force majeure*.

13. On 25 July 2014, Girelli submitted observations to the Customs Agency, in which it disputed the chargeability of excise duty on the quantity of pure ethyl alcohol lost.

14. On 3 October 2014, the Customs Agency rejected those observations. It issued a notice for the payment of excise duty in the amount of EUR 17 476.24, against which Girelli brought an action before the Commissione tributaria provinciale di Milano (Provincial Tax Court, Milan, Italy). Girelli submitted, inter alia, that there was no chargeable event for the excise duty, since, having been irretrievably lost, the pure ethyl alcohol had not been released for consumption. It also contended that the harmful event was attributable to unforeseeable circumstances or, in the alternative, to a 'non-serious fault' since it was caused by an employee's inattention.

15. The Commissione tributaria provinciale di Milano (Provincial Tax Court, Milan) upheld Girelli's action. It took the view that the loss was due to 'an unquestionable lack of diligence, which cannot, however, be described as "serious"'.

16. The Customs Agency brought an appeal against that decision before the Commissione tributaria regionale della Lombardia (Regional Tax Court, Lombardy, Italy), which decided that the exemption should be granted since the loss of pure ethyl alcohol was irretrievable and due to unforeseeable circumstances.

17. The Customs Agency brought an appeal on a point of law against the latter decision before the referring court, arguing, in essence, that, in holding that the negligent conduct of Girelli's employee came within the concept of 'unforeseeable circumstances' and that, in any event, that employee's fault was 'non-serious', the Commissione tributaria regionale della Lombardia (Regional Tax Court, Lombardy) had infringed Article 4 of Decree No 504/1995.

18. The referring court observes that its case-law takes two different approaches to the concept of unforeseeable circumstances. According to the first approach, which is subjective in nature, the person bound by the obligation must demonstrate that he or she has not committed any fault and that the damage occurred in a way that could not be foreseen or avoided by exercising due care in the light of the specific circumstances of the case. According to the second approach, which is objective in nature, it is irrelevant whether that person had acted diligently, or negligently.

19. The referring court submits that it may be inferred from the judgments of the Court of Justice in *Société Pipeline Méditerranée et Rhône*[5] and in *Latvijas Dzelzceļš*[6] that, in the field of excise duty, the concepts of '*force majeure*' and 'unforeseeable circumstances' both contain an objective element relating to abnormal circumstances extraneous to the trader as well as a subjective element involving the obligation, on that person's part, to guard against the consequences of an abnormal event by taking appropriate steps without making unreasonable sacrifices. It appears these two concepts share the same characteristics. Even with regard to unforeseeable circumstances, there must be 'abnormal and unforeseeable circumstances extraneous to the authorised warehousekeeper, the consequences of which, despite the exercise by him of all due care, could not have been avoided', and the 'requirement that the circumstances must be extraneous to the authorised warehousekeeper is not limited to those circumstances which are outside his control in a material or physical sense, but refers also to circumstances which are objectively outside the authorised warehousekeeper's control or situated outside his sphere of responsibility'.[7]

20. The referring court asks whether the exemption provided for in Article 7(4) of Directive 2008/118 may be granted where the event that caused the irretrievable loss of the excise goods results from a lack of care, prudence or expertise on the part of the warehousekeeper or his or her employee. Having regard to their objective and subjective elements, the concepts of '*force majeure*' and 'unforeseeable circumstances' do not apply to conduct characterised by fault, in particular a careless mistake, which is by nature both foreseeable and avoidable.

21. The referring court also asks whether the concept of 'unforeseeable circumstances' is different from that of '*force majeure*' with regard to the level of care that the person concerned must exercise when taking precautions to avoid a harmful event.

22. The referring court considers that, by equating non-serious fault with '*force majeure*' and 'unforeseeable circumstances', Article 4(1) of Decree No 504/1995 appears to provide for an additional ground for exemption from excise duty, by reference to a subjective criterion of the care exercised by the person concerned.

23. Finally, the referring court inquires as to whether the expression 'as a consequence of authorisation by the competent authorities of the Member State' in the first subparagraph of Article 7(4) of Directive 2008/118 can be interpreted so as to allow Member States to define other general categories that give rise to an exemption from excise duty. It takes the view that the scheme of that provision, which refers, in turn, to 'the actual nature of the goods', 'unforeseeable circumstances' and '*force majeure*', may suggest that that expression has a restrictive and residual value. It therefore refers to other specific events, which are not identifiable a priori but relate to

5 Judgment of 18 December 2007 (C-314/06, 'the judgment in *SPMR*', EU:C:2007:817).

6 Judgment of 18 May 2017 (C-154/16, 'the judgment in *Latvijas Dzelzceļš*', EU:C:2017:392).

7 The referring court quotes paragraph 40 of the judgment in *SPMR*. The first question referred, *in fine*, is to be understood in the light of that quotation.

particular facts which, in so far as they are subject to a specific prior assessment by the competent authorities, may justify the adoption of a decision to destroy the product. That view is confirmed by the fact that the grounds for exemption, in so far as they derogate from the ordinary taxation regime, must be interpreted strictly and by the use of the word 'circumstances' in recital 9 of Directive 2008/118.

