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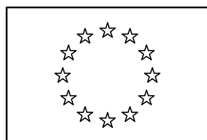

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels,
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**COMMISSION REPORT TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE**

**ON THE APPLICATION OF ARTICLES 7 to 10 OF DIRECTIVE 92/12/EEC**

Proposal for a

**COUNCIL DIRECTIVE**

**amending Directive 92/12/EEC on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products**

**(submitted in application of Article 27 of Directive 92/12/CEE)**

FR

(submitted by the Commission)

# TABLE OF CONTENTS

RAPPORT DE LA COMMISSION AU PARLEMENT EUROPEEN, AU CONSEIL ET AU COMITE ECONOMIQUE ET SOCIAL EUROPEEN CONCERNANT L'APPLICATION DES ARTICLES 7 A 10 DE LA DIRECTIVE 92/12/CEE ..... 5

1. Introduction ..... 6

2. Community provisions on the intra-Community movement of products already released for consumption in a Member State ..... 8

2.1. Background ..... 8

2.2. Procedure ..... 8

2.3. Evaluation of how Articles 7 to 10 are used ..... 9

2.3.1. Volume of trade ..... 9

2.3.2. Manufactured tobacco ..... 10

2.3.3. Mineral oils ..... 10

2.3.4. Alcoholic beverages ..... 10

3. Problems regarding the application of articles 7 to 10 and what to do about them ... 12

3.1. Introduction ..... 12

3.2. Overall structure of Articles 7 to 10 ..... 12

3.3. Article 7 ..... 13

3.3.1. Situations targeted and persons required to pay ..... 13

3.3.2. Determining the persons concerned ..... 15

3.3.3. Administrative formalities - Formalities in the Member State of destination ..... 15

3.3.4. Administrative formalities - Use of the simplified accompanying administrative document ..... 16

3.3.5. Sales to passengers on aircraft and vessels on intra-Community journeys ..... 17

3.3.6. Absence of provisions on offences ..... 20

3.4. Article 8 ..... 21

3.4.1. The difficulties taken as a whole ..... 21

3.4.1.1. How to interpret “transported by them” ..... 21

3.4.1.2. Non-commercial movements ..... 23

3.4.1.3. Cross-border trade ..... 24

3.4.2. Opinion ..... 24

3.5. Article 9 ..... 27

3.5.1. Importance of Article 9(1) ........ 28

3.5.2. Criteria to be applied when determining whether a movement is carried out for commercial purposes........ 28

3.5.3. Atypical modes of transport (Article 9(3))........ 29

3.6. Article 10........ 30

3.6.1. Movements of products intended for the exclusive use of a private individual........ 30

3.6.2. Vendor's obligations........ 31

3.6.3. Non-existence of an accompanying administrative document........ 32

3.6.4. Carriage arranged by the private individual........ 33

4. Conclusions........ 34

ANNEX 1 *Articles 7 to 10 of the existing Directive 92/12/EEC* ........ 35

PROPOSAL FOR A COUNCIL DIRECTIVE amending Directive 92/12/EEC on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products........ 39

**RAPPORT DE LA COMMISSION AU PARLEMENT EUROPEEN, AU CONSEIL ET AU COMITE ECONOMIQUE ET SOCIAL EUROPEEN**

**CONCERNANT L'APPLICATION DES ARTICLES 7 A 10 DE LA DIRECTIVE 92/12/CEE**

# 1. INTRODUCTION

This is the report on the examination of Articles 7 to 10 of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products[1] required by Article 27 of the Directive (referred to in what follows as "the Directive"), which provides that:

*"Before 1 January 1997 the Council, acting unanimously on the basis of a report from the Commission, shall re-examine the provisions of Articles 7, 8, 9 and 10 and, on the basis of a proposal from the Commission after consulting the European Parliament, adopt any necessary amendments."*

For the following reasons, this deadline was not kept to:

- The deadline laid down in Article 27 did not give the parties concerned time to gain a perspective on the situation and give a valid verdict on any difficulties there might be in applying Articles 7 to 10. It should also be emphasised that at the end of 1996 trade in tax-paid products represented only a small proportion of intra-Community commercial transactions in excisable products.

  Since then, interest in moving tax-paid excise products has grown. For instance, there has been a considerable increase in Internet operations (distance sales). It was consumer interest in purchasing by this method that led traders to request the Member States concerned to introduce simplified procedures for surveillance and payment of excise duty. The Commission therefore considered it better to await the outcome of the introduction of "alternative" national procedures of this type – which would show whether they were needed – before drawing any conclusions regarding Community legislation.

- Again, the Court of Justice handed down its judgment in Case C-296/95 (ex parte EMU Tabac SARL, The Man in Black, Ltd) on 2 April 1998. As the Case raised the problem of how to interpret the provisions of Article 8, the Commission had to take the Court's interpretation into account in its report.

- In recent years, there have been numerous complaints from the public about the restrictive way in which some Member States applied the provisions of Article 8. The information obtained in the course of dealing with these complaints has provided a better understanding of the difficulties encountered regarding the interpretation of certain Community provisions on excise matters.

Generally speaking excisable products moving within the Community do so under excise duty suspension arrangements. No excise duty has been paid on these products, they have

[1] OJ L 76 of 23.3.1992, p.1, as last amended by Council Regulation (EC) No 807/2003 of 14 April 2003 (OJ L 122, 16.5.2003, p.36).

not been released for consumption and they move from a tax warehouse in one Member State to a tax warehouse in another under cover of the accompanying administrative document (AAD). This ensures that excise duty – the duty payable on the consumption of these products – is collected in the Member State in which it is assumed that consumption is deemed to take place.

Excisable products already released for consumption – on which excise duty has therefore been paid in one Member State – may also be moved within the Community. It is movements of this type that are regulated by the provisions of Articles 7 to 10 of the Directive. These Articles lay down the general principles governing the taxation of such products and the procedures for applying the principles. One aim is to enable members of the public to buy excisable products on the domestic market of one Member State and then take them to another Member State without having to pay more excise duty. A further aim is to ensure that, where products are moved for commercial purposes, excise duty is paid in the Member State where the excisable products are consumed. The procedure for the intra-Community movement of excisable products already released for consumption in one Member State is described in point 2 below.

## 2. COMMUNITY PROVISIONS ON THE INTRA-COMMUNITY MOVEMENT OF PRODUCTS ALREADY RELEASED FOR CONSUMPTION IN A MEMBER STATE

### 2.1. Background

The final wording of Articles 7 to 10 of the Directive is the outcome of long and complex discussion in the Council of the proposal for a directive presented by the Commission in November 1990[2], the proposal having taken account of criteria drawn up by the Ecofin Council of 13 November 1989.

Instead of four articles as at present, the Commission proposal had a single provision intended to cover all intra-Community movement of products on which excise duty had already been paid. The proposed article (Article 5) included provisions which would have made it possible to collect excise duty in a Member State other than that in which the products were consumed.

As the general principles governing the single market already guaranteed private individuals the freedom to purchase, the above proposal for a directive did not include any provisions on purchases by such persons in Member States other than their own. But it should be remembered that, at the time the above proposal was drafted, it was reasonable to assume that tax rates would be more closely harmonised.

When discussing the Directive, the Council gradually realised what difficulties and obstacles had to be overcome to achieve common rates of excise duty in the short term, as proposed by the Commission. Consequently, as the rates were not harmonised, the focus of harmonisation gradually transferred to the system for the movement and surveillance of excisable products.

At the same time it also became clear that the provisions on the intra-Community movement of such products would have to be reviewed in order to lay down clearer application rules. The present wording of Articles 7 to 10 was the outcome of this review.

To make it easier to read this report, the present wording of Articles 7 to 10 is reproduced in Annex 1.

### 2.2. Procedure

The Directive's procedure for products already released for consumption may be summarised as follows:

(1) **In the case of products moved between Member States for commercial purposes** excise duty is chargeable in the Member State of destination.

[2] COM(90) 431 final of 7.11.1990.

(2) There are legal provisions to allow Member States to collect excise duty from persons involved in the intra-Community movement of such products (Article 7(3)).

(3) **For commercial movements – other than “distance sales”,** which are covered by Article 10 – a simplified accompanying administrative document (SAAD) has to be used to ensure proper surveillance (Article 7(4)). The form and content of this document are laid down in Commission Regulation (EEC) No 3649/92 of 17 December 1992 on a simplified accompanying document for the intra-Community movement of products subject to excise duty which have been released for consumption in the Member State of dispatch.[3]

(4) The Regulation also lays down specific provisions on the guarantee and on the payment of excise duty in the Member State of destination (Article 7(5)).

(5) **In the case of products purchased directly by private individuals** for their own use and then taken by them to another country, Article 8 provides that excise duty must be charged in the Member State where the products were acquired.

(6) Certain criteria, including guide levels, are laid down with a view to distinguishing between commercial and non-commercial transactions (Article 9(2)).

(7) **In the case of “distance sales”** (where a vendor who is not an authorised ware housekeeper, registered trader or non-registered trader sends goods to a person in another Member State) excise duty is payable in the Member State of destination by the foreign vendor (Article 10).

(8) There are provisions to ensure that excise duty paid in the Member State where the products were purchased is **reimbursed** after duty has again been paid in the Member State of destination (Articles 7(6) and 10(4)).

### 2.3. Evaluation of how Articles 7 to 10 are used

#### *2.3.1. Volume of trade*

The regular intra-Community movement, for commercial purposes, of excisable products already released for consumption in a Member State represents a rather marginal proportion of the total volume of trade in these products. Member States are therefore generally not able to provide significant statistics on these movements. However, overall estimates suggest that the movement of products on which excise duty has already been paid represents no more than 3% of total intra-Community trade in excisable products.

But this overall figure needs to be broken down by category of excisable product because the volume of products moved differs for the different categories.

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[3] OJ L 369 of 18.12.1992, p. 17.

### 2.3.2. *Manufactured tobacco*

There is very little *regular* commercial intra-Community movement of manufactured tobacco that has already been released for consumption. This is mainly because:

– All manufactured tobacco released for consumption is already packaged for use. As many Member States use fiscal strips or other marks to show that excise duty has been paid, it would be very difficult to take such products released for consumption in one Member State and legitimately trade them in another. Also, once they have been applied, such marks are difficult to remove without damaging the packaging or the product itself.

– Even though other Member States may not use tax marks they may nevertheless have a distribution monopoly and therefore do not allow tobacco products to be sold outside the authorised distribution network.

– Under the provisions of Directive 2001/37/EC,[4] all packets of manufactured tobacco must bear health warnings in the official language(s) of the Member State where the products are consumed.

Nevertheless, in view of the major differences between the tax rates applicable in the different Member States, *regular and occasional* intra-Community movements of manufactured tobacco products for private use represent a very large proportion of purchases made by EU citizens outside their own Member State.

### 2.3.3. *Mineral oils*

There is only a marginal amount of *regular* commercial and private intra-Community movement of mineral oils already released for consumption. This is mainly because the production and distribution of mineral oils is managed by a relatively small number of authorised traders. Also, tax-paid fuels are stored in distribution facilities which serve well-defined territories.

### 2.3.4. *Alcoholic beverages*

The intra-Community movement of alcoholic beverages already released for consumption accounts for the largest proportion of commercial and private transactions carried out under the tax-paid arrangements. The alcoholic beverages sector also differs from the other two sectors in the following ways:

– a large number of producers is involved;

– there is a large variety of products;

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[4] Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products (OJ L 194 of 18.7.2001, p. 26).

