courts as *amicus curiae*, amendments to Regulation 17 or its successor and codification of various *modi operandi* in notices), the proposals will necessarily bring about fundamental problems of regulating the relationship amongst the Commission, national competition authorities and national courts and imperil the uniform application of the law. Whether Commission confidence in the maturity of the system is well founded and whether upon reflection it is sufficient to justify letting the genie out of the bottle remains to be seen.

ROBERT LANE*

## IV. EXCISE, VAT AND CUSTOMS

### *A. Excise and VAT*

One of the major activities of the European Community for achieving its objectives is to establish an internal market characterised by the abolition, as between member States, of obstacles to the free movement of goods, persons, services and capital.[1]

The Community was required to adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992, in accordance with, and subject to, the provisions of the EC Treaty.[2] That aim was substantially achieved, but some measures necessary for the better functioning of the internal market could either not be agreed before that date or, if they had been agreed, could not, for commercial or political reasons, be implemented immediately.

Two such measures which were agreed before 31 December 1992 but which, for commercial or political reasons could not be implemented immediately after that date, concerned measures dealing with the incidence of excise duty and VAT in respect of goods sold in tax-free shops at ports and airports and at the terminals of the Channel tunnel to persons intending to make a journey from one member State to another (an intra-Community journey), or sold to passengers on a ship or aircraft in the course of an intra-Community journey.

There is clearly scope for debate whether the excise duty chargeable on such goods or the VAT chargeable on the supply of such goods should be that of the member State of departure of the passenger or of the member State of his arrival, but it is equally clear that it is anomalous for such goods to be completely free of duty and VAT within an internal market.

However, it was agreed that a further period of time was required after 31 December 1992 before such duty- and VAT-free treatment could be abolished, in order to allow measures to be taken to alleviate both the economic repercussions in the sectors concerned and regional difficulties, particularly in border regions between member States. That further period of time was set, at the outset, to

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1. EC Treaty, Arts.2 (ex Art.2) and 3.1(c) (ex Art.3(c)).
2. *Ibid.* Art.14 (ex Art.7a).

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expire on 30 June 1999.[3] There was some vigorous lobbying by some members of the sectors concerned for an extension beyond that date, but their efforts were unsuccessful. The sectors concerned were principally distillers, brewers, victuallers, operators of tax-free shops at ports, airports and the Channel tunnel terminals and shipping and air lines.

Although the lobbyists were concerned predominantly about the adverse impact on their businesses which they expected would result from the abolition of duty- and VAT-free sales, they were concerned also about the complicated accounting arrangements to which such abolition would give rise in connection with excise. We shall consider some of those arrangements later in this article, but before doing so it is necessary to describe the general background.

Travellers can generally buy on board ships and aircraft goods for immediate consumption (commonly called "stores") and goods for carrying away when they reach their destination (commonly called "merchandise") . It follows that, at tax-free shops, at ports and airports and at the Channel tunnel terminals intending travellers can only buy merchandise.

The law relating to stores was not affected by the changes made on 1st July 1999 and so member States may continue to allow them to be supplied duty-free to travellers making an intra-Community journey.[4] The supply of such stores however has been liable to the VAT of the member State of departure of the ship or aircraft in question since 1st January 1994.[5]

The position for merchandise differs. Merchandise, it will be recalled, can be purchased not only on board a ship or aircraft but also in a tax-free shop at a port, airport or at a Channel tunnel terminal.

3. For excise, the relevant directive is Council Directive 92/12/EEC (1992) O.J. L76/1 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products: the relevant recitals read—"Whereas a certain period of time will be required to take the necessary measures to alleviate both the social repercussions in the sectors concerned and regional difficulties, particularly in border regions, which might arise as a result of the abolition of taxes on imports and exemptions on exports in trade between member States; whereas to that end the member States should be authorized, for a period ending on 30 Jun. 1999, to exempt products supplied, within the limits laid down, by tax-free shops in the context of passenger traffic by air or sea between the member States."

