B. 1.2 Excise duties on goods crossing a border within the EU

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When the internal market was established on 1 January 1993, the EU introduced common rules for a number of excise duties.

The term excise duties comprises dues and charges on specific goods whereas Value Added Tax is characterized by being a general tax which, as a rule, affects all goods and services. Furthermore, excise duties differ from Valued Added Tax in that they are designed as single stage taxes which mean that they only are charged once during the goods´ way from the manufacturer/importer to the consumer, i.e. in the production, wholesale or retail stage. Value Added Tax, on the contrary, is characterized by being charged in all of the commercial stages towards the end consumer.

Besides the harmonized excise duties the individual Member States can maintain and introduce a number of purely national excise duties provided that they do not violate EU Law. In this article focus is only on the harmonized excise duties.[2]

B.1.2.1 Harmonization of Indirect Taxes

Art. 93 of the EC Treaty is the legal basis for the advanced harmonization of turnover taxes within the EC and is also the legal basis for the harmonization of excise duties. The harmonization of excise duties is less advanced than the harmonization of Value Added Tax and until now only includes *energy products (originally mineral oils)*, *manufactured tobacco*, *alcohol and alcoholic beverages*.

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[2] As the Danish registration fee on motor vehicles is of a considerable size, it is mentioned in short here: The Danish registration fee on motorcycles is 105 per cent of DKK 7,201-20,300 and 180 per cent of the rest. For other motor vehicles the registration fee is 105 per cent of DKK 64,500 and 180 per cent of the rest - see consolidated act no. 631 of 25 June 2008 in the Danish Registration Fee Act [LBK nr. 631 af 25/06/2008 Registreringsafgiftsloven], § 4. Persons, who move to Denmark with a motor vehicle that is registered abroad must register the vehicle in Denmark and thus pay registration fee, or they must hand in their number plates to the Danish tax authorities, SKAT, not later than 14 days after the vehicle has been brought to Denmark – see the Danish promulgation no 633 of 26 June 2009, Promulgation on registration of motor vehicles etc. [BEK nr 633 af 26/06/2009, Bekendtgørelse om registrering af køretøjer mv.], § 10. Persons who have residence in Danmark are, as a rule, not allowed to drive a car with foreign number plates - see the Danish promulgation on registration of motor vehicles etc. [Bekendtgørelse om registrering af køretøjer mv.], § 13. Registration fee on a used motor vehicle which is paid according to the Danish Registration Fee Act is reimbursed if the vehicle is unregistered in the motor registration and is taken out of the country - see the Danish Registration Fee Act [Registreringsafgiftsloven] § 7 b, paragraph 1. The reimbursement amount is determined as the registration fee that should have been paid if the same vehicle was taken into the country - see the Danish Registration Fee Act [Registreringsafgiftsloven] § 7 b, paragraph 2.

EU Law in connection with the excisable product area, the structure of the individual duties, the rates of duty and duty exemptions is laid down in the so-called framework directives. These directives are split up, so that the provisions for each of the three main product groups are stated partly in the "*structure Directives*",[3] partly in the "*Directives on rates*"[4].

The structure Directives lay down the provisions for the duty structure, i.e. a delimitation of the product area, definitions and exemptions, while the Directives on rates lay down how the actual rates of duty are determined and according to which rates the duty is to be charged. The rates of duty are characterized by being minimum rates, i.e. the Member States must charge duties that are higher or equivalent to the minimum rate determined by the EU. The minimum rates can be very low or even zero.

Furthermore, in the directives provisions on duty exemptions and modifications are established – of which some are established voluntarily. Moreover, EU countries can maintain certain special national rules.