24. The Corte suprema di cassazione (Supreme Court of Cassation) accordingly decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) First, should the concept of unforeseeable circumstances giving rise to losses under duty suspension arrangements, within the meaning of Article 7(4) of [Directive 2008/118], be understood, in the same way as *force majeure*, as abnormal and unforeseeable circumstances extraneous to the authorised warehousekeeper, which, in spite of the exercise of all due care, [could not have been avoided and which] were objectively outside the warehousekeeper's control?

(2) Furthermore, to exclude liability in the event of unforeseeable circumstances, is the care exercised in taking the necessary precautions to avoid the harmful act relevant, and if so, to what extent?

(3) Subject to the first two questions, is a provision such as Article 4(1) of [Decree No 504/1995], which equates ordinary negligence (by the same person or by third parties) with unforeseeable circumstances and *force majeure*, compatible with the provisions of Article 7(4) of [Directive 2008/118], which mentions no other conditions, particularly as regards the "fault" of the perpetrator or active participant?

(4) Lastly, can the expression "or as a consequence of authorisation by the competent authorities of the Member State", also contained in Article 7(4), be understood as the possibility for the Member State to identify another general category (slight negligence) that might have a bearing on the definition of release for consumption in the event of destruction or loss of the product, or does that expression preclude a clause of that type, it having to be understood, rather, as referring to specific cases that are individually authorised or otherwise identified by precedents in which the objective elements are defined?'

25. Girelli, the Italian Government and the European Commission submitted written observations. The Court asked questions of the European Parliament, the Council and the Commission for response in writing. Those institutions replied within the prescribed period. At the hearing of 7 June 2023, Girelli and the Commission presented oral argument and replied to the Court's questions.

Legal assessment

Admissibility

26. Without formally arguing that the reference for a preliminary ruling is inadmissible, Girelli submits that the questions referred fall outside the scope of the dispute in the main proceedings. Under Article 7(1) of Directive 2008/118 and Article 2(2) of Decree No 504/1995, excise duty becomes chargeable at the time of release for consumption. After spilling onto the floor of the

denaturation plant, the pure ethyl alcohol became 'unusable' as excise goods and was thus irretrievably lost,[8] such that under no circumstances could it be said to have been released for consumption.

27. According to settled case-law, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions it submits. Consequently, where the questions referred concern the interpretation of EU law, the Court is, in principle, bound to give a ruling. Such questions accordingly enjoy a presumption of relevance. The Court may decline to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.[9]

28. The reference for a preliminary ruling involves determining whether, in the circumstances described therein, irretrievable loss of excise goods may be considered as a release for consumption within the meaning of Article 7(2) of Directive 2008/118. Contrary to Girelli's submissions, the fact that excise goods have been totally destroyed or irretrievably lost is not necessarily inconsistent with their release for consumption. As is apparent from recital 9 of Directive 2008/118, it is only 'under certain circumstances', defined in Article 7(4) thereof, that where such goods have been totally destroyed or irretrievably lost no duty can be charged on them. The referring court seeks the Court's assistance to clarify whether a situation such as that which arose in the main proceedings falls within those circumstances.

29. It follows that the questions referred are useful and relevant to the outcome of the dispute before the referring court. I therefore advise the Court to reply to them.

Substance

The first question

30. By its first question, the referring court seeks to ascertain whether the concept of 'unforeseeable circumstances' in Article 7(4) of Directive 2008/118 must, like that of '*force majeure*', be understood in the sense of abnormal and unforeseeable circumstances, extraneous to the authorised warehousekeeper, the consequences of which, in spite of the exercise of all due care, could not have been avoided, and are objectively beyond the warehousekeeper's control or sphere of responsibility.[10]

8 Girelli refers to the second subparagraph of Article 7(4) of Directive 2008/118 and to Article 4(5) of Decree No 504/1995.

9 Judgment of 13 October 2022, *Baltijas Starptautiskā Akadēmija and Stockholm School of Economics in Riga* (C-164/21 and C-318/21, EU:C:2022:785, paragraphs 32 and 33 and the case-law cited).

10 The text of that question is based, in essence, on the terms the Court used in paragraphs 23 and 33 of the judgment in *SPMR* to define the concept of '*force majeure*' in the context of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1), as amended by Council Directive 94/74/EC of 22 December 1994 (OJ 1994 L 365 p. 46). See also point 36 of the present Opinion.

31. Directive 2008/118 neither defines the concepts of 'unforeseeable circumstances' and '*force majeure*' nor refers to the law of the Member States for that purpose. [11]

32. Girelli's written observations appear to rely on Article 7(5) of Directive 2008/118 to assert that the Member States enjoy a certain margin of appreciation when they grant an exemption from excise duty. The Italian Government and the Commission, in my view correctly, observe that the reference to national rules and conditions in that provision does not alter the meaning of the concepts of 'unforeseeable circumstances' and '*force majeure*' in Article 7(4) of Directive 2008/118. [12] As the Commission explained at the hearing, the discretion Article 7(5) of Directive 2008/118 leaves to the Member States is limited to ancillary matters. These include the formalities to be completed and the time limits within which to declare the destruction or the loss of excise goods, or to seek an authorisation from the competent authorities to destroy such goods, or to provide the evidence to establish that such destruction or loss has occurred, or the existence of unforeseeable circumstances or *force majeure*.

