**THE HIGH COURT**

**REVENUE**

**IN THE MATTER OF A CASE STATED PURSUANT TO SECTION 941 OF THE TAXES CONSOLIDATION ACT, 1997**

**[2015 No. 263 R]**

**BETWEEN**

**CITYWEST LOGISTICAL LIMITED (FORMERLY KNOWN AS CASSIDY WINES LIMITED)**

**APPELLANT**

**AND**

**THE REVENUE COMMISSIONERS**

**RESPONDENT**

**[2015 No. 266 R]**

**BETWEEN**

**MONAGHAN BOTTLERS LIMITED**

**APPELLANT**

**AND**

**THE REVENUE COMMISSIONERS**

**RESPONDENTS**

**JUDGMENT of Mr. Justice McDermott delivered on the 12th January, 2018**

1. Both of the above entitled cases concern a case stated pursuant to s. 941 of the Taxes Consolidation Act 1997 which allows an appellant if dissatisfied with a determination as being "erroneous in point of law" to require the Appeal Commissioner to state and sign a case for the opinion of the High Court. Under s. 941(4) the case stated must set out the facts and the determination of the Appeal Commissioner. Section 941(6) provides:-

> "The High Court shall hear and determine any question or questions of law arising on the case, and shall reverse, affirm or amend the determination in respect of which the case has been stated, or shall remit the matter to the Appeal Commissioner with the opinion of the Court on the matter, or may make such other order in relation to the matter, and may make such order as to costs as to the Court may seem fit."

The High Court may cause the case to be sent back for amendment to the Appeal Commissioner following which judgment should be delivered after the case has been amended.

2. The court approaches both cases on the basis that the relevant facts are those found by the Appeal Commissioner as set out in each case stated. The Appeal Commissioners, as they were obliged to do, set out the findings of fact which underpin their respective decisions. These findings must be accepted by the court unless there was no evidence at all to support them (see *Mitchelstown Co-Op Society Ltd v. the Commissioner for Valuations* [1989] I.R. 210 and *Inspector of Taxes v. Hummingbird* [1982] ILRM. 421, and *McGinley v. Deciding Officer, Criminal Assets Bureau* (Unreported, Supreme Court, 30th May 2001)).

**The Citywest Case Stated - Background**

3. The Revenue Commissioners made a demand for excise duty in the amount of €2,117,844.41 against Citywest in respect of deliveries of alcohol consigned from a bonded warehouse which it owned and operated to warehouses in France and Spain. These consignments were dispatched from between the 2nd July, 2008 and 3rd December, 2008. The first consignment on 2nd July was sent to Lauvie Distribution in France. A further eight consignments were sent between the 21st July and 24th November, 2008 to Gran Mariscal in Spain and the tenth consignment left the warehouse on the 3rd December, 2008 for Tracasa de Gestion in Spain. Consignments were mainly of a cheap form of vodka known as Glen's Vodka made by a company known as Glen Catherine in Ayrshire, Scotland.

4. In 2008 Citywest was approached by a representative of Euromax, a Waterford based company with which the appellant previously conducted business with a proposal whereby Euromax would introduce sellers and buyers to the appellant. The appellant would be invoiced by the sellers from whom it would purchase alcohol products. The appellant would then invoice purchasers for these goods which it would sell on to them. Euromax represented that it wished to keep the buyers and sellers apart and would act as a commissioned sales agent. The alcohol consignments would be exported to the client purchasers. Prior to July 2008 the appellant had only engaged in importing excise goods. This was its first venture into the export trade.

5. The appellant was an authorised warehouse keeper and stored excisable goods in its warehouse under a regime of duty suspension regulated in accordance with the provisions of Directive 92/12/EEC which facilitates the trade in goods between Member States of the European Union. It provides for a system whereby goods can be released and transported from one authorised warehouse to another while under a process of "duty suspension". Authorised warehouses in Member States of the Community are tightly controlled. Under the terms by which the appellant was approved as an authorised warehouse keeper, the appellant undertakes to comply with all relevant provisions of the law and general conditions and requirements as set down by the Revenue Commissioners in Notice No. 1877 issued in November 1998. This notice was replaced in September 2008 by notice no. 1890 in the same terms. The appellant in Monaghan Bottlers was subject to the terms of the same Notice. The appellant in accordance with the terms of the approval put in place a bond of a minimum of €400,000.00 designed to provide security for duty on goods removed to, deposited in or removed from the appellant's warehouse and under duty suspension arrangements.

6. The conditions attaching to the approval include *inter alia* a condition that the appellant comply with all relevant provisions of the law and with the general conditions, directions and requirements set down by the Revenue Commissioners in the respective notices.

7. In "The Excise: Authorisation of Warehouse Keepers and Approval of Tax Warehouses Notice No. 1890" (September 2008) Article 42 provides that all intra-community deliveries of duty suspended excisable goods must be covered by an "Accompanying Administrative Document" (AAD). The provisions of Part V of the Excisable Products Regulations 1992 (S.I. 430 of 1992) must be complied with. Goods may be dispatched to a Member State under duty suspension to tax warehouses approved by the fiscal authority in that Member State. Article 42 states:-

> "You should not dispatch goods under duty suspension arrangements to other Member States unless you have satisfied yourself that the consignee holds the appropriate authorisation or has secured the duty in his/her own country. A register (SEED) of all authorised traders in the EU is maintained by Custom and Excise and if you require confirmation of the status of a consignee, you should contact your Custom and Excise Administration Unit."

Article 43 requires that on dispatch of duty suspended goods an AAD must be completed. Copy 1 must be retained, copy 5 must be delivered to the Custom and Excise Administration Unit and copies 2, 3 and 4 must travel with the goods to the consignee. Article 44 provides that the approved warehouse-keeper is "responsible" for the excise duty on consignments moving to other Member States until such time as a proper receipt in the prescribed form is received on copy 3 of the AAD (if appropriate endorsed by the fiscal authorities of the Member State of destination). This reflects but does not add to the legal requirements applicable to such consignments.

**The Citywest Case Stated- Facts Proved or Admitted**

8. Apart from the facts already referred to a number of other important facts were said to be proved or admitted by the Appeal Commissioner:-

> "3.8 The appellant's logistics manager testified that he posted each of the ten relevant copy 3s to the respondents as soon as each was returned to him and also that he had handed two or three of such copy 3s to Ms. Nolan, an officer of the respondent, during her visit to the appellant's premises. I accept the evidence of Ms. Nolan that she did not receive any of the ten relevant copy 3s either by post or in person. It is not a statutory requirement that the copy 3 is sent to the respondent.
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> 3.9 The respondents maintained a list of the countries requiring endorsement of the copy 3 of the AAD by their national authorities but this list was not available on the Respondent's website. Mr. Corrigan of the Revenue Commissioners testified and I accepted that the Control Officer [in this case a Ms. Nolan] would be advised of changes to the list and it was in this way that information was to be disseminated. A copy of the list is attached at Annex C and forms part of this case stated. In this case the Control Officer for the appellant Miss G. Nolan, was not aware of the existence of the list. The appellant did not prepare any copy 3? AADs for any of the ten consignments."

9. The Appeal Commissioner was also satisfied that the appellant's logistics manager Mr. McTague completed the AAD's and checked the SEED database for the tax warehouses to which the consignments were destined. He also requested that the control officer check the SEED register. This was done and the officer confirmed that the warehouses were on the register. Had Mr. McTague been informed that any of the warehouses were not on the SEED register he would not have sent the consignment. The goods left the warehouse with copies 2, 3 and 4 of the AAD and a number of days later he received the respective copy 3 documents stamped and signed by the receiving warehouse. These copies bore a stamp with the warehouse's name together with a signature. He was unaware of the French and Spanish legal requirements that copy 3 AADs had to be stamped by their respective excise authorities and made no enquiries in this regard. It emerged following enquiries with the French and Spanish authorities that the goods consigned had not been received in the warehouses of Lauvie and Mariscal.

