

OPINION OF ADVOCATE GENERAL

BOT

delivered on 20 September 2011¹

1. The question referred for a preliminary ruling by the Højesteret (Denmark) relates to the tax exemption scheme applicable to mineral oils used as fuel for the purposes of navigation within Community waters, other than in private pleasure craft. The referring court asks the Court about the scope of the term 'navigation' within the meaning of Article 8(1)(c) of Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils,² in relation to the tasks performed by an excavator which is affixed to a vessel but which operates independently of the vessel's propulsion engine because it has its own motor and fuel tank.

the mineral oils consumed by that excavator. The Danish tax authorities consider that excise duties on mineral oils are chargeable on oils consumed for dredging operations. The claimant, on the other hand, considers that the tasks performed by an excavator qualify for the tax exemption provided for in Article 8(1)(c) of the Directive.

2. The dispute between the parties to the main proceedings relates to the taxation of

3. In this Opinion, I shall explain the reasons why it is my view that that provision should be interpreted as meaning that the mineral oil used by an excavator which is permanently affixed to a vessel and operates independently of that vessel's propulsion engine, since it has its own motor and fuel tank, qualifies for the excise duty exemption provided for in Article 8(1)(c) of the Directive.

¹ — Original language: French.

² — OJ 1992 L 316, p. 12. Directive as amended by Council Directive 94/74/EC of 22 December 1994 (OJ 1994 L 365, p. 46, 'the Directive'). The Directive was repealed by Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ 2003 L 283, p. 51).

I — Legal context

A — *European Union law*

For the purposes of this Directive, “private pleasure craft” shall mean any craft used by its owner or the natural or legal person who enjoys its use either through hire or through any other means, for other than commercial purposes and in particular other than for the carriage of passengers or goods or for the supply of services for consideration or for the purposes of public authorities.

4. Pursuant to Article 8 of the Directive:

...

‘1. In addition to the general provisions set out in Directive 92/12/EEC³ on exempt uses of excisable products, and without prejudice to other Community provisions, Member States shall exempt the following from the harmonised excise duty under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse:

2. Without prejudice to other Community provisions, Member States may apply total or partial exemptions or reductions in the rate of duty to mineral oils used under fiscal control:

...

(b) for navigation on inland waterways other than for private pleasure craft;

...

...

(c) mineral oils supplied for use as fuel for the purposes of navigation within Community waters (including fishing), other than in private pleasure craft.

(g) in respect of dredging operations in navigable waterways and in ports.

³ — 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).

3. Member States may also, in the case of all or some of the following industrial and

commercial uses, apply a reduced rate of taxation on gas oil and/or LPG and/or methane and/or kerosene used under fiscal control, provided that the rate charged is not less than the minimum rate set in [Council] Directive 92/82/EEC [of 19 October 1992] on the approximation of the rates of excise duty on mineral oils:⁴

(a) for stationary motors;

(b) in respect of plant and machinery used in construction, civil engineering and public works;

...'

6. The Danish legislature did not exercise the power made available by Article 8(2)(g) of the Directive.

7. Article 9(4)(1) of the Law on the duty on mineral oils provides that duty is to be reimbursed in respect of goods used for rail or boat transport and for commercial navigation with vessels other than those referred to in Article (9)(1)(3) of that law, apart from private pleasure craft.

8. Article 7(4)(1) of the Law on duties on carbon dioxide provides, *inter alia*, that tax is to be reimbursed in respect of taxable goods which are used by a business registered under the Law on value added tax for the purposes of navigation with vessels and fishing boats.

B — National law

5. Article 8(1)(c) of the Directive was transposed into Danish law by Article 9(4) of the Mineralolieafgiftsloven (Law on the duty on mineral oils) and by Article 7(4) of the Kuldi-oxidafgiftsloven (Law on the duty on carbon dioxide), in the versions in force at the time of the facts in the main proceedings.

II — The dispute in the main proceedings and the question referred

9. The *M/S Grete Fighter*, operated by Par-trederiet Sea Fighter ('Sea Fighter'), is a purpose-built vessel for dredging and other excavation tasks. It is used on operations involving dredging at sea, decontamination of

⁴ — OJ 1992 L 316, p. 19.

ports and channels, burying of pipelines and cables in the seabed, stone-laying for breakwaters, scour protection and other offshore marine tasks.

10. The *M/S Grete Fighter* is equipped with an excavator that is permanently affixed to the deck. That excavator has its own motor and therefore operates independently of the vessel's propulsion engine. It has its own fuel tank, the fuel in which is replenished from the vessel's main fuel tank. When the excavator is used for digging, the vessel is anchored.

