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R. (HOVERSPEED ET AL.) v COMMISSIONERS OF CUSTOMS AND EXCISE [2002] EWHC 1630 ADMIN

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Introduction

As part of the measures taken to create the single internal market, the Council of the European Communities adopted Directive 92/12 (also known as the Warehouse or Excise Directive). This established a regime for the fiscal treatment of excisable products on being moved from one Member State to another.

The Directive had another purpose which was to facilitate the purchase of excisable products by consumers from outlets in Member States other than the one in which they were resident. By encouraging cross-border shopping, it was believed that Member States would gradually converge their rates. This particular benefit was intended for consumers, not traders. To assist governments in determining whether a person was bringing in goods from another Member State for commercial purposes, the Directive set out factors to be considered by the authorities of the receiving Member State: these included the so-called guide levels or minimum indicative levels, such as 800 cigarettes and 110 litres of beer.

Other articles in this issue discuss the background to Directive 92/12 and raise questions about whether it has achieved its purpose. This article examines the way in which Directive 92/12 has been implemented in the UK and in particular the legality of the measures taken by HM Commissioners of Customs and Excise to enforce it, particularly in the light of the recent decision of the Divisional Court (see below). The principal implementing provisions are to be found in the Excise Duty (Personal Reliefs) Order 1979, SI 1992/3155 ("the PRO"), which is set out below

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together with the relevant enabling legislation.

The judgment of the Divisional Court in *R. (Hoverspeed et al.) v Commissioners of Customs and Excise* [2002] EWHC 1630 Admin analysed the scope of the administrative powers of the Commissioners under the Customs and Excise Management Act 1979 ("CEMA"), to check passengers travelling from other Member States for possession of alcohol and tobacco products and to seize and retain such goods (and other goods packed together with such goods and the vehicles in which such goods were carried) where the Commissioners found that they were not entitled to reliefs from UK duty.

Underlying these fundamental questions was the even more basic issue of whether the Commissioners had exercised their *legislative* powers, conferred by the Customs and Excise (General Reliefs) Act 1979 ("CE(GR)A"), ss. 13 and 13A, in accordance with Directive 92/12/EEC. The relevant UK legislation was the Alcoholic Liquor Duties Act 1979 ("ALDA") (ss. 1, 5, 36, 54 and 62) and the Tobacco Products Duty Act 1979 ("TPDA") (s. 2), together with CE(GR)A and the PRO.

The effect of that legislation was to make *all* imports of alcohol and tobacco *prima facie* chargeable to UK excise duty, including excise goods bought in other Member States subject to national excise duty, subject to a limited "relief" where those goods could be shown (i) to be imported for "own use" and (ii) not to be held "for commercial purposes".

If that legislative regime was inconsistent with the Directive, then the Commissioners' extremely wide administrative powers could not be validly exercised:

- As a matter of Community law, restrictions on freedoms guaranteed by the EC Treaty can only be lawful if exercised in accordance with applicable Community legislation.

- As a matter of the law of the European Convention on Human Rights, now introduced into English domestic law by the Human Rights Act 1998, interference with a "Convention right" can only be justified where it is "prescribed by law". Were an interference to be based on a national rule that was in fact incompatible with a higher rule of Community law (such as the terms of Directive 92/12), it would be very hard to see how that condition could be satisfied.

- Even looking at the matter from a purely domestic purpose, all the Commissioners' seizure powers were ultimately dependent on showing that an individual held goods subject to UK excise duty (see ss. 49, 139 and 141 of CEMA). If that had not been properly shown, then the legal basis for seizure fell away.

The Facts

The relevant facts as found by the Divisional Court can perhaps be summarised by three extended citations from the judgment (paras. 9-11, 42-43 and 48-62):