33. By stating that it is necessary for the proper functioning of the internal market that the concept and the conditions for chargeability of excise duty be the same in all Member States, recital 8 of Directive 2008/118 confirms the approach for which the Italian Government and the Commission contend. That recital also explains why Article 7(2) of Directive 2008/118 defines precisely when excise goods are to be regarded as having been released for consumption and, hence, pursuant to Article 7(1) thereof, when excise duty becomes chargeable on those goods. Inasmuch as the meaning and scope of the concepts of 'unforeseeable circumstances' and '*force majeure*' are relevant factors in determining the chargeability of excise duty, [13] they necessarily have an autonomous character and must apply uniformly throughout the European Union. [14]

34. It follows that, in so far as Article 7(5) of Directive 2008/118 affords Member States a margin of appreciation to grant exemptions from excise duty, that margin has no bearing upon the definitions of 'unforeseeable circumstances' and '*force majeure*' that feature in Article 7(4) thereof.

35. The Court has not yet interpreted the concepts of 'unforeseeable circumstances' and '*force majeure*' in Article 7(4) of Directive 2008/118. In the judgment in *SPMR*, which interpreted the first sentence of Article 14(1) of Directive 92/12, the predecessor of Directive 2008/118, the Court considered the concept of '*force majeure*' in the context of excise duties. [15] It held that the general scheme and purpose of Directive 92/12 did not require the constituent elements of '*force majeure*', as derived from its case-law in other areas of EU law, [16] to be interpreted and applied in a particular way. [17] The Court thus ruled that the definition of '*force majeure*' that it had adopted in those other areas of EU law applied equally to the first sentence of Article 14(1) of Directive

[11] The EU legal order does not, in principle, define concepts by reference to one or more national legal systems save where it makes express provision to that effect. See, to that effect, judgment in *SPMR* (paragraph 21 and the case-law cited).

[12] Ibid.

[13] See Article 7(4) of Directive 2008/118.

[14] See, to that effect, judgment in *SPMR* (paragraph 22).

[15] Directive 2008/118 repealed and replaced Directive 92/12 with effect from 1 April 2010. Under the first sentence of Article 14(1) of Directive 92/12, 'authorised warehousekeepers shall be exempt from duty in respect of losses occurring under suspension arrangements which are attributable to fortuitous events or *force majeure* and established by the [authorities] of the Member State concerned'.

[16] Such as agricultural regulations or the rules on time limits for bringing an action laid down by Article 45 of the Statute of the Court of Justice.

[17] According to settled case-law, since *force majeure* does not have the same scope in the various spheres of application of EU law, its meaning must be determined by reference to the legal context in which it operates (see judgment in *SPMR*, paragraph 25 and the case-law cited). As Advocate General Kokott observes in her Opinions in *Société Pipeline Méditerranée et Rhône* (C-314/06, EU:C:2007:457, point 31) and in *Commission* v *Italy* (C-334/08, EU:C:2010:187, point 21), the definition of '*force majeure*' is of general application.

92/12.[18] According to that definition, which may be described as 'customary', the concept of '*force majeure*' does not require absolute impossibility but is to be understood as consisting of abnormal and unforeseeable circumstances, extraneous to the operator concerned, the consequences of which, in spite of the exercise of all due care, could not have been avoided.[19] *Force majeure* thus comprises two elements: an objective element relating to the nature of the circumstances, abnormal and extraneous to the operator concerned, and a subjective element involving the obligation, on that operator's part, to guard against the consequences of the abnormal event by taking appropriate steps without, however, making unreasonable sacrifices.[20]

36. The Court consequently ruled that an authorised warehousekeeper can claim the benefit of the exemption that the first sentence of Article 14(1) of Directive 92/12 provides for 'only if he is able to demonstrate that there are abnormal and unforeseeable circumstances, extraneous to him, the consequences of which, in spite of the exercise of all due care, could not have been avoided'. Applying those conditions in the context of that provision is not to lead to the imposition of absolute liability on the authorised warehousekeeper for losses of products subject to a duty suspension arrangement. The requirement that the circumstances be extraneous to the authorised warehousekeeper is not limited to circumstances that are extraneous to him or her in a material or physical sense, but are those 'which are objectively outside the authorised warehousekeeper's control or situated outside his sphere of responsibility'.[21]

37. In my view, the steps in the reasoning the Court applied to those findings can be transposed to the definition of the concept of '*force majeure*' for the purposes of the first subparagraph of Article 7(4) of Directive 2008/118.

