Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 28 January 2016[1]

Case C-81/15

Kapnoviomichania Karelia AE
v
Ypourgos Oikonomikon

(Request for a preliminary ruling from the Symvoulio tis Epikrateias (Council of State, Greece))

(Reference for a preliminary ruling — Taxation — Excise duties — Directive 92/12/EEC — Liability of the authorised warehousekeeper — Whether the Member States may hold the authorised warehousekeeper jointly and severally liable for the payment of financial penalties imposed on the perpetrators of smuggling)

1. The present request for a preliminary ruling concerns the interpretation, in the light of the principles of legal certainty and proportionality, 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,[2] as amended by Council Directive 92/108/EEC of 14 December 1992.[3]

2. This request, submitted in the course of proceedings between Kapnoviomichania Karelia AE[4] and the Ypourgos Oikonomikon (Minister for Finance), asks, more specifically, whether an authorised warehousekeeper may be declared jointly and severally liable for the payment of financial penalties imposed on persons found guilty of smuggling tobacco products placed under a duty suspension arrangement.

3. In the present Opinion, I shall submit that, in the light of the general principles of EU law, in particular the principle of the legality of criminal offences and penalties and the principle of personal liability, Directive 92/12 must be interpreted as meaning that, where there is an irregular departure of goods from a duty suspension arrangement as a result of a smuggling offence committed during transport, it does not preclude the authorised warehousekeeper of dispatch from being declared jointly and severally liable for the payment of customs fines imposed on the perpetrators of the smuggling, to the extent that such a system of joint and several liability, which is in the nature of a criminal penalty, is expressly provided for by national legislation and, if based on a presumption that the goods are in the ownership or possession of the authorised warehousekeeper and the latter is represented by the perpetrators of the smuggling, that that presumption is not of an irrebuttable nature such as to deprive the authorised warehousekeeper of the right to exonerate himself from liability by demonstrating that he was not at fault. It is for the national court, taking into account all the relevant legal and factual circumstances, to determine whether the system at issue meets those requirements.

1 — Original language: French.
2 — OJ 1992 L 76, p. 1.
3 — OJ 1992 L 390, p. 124, ‘Directive 92/12’.
4 — ‘Karelia’.

I – Legal framework

A – *EU law*

4. Directive 92/12, in force at the time of the facts in the main proceedings, was repealed with effect from 1 April 2010 by Directive 2008/118/EC. [5]

5. Article 4(a) of Directive 92/12, which, by virtue of Article 3(1) of that directive, applied to manufactured tobacco, defined 'authorised warehousekeeper' as 'a natural or legal person authorised by the competent authorities of a Member State to produce, process, hold, receive and dispatch products subject to excise duty in the course of his business, excise duty being suspended un[d]er [a] tax-warehousing arrangement'.

6. Article 6(1) of that directive provided:

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

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

(a) any departure, including irregular departure, from a suspension arrangement;

...'

7. Article 13(a) of that directive provided that the authorised warehousekeeper was required to 'provide ... a compulsory guarantee to cover movement, the conditions for which shall be set by the tax authorities of the Member States where the tax warehouse is authorised'.

8. Article 15 of Directive 92/12 provided:

'...

3. The risks inherent in intra-Community movement shall be covered by the guarantee provided by the authorised warehousekeeper of dispatch, as provided for in Article 13, or if need be, by a guarantee jointly and severally binding both the consignor and the transporter. If appropriate, Member States may require the consignee to provide a guarantee.

The detailed rules for the guarantee shall be laid down by the Member States. The guarantee must be valid throughout the Community.

4. Without prejudice to the provision of Article 20, the liability of the authorised warehousekeeper of dispatch and, if the case arises, that of the transporter may only be discharged by proof that the consignee has taken delivery of the products, in particular by the accompanying document ...'

9. Article 20 of that directive provided:

'1. Where an irregularity or offence has been committed in the course of a movement involving the chargeability of excise duty, the excise duty shall be due in the Member State where the offence or irregularity was committed from the natural or legal person who guaranteed payment of the excise duties in accordance with Article 15(3), without prejudice to the bringing of criminal proceedings.