For VAT, the relevant directive is Council Directive 91/680/EEC (1991) O.J. L376/1 supplementing the common system of value added tax and amending Directive 77/388/EEC ((1977) O.J. L145/1)) with a view to the abolition of fiscal frontiers: the relevant recitals read —"Whereas advantage must be taken of the transitional period of taxation of intra-Community trade to take measures necessary to deal with both the social repercussions in the sectors affected and the regional difficulties, in frontier regions in particular, that might follow the abolition of the imposition of tax on imports and of the remission of tax on exports in trade between member States; whereas member States should therefore be authorized, for a period ending on 30 Jun. 1999, to exempt supplies of goods carried out within specified limits by duty-free shops in the context of air and sea travel between member States."

4. Art.23(5) of Council Directive 92/12/EEC (1992) O.J. L76/1 which provides—"Until the Council, acting unanimously on a proposal from the Commission, has adopted community provisions on stores for boats and aircraft, member States may maintain their national provisions on the subject."

5. Council Directive 77/388/EEC (1977) O.J. L145/1 Art.8(1)(c), as replaced by Art.1(4) of Council Directive 92/111/EEC (1992) O.J. L384/47.

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Before 1st July 1999, member States could, but were not obliged to allow limited quantities of merchandise to be sold duty-free[6] and VAT-free[7] to intra-Community travellers. The quantities of merchandise which could be sold to an individual traveller duty- and VAT-free were not to exceed the quantities of goods which a traveller entering a member State from outside the Community was allowed to import free of duty[6] and VAT[7].

Since 1st July 1999 intra-Community travellers can no longer purchase merchandise free of excise[6] or VAT.[7]

The VAT on the supply of such merchandise from a tax-free shop is chargeable in the member State in which the shop is situated,[8] while the VAT on the supply of such merchandise supplied on a ship or aircraft is chargeable in the member State from which the ship or aircraft departs[9] (as for stores supplied to an intra-Community traveller).

The excise position is a little less straight-forward and is perhaps best explained by an example.

Suppose a ship carrying passengers is to sail from member State A to member State B (an intra-Community journey). The excise goods with which the operator of the ship stocks his shop on board can no longer be loaded from a duty-free source. The goods will have to have borne the excise duty chargeable in the member State in which they were released for consumption, say member State A.[9] The goods, having borne that duty can then be sold whilst the ship is in member State A, including its territorial sea and on the high seas (which by reason of the right of innocent passage can be taken to include the territorial sea of any State through which the vessel passes without making port) en route to member State B, without any further excise considerations to trouble the operator.

Such considerations, however, resurface when the ship enters the territorial sea of member State B. The operator of the ship's shop has a choice at this point. He can decide either to shut up the shop and make no sales in member State B (including the territorial sea of member State B) or he can keep the shop open and continue to sell merchandise in member State B (including its territorial sea). His decision as to which of these options to adopt is likely to be influenced by the relative rates of excise duty in member States A and B respectively.

If the rates in member State A are considerably lower than those in member State B he may endeavour to stock his shop only with merchandise subject to member State A's duty and so to arrange his business as to avoid making any of his stock liable to the duty of member State B.

If the ship shuttles between member States A and B the operator of the ship's shop may use a system that not only enables him to avoid member State B's duty but also enables him to trade for the maximum period of time in goods that have borne member State A's duty. So in the present example, having stocked his shop with merchandise in member State A, if he wishes to avoid becoming liable to pay the duty of member State B when the ship enters the territorial sea of member

6. Art.28 of Council Directive 92/12/EEC (1992) O.J. L76/1.

7. Art.28k of Council Directive 77/388/EEC (1977) O.J. L145/1, which was inserted by Art.1(22) of Council Directive 91/680/EEC (1991) O.J. L376/1.