11. On 19 February 2004, the ToldSkat Østjylland (East Jutland Customs and Tax Office) decided that, for the period from 1 January 2001 to 30 September 2003, Sea Fighter was not entitled to the reimbursement of mineral oil and carbon dioxide duties on diesel fuel used to operate the excavator. The ToldSkat Østjylland therefore sought the payment of DKK 468 754 by way of duty on mineral oil and DKK 46 012 by way of duty on carbon dioxide in relation to the *M/S Grete Fighter*.

12. The ToldSkat Østjylland found that there was no entitlement to the reimbursement of duty charged on mineral oils used to run equipment, including pumps, in connection with dredging work. In particular, it attached significance to the fact that the excavator operates independently of the vessel's engine.

13. The Landskatteretten (Danish Tax Commission) upheld that decision on 4 March 2005.

14. Sea Fighter appealed against the decision of the Landskatteretten before the Vestre Landsret (Western Regional Court), which, by judgment of 29 February 2008, found in favour of the Skatteministeriet (Ministry of Taxation).

15. That judgment was the subject of an appeal before the Højesteret, which then referred the following question to the Court for a preliminary ruling:

'Is Article 8(1)(c) of the Directive ... to be interpreted as meaning that mineral oils supplied for use in an excavator which is affixed to a vessel but which, because it has its own separate motor and fuel tank, operates independently of the vessel's propulsion engine, in circumstances such as those of the present case, are exempt from duty?'

III — My analysis

92/81 defines the term ‘private pleasure craft’ as craft used ‘for other than commercial purposes’.⁷

16. By its question, the national court seeks to ascertain, in essence, whether Article 8(1)(c) of the Directive is to be interpreted as meaning that mineral oil used by an excavator which is permanently affixed to a vessel and operates independently of that vessel’s propulsion engine, because it has its own motor and fuel tank, should be exempt from excise duty.

19. It follows, in the Court’s view, that ‘all navigation activity for commercial purposes comes within the scope of the exemption from the harmonised excise duty provided for in the first paragraph of Article 8(1)(c) of Directive 92/81’.⁸ In other words, the Court held, that provision applies to ‘all forms of navigation, irrespective of the purpose of the voyage, when it is made for commercial purposes’.⁹

17. That question is an extension of those answered by the Court, first, in *Deutsche See-Bestattungs-Genossenschaft*,⁵ and, secondly, in *Jan De Nul*.⁶ In those two judgments, the Court provided some clarification on the meaning of the term ‘navigation’ as used in the first paragraph of Article 8(1)(c) of the Directive.

20. It may be inferred from that judgment that, where navigation within Community waters has a commercial purpose, such as the supply of services for consideration, it falls within the scope of the obligatory exemption provided for in Article 8(1)(c) of the Directive.

18. In *Deutsche See-Bestattungs-Genossenschaft*, the Court pointed out that that provision contains only one exception. It is apparent from that provision that the exemption does not apply to mineral oils used for the purposes of navigation in private pleasure craft. The Court then stated that the second paragraph of Article 8(1)(c) of Directive

21. The Court was then asked, in *Jan De Nul*, whether the manoeuvres carried out by a hopper dredger during its operations of pumping and discharge of materials, that is to say, journeys inherent in the carrying out of dredging activities, come within the scope of the term

5 — Case C-389/02 [2004] ECR I-3537.

6 — Case C-391/05 [2007] ECR I-1793.

7 — *Deutsche See-Bestattungs-Genossenschaft*, cited above (paragraph 22).

8 — *Ibid.* (paragraph 23).

9 — *Ibid.* (paragraph 29).

‘navigation’ within the meaning of the first paragraph of Article 8(1)(c) of the Directive. It answered that question in the affirmative,¹⁰ after pointing out that the hopper dredger has a propulsion system which permits it to be autonomous in its movements and that that vessel therefore has the technical characteristics necessary for navigation allowing it to provide services for consideration.¹¹

far as, for the purposes of applying that provision, the activities performed by a hopper dredger during its dredging operations, either on its journeys or in the course of its work, constitute an indivisible whole.¹²

22. It should be noted that, in so far as that case did not relate to the taxation of those quantities of mineral oils used specifically for the operations of pumping and discharge of materials, the Court was not required to comment on that matter. The question whether the term ‘navigation’ within the meaning of the first paragraph of Article 8(1)(c) of the Directive refers only to movement on water or is to be extended to the services supplied by a vessel, was therefore left unanswered.

