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EXCISE DUTIES AND THE INTERNAL MARKET

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Introduction

Excise duties have a long history as a form of taxation but have always been essentially a tax on the consumption of products, often food and drink, but also other products. Dr Johnson in his *Dictionary of the English Language* (1775) described excise duties as: 'Excise: a hateful tax levied on commodities'.

This article reviews the need identified by the European Commission for some degree of harmonisation of excise duties as part of the creation of the internal market, and the steps taken, including legal proceedings, to achieve that aim.

Excise duties have been introduced at different times on different products for different reasons - it may be that a trade arose in a new sort of product, either manufactured locally or brought from abroad (for example, coffee or tea), and a government saw a chance to levy an additional tax which would bring much needed income; in other cases, excise duties may have been imposed on certain products as an overt or covert way of protecting other products, often domestically produced, from competition from imports. Various reasons are often advanced to justify the imposition of an excise duty or the rate applied, such as concerns relating to environmental or health issues. The reality is that any product for which there is demand has been and is susceptible to the imposition of excise duty where that demand is sufficiently inelastic to warrant collection.

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Not only has the range of products subject to excise duty in the various Member States of the European Union lacked coherence (excisable products have included tobacco products and alcoholic drinks, matches, cigarette lighters, playing cards, salt, tea, coffee, and bananas) but there have also been great differences within countries and as between countries in relation to the structure of the tax, that is the way in which an excise on a given product is calculated (for example by reference to the value of the product or at a specific rate or a mixture of both bases) and the rates applied.

Differences in rates reflect a number of considerations. These include national perceptions towards the product (hence virtually no excise duty is levied on wine in the wine producing countries of the EC); views as to the purpose of the excise (or absence of it); governmental attitudes towards the balance between direct and indirect taxation, and governments' revenue requirements.

Differences also exist between Member States in relation to matters such as the period within which duty has to be paid (duty deferment) and the procedures for transporting excisable products under bond (that is, duty not paid).

Until some degree of harmonisation was achieved with the creation of the Internal Market in 1992, the picture of excise duties throughout the EC was, and to some extent continues to be, one of confusion — hugely different structures and rates applying to a variety of different products. It is probably worthwhile emphasising at this point the very complex social, economic and political sub-text involved in any consideration of excise duties. Just as the duties were first imposed for a wide variety of reasons, not necessarily fiscal, so their continuation involves similar questions. Thus, high rates have in some cases been used as a way of penalising certain imported products and so protecting local markets and local products: in this way, tax has served not only to protect national production but to fossilise consumer habits; the more heavily-taxed imported item becomes a luxury and is then taxed — in a vicious circle — as a luxury. In some instances, the luxury cachet may be of advantage in marketing to a limited class where conspicuous consumption is a goal, but the cachet inhibits importing and selling to the mass market, which is thus preserved for the domestic producer. Examples of this differentiation range from alcoholic drinks to vehicles — in the latter case, the tax varied depending on the size of engine in cases where national production was focussed on cars with smaller engines.

Moreover, the structure and rates of taxation applied to given products may themselves lead to distortions of competition as producers are effectively encouraged to devise ways or new formulations to ensure that their products might fall within a less heavily-taxed category.

Need for Harmonisation

The differences between Member States prior to 1992 in relation to products covered, rates applied and methods of calculation meant that there was a clear need for harmonisation measures if the goals of the Single Market were to be achieved. The creation of the Single Market necessarily involved as an essential element the removal of physical and fiscal barriers to trade within the Market and the removal of discrimination by one Member State against the products of another Member State.

Without some move towards harmonisation, it was clear that the removal of physical barriers by way of any frontier controls between Member States, would have led to considerable market distortions as consumers travelled across former frontiers to buy dutiable products in the nearest country with lower rates than their home country. Those countries with relatively higher rates of duty, particularly those with land frontiers and with significant populations within easy access of those frontiers, might have seen considerable loss of revenue (both excise and VAT), to say nothing of the loss of sales to retailers in the country. It would have been difficult, if not impossible, for Member States with higher tax rates to sustain them against lower rates in neighbouring countries.