8. Art.8(1)(b) of Council Directive 77/388/EEC (1977) O.J. L145/1.

9. Council Directive 92/12/EEC (1992) O.J. L76/1, Art.6.

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State B he will have to close the shop. His remaining stock will then be treated as moving from member State A to member State A via member State B (transit goods). Such a movement normally requires a detailed procedure to be followed but where, as is the case under consideration, such movements are made frequently and regularly, member States A and B can make a bilateral agreement to authorise a simplified procedure.[10]

The operator will record the quantity of his unsold merchandise at the time he closes the shop on the ship's entry into the territorial sea of member State B. He will keep the shop closed for the remainder of the journey from member State A to member State B, while the ship is docked in member State B and until the ship leaves the territorial sea of member State B on its return leg to member State A. At the point when the ship leaves the territorial sea of member State B, the operator of the shop will again record his unsold merchandise which of course should tally (assuming that he has neither made any sales since last shutting up shop nor taken on more stock in member State B) with his record of his stocktake when the ship entered the territorial sea of member State B on the inward leg. Once the ship has left the territorial sea of member State B the shop can be re-opened.

If on the other hand, on the journey from member State A to member State B, the operator of the shop decides to keep his shop open all the way to docking in member State B, his unsold stock when he enters the territorial sea of member State B will become liable to the excise duty of member State B[11] but he is entitled, subject to complying with the appropriate formalities, to reimbursement of the duty paid on that stock in member State A.[12] He must therefore take stock of his unsold merchandise as soon as he enters the territorial sea of member State B. That merchandise will be liable to the duty of member State B whether or not he succeeds in selling it whilst he remains in the territory (including the territorial sea) of Member State B. On the ship's return from member State B to member State A, the operator of the shop can continue to sell the merchandise (which has now borne the duty of member State B) until the ship enters the territorial sea of member State A when again the shop operator is faced with the option of shutting up shop or staying open all the way till the ship docks in member State A. Depending on which of these options he adopts, the excise position will be, with appropriate modifications, as described above in relation to the journey from member State A to member State B.

A further refinement to all this has been developed. In the example above we have considered the situation where, because the rate of excise duty chargeable on goods is lower in member State A than it is in member State B, the operator of the shop decides to close his shop once the ship has entered the territorial sea of member State B. However, there could well be the situation where the rate of excise duty on certain products (say on tobacco products) is higher in member State A than it is in member State B while the rate on other products (say on alcoholic liquors) is lower in member State A than it is in member State B. In such

10. *Ibid.* Arts.7(7), (8) and (9), as amended by Art.1(2) of Council Directive 94/74/EC (1994) O.J. L365/46.
11. *Ibid.* Art.7(1)
12. *Ibid.*. Arts.7(6) and 22(3).

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a situation the ship's shop operator may wish to arrange things so that his stock of tobacco products is loaded (duty paid) in member State B while his stock of alcoholic liquors is loaded (duty paid) in member State A. By doing this, the operator avoids having to close his shop completely on either the outward leg from member State A to member State B or on the return leg from member State B to member State A: he merely refrains from selling tobacco products when to do so would make those products chargeable to the duty of member State A (i.e. while the ship is in member State A, including the territorial sea of that State) and he refrains from selling alcoholic liquors when to do so would make those goods chargeable to the duty of member State B (i.e. when the ship is in member State B, including the territorial sea of that State). In other words, his stock of alcoholic liquors will be treated as moving from member State A to member State A via member State B and his stock of tobacco products will be treated as moving from member State B to member State B via member State A.

Further, because member States may agree bilaterally to authorise simplified procedures in relation to such transit goods[10] some member States have agreed that if the operator's own electronic point of sale record can be relied upon to identify where each sale occurred then the operator does not have to take stock each time that the ship enters the territorial sea of the member State of destination or leaves the territorial sea of the member State of departure.

