CURRENT DEVELOPMENTS

EUROPEAN COMMUNITY LAW

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I. Customs, Excise Duties and Value Added Tax
II. Agriculture, Fisheries and Environment
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I. CUSTOMS, EXCISE DUTIES AND VALUE ADDED TAX

A. VAT

1. The common VAT system (definitive system)

The last note[1] on this subject recorded that the Commission's proposals for the definitive VAT system (initially envisaged to be presented before 31 December 1994) were still awaited.

The Commission has now concluded that the preparation of such proposals is such a complicated task that it has produced a work programme[2] which it intends to follow between mid-1996 and mid-1999 for the purposes of presenting suitable proposals for shifting over to a new common system of VAT which is suited to the Single Market.

The provisional timetable for the programme is in five phases, as follows:

Phase 1: Preparatory work—late 1996

(1) Adoption by the Council before 31 December 1996 of the Commission's proposal of 20 December 1995 for a minimum standard rate of VAT of 15 per cent and a maximum rate of 25 per cent.[3]
(2) Proposals to be put forward by the Commission for the status of the VAT Committee[4] to be changed from an advisory committee into a regulatory

* This section covers at half-yearly intervals developments over the preceding two to three years in selected areas of the law of the European Union. Notes I and III update notes on the same subjects in the July 1996 issue of the I.C.L.Q. (Vol.45, Part 3, pp.736–749); Notes II and IV follow up the notes which appeared in January 1996 (Vol.45, Part 1, pp.226–235).

1. (1996) 45 I.C.L.Q. 736–740.

2. COM(96)328, Brussels, 10 July 1996—A Common System of VAT: A Programme for the Single Market.

3. In the event, the Council did not adopt any maximum rate but did continue the minimum rate of 15% provided for by Art.12(3)(a) of Council Directive 77/388/EEC (1977) O.J. L145/1 (the Sixth VAT Directive) as amended by Art.1(7) of Council Directive 92/111/EEC (1992) O.J. L384/47, for a further two years expiring on 31 Dec. 1998, by Council Directive 96/95/EC (1996) O.J. L338/89.

4. The VAT Committee was set up under Art.29 of the Sixth VAT Directive. The Com-

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committee whose task would be, by delivering opinions by a qualified majority, to assist the Commission in exercising its powers to implement Community legislation on VAT.

(3) Proposals to be put forward by the Commission for improving the arrangements on mutual assistance on recovery.

(4) Proposals to establish a new spirit of administrative co-operation between member States.[5]

Phase 2: Presentation of the work programme—mid-1996. Strangely, the Commission listed phase 2 of the programme after phase 1, which was scheduled for late 1996 (see above).

Phase 2 was to involve the presentation by the Commission to the Council and the European Parliament of:

(1) the broad lines of the new common system of VAT which the Commission was contemplating; and

(2) the work programme the Commission intends to follow with a view to achieving the objectives set.

Phase 3: General principles of VAT—first package of formal proposals—mid-1997. The Commission was to present its proposals concerning the broad general principles governing the operation of VAT and its essential features.

The proposals will relate to:

(1) determination of the physical scope of the tax, including the precise definition of taxable transactions; uniform definition of the supply of goods; the concept of the supply of services; the fact that the supplies are made for consideration; the precise determination of the territorial scope of the tax;

(2) definition of the concept of the taxable person for VAT purposes, including reviewing the VAT status of public bodies and the consequences of treating them as non-taxable persons;

(3) determination of the taxable amount for taxable transactions;

(4) whether exemptions are to be maintained or abolished and, if they are to be maintained, their harmonisation, the consequences of exemption on the right to deduct VAT incurred in making exempt transactions;

(5) the right to deduct; the conditions giving rise to, and governing, the exercise of the right to deduct; procedures, harmonisation of the non-deductibility of certain items of expenditure; deductibility of certain items of expenditure; deductible proportion of VAT incurred in relation to exempt transactions or transactions outside the scope of the tax.

mission has proposed (Brussels, 25 June 1997, COM(97)325 final, 97/0186(C.N.S.)) a Council Directive amending Art.29, so as to create a regulatory committee to assist the Commission in implementing EC legislation on VAT. It is proposed that this should be done in accordance with the procedure provided for in Art.2III(a) of Council Decision 87/373/EEC (1987) O.J. L197/33.

5. The Commission's proposal for a European Parliament and Council Decision adopting an action programme (the FISCALIS programme) for the reinforcement of the indirect taxation systems of the internal market (Brussels, COM(97)175) was adopted on 2 Mar. 1998.