Moves Towards Harmonisation

In considering the steps taken towards harmonisation, this article will focus on excise duties on alcoholic beverages, leaving aside tobacco products, and mineral oils.

The Commission first published proposals for harmonising the structures of special taxes on consumption, including excise duties, in 1972, just before the UK, Ireland and Denmark acceded to the Community. In contrast with the case of VAT, where there had been progress towards harmonisation, the only element of the 1972 proposals concerning the structure of excise duty which had been adopted before 1992 related to duties on cigarettes; the directive provided for harmonisation in successive stages and defined a range of relationships between the specific duty and the total duty. It was not, in the result, possible for political agreement to be reached by the Member States in relation to excises on alcoholic beverages or hydrocarbons (fuel).

In contrast with the situation at the political level, some progress was made as a result of judgments of the European Court in cases under Article 90 (ex Article 95) brought by the Commission or referred to the ECJ by national courts under Article

234 (ex Article 177) concerning discriminatory tax systems of Member States. For example, in relation to the drinks industry, the Commission instituted under Article 90 a number of proceedings against Member States for maintaining discriminatory excise systems:

Commission v France (Case 168/78) [1981] 2 CMLR 631 in connection with the preferential tax treatment of wine-based spirits (most of which were locally produced) compared with the tax on cereal spirits (most of which — such as gin and whisky — were imported);

Commission v Italy (Case 169/78) [1981] 2 CMLR 673 on similar grounds;

Commission v UK (Case 170/78) [1980] 1 CMLR 716 concerning the relative taxation of wine and beer;

Commission v Denmark (Case 171/78) [1981] 2 CMLR 688 concerning the preferential rate of excise levied on aquavit (mainly locally produced) compared with other spirits (the majority being imported);

Commission v Denmark (Case 106/84) [1987] 2 CMLR 278 concerning the taxation of fruit wines (mainly domestically produced) and imported table wines.

These cases are reviewed in the article in this issue entitled 'Article 90 EC and the principle of non-discrimination' by Scott Crosby and Nicholas Bridgland.

Actions based on Article 90 have not, however, been sufficient to establish a logical tax structure for the Community or to achieve the degree of convergence necessary to avoid disruption on the removal of fiscal frontiers. In particular, Article 90 applies only where some protectionism for local production can be shown: thus, it is permissible to differentiate on the basis of, say, raw materials or on economic grounds (small producers, etc) provided that any such privilege is also available in respect of imported products. Likewise, in the case of a Member State which produces both or all the types of alcoholic beverages in question, favouritism will not equal protectionism.

As the European Court said in Case 171/78 *Commission v Denmark* [1981] 2 CMLR 688:

> ". . . Article 90 (ex Article 95) aims to eliminate in the immediate future discriminatory or protective tax practices, whilst Article 93 (ex Article 99) aims to reduce trade barriers arising from the differences between the national tax systems, even where these are applied without discrimination."

White Paper: Completing the Internal Market

In March 1985, the European Council called on the Commission to draw up a programme for the completion of the Single Market by 1992. Lord Cockfield, then the Commissioner with responsibility for the Internal Market, drew up the famous "White Paper" (Com (85) 310) in which he identified physical, technical and fiscal barriers to the free movement of goods, persons, services and capital and proposed almost three hundred separate pieces of Community legislation (regulations and directives) necessary to complete the Single Market.

