

# Production, holding and movement of excise goods under duty suspension within the European Union<sup>1</sup>

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## Abstract

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This article provides an overview of the duty suspension procedure under which excise goods can be produced, held and moved within the European Union (EU). The harmonisation of special excise duties in the European Union (EU) is well advanced. Member States are obliged to charge excise duties on energy products, alcohol and alcoholic beverages, and tobacco products. Since 1 January 1993, following the realisation of the internal market and the related abolition of border checks between Member States of the then European Community (now the EU), new legal rules allow trade in excise goods which have not yet been taxed. The examples included provide some guidance on the interpretation of current EU regulations.

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## 1. Introduction

The harmonisation of special excise duties in the European Union (EU) is well advanced. According to EU law, Member States are obliged to charge excise duties on energy products (mineral oil, natural gas and coal), alcohol and alcoholic beverages (beer, wine, intermediate products and spirits) as well as tobacco products (cigarettes, cigars, cigarillos and fine-cut tobacco). Since the realisation of the internal market on 1 January 1993 and the related abolition of border checks between the Member States of the European Community (EC) (now the EU), certain legal rules have been created which make it possible to trade in excise goods which have not yet been taxed. Since goods are stored and moved without duties being charged, there must be adequate supervision to prevent tax evasion. This is ensured by means of special procedures first established in Articles 4 (c) and 15 to 20 of the Directive 92/12/EEC.<sup>2</sup> This was superseded by Directive 2008/118/EC<sup>3</sup> (Excise Directive), which entered into force on 1 April 2010. Directives do not produce direct effect and are only binding in terms of their aims. Accordingly, Member States must transpose them into their national law. Member States therefore had to amend their tax legislation to reflect the aims of these Directives.

Only a limited group of people can deal with untaxed goods. It is only possible to produce and store untaxed goods at specific locations. Goods can be moved from these locations to other tax warehouses or economic participants who hold a special permit. Since 1 January 2011, goods have been moved using an electronic procedure (Excise Movement and Control System [EMCS]). The following provides an overview of the duty suspension procedure under which excise goods can be produced, held and moved within the EU.

## 2. Purpose of the duty suspension procedure

The Excise Directive does not actually define the duty suspension procedure. Art. 4, no. 7 merely suggests that this procedure is nothing more than a fiscal rule applicable to the production, processing, holding

and movement of goods under duty suspension. Due to the fact that the duty suspension procedure does not apply when a customs suspensive procedure or arrangement is available (Art. 3 (4) Excise Directive), Art. 4, no. 7 establishes a new requirement that the goods cannot be subject to any customs suspensive procedure or arrangement. The definitions of ‘authorised warehousekeeper’, ‘tax warehouse’, as well as registered and non-registered economic participants suggest that it is only possible to hold excise goods under duty suspension in tax warehouses which are specially designed for this purpose and that movement under duty suspension can only take place between tax warehouses or between a tax warehouse and an authorised economic participant (for example, according to Art. 17 (1) (b) Excise Directive, from a registered consignor to a tax warehouse).

Advocate-General Colomer has compared duty suspension to a canal lock where the excise goods remain until the duty is charged, thereby opening the lock. The term ‘duty suspension’ is therefore misleading because the suspension refers to the duty itself rather than the act of charging duty which has already accrued. The tax suspension procedure ends once the goods have departed the tax warehouse without them being moved under duty suspension. If the goods are placed under the movement procedure, duty suspension ends once the consignee accepts delivery of the excise goods.

The real significance of duty suspension is that it defers payment for an unlimited period: as long as the goods are under duty suspension they will not be charged duty.<sup>4</sup> The parties to the procedure should be able to have duty charged on the goods as soon as they have been supplied to the consumer or intermediary. At the same time, the duty suspension procedure operates as a fiscal check: as long as the excise goods are under this procedure, they are subject to fiscal supervision. The holder of a duty suspension procedure must provide security. The security to be provided for a movement procedure must be valid in all Member States. If there are irregularities which lead to duties being charged, the security can be confiscated by the competent authority.