10. The Appeal Commissioner summarised the French and Spanish requirements in respect of certification as follows:-

> "3.15 At the relevant time, France required the receipt of the goods on the AAD to be stamped with the stamp of the French Custom Authority. The French Authority issued stamping machines to authorised warehouse keepers. If a warehouse keeper did not have a stamping machine he had to go to the Customs Office and have the customs stamp affixed to the AAD. There is no customs stamp on the AAD relating to the consignment to Lauvie. The French Customs Authority removed the stamping machine from Lauvie on the 4th July, 2008. Mr. Guilbaux visited Lauvie's warehouse on the 18th February, 2009 and interviewed Mr. Lauvie, the proprietor of the company. There was no stamp at the warehouse on the date of the visit. There was no stock recorded in the records of Lauvie after the 4th July, 2008.
>
> 3.16 At the relevant times Spain required copies 2, 3 and 4 of the AAD to be taken to the Customs Office to be stamped by the Customs Authority. The Customs Office would affix its stamp to the copies, give back copies two and three to the warehouse keeper and keep copy 4 for themselves. There is no customs stamp on any of the AADs relating to the 9 consignments to Spain. An order was served on Mariscal, evicting it from its warehouse as of 30th September, 2008. As a result of the mutual assistance request from Ireland, Ms. Lopez visited Mariscal's warehouse on the 10th, 11th and 12th December, 2008. The warehouse was closed and she was unable to speak to the administrator of the company. She also visited another business premises that belonged to Mariscal on the 15th, 16th, 17th December, 2008 but was unable to speak to the administrator. She also attempted to contact the administrator by telephone but was unable to do so.
>
> 3.17 The appellant made enquiries to establish the whereabouts of the goods. Mr. Cassidy contacted Mr. McCarthy of Euromax who stated that he was happy that the goods had gone to where they were intended. Mr. Cassidy asked him to try and get details of the transporters and drivers but he didn't have any success. He attempted to contact the transport companies but one had gone into liquidation and one did not appear to exist. The Appellant's solicitor contacted the shipping companies. The documentation from the shipping companies proved that four loads went as far as the UK or Wales namely to Pembroke, Fishguard or Holyhead. This documentation is appended to this case stated at Annex D.... There was a record of the vehicles which collected loads 8 and 9 travelling from Dover to Calais on the following day. The appellant reported the matter to the Gardaí."

11. The Appeal Commissioner outlined the investigation carried out by the Garda Bureau of Fraud Investigation. Mr. Cassidy of the Revenue Commissioners contacted him in 2010. Detective Inspector Heneghan informed the Appeal Commissioner of the following:-

> "3.21 …From his investigations he believed that [the fraud] was being organised by an organised criminal group because of a common link between the two cases. The people behind the operation had a subversive background and were heavily involved in smuggling of all types of produce that were excisable. He gave evidence that from his investigation it was his belief that subversive groups were involved in the Appellant's consignments because of the way the fraud was carried out and in addition there was intelligence available to another section of the gardaí as to who was behind it and how they

were operating the scam. He attempted to speak with the drivers of the consignments as the driver was one of the common links in the delivery and he was a native of Co. Fermanagh outside of the jurisdiction but was informed by the driver that he would not make himself available. Investigators in Monaghan had been informed by the driver's father that he was under a life threat. Detective Heneghan said that he believed that the life threat was in relation to this fraud. With regard to the level of satisfaction that he had as the liability of the source of information he said that the intelligence was classed as coming from a source that was reliable in the past. He said there were no means of independently verifying it due to the circumstances of the case or failure of any witnesses to provide statements and therefore it became uninvestigable from his point of view. While he could not independently establish the veracity of the information he had at that time the intelligence indicated the customers for the goods were private member's clubs in the UK jurisdiction."

**Citywest – The Determination**

12. Having considered the evidence and submissions made on behalf of the parties the Appeal Commissioner reached his determination. The Appeal Commissioner outlined the facts and set out the statutory provisions under s. 99 of the Finance Act 2001 and Council Directive 92/12/EEC and continued as follows:-

> "8.7 … the appellant admitted that it was not aware that France and Spain required endorsement by its National Authorities of copy 3. The appellant's warehouse manager testified that he posted each of the ten relevant copy 3's to the Respondent as soon as each were returned to him and he also handed two or three of such copy 3s to an officer of the respondent during her visit to the Appellant's premises. I accept the evidence of the Revenue official concerned that she did not receive any of the ten relevant copy 3s either by post or in person. I also note that it is not a statutory requirement that a copy 3 is sent to the respondent.
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> 8.8 I accept the evidence of Mr. D. Corrigan of the Respondent concerning the existence of a list dated 5th February, 2007 of countries requiring endorsement by their national authorities of the copy AAD (i.e. copy 3) for the return to the consignee in accordance with Article 19: the respondent is required by Regulation 33 [of the Control of Excisable Products Regulations 2001] to make this list available. Mr. Corrigan testified that the list was not available on the Respondent's website, that the Control Officer would be advised of changes to the list and that the Control Officer would convey that to the warehouse keeper. However, Ms. G. Nolan the relevant officer of the Respondent testified that she was not aware of the existence of the list.
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> 8.9 I have no evidence that the appellant was aware of the provisions that permit Member States to require endorsement of copy 3 by their national authorities or that the appellant made any enquiries in this regard.
>
> 8.10 I have concluded as urged by the respondent, that the absence of such national endorsement by the French and Spanish authorities that copy 3 of the 10 relevant AAD's is sufficient to result in non-compliance with the provisions for discharge. The appellant which had not familiarised itself with the legal provisions governing this matter cannot have the endorsement requirements set aside by this Tribunal on the grounds that it was not informed of such requirement by the Respondent.
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> 8.11 Furthermore, the Respondent submitted that presenting a copy AAD that purports to bear a stamp and signature of the managers of the warehouse where the goods were allegedly sent does not satisfy the provisions of Article 19 and s. 99(4) [of the 2001 Act]. I have concluded the evidence adduced by the Respondent in relation to the signatures and stamps on the ten AAD's is hearsay and therefore not admissible. …
>
> 8.12 It is admitted by the appellant that he did not prepare a copy 5 AAD for any of the ten consignments relevant to this appeal and consequently it did not provide such copy to the Respondent at least one day prior to the dispatch of each consignment as required. The Appellant stated that it had not been informed by the Respondent that is was a legal requirement to prepare and present such copy 5 to the Respondent and that it was not familiar with the Directive, Regulations and other legislation in this regard. I am not satisfied that the appellant is freed from the legal obligation to prepare copy 5 of each AAD and present such to the respondent as required simply because it, the appellant, was not specifically advised by the respondent of this legal requirement which is clearly set out in the legislation. I accept that copy 5 can be of assistance to the respondent as its receipt at least twenty-four hours before dispatch of the goods enables the Respondent to view the goods and carry out such enquiries as it might consider appropriate in relation to the goods and the disclosed parties to the transactions.
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> 8.13 I accept that the Appellants and the Respondent, at the request of the Appellant checked the entries on the SEED database for each of the destination warehouses prior to the dispatch of the consignments. I have concluded that the SEED database is, as submitted by the respondent, simply a record of authorised warehouses and it does not offer any guarantees or representations to an enquirer in relation to such warehouses."

13. The Appeal Commissioner then noted that the appellant and respondent broadly agreed that a review of the recitals to the Directive indicated that the regime established is concerned with the free movement of goods with an accompanying document that should clearly identify each consignment and its tax status and with the principle that excise duty should, in the event of an offence or irregularity, be collected by the Member State in which the offence or irregularity was either committed or ascertained or, in the event of non-presentation in the Member State of destination, by the Member State of departure.

14. In addressing this issue the Appeal Commissioner noted that Article 20(3) of the Directive was central to the appeal. It provided that when products subject to excise duty do not arrive at their destination and it is not possible to determine where the offence or irregularity was committed, that offence or irregularity "shall be deemed to have been committed in the Member State of departure, which shall collect the excise duties …".

15. The Appeal Commissioner made the following determination of fact in respect of this issue:-

> "8.16 The Respondents submitted that the ten documents purporting to be AADs are not in fact AADs as they were not "duly annotated", as required by Article 19(2), or properly certified. I do not agree. In my determination the ten documents are AADs albeit AADs which do not satisfy the requirement of the legislation to facilitate discharge of the appellant. I have concluded that the AADs, in view of their deficiencies and shortcomings are not to be relied on as indicative of the arrival of the goods at their destination. I accept the statements in SDM International Transport Ltd. and in Global Beer and Wines Ltd. that the burden of proof in relation to delivery lies on the consignor and that burden has not

been satisfied.

8.17 The appellant and the respondent carried out enquiries or caused enquiries to be carried out in relation to the movement of the goods following their dispatch from the appellant's premises [which are then set out] …

8.18 The above enquiries did not disclose where the consignments under appeal went following their exit from the appellant's warehouse. Mr. Cassidy and Mr. Rigney expressed their opinion that the volume of goods and the relevant consignment could not have reached the Irish market without being noticed while Mr. Ward of the Respondents was of the view that the goods could have been disposed of in the State. Detective Inspector Heneghan was informed through intelligence from a source regarded as reliable in the past that the goods were taken by an organised criminal's subversive group for private member's clubs in the United Kingdom, however, he admitted that the matter was uninvestigable. None of the witnesses and none of the investigations have shown to my satisfaction, on the balance of probabilities, where the offence or irregularity was committed or detected and I concluded that it is not possible to determine where the offence or irregularity was committed from the evidence adduced.

