

CROSS-BORDER SALES OF EXCISE GOODS IN THE EUROPEAN COMMUNITY

Mark Baldwin¹

Much interest was attracted during the summer of 1995 by the attempts of the suppliers of "Death" cigarettes to resist the UK government's challenges to their arrangements for selling cigarettes free of VAT and excise duty from a base in Luxembourg to private customers in the UK. This Article will examine the relevant Community and domestic law provisions against the background of this litigation (*R v Commissioners of Customs and Excise ex parte EMU Tabac SARL and others*).

The "Death" cigarettes scheme

In essence, the scheme was very simple. A Luxembourg company, EMU Tabac SARL ("EMU"), obtained cigarettes with the brand name "Death" from a factory on the continent and entered into arrangements with a second company, The Man in Black Limited ("the agent"), to sell the cigarettes into the UK market. Transactions took the following form:

- The agent received in the UK, and (acting as agent for the customers) communicated to EMU in Luxembourg, offers to purchase cigarettes. The arrangements between the agent and the customers made it clear that the customer was the principal and the agent was acting as his agent;
- At its discretion, EMU accepted the offers to purchase and communicated its acceptance to the agent (again acting as agent for the customer) by appropriating goods to particular orders and delivering the product together with the receipted copy of the agent's offer document;

¹ Mark Baldwin, Solicitor, Macfarlanes, 10 Norwich Street, London EC4A 1BD
Tel: (0171) 831 9222 Fax: (0171) 831 9607.

- The contract for the sale and purchase of the products was made in Luxembourg and title to the products passed there, although the contract was governed by English Law;
- Transport was arranged by the agent on the customer's behalf. In practice, the agent packaged the goods, which were collected from the agent's premises by DHL and delivered to individual customers.
- A trading agreement governed the relationship of EMU and the agent. Under the agreement EMU maintained a credit account in the name of the agent in respect of all purchases from EMU made by customers via the agent. The agent undertook to pay all receipts from customers directly into bank accounts in London or Luxembourg and guaranteed the payment by return of EMU's monthly credit account statement in accordance with EMU's usual payment terms. Any increases or reductions in the purchase price of the cigarettes in UK sterling caused by exchange rate fluctuations were absorbed by parallel increases or reductions in the agent's own fee to its customers.

Both EMU and the agent were subsidiaries of a Luxembourg company, The Enlightened Tobacco Company, although they had different directors. The Luxembourg offices of the two companies were separate, although in the same building. Most of EMU's sales fulfilled the orders of named individuals in the UK, but the company also sold cigarettes to individual residents of Luxembourg.

Relevant UK Provisions

Under UK Law, it is clear that the purchaser would be liable to duty on cigarettes brought into the UK under the scheme. Section 2(1) of the Tobacco Products Act 1979 provides that "there shall be charged on tobacco products imported into ... the United Kingdom a duty of excise at [a particular rate]" and the Excise Goods (Holding, Movement, Warehousing and REDS) Regulations 1992 set out who is liable and when the liability arises. Under these Regulations, excise duty on tobacco products imported into the UK from another Member State which had been produced or are in free circulation in the Community is due when the goods are imported.

The Excise Duties (Personal Reliefs) Order 1992 provides a relief from duty on importation for "a community traveller entering the United Kingdom ... on excise goods which he has obtained for his own use in the course of cross-border shopping and which he has transported." For these purposes, a "community traveller" is a person who makes such a journey between a Member State and the United Kingdom (other than a person who makes such a journey in a vessel or aircraft in which he travelled from the United Kingdom and from which he has not disembarked outside the United Kingdom) and so this relief would not be available

as far as these arrangements are concerned because there is no importation by a "community traveller".

Community Law

The introduction of the Single Market on 1st January 1993 resulted in a number of fundamental changes to Community VAT law. Other indirect taxes, such as excise duties (generally on, locally imported or manufactured mineral oils, alcohol and alcoholic drinks and tobacco products), were largely unaffected, although directives were adopted on the structure of duties (adopting common definitions for products concerned) and setting minimum (but not target) rates. Rates of duty on similar products vary significantly between Member States, as they always have done, and the advantages (and mischiefs) of cross-border shopping in such circumstances have long been known both in Europe and elsewhere (for example, along the US/Canada land frontier).