38. First, it is clear from a combination of recitals 2 and 8 and Article 1(1) of Directive 2008/118 that that directive seeks to ensure that the internal market for excise goods functions properly. For that purpose, it contains general arrangements under which the concept, and the conditions for chargeability, of excise duty are to be identical in all Member States.[22]

39. Next, under Article 2 of Directive 2008/118, excise goods[23] are subject to excise duty at the time of their production within, or of their importation into, the territory of the European Union. Under Article 7(1) of Directive 2008/118, that duty becomes chargeable only at the time of their release for consumption. By reference to Article 7(2)(a) thereof, release for consumption includes the departure of excise goods, including their irregular departure, from a duty suspension arrangement.[24]

40. Finally, an *a contrario* reading of the first subparagraph of Article 7(4) of Directive 2008/118 infers that the total destruction or irretrievable loss of excise goods under a duty suspension arrangement is to be treated as a release for consumption, except in the situations exhaustively set out in that provision, which include unforeseeable circumstances or *force majeure*.[25]

18 Judgment in *SPMR* (paragraphs 25 to 31).

19 Judgment in *SPMR* (paragraph 23 and the case-law cited).

20 Judgment in *SPMR* (paragraph 24 and the case-law cited).

21 Judgment in *SPMR* (paragraphs 31 to 33).

22 Compare with the findings in paragraph 27 of the judgment in *SPMR*.

23 Under Article 1(1)(b) of Directive 2008/118, excise goods include alcohol.

24 Compare with the findings in paragraph 28 of the judgment in *SPMR*.

25 The second subparagraph of Article 7(4) of Directive 2008/118 sets out the conditions under which goods are considered to be totally destroyed or irretrievably lost, and the third subparagraph of that provision sets out the conditions under which such destruction or loss is to be proven.

41. It follows that, in the context of Directive 2008/118, excise duties are, as a rule, also chargeable on excise goods under a duty suspension arrangement that are totally destroyed or irretrievably lost. As the Commission correctly states in its written observations and in its reply to one of the Court's written questions, the exemption Article 7(4) of Directive 2008/118 provides for in cases of destruction or loss of excise goods attributable to, inter alia, unforeseeable circumstances or *force majeure* is a derogation from that general rule and must therefore be interpreted strictly. [26]

42. I accordingly advise that the 'customary' definition of '*force majeure*' that the Court adopted in the judgment in *SPMR* in the context of the first sentence of Article 14(1) of Directive 92/12 – including the clarifications in paragraphs 32 and 33 of that judgment – [27] applies equally in the context of the first subparagraph of Article 7(4) of Directive 2008/118. That view appears to be confirmed by the statement in the Court's judgment in *IMPERIAL TOBACCO BULGARIA* that, since the relevant provisions of Directive 92/12 are in essence identical in scope to those of Directive 2008/118, its case-law with respect to the first directive applies to the second. [28]

43. As for the meaning and the scope of the concept of 'unforeseeable circumstances' in the first subparagraph of Article 7(4) of Directive 2008/118, the references the referring court, the Italian Government and the Commission made to the judgment in *Latvijas Dzelzceļš* appear to be particularly apposite. The issue in that judgment was whether the leak of solvent from a tank, caused by the lower unloading device of a wagon tank not having been correctly closed or having been damaged, could be regarded as an unforeseeable circumstance or *force majeure* within the meaning of Article 206(1) of Regulation (EEC) No 2913/92. [29] In its judgment, the Court held that, in the context of customs legislation, the concepts of '*force majeure*' and 'unforeseeable circumstances' are both characterised by the objective and subjective elements that point 35 of the present Opinion describes. [30] The Court thus attributed the same content to the two concepts and repeated its 'customary' definition of '*force majeure*'. [31] There appears to be no reason why the assimilation, in the judgment in *Latvijas Dzelzceļš*, of the concepts of '*force majeure*' and 'unforeseeable circumstances' for the purposes of Article 206(1) of the Customs Code should not apply equally to the first subparagraph of Article 7(4) of Directive 2008/118. [32]

44. In support of this conclusion, I first observe that both provisions are similar in content.

45. Second, in the judgment in *Latvijas Dzelzceļš*, the Court stated that Article 206(1) of the Customs Code is a derogation from the rule in Article 204(1)(a) thereof, which defines the circumstances in which the customs debt on importation is incurred, and that, consequently, the concepts of '*force majeure*' and 'unforeseeable circumstances' for the purpose of the first of those

[26] Compare with the finding in paragraph 30 of the judgment in *SPMR*. See also recital 9 of Directive 2008/118, which refers to 'certain circumstances'.

[27] See points 35 and 36 of the present Opinion.

[28] Judgment of 9 June 2022, *IMPERIAL TOBACCO BULGARIA* (C-55/21, EU:C:2022:459, paragraph 37).

[29] Council Regulation of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), as amended by Regulation (EC) No 648/2005 of the European Parliament and of the Council of 13 April 2005 (OJ 2005 L 117, p. 13) ('the Customs Code'). Article 206(1) of the Customs Code provides, inter alia, that by way of derogation from Article 204(1)(a) thereof, no customs debt on importation is deemed to be incurred in respect of specific goods, where the person concerned proves that the non-fulfilment of the obligations which arise from the use of the customs procedure under which the goods have been placed results from the total destruction or irretrievable loss of those goods as a result of the actual nature of the goods, unforeseeable circumstances or *force majeure*.