> "In March 2000, the Government announced a £209 million strategy designed to slow, stabilise and reduce smuggling over a three-year period. The aim of this strategy was to make smuggling less profitable and less attractive by increasing the chance of getting caught and by increasing the penalties on the smugglers who were caught. Key aspects of this strategy included a large increase in the Commissioners' resources (including the provision of more staff, who were made available to intensify the checks on cross-Channel passengers), and a hardening of policies relating to the seizure and retention of goods and vehicles. Other aspects of the strategy included the education of the public.
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> The strategy appears to have worked. In November 2001, the Commissioners estimated that revenue lost from non-freight, cross-Channel smuggling of tobacco products was down to £345 million (£395 million, if alcohol is included) in 2001. The claimants, however, contend that this success was achieved at the cost of their rights under EC law and the Convention.
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> In these circumstances the claimants seek declarations to the following effect:
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> (i) that the PRO is incompatible with the Excise Directive and Article 28 of the EC Treaty, by creating a presumption that goods imported to this country in excess of the MILs are held for a commercial purpose and therefore chargeable to further excise duty, and by placing a burden on the traveller to prove that tobacco products and alcohol are not held or used for a commercial purpose (draft declarations 1, 2 and 3);
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> (ii) that the Commissioners' policies and practices relating to checks on individual travellers and the goods which they bring from other member countries, in particular France and Belgium, are contrary to Articles 28 and

49 of the EC Treaty, Council Directives 64/221/EEC and 73/148/EEC and Council Regulation (EEC) No 3925/91 (draft declarations 4 and 5);

(iii) that the Commissioners' policy of seizure and non-restoration of goods presumed to be chargeable to UK excise duty, and of vehicles containing such goods, is incompatible with EC law and with the rights conferred on individuals by Article 6 and Article 1 of the First Protocol to the Convention (draft declaration 6); and

(iv) that Customs' checks on Mr and Mrs Andrews and Mr Wilkinson and their goods, and the decision to seize their goods, and the decisions to seize and not restore Miss Andrews' vehicle, in which they were carried, were contrary to EC law and incompatible with their Convention rights (draft declarations 7 and 8). Despite the conflict in some areas of the evidence, it is clear to us that on a significant number of occasions over the last two years large numbers of passengers with limited quantities of excise goods, or none at all, must have been detained in Hoverspeed's arrivals hall at Dover for periods of as long as an hour (and sometimes longer) and then questioned and their baggage searched. This practice occurs for no reason which relates to the individual passenger save that he has taken a route known to be taken by smugglers in the company of many other honest and innocent travellers.

...

"In the absence of oral evidence, it is not easy for us to form any clear view about the extent to which these checks are intimidating to passengers. Large numbers of uniformed officers may well be intimidating to those who are not used to them. No doubt the manner of some officers is more abrupt than that of others. Everything else being equal, the innocent traveller is unlikely to be intimidated by questioning. A search of baggage for no reason specific to the individual traveller is no doubt offensive to many. The question we have to decide is not whether it is offensive but the circumstances in which it may be lawful.

...

"A more reliable indication of the potential harshness of Customs' practices in seizing and refusing to restore goods and vehicles, including vehicles which do not belong to those using them to import tobacco products and alcohol, is given by the experiences of Mr and Mrs Andrews, Mr Wilkinson and Miss Lynne Andrews.

They all live in Widnes which is a five-hour drive from Dover. According to Mr Andrews, he and his wife travelled with Hoverspeed on four occasions over a period of twelve months during 2000 and 2001. On three of these trips, they travelled from Dover to Calais and then drove to Adinkerke in Belgium, where they normally spent time sightseeing. There are a number of large retail outlets, selling tobacco products and alcohol, in Adinkerke, which is just over the border from France. They bought tobacco products, alcohol and, on some occasions, soap powder which is much cheaper there.

Mr Andrews normally took his own car, but at the time of his booking on 22nd August 2001 he had had a crash. He therefore borrowed his sister's small Nissan Micra, which she had obtained on hire purchase. In his statement he says that this was at her suggestion; she says that he asked if he could borrow the car.

In any event, Mr and Mrs Andrews left Widnes in the small hours, with Mr Wilkinson, Miss Andrews's lodger, as their passenger. Miss Andrews did not come with them. She had simply lent her car to her brother for a day, for what she understood to be a pre-booked, special offer trip across the Channel. She presumably knew that he would bring back tobacco products and alcohol in significant quantities, as he had done so before.

They caught the 11.30 am hovercraft from Dover to Calais, and made the short motorway drive to Adinkerke where Mr Andrews bought 10,000 cigarettes, 8 kgs of HRT, three bottles of brandy and a bottle of rum. His wife bought 5,000 cigarettes and two cases of sparkling wine. Mr Wilkinson bought 10,000 cigarettes for himself, and 200 as a present for his mother, and two bottles of wine.