Council Directive 92/12/EEC sets out a general framework for products subject to excise duty and the holding, movement and monitoring of those products. In very broad terms, the structure of the relevant provisions of the Directive is as follows:

- Article 6 provides that excise duty becomes chargeable at the time of release for consumption (as defined);
- Article 7 provides that, where products released for consumption in one Member State are held for commercial purposes in another Member State, duty is levied in the second country and the duty charged in the first Member State is reimbursed;
- Article 8 provides that, where products are acquired by private individuals and transported by them, excise duty is to be charged in the country where the goods are acquired;
- Article 9 largely clarifies the foregoing. Paragraph 1 makes it clear that excise duty becomes due where goods are released for consumption in one Member State even though consumption will take place in another Member State. Paragraph 2 indicates how Member States can test whether the products referred to in Article 8 are in fact held for private consumption. Paragraph 3 allows Member States to charge excise duty on mineral oils released for consumption in another Member State if they are transported by or on behalf of private individuals using atypical modes of transport.
- Article 10 provides a special rule for "distance selling", broadly where goods are acquired by persons other than specified classes of traders and "dispatched or transported directly or indirectly by the vendor or on his

behalf". If the goods have already been released for consumption (and so subjected to duty) in the Member State of dispatch, provision is made for repayment of that duty.

Article 5 of the Excise Duties (Personal Reliefs) Order 1992 was designed to give effect to Article 8 of the Directive in the UK. However, that relief is clearly more narrowly drawn than the provisions of the Directive. In particular, the Directive does not contain the restrictions imposed through the narrow definition of "community traveller". EMU and the agent, therefore, argued that, under the doctrine of direct effect they were entitled to have domestic legislation disapplied to the extent that it was incompatible with the clear, precise and unconditional provisions of the Directive, which (they argued) covered the acquisition of goods by a purchaser pursuant to their scheme. It was common ground that Article 8 had direct affect.

The UK litigation, therefore, turned on the interpretation of Article 8 of the Directive and its relationship with Article 10. The particular issue on Article 8 was whether goods brought into the UK under the scheme had been "acquired by private individuals for their own use and transported by them." Is the concept which is expressed in the English language version by the words "transported by them" limited to transport by private individuals themselves, or is it wide enough to embrace transport by an agent?

Decisions in the English Courts

Popplewell J at first instance decided that the use of an agent was not compatible with the application of Article 8 of the Directive. On the basis of the history, purpose and general scheme of the Directive and other language versions of the phrase "transported by them" in Article 8, he saw a "clear distinction ... between the purchase by an individual personally under Article 8 and what is in effect a commercial exercise governed by Article 10".

The Court of Appeal was also prepared to look at other language versions of the Directive in interpreting Article 8² and, as a matter of linguistic construction, tended to the view that the wording of Article 8 requires personal acquisition and transportation. However, in a sufficient number of language versions the text did not rule out the wider meaning and so the Court considered the background to the Directive in reaching its preliminary view that Article 8 did not apply to the arrangements in question.

² The Court of Appeal judgment, given by Schiemann LJ, contains a useful review of the value of other authentic texts of Community instruments and the role of national courts and the European Court of Justice in determining issues where a detailed review of other language texts is called for.