- production is closely identified with a geographical area (e.g. products typical of a region, controlled appellations of origin).

The above characteristics suggest why there might be a big demand for products which have specific characteristics and are not always moved under the rules for tax warehouses. Also, the low tax levied by some Member States (e.g. a zero rate on wine) reflects the fact that a large proportion of the population consumes the alcoholic beverage concerned and explains the phenomenon of large numbers of *both regular and occasional* intra-Community movements of these products for private purposes.

## 3. PROBLEMS REGARDING THE APPLICATION OF ARTICLES 7 TO 10 AND WHAT TO DO ABOUT THEM

### 3.1. Introduction

As long ago as 1996 the Commission consulted the national administrations and trade associations involved in the excisable products sector on any difficulties they might have concerning the application of Articles 7 to 10.

The result indicated that the Article 7 to 10 procedures were generally considered satisfactory by the trade associations whereas the national administrations expressed some concern, *inter alia*, about the weaknesses of the administrative surveillance system. The results of a Fiscalis seminar on *the rules governing the movement of excisable products under Articles 7 to 10 of Directive 92/12/EEC* confirmed this conclusion.

It has to be said that, although the volume of intra-Community movements of tax-paid products remains relatively low, since this first survey more and more traders and private individuals are trying to interpret Articles 7 to 10 in such a way as to allow them to legitimise trade practices involving payment of excise duty in the Member State where the products are acquired. Also the increase in the volume of commercial transactions conducted via the Internet and the abolition of duty-free sales to persons travelling within the Community have resulted in more use being made of the above provisions.

The Commission therefore considers that, in the light of this finding and of the experience of both Member States and traders, the time has now come to present a report on the application of Articles 7 to 10 of the Directive. This report takes account of the results of the Commission's 2002 survey of the national administrations and traders involved in the intra-Community movement of excisable products.

Points 3.2 to 3.6 below explain the provisions of Articles 7 to 10 and the difficulties encountered in applying them, set out the Commission's opinion on each of these difficulties and state what remedy it envisages for each.

### 3.2. Overall structure of Articles 7 to 10

*Difficulties encountered*

As indicated in point 2.1, the current wording of Articles 7 to 10 was the outcome of long and complex discussion in the Council.

However, it has to be accepted that the resulting legislative structure was less than congruous. There are three provisions which apply to one particular situation, namely to excisable products held for commercial purposes in a Member State other than where the products were purchased, and all three provisions have the same aim, i.e. to ensure that excise duty is paid in the other Member State. What is more, none of the three provisions

clearly establishes its scope. As a result, certain types of movement may be covered by several different provisions each requiring the completion of different formalities.

*Opinion*

In the interests of consistency and easier reading, the scope of the articles intended to ensure that the excise duty is paid in the Member State of destination should be defined more precisely.

*Accordingly, under the proposal for a Directive amending Articles 7 to 10 of Directive 92/12/EEC (referred to below as "the proposal for a Directive") Article 9(1) would no longer indicate when duty becomes chargeable. In this, the existing Article 9(1) simply repeats what is already stated in Article 7(1) with one difference: that the duty is chargeable to the holder of the products rather than to the persons identified in the situations covered by Article 7. To cover the situations currently referred to in Article 9, an additional sub-paragraph has been added to Article 7(3) to the effect that, where it is not expressly stated to whom the tax is chargeable, it is to be charged to the holder of the products. The products in question may be goods held by private individuals for purposes other than their personal use, or products held by a trader or body governed by public law that has not met the requirements set out in the proposed Article 7(5).*

## 3.3. Article 7

### *3.3.1. Situations targeted and persons required to pay*

*Difficulties encountered*

The wording of Article 7(1) is very clear on the question of determining where excise duty is chargeable when products are moved for commercial purposes from one Member State to another.

But the provisions of paragraphs (2) and (3) are generally considered difficult to apply. Here the situations to which these provisions are intended to apply should be borne in mind:

a) Article 7(2) distinguishes between different situations in which excisable products are held for commercial purposes in a Member State other than the one in which the products were released for consumption. These situations are the delivery of excisable products to a trader or body subject to public law and the moving of such products within a Member State with a view to the products being sold. The latter in particular covers occasional sales by a wholesaler to retailers or restaurants established in a neighbouring Member State and "itinerant sales" when a foreign vendor pitches his products to potential customers.

Although no particular problems arise in situations where goods are delivered to a trader who first placed an order, problems do arise where excisable products are moved within another Member State prior to any commercial transaction having taken place. Article 7 does not in fact include any provisions on such movements to cover how the

accompanying administrative document should be used or the formalities to be completed when goods remain unsold and are therefore returned to the Member State of origin.

b) Article 7(3) lays down who may be required to pay the excise duty in the Member State of destination and must therefore complete the paragraph (5) formalities. The very "flexible" wording of paragraph (3) allows Member States great freedom of application, leaving them free to issue a general provision or to decide each case individually.

Such flexibility causes some Member States difficulties. The phrase "depending on all the circumstances" does not provide any criteria for whether excise duty should be paid by the consignor, the consignee or another person (e.g. the carrier). These Member States consider it essential to establish *first* who is required to pay the excise duty so that their respective national laws can clearly identify who has to complete the paragraph (5) formalities.

Many Member States have opted for a procedure requiring the consignee to pay the excise duty and therefore complete the formalities laid down in paragraph (5).

*Opinion*

In view of the difficulties over what procedures to apply in certain situations covered by Article 7, and the absence of provisions for determining unambiguously who is liable for excise duty in the Member State of destination, Article 7 needs to be worded more clearly. Here two separate situations have to be clearly defined:

– where excisable products are dispatched to the territory of another Member State by trader not established in that Member State with a view to being sold there, excise duty is payable by the foreign vendor in accordance with the procedure laid down for "distance sales" (see point 3.6.2). This procedure, which does not require use of an SAAD, solves the problems referred to at 3.3.1(a) above.

– where products are used within another Member State for the purposes of a trader or body governed by public law, excise duty is payable by those parties. If this obligation is introduced it will put "non-registered traders", as defined in Article 16(3), and the Article 7 trader and body governed by public law on an equal footing for the purpose of administrative formalities. Nevertheless, if a foreign vendor should wish to pay the excise duty on behalf of those parties, the procedure used for "distance sales" could also be applied to him (see point 3.6.2).

The phrase "used for the purposes of" covers situations in which the products are delivered to the trader or body governed by public law by a trader not established in the Member State of destination, and products otherwise used for the purposes of an economic operator or body governed by public law. This situation arises, for example, when a trader sends stock from one Member State to another under "duty-paid" arrangements.

*In the proposal for a directive, Article 7(3) defines the situations in which the products are held and who is required to pay the duty in each situation. Article 7(2) is deleted since it merely repeats what is already said in Article 7(1) and 7(3).*

*3.3.2. Determining the persons concerned*

*Difficulties encountered*

The terms "for the purposes of a trader carrying out an economic activity independently" and "for the purposes of a body governed by public law" are not defined in the Directive. Each Member State therefore has its own interpretation of the terms.

*Opinion*

The parties concerned are "all traders" and "all bodies governed by public law". It is therefore sufficient simply to use the words "traders" and "bodies governed by public law".

*Article 7(3) of the proposal for a directive refers solely to "trader" and "body governed by public law".*

*3.3.3. Administrative formalities - Formalities in the Member State of destination*

*Difficulties encountered*

Traders complain that the formalities set out in Article 7(5) of the Directive are too complex and restrictive. The formalities concerned are those requiring a guarantee to be lodged before goods are dispatched and excise duty to be paid upon delivery of the products. Generally operators who trade under the tax-paid arrangements are small businesses that have enormous difficulties complying with the formalities. Such undertakings do not often get involved in commercial transactions with parties in other Member States (if they did they would be authorised tax warehouses). This is particularly true of small-scale wine producers, who find it extremely onerous to comply with the procedures required in the Member State of final consumption.

The traders' associations consulted stated that the complexity of these formalities could lead to some traders abstaining from this type of intra-Community movement or to their deciding to use irregular methods.

*Opinion*

To resolve the difficulties arising out of formalities to be completed at destination the Commission considers that the excise duties should be chargeable to the party who is best placed to accomplish the formalities.

This is the trader not established in the Member State of destination when the products he holds have not yet been traded (the situation covered by the first subparagraph of the new Article 7(3)).

When the products are used in the Member State of destination for the purposes of a trader or a body governed by public law (the situation covered by the second paragraph of the new Article 7(3)) the general rule is that excise duty should be collected from the party established in the Member State of destination to whom the products are consigned. If, in such cases, the foreign vendor indicated his intention of paying the duty at destination (for example, because he regularly makes deliveries to that Member State under duty-paid arrangements) he can opt to be come the excise debtor instead of the consignee, in which case the simplified procedure for distance sales applies (see point 3.6.2.) The combination of centralising guarantees at an excise office and close cooperation between Member States should provide a satisfactory response to traders' legitimate requests for simplification.

*Article 7(3) of the proposal for a directive defines the situations in which goods must be held and determines which party is required to pay in each situation. Article 7(5) sets out the rules with which those required to pay excise duty have to comply.*

### *3.3.4. Administrative formalities - Use of the simplified accompanying administrative document*

*Difficulties encountered*

- Establishment and surveillance

The details of the accompanying administrative document required in Article 7(4) are set out in Commission Regulation (EEC) No 3649/92 where the document is called the "simplified accompanying document".

Most Member States consider this document necessary but have little confidence in the effectiveness of the surveillance it is supposed to guarantee. Some therefore require the simplified accompanying [administrative] document (SAAD) to be backed up by a guarantee certificate, or require excise duty to be paid in the Member State of destination.

Their lack of confidence mainly arises out of the fact that much more flexibility is allowed when drawing up this document, and in respect of the attendant checks, than is the case with the document used for suspension arrangements. The simplified accompanying administrative document (SAAD) is completed – without any (direct or indirect) input from, or supervision by, the national tax administrations – by and for traders most of whom have no status of any kind for excise purposes.

Reimbursement

Sometimes the SAAD is deemed insufficient for the purpose of obtaining reimbursement of excise duty paid in the Member State of departure.

Article 4 of Regulation No 3649/92 provides that, if repayment of the excise duty paid in the Member State of departure is to be obtained, the consignee must add in Copy No 3 of the SAAD information about what tax treatment was applied to the goods in the Member State of destination and then return the document to the consignor. However, under

Article 22(3) of Directive 92/12/EEC, Member States may refuse requests for reimbursement where this document does not satisfy the correctness criteria they lay down.

As the information entered on the back of Copy No 3 of the SAAD is not endorsed by the tax authorities of the Member State of destination, some Member States require the consignor to present further administrative proofs in addition to Copy No 3 to back up any claim for reimbursement. It should also be pointed out that the documents used by Member States to certify that excise duty has been paid are not in any way harmonised. This does not facilitate the processing of applications for reimbursement under Article 7.

*Opinion*

In the Commission's view there is no need for Member States to require, as some do for or the purposes of checking up, that the SAAD be accompanied by a guarantee certificate or a certificate of payment of excise duty in the Member State of destination. The references to the prior declaration that have to be entered in Boxes 3 and 6 of the SAAD are sufficient to enable the authorities to check whether all obligations have been met in the Member State of destination.