They then caught the hovercraft back to Dover where they were the third car to leave the boat, at about 5.10 pm (GMT). According to Mr Andrews, there was a white Transit van in front packed with boxes of 5,000 cigarettes, which Customs inspected and let pass. Customs cannot verify this, but it is common ground that Mr Andrews was stopped and questioned. He was not given any reason for this. Indeed, no reason was given in the Commissioners' evidence before this Court, and no reason was given during the course of the hearing itself.

He was open about the tobacco products and alcohol in the car. All three were further questioned, and their goods were confiscated. Miss Andrews' car was also seized. Although the Customs officers accepted Mr and Mrs

Andrews' accounts that the goods which they had purchased were for their own use, they said that they did not accept Mr Wilkinson's story that his goods were for his own use. They were therefore going to seize all the goods in the car, and the car as well, although Mr Andrews told them that it was his sister's car and on finance.

In his evidence to this Court, Mr Wilkinson has explained, among other things, that he was receiving incapacity benefit. He also smoked 60 cigarettes a day. He had not had a holiday for three years when Mr Andrews invited him to join the day trip to France, and he had never crossed the Channel before. Until 12 months previously, he had been living with his mother, and when he moved out he raised £500 by selling his computer equipment, stereo, video and TV to his brother. He had been able to make savings when he lived with his mother, and he also made savings from the £150 benefits he received every two weeks. He was stocking up for two years, because he was a heavy smoker. He did not drive and he had no plans to travel to France or Belgium again. He says that one of the Customs officers suggested to him that he should go across the Channel every six weeks or so in order to stock up in smaller amounts. It is not at all clear to us how he could have done this.

Mr Andrews said he felt he had been treated like a criminal. When he told the officers that it was a five-hour drive home, he was simply shown the door. The party finally left the Hoverport two-and-a-half hours after they arrived. They eventually got home by public transport at 5 am, about nine-and-a-half hours later, with the help of a neighbour who had to drive down from Widnes to Birmingham to rescue them in the middle of the night. The following day, Mr and Mrs Andrews each wrote to the Commissioners requesting the return of their goods. They followed this up with letters confirming their wish to resist the forfeiture of their goods. On 10th September they received a holding letter in reply. Ten weeks later the Solicitor's Office of Customs and Excise wrote and told them that the Commissioners had decided to return their goods if they still existed, or pay them their market value, but that they still maintained that the original seizure was lawful.

On the same day, Customs Law Enforcement wrote to all three with a Summons of Condemnation to appear in the Channel Magistrates' Court. In their formal Complaint they said that Mr and Mrs Andrews had satisfied officers that their goods were not held or used for a commercial purpose, but they had been seized as liable to forfeiture under section 141 of CEMA because they had been mixed, packed or found with Mr Wilkinson's goods

which were liable to forfeiture. Solicitors who act for Hoverspeed, as well as for the four individual claimants in the present proceedings, then intervened. The condemnation proceedings were stayed pending the outcome of the present applications. Since Mr and Mrs Andrews' goods had been destroyed, a payment of £1,750 to them was authorised.

Miss Andrews also wrote to the Commissioners on 23rd August 2001 to resist the forfeiture of her car. She later withdrew this challenge and made a request for the restoration of the car instead. She pointed out that she was not driving it when it was seized. On 18th October, the Commissioners refused restoration on the grounds that excise goods in excess of the PRO guidelines had been found in the vehicle, and that in willingly lending her vehicle to her brother she had accepted the risks involved. In their view, she should seek redress from the person whose act had caused her loss. Her employers also wrote on her behalf. They drew attention to her exemplary work record and the difficulties which she was experiencing in having to travel to work without her car.

On 22nd November, the Commissioners wrote to Miss Andrews confirming their decision not to restore her car. A very detailed letter from the review officer set out the history. This letter referred to the Commissioners' policy which was in application at the time of the vehicle's seizure. Private vehicles seized as a result of their use in the improper importation of excise goods would not be restored, although a vehicle might be restored to a third party if it had been stolen and the theft had been reported to the police at the time. The review officer was satisfied on the evidence available to her, which she explained, that the officer's conclusion that Mr Wilkinson had failed to rebut the presumption of commerciality was a reasonable one. The decision letter concluded:

"Any other excise goods found with his were liable to forfeiture by virtue of section 141(1)(b) of the 1979 Act which I have mentioned above and the vehicle used to transport them was equally liable by virtue of section 141(1)(a) of the same Act. I am satisfied that they, too, were properly seized.