An important factor in the Court's decision was its view that a detailed linguistic review of the Directive alone is not the way to resolve the question whether Article 8 applies to these arrangements. The correct approach, according to Schiemann LJ, is to look at the Directive in its historical context³ as a step on the road to an (as yet imperfectly established) Single Market. Whilst the Directive might have been intended to widen the scope of travellers' exceptions from duty beyond what one might have expected, a number of language versions of the Directive lend themselves naturally to the view that the exception from duty is confined to travellers who personally accompany their goods. The Court noted that other Member States have approached the scope of travellers' exceptions in the same way⁴ as the UK and neither the Commission nor any other Member States have complained about the UK's rules. In commercial reality the Court felt that it was faced with a distance selling arrangement, in which context it noted that there is no policy justification for making the incidence of liability to excise duty depend on whether the vendor or the purchaser arranged transport of the goods.⁵

Some of these approaches to the construction of the Directive (looking at other language versions and paying regard to how other Member States have implemented the legislation in their domestic law) are hallowed by time and it is (of course) legitimate to take policy factors into account in construing a Directive, but Schiemann LJ's list of ten points underlying the Court's decision contains some features whose foundations are not as firm, and displays a tendency to be swayed by assumption as to what is likely to have been the intention of those negotiating and drafting the Directive at a particular time in the development of Community policy, rather than by a detailed review of the language of the provisions in question and the relevant *travaux préparatoires*.

³ The internal market has not yet been fully established. If schemes like this one worked, governments would suffer severe revenue loss (and would have done in 1992 when these provisions were being discussed). It is unlikely that legislation permitting schemes such as this within a short timescale would have been intended, particularly given the starting point (tax in the country of importation with exceptions for travellers).

⁴ The approach of the Member States to a particular provision was considered by the Court in a VAT case, *Skatteministeriet v Henriksen* (Case 173/88) [1990] STC 768 - but, as *Defrenne v SA Belge de Navigation Aérienne* (Case 43/75) [1976] ECR 455 indicates, it is possible for there to be a "Community of error".

⁵ Be that as it may, it is the test the legislators chose and, in drawing up the corresponding VAT provision (Article 28b(B)(1) of the Sixth VAT Directive, Directive 77/388/EEC), other formulations were expressly rejected in favour of this one - see the Minutes of the ECOFIN Council meeting on 18th March 1991 (below).

Questions for the European Court of Justice

The Court of Appeal, although not persuaded by the merits of the appellants' arguments, has referred the following questions to the ECJ:

- "1. Does Directive 92/12/EEC and in particular Article 8 have the effect of precluding the charging of excise duty on goods in Member State A in circumstances where:
 - (i) the goods were acquired for the use of a private individual in Member State A;
 - (ii) they were acquired in Member State B by an agent acting on behalf of the private individual;
 - (iii) transportation of the goods from Member State B to Member State A was arranged by the agent; and
 - (iv) the individual does not himself travel with the goods from Member State B to Member State A?
2. Where a scheme has been commercially devised and marketed whereunder purchases made in Member State B for the personal use of a private individual in Member State A are made by an agent for that individual and those purchases are transported from Member State B to Member State A as a result of arrangements made by such an agent, does Directive 92/12/EEC have the effect of precluding the charging of excise duty on those purchases in Member State A?"

The first of these questions requires the Court to address the scope of Article 8 and the second the relationship between that Article and Article 10.

The First Question: The Scope of Article 8

There are three requirements to be satisfied before Article 8 applies. First, the goods must be "acquired by private individuals". Secondly, the goods must be acquired by those individuals "for their own use". Thirdly, the goods must be "transported by them". Only the third requirement is presently the focus of attention in this case. Particularly when contrasted with Article 10, it seems to the author that this expression could be regarded as imposing:

- a requirement that individual travellers carry (or accompany) back to their home state goods they have personally acquired in another Member State. This is the position of Customs and the intervener in the *EMU Tabac* litigation;

- a requirement that individuals go to another Member State to acquire goods, but thereafter they are free to arrange for the goods to be transported back to their home state however they choose (possibly by the vendor or an associate);
- no requirement other than that the goods are acquired by private individuals (even if they never leave their home state) and not transported to the purchaser's home state by the vendor or a person acting on his behalf. That is the position of the organisers of the "Death" cigarettes scheme.