8.19 Consequently, the demand is properly raised in this State and it is payable by the appellant as it has not complied with the provisions for discharge."

16. The Appeal Commissioner considered submissions relating to two judgments of the CJEU said to be relevant to these issues namely *Teleos C-409/04* and *Netto Supermarkt C-271/06* but concluded that these cases were concerned with Value Added Tax and customs duty respectively and were not of assistance in respect of an excise duty appeal which was based upon separate and distinct legislative provisions.

**Citywest Case Stated**
17. The appeal was determined against the appellant and the assessments raised were affirmed. The appellant then applied to have a case stated for the opinion of this Court. The question of law posed is as follows:-

"10.1 The question of law for determination by the High Court is whether, having regard to the evidence given and the facts as found by me as aforesaid I was correct in holding that the assessment should stand and that the appellant should discharge the tax as sought."

**The Issues in Citywest**
18. Though the question raised for the determination of the court by the Appeal Commissioner simply asks whether he was correct in holding that the assessment should stand in the light of the evidence given and the facts found, the parties were satisfied that the following issues fall to be decided:-

(1) Was the Appeal Commissioner correct to conclude, as he does at para. 8.10 of the case stated, that the absence of national endorsement by the French and Spanish authorities on the copy 3 of the ten relevant AADs was sufficient to result in non-compliance with the provisions for discharge having regard to the legislative framework and, in particular, the provisions of:-

- Article 19(2) of Council Directive 92/12/EC;

- Section 99(3) and s. 99(4)(a)(ii) of the Finance Act 2001;

- Regulation 33(1) and (2) of S.I. No. 443/2001, the Control of Excisable Products Regulations 2001.

In particular, having due regard to the principle of legal certainty were France and Spain at the material time, specified in the regulations by the Revenue Commissioners within the meaning of s. 99(4)(a)(ii) of the 2001 Act as Member States in which endorsement of copy 3 of the AAD was required by the authorities, this being the relevant condition for discharge which the Appeal Commissioner held had not been satisfied?

(2) If the AADs are not sufficient to result in discharge of the Appellant's liability to pay excise duties by reason of the fact that they are not endorsed by the French or Spanish competent authorities, do the principles of proportionality or legal certainty nonetheless preclude the Revenue Commissioners from seeking to impose liability for the excise duties on the Appellant:-

(i) having regard to the case law of the CJEU on proportionality and legal certainty and in particular the decisions in the *Teleos Case (C-409/09)* and *Netto Case (C-270/06),* contrary to the determination made by the Appeal Commissioner at para. 8.20 of the case stated;

(ii) having regard to the fact that the French and Spanish warehouses were listed on the SEED database as authorised warehouses, at the material time, as per the determination made by the Appeal Commissioner at para. 8.13 of the case stated.

In particular, does the application of the principle of legal certainty or the doctrine of legitimate expectation preclude the determination made by the Appeal Commissioner that the AADs were invalid and accordingly that an excise demand could be made in this jurisdiction, having regard to the provisions of Regulation 33(2) of the 2001 Regulations to the effect that the Respondents should make available a list of Member States to which Regulation 33(1)(b)(vi) applies in circumstances of this case?

(3) Was it appropriate for the Respondents to raise the excise demand in Ireland, having regard to the provisions of Article 20(3) of the Directive and the determination made by the Appeal Commissioner at para. 8.18 of the case stated to the effect that it was not possible to determine where the offence or irregularity was committed from the evidence adduced. In particular, noting the role of the High Court in cases stated, was the Appeal Commissioner entitled to hold that it was not possible to conclude on the balance of probabilities where the irregularity occurred?

**The Monaghan Bottlers Case Stated - Background**
19. Monaghan Bottlers Ltd is an authorised warehouse keeper as defined by s. 96 of the Finance Act, 2001 (the 2001 Act). The appellant's premises at Tirkeenan, County Monaghan was approved as a tax warehouse for the purposes of s. 109 of the Act. In 2008 Euromax (Wines and Beers) Ltd, introduced the appellant to Stockage et Manutention du Chanelle (hereafter Stockage), a company incorporated in France which purchased five consignments of mixed spirits from the appellant for delivery under excise duty suspension. One consignment was to be delivered to Lauvie F Distribution (Lauvie) in France and four consignments were for delivery to Bodegas Gran Mariscal (Mariscal) in Spain. Lauvie and Mariscal were authorised to operate tax warehouses by the authorities in their respective countries.

20. On the 29th April, 2009 the respondents served a demand on the appellant for the payment of €1,056,617.84. This was appealed pursuant to s. 145 of the 2001 Act. The appeal was determined against the appellant on 4th August, 2009. By letter dated 2nd September, 2009 the appellant appealed that decision to the Appeal Commissioners pursuant to s. 146. Hearings were held in 2010 and 2012.

21. A case stated was submitted to this court by the Appeal Commissioners following its determination which was adverse to the appellant on the 12th October, 2015.

**Monaghan Bottles - Facts Proved or Admitted**
22. The following facts were admitted or proved before the Appeal Commissioner:-

> "4.4 On the 4th July, 2008 a consignment of spirits was dispatched under duty suspension from the appellant's warehouse to the warehouse of Lauvie in France. The appellant subsequently received the copy 3 of the administrative accompanying document (hereafter "AAD") purportedly bearing a stamp of Lauvie and dated the 8th July, 2008. A copy of the copy 3 of the AAD is attached at annex B and forms part of this case stated."

23. Four further consignments of spirits were dispatched under duty suspension from the appellant's warehouse to the warehouse in Mariscal in Spain on the 11th August, 22nd August, 10th September and 10th October, 2008. The appellant subsequently received a copy 3 of the AAD purportedly bearing a stamp from Mariscal and representing that each consignment had been received on the 14th August, 1st September, 16th September and 17th October, 2008 respectively. A copy of each of the copy 3 AADs was attached to the case stated.

24. The Appeal Commissioner accepted that in each case the transport of the consignments was arranged and paid for by Stockage and the transporter was SR Logistics Ltd of Newtownbutler County Fermanagh now in liquidation. The Appeal Commissioner stated:-

> "4.10 In advance of dispatching the goods the appellant confirmed with the respondents that Lauvie and Mariscal were on the SEED database. The appellant also furnished copies of the receipted AADs to its local customs office. The local customs officer informed the appellants that the AAD in respect of consignment to France appears to be in order."

25. The facts found concerning the movements of these goods to Lauvie were as follows:-

> "4.12 At the relevant time, France required the receipt of the goods on the AAD to be stamped with a stamp of the French customs authority. The French authorities issued stamping machines to authorised warehouse keepers. If a warehouse keeper did not have a stamping machine he had to go to the customs office and have the customs stamp affixed to the AAD. There is no customs stamp on the AAD relating to the consignment to Lauvie. The French customs authority removed the stamping machine from Lauvie on the 4th July, 2008. Mr. Guilbaux visited Lauvie's warehouse on the 18th February, 2009 and interviewed Mr. Lauvie, the proprietor of the company. There was no stock in the warehouse on the date of the visit. There was no stock recorded in the records of Lauvie after the 4th July, 2008."

26. It should be noted that the 4th July, 2008 was the date of dispatch of the consignment of spirits by the appellant to the Lauvie warehouse.

27. In respect of the consignments sent to Mariscal the following facts were found:-

> "4.13 At the relevant time Spain required copies 2, 3 and 4 of the AAD to be taken to the customs office to be stamped by the customs authority. The customs office would affix its stamp to the copies, give back copies 2 and 3 to the warehouse keeper and keep copy 4 for themselves. There is no customs stamp on any of the AADs relating to the four consignments to Spain. As a result of the mutual assistance request from Ireland, Ms. Lopez visited Mariscal's Warehouse on the 10th, 11th and 12th December 2008. The warehouse was closed and she was unable to speak to the administrator of the company. She also visited another business premises that belonged to Mariscal on the 15th, 16th and 17th December, 2008. The warehouse was closed and she was unable to speak to the administrator. She also visited another business premises that belonged to Mariscal on the 15th, 16th and 17th December 2008, but was unable to speak to the administrator. She also attempted to contact the administrator by telephone but was unable to do so."