It remains for me to determine whether or not the seized item(s) should have been restored.

The crux of your disagreement with Customs is the retention of your car and I have gone through what you have written to decide whether or not the over-arching policy of non-restoration should not have been applied. In

essence I take your argument to be that as you were not there and none of the goods were for you, the policy should indeed be waived. That, however, is not the perspective of the Commissioners.

You offered a loan of your car as your brother's was damaged in an accident. The purpose of the loan was to go to the Continent to buy excise goods. By placing your car in the charge of Mr Andrews, you placed an onus upon him and those with him not to abuse your trust. One of them did. It is essentially the position of Customs in circumstances such as yours that it is to that person whom you should turn for redress. The seizure and retention of the car is due to the use which was made of it and [this is] not dependent upon any direct involvement on your part.

Given the ready access to quantities of cheap excise goods on the Continent, you took a risk that those using your car would not be tempted to go beyond the parameters of own-use cross-border shopping. I am satisfied that this is what Mr Wilkinson did and that the outcome in relation to your car was in line with policy and treats you no more leniently or harshly than anyone else in your circumstances. I cannot conclude that refusal to restore it was an unreasonable decision. .....

..... I have to advise you that the decision which you are contesting has been confirmed. The car will not be restored to you."

The car has remained in storage. Miss Andrews has made the remaining three hire purchase payments on it. Her appeal to the VAT and Duties Tribunal (see para 136 below for the procedure) against the review decision awaits the conclusion of these proceedings. In the meantime, her travel to work, her ability to shop, and her social life have all been adversely affected by the loss of her car. She often finishes her night shifts in the middle of the night. There is no public transport available at that hour, and it takes 45 minutes for her to walk home.

Even if these proceedings had not delayed matters, it would have been many months before the condemnation proceedings in respect of Mr Wilkinson's goods and, more inconveniently, the proceedings in respect of Miss Andrews' car, were concluded.

In their witness statements, Mr and Mrs Andrews say that they will never use Hoverspeed again.

The Claimants' Arguments

The Claimants argued that the legal position was as follows:

- The Commissioners had no *general* powers to stop and search individuals on their entry into the United Kingdom for excise duty purposes. Such powers were inconsistent with the creation of the internal market on 1st January 1993 unless they were grounded in specific concerns about specific individuals.

- Excise duty was chargeable on goods imported from other Member States where national excise duty had already been paid *only* where such goods were held in the United Kingdom "for commercial purposes". In general, excise goods were not subject to duty on importation from other Member States.[2]

- Article 8 of Directive 92/12/EEC was essentially irrelevant to the question of whether such goods were chargeable to UK excise duty, its scope and purpose being limited to imposing an obligation on *other* Member States, where the goods were purchased by private consumers, to ensure that chargeable duty was *paid* in that other Member State.[3]

- Article 9(1) imposed a straightforward condition for chargeability on goods imported from other Member States, that the goods were held in the United Kingdom "for commercial purposes".

- Article 9(2) applied where a Member State sought to establish that goods bought subject to duty in another Member State in accordance with Article 8 were in fact goods also subject to UK excise duty on the basis that the condition laid down in Article 9(1) was satisfied. The effect of Article 9(2) was to *require* the Commissioners to apply five specific criteria to determine that issue, and to *permit* the Commissioners to use specified minimum guidelines "solely as a form of evidence" in support of their findings on quantity.

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2 See in particular recital 19 to the Directive, which made the general *abolition* of duty clear.

3 The United Kingdom was of course equally obliged by Article 8 to ensure that duty was paid on retail purchases made by consumers at UK outlets.

- The ALDA, TPDA and PRO systematically failed to implement Directive 92/12/EEC in that *all* imported excise goods were *prima facie* subject to UK duty, including those from other Member States, whereas the clear intention of the Directive was to *abolish* duty on imports from other Member States, subject (i) to the specific regimes for commercial imports and reimbursement established by Articles 7 and 10 of the Directive and (ii) to the punitive double taxation regime established by Article 9(1) for goods held "for a commercial purpose" within the United Kingdom without satisfying the procedures and formalities laid down in Articles 7 and 10.

- Since 2000, this failure to implement the Directive had been greatly aggravated by two further infringements of Community law in relation to (i) the checking of individuals at the UK border on "generic" rather than individualised grounds;[4] and (ii) seizure and retention of goods and vehicles as part of an increasingly severe and automatic policy intended to punish and deter "smugglers".