24. Now that the Court has been asked to give a ruling on this point, I maintain that position, which I shall support by reference to the wording of Article 8(1)(c) of the Directive, and the objectives pursued by that directive.

25. An examination of the wording of that provision shows, first, that, by using the general term ‘navigation’, the European Union legislature did not expressly restrict the exemption to mineral oils used solely to propel the vessel. If the legislature had sought to limit the exemption exclusively to the mineral oils that feed the motors used to propel the vessel, it should have used a more precise term than ‘navigation’ within Community waters.

23. In the Opinion which I delivered in that case, I stated, as a final observation, that the exemption provided for in Article 8(1)(c) of the Directive should also apply to mineral oil consumed in connection with the actual carrying out of operations involving pumping and the dumping of dredged materials, in so

26. It should be pointed out, next, that the second paragraph of Article 8(1)(c) of the Directive expressly states that the commercial

10 — *Jan De Nul*, cited above (paragraph 40).

11 — *Ibid.* (paragraph 38).

12 — Point 104 of that Opinion.

purpose of navigation covers not only the carriage of passengers or goods but also the supply of services for consideration.

27. Those factors lead me to the view that it is the use of mineral oils for commercial purposes in the course of navigation which is exempt, in particular in the context of the supply of services for consideration.

28. The reference to 'including fishing' to illustrate the matters covered by 'navigation' within Community waters supports the idea that that expression denotes the commercial activities carried out in those waters, not only the movement of a vessel.

29. Let us suppose that the dispute in the main proceedings concerned the consumption of mineral oils used on a fishing vessel as fuel to work the machines for the mechanical hauling of fishing nets, such as the winches fitted to trawlers.¹³ Would it then be necessary to split the fuel consumption according to whether it is used for the fishing vessel's propulsion system or to power the

mechanical net-hauling system? It is my view that the express reference to fishing in the first paragraph of Article 8(1)(c) of the Directive as an example of the matters covered by 'navigation' within Community waters means that the exemption from excise duty cannot be limited to mineral oils used to enable the fishing vessel to move. After all, the term 'fishing' denotes a commercial activity and is thus meant to include all the mechanisms that need to be put in place in order for that activity to be carried out successfully.

30. There is no reason to adopt a different interpretation in relation to other types of commercial activities such as those carried out by the vessel at issue in the main proceedings. Consequently, services provided from a vessel, such as the operation of an excavator which is affixed to it, should qualify for the exemption in Article 8(1)(c) of the Directive.

31. The key point, in short, is that any equipment permanently affixed to the vessel which runs on mineral oils is closely linked to the very purpose of the navigation, such as fishing or dredging operations. In other words, without the tasks performed by such equipment, the type of commercial navigation at issue would no longer serve any purpose. To this extent, the movement of the vessel and the supply, by that vessel, of services such as

13 — I could cite other examples such as a cargo ship equipped to load and unload freight completely independently and without the use of port cranes.

offshore marine works constitute an indivisible whole.

32. From that point of view, the performance of dredging is indissociable from the movement of a vessel such as the *M/S Grete Fighter* within Community waters.

33. Although the excavator at issue is indeed, as the national court states, identical in type to excavators used onshore on wheels or on tracks, it is distinguished by the fact that it cannot be used off the vessel. It is an integral part of the vessel and cannot be separated from it. Without the excavator, the vessel loses the point of its existence, which is to navigate for the purpose of performing offshore marine operations. Without the vessel, the excavator is of no further use, since it cannot be used for onshore work because it is affixed to the vessel. The performance of offshore marine operations is indistinguishable from the very purpose of the navigation and therefore constitutes an essential accessory to it.

34. In its written observations, the European Commission accepts that some of the mineral oils used for purposes other than to propel the vessel nevertheless fall within the meaning of the term ‘navigation’ as used in the first paragraph of Article 8(1)(c) of the Directive. It gives the example of the fuel used to produce

the electricity required to light the vessel or operate its navigation system.¹⁴ While I agree that such fuel consumption cannot reasonably be distinguished from navigation, I do not see why the same reasoning should not be extended to the consumption of mineral oils required to operate equipment on the vessel which is essential for achieving the very purpose of the commercial navigation, that is to say an activity such as fishing or dredging.

35. Furthermore, in my view, the objectives pursued by the Directive preclude the exemption provided for in Article 8(1)(c) of that directive from being restricted to mineral oils supplied exclusively for use as fuel to propel a vessel.

36. The Court has held that the obligatory exemption for mineral oils used as fuel for the purposes of navigation within Community waters is designed to facilitate intra-Community trade, particularly the movement of goods and the freedom to provide services capable of taking place on the waters concerned.¹⁵

14 — I would point out in this regard that the first paragraph of Article 14(1)(c) of Directive 2003/96 expressly states that the exemption applies to ‘electricity produced on board a craft’.