28. The Appeal Commissioner found that the directors of Euromax had been interviewed by the authorities. The directors stated that Euromax acted as a commission agent in putting Monaghan Bottlers in touch with Stockage. They claimed that they could not remember the names of the people with whom they dealt in Stockage. Investigations revealed the registered owners of the two trucks identified in the AADs as having carried some of the consignments. One was registered in the name of one of the directors of SR Logistics. Mr. Ward, the investigator was unable to interview this director as he was out of the jurisdiction. The director of SR Logistics came to the attention of customs authorities in both France and the United Kingdom since these events in relation to excise diversion fraud. The registered owner of the other truck was found to have left the jurisdiction and the investigator was unable to interview him. The freight manifest of ferries leaving the State on the dates on and after the goods had been dispatched from the appellant's warehouse were examined but investigators were unable to identify the vehicles identified on the AADs on these manifests.

29. The Appeal Commissioner in this case also accepted that the respondents maintain a list of the EU Member States that require a customs stamp to be affixed to an AAD and a copy of that list was attached at appendix G of the case stated. This is the same appendix which formed part of the case stated in the Citywest case and reflects the fact that France and Spain both required certification of the third copy of the accompanying document under Article 19(2) of the Directive. The list was said to be effective from 1st January, 2007 and its latest version was stated to be 5th February, 2007. Each Member State was listed and it was

indicated in respect of each state whether or not the certification of the third copy was required by the relevant authorities. Five member states did not require such certification. A number of the Member States granted an exemption from some requirements to small wine producers under Article 29(1) of the Directive. France and Spain required endorsement.

**Monaghan Bottlers - The Determination**

30. The Appeal Commissioner determined the following matters in respect of the disposal of the consigned goods: -

> "4.16 Neither the Irish, Spanish and French authorities, nor the appellant, are aware of where the goods went following their dispatch from the appellant's premises.
>
> 4.17 It has not been possible from the investigations carried out by the appellant and the respondent to determine, on the balance of probabilities, where the offence or irregularity was committed."

31. Issues which are substantially similar to those raised in the Citywest case were raised in argument before the Appeal Commissioner.

32. The Appeal Commissioner referred to s. 99(3) of the 2001 Act which provides that liability for excise duty shall be fully or partly discharged where excisable products have been received by a person authorised by the authorities of another member state to operate a tax warehouse and evidence to that effect has been received within the prescribed time. He also referred to s. 99(4) to the effect that evidence of such receipt is to be provided by means of a copy 3 AAD returned duly endorsed by the destination tax warehouses houseman and where such national authority undertakes to carry out an endorsement by the competent authority of the Member State of the consignee. The Appeal Commissioner held in relation to the absence of endorsements on the copy 3s:-

> "8.6 The appellant referred to the Directive and submitted that the cornerstone of the system is to promote the free movement of goods; it is a system that can be abused but is not a system which requires a consignor, acting honestly and in good faith, who received the required copy AAD which is complete on its face, to pay duty because someone else has committed a fraud. I do not accept, as will be seen in the following paragraphs, that the AADs are complete on their face.
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> 8.7 The appellant submitted in accordance with Article 6.1 of the Directive, that the consignee took delivery of the goods at the appellant's premises by having its agent, the carrier, collect them. Consequently if a liability arises it is the consignee that is liable for its failure to put the goods into its authorised warehouse. I accepted the submission of the respondents in this matter; no evidence has been tendered by the carriers and there is no discharge until the return of a copy of the AAD duly endorsed as required by s. 99(4) of the 2001 Act.
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> 8.8 The endorsement of the National Customs Authority of France (1 AAD) and of Spain (4 AADs) is absent from the relevant copy AADs before me. This absence is critical as it results in a position where the copy AADs do not comply with the provisions of s. 99(4) of the 2001 Act with the result that the appellant, being the authorised warehouse keeper, is liable for the excise duty on the five consignments."

The Appeal Commissioner also rejected a submission that the respondents were not entitled on the third day of the hearing to make submissions for the first time about the absence of the national customs endorsements from the returned copy AADs some eighteen months after the initial hearing. The Appeal Commissioner did not accept that he could set aside a requirement for compliance with a clearly stated legal provision on that basis.

33. The Appeal Commissioner considered the absence of endorsements on the copy AADs and stated:-

> "8.10 I accepted the evidence adduced that at the relevant time, France and Spain required the endorsement of their national authorities to be affixed to the copy AAD returned to the consignee. A list of the Member States that required such stamping was prepared by and held by the respondents at the relevant time. I am not satisfied that I have jurisdiction to free the appellant from the need to comply with such stamping requirements given the existence of a list of countries requiring endorsement of their national authorities and given the availability on request of information from the respondents concerning the identities of the Member States requiring such endorsements….
>
> 8.12 The appellants submitted that its liability under s. 99(1)(a) of the 2001 Act was discharged by receipt by it, in good faith, of copy 3 of each of the five AADs, signed by the consignee certifying that he had received the goods, within the fifteen day period specified in Regulation 33(1)(a) of the regulations. The appellant submitted that a consignor, acting in good faith, does not have any responsibility in relation to the validity of the signatures or stamps on the copy AAD's returned by the consignee. In this regard it placed particular emphasis on the phrase, in Regulation 33(1), 'an authorised warehouse keeper shall…be deemed to have complied with s. 99(3) FA … where …' it has satisfied the provisions of Regulation 33(1). All a consignor can be expected to do is to get a form which appears on its face to have the requisite information on it, as, if it were otherwise, it was submitted, the consignor would be a guarantor for the conduct of every person in the chain of supply. I disagree – the absence of the endorsement of the competent national authorities of France and Spain is sufficient to constitute non compliance with the provisions of s. 99(3) of the 2001 Act and also results in a situation where in the AAD's cannot be relied on as indicative of the arrival of the goods at their declared destinations."

34. The Appeal Commissioner also addressed the question of where the irregularity or offence occurred in respect of the consigned goods in this case and the issue of whether it was appropriate to raise the excise demand in Ireland:-

> "8.13 The appellant also submitted that the onus is solely that of the respondent to carry out an investigation to determine where an offence or irregularity, referred to in Article 20(3) of the Directive, took place. I accept, as does the respondent that there is an onus on the respondent to carry out an investigation but I do not agree that the appellant has no such obligation. The evidence before me, and which I accept, is that witnesses from the Irish, Spanish and French authorities, and the appellant are not aware of where the goods went following their dispatch from the appellant's premises.
>
> 8.14 It has not been possible from the investigations carried out by the appellant and the respondent to determine, on the balance of probabilities, where the offence or irregularity was committed. Consequently it is appropriate to raise the excise demand in this Member State.

8.15 The respondents submitted that the evidence before me in relation to the consignee signatures and the consignee stamps on the returned copy of each of the 5 AAD's shows that such AAD's were not duly endorsed. It was submitted by the appellant, as a matter of general principle, that the respondents, who assert that an irregularity has occurred, must prove that assertion. I agree with that submission. I have concluded that the evidence from the French and Spanish customs authorities and personnel relating to the Lauvie and Mariscal stamps and signatures is, as submitted by the appellant, hearsay in nature and consequently, not admissible.

8.16 I note that the appellant has not furnished evidence concerning the validity of the stamps and signatures on the returned copy on each of the 5 AAD's and has not adduced any evidence as to the arrival of the goods at their intended destinations.

8.17 I have concluded that the line of authority in case *C-409/04 Teleos Plc* relating to VAT has no application to the Directive. Accordingly I determined the appeal in this case by confirming the assessments."

**Monaghan Bottlers - The Case Stated**

35. The appellant being dissatisfied with the Appeal Commissioner's decision as erroneous in law requested that he state a case for the opinion of this court in respect of the following questions of law:-

"(a) Was there sufficient evidence before me entitling me to conclude that at the material time the French and Spanish authorities undertook to carry out the endorsement within the meaning of s. 99(3) of the Finance Act, 2001?

(b) Was I correct in concluding that the decision of the Court of Justice of the European Communities in *R (Teleos and Ors) v. Commissioners of Customs and Excise* (Case C-409/04) was inapplicable and did the raising of assessments in these circumstances infringe principle of legal certainty?

(c) Did the appellants have a legitimate expectation in the circumstances:-

(i) That the Revenue Commissioners would draw to its attention in advance of dispatch of the consignments that AADs in respect of consignments destined for France or Spain had to be endorsed by the authorities in those countries;

(ii) That it had complied with s. 99 of the Finance Act, 2001 when it delivered AADs to the Respondent, complete on their face, and when those AADs were not rejected at the time or immediately thereafter; and if so, did the Revenue infringe those legitimate expectations by raising these assessments and are they thereby estopped or precluded from (a) contesting this appeal or (b) arguing in particular that the requirements of s. 99(3) of the Finance Act, 2001 had not been complied with?