### 3. The tax warehousing procedure

A tax warehouse is a place where excise goods can be produced, processed, held, received or dispatched under duty suspension by the authorised warehousekeeper subject to the conditions stipulated by the competent authority of the Member State in which the tax warehouse is situated. According to Art. 16 (1) Excise Directive, the opening and operation of a tax warehouse are subject to authorisation by the competent authorities of Member States. The latter are empowered to establish detailed procedures on the production (including the obtaining), processing and holding of the goods under duty suspension in a tax warehouse (Art. 15 (1)). In comparison to customs law, they have a wide discretion in this respect. The customs warehousing procedure (including the establishment of certain types of warehouses) is comprehensively regulated in Art. 98 ff. CC and Art. 524 ff. CCIP. There are differences between private and public warehouses. There is express provision for notional warehouses (that is, warehouse type E according to Art. 525 (2) (b) CCIP), which can either be ships on water and aircraft.<sup>5</sup> Since Community goods can also be held in a customs warehouse owing to economic necessity (see Art. 106 (a) CC, Art. 534 CCIP), Member States are permitted to authorise one and the same storage location as a tax and customs warehouse for non-Community goods subject to customs duties.<sup>6</sup>

Excise law provides for traditional tax warehouses (for example, breweries, foundries, refineries or tobacco manufacturing plants). Storage premises, where excise goods are held, processed or repackaged, can also be approved as tax warehouses. A tax warehouse must be situated on a defined, fixed location which rules out means of transport (for example, a tank wagon or tanker) being authorised as tax warehouses, despite the fact that the mineral industry has repeatedly made its needs known in this respect. Excise law does not have a rule comparable to the one in customs law which provides that goods do not necessarily have to be stored at a location authorised as a customs warehouse (Art. 525 (2) (b) CCIP). There is an exception for pipeline networks, however. The so-called NATO pipeline is considered to be a Community tax warehouse which Member States use to hold or extract mineral oil.

It is left to the Member States to determine the authorisation procedure and rules governing the opening of a tax warehouse.

Authorised warehousekeepers can be either natural or legal persons authorised by the competent authorities of a Member State to perform permitted acts in a tax warehouse during the course of their business (Art. 4, no. 1 Excise Directive). This provision rules out the possibility of other persons (for example, private persons) being issued with a tax warehouse authorisation.

Each Member State maintains a data bank with information on authorised warehousekeepers, registered economic operators and tax warehouses in the Community. The legal basis for the System for Exchange of Excise Data (SEED) is found in Art. 22 of the Council Regulation (EC) No. 2073 of 16 November 2004 on administrative cooperation in the field of excise duties. According to Art. 22 (4), a central liaison office or department of each Member State is to ensure that the persons involved in the intra-Community movement of excise goods can obtain confirmation of the information held in the SEED. Prior to dispatch, the tax warehousekeeper can request confirmation that the consignee is authorised to procure the excise goods under duty suspension. The procedure is similar to the VAT identification number and the qualified confirmation of this number in the case of duty free intra-Community supplies.

## **4. Intra-Community movement under duty suspension**

### **4.1 Consignor and consignee**

Generally speaking, when goods are moved under duty suspension, only a warehousekeeper can be the consignor. In response to complaints by Member States concerning this restriction in relation to imports, Art. 17 (1) (b) Excise Directive now allows a registered consignee to open a duty suspension procedure as well. This applies to natural or legal persons authorised by the competent authorities to dispatch excise goods once they have been released for consumption in accordance with Art. 79 CC under duty suspension (Art. 4, no. 10 Excise Directive). This procedural simplification recognises the needs of industry. Before this, the law had restricted the importation of excise goods and their release for consumption insofar as the further movement under duty suspension required there to be a tax warehouse at the customs office of entry whose keeper could open a transit procedure. The registered consignee can act as a tax warehousekeeper despite the fact that they do not have such sites at their disposal. Therefore, it is possible for a transport company or customs agent to perform this function.

Tax warehousekeepers and certain companies can act as registered consignees (Art. 4, no. 9 and Art. 19 Excise Directive). The registered consignee can only hold or forward the goods purchased if they first pay duties. The duties in the country of destination are chargeable once the goods have been received. Those wishing to act as consignees require the special authorisation of the Member State in which they are situated and must provide a security. In the case of exports to third countries, the customs office of departure<sup>7</sup> (but not, however, the customs office of export), which has confirmed the export (report of export to be transmitted electronically according to Art. 25 (1) Excise Directive), will function as the consignee. The consignees can also be participants in a suspensive customs procedure or arrangement according to Art. 84 CC (in cases where the goods are under a customs procedure which is ended in accordance with the customs provisions), as well as armed forces and certain international organisations and bodies (for example, diplomatic representations), which enjoy special status under procedural law.

