



## Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

17 October 2019\*

(Reference for a preliminary ruling — Excise duty — Directive 2008/118/EC — Articles 8 and 38 — Person liable to pay excise duty following the irregular introduction of goods into a Member State — Definition — Company having civil liability for acts of its manager)

In Case C-579/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the cour d'appel de Liège (Court of Appeal, Liège, Belgium), made by decision of 6 September 2018, received at the Court on 17 September 2018, in the proceedings

**Ministère public,**

**Ministre des Finances du Royaume de Belgique**

v

**QC,**

**Comida paralela 12**

THE COURT (Ninth Chamber),

composed of D. Šváby, acting as President of the Chamber, K. Jürimäe and N. Piçarra (Rapporteur), judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having considered the observations submitted on behalf of:

- the Belgian Government, by J.-C. Halleux, P. Cottin and C. Pochet, acting as Agents,
- the European Commission, by M. Kocjan and C. Perrin, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

\* Language of the case: French.

## Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 79 of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ 2013 L 269, p. 1) ('the Customs Code').
- 2 It has been made in proceedings between the ministère public (public prosecution service) and the ministre des Finances (Finance minister) of the Kingdom of Belgium, on the one hand, and QC and Comida paralela 12, a company ('Comida paralela'), on the other, concerning the question of who is liable to pay excise duty which becomes chargeable as a result of the irregular introduction of goods into Belgium.

### Legal background

#### *European Union law*

- 3 Article 79 of the Customs Code defines the expression 'Customs debt incurred through non-compliance' in paragraph 1, makes provision as to the time at which such debts are incurred in paragraph 2, and identifies the debtor in paragraphs 3 and 4.
  - 4 Article 8 of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC (OJ 2009 L 9, p. 12) provides:
    - '1. The person liable to pay the excise duty that has become chargeable shall be:
      - (a) in relation to the departure of excise goods from a duty suspension arrangement as referred to in Article 7(2)(a):
        - (i) the authorised warehousekeeper, the registered consignee or any other person releasing the excise goods or on whose behalf the excise goods are released from the duty suspension arrangement and, in the case of irregular departure from the tax warehouse, any other person involved in that departure;
        - (ii) in the case of an irregularity during a movement of excise goods under a duty suspension arrangement as defined in Article 10(1), (2) and (4): the authorised warehousekeeper, the registered consignor or any other person who guaranteed the payment in accordance with Article 18(1) and (2) and any person who participated in the irregular departure and who was aware or who should reasonably have been aware of the irregular nature of the departure;
      - (b) in relation to the holding of excise goods as referred to in Article 7(2)(b): the person holding the excise goods and any other person involved in the holding of the excise goods;
- ...
2. Where several persons are liable for payment of one excise duty debt, they shall be jointly and severally liable for such debt.'
- 5 Article 33 of that directive provides:
  - '1. Without prejudice to Article 36(1), where excise goods which have already been released for consumption in one Member State are held for commercial purposes in another Member State in order to be delivered or used there, they shall be subject to excise duty and excise duty shall become chargeable in that other Member State.

For the purposes of this Article, 'holding for commercial purposes' shall mean the holding of excise goods by a person other than a private individual or by a private individual for reasons other than his own use and transported by him, in accordance with Article 32.

2. The chargeability conditions and rate of excise duty to be applied shall be those in force on the date on which duty becomes chargeable in that other Member State.

3. The person liable to pay the excise duty which has become chargeable shall be, depending on the cases referred to in paragraph 1, the person making the delivery or holding the goods intended for delivery, or to whom the goods are delivered in the other Member State.

4. Without prejudice to Article 38, where excise goods which have already been released for consumption in one Member State move within the [European Union] for commercial purposes, they shall not be regarded as held for those purposes until they reach the Member State of destination, provided that they are moving under cover of the formalities set out in Article 34.

...'

6 Under Article 38(3) of that directive, 'the excise duty shall be due from the person who guaranteed payment thereof in accordance with Article 34(2)(a) or Article 36(4)(a) and from any person who participated in the irregularity'.