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(a) Late 1997. The Commission was to propose a second round in the approximation of member States' VAT rates.

There has been some slippage in the Commission's timetable in relation to phases 2 and 3. The Commission's current efforts appear to be concentrated on those areas of VAT which have been highlighted for action by the work of the SLIM II VAT Team, one of the teams established under the SLIM initiative described *infra* Section A.3. Thus, proposals are expected soon on changes to the scheme provided by the Eighth VAT Directive,[6] which relates to refunds of VAT incurred by businesses in member States other than that in which they are established. Proposals are also expected on improving the arrangements for mutual assistance on recovery of VAT, on the right to deduct and on some of the other general principles of VAT.

In the meantime, under existing agreements, the current EC VAT system will continue automatically in the absence of the adoption of a directive to introduce a new system.

Phase 4: Scope and place of taxation—second package of formal proposals—mid-1998. The Commission will present proposals relating to:

(1) the definition of the territorial scope of VAT;
(2) the place of taxation for transactions falling within the scope of VAT;
(3) Community-wide organisation of the control of taxable persons carrying out taxable transactions in the Community. These proposals will include provisions as to the obligations of taxable persons and as to how, and by which tax administration, they will be controlled.

Phase 5: Reallocation of revenue between member States and overall finalisation of the system—late 1996 to mid-1999. Since (under the Commission's programme) revenue will no longer be allocated between the member States by the tax systems, the Commission states that special machinery and the necessary statistical measures will have to be set in place for ensuring that member States receive a level of revenue commensurate with consumption within their territory.

According to the Commission's programme, consideration will also be given to whether the special schemes, such as for small firms, farmers, second-hand goods and travel agencies, should be maintained. Transitional measures will have to be established for changing from the present system of taxation, generally, in the country of destination to the new system of taxation in the country of origin (i.e. where the supplier is established). Finally, harmonisation of VAT rates, begun in 1995, will have to be implemented. The Commission's programme is that, in late 1998, it will present its proposals relating to:

(1) the machinery for allocating the tax revenue between member States;
(2) special schemes (i.e. their abolition or harmonisation); and
(3) transitional measures.

The Commission will present its proposals relating to the final round in the harmonisation of rates and any remaining proposals necessary for introducing the new common system of VAT in mid-1999.

6. Council Directive 79/1072/EEC (1979) O.J. L331/11.

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The Commission envisages that there will be at least two years between adoption by the Council of the various proposed directives and the implementation of those directives. This length of time would be necessary to enable traders and tax administrations to introduce the new system smoothly.

2. *Telecommunications—place of supply*

The basic rule for the place where a supply of services is treated as taking place is where the supplier has established his business, or has a fixed establishment from which the service is provided or, in the absence of either of those, the place where he has his permanent address or usually resides.[7] Historically, supplies of telecommunication services were taxed in this way.

Technological developments and liberalisation of the international telecommunications market now enable suppliers of telecommunication services to provide their services in countries other than their own. Thus, the basic rule disadvantaged suppliers of such services who were established in the Community in two ways. First, the supply of telecommunication services to EC consumers by suppliers established outside the Community was not liable to VAT within the Community. Second, EC-based suppliers of telecommunication services were always deemed to have made their supplies within the Community, even when they supplied such services to non-EC customers. (This second disadvantage could be mitigated where a non-EC customer qualified for a refund of VAT.[8])

To combat these problems, which were common to all 15 member States of the Community, each member State was granted a derogation[9] authorising it, in respect of telecommunication services supplied on or after 1 January 1997, to provide, in specified circumstances, that the supplies should be treated as made in the place where the *customer* (as opposed to the supplier) has established his business, or has a fixed establishment at which the services are received, or, in the absence of such a place, where the customer has his permanent address or usually resides.[10]

7. Art.9(1) of the Sixth VAT Directive (1977) O.J. L145/1.

8. A taxable person not established in EC territory may be entitled to a refund of VAT incurred in the EC under the 13th Council Directive on VAT, 86/560/EEC (1986) O.J. L326/40.