5 — 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).

...

3. ... Member States shall take the necessary measures to deal with any offence or irregularity and to impose effective penalties.

...'

B – *Greek law*

10. Directive 92/12 was transposed into Greek law by Law 2127/1993 on the harmonisation with Community law of the tax regime applicable to petroleum products, ethyl alcohol and alcoholic beverages and manufactured tobacco, and other provisions. [6]

11. Article 67(5) of that law provides:

'Any form of evasion or attempted evasion of payment of excise and other duties, as well as failure to comply with the formalities provided for by law with a view to evading payment of the aforementioned excise and other duties, shall constitute smuggling within the meaning of the provisions of Article 89 et seq. of Law 1165/1918 on the Customs Code ["the Customs Code"]; those acts shall incur the increased charge laid down in those articles, even if the competent authorities find that that the criteria defining the criminal offence of smuggling are not met.'

12. Article 97(3) and (5) of the Customs Code provides:

'3. ... all persons who are known to have participated in a customs offence within the meaning of Article 89(2) of this Code shall have imposed upon them, in proportion to their individual degree of participation and independently of any criminal proceedings brought against them, an increased charge, for which they shall be jointly and severally liable, ranging from double to ten times the excise and other duties owed on the object of the infringement ...'

…

5. After conducting an administrative inquiry, the ... director of the competent customs office shall, at his earliest convenience, draft and issue a reasoned act by which he shall exonerate or identify, as appropriate, the persons liable within the meaning of the present code, determine the degree of liability attaching to each of them and the customs duties and other charges due or lost on the object of the smuggling, and seek to recover the increased charge within the meaning of this article and, where appropriate, the customs duties and other charges lost.'

13. Article 99(2) of that code stipulates that the provisions of Article 108 of that code are to apply, 'by analogy', to customs offences and that 'the fact that the persons jointly liable in civil law did not know that it was the intention of the persons identified as the primary perpetrators to commit the offence shall not exonerate the former from their liability'.

6 — FEK A' 48.

14. Under Article 100(1) of the Customs Code:

'The following shall constitute smuggling:

(a) the importation into or exportation from State territory, without the written authorisation of the competent customs authority, or at a place and time other than that authorised by that authority, of goods subject either to customs duties on imports or to excise duties or other customs taxes or charges;

(b) any act seeking to deprive the State of the customs duties, excise duties or other taxes and charges to be levied by it on goods imported from or exported to other countries, including where those acts were committed at a time and by a method other than those prescribed by law.'

15. Article 108 of that code provides:

'The criminal court trying the smuggling offence may, when passing sentence, declare the owner or the recipient of the smuggled goods jointly and severally liable with the sentenced person for payment of the fine imposed, the costs and, at the request of the State where the latter has joined the proceedings as a civil party, the amount awarded in damages; this shall be the case even if the party jointly and severally liable has had no criminal charges brought against him, where the sentenced person had possession of the smuggled goods in his capacity as agent, administrator or representative of the owner or recipient, irrespective of the legal relationship under which the authority to act is presented or concealed; it shall therefore make no difference whether the agent acts in his own name ..., whether he presents himself as the owner of the goods or as having any other legal connection with those goods, or whether the actual representation of the owner is specific or general, unless it can be proved that the aforementioned persons could not have been aware of the likelihood that a smuggling offence was being committed.'

II – The facts giving rise to the dispute in the main proceedings and the question referred for a preliminary ruling

16. Karelia is a company incorporated under Greek law whose business is the manufacture of tobacco products and which has the status of authorised warehousekeeper.

17. Having received an order for 760 cartons of cigarettes from a Bulgarian company, Karelia filed an export declaration at the customs office on 9 June 1994.