### ***Belgian law***

7 Under Article 265 of the general law on customs and excise duties of 18 July 1977 (Moniteur Belge of 21 September 1977, 'the general law on customs and excise duties'), 'natural and legal persons are, under civil law, jointly and severally liable for fines and costs arising from convictions issued under the laws on customs and excise duties against their agents, administrators, managers or liquidators, for offences they have committed in that capacity'.

8 Article 266 of that law provides that 'save where specific laws provide otherwise, and without prejudice to fines and confiscations from which the treasury will benefit, offenders, their accomplices and the persons liable for the offence are jointly and severally liable to pay the duties and taxes which have or could have been lost to the treasury as a result of fraud, together with any interest due by reason of late payment'.

9 The law on the general system of excise duties of 22 December 2009 (Moniteur Belge of 31 December 2009) provides that it establishes the general of system of excise duties 'subject to the application of the rules laid down by the [general law on customs and excise duties]'.

10 That law also stipulates that where an irregularity occurs in Belgium during a movement of excise goods, the persons liable to pay excise duty are 'the natural or legal person who guaranteed the payment of such duty, ... or any person participating in the irregularity'.

### **The dispute in the main proceedings and the question referred for a preliminary ruling**

11 Comida paralela is a company incorporated under Spanish law with the corporate object of trading in beverages. QC is its manager.

- 12 It was alleged against Comida paralela and QC that, during the years 2012 and 2013, they irregularly introduced beverages into Belgium which had already been released for consumption in another Member State, without having covered those goods by a simplified accompanying document or guarantee certificate, and without having paid the excise duty or packaging levy.
- 13 By judgment delivered on 18 May 2017, the tribunal correctionnel de Liège (Criminal Court, Liège, Belgium) declared Comida paralela and QC jointly and severally liable to pay the excise duty, special excise duty and packaging levy, together with interest due by reason of late payment, and to deliver up the quantity of beverages which had been ‘fraudulently imported’, or pay an amount corresponding to their value. That court also made an individual order against Comida paralela, imposing a fine on it. Comida paralela brought an appeal against that judgment before the referring court.
- 14 By judgment of 17 September 2018, the referring court acquitted Comida paralela of the criminal charges, on the basis that it was merely a corporate shield enabling QC to commit fraud for his own benefit. The referring court stated that, under Belgian legislation, a legal person cannot be guilty of a criminal offence by reason of an act which has been carried out by one of its organs in the exercise of its functions, if that act was carried out for the sole benefit of the organ and to the detriment of the legal person.
- 15 The referring court nevertheless indicates that, while it has been acquitted of the criminal charges, Comida paralela remains jointly and severally liable, under civil law, for the customs debt under Articles 265 and 266 of the general law on customs and excise duties. That court takes the view, however, that the Customs Code precludes a company being required to pay a customs debt arising from the irregular introduction, by its manager, of goods originating from an EU Member State into Belgium.
- 16 In those circumstances, the cour d’appel de Liège (Court of Appeal, Liège, Belgium) decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

‘Does Article 79 of [the Customs Code] preclude national legislation, such as that implemented by Article 266 of the [general law on customs and excise duties], in the case of the unlawful importation into the customs territory of the European Union of goods subject to import duties, from making the person civilly liable for the person who has committed that offence — in which the person civilly liable did not participate — jointly and severally liable for the customs debt?’

### **Admissibility of the request for a preliminary ruling**

- 17 The Belgian Government submits that this request for a preliminary ruling is inadmissible, on the basis that the question referred has no bearing on the resolution of the dispute in the main proceedings, and also on the basis that neither the factual and legal background to that dispute, nor the reasons for the reference for a preliminary ruling, have been set out in sufficient detail.
- 18 In this regard, it should first be recalled that questions referred to the Court enjoy a presumption of relevance (see, to that effect, judgment of 10 December 2018, *Wightman and Others*, C-621/18, EU:C:2018:999, paragraph 27). Indeed, where such questions concern the interpretation of EU law, the Court is, in principle, bound to give a ruling (see, to that effect, judgment of 7 February 2019, *Escribano Vindel*, C-49/18, EU:C:2019:106, paragraph 24).
- 19 Thus, 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 for it to deliver judgment, and the relevance of the questions submitted to the Court. (see, to that effect, judgment of 7 February 2019, *Escribano Vindel*, C-49/18, EU:C:2019:106, paragraph 24).