In cases where the ship is not merely shuttling between two member States, for example, a ship that makes a journey from member State A to B then to C before returning to A the option of treating the goods as in transit from member State A to member State A via the territory of another member State is not available. This means that on the first leg of the journey from member State A to member State B, as described above, the duty of member State B will become due on all the merchandise in stock on reaching the territorial sea of that State (subject to the right to reimbursement of the duty already paid on the goods in member State A). The operator of the ship's shop may decide not to sell merchandise if member State B's rate is too high to make sales commercially viable but his stock will remain duty paid at member State B's rates until the ship reaches the territorial sea of member State C. At this point the duty of that State becomes due on all the merchandise in stock and a right to reimbursement of the duty of member State B arises. Obviously if the operator of the ship's shop did not sell any merchandise between the time that the ship entered the territorial sea of member State B and the time it entered the territorial sea of member State C all the duty paid in member State B may be the subject of a claim for reimbursement. In practice in most member States the payment and reimbursement of duty will be the subject of accounting procedures that will require payment of only the net liability at predetermined intervals. The same procedures will apply on the final leg of the journey from member State C to member State A.

The position for air flights is the same, save that the references above to the territorial sea of a member State should be construed as references to the air space of that member State and, of course, the "shop" on an aircraft is comprised of a trolley.

10. *Ibid.* Arts.7(7), (8) and (9), as amended by Art.1(2) of Council Directive 94/74/EC (1994) O.J. L365/46.

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These new procedures have been in place only since 1st July 1999. The early indications are that they are working effectively. That is very much to the credit of the operators concerned, the Commission and the tax authorities of the member States all of whom co-operated to make the overnight changes from the duty- and VAT-free régimes to the duty- and VAT- payable régimes as smooth as possible.

### *B. Customs*

*Community Transit*

For a number of years there has been disquiet over the deficiencies of the Community transit ("CT") system.[13] In December 1995 the European Parliament established a committee of enquiry to examine shortcomings in the system and took evidence from member States and interested parties. The Committee's report, adopted by the Parliament in February 1997, found that the transit system was an antiquated paper based system vulnerable to fraud and that the system had been targeted by organised crime resulting in the loss of several billion ECU in Community and national duties.[14]

In April 1997 in response to the Committee's report the Commission published a communication[15] setting out measures for making customs transit more effective by parallel improvements in the facilities transit procedures offered to operators and in the measures for securing effective protection of national and Community financial interests. Subsequently the Commission made a proposal for a Regulation amending Regulation 2913/92 on the Community Customs Code.[16] Thereafter the Commission made two more amended proposals[17] in response to an opinion and a decision of the Parliament[18] and the common position adopted by the Council.[19] The final product, Regulation 955/99 amending Regulation 2913/92 ("the Community Customs Code") with regard to the external transit procedure, came into force on 10th May this year.

The Regulation introduced the following amendments. Article 91(1) (b) of the Community Customs Code is amended to extend the external Community transit procedure to Community goods in order to prevent the evasion of export

13. The internal Community transit system applies to Community goods moving between a member State and one of the "special territories" of the Community or moving between member States via an EFTA or Visegrad country.

The external Community transit system is a system which enables non-Community goods chargeable with Community Customs duties or CAP charges to move from their point of entry in the Community to their destination without payment of duty and charges. On arrival at a Customs office of destination in the Community the goods may be released onto the Community market (after Customs formalities and any payable duties and taxes have been accounted for) or assigned to another customs procedure.

14. In 1998 the UK National Audit Office reported that HM Customs and Excise estimated, on the basis of transit frauds investigated by that Department, fraud against the UK and other member States' revenues exceeded £321 million in the period 1991–1996. Of that amount 82% related to fraud involving cigarettes. (Report on the Reform of Customs Transit in the European Community HC 566 Session 1997–98.)

15. COM(97)188.

16. Commission proposal O.J. C337, 7.11.97 p.52.

17. COM(98)428 and COM(99)47.

18. O.J. C167, 1 Jun. 1998 O.J. C98, 9 Apr. 1999.

19. O.J. C333, 30 Oct. 1998.

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measures or prevent those measures being manipulated to secure an unjustifiable benefit for those goods. The particular cases and conditions under which these goods will be subject to the external procedure will be determined in accordance with the comitology procedure set out in Article 249 of the Code.