(d) Did the Revenue Commissioners infringe the principle of equal treatment in circumstances where:-

(i) In his appearance before the Oireachtas Public Accounts Committee on 17th January, 2008 the then Chairman of the Revenue Commissioners Frank Daly outlined the treatment by the Commissioners of similar cases involving fraudulent deliveries which left innocent Irish warehouse keepers with a potential excise liability;

(ii) The Chairman indicated to the Committee that although the landlord warehouse keepers were technically liable to Irish excise duty on the consignments, on the grounds of natural justice, no liability was sought from them by the Revenue Commissioners as they were innocent of any knowledge or the involvement of any frauds and derived no financial benefit there from and to seek the duty could have put them out of business;

(iii) The agreed evidence before me was that if a fraud had been committed in respect of this consignment (and there was no admissible evidence of such fraud before me) the appellant was innocent of any knowledge or involvement in such fraud and derived no financial benefit therefrom; furthermore, the appellant adduced evidence which was not challenged that the imposition of this duty could put them out of business; and if so, are the Revenue Commissioners thereby estopped or precluded from contesting this appeal?

(e) Did the procedure leading to my decision on 9th August, 2012 infringe Article 6 of the European Convention on Human Rights on the basis of delay on the part of the Revenue Commissioners and as a result ought I to have refused to uphold the assessment? [This issue was not pursued at the hearing before this Court]

(f) Was I correct in holding that the requirement of s. 99(3) of the Finance Act, 2001 had not been complied with in particular, having regard to s. 99(4) of the Finance Act and Regulation 33(2) of the Control of Excisable Products Regulations, 2001 (S.I. No. 443/2001)?

(g) Was I entitled to conclude on the evidence that information was available on request from the respondent concerning the identity of countries requiring the endorsement of their national authorities to be affixed to the copy AAD returned to the consignee?

(h) Was I entitled to conclude that the existence of a list of countries requiring endorsement of their national authorities and the availability, on request of information from the respondent concerning the identity of countries requiring such endorsements was sufficient compliance with s. 99(4) of the Finance Act, 2001 and Regulation 33(2) of the Regulations?

(i) In circumstances where I found as a fact that it has not been possible from the investigations carried out by the appellant and the respondent to determine on the balance of probabilities where the offence or irregularity was committed, was I entitled to find that it was appropriate as a matter of law to raise the excise demand in this Member State?

(j) In circumstances where I found that the evidence from the French and Spanish customs authorities and personnel relating to the Lauvie and Mariscal stamps and signatures was not admissible, was I entitled to conclude that the appellant had failed to comply with s. 99 of the Finance Act, 2001 and Regulation 33 of the Regulations?

(k) On the evidence that I held to be admissible, and having regard to the burden of proof, was I correct in upholding the assessments?"

**The Issues in The Monaghan Bottlers case**

36. In their written submissions the Monaghan Bottlers Limited (Monaghan Bottlers) identified the following relevant issues arising from the questions posed, namely:-

"(a) Having due regard to the principle of legal certainty, were France and Spain at the material time, specified in regulations by the Revenue Commissioner within the meaning of s. 99(4)(a)(ii) of the 2001 Act as Member States in which endorsement of the copy 3 of the AAD was required by the authorities, this being the relevant condition for discharge which the Appeal Commissioner held had not been satisfied?

(b) If France and Spain were at the material time so specified in Regulations made by the Revenue Commissioners within the meaning of s. 99(4)(a)(ii) of the 2001 Act, did the Revenue Commissioners make the list available, as required by Regulation 33 of the control of exercisable products Regulations 2001 (the 2001 Regulations) and if not, what are the consequences of the failure so to do?

(c) If France and Spain were so specified in Regulations made by the Revenue Commissioners within the meaning of s. 99(4)(a)(ii) of the 2001 Act is it nevertheless a breach of the principle of equal treatment, legal certainty, legitimate expectations and/or proportionality to seek to recover the excise duty from the Appellant in the circumstances of this case?"

37. The respondent in the Monaghan case identified the following five issues arising from the questions posed, namely:-

(i) The discharge issue, said to arise from questions (a), (f), (g), (h), (i), (j), and (k):

(ii) The application of the principle of legal certainty said to arise from *Case C-404/04 Teleos* and question (b);

(iii) The issue of legitimate expectation said to arise from question (c);

(iv) An issues as to equal treatment under question (d);

(v) An issue as to irregularity raised at question (i).

**The Legal Framework**

38. The following is the legal framework applicable to the excisable goods consigned in both cases.

**Council Directive 92/12/EC**

39. Council Directive 92/12/EEC provides the legal framework within which products subject to excise duties may be moved within the European Union and the conditions under which duty on such products may be suspended. The purpose of regulating the movement of these products under the Directive is to make it possible to identify and locate products in respect of which excise duty has not yet become chargeable, even though the event which renders these products liable to duty has already occurred, namely that the excisable product has been manufactured and imported into the European Union. Excise duty as a tax on consumption is chargeable as close as possible to the end consumer. There is usually a gap between the event which triggers the application of the excise duty to the product and its release for consumption. That gap may include a period during which the goods are moved between the Member States. Thus the Member State in which the excise duty is chargeable may change. The Directive makes provision for this gap by providing for a "suspension arrangement" which is defined by Article 4(c) as "a tax arrangement applied to the production, processing, holding and movement of products, excise duty being suspended". A product may be processed, held and transported within the European Union without excise duty becoming chargeable until such time as a step is taken outside the suspension arrangement or an irregularity or offence is committed in the course of the movement of the excisable product within the European Union. Strict controls are attached to the movement of such products which may only be produced, processed and held under a suspension arrangement in a tax warehouse duly authorised by the Member State where it is located.

40. The appellants are "authorised warehouse keeper[s]" under Article 4(a) of the Directive having been authorised by the Revenue Commissioners to produce, process, hold, receive and dispatch products subject to excise duty in the course of their business "excise duty being suspended under tax – warehousing arrangement[s]". As such the appellants were required under Article 13(a) to:

"Provide a guarantee, if necessary, to cover production, processing and holding and a compulsory guarantee to cover movement, subject to Article 15(3), the conditions for which should be set by the competent authorities of the Member State in which the tax warehouse is authorised …"

41. Article 14 provides that authorised warehouse keepers shall be exempt from duty in respect of losses occurring under suspension arrangements which are attributable to fortuitous events or force majeure and established by the authorities of the Member State concerned. They should also be exempt under suspension arrangements in respect of losses inherent in the nature of the products during production and processing, storage and transport. Each Member State must lay down the conditions under which these exemptions are granted. The losses must be established according to the rules of the Member State of destination. Article 14(4) sets out a written procedure for the recognition of such losses on the documentation accompanying the consignment.

42. Under Article 15(1) the movement of products subject to excise duty under suspension arrangements must take place between tax warehouses. Warehouse keepers who are authorised by the competent authorities of a Member State in accordance with Article 13 are deemed to be authorised for both national and intra-Community movement.

**Documentation**

43. Article 18(1) provides that all products subject to excise duty moving under duty suspension arrangements between Member States shall be accompanied by a document drawn up by the consignor. The form and content of this document is regulated. Article

18(2) provides that in order to identify the goods and conduct checks, packages should be numbered and the products described using the document referred to in sub-para. 1 and if needs be each container should be sealed by the consignor when the means of transport is recognised as suitable for so doing by the Member State of departure or the packages should be sealed by the consignor. Article 18(3) provides that where the consignee is not an authorised warehouse keeper or a registered trader the document referred to in sub-para. 1 must be accompanied by a document certifying that excise duty has been paid in the Member State of destination or that any other procedure for collection of duty has been complied with in accordance with the conditions laid down by the competent authorities of the Member State of destination. The reference document described in Article 18 which may be an administrative document or commercial document forms the basis upon which the tax authorities of the Member States are informed by traders of relevant deliveries dispatched or received.

44. Article 19(1) provides that the tax authorities of the Member States must be informed by traders of deliveries dispatched and received under duty suspension arrangements. The relevant document specified in Article 18 must be drawn up in quadruplicate. One copy must be kept by the consignor, one copy is for the consignee, one copy must be returned to the consignor for discharge and one copy must be reserved for the competent authorities of the Member State for which the goods are destined. Article 19(1) provides *inter alia*:-

> "The Member State of destination may stipulate that the copy to be returned to the consignor [copy 3] for discharge shall be certified or endorsed by its national authorities. Member States applying this provision must inform the Commission which shall in turn inform the other Member States thereof."

45. Article 19(2) provides that:-

> "When products subject to excise duty move under the duty suspension arrangements to an authorised warehouse keeper … a copy of the Accompanying Administrative Document or a copy of the commercial document, duly annotated, shall be returned by the consignee to the consignor for discharge, at the latest within 15 days following the month of receipt by the consignee".