The first argument in favour of a narrow reading of Article 8 is a linguistic one. Although "transported by them" could encompass the use of an agent in a case such as this, one's natural reaction to that expression in Article 8, particularly when it is compared with the much wider phrase ("despatched or transported directly or indirectly by the vendor or on his behalf") in Article 10, is that it does not include transport by an agent. Secondly, Article 9(2) sets out a number of factors which Member States can take into account in determining whether the products referred to in Article 8 are held for commercial purposes. These include the commercial status of the holder of the products and his reasons for holding them. Arguably, if transport by persons other than the individual claiming the benefit of Article 8 satisfied the requirements of that Article, it could be difficult to operate Article 9(2) in practice.

In favour of a less restrictive approach one could argue that there are examples in this Directive and elsewhere of Community legislation clearly specifying where actual physical transport by individuals is required. For example, Article 28(1) of this Directive confers an exemption for goods supplied in tax-free shops "which are carried away in the personal luggage of travellers taking an intra-Community flight or sea crossing to another Member State".⁶ If the legislators wanted Article 8 to require travellers to accompany their purchases back to their home states, they could easily have imposed this requirement by using language such as "... acquired by private individuals for their own use and carried in their personal luggage ...".

Article 9(3) allows Member States to impose excise duty charges where mineral oils already released for consumption in another Member State are "transported using atypical modes of transport by private individuals or on their behalf". This seems to be a derogation from Article 8, reimposing a liability in the Member State of consumption where an individual traveller brings home more than he needs for the journey in hand (most obviously, if one travels to another Member State in one's car and returns home pulling a trailer full of petrol). Note that Article 9(3)

⁶ Another example is Article 15(2) of the Sixth VAT Directive, which gives a VAT exemption for retail sales of goods "to be carried in the personal luggage of travellers" leaving the Community.

refers to transport "by private individuals or on their behalf". If Article 9(3) is a derogation from a general rule in Article 8, why does it contain the words "or on their behalf" if they are not implicit in Article 8 anyway?

A more fundamental objection to a narrow interpretation of Article 8 is the possibility of double taxation. Where Articles 9 (movement of goods held for commercial purposes) and 10 (distance selling) apply to impose a duty charge in a second Member State, provision is made for repayment of duty in the first Member State. There is no such provision where the requirements for the operation of Article 8 are not satisfied on a cross-border movement of excise goods by an individual unless a trigger for the duty liability in the second Member State can be found in Article 9 or Article 10. If the narrow interpretation of Article 8 is correct, a liability to double duty will arise in a number of essentially private transactions. For example, on visits to my (regrettably hypothetical) house in France, I buy wine which I store in the cellar. My cellar in the UK looks empty in the run-up to Christmas and so I telephone the housekeeper and ask her to arrange for a couple of crates to be shipped to the UK. On Customs' narrow reading of Article 8, UK duty (with no remission for French duty paid) will arise. The same position would obtain if my wife went over to bring the wine back. Customs' argument is that Article 8 avails only a traveller who both acquires and personally transports the wine, and in this example a man buys the wine and a woman carries it back.

One can also dispense with the argument based on Article 9(2). This provision includes among the factors to be taken into account in determining whether goods are held for a commercial purpose factors such as the commercial status of the holder of the goods and his reasons for holding them. It is said that this suggests that the authorities should be able to interrogate travellers at frontiers. Leaving aside the fact that, except where the UK is concerned, most internal frontiers in the Community have effectively disappeared (a process set in train by the Single Market reforms of which this Directive is one), the factors listed in Article 9(2) are wide enough to allow a commercial carrier to be interrogated at a frontier in sufficient detail to enable the authorities to ascertain that he is carrying goods for a number of individuals, each of whom otherwise satisfies the criteria of Article 8.

In the author's view, Article 8 is wider in scope than Customs contend and may well apply to cross-border movement of goods by an agent of the purchaser. How much wider Article 8 is and whether it rescues the "Death" cigarettes scheme from the grave depends on its inter-relation with Article 10.

The Second Question: Does Article 10 apply?