- The checking policy, particularly where it involved systematic checks on entire ferry-loads of passengers, so-called "filtration" exercises, was in flagrant disregard of the principles of the internal market, which had required the abolition of Customs' posts and time-consuming Customs' procedures for internal traffic since 1st January 1993, as the UK Finance (No. 2) Act 1992 had plainly recognised.

- In relation to passenger luggage, the checking policy was further in breach of Council Regulation (EEC) No. 3925/91, which precluded checks on luggage on inter-State maritime travel unless justified by national criminal law.

- The seizure and non-return policy pursued since July 2000, whereby goods and vehicles were seized and destroyed automatically, was in breach not only of Community law itself, which proscribes disproportionate and discriminatory penalties, but also Article 1 of the First Protocol to and Article 6 of the European Convention on Human Rights.

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4 Cf. recital 10 to the Directive.

- All the above points (apart from "filtration", which was evidenced by other passengers' complaints and by Hoverspeed's own evidence) were illustrated by the individual Claimants' treatment on and since 22nd August 2001.

The Claimants' case was supported by a recent initiative of the EC Commission, which had issued a press release on 24th October 2001, stating its concerns at the current policies being pursued by the Commissioners and indicating its intention to investigate the matter with the United Kingdom pursuant to its powers under the EC Treaty. Similarly, two recent Court of Appeal cases supported the Claimants' cases in respect of Customs' seizure policies:

- *International Roth Gmbh v Home Office* [2002] 1 CMLR 52, in which the UK regime, established by primary legislation, for the seizure and detention of lorries as security for large flat-rate fines imposed for transport of illegal immigrants, was found to be incompatible with Article 1 of Protocol 1 and Article 6.

- *Lindsay v Commissioners of Customs and Excise* [2002] 1 WLR 1766, in which the vehicle seizure and non-return policy of the Commissioners was found to be disproportionate and therefore contrary to Article 1 of the First Protocol (and UK administrative law) in failing to distinguish between goods imported for "commercial" and "non-commercial" purposes.

The Judgment

In substance, the Divisional Court decided all points of principle in favour of the Claimants.

- It found, notwithstanding the fact that several recent Divisional Court and Court of Appeal decisions[5] had proceeded on the

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5 E.g. *R v Customs and Excise Commissioners ex p Mortimer* [1999] 1 WLR 17 (DCt); *Goldsmith v Customs and Excise Comrs* [2001] 1 WLR 1673 (CA); *Lindsay v Customs and Excise Commissioners* [2002] 1 WLR 1766 (CA); but *cf.* the fully reasoned judgment of Stephen Oliver QC in *Hodgson v Commissioners of Customs and Excise* [1997] Eu LR 116, approved by the Court of Appeal, Criminal Division in *R v Travers* (unreported, 9 July 1997, CACD). The Divisional Court plainly accepted the reasoning in *Hodgson* as essentially correct and as demonstrating, on further analysis, the radical inconsistency between the PRO and the Directive: see the very full and systematic analysis of the differences at para. 130 of the judgment.

unquestioned basis that the PRO had given proper effect to Directive 92/12/EEC, that the UK legislation was indeed radically inconsistent with the scheme of the Directive in failing to provide any general exemption from duty for imports from other Member States.[6]

- On checking, it found that there was no *domestic* power to carry out systematic border checks, given the terms of ss.163 and 163A of CEMA and the restrictions on the Commissioners' powers introduced by the Finance (No. 2) Act 1992, s. 4.

- On seizure and non-return, although it accepted that the Commissioners might lawfully *seize* goods (provided that: (i) they abided by their powers in respect of the criteria for chargeability and for checking; and (ii) such decisions were subject to effective judicial scrutiny), it found that the automatic non-return policy was disproportionate and discriminatory.

On the construction of the Directive and the PRO, the Court made the following declaration:

> "The Excise Duty (Personal Reliefs) Order 1992 is incompatible with Council Directive 92/12/EEC and Article 28 of the EC Treaty in so far as:
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> 1. excise goods imported from another Member State (where excise duty has been paid) are additionally chargeable to UK excise duty without it being established that the goods are imported into the United Kingdom for commercial purposes; and
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> 2. a persuasive burden of proof is placed on the individual to prove that the goods are not held for commercial purposes, where such goods are held in excess of the minimum indicative levels laid down in the Directive and in the Schedule to the Order."