The common rules for movement and monitoring of products that are subject to harmonized duties are established in the Council Directive 92/12/ECC on the general arrangements for products subject to excise duty and on holding, movement and monitoring of such products, known as the "*horizontal Directive*".[5]

Generally speaking excisable products moving within the Community do so under excise duty suspension arrangements. No excise duties have been paid on these products, they have 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 the 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.[6] Even though taxation of excise products are in principle based on the *origin principle,* excise taxation of commercial transactions is de facto based on the *destination principle*; hence the

[3] Council Directive 92/81/EEC of 19 October 1992 on the harmonization of the structures of excise duties on mineral oils, Council Directive 92/83/EEC of 19 October 1992 on the harmonization of the structures of excise duties on alcohol and alcoholic beverages, and Council Directive 92/78/EEC of 19 October 1992 amending Directives 72/464/EEC and Council Directive 95/59/EC of 27 November 1995 on taxes other than turnover taxes which affect the consumption of manufactured tobacco (replacing Council Directive 92/78/EEC).

[4] Council Directive 92/82/EEC of 19 October 1992 on the approximation of the rates of excise duties on mineral oils, Council Directive 92/84/EEC of 19 October 1992 on the approximation of the rates of excise duty on alcohol and alcoholic beverages, Council Directive 92/79/EEC of 19 October 1992 on the approximation of taxes on cigarettes and Council Directive 92/80/EEC of 19 October 1992 on the approximation of taxes on manufactured tobacco other than cigarettes.

[5] A new "horizontal Directive" has been adopted, Council Directive 2008/118/EC of 16 December 2008, which replaces Council Directive 92/12/ECC with effect from 1 April 2010.

[6] See COM (2004) 227 final, Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee, p. 5.

suspension arrangement makes it possible to postpone taxation until the products reach the country of destination.[7] Production of and trade with products under excise duty suspension requires that the enterprises are licensed and registered at the excise duty authorities in the Member States. 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. Movements of this type are regulated by the horizontal Directive Articles 7 to 10. 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.[8] 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.

As the main purpose of the national and general reports is to highlight the tax effects of an individual travelling as a private person or taking up employment in another EU country, the below analysis will purely deal with the horizontal directive and the provisions that are relevant for cross border movement of goods by or on behalf of private persons.

B. 1.2.2 The place of taxation

Article 8 of the horizontal Directive states that "[a]s 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". As it appears from this provision, the place of taxation is established in relation to private individuals´ purchase of excisable products in the following way according to the origin principle, because, as a rule, you have to pay excise duty in the country, where the product is purchased. This provision only applies, if two conditions are met: The products shall be acquired for the purchasers´ *own use* and shall be *transported by them*.

B. 1.2.2.1 For their own use

The term "for their own use" has its limitations and is opposed to the term "for commercial purposes". Thus it follows from Art. 9 (1) that without prejudice to Art. 8, excise duty shall become chargeable, where products for consumption in a Member State are *held for commercial*

[7] See Terra and Wattel, *European Tax Law*, Fifth Edition, 2008, Kluwer Law International, p. 399.
[8] See COM(2004) 227 final, Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee, p. 5.

purposes in another Member State. In this case, the duty *shall be due in the Member State in which territory the products are and shall become chargeable to the holder of the products*. If the transaction is covered by Art. 9, the place of taxation will thus change from the origin principle to the destination principle, and the duty will be due for the holder of the products and not the vendor.

In the event that products subject to excise duty are already released for consumption in one Member State, but are 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, see Art. 7 (1). In such circumstances the excise duty paid in the first Member State shall be reimbursed in accordance with the horizontal Directive Art. 22 (3), see Art. 7 (6).

Goods are held for commercial purposes, if they are delivered or used for the purpose of a trader carrying out economic activities independently or for the purpose of a body governed by public law.[9]

It follows from the horizontal Directive Art. 9 (2) that in order to establish that the products referred to in Art. 8 are in fact intended for commercial purposes and not for the private individuals´ own use, "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 [the quantity of the products], Member States may lay down guide levels, solely as a form of evidence."

Regarding mineral oils 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"; see Art. 9 (3).