Although cast in rather broader terms, the second question essentially asks whether these arrangements constitute "distance selling" within Article 10 of the Directive

(broadly, sales of excise goods to, *inter alios*, private individuals where the goods are "dispatched or transported directly or indirectly by the vendor or on his behalf"). Schiemann LJ in the Court of Appeal clearly thought they did (or at least ought to). His final reason for instinctively wanting to find against the applicants was as follows:

"It is clear from Article 10 that in many cases of distance selling to private purchasers of goods for their own use the tax will be payable in the country of destination. As a matter of commercial reality, as opposed to the legal forms of the transactions involved in the scheme, there is not any significant difference either from the point of view of the seller or of the ultimate customer between a traditional mail order operation and the scheme. No policy justification for making the test for identifying which Member State should be the beneficiary of the duty depend on whether it was the vendor or the purchaser who arranged the transport was suggested by any of the parties before us nor can we think of any."

There is a similar distance selling rule in Article 28B(B) of the Sixth VAT Directive, which deems a supply of goods to be made in the Member State to which goods are dispatched (technically, the Member State where the goods are when the dispatch or transport to the purchaser ends) where goods are "dispatched or transported by or on behalf of the supplier from a Member State other than that of arrival of the dispatch or transport". In contemplating the meaning of the phrase "dispatched or transported by or on behalf of the supplier" and its near identical equivalent in Article 10 of the Directive, it may be worth recalling that the original Commission proposals in 1990 would have restricted the VAT distance selling rules to mail order transactions, which would have been elaborately and precisely defined. But, at its meeting on 18th March 1991, the ECOFIN Council decided to subject intra-Community distance sales to private individuals to tax in the country of destination. The published Minutes of that meeting contain the following passage:

"Distance selling will be defined according to whether the vendor is responsible for the carriage of goods, i.e. *the sale is made on the basis that the goods are delivered to the purchaser residing in a Member State other than that whence the goods came.*"

The words I have emphasised may hold the clue to the meaning of the phrase "dispatched or transported by or on behalf of the supplier".⁷ The expression

⁷ One must, of course, act with care when having recourse to *travaux préparatoires*, which may not always be of the highest value or even in fact be admitted or taken into account by the Court. Nevertheless, this evidence of a clear shift in language and the reason for that shift is, in the author's view, not something which should be ignored given that it has been published.

points not so much at who organises the transport *per se*, but whether the goods are sold on the basis that the vendor or someone acting on his behalf will organise the transport. In the round, is the sale of goods complete when the seller passes title or appropriates goods to the contract in the country where he is based, or is there more to the transaction? Looked at in this light, "Death" cigarettes were "dispatched by or on behalf of the supplier". Although the transporter was employed by the agent, who in law was retained as agent for the purchasers, the corporate relationship between EMU and the agent and their obvious co-operation in the production of what are clearly single transactions involving the sale of cigarettes from Luxembourg to individuals in the UK, can reasonably be expected to lead the European Court to conclude that Article 10 applies to these transactions.

It has been suggested that the key to Articles 8 and 10 lies in the distinction between commercial and non-commercial holding and that Article 10 applies where the consignee holds goods for a commercial purpose in the state of destination (where Article 8 cannot apply). The author doubts whether that view is correct. Article 10 in terms applies to all forms of distance-selling except where the consignees are not in specified categories. The capacity in which the purchaser acquires or holds the excise goods is irrelevant to the operation of Article 10. A more sustainable interpretation, in the author's view based on the overall scheme of the arrangements, is that excise goods attract duty on release for consumption (even if it is known that consumption will be in another Member State - Articles 6 and 9), the duty shifts to another Member State where the goods are held for commercial purposes there (Article 7) or sold into that Member State under "distance selling" arrangements (where the policing regime is more rigorous than Article 7, whether the purchaser is a private individual or a commercial purchaser - Article 10, which is not limited to commercial movements). Article 8 applies to all movements of goods acquired by private individuals other than those which fall within Article 10. The author agrees that it is a fallacy to make too much of the phrase "transported by them", but it is equally wrong (if not more so) to focus on the status of the purchaser in the Member State to which the consignment is dispatched. "Transported by them" should be read in contrast to "dispatched or transported directly or indirectly by the vendor or on his behalf" in Article 10 and excise duty is charged in the country of acquisition where private individuals acquire goods other than by direct selling from another Member State.