Where reimbursement is concerned, to make it easier to process traders' applications it will be necessary to require the authorities of the Member State of destination to authenticate the entry made in Copy No 3 of the simplified accompanying administrative document to show that the products concerned have been received. Since the party liable for excise duty in the Member State of destination is required to complete the formalities upon reception of the products, the new requirement will not increase the administrative burden borne by traders. The new provision will harmonise the conditions subject to which reimbursement can be obtained and render superfluous the requirements of certain Member States which demand other proofs in addition to Copy No 3 of the SAAD.

*Commission Regulation No 3649/92 will have to be amended to provide that the authorities of the Member State of destination must endorse the return copy of the said document.*

*3.3.5. Sales to passengers on aircraft and vessels on intra-Community journeys*

*Present situation*

<u>The legal position</u>

The transitional provisions of Article 28 of the Directive ceased to apply on 1 July 1999. They allowed Member States to exempt products supplied by tax-free shops and carried away in the personal luggage of travellers taking an intra-Community flight or sea-crossing to another Member State. It should be noted that products supplied on board an aircraft or vessel during an intra-Community passenger service were treated in the same way as products supplied by tax-free shops.

The ending of tax-free sales within the European Union had a particular incidence on the tax treatment of excisable products sold on board ferries and aircraft and not intended for immediate consumption (sales for immediate consumption may be exempted from excise duty if the conditions of Article 23(5) of the Directive are met). The VAT and excise rules applicable to such sales from 1 July 1999 were clarified in a Commission notice.[5] As a reminder, the main principles governing excise in these situations are:

– Ferry and airline operators may no longer carry such products tax-free since, under the provisions of Directive 92/12/EEC, the products are deemed to no longer be covered by the tax suspension system once they are loaded on board.

– The products are therefore subject to the rate of excise duty in force in the Member State in which the intra-Community journey begins. They may be sold at a price including the rate of excise duty of the Member State of embarkation until such point as the means of transport enters the national territory of the Member State of destination.

– Under Article 7(1) and (2) excise duty is payable again on goods sold in the national territory of the Member State of destination. However, ferry and airline operators wishing to avoid taxation in the second Member State may declare that they have no intention of selling the goods in the territory of that Member State. Article 7(1) and (2) then no longer applies and the goods may be held on board without duty having to be paid again. The provisions of Article 7(7) and (8) on checks and prior declaration then apply although under Article 7(9) the Member States concerned may agree bilaterally to authorise the application of simplified procedures.

– Traders may also continue to sell in the territory of other Member States tax-paid goods loaded on board in a given Member State. Article 7(1) and (2) then applies and the excise duty due in the Member State in question has to be collected. Under Article 22(3) traders may apply for reimbursement of excise duty already paid in the Member State where the goods were loaded. Each tax authority is required to lay down the procedures for collecting and refunding duties and for simplified procedures where appropriate.

– For intra-Community services calling in one or more Member States the basic rule is that each section of the journey has to be treated separately. If a ferry operator loads goods in Member State A and wishes to sell them on board whilst the ferry is making passage in international waters between Member State B and Member State C there is no legal basis for charging tax on these sales at the rates applicable in Member State A. Given that there is no intention to bring the goods back to the Member State of departure they must be taxed, first in Member State B and then in Member State C, in accordance with Article 7(1) and (2).

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[5] Commission notice 1999/C 99/08 concerning the VAT and excise rules to be applied from 1 July 1999 by suppliers of goods sold on board ferries and aircraft or in airports to passengers travelling within the European Union (JO C 99 du 10.4.1999, p. 20).

Implementing procedures

Strict compliance with the above procedures requires traders to do a massive amount of administrative work. Some Member States have therefore authorised the use of simplified procedures of which the following are examples:

- On some sea links between Member States the States concerned have introduced the kind of simplification provided for in the third indent above. This means that a link between Member State A and Member State B is treated as if goods were being moved from Member State A back to Member State A via the territory of Member State B. Hence excisable products on board intended to be taken away by passengers may be sold at the excise rate applicable in Member State A (generally the Member State applying the lower rate) throughout the journey except that part when the vessel is in the territory of Member State B.

- Traders have the option of loading the products concerned onto a vessel under the suspension arrangements. These cease to apply when the products enter the territory of the Member State from which the trader intends to sell the products. At this point the trader has to pay the duty due in that Member State.

  This simplification is one of the tax suspension procedures and means that the Member State of destination accepts that the products being moved under the arrangement may be released for consumption without a consignee authorised for excise purposes first having taken charge of them physically and, therefore, without their having to be unloaded from the vessel.

Within the limits set by the Directive's legal framework, each Member State can decide for itself what procedural simplifications it will grant its traders.

*Opinion*

The principle that when goods are released for consumption in one Member State and held for commercial purposes in another excise duty must be paid in the second Member State applies to all excisable products sold in the course of an intra-Community journey, unless, as provided for by Commission notice 99/08 referred to above, the products are held on board a vessel or aircraft making crossings or flights between two Member States but not available for sale when the vessel or aircraft is in the territory of one of those two Member States. In this case, the products are not deemed to be held for commercial purposes in that Member State. In order to remove any uncertainty on this point, it should be incorporated expressly into the Directive.

Community-wide harmonisation of the administrative procedures that traders are required to complete would still be desirable because, as can be seen, only a few Member States have introduced procedural simplifications and the traders concerned therefore have to apply a wide variety of different procedures for the different Member States. It should be stressed here that in some cases simplified administrative procedures have not been introduced because the procedure for doing so is itself so complicated. Some Member

States have come to the conclusion that bilateral agreements of the type mentioned in Article 7(9) can be negotiated only at the political level whilst others consider that a simple administrative agreement is enough.

Hence to provide a satisfactory response to traders' legitimate demands for simplification, the Commission calls on the Member States to collaborate with it in drawing up common simplified procedures whilst remaining within the existing legal framework. Should the need become clear the Commission could see its way to using the non-regulatory forum of the Excise Committee to work out a common Community framework for introducing simplified procedures.

Since these simplified procedures would not alter the general principle governing taxation the proposal is that the Article 7(9) provision, by which bilateral agreements may be authorised, should be replaced by one permitting such agreements to be authorised by simple administrative agreement.

*The third subparagraph of Article 7(1) expressly provides that products held on board a vessel or aircraft making crossings or flights between two Member States but not available for sale when the vessel or aircraft is in the territory of a Member State are not deemed to be held for commercial purposes in that Member State. Furthermore, Article 7(9) states that simplified procedures may be introduced by simple bilateral administrative agreement.*

*3.3.6. Absence of provisions on offences*

*Difficulties encountered*

By contrast with movements under the suspension arrangements, for which specific provisions on offences were included in Directive 92/12/EEC (see Articles 14 and 20), there are no Community provisions on how to proceed in the event of losses or offences occurring under the "tax-paid" arrangements.

*Opinion*

The fact that the Directive contains no legal provisions on losses and offences occurring whilst tax-paid excisable products are being moved represents a legal loophole which has to be closed. The absence of provisions on how to determine the Member State in which excise duty is due could cause conflict of interest between Member States and, in some cases, lead to double taxation. What is more, it could lead to different traders in comparable situations being treated entirely differently in different Member States and, therefore, to distortion of competition between traders. Such losses and offences should therefore be made subject to a regime similar to that for losses and offences detected in connection with the excise suspension arrangements.

*The proposal for a Directive introduces specific provisions on how to handle losses and offences detected during movement within the Community of products already released for consumption (new Articles 10a to 10c).*

## 3.4. Article 8

Article 8 of the Directive states that, as regards products acquired by private individuals for their own use and transported by them, the principle governing the internal market lays down that excise duty is to be charged in the Member State in which they are acquired.

Despite its apparent simplicity this Article has been the focus of numerous discussions centring mainly on:

– how to interpret "transported by them";

– how to treat other types of non-commercial movements of goods;

– cross-border trade.

### *3.4.1. The difficulties taken as a whole*

#### 3.4.1.1. How to interpret "transported by them"

In 1995 the London Court of Appeal referred a question on the interpretation of Article 8 to the Court of Justice for a preliminary ruling. The referral was made in connection with a case involving products released for consumption in Member State B and acquired by, or on behalf of, a private individual resident in Member State A through an agent who also arranged carriage of the products.

A structure for tax purposes, based on a wide interpretation of Article 8, had been set up by a network of associated companies. It worked as follows:

– one company in the group produced a particular make of cigarette aimed at the United Kingdom market;

– a second company with links to the first released the cigarettes for consumption in the Grand Duchy of Luxembourg where they were sold both wholesale and retail;

– a third company, with links to the other two and established in the United Kingdom, centralised orders from British individuals for cigarettes of this make already released for consumption in Luxembourg; it also arranged carriage to the United Kingdom.

The tax principle propounded by these companies was that ownership of the products was transferred to the private individual when he placed the order. The companies maintained that, since the carrier did not participate in the commercial transaction (he did not sell the cigarettes, but simply received orders to purchase and carry the products), the provisions of Article 8 of Directive 92/12/EEC applied.

Still according to the companies, the movements concerned were similar to those involved in "distance sales" which were not explicitly covered by the Directive and therefore had to be treated by analogy with the said Article. The orders placed by private individuals in any month did not exceed the guide levels laid down in Article 9(2), i.e. 800 cigarettes per purchaser.

The United Kingdom authorities considered that this structure had been set up to evade tax and that it enabled a British individual (*"without leaving the comfort of his armchair"*) to purchase products in another Member State where tax rates were lower than those in the United Kingdom. The authorities' argument, upheld by the Advocate-General, was that Article 8 applied solely if the following conditions obtained simultaneously:

(a) the products had to have been acquired by private individuals;

(b) they had to have been acquired for the personal use of those individuals;

(c) the products had to be carried by the individuals themselves.

In its judgment of 2 April 1998 in Case C-296/95,[6] the Court decided that:

"Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products as amended by Council Directive 92/108/EEC of 14 December 1992 must be interpreted as not precluding the levying of excise duty in Member State A on goods released for consumption in Member State B, where the goods were acquired from a company, X, for the use of private individuals in Member State A, through a company, Y, acting in return for payment as agent for those individuals, and where transportation of the goods from Member State B to Member State A was also arranged by company Y on behalf of those individuals and effected by a professional carrier charging for his services"

The Court thereby put an end to this particular arrangement. Concerning the case that had been referred, the Court recognised that the transactions had been of a commercial nature and that excise duty was therefore payable in the Member State in which the products were consumed.

However, it should be pointed out that, in the grounds for its decision, the Court gave its interpretation of the phrase "transported by them". Particularly in points 33 to 36 of the grounds the Court, having examined all the language versions of Article 8, mentioned only the condition that "transportation must be effected personally by the purchaser of the products subject to duty".

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[6] European Court Reports 1998, I-01605.

3.4.1.2. Non-commercial movements

Context

Article 23(3) of Directive 92/12/EEC states that the provisions on excise duty laid down in the following Directives shall cease to apply on 31 December 1992:

- Council Directive 74/651/EEC on the tax reliefs to be allowed on the importation of goods in small consignments of a non-commercial character within the Community;[7]

- Council Directive 83/183/EEC on tax exemptions applicable to permanent imports from a Member State of the personal property of individuals;[8]

- Council Directive 68/297/EEC on the standardisation of provisions regarding the duty-free admission of fuel contained in the fuel tanks of commercial motor vehicles.[9]

These provisions were repealed so that excisable products ***not moved in a commercial transaction*** should no longer be subject to administrative surveillance since, following establishment of the single market and application of the principle that duty is paid in the Member State of acquisition, such products may now move freely within the Community.