[30] Judgment in *Latvijas Dzelzceļš* (paragraph 61). See also, in the context of customs legislation, judgment of 4 February 2016, *C & J Clark International and Puma* (C-659/13 and C-34/14, EU:C:2016:74, paragraph 192).

[31] See point 35 of the present Opinion.

[32] In support of its statement in paragraph 61 of the judgment in *Latvijas Dzelzceļš*, the Court refers, inter alia, to the judgment in *SPMR*. As point 35 of the present Opinion explains, the Court also adopted, as regards the concept of '*force majeure*' within the meaning of the first sentence of Article 14(1) of Directive 92/12, the 'customary' definition of that concept in other areas of EU law.

provisions must be interpreted strictly.[33] Both concepts are capable of affecting the chargeability of excise duty in the context of the exemption from excise duty for which Article 7(4) of Directive 2008/118 provides. As a derogation from a general rule they must, therefore, also be interpreted strictly.[34]

46. As the Italian Government states in its written observations, the Court, in its judgment in *Dansk Transport og Logistik*,[35] emphasised the existence of 'similarities between customs duties and excise duties in that they arise from the importation of goods into the [European Union] and their subsequent distribution through the economic channels of the Member States'. Given those similarities, and in order to provide a coherent interpretation of the applicable EU legislation, the Court held that excise duty is to be considered as having been extinguished in the same way as customs duty.

47. Finally, it is apparent from the Court's case-law in other areas of EU law that it does not draw a clear distinction between the concepts of 'unforeseeable circumstances' and '*force majeure*', but in effect treats them as one and the same.[36] As Advocate General Kokott observed in her Opinion in *SPMR*,[37] the Court often examines those concepts together, by reference to the same criteria and without further explanation as to the differences between them. For example, in the judgment in *RF* v *Commission*,[38] which related to the rules on procedural time limits in Article 45 of the Statute of the Court of Justice, the Court held that 'the concepts of "unforeseeable circumstances" and "*force majeure*" contain the same elements and have the same legal consequences'. In the same vein, it may be observed that, in the very few cases where the Court defined the concept of 'unforeseeable circumstances' separately, it adopted precisely the same words as those it used to define the concept of '*force majeure*'.[39]

48. As to the reference in the first question, *in fine*, to the fact that the circumstances must be 'objectively outside the warehousekeeper's control', it concerns the objective element of the concept of 'unforeseeable circumstances' and is to be read in the light of paragraphs 32 and 33 of the judgment in *SPMR*, as point 36 of the present Opinion explains. Again, I see no reason why the findings in those paragraphs, developed in relation to the concept of '*force majeure*', ought not to apply to the concept of 'unforeseeable circumstances'.

33 Judgment in *Latvijas Dzelzceļš* (paragraphs 58 and 62).

34 See points 39 to 41 of the present Opinion.

35 Judgment of 29 April 2010 (C-230/08, EU:C:2010:231, paragraph 84).

36 In his Opinion in Joined Cases *C & J Clark International and Puma* (C-659/13 and C-34/14, EU:C:2015:620), Advocate General Bot went so far as to assert that, 'in reality, the concepts of unforeseeable circumstances and *force majeure* are the same' (point 135). In his Opinion in *RF* v *Commission* (C-660/17 P, EU:C:2019:67), Advocate General Wahl took a more nuanced approach when he observed that 'although the Court has never … made a clear distinction between the two concepts, it seems reasonable to suppose that their scope is not exactly the same' (point 33). According to him, *force majeure* refers to 'a more limited set of extreme events', to 'an external force which hinders the party from fulfilling an obligation and leaves that party with no alternative course of action' (point 35), while the concept of 'unforeseeable circumstances' is 'somewhat more flexible' and 'can encompass a broader set of circumstances not covered by *force majeure*' (point 36). He nevertheless considers that 'to a certain extent, the definition of those concepts in relation to each other is a matter of personal judgment', that 'they might even partly overlap', and that 'no matter how the demarcation between the two concepts is drawn, it is clear that they are very closely connected and designate a set of exceptional circumstances' (point 37). Advocate General Wahl concludes that 'the existence of "unforeseeable circumstances" or of "*force majeure*" should therefore be assessed together, as a conceptual cluster' (point 41).

37 Opinion of Advocate General Kokott in *SPMR* (C-314/06, EU:C:2007:457, point 27). See also, in similar terms, Opinion of Advocate General Wahl in *RF* v *Commission* (C-660/17 P, EU:C:2019:67, point 30).

38 Judgment of 19 June 2019 (C-660/17 P, EU:C:2019:509, paragraph 37). See also order of the President of the Court of 30 September 2014, *Faktor B. i W. Gęsina* v *Commission* (C-138/14 P, EU:C:2014:2256, paragraph 19).