The third recital to the Regulation identifies an insufficiency of definition of the way in which a customs authority is to discharge a transit procedure as regards the place and time at which, and the conditions under which the procedure is to come to an end. The recital also identifies a need to make improvements in discharging transit procedures by operational means and by implementing provisions to ensure discharge in the shortest possible time. This improved definition will serve to clarify the extent of the principal's obligations. Article 92(2) of the Code now places an obligation on the customs authority to discharge the procedure at a time when it is in a position to establish from a comparison of the data available to the office of departure and to the office of destination that the procedure has ended correctly.

The fourth recital to the Regulation identifies a need to define more clearly the legal provisions applicable to transit guarantees, the availability of those guarantees, and the factors to be taken account of in establishing the level of the guarantee. Article 94 establishes the purpose of the guarantee, the 2 guarantees available: individual and comprehensive, the persons to whom and the circumstances under which the comprehensive guarantee may be issued and the circumstances under which the level of obligations may be reduced or waived. Conversely, Article 94 now also makes provision for excluding application of the guarantee waiver to certain goods which are the subject of greater risks, and for temporarily excluding use of the comprehensive guarantee as an exceptional measure in special circumstances or where goods are identified as being subject to large scale fraud. The measures setting out the circumstances in which the guarantee waiver and the comprehensive guarantee do not apply will fall to be determined in accordance with the comitology procedure mentioned above.

The sixth recital identifies a concern over the compatibility of simplified national, bilateral and multilateral transit procedures with Community transit procedures. Whilst acknowledging the benefit of these procedures to operators the recital points up the need for greater transparency of the procedures. Article 97(3) provides for these procedures to be communicated to the Commission.

The eighth recital acknowledges that although the Code identifies the place at which a customs debt arises it does not place any obligation on the Customs authority responsible for that plan to recover the debt. Article 215 repairs that omission and also establishes a sequential order of rules for establishing the place at which a customs debt is incurred. Amendments have also been made to Commission Regulation 2454/93 which contains the provisions implementing the Code.[20]

Commission Regulation 502/99,[21] makes provision for the computerisation of the transit procedure. It enables customs authorities to authorise lodging of a declaration or particular details by means of disc or magnetic tape, and exchange

20. O.J. L253, 11 Oct. 1993, p.1.
21. O.J. L65, 12 Mar. 1999, p.1.

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of information by similar means in a coded form where appropriate. It creates a particular type of declaration. A person wishing to meet the conditions for authorisation as an authorised counsignor must, apart from meeting the conditions in Article 399 of the Implementing Regulation, also have the capability to lodge a transit declaration and communicate with a customs authority using data processing techniques. Information exchange between customs authorities administering the transit procedures is to take place by means of computer.[22] Those authorities are required to establish and maintain adequate security arrangements for the effective, reliable and secure operation of the transit system and to inform each other of suspected breaches of the system.[23] The eighth recital to the Regulation refers to the application of Directive 95/46 on the protection of individuals with regard to the processing of personal data.

Similar amendments to those made by Commission Regulation 502/99 have been made to the Convention on the common transit system[24] so as to maintain an alignment between the rules of the Community transit system and the common transit system which provides for transit between the Community, EFTA and Visegrad countries. Decision 2/99 requires the Contracting parties to use a common communications network for exchange of information.[25]

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22. Art.388a.

23. Art.388c.

24. The Convention of 20 May 1987 on a common transit system (O.J. L266, 13 Aug. 1987, p.2) was amended by Decision No.1/99 of the EC/EFTA Joint Committee on Common Transit.

25. Decision No.2/99 of the EC/EFTA Joint Committee on Common Transit (O.J. L119, 7 May 1999, p.53.)

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