- 20 However, 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, 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, it may reject the request for a preliminary ruling as inadmissible (judgment of 10 December 2018, *Wightman and Others*, C-621/18, EU:C:2018:999, paragraph 27).
- 21 Furthermore, in view of the spirit of judicial cooperation which governs relations between national courts and the Court of Justice in the context of preliminary-ruling proceedings, the fact that the referring court did not make certain initial findings does not necessarily mean that the request for a preliminary ruling is inadmissible if, in spite of those deficiencies, the Court, in the light of the information contained in the case file, considers that it is in a position to provide a useful answer to the referring court (judgment of 27 October 2016, *Audace and Others*, C-114/15, EU:C:2016:813, paragraph 38).
- 22 It should also be stated that the Court does not, of course, have jurisdiction to give a preliminary ruling where it is obvious that the provision of EU law referred to it for interpretation is incapable of applying (see, in particular, judgment of 1 October 2009, *Woningstichting Sint Servatius*, C-567/07, EU:C:2009:593, paragraph 43). Nonetheless, with a view to giving a useful answer to the referring court, the Court may decide to take into consideration rules of EU law to which the national court has made no reference in the wording of its question (judgments of 13 October 2016, *M. and S.*, C-303/15, EU:C:2016:771, paragraph 16, and of 16 May 2019, *Plessers*, C-509/17, EU:C:2019:424, paragraph 32).
- 23 In the present case, with regard, first of all, to whether the interpretation sought by the referring court bears any relation to the actual facts of the main proceedings, or their purpose, it is undeniable, as the Belgian government and the European Commission have observed, that the Customs Code, to which the interpretation that is sought would relate, does not apply to goods irregularly introduced into Belgium after being released for consumption in another Member State.
- 24 However, it is apparent from the material that the referring court has provided to the Court that Comida paralela and QC have been ordered to pay excise duties, and not customs duties, because the goods at issue had been irregularly introduced into one Member State after being released for consumption in another. It can thus be seen from the order for reference that the interpretation sought by the referring court concerns Directive 2008/118.
- 25 With regard, secondly, to the referring court's presentation of the factual and legal background, it must be said that all the parties lodging observations were able to identify the question of law being raised by that court. Similarly, while the order for reference does not contain a description of the legal background as such, it does set out the content of the applicable provisions of national law. The Court does therefore have before it the factual and legal material necessary to give a useful answer to the referring court.
- 26 In view of the foregoing, therefore, the reference for a preliminary ruling is admissible.

### **The question referred**

- 27 By its question, the referring court asks the Court for an interpretation of the Customs Code.
- 28 However, as is apparent from paragraphs 23 and 24 of this judgment, that question invites the Court to interpret a provision of EU law which does not govern the matters at issue in the main proceedings.