18. However, that cargo never reached its destination. The investigation carried out by the customs service revealed that the lorry in which the cargo was to be transported had departed for Bulgaria empty and that the cargo had been transferred to another lorry. During that investigation, Karelia's export manager explained that, following the order, he had received payment of the sum of EUR 82 000, corresponding to the value of the goods in question, which he deposited into a Karelia bank account in Greece. For his part, the Managing Director of Karelia maintained that he did not know whether the Bulgarian company that had placed the order actually existed, as the Bulgarian Chamber of Commerce was in a state of chaos and any attempt to identify that company would therefore have been futile.

19. Since no proof of departure of the disputed cargo had been furnished, the bank guarantee which Karelia had provided to cover the amount of excise duty, namely GRD 114 726 750 (EUR 336688.92), was retained.

20. Thereafter, the customs authorities issued an act determining liability for payment in respect of the smuggling of 760 cartons of cigarettes by which they declared that the joint perpetrators of that smuggling were, in particular, the persons who had placed the order for the cigarettes, on behalf of the Bulgarian company, with Karelia's export manager. Liability for payment of the increased charge in the total amount of GRD 573 633 750 (EUR 1683444.60) and increased excise duty in the amount of GRD 9 880 000 (EUR 28994.86) was divided among the perpetrators of the smuggling. By the same act, Karelia was declared jointly and severally liable in civil law for the payment of those sums.

21. That company brought an action against the act determining liability for payment, which the Dioikitiko Protodikeio Peiraia (Administrative Court of First Instance, Piraeus) upheld on the ground that there was no evidence of the existence of any relationship in the form of an agency or representation or of any other legal relationship concealing an authority to act as agent between Karelia and the perpetrators of the smuggling.

22. The Ypourgos Oikonomikon (Greek Ministry of Finance) appealed against that judgment and the Dioikitiko Efeteio Peiraia (Administrative Court of Appeal, Piraeus) upheld that appeal but reduced the amount of the increased charge to GRD 344 180 250 (EUR 336688.91). That court considered that, in so far as the cigarettes were under a duty suspension arrangement, the perpetrators of the smuggling had acted as agents of Karelia, which, in its capacity as authorised warehousekeeper, was in possession of the goods and had sole responsibility for their movement up until they were exported, regardless of the capacity in which the smugglers had purported to act (as drivers, intermediaries, consignees, buyers, etc.).

23. Karelia appealed against the judgment of the Dioikitiko Efeteio Peiraia (Administrative Court of Appeal, Piraeus).

24. The majority opinion within the Greek Council of State is that the joint and several liability of the authorised warehousekeeper extends not only to the payment of excise duties but also to the other financial consequences of smuggling. This is the case irrespective of any specific agreement between the supplier and the purchaser under which ownership of goods under a duty suspension arrangement is transferred upon their delivery to the purchaser, who is responsible for their transportation. According to that consensus, the system of increased liability on the part of the warehousekeeper serves the objective of preventing tax evasion because it acts as a strong incentive for that trader to ensure that the export procedure is properly followed and to take appropriate measures in the course of its contractual relations to protect itself against the risk of being held jointly and severally liable. That system is consistent with the principle of proportionality in so far as the warehousekeeper has an opportunity to exonerate himself from liability by proving that he acted in good faith, took all appropriate measures and exercised the diligence of an informed trader.

25. The minority opinion, on the other hand, is that the authorised warehousekeeper can be held jointly and severally liable only for the payment of excise duties, but not for the payment of the financial penalties imposed on smugglers. First, the authorised warehousekeeper cannot legally be regarded as the owner of the goods in his possession, which depart from his tax warehouse and are dispatched to a third State under a duty suspension arrangement applicable until such time as those goods reach their lawful destination or leave the territory of the European Union, and, secondly, it cannot legally be presumed that the natural persons involved, in whatever capacity, in the movement of the goods act as agents or representatives of that authorised warehousekeeper.