39 See, for example, order of 21 September 2012, *Noscira* v *OHIM* (C-69/12 P, EU:C:2012:589, paragraph 39).

49. In the light of the foregoing, I agree with the Italian Government and the Commission that the concept of 'unforeseeable circumstances' in Article 7(4) of Directive 2008/118 is to be interpreted, like that of '*force majeure*' in that provision, as referring to abnormal and unforeseeable circumstances, extraneous to the authorised warehousekeeper, the consequences of which, despite the exercise by him or her of all due care, could not have been avoided.[40] The requirement that the circumstances must be extraneous to the authorised warehousekeeper is not limited to those outside his or her control in a material or physical sense, but include those that are objectively beyond his or her control or sphere of responsibility.

The second question

50. The second question asks, in essence, whether recognition of unforeseeable circumstances within the meaning of Article 7(4) of Directive 2008/118 requires the authorised warehousekeeper to have exercised all due care in order to avoid the occurrence of the harmful event.

51. The Italian Government and the Commission interpret that question as addressing the subjective element of the concept of 'unforeseeable circumstances'. The Commission therefore considers that the referring court seeks to ascertain whether due care may be relevant as regards the obligation, on the authorised warehousekeeper's part, to guard against the consequences of the abnormal event by taking appropriate steps without making unreasonable sacrifices.

52. Viewed from that perspective, I share the Commission's view that the Court's findings in the judgment in *SPMR*[41] may be applied by analogy in order to determine whether the subjective element had been met in the circumstances of the present case. It is apparent from paragraph 37 of that judgment that, although compliance with the technical requirements concerning the operation to be carried out may be a necessary condition to ground a finding of diligence, sufficient diligence requires, in addition, continuous action aimed at identifying and assessing potential risks and the ability to take appropriate and effective steps to avoid them.

53. In the light of those findings, it is for the referring court to ascertain whether, in the main proceedings, the authorised warehousekeeper had not only complied with the technical requirements relating to the operation of loading ethyl alcohol into the tank, but had also identified and assessed the potential risks of leakage in view of the mechanical appliances used to load the tank and had taken all necessary measures to avoid those risks. As regards the latter point, as the referring court itself suggests, it could verify whether the authorised warehousekeeper had installed security devices to block the opening of valves when loading the tank. I agree with the Italian Government that such a preventive measure would not have involved an unreasonable sacrifice.

[40] It may be observed that, contrary to the text of the first question referred *in fine*, according to the Court's case-law it is the 'consequences', and not the 'circumstances', that could not have been avoided.

[41] In that case, fuel had escaped from an oil pipeline in which it was being transported under excise duty suspension arrangements. The operator attributed the leaks and bursting of the pipeline to corrosive cracking. It applied for an exemption from excise duties in respect of the lost fuel. The administration rejected that application since it considered that the operator had not met the conditions to enable it to rely on *force majeure*.

54. It is nevertheless apparent from the text of the second question referred and from the statement of reasons for the request for a preliminary ruling that the referring court asks the Court about the standard of care an authorised warehousekeeper must exercise, not so much in order to guard against the consequences of the abnormal event, but rather in order to avoid its occurrence in the first place.

55. Understood in that way, the second question engages both the subjective and the objective elements that together constitute unforeseeable circumstances.

56. In that regard, a parallel can be drawn with the facts that gave rise to the judgment in *Latvijas Dzelzceļš*, which addressed, inter alia, the question as to whether a leak of solvent from a tank was to be regarded as an unforeseeable circumstance or *force majeure*. On the hypothesis that the leak had been caused by the incorrect closure of an unloading device, the Court ruled that it was not an abnormal circumstance extraneous to a trader engaged in the transport of liquids, but rather a consequence of a failure to exercise ordinary due care in the context of that trader's business. As a result, it held that neither the objective nor the subjective elements of the concepts of '*force majeure*' and 'unforeseeable circumstances' had been met. [42]

57. In the present case, I consider that, should the irretrievable loss of excise goods be attributable to the negligent conduct of the authorised warehousekeeper's employee in the performance of his or her duties, which it is a matter for the referring court to ascertain, the objective element of the unforeseeable circumstances would be absent. Conduct of that nature does not constitute an abnormal circumstance extraneous to that operator and clearly falls within his or her sphere of control or responsibility.

58. As for the subjective element, which involves an assessment of the conduct of the person concerned, I take the view that the lack of fault, whether considered 'non-serious' or negligent, is an essential condition for the existence of unforeseeable circumstances. Such circumstances are not present where a party does not take the care that is ordinarily required of persons carrying on a business.

59. In the light of those observations, I propose that the Court answer the second question to the effect that Article 7(4) of Directive 2008/118 is to be interpreted as meaning that recognition of unforeseeable circumstances requires an authorised warehousekeeper to have exercised all due care in order to avoid the occurrence of the harmful event.

The third question

60. By its third question, the referring court asks, in essence, if Article 7(4) of Directive 2008/118 is to be interpreted as precluding national legislation whereby facts constituting non-serious fault, whether attributable to the person liable to pay the duty or to a third party, are to be equated with unforeseeable circumstances and *force majeure*.