Difficulties encountered

This question of freedom of movement has been raised on three occasions in the Excise Committee:

- in January 1993, four Member States reported that they required payment of excise duty on presents sent by post to private individuals;

- in January 1999, four Member States reported that, when a private individual moved house and took his excisable products with him, the requirement to pay excise duty in the Member State of destination could only be waived if the individual himself moved his household effects (application of Article 8 of Directive 92/12/EEC);

- in July 2000, the question of presents sent to private individuals was raised again. As in January 1993, four Member States reported that they charged duty on gifts to private individuals. These States particularly emphasised the fact that it was difficult to verify the non-commercial nature of such consignments and that Directive 92/12/EEC contained no provisions expressly exempting such consignments from the obligation to pay excise duty in the Member State of destination.

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[7] OJ L 354 of 30.12.1974, p. 57.
[8] OJ L 105 of 23.4.1983, p. 64.
[9] OJ L 175 of 23.7.1968, p. 15.

In the Member States concerned, the above interpretations mean that duty is always charged in the Member State of destination on consignments of a non-commercial nature sent to private individuals. Citizens of some Member States therefore now find themselves at a greater disadvantage than before establishment of the single market in that the tax treatment to which they are now subject is less favourable than that applied to similar imports from non-Community countries.

The cases described below are given as examples of situations in which, in principle, no further excise duty is chargeable:

a) products sent as small consignments of a non-commercial nature by one individual to another established in another Member State. Such products have to be for the sole use of the consignee and/or his family. They also have to be sent free of any sort of direct or indirect payment in return.

b) the transfer from one Member State to another of goods intended for the personal use of an individual and/or his family (e.g., alcoholic beverages produced by the family and intended for a member of the family resident in another Member State).

c) excisable products carried as a consequence of an individual changing his usual place of residence or to furnish a secondary residence.

d) excisable products given as a wedding present.

e) excisable products acquired by inheritance.

3.4.1.3. Cross-border trade

Since the elimination of tax frontiers between Member States a citizen may acquire excisable products for personal use in a Member State other than his own without having to pay excise duty in the Member State where he is resident. This is the consequence of the principle of freedom of movement resulting from the establishment of the single market.

Because excise rates are not harmonised across the Community, citizens understandably apply the freedom of movement principle and take full advantage of the differences between tax rates resulting from lack of harmonisation. Such application of the principle explains the large volume of excisable products moved between certain Member States.

However, it causes great concern to the Member States that apply much higher rates of excise duty than those in force in their neighbouring Member States, the main problem being how to distinguish between commercial and private movements.

*3.4.2. Opinion*

When deciding whether Article 8 is relevant, it should be remembered that, under the principle governing the single market, all products carried within the Community by

individuals for their own use are subject to taxation solely in the Member State where the products are acquired.

The present wording of Article 8 waters down or might appear to water down this principle. The phrase used is products "transported by the private individuals themselves". Here it has to be remembered that the original Commission proposal did not include any specific provisions on the movement of excisable products by private individuals since these had no place in a draft directive concerned only with the movement of such products for commercial purposes. However, in the absence of any real harmonisation of rates of duty, the Member States requested the addition in Directive 92/12/EEC of a provision which, at first sight, could be interpreted as restricting application of the general principle of the free movement of goods to ***goods carried by private individuals themselves***.

*Products transported on behalf of private individuals*

Under Article 8 as currently worded and interpreted by the Court, the principle applies only when excisable products are transported personally by the buyer. If the buyer does not personally accompany the products, the excise duties are chargeable again in the Member State of destination. This restriction on private individuals' right to buy goods in one Member State and, having paid taxes on them in that Member State, to transport them to another without being taxed again, runs counter to the general rule for VAT, whereby VAT is payable in the Member State of destination only on distance sales (where goods are dispatched or transported by or on behalf of the vendor). However, VAT on distance purchases (where the goods are dispatched or transported by or on behalf of the buyer) is always payable in the Member State of departure, even when the goods are subject to excise duties.

In the Commission's view it is no longer justifiable to restrict the general principle governing the single market in this way. It therefore proposes, in line with the principle applied to VAT, that all movements of products intended for the personal use of private individuals carried out by or on behalf of a private individual should by virtue of their non-commercial nature be subject to taxation in the Member State only in the Member State of acquisition.

However, an exception has to be made in the case of tobacco products because, if applied to these products, the above principle would inter alia contradict the health policy advocated in Article 152 of the Treaty in particular. In view of that policy and of the World Health Organisation's Framework Convention on Tobacco,[10] which calls for "*tax policies and, where appropriate, price policies, on tobacco products so as to contribute to the health objectives aimed at reducing tobacco consumption*", the Commission proposes that, for all excisable products other than tobacco products physically carried by the private individual himself or moved from one private individual to another and intended for the personal use of the private individual to whom they are consigned, excise

[10] The Convention was adopted by the World Health Assembly on 21 May 2003 and was signed by the European Community on 16 June 2003.

duty should be paid in the Member State of destination. This will ensure that any measures introduced by Member States to comply with the conclusions of the above Framework Convention will not be compromised by the fact that private individuals are free to purchase tobacco products in Member States where prices are lower than in the one where they reside.

*In the proposal for a Directive, a second subparagraph is added to Article 8, which clearly states that the principle set out in the first subparagraph also applies to products, other than manufactured tobacco, transported <u>on behalf of</u> a private individual.*

*Non-commercial movements referred to at point 3.4.1.2.*

With regard to the non-commercial movements referred to at point 3.4.1.2, some Member States want to apply a restrictive interpretation of the free movement of products acquired by private individuals. The Commission has frequently issued reminders that the emphasis of the provisions of Article 8 is on movements made for non-commercial purposes but that, subject to compliance with the above-mentioned principle governing the single market, it could also cover other situations. In particular it could be taken to cover the non-commercial movement of excisable products by private individuals (e.g. in the course of removals or gifts). A restrictive interpretation of Article 8 in this context suggests that such non-commercial movements may not be exempted from excise duty in the Member State of destination unless the products are physically carried by the private individuals for whom they are intended. As a consequence movements which, subject to certain conditions, were exempt from duty before establishment of the single market are now taxed - which completely contradicts the principles of the single market.

*In the proposal for a Directive, a third sub-paragraph is added to Article 8 stating that the principle set out in Article 8(1) also applies when products are sent from one private individual to another, without any payment, direct or indirect (as when a gift is sent, for example). The other situations referred to at point 3.4.1.2 are covered by the second subparagraph of Article 8 since these involve products transported on behalf of a private individual.*

*Products for purposes other than for own use of private individuals*

For the remaining excisable products purchased by private individuals, transported by them or on behalf of them but <u>for purposes other than their own use</u>, excise duties must be collected in the Member State of destination. At present, the Directive does not expressly state what procedure private individuals should follow to do this legitimately. Nor does it clearly establish the right to have the excise duties paid in the Member State of purchase refunded. To make the rules clearer, the Directive should: clearly state that the excise duties are payable in the Member State of destination; identify the person to whom they are chargeable and lay down the procedures that person has to follow. It makes sense for the excise duties to be charged to the private individual who transports the goods, or who has them transported. As far as the procedure is concerned, movements of this kind should be treated in the same way as the movements referred to in Article 7.

*In the proposal for a Directive, a second subparagraph is added to Article 7(1) stating that all purposes other than private individuals' own use should count as commercial purposes. The procedures referred to by Article 7(4) and the second subparagraph of Article 7(5) would then apply to the holding of products acquired by a private individual for purposes other than his own use and the refunding of the excise duty in the Member State of departure would be possible under Article 7(6).*

*Guide levels*

It is recorded in the Council Minutes on the Directive that it is for private individuals introducing more than a certain quantity of excisable products to *prove* to the satisfaction of the administration that the products are for his own use. The Commission does not think it advisable to incorporate this into the new legal instrument. Whenever a private individual brings excisable products into a Member State, the administration has to examine the situation in the light of *at least* all the criteria set out in Article 9(2) before deciding whether the products are being held for commercial purposes. As such a decision is likely to be contested in court, the administrations have to base their decisions on actual facts, not on mere supposition.

As it would not be legal to envisage reversal of the burden proof, retaining the guide levels laid down in the present Article 9(2) is no longer justified. In any case an administration may never use these levels *on their own* as evidence that excisable products are being held for commercial purposes. Neither may these levels ever be interpreted as tax-free "thresholds" since, if the administration of the Member State carrying out checks wants to classify a consignment exceeding these levels as commercial, it must have solid facts to hand on which to base such a conclusion.

The guide levels should therefore be seen simply as guidelines given to officials by their administration which may recommend that checks should not be carried out on private individuals unless these are carrying in excess of a given amount of excisable products. However, as such recommendations lie solely within the jurisdiction of the Member States, they should not be included in the legal instrument that is the Directive.

*Under the new Article 9(2) in the proposal for a Directive, it is no longer possible to apply guide levels.*

### 3.5. Article 9

Article 9(1) repeats the general principle governing taxation already set out in Article 7(1), whilst at the same time requiring that, in addition to the situation covered by Articles 7 and 8, excise duty is due in the Member State in which the products are being held for commercial purposes and is payable by the person holding the products.

Article 9(2) sets out the minimum criteria which have to be taken into account to determine whether the products referred to in Article 8 are intended for commercial purposes.

*3.5.1. Importance of Article 9(1)*

*Difficulties encountered*

The wording of Article 9(1) and Article 7(1) is similar except for the fact that Article 9(1) lays down that excise duty is chargeable to the holder of the products.

*Opinion*

*As stated above at point 3.2., Article 9(1) should no longer state when duty becomes chargeable since it merely repeats what is already stated in Article 7. Since under the current Article 9 the duty is chargeable to the holder in the situations covered by that Article, a subparagraph should be added to Article 7(3) stating that, unless it is expressly stated to whom the duty should be charged, it should be charged to the holder of the products. The situations in question concern, inter alia, products held by private individuals for purposes other than their own use or products held by traders of bodies governed by public law who have not complied with the proposed Article 7(5).*

*3.5.2. Criteria to be applied when determining whether a movement is carried out for commercial purposes*

*Difficulties encountered*

Article 9(2) lays down all the factors that have to be taken into account when establishing whether a product acquired by a private individual is of a commercial nature and whether duty may therefore be levied in the Member State where the product is held.

The main problem lies in the criterion for guide levels. Whilst Article 9(2) simply mentions "guide levels" as one of the factors to be taken into consideration in the process of determining whether a private individual is liable for duty on a given movement, the guide levels are often regarded as legal thresholds which allow them to handle movements carried out by private individuals as follows:

- <u>up to and including the guide levels</u>: the national administration has to demonstrate that the products have been acquired by the private individual for commercial purposes;

- <u>above the guide levels</u>: the private individual has to demonstrate to the satisfaction of the administration carrying out the checks that the products really are for the individual's own use.

As can be seen from the large number of complaints the Commission receives on this matter, many European citizens consider reversing the burden of proof in this way to be contrary to the general principles of the Treaty. On the basis of these complaints, the Commission has started infringement proceedings against certain Member States which have reversed the burden of proof. This has prompted the Member States in question to take a different approach.