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6 It was accepted by the Claimants in argument that s. 3 of CE(GR)A would have empowered the Secretary of State to adopt appropriate measures to give effect to the Directive, probably in the form of a general relief subject to derogation where goods were held in the United Kingdom "for a commercial purpose" (or where no duty had been paid in any other Member State: *cf.* Art. 20 of the Directive).

In relation to checking at the border, the Court stated:

> "the only power available to Customs and Excise officers to stop and search people (or their vehicles) at an internal frontier arises if there are reasonable grounds to suspect one or other of the matters set out in sections 163 and 163A of CEMA. They are not entitled to rely on generalities or trends: there must be reasonable grounds to suspect the person(s) whom they are checking. In the absence of such suspicion on an individualised basis, they have no right to impede Community travellers' movement at the frontier for purposes connected with the collection of excise duty. The powers they use at a frontier must be the same powers as they would use anywhere else within the state for the purpose of ensuring that duty is paid on excise goods chargeable within that territory."

In relation to seizure of goods and vehicles, the Court found:

> "We would ... draw the same distinction as that which was drawn in the *Lindsay* case between the treatment of those who are found to be smuggling for profit and those who are directly or indirectly involved in not-for-profit smuggling. So far as the latter are concerned, the remedy applied by the Commissioners must be proportionate to the activity of which complaint is made. We are not satisfied that the vague exception contained in item 12 of the Commissioners' July 2000 guidance does much more than pay lip service to the important EC and ECHR principle of proportionality, because it gives Customs officers no proper guidance about how to apply this exception in a way of which the courts at Strasbourg and Luxembourg would approve.
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> The hostility shown in Strasbourg jurisprudence to the exercise of wide discretions by executive bodies must be taken into account in the individual decision-making process in these cases. If an executive body with powers as extensive as those accorded to the Commissioners by section 141(1) of CEMA makes it clear to the person against whom it may exercise those powers of the likely consequences if he acts or omits to act in a particular way, and if it then exercises its power in a proportionate manner, then the *Air Canada* case shows that it may well be found to be acting lawfully. On the other hand, Article 1 of the First Protocol to the Convention does not permit a public authority to act in a disproportionate way when forfeiting a person's property, however keen it is on a harsh deterrent policy for the greater public good.

Provided that the Commissioners confine their checks to those individuals about whom there are reasonable grounds for suspicion, such grounds being relevant to those individuals, we see nothing unlawful about their policy of seizing goods or vehicles until such time as an independent court or tribunal can adjudicate on the matter. It is their present policy on restoration which concerns us. They do not purport to treat all absentee owners equally, and they do not purport to give a proportionate response in every case (see *Commission v Italy* [1963] ECR 165 at [177-8] and *Kraus* [1993] ECR I-1663 for relevant principles of EC law). If goods worth £1,000 are seized, the genuine smuggler's car worth £2,000 will also be seized, and both will be forfeited. If goods worth £500 are seized from a "not for profit" smuggler, the absentee owner's car worth £15,000 will also be seized, and both will be forfeited. And the policy discriminates in favour of the absentee owner who is a hiring company and against the absentee owner who is a private individual, although both could have imposed conditions on the terms on which they were willing to hire or lend their goods. It is easier to consider how these principles should be applied in particular cases, however, than to state them in a vacuum."

Unresolved Issues

The only legal points on which the Divisional Court did not specifically make the findings sought by the Claimants were as follows:

- The Divisional Court did not clearly state its understanding of the expression "for commercial purposes". Although it clearly accepted the difference between "commercial" and "non-commercial" drawn by the Court of Appeal in *Lindsay* for some purposes (e.g. paras. 47 "for the non-commercial use of family or close friends", 169 and 187 "the same distinction as that which was drawn in the *Lindsay* case between the treatment of those who are found to be smuggling for profit and those who are directly or indirectly involved in not-for-profit smuggling"), at other parts of the judgment (e.g. paras. 104 and 110) the Court seems to accept that "commercial" has a broader, specialised meaning that is equivalent to "not for own use".

- The Court appears to have overlooked the Claimants' argument that Article 8 of the Directive does not lay down any conditions for "chargeability" at all, so cannot be used as an aid to the construction of the expression "for commercial purposes". This

expression should be given its ordinary meaning, as elucidated by Lord Phillips MR in *Lindsay* (see paragraphs 104-110).