9. The derogations were published as Council Decisions 97/200/EC (1997) O.J. L86/5 (Belgium); 97/201/EC (1997) O.J. L86/7 (Denmark); 97/202/EC (1997) O.J. L86/9 (Germany); 97/203/EC (1997) O.J. L86/11 (Greece); 97/204/EC (1997) O.J. L86/13 (Spain); 97/205/EC (1997) O.J. L86/15 (France); 97/206/EC (1997) O.J. L86/17 (Ireland); 97/207/EC (1997) O.J. L86/19 (Italy); 97/208/EC (1997) O.J. NL86/21 (Luxembourg); 97/209/EC (1997) O.J. L86/23 (Netherlands); 97/210/EC (1997) O.J. L86/25 (Austria); 97/211/EC (1997) O.J. L86/27 (Portugal); 97/212/EC (1997) O.J. L86/29 (Finland); 97/213/EC (1997) O.J. L86/31 (Sweden); 97/214/EC (1997) O.J. L86/33 (UK).

10. This change of place of supply is achieved by treating telecommunication services as services to which Art.9(2)(e) of the Sixth VAT Directive applies. That para. in Art.9 makes the supply of the various services described in it when the services are performed for customers established outside the EC, or for taxable persons established in a different member State to that of the supplier, to be where the customer has established his business, or has a fixed business establishment to which the service is supplied or, in the absence of such a place, the place where the customer has his permanent address, or usually resides.

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Member States which exercised their derogation were also required to treat a supply of telecommunication services which would otherwise be treated as made outside the Community (for example, a supply by a non-EC supplier to an EC non-taxable customer) but are used and enjoyed in their member State, as taxable in that country.[11]

Each derogation applies also to prepayments made in respect of telecommunication services paid for before the date of implementation by the member State concerned, in so far as the prepayments cover supplies of telecommunication services performed after the date of implementation.[12] Each derogation applies until 31 December 1999 or, if a directive altering the place of taxation of telecommunication services enters into force at an earlier date, until that date.[13]

3. *Simpler legislation for the Single Market (SLIM)*

The SLIM initiative was launched in May 1996, with the aim of identifying ways of simplifying legislation relating to the Single Market. It covers both Community legislation and harmonised national legislation. The key focus of the SLIM VAT Team was on the identification of measures which would ease burdens on businesses in the short term by eliminating "excessive formalities". As a result, the team has produced a series of recommendations to deal with identified "problem" areas, the majority of which require further implementation work to be done.

The Commission's position is that it intends to:

(1) propose, during 1998, a reinforcement of mutual assistance on recovery of outstanding VAT;
(2) propose legislative measures to ease the requirements on tax representation in other member States;
(3) consider the procedures enabling taxable persons to recover VAT they have incurred in another member State;
(4) conduct, during 1998, a study on electronic invoicing;
(5) examine the time needed for VAT refunds within the Community;
(6) propose the harmonisation of entitlement to deduction of VAT, and a study on the VAT system applicable to small and medium-sized enterprises.

Developments in these areas will be reported in future editions of these notes.

B. *Customs*

1. *Amendment to the Community Customs Code*

A previous note[14] recorded the coming into force of the Community Customs Code.[15] It has been subject to an amendment with effect from 1 January 1997.[16] Two of the changes brought about are mentioned here.

11. See Art.1 of each of the derogations mentioned *supra* n.9 and Art.9(3)(b) of the Sixth VAT Directive.
12. See Art.2 of each of the derogations mentioned *supra* n.9.
13. See *idem*, Art.3.
14. (1995) 44 I.C.L.Q. 224–225.
15. Council Reg. (EEC) No.2913/92 (1992) O.J. L302/1.
16. Council Reg. (EEC) No.82/97 (1997) O.J. L17/1.

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First, slight alterations have been made to the customs territory of the Community to include the Åland Islands[17] and to exclude San Marino.[18]

Second, pursuant to the Uruguay Round Agreement on rules of origin[19] there has been introduced into the Community Customs Code a procedure for an importer or exporter of goods to obtain a binding decision from the customs authorities as to the origin of goods. This is known as a "binding origin information".

Provided that the conditions laid down are fulfilled, the holder of a valid binding origin information issued by any customs authority in the Community may rely upon it as determining the origin of goods subsequently imported into, or exported from, anywhere in the customs territory of the Community.

The binding origin information procedure is additional to the similar procedure already applying to the classification of goods, known as "binding tariff information".