61. It is apparent from my analysis of the first and second questions that negligent conduct or a fault which may be classified as 'non-serious', attributable to the operator concerned or to one of its employees, does not constitute unforeseeable circumstances or *force majeure* for the purposes of Article 7(4) of Directive 2008/118. A non-serious fault committed by a third party, and not by

[42] Judgment in *Latvijas Dzelzceļš* (paragraph 63).

the person liable for payment of the duty or by one of its employees, could amount to unforeseeable circumstances or *force majeure* for the purposes of that provision only in so far as the objective and subjective elements characterising those two concepts were present.

62. In that context, Article 7(4) of Directive 2008/118 contains an exhaustive list of the circumstances in which the total destruction or irretrievable loss of excise goods under a duty suspension arrangement is not to be considered a release for consumption and, consequently, does not give rise to the chargeability of excise duty; that provision does not refer to non-serious fault. As the Commission states in its reply to a written question from the Court, the limitation of the exemption from excise duty to the three circumstances described therein is explained by the fact that Directive 2008/118 seeks, inter alia, to prevent fraud and abuse. The EU legislature considered that the circumstances set out in that provision were based upon a presumption that excluded any risk of fraud or abuse. That presumption cannot apply in the case of non-serious fault, whether it is attributed to the person liable to pay the duty or to a third party.

63. Since Article 7(4) of Directive 2008/118 derogates from the general rule that excise duties are also chargeable on excise goods under a duty suspension arrangement that have been totally destroyed or irretrievably lost,[43] it must be interpreted strictly. It follows that Member States cannot add grounds of exemption from excise duty not found in that provision. As the Italian Government appears to acknowledge in its written observations, to permit Member States to do so would undermine the objective in recital 8 of Directive 2008/118, according to which it is necessary for the proper functioning of the internal market that the concept, and conditions for chargeability, of excise duty be the same in all Member States.

64. I therefore propose that the Court answer the third question to the effect that Article 7(4) of Directive 2008/118 is to be interpreted as precluding national legislation whereby facts constituting non-serious fault are to be equated with unforeseeable circumstances and *force majeure*.

The fourth question

65. The fourth question inquires as to whether the expression 'as a consequence of authorisation by the competent authorities of the Member State' in Article 7(4) of Directive 2008/118 is to be understood as allowing Member States to add a general circumstance based on non-serious fault to those set out in that provision where the total destruction or irretrievable loss of excise goods does not constitute a release for consumption.

66. I share the view of the Italian Government and the Commission that the expression under consideration is to be understood as referring to the possibility that the competent national authorities may authorise the destruction of excise goods on a case-by-case basis, where specific conditions or requirements justify an exemption from excise duty. In particular, the word 'authorisation', read in context, refers to the right of those authorities to adopt authorisations in individual cases. It does not give Member States an option to legislate in respect of circumstances additional to those for which Article 7(4) of Directive 2008/118 provides.

[43] See point 41 of the present Opinion.

67. That the expression under consideration commences with the words 'as a consequence of' also makes it clear that, as the Commission rightly submits, an authorisation must precede the event that it permits. Of their very nature unforeseeable events, such as the irretrievable loss of excise goods, cannot be the subject of advance authorisation.

68. As point 63 of the present Opinion explains, were Member States allowed to facilitate, by means of authorisations under Article 7(4) of Directive 2008/118, additional circumstances where the total destruction or irretrievable loss of excise goods was not deemed to constitute a release for consumption, they could determine the conditions for the chargeability of excise duty independently, thereby undermining the objective of harmonisation in recital 8 of Directive 2008/118. That facility would also be contrary to the principle that a derogating provision, such as Article 7(4) of Directive 2008/118, is to be interpreted strictly.

69. It follows from the foregoing considerations that Article 7(4) of Directive 2008/118 is to be interpreted to mean that the expression 'as a consequence of authorisation by the competent authorities of the Member State' does not allow Member States to add a general circumstance based on non-serious fault to those where the total destruction or irretrievable loss of excise goods is not considered as a release for consumption.

Final observations

70. In its written observations, Girelli emphasises that, in the present case, it is indisputable that the ethyl alcohol which spilled onto the floor of its denaturation plant as a result of an error committed by one of its employees was irretrievably lost and could no longer be released for consumption. Since an official of the Customs Agency was present at the time that event occurred and recorded the incident in a report, there was no risk of fraud or abuse.

71. One might be tempted to ask whether the fact that Directive 2008/118 does not provide for any derogation from the chargeability of excise duty in such a situation, as follows from my proposed replies to the four questions referred, is consistent with the principle of proportionality.