- 29 Accordingly, in order to give a useful answer to the national court, it is necessary for the Court to reformulate the question referred (see, to this effect, judgment of 16 May 2019, *Plessers*, C-509/17, EU:C:2019:424, paragraph 32).
- 30 In that regard, it should be noted that, while the question does not make express reference to Articles 8 and 38 of Directive 2008/118, it is apparent that those provisions are relevant for the purposes of answering the referring court, relating as they do to the persons liable to pay the excise duty which becomes chargeable as a result of the irregular introduction into one Member State of goods already released for consumption in another.
- 31 In those circumstances, the question referred has to be reformulated as asking, essentially, whether Articles 8 and 38 of Directive 2008/118 are to be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which, where excise goods which have been released for consumption in one Member State are irregularly introduced into another, a legal person with civil liability for criminal offences committed by its manager is jointly and severally liable for the excise duty.
- 32 In this regard it should be stated, first, that section 5 of Directive 2008/118, which consists of a single article — Article 38 — concerns irregularities during the movement of excise goods. Article 38(3) of that directive provides that, in such cases, ‘the excise duty shall be due from the person who guaranteed payment thereof in accordance with Article 34(2)(a) or Article 36(4)(a) and from any person who participated in the irregularity.
- 33 As the Commission pointed out in the main proceedings, the goods introduced into Belgium were not accompanied by a guarantee certificate, and it is thus impossible to require the excise duty to be paid by a person who guaranteed such payment, as referred to in Article 34 or Article 36 of Directive 2008/118.
- 34 Second, it should be observed that the wording ‘any person who participated in the irregularity’, used by the EU legislature in Article 38(3) of that directive, cannot be taken to preclude a company and its manager being regarded as having participated in one and the same irregularity, and accordingly as being jointly and severally liable to pay the excise duty.
- 35 In the first place, the use of the word ‘person’ without further qualification does not, a priori, exclude legal persons, and similarly, the indefinite adjective ‘any’ enables situations in which several persons participate in one and the same irregularity to be included.
- 36 This literal interpretation, on which it is possible to hold a legal person jointly and severally liable to pay excise duty together, potentially, with other persons who participated in the same irregularity, is supported by Article 8 of Directive 2008/118, which identifies the persons liable to pay excise duty that has become chargeable. Indeed, paragraph 2 of that article provides that where several persons are liable for payment of one excise duty debt, they are jointly and severally liable for such debt.
- 37 This interpretation is also supported by the preparatory work relating to Directive 2008/118. As the Commission has pointed out, the initial draft of the directive limited the list of persons who, in the event of irregular introduction of goods into a Member State, would be liable for the excise duty, to those who had guaranteed the payment of such duty. However, the Council of the European Union wished to extend this list so as to include ‘any person who participated in the irregularity’, as Article 38(3) of the directive provides. In adopting that wording, the intention of the EU legislature was thus to lay down a broad definition as to the persons potentially liable to pay excise duty in cases of irregularity so as to ensure, as far as possible, that such duty was collected.

- 38 In the second place, it is necessary to determine whether a natural or legal person can meet the condition of having ‘participated in the irregularity’, in Article 38(3) of Directive 2008/118, simply by having the status of principal.
- 39 In this regard, it should be emphasised that Article 8(1)(a)(ii) of Directive 2008/118 provides, in the case of an irregular departure of excise goods under a duty suspension arrangement, for liability to pay the excise duty on the part of any person who participated in the irregular departure and who, furthermore, was aware or should reasonably have been aware of the irregular nature of the departure. However, the EU legislature did not restate this second condition, which can be regarded as requiring an element of intention, in Article 38(3) of the directive.
- 40 Accordingly, the lack of further indications in the wording of Article 38(3) of Directive 2008/118 as to the meaning of a person who participated in the irregularity, enables a legal person to be regarded as liable for excise duty, by reason of the conduct of a natural person, where that natural person has acted as the agent of the legal person.
- 41 Thus, it is apparent from the order for reference that, in the main proceedings, the fact that QC acted for his own benefit and to the detriment of his employer affects only the criminal aspect of the matter, and not the civil aspect. Moreover, it is not disputed that QC acted in the performance of his functions and the pursuit of the corporate object of the undertaking.
- 42 In any event, as the Belgian Government has pointed out, in the light of the obligations imposed by Article 33 of Directive 2008/118, a company such as Comida paralela, which fails to comply with the prescribed formalities, can be regarded as a ‘person who participated in the irregularity’ within the meaning of Article 38 of that directive.
- 43 Accordingly, the answer to the question referred is that Article 38 of Directive 2008/118, read in conjunction with Article 8(2) of that directive, is to be interpreted as not precluding national legislation, such as that at issue in the main proceedings, under which, where excise goods which have been released for consumption in one Member State are irregularly introduced into another, a legal person which has civil liability for criminal offences committed by its manager is jointly and severally liable for the excise duty.
- 44 That interpretation is without prejudice to the possibility, where provided for by national law, of the principal, having become jointly and severally liable for the excise duty, to bring an action for a contribution or indemnity against the agent who has been found guilty of an offence arising out of the facts at issue.

### **Costs**

- 45 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Ninth Chamber) hereby rules:

**Article 38 of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC, read in conjunction with Article 8(2) of that directive, is to be interpreted as not precluding national legislation, such as that at issue in the main proceedings, under which, where excise goods which have been released for consumption in one Member State are irregularly introduced into another, a legal person which has civil liability for criminal offences committed by its manager is jointly and severally liable for the excise duty.**

[Signatures]