On fiscal barriers, the White Paper concluded:

> "182. If frontier controls were dismantled while the present wide differences in excise taxation persisted, the system would be exposed to fraud and evasion. This situation would allow excised goods to be routed through a bonded warehouse in a low rate country, taken out of 'bond' there and shipped on for consumption in a high rate country. There would also be a strong incentive for those traders in high rate countries who were not covered by the bonded warehouse system to obtain their goods in low rate countries. The only way of dealing with these problems would be to impose frontier controls, the very thing we are seeking to abolish.
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> 183. We conclude that there is no way of removing frontier controls for goods subject to excise duties whilst the present significant differentials in coverage and rates continue to exist.
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> 184. Whether from the point of view of commercial traffic or of the individual traveller, we conclude that the removal of frontiers together with the associated controls will require for practical reasons not only the setting up of a Community Clearing House System for VAT and a linkage system for bonded warehouses for excised products, but also a considerable measure of approximation of indirect taxes. We wish to make it clear that complete harmonisation, which has come to imply absolute identity in every respect, is not essential and for this reason we should now use the term 'approximation'."

The White Paper concluded that absolute identity of rates was unnecessary: differentials of up to 5 per cent (2.5 per cent each side of a norm) could be tolerated in neighbouring Member States since market forces would exert pressures on Member States to achieve approximation where tax-inclusive price differentials became significant. The White Paper considered that approximation of indirect tax rates could be achieved with manageable budgetary impact for Member States, with the exception of Denmark and Ireland.

The timetable set out in the White Paper was ambitious: agreement on structures for excises on alcoholic drinks by 1985, on mineral oils by 1986 and on tobacco by 1987, with agreement on excise and VAT rates during 1987. That programme was designed to allow orderly convergence, but the timetable was not achieved.

Single European Act

The Single European Act, adopted in 1986 in the spirit of the White Paper, contained three provisions of importance for fiscal harmonisation.

First, it provided a legislative definition of the Single Market in a new Article 8a of the Treaty:

> "The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty."

Secondly, the Single European Act provided for more comprehensive consultation with the European Parliament on Single Market measures with the exception, among other things, of fiscal harmonisation measures: these have remained subject to unanimity in the Council of Ministers.

Thirdly, the Single European Act amended the text of what is now Article 93 of the Treaty, to read:

> "The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market within the time limit laid down in Article 8a."

The Maastricht Treaty provided for a further amendment under which consultation with the Economic and Social Committee would now be required.

The 1987 Proposals

The Member States' concerns about tax harmonisation were evidenced by their request at the June 1985 summit in Milan that ECOFIN (EU Council of Economic and Finance Ministry) study the White Paper to identify "any measures which might be necessary for the achievement of a single market" .... The ECOFIN study group found no workable alternatives to the Commission's strategy, but recognised that no final positions could be adopted until all the details of the Commission's entire fiscal package were known.

The Commission's response was to produce in 1987 a Global Communication setting out in detail the justifications for action and for its proposals. This was accompanied by various detailed proposals concerning excise duties and VAT. The Commission stated in its Global Communication that its objective was not to create an "ideal fiscal system" but to propose only that which was "strictly necessary" to achieve the removal of frontiers on 31 December 1992.

Debates following that Communication covered not only such obvious matters as what rates of duty should apply to which products, but also the method of calculation (specific as against ad valorem), the structures for enforcement, and the definitions of different categories of products. It proved much more difficult to reach agreement on excise duties than it has on VAT, for which there has been for some time a Community structure.

Eventually, agreement was reached that, from 1 January 1993, excise duties would be charged on only three major categories of products: tobacco, mineral oils and alcoholic beverages. The 1972 proposals already provided for the abolition of "minor" excise duties, for which collection costs were disproportionate to their yield. These were the taxes on products such as tea, coffee, salt and playing cards; they were applied only in some countries and had no discernible common structure. After 1993, minor excise duties could be retained only if they did not entail any checks or formalities at internal frontiers.

Rates and Structures of Excise Duties on Alcoholic Beverages

Background

As has been said, the harmonisation of excise duties on alcoholic beverages has always been on the Community agenda; albeit not getting anywhere fast. The earliest proposals in this regard, made in 1972 — shortly before the UK joined — were an attempt to harmonise the structure of the duties without at that point seeking to harmonise the rates.

The two elements, the structure of excise duties and the rates of duty, have progressed separately and at different speeds.