26. It was in those circumstances that the Symvoulio tis Epikrateias (Greek Council of State) decided to stay the proceedings and refer the following question to the Court:

‘May Directive 92/12/EEC, in the light of the general principles of EU law and, in particular, the principles of effectiveness, legal certainty and proportionality thereof, be interpreted, in a case such as this, as prohibiting the implementation of legal provisions of a Member State, such as Article 108 of the Greek Customs Code, according to which the authorised warehousekeeper of goods moved from the tax warehouse thereof under a duty suspension arrangement, which departed the arrangements in question irregularly through smuggling, may be declared as jointly liable for the payment of administrative fines, on the ground of smuggling, regardless of whether the warehousekeeper had, at the time when the offence was committed, possession of the goods, on the basis of the rules of private law, and, furthermore, regardless of whether the perpetrators of the offence involved in that movement had concluded a particular contractual relationship with the authorised warehousekeeper from which they can be seen to have acted as agents of the authorised warehousekeeper?’

III – My Analysis

27. By its question, the referring court asks, in essence, whether Directive 92/12, read in the light of the general principles of EU law, in particular the principles of legal certainty and proportionality, must be interpreted as meaning that it precludes a national provision such as that at issue in the main proceedings, under which the authorised warehousekeeper of dispatch may be declared jointly and severally liable for payment of the increased charges due in the event of an offence committed during the movement of products under a duty suspension arrangement, which movement has rendered those duties chargeable, even if that warehousekeeper is not, under national private law, in possession of those products at the time when the offence is committed and he is not contractually bound to the perpetrator of that offence, who cannot be regarded as having acted as his agent.

28. This case raises the question of whether Directive 92/12 prohibits Member States from imposing on the authorised warehousekeeper of dispatch a system of no-fault joint and several liability for the payment of penalties owed by those who smuggle tobacco products moving under a suspension arrangement.

29. It is settled case-law that, in 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. [7]

30. As regards the general scheme of Directive 92/12, it is important to note the central role given to the authorised warehousekeeper in the procedure for moving products subject to excise duty under a duty suspension arrangement, one of the features of which is that the excise duty on the products covered by it is not yet payable, although the chargeable event for taxation purposes has already taken place. [8]

31. In return for authorisation to produce, process, hold, receive or dispatch goods subject to excise duty under a duty suspension arrangement in a tax warehouse, the authorised warehousekeeper must, first, pursuant to Article 15(3) of that directive, provide a guarantee covering all risks inherent in the movement of those products.

7 — See, in particular, the judgment in *Covaci* (C-216/14, EU:C:2015:686, paragraph 29).

8 — See the judgments in *Cipriani* (C-395/00, EU:C:2002:751, paragraph 42) and *Dansk Transport og Logistik* (C-230/08, EU:C:2010:231, paragraph 78).

32. Next, it follows from Article 15(4) of Directive 92/12 that the authorised warehousekeeper may be relieved of liability only by the discharge of the duty suspension arrangement that follows from proof that the consignee has taken delivery of the products, such proof being established in particular by the accompanying document, a copy of which must be returned to the consignor by the customs office of exit from the European Union. Furthermore, pursuant to Article 14(1) of that directive, the warehousekeeper is to be exempt from duty in respect of losses occurring under suspension arrangements only if he demonstrates that those losses are attributable to fortuitous events or *force majeure* or to the nature of the products.

33. Finally, Article 20(1), first subparagraph, of that directive makes the authorised warehousekeeper liable for the payment of excise duty in the event of an irregularity or offence committed during the movement of products under a duty suspension arrangement.

34. It follows from a combined reading of all the provisions referred to in the previous three points of the present Opinion that Directive 92/12 imposes on the authorised warehousekeeper a system of liability for risk from which he may exonerate himself only by providing proof of *force majeure*. Under that system, the authorised warehousekeeper is designated as the person liable for all risks inherent in the movement of products subject to excise duty under a duty suspension arrangement and, consequently, as the person liable for the payment of excise duties where an irregularity or offence has been committed in the course of a movement involving the chargeability of such duties.