In case C-5/05, B.F. Joustra the ECJ pointed out that for the application of the horizontal Directive, products which are not held for private purposes must necessarily be regarded as being

[9] See Terra and Wattel, *European Tax Law*, Fifth Edition, 2008, Kluwer Law International, p. 399.

held for commercial purposes.[10] In this case the ECJ also stated that it is clear from the actual terms in which Article 8 of the horizontal Directive is couched that it requires that the products *be intended for the personal use of the private individual who has acquired them* and that it therefore excludes products acquired by a private individual for the use of other private individuals. The latter products cannot be considered to be held for strictly personal purposes by the private individual who has acquired them.[11] Where products subject to excise duty have been acquired by a private individual not only for his own use, but also for the use of other private individuals, only the products acquired for that private individual´s own use are capable of coming within the scope of Art. 8 of the horizontal Directive.[12]

B.1.2.2.2 Transported by the private individual

If a private individual acquires a product in another Member State for his own use and transports it himself to another Member State the transaction will unquestionable fall within the scope of the horizontal directive Art. 8 with the effect that the origin principle shall be applied on the transaction.

In those instances where the product is *transported directly or indirectly by the vendor or on his behalf*, the destination principle will apply, whether the product is acquired for the private individual´s own use or not; see Art. 10 (1). In such cases the duty of the Member State of destination shall *be chargeable to the vendor* at the time of delivery; see Art. 10 (2).

The horizontal Directive, on the other hand, is more vague in cases where the product is acquired for the private individual´s own use, but is transported by a carrier on behalf of the private individual and without no direct or indirect involvement of the vendor. The European Court of Justice has had the opportunity to relate to exactly this situation in case C-5/05, B.F. Joustra.

Mr Joustra and some 70 other private individuals had formed a group called the 'Cercle des Amis du Vin' ('the circle'). Each year, on behalf of the circle, Mr Joustra ordered wine in France for his own use and that of the other members of the group. The wine ordered by Mr Joustra was released for consumption in France and excise duty was paid in that Member State. On Mr Joustra´s instructions the wine was then collected by a Dutch transport company which transported it to the Netherlands and delivered it to his home. The wine was stored there for a few days before being delivered to the other members of the circle on the basis of their respective shares of the quantity purchased. Mr Joustra paid for the wine and the transport, and

[10] See case C-5/05, B.F. Joustra, para. 29.
[11] See case C-5/05, B.F. Joustra, para. 35.
[12] See case C-5/05, B.F. Joustra, para. 36.

each member of the group then reimbursed him for the cost of the quantity of wine delivered to that member and a share of the transport costs calculated in proportion to that quantity. It was common ground that Mr Joustra did not engage in that activity on a commercial basis or with a view to making a profit. Furthermore, it was common ground that the quantity of wine delivered to each member of the circle did not exceed 90 litres, of which no more than 60 litres were sparkling wine. On 2 December 1997, Mr Joustra declared to the Dutch tax authorities that he had received 13.68 hectolitres of red and white wine and 1.44 hectolitres of sparkling wine. The Dutch authorities levied excise duty of EUR 906,20 (NLG 1.997) on the wine. Mr Joustra disputed liability for this excise duty. However, his objection was rejected and finally led to a preliminary ruling from the ECJ.

The ECJ found that it is apparent from the words 'transported by them' in Article 8 of the Directive that for that provision to apply, the products *must be transported personally by the private individual who purchases them*.[13] This was not the situation in the Joustra case which meant that Art. 8 couldn't be applied.