2. Management of preferential tariff arrangements

The Community has entered into a number of agreements with third countries, which permit the import into the Community of goods qualifying as originating from those countries at a preferential tariff rate, often subject to a quota. There are also similar preferential tariff arrangements granted autonomously by the Community. In order to qualify for the preferential tariff rate, the declaration for free circulation within the Community of the goods must be accompanied by certificates of origin, authenticated in the third country concerned. These certificates are frequently provided to the importer by a third-party manufacturer of the goods. It may happen that a certificate is, in fact, inaccurate or otherwise invalid, but it has been relied upon in good faith by the importer in making the customs declaration. Instances where customs authorities take post-clearance recovery action against the importer in respect of the difference between the preferential rate of duty and the full rate in circumstances such as this have given rise, not only to a series of cases before both the Court of First Instance and the European Court of Justice,[20] but also to a request from the Council to the Commission pursuant to Article 152 of the EC Treaty, to carry out a study with a view to finding an overall solution to various problems which have arisen in the application of preferential customs arrangements.[21] In its study[22] the Commission emphasises the significance of these

17. Consequent upon a declaration made by the Republic of Finland, in accordance with Art.227(5) of the EC Treaty. This Art. was amended by Art.28 of the Act of Nordic and Austrian Accession (1994) O.J. C241/9.

18. Consequent upon an interim agreement on trade and customs union between the EEC and the Republic of San Marino of 27 Nov. 1992 (1992) O.J. L359/14.

19. (1994) O.J. L336/22.

20. Judgment of 14 May 1996 in joined Cases C-153/94 and C-204/94 *The Queen* v. *Commissioners of Customs & Excise, ex p. Faroe Seafood Co. Ltd and Others* [1994] E.C.R. I-2465; judgment of 17 July 1997 in Case C-97/95 *Pascoal & Filhos Lda* v. *Fazenda Public* (not yet rep.); judgment of 19 Feb. 1998 in Case T-42/96 *Eyckeler & Malt AG* v. *Commission of the European Communities* (not yet rep.). Pending cases include T-186/97, T-191/97, T-192/97, T-210/97, T-211/97, T-216/97, T-218/97 (televisions from Turkey) and T-50/96 (beef from Argentina).

21. Decision No.96/C-170/01 of 28 May 1996 (1996) O.J. C170/1.

22. COM(97)402.

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preferential tariff arrangements, both to the external policies of the Community and in dealings by traders. It also emphasises the significant impact of fraud and irregularity upon these arrangements. By way of solution, the Commission advocates strengthening measures across the board, such as simplification of the legislation, closer monitoring of the arrangements in the beneficiary countries, early notification to importers of doubt as to the validity of origin certificates, and encouragement for importers to use the binding origin information procedure.

C. Excise

There has been very little by way of significant developments in the area of excise since the last note, apart from the judgment of the European Court of Justice in the case of *The Queen* v. *Commissioners of Customs & Excise, ex parte EMU Tabac SARL, The Man in Black Ltd and John Cunningham, with Imperial Tobacco Ltd intervening*.[23] The case had been referred to the Court by the Court of Appeal, with questions as to the interpretation of the directive on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products.[24] One effect of the directive is that, where an individual travels from member State A to member State B and acquires there goods which have borne (member State B's) excise duty, and he transports them to member State A (or, indeed, to any other member State) for his own use, the goods are not chargeable to the excise duty chargeable on such goods in member State A (or such other member State to which they are transported).

The scheme devised by EMU and the Man in Black was elegant in its simplicity but, in the event, proved to be ineffective in achieving its objective. The objective was that an individual in a member State having a high rate of excise duty on tobacco products (member State A) would be able to enjoy the benefit of acquiring such products from a member State having a low rate of duty (member State B) without needing to go to the trouble of travelling there: it would all be done by his appointing the "Man in Black" as his agent to acquire the goods for him from EMU in member State B, and transport them for him to member State A. The sponsors of the scheme relied on the maxim of Roman law *qui facit per alium facit per se*, meaning that a person acting through an agent must be treated as if he himself were so acting. The Court rejected that argument on three grounds. First, the Community legal order does not, in principle, aim to define concepts on the basis of one or more national legal systems, unless there is express provision to that effect. Second, the maxim derives from the law of obligations and it does not necessarily fall to be applied in the sphere of fiscal law, where the objectives are of a quite different nature. Lastly, the directive expressly provided the situations where an agent could be used (and this was not one of them). Thus, the scheme failed in its objective of avoiding the charge to duty on such goods when they were transported to member State A.

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23. ECJ Case C-296/95; the Advocate General's opinion was delivered on 17 Apr. 1997 and the judgment on 2 Apr. 1998.

24. Council Directive 92/12/EEC (1992) O.J. L76/1, as amended by Council Directive 92/108/EEC (1992) O.J. L390/124.

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