35. It is important to add that it follows unequivocally from Article 15(3) and (4) of Directive 92/12 that the liability of the authorised warehousekeeper of dispatch is very broad in scope and covers all risks capable of arising during the phase involving the movement of products under suspension arrangements. Far from stopping at the gates of the tax warehouse from which the warehousekeeper dispatches the products, that liability therefore continues in being until such time as proof is provided that those products have reached their recipient.

36. The fact that the liability of the authorised warehousekeeper of dispatch is expressly founded on the concept of risk and, in the case of losses, gives way only upon proof of *force majeure* demonstrates that it is an objective liability based not on the proven or presumed fault of the warehousekeeper but on his participation in an economic activity. Being the counter-concession for the right to produce, process, hold, receive and dispatch products under a duty suspension arrangement, that liability attaches to the authorised warehousekeeper by reason of that characteristic alone, it being immaterial whether or not he is also the owner of the excisable goods or, where an offence is found to have been committed, whether or not there is a contractual relationship with the perpetrator of that offence. On that latter point, it should be stated that the commission of a smuggling offence may be regarded as the actualisation of a risk inherent in the movement of products under suspension of excise duty which the warehousekeeper accepted by deciding to dispatch those products.

37. However, although expressed in very general terms in Article 15 of Directive 92/12, the obligation of the authorised warehousekeeper is limited, as Article 20(1) of that directive states, to the payment of the excise duties payable on the goods dispatched. The system of liability for risk provided for in that directive therefore stops at responsibility for the payment of those duties, the obligation to pay which devolves upon the authorised warehousekeeper in the event of an irregularity or offence involving the chargeability of excise duty. However, Directive 92/12 does not create a system of joint and several liability that would render the authorised warehousekeeper jointly liable for payment of the financial penalties imposed on the perpetrators of the offence found to have been committed.

38. It is therefore necessary to determine, given that that directive is silent in this regard, whether the Member States may increase the obligations incumbent on the authorised warehousekeeper by establishing such a system of joint and several liability.

39. An initial argument in favour of a positive answer to that question appears to come from Article 20(3) of that directive, which leaves to the Member States the task of taking the requisite measures to remedy any offence or irregularity and to impose 'effective penalties' to ensure that the tax debt is actually recovered once the excise duty becomes chargeable. That provision may be seen as an enabling act in relation to the national legislature, conferring on the latter, in particular, the power to increase, by way of a potential penalty, the scope of the liability incumbent on the authorised warehousekeeper by going beyond the obligation, expressly provided for in Directive 92/12, to pay excise duties.

40. A second argument to the same effect lies in the observation that, in tax matters, the joint and several liability of a person other than the debtor is a traditional means of ensuring that tax is collected and fighting evasion.[9] As regards excise duty, the obligation on the warehousekeeper to assume joint and several liability for the financial consequences of smuggling offences serves to address the legitimate concern to combat the development of an illegal trade in tobacco products and to ensure that the smuggling of such products, which are harmful to health, is punished.

41. It must therefore be inferred from the foregoing that Directive 92/12 does not, in principle, preclude the Member States from increasing the liability of the authorised warehousekeeper by making him jointly and severally liable for the financial consequences of offences found to have been committed during the movement of products under a duty suspension arrangement.

42. However, in exercising the punitive powers conferred on them by that directive, the Member States must respect the general principles of law which form part of the legal order of the European Union.

43. The general principles that govern the measure adopted by the national legislature differ according to whether or not the system of joint and several liability which it introduces is to be regarded as a criminal penalty. It is my opinion, therefore, that this question must be examined first, using the method of analysis customarily employed in such matters.

44. In order to the determine the criminal nature of the proceedings leading to the imposition of penalties, the EU judicature applies the three criteria which the European Court of Human Rights first established in its judgment in *Engel and Others v. Netherlands*[10] with a view to defining the concepts of 'criminal charge', 'penalty' and 'criminal proceedings' within the meaning of Articles 6 and 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and Article 4(1) of Protocol No 7 to that convention, respectively. The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned is liable to incur.[11]

9 — See Article 21(3) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), as amended by Council Directive 2001/115/EC of 20 December 2001 (OJ 2002 L 15, p. 24), as well as Articles 205 and 207 of Council Directive 2006/112/EC of 28 November 2006 on the Common System of Value Added Tax (OJ 2006 L 347, p. 1), which repealed Sixth Directive 77/388.