The Commission's early proposals for the harmonisation of excise duties on alcoholic beverages encompassed both the rates and the structure of excise duties. There was no point in agreeing a single, or a minimum, rate of duty for the Community if that rate would apply to different products in different Member States. On 19 October 1992, the Council of Ministers adopted two harmonising directives on excise duties on alcoholic drinks:

(1) EEC Directive 92/83 on the structure of excise duties including definitions of products covered (the Structures Directive); and

(2) EEC Directive 92/84 on the rates to be applied (the Rates Directive).

Structure of alcohol excise duties

The structure of excise duties proposed by the Commission in 1987 comprised five principal categories of alcoholic beverage:

- spirits;
- intermediate products (i.e. fortified wines);
- sparkling wines;
- still wine; and
- beer.

The Structures Directive created a structure of duties based on categories of alcoholic beverage as defined in the Common Customs Tariff.

Rates of alcohol excise duties

The pre-1 January 1993 process of approximation began in 1987, when Lord Cockfield published proposals for the harmonisation of rates of duty (Com (87)328) which provided for a single rate of duty, across the whole Community, for five different categories of beverage:

Spirits	1271 ECU[2]/hlpa
Intermediate products	85 ECU/hl
Sparkling wine	30 ECU/hl
Wine	17 ECU/hl
Beer	1.36 ECU/hlldegree Plato (17 ECU/hl)

In putting forward these rates, the Commission considered the simple, arithmetic average of the rates charged in the then Twelve Member States and, by this means, arrived at a spirits rate of 1271 ECU/hlpa. The arithmetic average for beer was approximately 22 ECU/hl; however, the arithmetic average for wine was of the order of 55 ECU/hl (£0.29 per bottle). By a remarkable coincidence, these averages equated quite closely with taxing wine and beer equally (as required of the UK under the beer/wine case) by reference to their alcohol content.

The Commission rapidly realised that such a rate for wine — roughly one-third of that charged in the UK — would be far too high to be acceptable to some Member States. They therefore came up with the following:

> "A rate of tax applied to beer and wine equally, by reference to volume (not alcoholic strength) which would have a neutral impact on total Community revenues from beer and wine."

This proposal had the desired effect of achieving the lowest possible rate for wine (in order to placate the wine-producing Member States which do not tax wine) and the highest possible rate for beer in relation to wine (in order to minimise the loss of revenue to the high-taxing northern Member States) whilst retaining at least a semblance of consistency with Community law.

However, despite Lord Cockfield's best efforts, no progress was made on these proposals during his time as Commissioner. The northern Member States refused to reduce their duties whilst the southern Member States refused to increase theirs — and in particular refused to introduce a tax on wine.

When Mme Scrivener took over this portfolio in 1990, she revised these proposals significantly in the hope of achieving some progress with the Member States. She

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2 Now Euros.

proposed that instead of mandatory rates of duty for the whole Community there should be:

— "Target rates" of duty, from which the Member States should not diverge when changing their national rates of duty;

	Target	Minimum	
Spirits	1,398.1	1,118.5	ECU/hlpa
Intermediate Products	93.5	74.8	ECU/hl
Sparkling Wine	33.0	16.5	ECU/hl
Wine	18.7	9.35	ECU/hl
Beer	1.496	0.748	ECU/hl/degree Plato
	18.7	9.35	ECU/hl

These rates were based on the original 'Cockfield' proposals and derived, in the case of the target rates, by increasing those proposals by 10 per cent — in effect a revalorisation. The minimum rates were then calculated by taking 80 per cent of the target rates for spirits and intermediate products and 50 per cent of the target rates for beer and wine. The logic of imposing only minimum rates was that, in practice, a Member State which chose to charge a high rate of duty hurt only itself — indeed, its neighbours might benefit from a diversion of trade.

The purpose of these proposals was to avoid requiring the northern Member States, particularly the UK, to lower their duties (which they refused to do) and to reduce the required tax increases in the southern Member States and, in particular, the required rate of duty on wine. These revised proposals proved to be no more amenable to agreement. The UK, for example, refused to accept that it should be prevented from increasing its duties (and hence diverging from the target rates), whilst other Member States, notably Germany, refused to countenance any duty on wine. Other Member States had their own objections.

