

## NATIONAL EXCISE DUTIES AND THE INTERNAL MARKET

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Excise duty has given rise to a number of disputes before the European Court of Justice and the courts of Member-States. Recently, Eurotunnel SA has taken its case, alleging that SeaFrance has been guilty of unfair competition by selling goods duty-free on its cross channel ferries, to the High Court in London, the Tribunal de Commerce in Paris and the European Court of Justice<sup>2</sup>. Then there was the reference in *R v Commissioners of Customs and Excise ex parte: Emu Tabac & Others*.<sup>3</sup> If the English brewers Shepherd Neame Limited ("SNL") have their way, the ECJ will have to consider excise duty once again in a rather different context from that found in earlier cases.

In both *Eurotunnel* and *Emu Tabac* the excise duty legislation of the Community was in issue. In *Eurotunnel* the validity of Directive 91/680/EEC, permitting duty free sales until 30th June 1999, was questioned. In *Emu Tabac* the interpretation of Directive 92/12/EEC, which establishes general arrangements for products subject to excise duty, was considered. In both cases the existence of the internal market is the essential back-drop to the dispute. The ECJ said in *Eurotunnel* that the object of Directive 92/12 is:

"...to ensure that the conditions applicable to the movement of goods subject to excise duty within the internal market without fiscal frontiers are implemented as from 1 January 1993."<sup>4</sup>

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<sup>2</sup> *Eurotunnel SA and Others v SeaFrance* Case C-408/95, judgment given 11th November 1997.

<sup>3</sup> Case C-296/95, Judgment delivered on 2nd April 1998.

<sup>4</sup> Para 7 of the judgment.

It said that the aim of Directive 91/680 was:

"...to ensure that the conditions necessary for the elimination of fiscal frontiers within the Community as regards supplies of goods and services are implemented as from 1 January 1993."<sup>5</sup>

It is clear that the abolition of fiscal frontiers and the single market are seen by the ECJ as essential concepts against which the Community's law in relation to excise duty must be viewed. Unsurprisingly, the single market was a fundamental concept in advancing SNL's case. Its challenge, though, was directed primarily against the activities of the UK as a Member-State.

SNL objected to a 3% increase in excise duty on beer effected by the Finance (No 2) Act 1997 section 8 and claimed that such an increase was illegal. The grounds of its objection would seem likely to apply to the further 3.2% increase in duty on beer announced in the most recent Budget on 17th March 1998 and effective from 1st January 1999. (Both increases were said by the Chancellor of the Exchequer to be in line with inflation.)

The first ground of objection to the increase in duty was founded on Article 5<sup>6</sup> of the EC Treaty which requires Member-States to "...abstain from any measure which could jeopardise the attainment of the objectives of this Treaty." The objective which was relied upon was such further harmonisation of excise duty rates as is necessary to achieve the proper functioning of the internal market. The objective was said to derive, primarily, from Article 99 of the EC Treaty which requires the Council to:

"...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 functioning of the internal market..."

It was said that increasing rates by 3%, even if the increase was in line with inflation, was a measure from which the UK government should have abstained and that, therefore, SNL should have leave to review judicially the raising of duty rates. Naturally enough, SNL referred to a number of articles of the EC Treaty including article 7a, with its well-known definition of the internal market, as well as other relevant legislation and communications from the Commission.

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<sup>5</sup> See para 3 of the judgment.

<sup>6</sup> In the judgment and in this note article numbers applicable prior to the Treaty of Amsterdam are used.

The Court heard that the UK has the fourth highest rate of excise duty in the EU and a rate which is more than seven times the minimum rate and three and a half times the reference rate. Evidence was given on behalf of SNL as to cross-border shopping and smuggling and the Court accepted that the sales of traders close to hypermarkets in jurisdictions with low excise duty rates would be damaged. Interestingly, a Commissioner of Customs and Excise disputed SNL's evidence. The area of dispute is not reported, but it would seem most unlikely that Customs and Excise denied the existence of "bootlegging".

Faced with the submissions of SNL the High Court was clear in its view.<sup>7</sup> There was, it said, no Treaty objective to achieve further approximation of excise rates beyond the minimum rates set out in Directive 92/84/EEC. To say that there was required one to adopt a "maximalist" view of the internal market which, it was noted, was a matter for discussion at the Lisbon Conference. The only legal obligation, in the Court's view, was to comply with Directive 92/84. The submission that there was a legal obligation to abstain from raising rates was, therefore, rejected. The Court noted that market forces would influence the conduct of Member-States in setting the rates of excise duty and was clearly conscious of the important constitutional issues underlying the case, commenting that it "can make no judgment whatever as to how the Government should exercise its fiscal freedom".

As the Court rejected the existence of harmonisation of rates as an objective other contentions on behalf of SNL, including that Article 5 of the EC Treaty has direct effect, were either rejected or did not require decision. For good measure, though, the Court also said, and perhaps with some force, that even if the alleged objective had been established, it would not have been breached since the increase in rates merely preserved divergence through an inflation-only rise.

SNL also contended that, under article 102 of the EC Treaty, the UK government should have consulted the Commission and awaited its recommendation before making the increase because there was reason to fear that the increase would cause distortion. The Court considered that there was no obligation to consult and reserved its position on whether it had the power to declare that there was an obligation. Even if the obligation had been established it would have refused relief as it considered it plain that the Commission had no recommendation to make. Finally, the Court refused to refer the matter to the ECJ. It concluded by characterising the pursuit of the contention that there was an obligation to refrain from raising the rate of duty and to consult the Commission as "the pursuit of a chimera". Leave to apply for judicial review was, accordingly, not granted.

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I am grateful to Mr Michael Beloff QC for a copy of the Court's judgment given on 21st January 1998 and briefly reported in *The Times*, 2nd February 1988. Responsibility for the views expressed in this note is the author's alone.

Disappointing though the result was for SNL the Court of Appeal has subsequently indicated that it will hear its application. SNL will no doubt hope that the Court of Appeal will give more weight to the plain words of Article 99 which expressly require that "the Council *shall*...adopt provisions...for the harmonisation of legislation concerning...excise duties...to the extent...necessary to ensure the establishment and functioning of the internal market..." In its original form Article 99 was not obligatory. In its present form, introduced by Article 17 of the Single European Act in 1986, the intention to impose obligations is clear.

The discomfort that a national court may feel when faced with a challenge to a national government's powers over taxation is understandable. Ideally, Member-State's governments would take the initiative in harmonising excise duty rates. In the absence of action at the EC level, it is not surprising that traders are beginning to look to the courts, and particularly to the ECJ, to ensure that "the conditions necessary for the elimination of fiscal frontiers within the Community...are implemented..."<sup>8</sup> As we have seen, the High Court thought SNL's submissions amounted to the pursuit of a chimera. Although it is unlikely to be very surprised by that approach, SNL could be forgiven for thinking that it is the single market which is chimerical.

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<sup>8</sup>See note 4 *supra*.