10 — European Court of Human Rights, judgment in *Engel and Others v. the Netherlands*, 8 June 1976, Series A no. 22.

11 — § 80 to 83. See also European Court of Human Rights, judgments in *Öztürk v. Germany*, 21 February 1984, § 50 to 53, Series A no. 73, and *Sergey Zolotukhin v. Russia [GC]*, no. 14939/03, § 52 et 53, ECHR 2009. For the application of those criteria by the Court of Justice, see, in particular, the judgments in *Commission* v *Anic Partecipazioni* (C-49/92 P, EU:C:1999:356, paragraph 78); *Hüls* v *Commission* (C-199/92 P, EU:C:1999:358, paragraph 150); *Montecatini* v *Commission* (C-235/92 P, EU:C:1999:362, paragraph 176); *Spector Photo Group and Van Raemdonck* (C-45/08, EU:C:2009:806, paragraph 42); and *Bonda* (C-489/10, EU:C:2012:319, paragraph 37). See also the judgment in *Åkerberg Fransson* (C-617/10, EU:C:2013:105), which refers to those criteria but leaves to the referring court the task of assessing, in the light of those criteria, whether the combining of tax penalties and criminal penalties provided for by national law should be examined in relation to the national standards for the protection of fundamental rights (paragraphs 35 and 36).

45. The application of the criteria I have just reiterated leads me to the view that the penalties imposed on the authorised warehousekeeper under the system of joint and several liability provided for in Greek law are measures of quasi-criminal law according to those criteria. While the order for reference states that that liability is classified in Greek law as a 'civil liability' which 'does not constitute an administrative penalty', and the Greek Government observes that the liability in question is in the nature not of a penalty but of a guarantee of payment of the amounts charged, there is no getting away from the fact that the customs offence referred to in Article 89(2) of the Customs Code, under which an increased charge is to be levied on the persons responsible for such an offence, is defined in identical terms to the criminal offence of smuggling defined in Article 67(5) of law 2127/1993. Consequently, there is no watertight separation between customs penalties and criminal offences, especially as the joint and several liability of the authorised warehousekeeper is based on the application, 'by analogy',[12] of Article 108 of the Customs Code, which allows the criminal court, when passing sentence, to declare the owner of the smuggled products to be jointly and severally liable with the person sentenced under criminal law for payment of the fine. Furthermore, unlike excise duties properly so-called, the increased charge imposed on the authorised warehousekeeper is both punitive, in that it penalises the warehousekeeper's failure to exercise adequate vigilance and diligence, and preventive, in that, according to the referring court, it seeks to guarantee the effectiveness of the fines imposed and to ensure that traders who profit from the activity in the context of which the smuggling was committed take all possible measures to prevent the commission of acts of smuggling.[13] Those two objectives of punishment and deterrence of excise duty evasion are characteristic of criminal penalties. Finally, the tax penalties for which the authorised warehousekeeper may be declared jointly and severally liable can be substantial, amounting to up to 10 times the tax due.[14]

46. In the light of the above findings, I conclude that a system of joint and several liability such as that provided for in Greek law falls within the scope of criminal law and must therefore respect the fundamental principles that govern that sphere. I shall turn now to examining whether that system is consistent with the principles of legal certainty and personal liability.

47. I shall begin by recalling the schedule for analysing those two principles, as set out in the case-law of the Court.

48. In the first place, the principle of legal certainty, which is part of the legal order of the European Union and is binding on every national authority responsible for implementing EU law, requires, inter alia, that rules of law be clear and precise and predictable in their effects, especially where they may have negative consequences for individuals and undertakings.[15] In criminal law, that general principle finds 'specific expression'[16] in the principle of the legality of criminal offences and penalties enshrined in Article 49(1) of the Charter of Fundamental Rights of the European Union, which implies that the law must clearly define offences and the penalties which they attract, that requirement being satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable.[17]

49. Defining the scope of the principle of the legality of criminal offences and penalties, the Court has held that that principle cannot be interpreted as precluding the gradual, case-by-case clarification of the rules on criminal liability by judicial interpretation, provided that the result was reasonably foreseeable at the time the offence was committed, especially in the light of the interpretation put on the provision in the case-law at the material time.[18]

12 — See Article 99(2) of the Customs Code.