This apparent impasse continued until June 1991 when the Luxembourg Presidency brokered a compromise covering the whole excise duty package (not just alcoholic beverages).

In the event, and so far as alcoholic beverages were concerned, the agreement reached in 1991 did not include the duties on spirits and intermediate products.

However, there was agreement on the minimum rates for the other products:

	minimum rate
Sparkling wine	0
Wine	0
Beer	0.748 ECU/hl/degree Plato.

The "target rates" were unchanged; however, their significance was reduced to that of an objective which Member States should consider when changing their rates of duty.[3] During the UK Presidency, the minimum rates for spirits and intermediate products were also agreed at levels which were approximately half those proposed by the Commission:

	minimum rate
Spirits	550 ECU/hlpa
Intermediate products	45 ECU/hl.

The rates were subsequently set out in the Rates Directive.

Two points may be made in conclusion:

(1) The original purpose of these new rates was to reduce tax differentials across frontiers so as to permit the removal of customs controls without that giving rise to widespread fraud, diversion of trade and distortion of competition. These minimum rates, however, did not significantly reduce any of the sensitive frontier tax differentials and, in terms of achieving their declared purpose, they have been less than a resounding success. The Commission is increasingly reliant on "market forces" to oblige Member States to reduce their duties.

(2) Whilst these new rates have been largely ineffective in terms of creating the Single Market, they are highly significant in that they establish Community competence in this area of legislation and set a framework for future

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[3] In *R v Shepherd Neame* [1999] 1 CMLR 1274, the UK High Court held that the UK Government had not been in breach of its Community obligations by increasing excise duties such that they diverged from the target rates.

proposals. In this regard, it is important to note that Art 8 of the Rates Directive requires the Commission to propose revisions of the minimum rates to take effect every two years.

Commercial Movement of Dutiable Goods

Background

It is a common feature of excise duty systems that, in principle, excise duties are charged on goods "consumed" within the jurisdiction. Thus, duty is levied on goods which are produced within the jurisdiction - if they are consumed there but not if they are exported - and on goods which are imported. Within this basic concept it is worth distinguishing two points in the distribution chain:

— the point at which the goods become chargeable to excise duty, that is to say, the point at which a duty liability arises; and

— the "chargeable event", that is to say, the point at which duty becomes payable.

Generally, liability to duty arises on production of the goods in question within the jurisdiction or on importation of such goods into the jurisdiction. However, particularly where the rates of excise duties are high and/or the goods may be stored for long periods of time, the "chargeable event" may be much later.

In the time between liability arising and duty becoming payable the goods have generally been held, under supervision by the authorities, in a "duty suspension" scheme. The chargeable event is "the release from that scheme for domestic consumption".

Although all the Member States had duty suspension schemes, these varied significantly from one to another.

Common to all these systems, however, was a requirement that all "imports" were declared on arrival (so as to become liable to duty) and entered into the system, and a requirement that all "exports" were declared at the point of departure if the operator was to obtain an exemption in respect of those goods. These frontier checks were, self evidently, fiscal barriers to free movement.

The Commission therefore developed proposals designed to remove the frontier formalities associated with ensuring that a duty liability arose on importation and was removed on exportation.

EEC Directive 92/12 — the Warehouse Directive

The Commission's original proposals (in 1987) were based on a system of "linked bonded warehouses" and sought to extend the concept of "bonded premises" and transport between them to the whole Community (a remarkable anglo-centric approach for the Commission).

The proposals changed significantly over the years as a more detailed understanding of the different national systems was gained. In essence, the agreement embodied in EEC Directive 92/12 (the Warehouse Directive) does not require changes in the national "duty suspension schemes" as they affect the holding or movement of goods within a given Member State. Rather it provides, and at the same time restricts, the means by which goods may be taken from one suspension scheme to another without the need for frontier formalities. The detail of the arrangements for commercial movement of dutiable goods is outside the scope of this article.