Article 19(2) also provides that the copy returned must contain a number of details "which are required for discharge" namely the address of the office of the tax authority for the consignee, the date and place of receipt of the goods and a description of the goods received in order to check whether the consignment tallies with the document. If it does the note "consignment checked" must be added. In addition, Article 19(2)(d) also provides that the copy returned must contain:-

> "(d) The reference or registration number issued, where appropriate, by the competent authorities of the Member State of destination which use such numbering *and/or the endorsement of the competent authorities of the Member State of destination if that Member State stipulates that the copy to be returned must be certified or endorsed by its authorities"*. (emphasis added)

It must also contain the authorised signature of the consignee.

46. The condition under which the consignor's liability for excise duty in respect of goods subject to duty suspension will be discharged is set out in Article 19(3) which states:-

> "The duty–suspension arrangements as defined in Article 4(c) shall be discharged by the placing of the products subject to excise duty under one of the arrangements referred to in Article 5(2) and subject to the conditions referred to therein, after the consignor has received the copy to be returned of the Accompanying Administrative Document or a copy of the commercial document duly annotated in which it must be noted that the products have been placed under such an arrangement."

In these cases the documents submitted as copy 3s did not carry the appropriate endorsement required by France and Spain. The Revenue Commissioners therefore declined to regard the appellant's liability as discharged and levied the excise duty the subject of this appeal on the appellants.

**Payment of Duty Where Offence or Irregularity Occurs**

47. Article 20 contains a jurisdictional code which defines the Member State in which excise duty shall be due where an offence or irregularity has been committed in the course of the movement of a consignment under duty suspension. The excise duty shall be due in the Member State where the offence or irregularity was committed from the natural or legal person who guaranteed payment of the excise duties in accordance with Article 15(3). Article 20 provides *inter alia*:-

> "1. Where an irregularity or offence has been committed in the course of a movement involving the chargeability of excise duty, the excise duty shall be due in the Member State where the offence or irregularity was committed from the natural or legal person who guaranteed payment of the excise duties in accordance with Article 15(3). without prejudice to the bringing of criminal proceedings.
>
> 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 country of departure.
>
> 2. When, in the course of movement, an offence or irregularity has been detected without it being possible to determine where it was committed, it shall be deemed to have been committed in the Member State where it was detected.
>
> 3. Without prejudice to the provision of Article 6(2), when products subject to excise duty do not arrive at their destination and it is not possible to determine where the offence or irregularity was committed, that offence or irregularity shall be deemed to have been committed in the Member State of departure, which shall collect the excise duties at the rate in force on the date when the products were dispatched unless within a period of four months from the date of dispatch of the products evidence is produced to the satisfaction of the competent authorities of the correctness of the transaction or of the place where the offence or irregularity was actually committed. Member States shall take the necessary measures to deal with any offence or irregularity and to impose effective penalties. …"

**Transposition of the Directive**

48. The suspension of duty arrangements in respect of excisable products under the Directive were transposed into domestic law

under the provisions of the Finance Act 2001 and the Control of Excisable Products Regulations 2001 (S.I. No. 443 of 2001) (the 2001 Regulations).

49. Section 99(1)(a) of the 2001 Act provides that an authorised warehouse keeper shall be liable for payment of excise duty on excisable products released from an approved tax warehouse for delivery to another Member State "subject to the procedure for discharge of such liability provided for in subsection (3)". Section 99(2) provides that the excise duty payable must be paid "at such time and in such manner as may be prescribed under section 153". Section 153 empowers the Revenue Commissioners to make regulations concerning *inter alia* the securing and collecting of excise duties.

50. Section 99(3) provides that:-

> "The liability to excise duty under subs. (1)(a) shall be fully or partly discharged and satisfied and excise duty shall not be payable where, and to the extent that, such excisable products have been fully or partly received by a person or trader referred to in s. 115(2) or have been exported from the Community, and evidence to this effect is received within the prescribed time and in the prescribed manner."

51. Section 115(2) defines the category of authorised warehouse keepers to whom excisable products may be delivered in another Member State under a suspension arrangement. These include persons entitled to operate a tax warehouse under Article 12 of the Directive and a trader registered with the authorities of another Member State under Article 16.2. If the consignee is a trader referred to in Article 16.3 who is not registered with the tax authorities of his Member State, the consignor must receive in advance of the dispatch of the excisable products a "duty document" which certifies that the trader has declared to the authorities in his Member State his intention to obtain the excisable products from the consignor and has paid or secured to the authorities the excise duty on the products in accordance with the prescribed procedures in that Member State.

52. The evidence required of the receipt of excisable products under subs. 3 is set out in s. 99(4) as follows:-

> "(4) For the purpose of subs. (3), evidence of receipt shall be provided by means of a copy of the accompanying document, referred to in subs. (1) of s. 117, returned duly endorsed—
>
> (a)(i) by such person or trader, and
>
> (ii) in the case of such Member State, as may be specified by the Commissioners in regulations under s. 153, by the authorities of such Member State in which such person or trader has his or her place of business - - -
>
> to the effect that such excisable products have been duly received …"

53. The Regulations made under s. 153 referred to in subs. 4 above are set out in Part IV of the 2001 Regulations. Regulation 33(1) provides that an authorised warehouse keeper shall be deemed to have complied with s. 99(3) of the 2001 Act where it has obtained from the consignee the return of "copy 3 of the main accompanying document within 15 days following the month of receipt of the excisable products by the consignee". Regulation 33(1)(b) provides that copy 3 must be properly certified with the appropriate information including:-

> "(vi) The endorsement of the competent authority of the Member State of the consignee in the case of those Member States where such authority undertakes to carry out such endorsement."

54. Regulation 33(2) provides that:-

> "The Commissioners shall make available a list of the Member States to which para. (1)(b)(vi) applies."

It is clear that the provision does not specifically provide that a list should be made available on demand or request and it is common case that though a list existed which included France and Spain there was no specific provision as to how it was to be made available.

55. Article 44 of Notice No. 1877 provides that a warehouse keeper remains "responsible for the excise duty on consignments moving to other Member States until such time as a proper receipt in the prescribed format is received on copy 3 of the AAD (if appropriate, endorsed by the fiscal authorities in the Member State of destination)". Article 45(b)(iii) states that:-

> "If a full consignment does not arrive at it's destination, and it is not possible to determine where the loss or irregularity occurred, you will be liable for payment of duty at the rate enforced in Ireland, and this duty is payable to the Revenue Commissioners."

**Citywest Issue (1) and Monaghan – Appellants Issues (1) and (2) and the Respondents Issue (i) - The Discharge Issue**

56. It is accepted that none of the copy 3 AAD's in issue in either case carry the endorsement required and this was found as a fact by the Appeal Commissioners.

57. Article 19(1) of the Directive provides that the Member State of destination may stipulate that the copy 3 to be returned to the consigner should be certified or endorsed by its national authorities. It also provides that the Member States applying this provision must inform the Commission, which shall inform the other Member States thereof. Article 19(2)(d) provides that the copy 3 must contain the endorsement of the competent national authority of the Member State of destination if that Member State stipulates that the copy 3 to be returned must be so endorsed by its authorities. It should also be noted that the liability of an authorised warehouse keeper of dispatch may only be discharged by proof that the consignee has taken delivery of the products "in particular by the accompanying document referred to in Article 18 under the conditions laid down in Article 19".

58. Issue 1 in the Citywest case is whether the Appeal Commissioner was correct to conclude that the absence of a national endorsement by the French and Spanish authorities on the copy 3 AADs was sufficient to justify a finding of non-compliance with the provisions for discharge. Furthermore, the question is raised under the principle of legal certainty whether France and Spain were at the material time lawfully specified in regulations by the Revenue Commissioners within the meaning of s. 99(4)(a)(ii) as Member States in which the endorsement of the AAD was required by the authorities. This issue is also raised as issues (1) and (2) by the appellant in the Monaghan case and issue (i) - the discharge issue - by the respondents in that case. It is also said to relate to the

questions posed at (a), (f), (g), (h), (i), (j) and (k), in the Monaghan case.

59. The consignor of excisable goods must bear the liability for any duty payable in respect of goods released from its authorised warehouse for delivery to an authorised warehouse in another Member State under s. 99(1) of the 2001 Act. The duty will be regarded as discharged in full under s. 99(3) and shall not be payable by the consignor only if evidence that the consignment of goods has been received by the consignee in the prescribed manner. Since the AADs did not carry the appropriate endorsement the Appeal Commissioners found as a fact that such evidence had not been so received. Clearly on the face of the copy 3 AADs this finding of fact is correct.