13 — See paragraph 8 of the order for reference.

14 — See Article 97(3) of the Customs Code.

15 — See, to that effect, the judgment in *Berlington Hungary and Others* (C-98/14, EU:C:2015:386, paragraph 77).

16 — This description was adopted by the Court in its judgment in *Intertanko and Others* (C-308/06, EU:C:2008:312, paragraph 70).

17 — See the judgment in *Intertanko and Others* (C-308/06, EU:C:2008:312, paragraph 71).

18 — See the judgment in *AC-Treuhand* v *Commission* (C-194/14 P, EU:C:2015:717, paragraph 41).

50. That principle implies that no one may be prosecuted for an offence or sentenced to a penalty not expressly provided for by law.

51. Secondly, the principle of personal liability, arising from criminal law, means that no one may be liable for any conduct other than his own. On several occasions, the Court, taking into account the quasi-punitive nature of the penalties imposed following the commission of an infringement of the competition rules, has applied that principle to those penalties. Accordingly, in its judgment in *Commission* v *Anic Partecipazioni*,[19] it ruled that, given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, responsibility for committing those infringements is personal in nature.[20]

52. Under the principle of personal liability, a person declared jointly and severally liable must be able to exonerate himself from liability by demonstrating that he took every step to ensure that the transaction was carried out legally and that the reason for the illegal departure of the goods from the duty suspension arrangement had nothing to do with him.

53. It should be observed, by analogy, that the Court, relying on the principle of proportionality, held, in a case relating to value added tax, that imposing responsibility for paying that tax on a person other than the person liable to pay that tax, even where that person is an authorised tax warehousekeeper bound by the specific obligations referred to in Directive 92/12, without allowing him to escape liability by providing proof that he had nothing whatsoever to do with the acts of the person liable to pay the tax, must be considered contrary to the principle of proportionality. The Court justified that solution by noting that 'it would clearly be disproportionate to hold that person unconditionally liable for the shortfall in tax caused by acts of a third party over which he has no influence whatsoever'.[21] It added, referring to its previous case-law, that 'it is not contrary to EU law to require the person other than the person liable to pay the tax to take every step which could reasonably be required of him to satisfy himself that the transaction which he is effecting does not result in his participation in tax evasion'.[22]

54. The principle of proportionality therefore requires, according to the Court, that national legislation provide the person subject to joint and several liability with an effective opportunity to exonerate himself from liability by demonstrating that he acted in good faith and was not at fault.

55. While it is, in my view, preferable to rely on the principle of personal liability, given the quasi-criminal nature of a system of joint and several liability such as that provided for in Greek law, which, unlike the system of joint and several liability applicable in matters relating to value added tax, has no textual basis in EU law, the application of that principle leads to the same result as that obtained by applying the principle of proportionality.

56. In the light of the requirements flowing from the principles of legal certainty and personal liability, there is still some uncertainty as to the scope of the Greek law, as a result of a degree of ambiguity in its wording and the way in which the national courts seem to have interpreted it.

19 — C-49/92 P, EU:C:1999:356.

20 — Paragraph 78.

21 — Judgment in *Vlaamse Oliemaatschappij* (C-499/10, EU:C:2011:871, paragraph 24).

22 — Judgment in *Vlaamse Oliemaatschappij* (C-499/10, EU:C:2011:871, paragraph 25).