The ECJ then went on to analyze whether the situation may come within the scope of Art. 7, 9 or 10 of the horizontal Directive. If the situation was not covered by any of these provisions, taxation takes place in the country of origin according to the general rule in the horizontal Directive Art. 6.[14] The ECJ rejected the application of Art. 9 and 10, but decided that Art. 7 was applicable and, as a consequence, taxation must take place in the country of destination in spite of the goods initially were released for consumption in the Member State of origin.[15]

Article 7 (2) of the horizontal Directive covers the situation in which products already released for consumption in one Member state (as defined in Art. 6) are delivered, intended for delivery or use in another Member State or used in another Member State for the purposes of a trader carrying out an economic activity independently. According to the ECJ that is true for a private individual who, as in the Joustra case, is not acting with a view to profit, since the *transport of the products* subject to excise duty *is carried out by a trader acting on his behalf*.[16]

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[13] See case C-5/05, B.F. Joustra, para. 37. See also case C-396/95, Emu Tabac and others, para. 33.

[14] Art. 6 essentially lays down the general rule that duty is chargeable in the state in which goods are first released for consumption, see of Advocate General Jacobs delivered on 1 December 2005 in Case C-5/05, B.F. Joustra, points 55 and 75.

[15] Where excise duty is levied under Art. 7 in the Member State in which the products are being held for commercial purposes, although they have already been released for consumption in another Member State, Art. 7 (6) of the horizontal Directive provides that the excise duty paid in that other Member State is to be reimbursed in accordance with Art. 22 (3) of the Directive.

[16] See case C-5/05, B.F. Joustra, para. 51.

This decision might seem surprising - and the decision is also contrary to the decision that Advocate General Jacobs reached in his opinion on the Case.[17] Jacobs was in line with the ECJ on the fact, that Art. 8, 9 and 10 didn't apply, but contrary to the ECJ he was also of the opinion that Art. 7 did not apply in the situation.[18] He therefore concluded that it followed by Art. 6 that excise duty should be levied only in the Member State of acquisition. As shown above the ECJ didn´t follow his opinion in this respect, but ruled the following: "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 construed as meaning that where, as in the case in the main proceedings, a private individual, who is not operating commercially or with a view to making a profit acquires in one Member State, for his own personal requirements and those of other private individuals, products subject to excise duty which have been released for consumption in that Member State and arranges for them to be transported to another Member State on his behalf by a transport company established in that other State, Article 7 of that Directive, and not Article 8 thereof, is applicable, with the result that excise duty is also to be levied in that other State. Under Article 7(6) of the Directive, the excise duty paid in the first State is, in such a case, to be reimbursed in accordance with Article 22(3) of the Directive."

It is worth remembering 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.[19] The present wording of Art. 8 waters down this principle, since the principle only applies, 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 according to the ECJ´s interpretation of the horizontal Directive. A restrictive interpretation of Article 8 in this context may even suggest that non-commercial movements (e.g. in the course of removals or gifts) 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.[20] 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.[21]

[17] See Opinion of Advocate General Jacobs delivered on 1 December 2005 in Case C-5/05, B.F. Joustra, point 53-75.
[18] See Opinion of Advocate General Jacobs delivered on 1 December 2005 in Case C-5/05, B.F. Joustra, point 61.
[19] See COM(2004) 227 final, p. 20.
[20] See COM(2004) 227 final, p. 21.
[21] See COM(2004) 227 final, p. 21.

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, also runs counter to the general rule for VAT.[22] 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.[23]

B.1.2.3 The new horizontal Directive

In 2004 the European Commission put forward a proposal to simplify and liberalize the rules on intra-EU movements on products on which excise duty has already been paid in a Member State.[24] In the Commission´s view it was no longer justifiable to restrict the general principle governing the single market in the above mentioned way.[25] The Commission therefore proposed, in line with the principle applied to VAT, that all movements of excise goods other than manufactured tobacco 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 only be subject to taxation in the Member State of acquisition.[26]

The European Economic and Social Committee (the EESC) expressed its concern with this part of the proposal. In the view of the EESC "from a legal point of view, and contrary to the principle of taxation at the point of actual consumption, the goods could […] *always* be deemed to have been purchased by private individuals and sent or transported on their behalf and therefore be subject to excise duty in the Member State in which they were purchased, even if dispatch was effected by the seller".[27]

On 16 December 2008 the new horizontal Directive was adopted (Council Directive 2008/118/EC) which will repeal the former horizontal Directive (Council Directive 92/12/EEC) with effect from 1 April 2010, see the new horizontal Directive Art. 47 (1).