60. The court is satisfied that the Appeal Commissioner in Citywest was *prima facie* correct in concluding at para. 8.10 that the absence of the required endorsement by the appropriate authorities in France and Spain on the copy 3 AAD's constituted a failure to provide the necessary evidence upon which to regard the duty payable as discharged. The onus of producing the necessary proofs under the statute lay on the consignor and it failed to discharge it.

61. The court has reached the same conclusion in the Monaghan case. The evidence set out at paras. 4.12 and 4.13 of the case stated is that France and Spain required the copy 3 AAD to be stamped by the relevant custom authorities. They were not so stamped. The Appeal Commissioner therefore concluded that the AAD's did not comply with domestic legislation or the Directive and therefore the appellant as the authorised warehouse keeper was liable for excise duty on the five consignments.

62. The court is therefore satisfied having regard to the facts as found by the Appeal Commissioners on this issue that their determinations in Citywest and Monaghan are *prima facie* in accordance with the provisions of the Directive and the Regulations and should be upheld absent any other legal basis which required them to reach a contrary conclusion. In that regard, the Appellants submit that the Appeal Commissioners in both cases misinterpreted the relevant statutory provisions in determining whether they were liable for excise duty.

**Specifying the Member States**

63. The appellants submit that the Appeal Commissioners erred in law because France and Spain were not lawfully "specified" under s. 99(4)(a)(ii) so as to enable a consignor to discharge the evidential burden under s. 99(3) of the 2001 Act. There was a failure by the Revenue Commissioners to promulgate by regulation those Member States which required an endorsement of the copy 3 AAD. The Commissioners failed to identify France and Spain in the 2001 regulations in a clear and transparent way as Member States which required that endorsement. A consignor which dispatched excise goods to an authorised warehouse in either State was deprived of essential information whereby it might ensure its compliance with the proofs required for claiming discharge from its excise liability. At the very least if these countries had been so specified the consignor would have been aware on receipt of a copy 3 without the requisite endorsement that it was deficient and taken steps to seek a compliant copy 3 or investigate why one was not furnished. Forewarned is forearmed and the consignor could take appropriate steps to avoid dealing with entities which failed to comply with their own domestic law. This would also empower and assist the trade and the revenue and police authorities within the EU in detecting and addressing irregularities and fraud in the interstate movement of goods and the early detection of diversion frauds.

64. As noted s. 99(3) provides that the liability to excise duty shall be fully discharged and not payable where evidence is received that the excisable products have been fully received by an authorised warehouse keeper to whom excisable products may be delivered in another Member State under the suspension arrangement. Section 99(4)(a)(ii) provides that sufficient evidence is provided of the receipt of excisable goods by an authorised warehouse where the returned AAD is duly endorsed by the trader and in the case of "such Member State, *as may be specified by the Commissioners in Regulations under* s. 153, by the authorities of such Member State in which such person or trader has his or her place of business to the effect that such excisable products have been duly received". The appellants in both cases submit that France and Spain have not been lawfully "specified by the Commissioners" as intended by the legislature.

65. As already outlined the regulations made under s. 153 referred to in s. 99(4) are contained in Part IV of the 2001 Regulations. Regulation 33(1) provides that an authorised warehouse keeper should be deemed to have complied with s. 99(3) where it has obtained the appropriate AAD from the consignee. However, Regulation 33(1)(b)(vi) provides that the copy 3 must be properly certified with the appropriate information which includes an endorsement of the competent authority of the Member State of the consignee "in the case of those Member States where such authority undertakes to carry out such endorsement". Regulation 33(2) provides that:-

> "The Commissioners shall make available a list of the Member States to which para. (1)(b)(vi) applies."

This provision derives from Article 19(1) of the Directive which placed an obligation on any Member State stipulating that the AAD to be returned for discharge should be certified or endorsed by its national authorities to inform the Commission of that requirement which must then inform the other Member State thereof. Thus France and Spain informed the Commission of their requirements for endorsement by their national authorities. The Commission must then inform Ireland of that fact. There is no obligation under the Directive to produce a list. However, in transposing the Directive s. 99(4)(a)(ii) required the AAD to be endorsed in the case of such Member States as are specified by the Commissioners as set out in Regulation 33(1)(b)(vi): Regulation 33(2) already quoted above requires the Commissioners to "make available a list" of those Member States to which Regulation 33(1)(b)(vi) applies.

66. The appellants submit that there has been a failure to specify the Member States which require the returned AAD to be certified or endorsed in the Regulations as required under section 99(4)(a)(ii). All that is required is that the Commissioners make available a list of the Member States to which that sub-paragraph applies. A list existed but was clearly not circulated or published to authorised warehouse-keepers or to the public in general.

67. The relevant officials dealing with Citywest did not know of the list's existence or contents.

68. In the Monaghan case a list of the Member States that required such stamping was prepared by and held by the respondents at the relevant time. The Appeal Commissioner held that he did not have jurisdiction to free the appellant from the need to comply with the stamping requirement "given the existence of the list of countries requiring endorsement of their national authorities and given the availability on request of information from the respondents concerning the identities of the Member States requiring such endorsements" (see para. 8.10). The extent to which the list was available on request is not clear from the facts proved or admitted as set out in the case-stated nor is the evidential basis for that finding. The Appeal Commissioner at para. 4.15 simply stated that the respondents maintained such a list.

69. It is submitted on behalf of both appellants that the ordinary and literal meaning of the word "specified" in s. 99(4)(a)(ii) should be construed as requiring the Revenue Commissioners to identify definitively and unambiguously in the regulations which countries

require the endorsement in question so that traders such as the appellant may know exactly the extent of their obligations. Reliance is placed on the Oxford English Dictionary definition of "specified" as something:-

> "that is or has been definitely or specifically mentioned, determined, fixed or settled."

A number of English authorities were cited as to the meaning of the word "specified" in various statutory provisions. It is accepted that these cases are merely examples of the application of the ordinary meaning of the term "specified" in different contexts but with an emphasis on a requirement of definitive and specific identification. In that regard reliance was placed on *McMorran v. Marrison* [1944] 2 All ER 448, *Paddock Investments Ltd. v. Lory* [1975] 2 EGLR 5 and *R. v. Inland Revenue (ex parte Ulster Bank)* [1997] STC 832.

70. It is submitted on behalf of the respondents that Regulation 33 gives effect to the Directive and s. 99(4)(a)(ii) and fully complies with their provisions. The reference under s. 99(4)(a)(ii) to such Member States as may be specified whose endorsement of the AAD was required in order to discharge the liability to pay excise duties is said to have been fulfilled under Regulation 33(1)(b)(vi) which states that the endorsement was required in respect of "those Member States where such [competent] authority undertakes to carry out such endorsement". It is submitted that the regulations operate to fix or settle the Member States in respect of which an endorsement is required. They do so by simply specifying that endorsement is required by the competent authorities in any Member State the domestic law of which requires it. This is said to be "an elegant and pragmatic approach" in circumstances where most of the Member States required such an endorsement. It is submitted that this gives effect to the entitlement under Article 19(1) of Member States of destination to stipulate that the copy of the AAD returned to the consigner for discharge should be certified or endorsed by its national authority. It was not therefore necessary to list the countries which require an endorsement for the purposes of s. 99(4)(a)(ii) in order to comply with the provisions of the Directive. The general group description was said to be sufficiently clear to identify the Member States which required the endorsement.

71. The court is satisfied that the ordinary and literal meaning of "specified" in this case indicates that something more than a generic description of the countries requiring endorsement was contemplated by the Oireachtas for the reasons advanced by the appellants and accepts the appellants' submissions on this issue in both cases. The court is satisfied that the wording of the sub-section is clear and does not give rise to any ambiguity or uncertainty in its meaning.

72. Though satisfied that there is no ambiguity that requires the court to examine the purpose and intention of the provision (see *McGrath v. Mc Dermott* [1988] I.R. 258), the court is also satisfied for the reasons set out below that this interpretation is consistent with the purpose and intention of the specification of the Member States required by s. 99(4)(a)(ii) and said to have been achieved under Regulation 33(1)(b)(vi).

73. It seems to me that there is a link between the specification of the relevant Member States and the list which the Commissioners is obliged to compile in order to comply with their obligation to make it available in the context of Regulation 33(2). To whom was it to be made available and for what purpose? It is clear that a specific list was compiled by the Commissioners of the Member States which listed those states that required endorsement of the AAD by their national authority, those that did not and those that required endorsements but not for small wine producers. The evidence in Citywest established that the Commissioners made the list available to some of their staff and officers but not to the appellant or its officials dealing with the appellant. A similar situation applied in the Monaghan case save that it was found that the appellant did not make any enquiries in relation to whether France and Spain required such endorsements. A regulation specifying the relevant countries would have enabled revenue officials or consignors to check copy 3 AADs to ensure that the appropriate endorsement had been obtained from any Member State which required it to ascertain whether the duty could be regarded as discharged. If the endorsement was missing that fact could be readily ascertained and the duty could not be regarded as discharged.