57. After all, the liability of the authorised warehousekeeper of dispatch appears to be based on the combined provisions of Law 2127/1993, and Articles 89(2), 97(3), 99(2) and 108 of the Customs Code. It follows from the terms of the latter article, as clarified by the explanations contained in the order for reference, that the Greek legislation imposes joint and several liability in the event of a smuggling offence only on the owner of the goods forming the subject of the offence or their consignee and on condition, moreover, that the perpetrator acted as the agent, administrator or representative of the owner or consignee.

58. The provisions of Article 108 of the Customs Code therefore allow for the prosecution only of the owner or consignee of the products and do not expressly apply to an authorised warehousekeeper who did not retain ownership of those products.

59. It would therefore seem that it is only on a judicial presumption that the authorised warehousekeeper is regarded as the owner of the products until they reach their destination that that person may be declared jointly and severally liable for the sentence imposing an increased tax on the perpetrators of the smuggling.

60. Those conditions under which liability for acts of smuggling may be attributed to the authorised warehousekeeper raise two concerns.

61. First, they seem to disregard the principle of legal certainty, as specifically expressed by the principle of the legality of criminal offences and penalties, in that the joint and several liability of the authorised warehousekeeper does not expressly follow from the national legislation but either from an *ultra legem* interpretation of Directive 92/12 or from a broad judicial interpretation of a national provision concerned only with the owner or consignee of the goods.

62. Secondly, they may also be contrary to the principle of personal liability if they establish an irrebuttable presumption of liability. Although Article 108 of the Customs Code provides that persons whom the court seeks to hold jointly and severally liable may prove that they could not have been aware of the likelihood that an act of smuggling was being committed, the explanations provided by the referring court cast serious doubt on whether it is indeed possible for the warehousekeeper to exonerate himself from liability. To my mind, that presumption must be considered to be rebuttable if it is to be interpreted as being consistent with EU law.

63. Even though that presumption is not easy to rebut, the authorised warehousekeeper must be able to demonstrate to the court that he took all measures that could reasonably be required to prevent smuggling and that he was not at fault.

64. As the European Commission notes, there has to be some way of taking account of the situation, described as 'chaotic', in the Chamber of Commerce of the receiving State or the fact that the authorised warehousekeeper had himself reported a previous act of smuggling, thus opening up a route to discovering the existence of the network.

65. I would submit, however, that the authorised warehousekeeper's proven knowledge of that chaotic situation and the fact that he agreed to entrust the transport of the goods to a transporter who was unknown to him and had been designated by the consignee does not necessarily militate in favour of the rebuttal of that presumption.

66. Be that as it may, it is important that the national court has the discretion to take into account any factual circumstances such as to counter the presumption that the acts of smuggling are attributable to the warehousekeeper.

67. It is for those reasons that I consider that a system such as that at issue in the main proceedings is capable of meeting the requirements of the principles of legal certainty and personal liability only on condition that it is clearly and expressly provided for by national law and provides a genuine opportunity for the warehousekeeper to exonerate himself from liability.

IV – Conclusion

68. In the light of the foregoing, I propose that the Court's reply to the question raised by the Symvoulio tis Epikrateias (Council of State) should be as follows:

In the light of the general principles of EU law, including in particular the principle of the legality of criminal offences and penalties and the principle of personal liability, Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, as amended by Council Directive 92/108/EEC of 14 December 1992, must be interpreted as meaning that, where there is an illegal departure of goods from a duty suspension arrangement as a result of a smuggling offence committed during transport, it does not preclude the authorised warehousekeeper of dispatch from being declared jointly and severally liable for payment of the customs fines imposed on the perpetrators of the smuggling, to the extent that such a system of joint and several liability, which is in the nature of a criminal penalty, is expressly provided for by national legislation and, if based on a presumption that the goods are in the ownership or possession of the authorised warehousekeeper and the latter is represented by the perpetrators of the smuggling, that presumption is not of an irrebuttable nature such as to deprive the authorised warehousekeeper of the right to exonerate himself from liability by demonstrating that he was not at fault. It is for the national court, taking into account all the relevant legal and factual circumstances, to determine whether the system at issue meets those requirements.