*Opinion*

As already explained in *point 3.4.2*, the Commission does not believed there is any justification for retaining the guide levels in Article 9(2). The provision should otherwise be kept unchanged, except for the introductory phrase. This has been brought into line with the new wording of Article 8(1) to Article 8(4) and now covers products intended for purposes other than private individuals' own use rather than products intended for commercial purposes. The new version should eliminate any uncertainty as to the status of certain categories of holding products, which cannot be classed as "commercial" but where the products are not intended for private individuals' own use.

*The second subparagraph of Article 9(2), which allows the Member States to set guide levels, has been dropped from the proposal for a Directive.*

*3.5.3. Atypical modes of transport (Article 9(3))*

*Difficulties encountered*

When the Directive was being discussed in Council the Member States expressed concern about safety in connection with moving mineral oils and about the fact that failure to harmonise excise rates, particularly for mineral oils, could encourage private individuals to buy such products (particularly heating fuel) in a Member State where the rate was low and then move the products back home themselves.

The optional provision in Article 9(3) should be seen as one under which Member States may introduce tax provisions tantamount to a general prohibition on using any mode of transport other than one that is duly licensed for moving mineral oils. To summarise:

– all "authorised" movements, i.e. those carried out for commercial purposes by a professional trader, are subject to excise duty in the Member State of destination;

– quite apart from any fines that may apply in connection with transport safety, all "atypical" modes of transport used are also subject to excise duty in the Member State of destination.

This means that Member States may exclude mineral oils from the scope of Article 8.

In other words, private individuals moving mineral oils – particularly heating fuel – under conditions identical to those permitted for other excisable products do not benefit from the tax freedom applicable to those other products (i.e. the freedom to pay duty solely in the Member State of departure). The whole question of using a tax instrument to regulate transport safety still needs to be examined.

*Opinion*

The Commission is not convinced of the need to retain a measure which derogates from the general principle that private individuals are free to move goods. If there is a problem

regarding the safe carriage of mineral oils, a provision exempting those concerned from the scope of the above Article is unlikely to provide a satisfactory legal solution.

There is no fiscal justification for introducing provisions whose sole purpose is to dissuade private individuals from moving mineral oils. Therefore the tax principle by which excise duty on excisable products carried by private individuals must always be paid in the Member State where the goods were acquired must be applied in full to mineral oils. The fact that national and Community legislation makes the carriage of mineral oils subject to very strict safety regulations must be wholly dissociated from the principle governing the taxation of such movements. If the two are not so separated, an offence might be established, but the fact that it was would never affect the excise duty.

*The provisions of the present Article 9(3) are no longer included in the proposal for a directive.*

## 3.6. Article 10

Article 10 establishes the principle that excise duty on distance sales is due in the Member State of destination.

The payment procedure laid down in that Article requires the vendor, or his tax representative where applicable, to pay the excise duty.

There are therefore two distinct procedures for paying excise duty in the Member State of destination: the first for payments made by the vendor himself and the second for payments made by the vendor's tax representative.

The Member State in which the vendor is established must ensure that the vendor or his tax representative:

– guarantees payment of excise duty, prior to dispatch of the products, in accordance with the conditions set by the Member State of destination;

– ensures that the excise duty is paid following the arrival of the products;

– keeps records of deliveries of products.

### *3.6.1. Movements of products intended for the exclusive use of a private individual*

*Difficulties encountered*

No reading of Article 10 permits the conclusion that its provisions apply **<u>solely</u>** to the movement of products intended for private individuals. What is more, the distinction between Article 7 and Article 10 is not clear. The only difference in the wording of the two Articles would appear to be that, in Article 10, the products are carried "directly or indirectly by the vendor or on his behalf". However, this is also the situation set out in Article 7.

*Opinion*

The wording of Article 10 does not identify clearly what movements are meant. The original intention of the legislator - namely to lay down procedures for the sale by a foreign vendor of goods intended for a private individual established in another Member State - was not made sufficiently clear.

*In the proposal for a directive, Article 10(1) makes it clear that the new Article covers the sale of products to a private individual by a vendor who is directly or indirectly responsible for the transport of the products.*

*3.6.2. Vendor's obligations*

*Difficulties encountered*

Traders generally consider the current procedure rather unsatisfactory. Their main difficulties are:

– The procedures with which they have to comply are not harmonised. Each Member State decides independently what procedures to impose for lodging guarantees and paying excise duty. Vendors therefore have to comply with rules which differ from one Member State to the next and this causes difficulties.

– It is difficult to comply with the procedure which requires a guarantee to be lodged before the corresponding products are dispatched because, in practice, this would mean a vendor having to travel physically to the Member State of destination before the products are dispatched to that State.

The Directive allows Member States the option of requiring excise duty to be paid by a tax representative, but is otherwise silent on the obligations of that representative and the formalities to be completed. It is therefore left to the Member States themselves to decide what these obligations and formalities shall be. Consequently the procedures differ substantially from one Member State to the next and cause traders even greater confusion.

Most Member States elected to apply the option requiring excise duty to be paid by a tax representative because, unlike the vendor, the representative is established in the Member State of destination and therefore has to comply with the tax laws applicable in that State.

However, traders did not find this satisfactory because keeping a tax representative costs them extra. Vendors consider this financial burden disproportionate to sales actually made.

*Opinion*

Where tax representatives are mandatory in a Member State of destination, the obligations they have to fulfil vary widely. In some Member States the representative has to be approved by the administration but is still required to lodge a guarantee.

The very concept of tax representative is interpreted very differently in different Member States so that the representative's obligations also differ. Also, the cost to a trader of appointing a tax representative is not negligible since the representative will not take on the vendor's obligations unless he is paid to do so.

All this is perceived as restrictive and cumbersome, particularly by small and medium-sized businesses. The procedure needs to be simplified.

Here it would be appropriate to mention a pilot project, conducted by France and Belgium, in which the obligation to appoint a tax representative was dropped. The two Member States established a procedure which both facilitates the payment of excise duty at destination and enables the Member States' administrations to monitor movements of excisable products more closely. The procedure authorises a foreign vendor to lodge a guarantee covering all movements he effects into the other Member State at a central office in that Member State. Duty is then paid on the basis of information exchanged between the Member State of departure and the Member State of destination.

*Article 10(3) of the proposal for a Directive includes all the simplified procedures tried out in the pilot project run by Belgium and France. Furthermore the wording of the Article has been simplified. Paragraphs 1 and 2 in the current version have been run together to form a single paragraph. The new paragraph 2 specifies when the excise duty becomes chargeable. Lastly, the phrases* "subject to Community law" and "compatible with the Treaty" have been deleted from paragraph 5.

*3.6.3. Non-existence of an accompanying administrative document*

*Difficulties encountered*

Another big difference between the old procedure and the one proposed in Article 7 is that no accompanying administrative document is required as the Council considered that private individuals could not be required to comply with the discharge procedure.

In practice the Member States are against excisable products intended for sale being moved without an accompanying administrative document because this makes it more complicated to check whether the movement was completed in accordance with the rules.

*Opinion*

The new procedure for distance sales (*see point 3.6.2*) requires a vendor to write on the commercial documents accompanying his consignment the references for the authorisations he has been granted by both the Member State of departure and that of destination (the authorisations implying that a guarantee has been lodged with a central

office). It will therefore be easy to check whether the movement has been completed in accordance with the rules.

### *3.6.4. Carriage arranged by the private individual*

*Difficulties encountered*

Article 10 has nothing specific to say about the movement of products purchased by private individuals who then arrange for carriage without any direct or indirect input by the vendor. The principle that excise duty must be paid at destination is therefore not clearly stated in Article 10.

On the basis of this "legal loophole" some traders have concluded that duty on such movements is payable only in the Member State where the excisable products are purchased. But this contradicts the provisions of Article 8 which require duty to be paid in the Member State where the products are acquired, but only on condition that the excisable products are acquired by private individuals for their own use and **moved by them.**

*Opinion*

Liberalising movements of excisable products effected by private individuals or on their behalf will provide a satisfactory response to the current problem. Tobacco products are not covered by the liberalisation measures for the reasons given at point 3.4.2 under the heading "*Products transported on behalf of private individuals*".

## 4. CONCLUSIONS

Ten years have gone by since the single market was established and, therefore, since the provisions of Articles 7 to 10 of Directive 92/12/EEC entered into force. Whilst it is true that the type of intra-Community movement covered by these provisions represents only a very small proportion of total intra-Community movements of excisable products, it must nevertheless be stressed that this type of movement mainly involves private individuals and small traders without substantial financial resources and no commercial infrastructure.

Such parties are particularly aware of the opportunities the single market should open up for them but, as is clear from the problems described in point 4, they are finding it difficult to comply with the implementing procedures of Articles 7 to 10, or even to understand the reasons underlying the taxation principles reflected in these Articles.

It has to be said that the present wording of Articles 7 to 10 has allowed the application of national interpretations which, depending on the Member State, are framed more liberally or more restrictively than the provisions of those Articles. The Commission considers that this is not entirely attributable to any difficulty over how to read the Articles but due, rather, to a protectionist reaction on the part of some Member States which, in order to protect income accruing to their national budgets, seek as far as possible to restrict the free movement of goods brought about by the single market.

Consequently, although it was possible to achieve a common interpretation of Articles 7 to 10 of the Directive through the case law of the Court, the Commission considers that it is the responsibility of the legislator, i.e. the Council, to provide the requisite solutions. A proposal for amending the Directive has therefore been drafted (see the proposal for a Directive annexed to this report). The amendment is based on the same principles as those underlying the present Articles, namely:

– that excise duty must be paid in the Member State of destination when excise products are moved for commercial purposes; and

– the general principles governing the single market, i.e. that excise duty on products moved for non-commercial purposes by private individuals should always be paid in the Member State where the goods were acquired.

Apart from the above proposal, the Commission considers that Commission Regulation (EEC) No 3649/92 should also be amended to take account of the problems of reimbursement described in Chapter 4. A draft proposal setting out amendments to that instrument is also annexed.

# ANNEX 1

*Articles 7 to 10 of the existing Directive 92/12/EEC*

## *Article 7*

1. In the event of products subject to excise duty and already released for consumption in one Member State being held for commercial purposes in another Member State, the excise duty shall be levied in the Member State in which those products are held.

2. To that end, without prejudice to Article 6, where products already released for consumption as defined in Article 6 in one Member State are delivered, intended for delivery in another Member State or used in another Member State for the purposes of a trader carrying out an economic activity independently or for the purposes of a body governed by public law, excise duty shall become chargeable in that other Member State.

3. Depending on all the circumstances, the duty shall be due from the person making the delivery or holding the products intended for delivery or from the person receiving the products for use in a Member State other than the one where the products have already been released for consumption, or from the relevant trader or body governed by public law.

4. The products referred to in paragraph 1 shall move between the territories of the various Member States under cover of an accompanying document listing the main data from the document referred to in Article 18 (1). The form and content of this document shall be established in accordance with the procedure laid down in Article 24 of this Directive.

5. The person, trader or body referred to in paragraph 3 must comply with the following requirements:

> a) before the goods are dispatched, make a declaration to the tax authorities of the Member State of destination and guarantee the payment of the excise duty;
>
> b) pay the excise duty of the Member State of destination in accordance with the procedure laid down by that Member State;
>
> c) consent to any check enabling the administration of the Member State of destination to satisfy itself that the goods have actually been received and that the excise duty to which they are liable has been paid.