The aim of the directive — in line with the aim of the Single European Act — was to allow the free circulation of products, whilst ensuring that excise duties for commercial consignments will accrue to and in the country of consumption of the product. The directive was to ensure that there would be no bar to people cross-border shopping for purely private purposes and rules are laid out to distinguish private from commercial transactions (see below).

Personal Movement of Dutiable Goods

History

Originally, excise duty regimes made no distinction between commercial and personal imports. Thus, in principle all excisable goods brought into the jurisdiction were liable to duty — and customs authorities were able to check any incoming passenger's baggage and to collect duty on the contents.

At this time, there was no distinction between goods purchased "duty paid" in another country and goods purchased "duty-free". Such a distinction was unnecessary; all that Customs were interested in was the collection of their national excise and customs duties and it was immaterial whether duty had, or had not, been paid elsewhere.

However, the rigorous checking of passengers' baggage for small quantities of dutiable goods was not cost-effective. Consequently, over a century ago the UK Customs (and others) adopted an administrative practice under which they permitted limited quantities of goods to be imported in passengers' personal baggage without charging excise and customs duties. For example, for spirits the original practice was to allow passengers who had purchased a bottle for consumption on board ship to bring any unconsumed portion thereof ashore without charging duty. This evolved into a rule that, provided the bottle had been opened, it could be brought ashore and, finally, to a rule that one bottle could be brought ashore "duty free". Thus emerged the concept of "travellers" allowances' and these were ultimately formalised in the New York Convention 1954 which established the allowances as we know them today — for example one litre of spirits; two litres of wine; 200 cigarettes. etc.

It should be emphasised that it was still immaterial whether the goods had been purchased "duty paid". These allowances were "duty-free" allowances in the sense that passengers were allowed to import the goods without paying duty in the country of destination.

The need to distinguish between "duty-free" and "duty paid" purchases arose only in the European Community. EEC Directive 69/169 (as amended), which regulated tax exemptions on cross-frontier travel within the Community, distinguished between goods imported from third countries and those imported from another Member State. The directive was adopted to implement the New York Convention allowances until the long-term aims of achieving customs union and harmonising indirect taxation reached a stage sufficiently advanced to render such allowances obsolete.

As far as third country travellers are concerned, the directive simply implemented the allowances set out in the New York Convention. However, goods purchased in another Member State "according to the general national rules governing taxation" were made subject to different, higher allowances — for example, one-and-a-half litres of spirits, three litres of wine, 300 cigarettes, etc.

The status of goods purchased in duty free shops was not expressly established in this directive; however, it was clarified in the second Butter Boat case, Case 278/82 *REWE v Hauptzollamter Flensburg, Itzehoe and Lubeck-West* [1985] 2 CMLR 586. In that case it was held that goods sold in duty free shops were subject only to the "third country allowances" (one litre of spirits, etc).

In this way a traveller from one Member State to another was to be granted a different allowance depending on whether he purchased goods "duty paid" or "duty free" — and, for the first time, Customs at the point of arrival had, in theory, to establish whether duty had been paid elsewhere.

Different Member States have implemented and policed this legislation to a greater or lesser extent. Whilst the aim of EEC Directive 69/169 was to facilitate progress towards an open market, problems had arisen in relation to Denmark and the Republic of Ireland.

Both these countries share borders with countries whose tax rates are significantly lower than those relating to domestic goods (Germany and the UK, respectively). As a result, both countries share the same problem: their residents cross the border to purchase large quantities of goods at the lower tax rate, bring these goods back so as to take advantage of the EC allowances and, so Denmark and Ireland alleged, to re-sell these goods at a profit.

In 1987, Ireland therefore implemented a statutory instrument which provided, that in order to benefit from the allowances provided under EEC Directive 69/169 a traveller must have spent the 48 hours immediately preceding his entry into Ireland outside Ireland. Consequently Ireland sought to differentiate between "genuine" travellers and "fiscal" travellers whose aim in travelling was purely to make a profit by taking advantage of the EC's duty-paid allowances.