In many ways, the more interesting question is not whether the European Court will conclude that Article 10 applies to these transactions but how it will justify that conclusion juridically. Will it prefer a narrower justification, for example that "directly or indirectly by the vendor or on his behalf" must encompass a transaction which all the players in reality conceive as a single transaction for the cross-border sale of goods, or will the Court take the opportunity to pronounce on the effectiveness in Community law of commercially devised schemes which are aimed to reduce or avoid tax or go a step further and consider whether there exists

in Community law a concept similar to the "abuse of law" rules found in Continental jurisdictions?⁸

The Scope of Article 8

After reaching these conclusions, what transactions will Article 8 apply to? Clearly, it applies to transactions where an individual himself travels to another Member State, buys goods there for his own use and brings them back. It will not apply to "distance selling" transactions (to be interpreted as any transaction where goods are bought under arrangements made before or at the point of sale for the supplier to transport the goods back to the individual's home Member State) or to "distance buying" transactions (where the individual appoints a commercial agent to go to another Member State and buy goods for him there and bring them back to his home State) even if the seller is completely unaware of the arrangement (Articles 7(1) and 9(1) will catch an arrangement such as this). It should, however, apply to arrangements where an individual goes abroad, buys excise goods in person and arranges their shipment back via a commercial shipper (even the vendor, as long as the arrangements are made after the point of sale).

Finally, does Article 8 apply to transactions under which a non-commercial agent (friend or relative) acquires the goods and brings them back? One might argue that, as a policy matter, it should not matter for excise duty purposes how (and therefore by whom) goods are transported to an individual's home Member State as long as he has not acquired the goods as or through a commercial person. So, as discussed above, "transported by them" should simply refer to transport arranged by the buyer. But the same may not be true of the requirement that the goods are "acquired by private individuals for their own use". Recalling the

⁸ In *EMU Tabac* the interveners raised, without success, the possibility of the UK anti-avoidance principles in cases such as *WT Ramsay Ltd v IRC* [1981] STC 174 and *Furniss v Dawson* [1984] STC 153 applying. In the author's view these principles can have no place in a Community-wide tax such as VAT (cf *Staatssecretaris van Financiën v Shipping and Forwarding Enterprise Safe BV* [1991] STC 627) or to the application in particular cases of directly effective provisions of other fiscal directives, such as those setting out a broad framework for excise duties. However, in the discharge of its Treaty functions, the ECJ is charged with seeing that "the law is observed" and on this ground has adopted into Community law general legal concepts, such as proportionality, fundamental human rights and the protection of legitimate expectations, to be collected from the laws of Member States. The author would not be surprised in due course - not necessarily in the tax field - to find a general Community law concept of "abuse of law" emerging with general application subject to the provisions of particular pieces of Community legislation. In that context, an interesting question is whether the "Death" cigarettes scheme is an abuse of the law of agency. A more disturbing question would be what else, in other contexts, might be struck down by such a rule.

mischief at which Article 10 is aimed and anticipating an argument that the lofty aims of the internal market have nothing to do with facilitating "armchair cross-border shopping", should we anticipate a requirement being found to be implicit in Article 8 that an individual must exercise another of his fundamental Community freedoms, to travel between countries of the Community and purchase goods (i.e., they must be acquired by the private individual in person) if he is to earn the benefit of Article 8? In the overall context of the Single Market, it is easier to justify a requirement that an individual makes a journey across a Community frontier than that he travels back with his purchases.

Conclusion

Assuming himself to be safely separated from the European Court's judgment in this case, the author would venture to suggest that the Court's answer to the first question will be that, to benefit from Article 8, an individual (or a non-commercial agent, such as a friend or relative) must travel to another Member State and acquire goods there but that how he arranges for those goods to be brought back to his home Member State is of no moment as long as he does not make that arrangement with the vendor before he effects the purchase. As regards the second question, the "Death" scheme (as described in the question) will fall foul of either the suggested requirement for a personal cross-border movement implicit in Article 8 or of Article 10, which must be expected to catch arrangements such as those in question here.