15 — *Jan De Nul*, cited above (paragraph 24).

37. By the exemption concerned, the Community legislature intended to promote the equality of certain tax conditions under which the transport undertakings or other services which ply the waters concerned operate.¹⁶

38. The Directive also has as its objective to ensure the free movement of mineral oils in the internal market, and to avoid distortions of competition which could stem from variations in the structures of excise duties from one Member State to another.¹⁷

39. It is my view that the interpretation to the effect that all activities carried out on a vessel with a view to the successful completion of a commercial navigation activity must be regarded as forming part of the 'navigation' within the meaning of Article 8(1)(c) of the Directive, is not only consistent with the objective of facilitating the freedom to provide services within Community waters but would also prevent distortions of competition in the internal market. If, on the other hand, fuels used on a vessel for purposes other than its propulsion were excluded from the exemption in that provision, this, as the German Government points out, would necessarily lead to difficulties when it comes to classifying individual cases and differing interpretations from one Member State to another.

40. I note in this regard that it is clear from the order for reference that, in refusing to grant the exemption from excise duty on mineral oils used to operate the excavator, the ToldSkat Østjylland, in particular, attached significance to the fact that the excavator operates independently of the vessel's engine.

41. That assessment by the ToldSkat Østjylland demonstrates that, on the basis of the restrictive interpretation adopted by the Danish Government and the Commission, the obligatory exemption provided for in Article 8(1)(c) of the Directive could, in fact, depend on the characteristics of a vessel, and in particular on the number and position of the motors and fuel tanks. This would lead to differences in treatment based on the construction characteristics of vessels operating on the same market, such as the offshore public works market, and, therefore, to distortions of competition which the Directive specifically seeks to avoid.

42. Contrary to the submissions of the Danish Government, an interpretation to the effect that the exemption provided for in Article 8(1)(c) of the Directive covers the consumption of mineral oils by an excavator which is permanently affixed to a vessel would not give the undertaking operating that vessel

¹⁶ — *Ibid.* (paragraph 25).

¹⁷ — *Ibid.* (paragraph 28 and case-law cited).

a competitive advantage over onshore public works undertakings.

43. After all, the work carried out by onshore excavators is in no way interchangeable with that carried out by excavators which are permanently affixed to vessels. As the German Government rightly points out, it is impossible to make efficient use of public works equipment permanently affixed to a vessel for excavations carried out on land. Likewise, in the case of offshore excavation, onshore excavators operating from the shore are able to cover only a fraction of the surface area that can be covered by an excavator affixed to a vessel. The ability to move on water creates a specific product market for public works equipment permanently affixed to self-propelled vessels, with which onshore public works equipment is not in direct competition.

44. I would also point out that I share the German Government's view that the different treatment for tax purposes of fuels used for the vessel's propulsion engine and for the public works equipment affixed to that vessel would be difficult to monitor and would impose a more onerous supervisory burden on the authorities. Instances of tax evasion cannot be ruled out where, as in the present case, the fuel is drawn from the vessel's main tank.

45. With regard, finally to the impact of Article 8(2)(g) and Article 8(3)(a) and (b) of the Directive on the interpretation which I propose that the Court should adopt, I should like to make two observations.

46. First, I would point out that, in *Jan De Nul*, the Court held, with regard to the system provided for in Article 8(2)(g) of the Directive, namely the possibility for the Member States to apply total or partial exemptions or reductions in the rate of duty to mineral oils used for dredging operations in navigable waterways and in ports, that that exemption capacity granted to the Member States cannot influence the interpretation to be given to Article 8(1).¹⁸

47. Secondly, I would make the point that my interpretation of Article 8(1)(c) of the Directive preserves the effectiveness of Article 8(3)(a) and (b) of that directive in relation to stationary motors and in relation to plant and machinery used in construction, civil engineering and public works, in so far as these do not include equipment permanently affixed to a vessel carrying out a commercial activity within Community waters.

¹⁸ — *Jan De Nul*, cited above (paragraph 39).

IV — Conclusion

48. In the light of the foregoing considerations, I propose that the Court should give the following answer to the Højesteret:

Article 8(1)(c) of Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils, as amended by Council Directive 94/74/EC of 22 December 1994, is to be interpreted as meaning that the mineral oil used by an excavator which is permanently affixed to a vessel and operates independently of the vessel's propulsion engine, in so far as it has its own motor and fuel tank, should be exempt from excise duties.