The matter was considered by the European Court in Case 158/88 *Re-Border Shopping: EC Commission v Ireland* [1990] ECR 12367. Advocate General Damon acknowledged that there was a serious problem facing Ireland. Queues of cars of up to 12 kilometres in length had been reported at the border; officials had seen individuals making several trips each day and had traced goods thus imported into Ireland to retail outlets in the country. Most significantly, this had the severe economic effect that in 1986 in excess of IR £300m worth of goods was imported by travellers into Ireland. This represented 1.9 per cent of the gross national product (91.2 per cent of the deficit on current account of the balance of international payments). In addition, the Irish exchequer believed that IR £40m of revenue was lost due to these purchases — 0.6 per cent of all exchequer resources. However, those arguments failed to sway the court: it was decided that a Member State could only impose quantitative limits under EEC Directive 69/169 under the authority of a directive derogating from Directive 69/169 or by way of protective measures as provided in the Treaty. Ireland had done neither of these and had therefore failed to fulfil its obligations under the Treaty.

The ECJ also considered Ireland's argument that a distinction should be drawn between "genuine" and "fiscal" travellers. The court decided that a "traveller" within the meaning of EEC Directive 69/169 is a person who goes from one

Member State to another[4]:

> ". . . after having, in fact, had an opportunity to make purchases in the Member State of departure. A purely objective criterion should be adopted. The purpose of a journey is immaterial; all that matters is that it was physically possible for a person to make purchases in another Member State."

Denmark and Ireland have also sought to limit imports of duty-paid goods by setting quantitative limits on the amount of duty-paid beer which can be imported. Denmark imposed an upper limit of ten litres of beer and Ireland imposed an upper limit of 12 litres of beer. In both cases it was argued that such amounts of beer contain approximately the same amount of alcohol as the four litres of wine which a traveller is allowed under Art 4 of EEC Directive 69/169. Each State then argued that any imports above this limit would be presumed to be of a commercial nature and therefore would not benefit from the provisions of EEC Directive 69/169. Once again, the European Court held in both cases that Member States had no power to set such quantitative measures for goods which did not expressly appear in Art 4(1). Therefore, beer fell to be considered only under Art 2 of EEC Directive 69/169.

However, subject to such variations in the interpretation of the directive, this was where matters stood until the publication of the Single Market proposals.

Proposals

The Commission's proposals regarding the future of "duty paid" and "duty free" allowances were published in 1987. They were, of course, directed towards the abolition of fiscal frontiers (which in this regard means customs checks on arriving passengers and the "red" and "green" channels) and predicated on the assumption that these controls would be removed.

The effect of these proposals was, broadly, as follows:

— EEC Directive 69/169 was no longer to apply with regard to "relations between Member States". Thus, both the intra-community "duty paid" allowances and the third country allowances applicable in respect of "duty-free" would disappear;

4 See also Case C-296/95 *R v CCE ex p EMU Tabac* [1998] ECR I-1605.

— however, the "duty paid" allowances (that is relating to goods purchased duty paid in another Member State) were to be increased to infinity. This was necessary to effect abolition not only of the allowances but more importantly of the requirement that duty must be paid on imports.

The net effect of these proposals would have been a situation in which intra-community travellers could carry as much, or as many goods as they wanted to, across intra-community frontiers without giving rise to any liability to excise duties. At the same time there was an implication in the proposals, and an intention on the part of the Commission, that duty free sales to intra-community travellers would be abolished.

"Duty paid" goods

In anticipation of the proposals effectively to abolish travellers' duty-paid allowances altogether, it was proposed by the Commission in 1989 (proposed EEC Directive 89/331 as amended by proposed EEC Directive 90/76) that there should be stepwise increases in the volume allowances leading to their being double those prevailing by 1992 (that is three litres of spirits, six litres of wine, and 600 cigarettes). In due course, it was intended to increase the allowances to infinity on 1st January 1993. However, the complete liberalisation of the personal movement of excisable goods caused some Member States (not least the UK) problems.