[22] See COM(2004) 227 final, p. 20.
[23] See Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, Art. 32 and 33.
[24] COM(2004) 227 final, Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee.
[25] COM(2004) 227 final, p. 20.
[26] See COM(2008) 78 final/3, Art.30
[27] See Opinion of the European Economic and Social Committee on the Proposal for a Council Directive concerning the general arrangements for excise duty, COM(2008) 78 final/3 – 2008/0051 (CNC), section 4.9.1.

The above mentioned elements in the proposal from the Commission didn´t reach the final Directive. Even though the wording of the provisions has changed a bit, the ECJ´s ruling in the Joustra case must therefore be assumed to stand, even when the new horizontal Directive comes into force 1 April 2010.

The wording of the new horizontal Directive Art. 33 that will replace the horizontal Directive Art. 7 currently in force can, however, give rise to considerations about the extent of the ECJ´s ruling in the Joustra case. According to the new horizontal Directive Art. 33 (1), "holding for commercial purposes" shall mean the holding of excise goods by a person other than a private individual *or by a private individual for reasons other than his own use and transported by him*, in accordance with Article 32."

With this wording of the new Art. 33 it cannot be completely ruled out that the ECJ will be of the opinion that the new rule cannot be applied in connection with private individuals´ transactions, when the excise goods are *acquried entirely for the private individual´s own personal* use even though the goods are not transported by the private individual himself, but is dispatched or transported by or on behalf of the buyer. When you take into account that the Commission´s original proposal could not be approved on this count, the result is very uncertain, however.

B.1.2.4 Conclusion

The purpose of this national report is to highlight the excise duty effects on an individual travelling as a private person or taking up employment in another EU country. In this aspect the report has furthermore been limited to the EU harmonized excise duties.

It is well known that according to the principle governing the single market, all products carried within the Community by individuals for their own use should solely be subject to taxation in the Member State, where the products are acquired. Nevertheless this national report shows that if a private individual does not personally accompany belongings brought into another Member State, he will run the risk that 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 principle governing the single market. It is also different from the general rule for VAT, which can result in the strange fact that it might occur that one and the same product is subject to VAT according to the rates in the Member State of origin, while excise duty is calculated according to the rate in the Member State of destination. This peculiar difference can

only be explained by the fact that the Member States must be more concerned by cross-border shopping caused by differences in excise duties than by cross-border shopping caused by differences in VAT rates between Member States.

The Commission even suggests that a restrictive interpretation of Article 8 may entail that non-commercial movements (e.g. in the course of removals or gifts) may not be exempted from excise duty in the Member State of destination unless the products are physically carried by the private individual for whom they are intended. Especially with regard to removals such a result is very worrying and after all it seems not very likely either.[28]

In any case attention should be directed to the fact that the harmonized excise duties only in rare cases will pose a barrier to private individuals´ travelling as private persons or taking up employment in another Member State.

[28] For wine and beer brought into the country for the person´s own use by a person taking up residence in Denmark and who, in a period of at least one year, has had residence in another EU country – and in this other country has owned the wine and beer in question, it is allowed to bring these goods into the country duty free as household removals in a commercial transport – see the Danish Excise Duty instruction 2009-2, section A.9.2.1 [Punktafgiftsvejledningen 2009-2 afsnit A.9.2.1]. On the other hand duty must be paid on liquour and tobacco forwarded by private persons abroad to a private person in Denmark, e.g. as a gift. For other goods besides the two mentioned above duty must only be paid, if the value of the goods less duty exceeds DKK360 – see the Danish Excise Duty instruction 2009-2, section A.9.2.2 [Punktafgiftsvejledningen 2009-2 afsnit A.9.2.2].