- The Court quashed decisions taken in relation to four individuals, who had been unlawfully stopped and whose goods and car had been seized, but refused to make declarations as to the illegality of their treatment under Community law and the Convention. The reasoning in the judgment on their cases tends to suggest that the basis for the illegality of the decisions resides in the decision to carry out checks on these individuals. This is potentially misleading: see para. 194 of the judgment. The better analysis would be that the underlying illegality of these decisions relates to the terms of the PRO, rather than the decision to stop a particular individual. The effect of this part of the judgment may be to permit the Commissioners to argue that their seizure decisions in other cases were lawful, for instance if they had reasonable grounds for carrying out checks in an individual case, albeit that the PRO was used as the basis for a finding that excise duty was payable.

- The Court made no finding that Article 6 of the Convention was infringed. His Honour Stephen Oliver QC had found in *Gora v Commissioners of Customs and Excise* (21st January 2002) that the jurisdiction of the VAT Tribunal in such cases was sufficiently broad and flexible, particularly in respect of the investigation of disputed facts, that it could satisfy the requirements of Article 6. On that basis, the Article 6 complaints were necessarily more limited than they had been in the *Roth* case, where there were various statutory restrictions on the scope of any appeal against seizure (the Court was also clearly influenced by the fact that the Court of Human Rights had found the UK regime to be compatible with Article 6, even prior to the creation of the VAT Tribunal, in the *AGOSI* and *Air Canada* cases).[7]

- The Divisional Court gave the Commissioners permission to appeal. At the time of writing this short article, it is unclear if and to what extent that permission will be exercised.

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7 See paragraph 147 of the judgment; *Agosi v United Kingdom* (1987) 9 EHRR 1; and *Air Canada v United Kingdom* (1995) 20 EHRR 150.

Conclusion

It is perhaps appropriate to end this paper by what, to the author, was the most refreshing aspect of the judgment. There has been a tendency in recent decisions of the Court of Appeal and the House of Lords to amalgamate Community law and the Convention law into an undifferentiated body of "European law",[8] and to apply a generalised proportionality test as a single, and necessarily subjective, test of legality.[9] By contrast, the Divisional Court here displays a willingness to grapple with the detail of a specific statutory scheme to which the Commissioners must adhere, not at the level of broad generality but in respect of its binding rules of law, and also to recognise the radical implications of internal market legislation such as Directive 92/12:

> "It seems to us that the mindset of those who were responsible for determining these policies has not embraced the world of an internal market where excise goods can move freely across internal frontiers, subject only to checks made when there are reasonable grounds for suspecting that an individual traveller holds alcohol or tobacco for a commercial purpose, and not for his own use." (Para. 193.)

Although the point did not form part of the Claimants' argument, it is clearly implicit in the creation of an internal market that it will become increasingly difficult to maintain widely divergent national policies, in so far as such policies create large commercial incentives for cross-border trade to avoid their effects. The Divisional Court's judgment, which is at least in outline entirely consistent with the EC Commission's concerns (and also with the consistent pattern of consumer outrage at the Commissioners' behaviour, evidenced not only by Hoverspeed but also in the pages of the Daily Telegraph), recognised the paradox of unruly scenes and protracted delays at the UK border, almost ten years after the much-heralded abolition of national border controls.[10]

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8 See, e.g., the judgment of Lord Hoffmann in *R. v Hertfordshire County Council, ex parte Green Industries Ltd.* [2000] 2 AC 412 at 422A.

9 See, e.g., *Gough & Smith v Chief Constable of Derbyshire* [2002] 2 All ER 985 (CA); *cf. Lindsay* itself, where the questions of legality do not seem to have been argued, although Lord Phillips MR comes close to raising them of his own motion in his discussion of the meaning of "for commercial purposes".

10 See paragraph 74 of the judgment.

From a Community law perspective, the answer to the travails of the Commissioners, in seeking to keep its finger in the dyke, is tolerably obvious: to abandon the attempt and to seek to agree a harmonised approach with our Community neighbours, based on the policy considerations that have weighed heavily with successive UK governments in seeking to use tax policy to limit smoking.[11] Whether such a Communautaire response will be acceptable to the Treasury remains to be seen.

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11 See the latest Commission report "on the structure and rates of excise duty applied on cigarettes and other manufactured tobacco products", COM (2001) 133 final.