At bottom, this issue became a question as to the extent to which Member States should be able to distinguish between goods carried "for personal consumption" (which would not be subject to any limitation) and goods carried "for commercial purposes" (which should be prohibited to the extent that they are not within the system agreed for commercial movements). In this connection, it should also be pointed out that since 1 January 1993, customs authorities have not been able to carry out searches of cabin or hold baggage of private travellers making intra-Community journeys by air or boat (reg 3925/91, implemented by reg 1823/92).

Directive 92/12 provides that to establish whether goods being carried for purposes of a "commercial nature" the Member States will have regard to the commercial status of the holder; his reasons for holding them; the place where they are located; any documents relating to the goods; their nature; and the quantities held.

Moreover, and this is particularly significant with regard to the UK, "guide levels" or "minimum indicative levels" are set for the purpose of distinguishing goods of a commercial nature. These levels for alcoholic drinks are:

Alcoholic Beverages

—	Spirits	10 litres
—	Intermediate Products	20 litres
—	Wines	90 litres
—	Beer	110 litres

These are contained in SI 1992 No 3155, as amended.

These minimum indicative levels are not revised travellers' allowances and it is not the case that a person carrying more than the specified quantities (for his or her personal consumption) would automatically be breaking the law.

In the course of negotiations, Denmark obtained a derogation, allowing them to retain their existing rules until 31 December 1996. This meant that:

- private travellers entering Denmark would only be entitled to the pre-existing "duty paid" allowances for tobacco products and spirits; and

- Danish residents would only be entitled to a much lower allowance unless they had been out of Denmark for more than 48 hours.

In addition, it is provided that Denmark would be able to carry out the checks — and collect excise duties — necessary to police these controls. Thus, in effect, Denmark retained fiscal frontier controls until the end of 1996.

The nature of these "guide levels" was reviewed in *R (Hoverspeed Ltd) v Commissioners of Customs and Excise* heard in July 2002 and which is analysed elsewhere in this issue by Rhodri Thompson QC.

"Duty-free" sales

Duty-free sales (as opposed to imports) have their origins in the traditional tax-free status of ships in international waters and the development of freeports and "bonded" chandleries to serve them. In 1944, the Chicago Convention extended this tax-free status to include aircraft on international flights and "customs free" airports to serve such aircraft.

In the context of the Single Market, the debate on duty free sales has primarily turned on the question of the travellers' allowances for obvious reasons. The creation of the Single Market requires the removal of fiscal barriers to free movement and it is readily apparent that customs checks on travellers are, and would be, such a barrier. It is equally clear that, in so far as customs checks are necessary in order to police a traveller's allowance, the removal of those checks would make such an allowance redundant and unenforceable. The view taken by the EC Commission, and others such as MEPs, was that the concept of "duty free" was an anathema to the internal market: such sales could not take place for travellers between Edinburgh and London or Manchester and London, so their retention for travellers between points in the EC was inappropriate. In reality, that logic was faulty: so long as there continued to be separate tax jurisdictions, there remained a case for duty free, as there was no overriding imperative to require a Member State to levy tax on goods which would be consumed elsewhere.

The debate was entirely political. In recognition of the impact which the abolition of duty fee sales would have on the economics of ferry companies and on employment, the EC decided in 1993 that there would be a three-year transitional period, subject to the implementation of an adequate system of control at point of sale. Duty free sales for travellers between Member States were eventually terminated with effect from 1 July 1996.

Conclusion

The provisions of the directives on structures and rates of excise duty will not remove the tax differentials between Member States — which was the intention as put forward in the White Paper on Completing the Single Market. This means that the extent to which Member States will be able to maintain any differentials will depend on market forces. The agreed legislative framework provides for regular two-year reviews and one can anticipate that further harmonisation will be necessary and that the process of convergence will be a continuing one.