### **4.2 The movement procedure using an electronic administrative document (EMCS)**

As early as June 2003, the European Parliament and Council decided that the accompanying documents were to be replaced by a paperless, electronic procedure.<sup>8</sup> The EMCS enables an efficient check before the

movement starts. Regulation (EC) No. 684/2009<sup>9</sup> establishes the structure and contents of the electronic administrative documents as well as the intra-Community information procedure. As a Regulation is directly applicable within the EU, Member States do not have to transpose it into their respective legal systems.

The consignor of the competent authority has to send a draft of the electronic administrative document using a computerised system. After the review of the data, they will receive a reference code for the transit procedure (Administrative Reference Code [ARC]) consisting of 21 characters. This allows the goods to be identified within the system and their movement traced. The competent authorities of the Member State of departure send the electronic administrative document to the competent authorities of the Member State of destination which forward it to the consignee (tax warehousekeeper or registered consignee). In the case of export, the electronic administrative document is sent to the customs office of export (that is, the customs office to which the export declaration is to be submitted in accordance with Art. 161 (5) CC).

The consignee must print the administrative document which the authority of their Member State has returned to them electronically together with the reference code and make it available to the person who accompanies the movement. It is also possible to use a commercial document bearing the reference code. The documents with the reference code must accompany the entire movement.

After receiving the goods, the consignee (tax warehousekeeper, registered consignee, international organisations, etc., pursuant to Art. 12 (1) Excise Directive) is to lodge an entry declaration with the authorities of the Member State of destination no later than five days after the completion of the movement. This will be checked by the authorities of the destination country and forwarded to the authorities of the Member State of departure which will notify the consignor of the entry. If the goods are exported to a third country or territory of a third country, the authorities of the Member State of export will issue a report of export on the basis of the endorsement drawn up in accordance with Art. 793a (2) CCIP (Art. 25 Excise Directive). In accordance with Art. 20 (2) Excise Directive, the duty suspension procedure ends once the consignee has taken delivery of the goods or the goods have been exported. The report of receipt or – in the case of exports – the report of export, is deemed evidence that the movement of excise goods has ended pursuant to Art. 20 (2) Excise Directive. In exceptional cases (for example, system disruption), it is possible to perform the transit procedure using paper documents. In accordance with Art. 8 Regulation (EC) No. 684/2009, the document bears the title ‘Fallback Accompanying Document for movements of excise goods under suspension of excise duty’. Simplified procedures are provided for movements taking place within one Member State or by means of a pipeline. There are also special rules governing the movement of energy products (Art. 22 and 23 Excise Directive). These provisions allow the destination to be changed during movement or the consignment to be split into two or more movements.

### 4.3 Infringements and irregularities

During the movement of excise goods under a duty suspension arrangement, disruptions to the procedure may occur which lead to the goods being removed from fiscal control and released for consumption. For example, the consignment or part of it may not arrive at the destination and it may not be possible to establish whether the loss of goods occurred at the Member State of destination or departure. This has an impact on tax revenue because it must be determined which Member State is competent to charge duties.

Before the advent of the internal market, such cases were decided according to customs law. However, since the Community transit procedure ceased to apply after the abolition of border checks, it was necessary to find rules to replace it. In the first draft of Directive 92/12/EEC, the EC proposed incorporating provisions on the internal Community transit procedure in EC excise law. This approach is reflected in Art. 20 of that Directive which uses almost the same wording as Art. 34 of Regulation (EEC) No. 2726/90 on Community transit. This is the only area where customs law provisions have survived.

It is against this background that Art. 10 of the Excise Directive must be viewed and interpreted. The provision has formed the subject of proceedings before the European Court of Justice (ECJ) several times. There are three types of cases, of which the first is the least problematic. If an offence or irregularity giving rise to duty occurs during the movement under duty suspension, the duty will be charged in the Member State where the infringement or irregularity occurred (Art. 10 (1) Excise Directive). In this case, the place where the infringement occurred can be established reliably, so that there is no doubt about allocating the competence to charge duty to the Member State where the irregularity or offence was detected. For example, if a customs officer were to find that some excise goods had been removed from a heavy goods vehicle (HGV) in a parking area and an inspection of the bill of lading showed that the goods were being moved under duty suspension, then the goods would have been released for consumption due to an irregular departure from a duty suspension arrangement (Art. 7 (2) (a) Excise Directive). As a result, duty would be payable in this Member State.