6. The excise duty paid in the first Member State referred to in paragraph 1 shall be reimbursed in accordance with Article 22 (3).

7. Where products subject to excise duty and already released for consumption in a Member State are to be moved to a place of destination in that Member State via the territory of another Member State, such movements shall take place under cover of the accompanying document referred to in paragraph 4 and shall use an appropriate itinerary.

8. In the cases referred to in paragraph 7:

a) the consignor shall, before the goods are dispatched, make a declaration to the tax authorities of the place of departure responsible for carrying out excise-duty checks;

b) the consignee shall attest to having received the goods in accordance with the rules laid down by the tax authorities of the place of destination responsible for carrying out excise-duty checks;

c) the consignor and the consignee shall consent to any check enabling their respective tax authorities to satisfy themselves that the goods have actually been received.

9. Where products subject to excise duty are moved frequently and regularly under the conditions specified in paragraph 7, Member States may agree bilaterally to authorise a simplified procedure in derogation from paragraphs 7 and 8.

***Article 8***

As regards products acquired by private individuals for their own use and transported by them, the principle governing the internal market lays down that excise duty shall be charged in the Member State in which they are acquired.

***Article 9***

1. Without prejudice to Articles 6, 7 and 8, excise duty shall become chargeable where products for consumption in a Member State are held for commercial purpose in another Member State.

In this case, the duty shall be due in the Member State in whose territory the products are and shall become chargeable to the holder of the products.

2. To establish that the products referred to in Article 8 are intended for commercial purposes, Member States must take account, *inter alia*, of the following:

– the commercial status of the holder of the products and his reasons for holding them,

– the place where the products are located or, if appropriate, the mode of transport used,

– any document relating to the products,

– the nature of the products,

– the quantity of the products.

For the purposes of applying the content of the fifth indent of the first subparagraph, Member States may lay down guide levels, solely as a form of evidence. These guide levels may not be lower than:

a) *Tobacco products*

– cigarettes 800 items

– cigarillos (cigars weighing not more than 3 g each) 400 items

– cigars 200 items

– smoking tobacco 1.0 kg

b) *Alcoholic beverages*

– spirit drinks 10 l

– intermediate products 20 l

– wines (including a maximum of 60 l of sparkling wines) 90 l

– beers 110 l

Until 30 June 1977 Ireland shall be authorised to apply guide levels which may not be less than 45 litres for wine (including a maximum of 30 litres of sparkling wine) and 55 litres for beer.

3. Member States may also provide that excise duty shall become chargeable in the Member State of consumption on the acquisition of mineral oils already released for consumption in another Member State if such products are transported using atypical modes of transport by private individuals or on their behalf. Atypical transport shall mean the transport of fuels other than in the tanks of vehicles or in appropriate reserve fuel canisters and the transport of liquid heating products other than by means of tankers used on behalf of professional traders.

***Article 10***

1. Products subject to excise duty purchased by persons who are not authorised warehouse keepers or registered or non-registered traders and dispatched or transported directly or indirectly by the vendor or on his behalf shall be liable to excise duty in the Member State of destination. For the purposes of this Article, 'Member State of destination' shall mean the Member State of arrival of the dispatch or transport.

2. To that end, the delivery of products subject to excise duty already released for consumption in a Member State and giving rise to the dispatch or transport of those products to a person as referred to in paragraph 1, established in another Member State, and which are dispatched or transported directly or indirectly by the vendor or on his behalf shall cause excise duty to be chargeable on those products in the Member State of destination.

3. The duty of the Member State of destination shall be chargeable to the vendor at the time of delivery. However, Member States may adopt provisions stipulating that the excise duty shall be payable by a tax representative, other than the consignee of the products. Such tax representative must be established in the Member State of destination and approved by the tax authorities of that Member State.

The Member State in which the vendor is established must ensure that he complies with the following requirements:

- guarantee payment of excise duty under the conditions set by the Member State of destination prior to dispatch of the products and ensure that the excise duty is paid following arrival of the products;

- keep accounts of deliveries of products.

4. In the case referred to in paragraph 2, the excise duty paid in the first Member State shall be reimbursed in accordance with Article 22 (4).

5. Subject to Community law, Member States may lay down specific rules for applying this provision to products subject to excise duty which are covered by special national distribution arrangements compatible with the Treaty.

Proposal for a

# COUNCIL DIRECTIVE

**amending Directive 92/12/EEC on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products**

# EXPLANATORY MEMORANDUM

The report from the Commission to the European Parliament, the Council and the Economic and Social Committee on the application of Articles 7 to 10 of Directive 92/12/EEC[1] concludes that some of the provisions of these Articles should be clarified to ensure unambiguous understanding of the tax rules and procedures set out therein.

The Commission therefore proposes amending the provisions on excisable products already released for consumption in one Member State and then moved to a destination in another. This amendment is based on the same principles as those applied when Directive 1992/12/EEC was adopted, namely:

– that excise duty must be paid in the Member State of destination when excise products are moved for commercial purposes; and

– the general principles governing the single market, i.e. that excise duty on products moved for non-commercial purposes by private individuals should always be paid in the Member State where the goods were acquired.

## COMMENTS ON THE PROPOSED MEASURES

### Article 1 - Amendments to Directive 92/12/EEC

*1) Amendment of Article 7*

a) Amendment of Article 7(1)

<u>The first of the proposed subparagraphs</u> sets out the principle laid down in the current text of Article 7 that where products already released for consumption in one Member State are held for commercial purposes in another, the excise duty should be collected in the Member State in which they are being held. However, the wording is simplified.

<u>A second subparagraph</u> is added to indicate that commercial purposes are considered to be all purposes other than personal use by private individuals. The procedures referred to in paragraphs 4 and 5, second subparagraph, are thus explicitly made applicable to excisable products held by private individuals for purposes other than their personal use, and reimbursement of the excise duty in the Member State of departure is explicitly made possible under paragraph 6. At present the Directive makes no express provision for the procedure to be followed by private individuals wishing to carry out such transactions legitimately. It makes sense for the excise to be charged to the private individual who transports the products or has them transported. In terms of the procedures to follow, these movements should be treated in the same way as the movements referred to in Article 7.

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[1] Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ L 76, 23.3.1992, p. 1), as last amended by Council Regulation (EC) No 807/2003 of 14 April 2003 (OJ L 122, 16.5.2003, p.36).

The principle set out in first subparagraph fully applies to all excise products sold in the course of journeys within the Community unless, as provided for in Commission notice 99/08,[2] the products are held on a vessel or aircraft making crossings or flights between two Member States and are not available for sale when the vessel or aircraft is in the territory of one of those Member States. In such cases the goods are not considered to be held for commercial purposes in that Member State. To eliminate all doubt about the existence of this possibility, it should be explicitly indicated in the Directive. To this end a third subparagraph is added to paragraph 1 specifying that products held on board a vessel or aircraft making crossings or flights between two Member States but not available for sale when the vessel or aircraft is in the territory of one of the Member States are not deemed to be held for commercial purposes in that Member State.

b) Amendment of Article 7(2)

Since Article 7(2) only repeats provisions already covered in paragraphs 1 and 3, it is deleted.

c) Amendment of Article 7(3) to (9)

The present wording of paragraph 3 leaves a lot of leeway to Member States regarding the identification of persons from whom excise duty may be due in the Member State of destination. This flexibility causes some Member States difficulty. The expression "depending on the circumstances" gives no definite criteria for establishing whether the excise duty must be paid by the consignor, the consignee, or by some other person (the carrier, for instance).

The proposed paragraph 3 makes a clear distinction between two situations in which excisable products are held for commercial purposes in a Member State other than the one where they are released for consumption and defines clearly and without ambiguity the persons from whom excise duty is due, and who must also complete the formalities set out in paragraph 5, in each situation. To solve the difficulties associated with the formalities to be completed at destination, the person best placed to carry out those formalities should be designated as the excise debtor.

The first subparagraph of paragraph 3 refers to situations in which products are dispatched to the territory of another Member State by a trader not established in that Member State to be offered for sale there. This concerns products which, at the moment of entering the territory of another Member State, have not yet been the subject of a commercial transaction. The non-established trader is designated as the excise debtor in this situation.

The second subparagraph of paragraph 3 refers to situations in which products are used within another Member State for the purposes of a trader or body governed by public law. In such situations the general rule to apply is that the excise is due from the consignee (trader or body governed by public law to whose use the goods are assigned) established in the Member State of destination. If, in such cases, the foreign vendor has indicated his intention of paying the duty at destination (for example, because he regularly makes deliveries to that Member State under duty-paid arrangements) he can opt to be come the excise debtor instead of the consignee (third subparagraph of paragraph 3).

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[2] Commission notice concerning the VAT and excise rules to be applied from 1 July 1999 by suppliers of goods sold on board ferries and aircraft or in airports to passengers travelling within the European Union: 1999/C 99/08 (OJ C 99. 10.4.1999, p. 20).

In view of the removal of the chargeable event for excise currently provided for in Article 9, a fourth subparagraph should be added to Article 7(3) providing that in cases other than those referred to in the first to third subparagraphs, excise is due from the person holding the products for commercial purposes. This provision replaces the second subparagraph of Article 9(1), which is deleted (see also the comments at point 3(a) below).

A final amendment to paragraph 3 concerns the concept of the "trader carrying out an economic activity independently", which the proposed amendment replaces with the concept of "trader", since all traders are concerned by this provision. It therefore suffices to refer to the status of "trader".

In paragraph 4, the words "excluding those in respect of which the non-established trader is identified as the excise debtor" are added. This means that the simplified accompanying document provided for in Commission Regulation (EEC) No 3649/92 of 17 December 1992[3] need no longer be used in these situations. Use of this document is replaced by the procedure applicable to "distance sales" provided for in Article 10(3) which, while facilitating procedures for paying excise at destination, allows the administrations of the Member States concerned to monitor movements more closely.

Paragraph 5 sets out the obligations of the excise debtors defined in paragraph 3. The first subparagraph, which is new, provides that the formalities to be completed by the trader not established in the Member State of holding are the same as those applicable to the "distance sales" provided for in Article 10(3). The second subparagraph sets out the formalities currently provided for in paragraph 5 while specifying in the first sentence that they now apply only to the situations referred to in the second and fourth subparagraphs of paragraph 3.

The changes to paragraphs 6, 7 and 8 are purely formal.

At present paragraph 9 authorises Member States to introduce simplified procedures by bilateral agreement where products subject to excise duty are moved frequently and regularly from one place in a Member State to another place in the same Member State via the territory of another Member State. Since these simplified procedures have no impact on the general taxation principle referred to in paragraph 1, the wording of paragraph 9 is changed to allow the use of simple administrative agreements to introduce simplified procedures. This should facilitate the conclusion of bilateral agreements between Member States.

*2) Amendments to Article 8*

At present Article 8 only has one paragraph. The proposal amends this paragraph and adds two new ones.

The proposed first paragraph sets out the principle set out in the current version of Article 8, but the words "the principle governing the internal market lays down that" are deleted, since it is superfluous to refer to a general principle derived directly from the Treaty.