72. In my view that issue is not before the Court.

73. The reference for a preliminary ruling seeks the Court's guidance on the interpretation, and not the validity, of Article 7(4) of Directive 2008/118. Within the allocation of tasks between national courts and the Court in the context of Article 267 TFEU, it is for the former to determine the relevance of the questions they refer for a preliminary ruling. The Court may nevertheless identify, from all of the information a national court provides, those aspects of EU law which, having regard to the subject matter of the dispute, may require interpretation, or the validity of which may require appraisal. [44] Any doubts that a referring court may express as to the validity of an EU measure, or the fact that such a question has been flagged in the main proceedings, are factors that the Court can take into account in its assessment as to whether it is appropriate to raise, of its own motion, the issue of the validity of a measure with respect to which the referring court seeks an interpretation. [45]

[44] Judgment of 17 September 2020, *Compagnie des pêches de Saint-Malo* (C-212/19, EU:C:2020:726, paragraph 27 and the case-law cited).

[45] Ibid., paragraph 28.

74. It is not apparent from the order for reference that the main parties seek to challenge the validity of Directive 2008/118. Nor does the referring court express any view on that question. In those circumstances, I advise that there is no need for the Court to examine that issue.

75. In any event, I agree with the Commission that the fact that Directive 2008/118 does not provide for any derogation from the chargeability of excise duty in a situation such as that described in point 70 of the present Opinion is not contrary to the principle of proportionality.

76. I am of the view that the treatment of the irretrievable loss of excise goods under a duty suspension arrangement as a result of the negligent conduct of an authorised warehousekeeper or one of its employees as a release for consumption in all cases is justified by the legitimate objective of laying down at EU level all of the conditions for the chargeability of excise duty in order to ensure the proper functioning of the internal market. I also consider that such treatment does not go beyond what is appropriate and necessary to achieve that objective. As the Commission submitted both in its reply to a written question from the Court and at the hearing, the non-chargeability of excise duty in such circumstances might compromise the entire system of taxation and the collection of excise duties by authorising the circumvention of the payment of those duties.

77. Account must be taken of the fact that Article 7(4) of Directive 2008/118 also draws a clear line between irretrievable losses that trigger the chargeability of excise duty and those which, exceptionally, give rise to an exemption. In that way it delimits the risks that operators responsible for the operation of duty suspension arrangements assume voluntarily. I am of the view that the legislation is sufficiently clear to enable authorised warehousekeepers to ascertain the nature and extent of the risks – including any losses caused by negligent conduct – that they take on under the special regime of which they enjoy the benefit and thus against which they can choose to insure. [46]

78. Finally, in its reply to one of the Court's written questions and at the hearing, the Commission advanced the possibility that, in a very specific situation such as that point 70 of the present Opinion describes, the competent national authorities may, after an irretrievable loss has occurred, adopt an administrative decision to grant an exemption from excise duty. In my view, there is no legal basis to grant such an exemption. Questioned on this point at the hearing, the Commission was unable to identify any legal basis for its approach. [47] Such a possibility would, in any event, be manifestly contrary to the objective of harmonisation that Directive 2008/118 pursues and the consequent requirement to give its Article 7(4) a restrictive interpretation.

[46] In paragraph 52 of the judgment of 24 February 2021, *Silcompa* (C-95/19, EU:C:2021:128), the Court held as follows: 'Thus, the EU legislature gave a central role to the authorised warehousekeeper in the context of the procedure for movement of products subject to excise duty and placed under a suspension arrangement, which results in liability for all the risks inherent in that movement. That warehousekeeper is, consequently, designated as liable for the payment of excise duties in cases where an offence or an irregularity involving the chargeability of such duties has been committed in the course of the movement of those products. That liability is, moreover, objective and based not on the proven or presumed fault of the warehousekeeper, but on his participation in an economic activity.'

[47] In particular it could not constitute an 'authorisation by the competent authorities of the Member State' under Article 7(4) of Directive 2008/118, since, as point 67 of the present Opinion explains, that authorisation must be granted *ex ante* to permit the occurrence of a future event.

Conclusion

79. In the light of the foregoing considerations, I propose that the Court answer the questions referred by the Corte suprema di cassazione (Supreme Court of Cassation, Italy) as follows:

(1) Article 7(4) of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC

must be interpreted as meaning that the concept of 'unforeseeable circumstances' in that provision refers, like that of '*force majeure*', to abnormal and unforeseeable circumstances extraneous to the authorised warehousekeeper, the consequences of which, despite the exercise by him or her of all due care, could not have been avoided. The requirement that the circumstances must be extraneous to the authorised warehousekeeper is not limited to those circumstances which are outside his or her control in a material or physical sense, but includes those that are objectively beyond his or her control or sphere of responsibility.

(2) Article 7(4) of Directive 2008/118

must be interpreted as meaning that recognition of unforeseeable circumstances requires an authorised warehousekeeper to have exercised all due care in order to avoid the occurrence of the harmful event.

(3) Article 7(4) of Directive 2008/118

must be interpreted as precluding national legislation whereby facts constituting non-serious fault are to be equated with unforeseeable circumstances and *force majeure*.

(4) Article 7(4) of Directive 2008/118

must be interpreted as meaning that the expression 'as a consequence of authorisation by the competent authorities of the Member State' in that provision does not allow Member States to add a general circumstance based on non-serious fault to the circumstances where the total destruction or irretrievable loss of excise goods is not considered as a release for consumption.