If the customs officials merely conclude that the goods must have been lost somehow and there is no evidence that the goods have been removed from the parking area or other location in this Member State, the second alternative of Art. 10 Excise Directive applies. Owing to the detection of an offence or irregularity, the fiction is applied that the act has been committed in the Member State where it was discovered. There is no separate criterion for the incurrance of duty but merely a fiction concerning the place of the offence. Generally speaking, the offence leads to an illegal departure from a duty suspension arrangement so that, in this case, excise duty is also chargeable according to Art. 7 (2) (a) Excise Directive. In the view of Advocate-General Mischo, the internal logic of Art. 20 (2) and (3) of Directive 92/12/EEC also rules out the possibility of the consignor submitting evidence that the procedure has been properly carried out in the second type of case as well.<sup>10</sup>

Art. 10 (4) Excise Directive provides a solution in the event that the consignment or part of it fails to arrive. If the excise goods do not reach the destination and if there have not been any irregularities during the movement which lead to the charging of duties according to Art. 7 (2) (a) Excise Directive, then an irregularity is deemed to have occurred in the Member State of departure (at the time the movement commences). The fiction here relates to the irregularity and location of the offence. In such cases, the competence to charge duties is allocated to the Member State of departure. This would also be the case if it could be established that the goods have actually left the Member State of departure. This is because Art. 10 (4) Excise Directive was designed in such a way that a clear allocation of the competence to charge duties is also made in cases where the goods are moved through several Member States. In the case of movements through Europe, the goods may transit several Member States. Even if it was possible to rule out the charging of duties in the Member State of departure, the problem remains which of the Member States transited would be entitled to charge duties. After all, it would not be possible to establish where the offence exactly occurred. In order to resolve this conflict, the Community legislator has held the Member State of departure to be the Member State which is entitled to charge duties.

Art. 20 (3) of Directive 91/12/EEC stated that the consignor had a period of four months from dispatch within which they could adduce evidence that the duty suspension procedure was properly completed or the place where the offence actually occurred. However, this was held in contravention of Community law.<sup>11</sup> In the case in question, the consignor (an Italian warehousekeeper) received receipts and failed to notice that the official stamp was a forgery. It was only several months later, when the consignor received a tax assessment from the Italian tax authorities, that they became aware of this fact. By that time, however, the four-month time limit had long expired. The ECJ held that the time limit was unreasonable because it infringed the principle that the right of self-defence had to be respected. However, the court did not state what period would be deemed reasonable. The Commission and General Advocate Mischo had suggested that if the consignor had acted in good faith, the time limit should run as soon as they had actually become aware of the offence (for example, through information provided by the customs administration). Arguably, this is an acceptable solution. Art. 10 (4) (2) Excise Directive now grants the consignor or person who has provided security a period of one month from the communication of

information concerning the failure of the goods to arrive at the destination to submit evidence that the transit procedure was properly carried out.

If the Member State in which the infringement or irregularity actually occurred is determined within three years from the date on which the accompanying document was issued (that is, from dispatch or the beginning of the movement according to Art. 20 (1) Excise Directive), this Member State will charge excise duty at the rate applicable when the goods were dispatched. Subject to evidence that duty has been paid in this Member State, the Member State which originally charged duties will be bound to grant a refund.

## Notes

- 1 Translated from German by Christopher Dallimore, LL.B (Cardiff), Mag. Iur. (Trier), Dr Iur. (Münster).
- 2 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 (O.J. L 76/1).
- 3 Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC (O.J. 9/12).
- 4 This is made clear by Art. 15 (2) of the Excise Directive (Art. 11. (2) former edition) which states that the production, processing and holding of products subject to excise duties, where the latter has not been paid, shall take place in a tax warehouse.
- 5 Henke in Witte, Zollkodex, 5th edn, Art. 98, note 22.
- 6 Henke in Witte, Zollkodex, 5th edn, Art. 98, note 16.
- 7 The customs office at which the goods are to be presented before they leave the Community and where they are to undergo customs controls in relation to the application of departure formalities and appropriate controls on the basis of risk analysis (Art. 4, no. 4 (d) CCIP).
- 8 Decision No. 1152/2003/EC of the European Parliament and of the Council of 16 June 2003 on computerising movement and surveillance of excisable products (O.J. L 162/5).
- 9 Commission Regulation (EC) No. 684/2009 implementing Council Directive 2008/118/EC of 24 July 2009 as regards the computerised procedures for the movement of excise goods under suspension of excise duty (O.J. L 197/24).
- 10 Opinion of 21 March 2001 in the Case C-395/00, ECR 2002, I-11877.
- 11 ECJ judgement of 12 November 2002 Case C-395/00, ECR 2002, I-11877.

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Harald's PhD thesis in law was titled 'The system of German excise law with regard to the results of the harmonisation of excise duties in the European Union'. He has published widely on national and European excise law.