The present wording of Article 8 refers only to the situation in which transport is carried out personally by the person acquiring the excisable products. In the Commission's view it is no longer justifiable to restrict the general principle governing the single market in this way. It therefore proposes, in line with the principle applied to VAT, that all movements of products intended for the personal use of private individuals carried out by or on behalf of a private

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[3] OJ L 369, 18.12.1992, p. 17.

individual should by virtue of their non-commercial nature be subject to taxation in the Member State only in the Member State of acquisition. To this end the proposed second paragraph clearly states that the principle set out in the first paragraph also applies to products transported by third parties on behalf of private individuals, with the exception of manufactured tobacco. The full application of this principle to manufactured tobacco products would be contrary to the health policy provided for in the Treaty, in particular Article 152, and to the World Health Organisation's Framework Convention on Tobacco Control,[4] which provides for "implementing tax policies and, where appropriate, price policies, on tobacco products so as to contribute to the health objectives aimed at reducing tobacco consumption". Consequently excise duty will continue to be chargeable in the Member State of destination on tobacco products acquired from a foreign vendor and transported on behalf of a private individual.

The third paragraph states that the principle of taxation in the Member State of acquisition also applies to products dispatched by one private individual to another without any payment, direct or indirect (this applies mainly to gifts). This seems necessary to avoid any doubt as to how to treat these non-commercial movements.

*3) Amendments to Article 9*

a) Amendment of the first subparagraph of Article 9(1)

The first subparagraph of Article 9(1) provides that excise becomes chargeable where products released for consumption in one Member State are held for commercial purposes in another in circumstances other than those provided for in Articles 6, 7 and 8. It is proposed to delete this provision, which simply repeats the chargeable event already provided for in Article 7(1), with the sole difference that the person from whom excise duty is due is the holder of the products instead of the excise debtors identified in the situations referred to in Article 7. To cover the situations currently referred to in Article 9, a subparagraph has been added to Article 7(3) stipulating that in cases other than those for which the person from whom excise duty is due is explicitly designated, that person shall be the holder of the products. This may in particular concern goods held by private individuals for purposes other than their personal use, or products held by a trader or body governed by public law that has not met the requirements set out in the proposed Article 7(5).

b) Amendment of Article 9(2)

In the first sentence of paragraph 2, the reference to Article 8 is deleted since this provision is intended to set criteria to be taken into account by the competent authorities of Member States in all situations in which goods are held in their territories and there are doubts as to whether they are held for commercial purposes or for the personal use of private individuals.

The second subparagraph of paragraph 2 is no longer included in the proposal. This subparagraph allows Member States to provide guide levels, solely as a form of evidence, for establishing that the products referred to in Article 8 are intended for commercial purposes. In any case an administration can never use these guide levels on their own as evidence that excisable products are being held for commercial purposes. Neither may they ever be interpreted as tax-free "thresholds" since, if the administration of the Member State carrying out checks wants to classify a consignment as commercial, whether it falls short of these

[4] This convention was adopted by the World Health Assembly on 21 May 2003 and signed by the European Community on 16 June 2003.

levels or exceeds them, it must have solid facts to hand on which to base such a conclusion. The guide levels should therefore be seen simply as guidelines given to officers by their administration, which may recommend that checks should not be carried out on private individuals unless these are carrying in excess of a given amount of excisable products. However, as such recommendations lie solely within the jurisdiction of the Member States, they should not be included in the enacting terms of the Directive.

c) Amendment of Article 9(3)

Article 9(3) is deleted. The Commission is not convinced of the need to retain a tax provision allowing Member States to derogate from the general principle of free movement applicable to movements carried out by private individuals. Although there may be a safety problem associated with the transport of mineral oils, a provision derogating from that general principle would not provide a satisfactory legal solution to the problem. Any stricter national or Community rules that may be applied to the transport of mineral oil must be kept completely separate from the principle of the taxation to be applied to such movement. If there is a failure to comply with certain safety standards, an offence should be recorded, but should have no impact on excise duties.

*4) Amendments to Article 10*

The wording of paragraph 1 does not clearly identify the movements it concerns. The original intention of the legislator, which was to introduce procedures applicable to sales made by foreign vendors who take responsibility, directly or indirectly, for the transport of products to private individuals established in another Member State ("distance sales") is not sufficiently highlighted. In order to make clear that this provision refers to distance sales to private individuals, the words "*purchased by persons who are not authorised warehouse keepers or registered or non-registered traders*" are replaced by the words "*purchased by persons acting in their capacity as private individuals*".

Paragraph 2, which repeats the provisions of paragraph 1, is deleted. It is replaced by a provision, currently set out in paragraph 3, specifying that the excise duty becomes chargeable at the time of delivery of the products.

Paragraph 3 sets out the obligations of the traders carrying out the transactions referred to in paragraph 1. The report states that traders generally consider the current payment procedure rather unsatisfactory. Their main difficulties are:

- the procedures with which they have to comply are not harmonised; each Member State decides independently what procedures to impose for lodging guarantees and paying excise duty;
- it is difficult to comply with the procedure which requires a guarantee to be lodged before the corresponding products are dispatched, since in practice this would mean a vendor having to travel physically to the Member State of destination before dispatching the products;
- appointing a tax representative, which most Member States require, places an additional financial burden on vendors, which they consider disproportionate to the sales made; and
- the very concept of tax representative is interpreted very differently in different Member States so that the representative's obligations are also likely to vary.

Since all this is perceived as restrictive and cumbersome, particularly by small and medium-sized businesses, the procedure provided for in paragraph 3 is replaced by a simplified procedure. This facilitates the payment of excise duty in the Member State of destination while allowing that Member State's administration to monitor movements more closely. The right of the Member State of destination to require the appointment of a tax representative has not been retained.

Paragraph 4 no longer refers to paragraph 2, but to paragraph 1 because of the proposed amendments to paragraphs 1 and 2.

In paragraph 5 the words "subject to Community law" and "compatible with the Treaty" have been deleted as superfluous, since Community law and the Treaty apply in any event.

*5) Insertion of Articles 10a, 10b and 10c*

The fact that the Directive contains no Community provisions on losses and offences occurring whilst excisable products already released for consumption in a Member State are being moved within the Community constitutes a legal loophole. The absence of provisions on how to determine the Member State in which excise duty is due in this case could cause conflict of interest between Member States and, in some cases, lead to double taxation. What is more, it could lead to different traders in comparable situations being treated entirely differently in different Member States and, therefore, to distortion of competition between traders. Such losses and offences should therefore be made subject to a regime similar to that for losses and offences detected in connection with the excise suspension arrangements (see Articles 14 and 20 of the Directive).

*Article 10a(1) and (2)* provide for a tax exemption in the Member State of destination for losses which occur whilst excisable products already released for consumption in one Member State are moved within the Community for commercial purposes. The conditions subject to which this is granted are laid down independently by each Member State, the amount depending on whether the losses are attributable to fortuitous events or force majeure and whether they are typical of the type of product transported. *Paragraph 3* covers the tax treatment of losses, other than those deemed to be due to an offence or irregularity, that are not eligible for the exemption from excise duty granted for the type of loss covered in paragraphs 1 and 2.

*Article 10b* covers the tax treatment of excisable products in connection with which an offence or irregularity has occurred whilst they were being moved within the Community. In particular, the paragraph lays down where and by whom excise duty is payable in the different situations that can be envisaged. The provisions of this Article are similar to those for excisable products moving under the suspension arrangements (see Article 20 of Directive 92/12/EEC).

To avoid double taxation, *Article 10c* provides that the Member State of departure is to reimburse the excise duty initially levied once evidence is provided of recovery of the excise duty in another Member State in the cases referred to in Article 10a(3) and Article 10b, paragraphs 1 to 4. It also provides that in these cases the guarantee lodged in the Member State of destination under Article 7(5)(a) and Article 10(3)(b) is to be released.

*6) Amendment of Article 27*

This provides that application of the amendments made by this Directive should be evaluated and examined by the Council on the basis of a Commission report before 1 January 2010.

Proposal for a

**COUNCIL DIRECTIVE**

**amending Council Directive 92/12/EEC on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 93 thereof,

Having regard to the proposal from the Commission,[1]

Having regard to opinion of the European Parliament,[2]

Having regard to the opinion of the European Economic and Social Committee,[3]

Whereas:

(1) Article 27 of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products[4] provides that before 1 January 1997 the Council is to re-examine the provisions of Articles 7 to 10 with a view to adopting any necessary amendments. These Articles lay down the provisions applicable to movements within the Community, whether commercial or private, of products on which excise duties have already been paid in a Member State. However, at that date the volume of products already released for consumption in a Member State being moved within the Community was relatively insignificant and so Member States had not yet gathered sufficient experience to evaluate the relevance of Articles 7 to 10 of Directive 92/12/EEC.

(2) Since then, however, although the figures for intra-Community movements of tax-paid products remain relatively low, more and more traders and private individuals are trying to interpret Articles 7 to 10 of Directive 92/12/EEC in such a way as to legitimise trade practices involving payment of excise duty in the Member State where the products are acquired. Also, the increase in the volume of commercial transactions conducted via the Internet and the abolition of duty-free sales to persons travelling within the Community have resulted in more use being made of these provisions. On the basis of the conclusions of a further survey of the national administrations and traders involved, launched in January 2002, the Commission drew up a report on the application of Articles 7 to 10 of Directive 92/12/EEC.

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1 OJ C […] of […], p. […].
2 OJ C […] of […], p. […].
3 OJ C […] of […], p. […].
4 OJ L 76 of 23.3.1992, p.1, as last amended by Council Regulation (EC) No 807/2003 of 14 April 2003 (OJ L 122, 16.5.2003, p. 36).

(3) The report concluded that some of these provisions needed to be revised and others clarified to allow the taxation and procedural rules in Articles 7 to 10 of Directive 92/12/EEC to be understood unequivocally.

(4) The concept of "commercial purposes" should be defined as "purposes other than personal use by private individuals" to make clear that the principle of charging excise duties on products already released for consumption in one Member State but held for commercial purposes in another, as well as the associated procedures, apply fully to products held by private individuals for purposes other than their personal use.

(5) The principle of charging excise duty applies fully to excisable products held on board a vessel or aircraft making crossings or flights between two Member States for sale during journeys within the Community unless, as provided in Commission notice 1999/C 99/08,[5] the products are not available for sale when the vessel or aircraft is in the territory of one of those two Member States. In that case the goods are not considered to be held for commercial purposes in that Member State. To eliminate all doubt about the existence of this possibility, it should be explicitly provided for in the Directive.

(6) Article 7 distinguishes different situations in which excisable products already released for circulation in one Member State are held for commercial purposes in another, but does not clearly identify the person from whom excise duty is due in the Member State of destination in each of these situations. An unambiguous definition should therefore be given of the person from whom excise duty is due and the requirements to be met in the Member State of destination in each of the situations referred to.

(7) In these situations the obligations of persons not established in the Member State of holding but liable for excise duty should be simplified and at the same time provision should be made for the Member States concerned to supervise the movements more effectively.

(8) The concept of "trader carrying out an economic activity independently" should be replaced by the concept of "trader", since all categories of trader are concerned.

(9) In view of the difficulties encountered by Member States wishing to introduce simplified procedures by means of bilateral conventions on the basis of Article 7(9), in particular in the case of sales on board an aircraft or vessel during travel within the Community, the use of simple administrative agreements to introduce such simplified procedures should be allowed.

(10) Article 8 sets out the principle governing the single market whereby in the case of products acquired by private individuals for their own use and transported by them, excise is to be charged in the Member State in which the products are acquired. This principle should be extended to apply to products for the personal use of a private individual transported by a third party on behalf of the private individual, since such transactions are purely private. For health protection reasons this principle should not

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[5] Commission notice concerning the VAT and excise rules to be applied from 1 July 1999 by suppliers of goods sold on board ferries and aircraft or in airports to passengers travelling within the European Union - 1999/C 99/08(OJ C 99, 10.4.1999, p.20).

however be extended to cover manufactured tobacco transported on behalf of a private individual.

(11) It should be specified that the principle set out in Article 8 also applies to products sent by one private individual to another without any payment, direct or indirect (this applies mainly to gifts), to clear up any doubts as to how such non-commercial movements are to be treated.

(12) Article 9(1) should be deleted, since it simply repeats the chargeable event already provided for in Article 7(1), with the sole difference that the excise debtor is the holder of the products instead of the debtors identified in the situations referred to in Article 7. To cover the situations currently referred to in Article 9, a subparagraph should be added to Article 7(3) stipulating that in cases other than those for which the person from whom excise duty is due is explicitly designated, that person shall be the holder of the products.

(13) The provision allowing Member States to lay down guide levels to establish whether products are held for commercial purposes or for the personal use of private individuals should be deleted. In any case an administration can never use these guide levels on their own as evidence that excisable products are being held for commercial purposes. They should therefore only be included in inspection instructions given by a national administration to its officers.

(14) Article 9(3) should be deleted since it is not appropriate to retain a tax provision allowing Member States to derogate from the principle laid down in Article 8 in respect of the transport of mineral oils for safety reasons.

(15) It should be specified that the situation covered by Article 10 ("distance sales") refers only to movements to persons acting in their capacity as private individuals, since movements to traders or bodies governed by public law are explicitly covered by Article 7. For these "distance sales" a procedure should also be introduced for the payment of excise in the Member State of destination that reconciles traders' legitimate calls for simplification with the need to increase the possibilities of monitoring this type of transaction.

(16) The fact that the Directive contains no common provisions on losses and offences occurring whilst excisable products already released for consumption in a Member State are being moved within the Community constitutes a legal loophole which may lead to conflicts of interest between Member States and in some cases lead to double taxation. Such losses and offences should therefore be made subject to a regime similar to that for losses and offences detected in connection with the excise suspension arrangements.

(17) The application of amendments made by this Directive should be evaluated and examined by the Council on the basis of a Commission report before 1 January 2010.

(18) Directive 92/12/EEC should be amended accordingly,

HAS ADOPTED THIS DIRECTIVE:

*Article 1*

Directive 92/12/EEC is amended as follows:

1) Article 7 is amended as follows:

a) paragraph 1 is replaced by the following:

"1. Where products subject to excise duty and already released for consumption in one Member State are held for commercial purposes in another Member State, the excise duty shall be levied in that other Member State.

“Commercial purposes” shall be deemed to be all purposes other than personal use by private individuals.

However, products which are held on board a vessel or aircraft making crossings or flights between two Member States but which are not available for sale when the vessel or aircraft is in the territory of one of the Member States are not deemed to be held for commercial purposes in that Member State.”

b) paragraph 2 is deleted;

c) paragraphs 3 and 9 are replaced by the following:

"3. In the situations referred to in paragraph 1, where products are held by a trader not established in the Member State of holding (hereinafter “non-established trader”) with a view to their sale, the excise duty shall be due from that trader.

Where the products used within another Member State for the purposes of a trader or body subject to public law, the excise duty shall be due from the trader or body subject to public law.

However, where the products are delivered to a non-established trader, that trader may pay the excise duty instead of the debtors identified in the second subparagraph.

In all other cases the excise duty is due from the person holding the products for commercial purposes.

4. The products referred to in paragraph 1, excluding those in respect of which the non-established trader is identified as the excise debtor, shall move between the territories of the various Member States under cover of an accompanying document listing the main data from the document referred to in Article 18 (1).

The form and content of this document shall be established in accordance with the procedure laid down in Article 24(3) and (4).

5. Non-established traders shall comply with the requirements set out in Article 10(3).

The traders and bodies governed by public law referred to in the second subparagraph of paragraph 3, and the persons from whom excise duty is due under the fourth subparagraph of paragraph 3 must:

a) before the goods are dispatched, submit a declaration to the tax authorities of the Member State of destination and guarantee payment of the excise duty;

b) pay the excise duty of the Member State of destination in accordance with the procedure laid down by that Member State;

c) consent to any checks enabling the administration of the Member State of destination to satisfy itself that the products have actually been received and that the excise duty chargeable on them has been paid.

6. The excise duty paid in the first Member State referred to in paragraph 1 shall be reimbursed in accordance with Article 22(3).

7. Where products already released for consumption in a Member State are to be moved to a place of destination in that Member State via the territory of another Member State and using an appropriate itinerary, such movement shall take place under cover of the accompanying document referred to in paragraph 4.

8. In the cases referred to in paragraph 7, the following requirements shall apply:

a) the consignor shall, before the goods are dispatched, make a declaration to the tax authorities of the place of departure responsible for carrying out excise-duty checks;

b) the consignee shall attest to having received the goods in accordance with the rules laid down by the tax authorities responsible for carrying out excise-duty checks in the place of destination;

c) the consignor and the consignee shall consent to any checks enabling their respective tax authorities to satisfy themselves that the goods have actually been received.

9. Where products subject to excise duty are moved frequently and regularly under the conditions specified in paragraph 7, Member States may, by means of bilateral administrative agreements, authorise a simplified procedure in derogation from paragraphs 7 and 8."

2) Article 8 is replaced by the following:

*"Article 8*

Excise duty on products acquired by private individuals for personal use and transported from one Member State to another by them shall be charged in the Member State in which the products are acquired.

As regards products other than manufactured tobaccos acquired by private individuals, the provisions of the first subparagraph shall also apply in cases where the products are transported on their behalf.

Taxation in the Member State of acquisition also applies to products dispatched by one private individual to another without any payment, direct or indirect.

3) Article 9 is amended as follows:

a) paragraph 1 is deleted;

b) paragraph 2 is replaced by the following:

"2. To determine whether the products referred to in Article 8 are intended for commercial purposes, Member States shall take account of the following:

a) the commercial status of the holder of the products and his reasons for holding them;

b) the place where the products are located or, if appropriate, the mode of transport used;

c) any document relating to the products;

d) the nature of the products;

e) the quantity of the products."

c) Paragraph 3 is deleted.

4) Article 10 is replaced by the following:

*"Article 10*

1. Products already released for consumption which are purchased by persons acting in their capacity as private individuals and which are dispatched or transported directly or indirectly by the vendor or on his behalf are subject to excise duty in the Member State of destination.

'Member State of destination' shall mean the Member State of arrival of the consignment or of transport.

2. In the case referred to in paragraph 1, the excise duty becomes chargeable at the time of delivery of the products.

3. The excise duty in the Member State of destination is chargeable to the vendor.

The vendor must:

a) register his identity with the tax authorities of his Member State, as certified by a document whose form and content shall be laid down in accordance with the procedure set out in Article 24 (3) and (4);

b) before dispatching the products, lodge a guarantee covering payment of the excise duty with the "central" tax office designated by the Member State of destination;

c) for control purposes, indicate the identification number referred to in the third subparagraph on the commercial documents accompanying the consignments of excisable products;

d) at the end of a given period, to be determined by each Member State, send the central office with which his identity is registered a document setting out the quantities of products he delivered during that period.

The Member State of destination shall define the conditions for calculating the guarantee referred to in point b) of the first subparagraph. When lodging the guarantee, the vendor shall produce the identifying document referred to in paragraph (a) of the first subparagraph. The Member State of destination shall then allocate the vendor an identification number.

The form and content of the document referred to in point d) of the first subparagraph shall be established in accordance with the procedure laid down in Article 24(3) and (4). The document shall be endorsed by the tax authorities of the Member State of departure and, where appropriate, shall be accompanied by the administrative and commercial documents required by the Member State of destination. The excise duty shall be paid in accordance with the procedure laid down by the Member State of destination.

4. In the case referred to in paragraph 1, the excise duty paid in the first Member State shall be reimbursed in accordance with Article 22 (4).

5. Member States may lay down specific rules for applying paragraphs 1 to 4 to products subject to excise duty that are covered by special national distribution arrangements."

5) The following Articles 10*a*, 10*b* and 10*c* are inserted:

*"Article 10a*

1. Persons from whom excise duty is due under Article 7(3) or Article 10(3) shall be exempt from duty in the Member State of destination in respect of losses attributable to fortuitous events or force majeure that occur in the course of movements of products and are established by the authorities of the each Member State.

They shall also be exempt from duty in the Member State of destination in respect of losses inherent in the nature of the products during transport. Each Member State shall lay down the conditions under which these exemptions are granted.

2. The losses referred to in paragraph 1 shall be established according to the applicable rules of the Member State of destination.

The guarantee lodged pursuant to Article 7(5)(a) and Article 10(3)(b) shall be totally or partially released.

3. Without prejudice to Article 10*b*(1), the duty on shortages other than the losses referred to in paragraph 1 of this Article shall be levied on the basis of the rates applicable in the Member States concerned at the time the losses, duly established by the competent authorities, occurred, or if necessary at the time the shortage was recorded.

*Article 10b*

1. Where an irregularity or offence on which excise duty is chargeable has been committed in the course of a movement which comes under Article 7(4) or Article 10(1), the duty shall be due in the Member State where the offence or irregularity was committed from the person who guaranteed payment of the duty in accordance with Article 7(5)(a) or Article 10(3)(b).

Where the excise duty is collected in a Member State other than that of departure, the Member State collecting the duty shall inform the competent authorities of the Member State of departure.

2. When, in the course of a movement of products carried out in accordance with Article 7(4) or Article 10(1), an offence or irregularity has been detected without it being possible to determine where it was committed, the offence or irregularity shall be deemed to have been committed in the Member State where it was detected.

3. When the products do not arrive at their destination and it is not possible to determine where the offence or irregularity was committed, it shall be deemed to have been committed in the Member State of departure.

4. If, before the expiry of a period of three years from the date on which the accompanying document referred to in Article 7(4) or the commercial document referred to in Article 10(3)(c) was drawn up, the Member State where the offence or irregularity was committed is ascertained, that Member State shall collect the excise duty at the rate in force on the date when the goods were dispatched.

5. Member States shall take the necessary measures to deal with any offence or irregularity and to impose effective penalties.

*Article 10c*

In the cases referred to in Article 10a(3) and Article 10b(1) to (4), once evidence is provided of recovery of the excise duty in a Member State other than that of departure, the excise duty initially levied shall be reimbursed and the guarantee lodged pursuant to Article 7(5)(a) and Article 10(3)(b) shall be released.

6) Article 27 is replaced by the following:

"On the basis of a report from the Commission, the Council shall re-examine the provisions of Articles 7 to 10c before 1 January 2010 and in accordance with Article 93 of the Treaty shall adopt any necessary amendments."

*Article 2*

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by […] at the latest. They shall send the Commission forthwith the text of those provisions and a correlation table between those provisions and this Directive.

When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The methods of making such a reference shall be decided by the Member State.

2. Member States shall communicate to the Commission the text of the main provisions of domestic law which they adopt in the field governed by this Directive.

*Article 3*

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

*Article 4*

This Directive is addressed to the Member States.

Done at Brussels, […]

*For the Council*
*The President*