74. Although the Revenue Commissioner drew up a list of countries which required an endorsement of the copy 3 AAD by their National Authorities, this list was not available on the respondent's website. The list included France and Spain. It was not circulated to the appellants or other authorised warehouse keepers. It was not published in any of the outlets or official publications such as Iris Oifigiúil. Evidence was given in the Citywest case by Mr. Corrigan of the Revenue Commissioners which was accepted, that the control officer assigned to a consignor would be advised of changes to the list and that information in relation to the list was to be disseminated through the control officer. However, it was accepted by the Appeal Commissioner that the control officer dealing with the appellant was not aware of the existence of the list much less its content.

75. The appellants for their part state that they were unaware that France and Spain required endorsement by the national authorities of copy 3. The absence of the endorsements in the AAD's proved fatal to the appellants in both cases.

76. The Appeal Commissioner in Citywest set out his findings as follows:-

> "8.8. I accept the evidence of Mr. D. Corrigan of the respondent concerning the existence of a list dated 5th February, 2007 of countries requiring endorsement by their National Authorities of the copy AAD (i.e. copy 3) for the return to the consignee in accordance with Article 19: the respondent is required by Regulation 33 to make this list available. Mr. Corrigan testified that the list was not available on the respondent's website, that the Control Officer would be advised of changes to the list and that the Control Officer would convey that to the warehouse keeper. However, Ms. G. Nolan the relevant officer of the respondent testified that she was not aware of the existence of the list.
>
> 8.9. I have no evidence that the appellant was aware of the provisions that permit Member States to require endorsement of copy 3 by their National Authorities or that the appellant made any enquiries in this regard.
>
> 8.10. I have concluded, as urged by the respondent, that the absence of such national endorsement by the French and Spanish authorities that copy 3 of the ten relevant AADs is sufficient to result in non-compliance with the provisions for discharge. The appellant, which had not familiarised itself with the legal provisions governing this matter, cannot have the endorsement requirements set aside by this Tribunal on the grounds that it was not informed of such requirement by the Respondent."

77. The appellant submits that the list and the information contained in it was necessary for an authorised warehousekeeper to make an informed assessment of the documentation which was required and which was returned to him. If the Revenue officials did not convey this information from the list to the warehouse-keeper how else was the warehouse owner to ascertain this information?

78. The Oireachtas clearly envisaged that the copy 3 AAD receipt must contain information which included the endorsement of such Member States "as may be specified by the Commissioners and Regulations". If one takes the plain and ordinary meaning of "specified"

as something that has been definitely or specifically "mentioned, determined, fixed or settled" reg. 33(1)(b)(vi) simply does not specify the Member States to which the provisions of s. 94(4)(a)(ii) apply.

79. The Appeal Commissioner found as a fact that the list prepared by the Revenue Commissioners was not furnished to Ms Nolan and notice of its existence or contents was not given to the appellant at any stage. He also found as a fact that the appellant did not make any inquiries about whether France or Spain required such endorsements. Indeed it was accepted by the Appeal Commissioner that the appellant was ignorant of this requirement.

80. In Monaghan the Appeal Commissioner was satisfied that a list of the Member States requiring the endorsement to be fixed to the AAD was prepared by and held by the respondents at the relevant time. It was accepted that a list of countries requiring the endorsements was available on request from the respondents in respect of the identities of the Member States requiring the endorsements. There is no evidence of such a request having been made nor is there any reference in the proved or agreed facts that such a list was available on request to the appellant.

81. The list held by the Revenue Commissioners consisted of all countries operating the endorsement system some of which have exemptions in respect of small wine producers and five of which did not require any such endorsement. Each Member State that required endorsement is a member of that broadly defined group. France and Spain are included in the list as Member States which require endorsements by their national authorities.

82. It is clear that the relevant Member States were never specified in the regulations in the manner contemplated by section 99(4)(a)(ii). I am satisfied that the purpose of the statutory reference to such Member States as may be specified in regulations was to ensure that the Commissioners would convey the important information conveyed to Ireland by other Member States as to their endorsement requirements to consignors engaging in cross-border trade so that they were aware of the precise documentation required as evidence sufficient to discharge their obligation on duty payable in respect of excisable goods for delivery in another Member State. The Oireachtas provided a statutory mechanism to ensure maximum clarity and transparency for consignors of goods in a strictly controlled regime. That purpose is not achieved by a generic description of those Member States as presently described in Regulation 33(1)(b)(vi) as those where the competent authority undertakes to carry out such endorsement: neither is it achieved by providing for the compilation of list of such countries to be made available in such an obscure way at some unspecified time to unspecified persons or entities under reg.33(2). I do not accept the submission that the relevant Member States have been lawfully specified in the regulations as envisaged in section 99(4)(a)(ii).

83. I am therefore satisfied that the requirement of an endorsement could not have been legally required by the Commissioners under s. 99 in respect of consignments to France and Spain because these countries had not been specified under subs. (4)(a)(ii). I am also satisfied that the copy 3 AADs produced in both cases constituted a sufficient basis upon which to consider the appellant's liability discharged under s. 99(3) absent the proper promulgation of specified Member States in the regulation as required by the section. In effect since the court does not consider that the relevant Member States were lawfully specified the obligation to produce a copy 3 AAD with a French or Spanish endorsement was not given effect under the regulation as envisaged by s. 99(4)(a)(ii) and did not therefore arise under domestic law. The court has reached this conclusion taking into account its obligations under European Union law to seek a harmonious interpretation of domestic law with the Directive in order to give it full effect.

84. In that context the respondents submitted that even if reg. 33(1)(b)(vi) did not constitute adequate specification for the purposes of s. 99(4)(a)(ii) consistent with its literal interpretation it was necessary for the court to go further and either seek a harmonious interpretation of these requirements and provisions or give those requirements a teleological interpretation to achieve the requirements of Article 19(2) of the Directive. It was submitted that if the ordinary and natural meaning of words yielded a result that was contrary to EU law the courts must seek to find a meaning that conforms with EU law in order to give effect to a Directive, subject only to the limitation that the obligation as to harmonious interpretation does not require a *contra legem* interpretation of national law. The court had an obligation to ensure that the result envisaged by the Directive should be achieved and should interpret domestic law as far as possible in the light of the wording and purpose of the Directive in order to achieve that result. Alternatively, the court must apply a schematic or teleological approach. (See *Marleasing Case C-106/89* [1990] ECR i-4135, *OCS One Complete Solution Ltd*. [2014] IEHC 306 and *Cadbury Ireland Pension Trust Ltd. v. Revenue Commissioners* [2007] 4 I.R. 334).

85. In *Marleasing* the European Court of Justice stated at para. 8 of the judgment:-

> "The Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 [now Article 249] of the Treaty."

86. The relevant principles applicable to statutory interpretation in such cases were helpfully summarised by Barrett J. in *OCS* as follows:-

> "13. … First, national courts are required to interpret national law in the light of directives, including any directive the time limit for implementation of which has expired but which remains unimplemented in a particular Member State. Second, this obligation applies even to legislation that pre-dates a directive and has no ostensible connection with same. Third, the obligation applies to the entirety of a national legal system. Fourth, the principle of harmonious interpretation cannot result in aggravated criminal liability for an individual. Fifth, the application of harmonious interpretation may result in the imposition of civil liability on a private party. Sixth, the obligation as to harmonious interpretation does not require a *contra legem* interpretation of national law. Seventh, not mentioned above, though extant under Article 4(3) of the Treaty on European Union, and affirmed by Fennelly J. in *Dellway Investments v. NAMA* [2011] 4 I.R. 1, is the court's obligation to apply the principle of sincere cooperation whereby the European Union and the Member States are each obliged, amongst other matters, to ensure fulfilment of obligations arising from the acts of European Union institutions, to facilitate the achievement of the European Union's objectives and to refrain from any measure which could jeopardise the attainment of the European Union's objectives. Any consideration of the traditional principles of statutory interpretation must, in cases that are concerned with the interpretation of domestic laws that have their provenance in European Union law, be done in the context of, and in compliance with, these requirements of European Union law."

87. One of the main objectives of the Directive is to ensure that for the purpose of Revenue collection and chargeability the authorities have the fullest information available concerning the movements of products which are subject to excise duty. Provision is

therefore to be made by the Member States for accompanying documentation for such products which are retained and delivered from authorised warehouse keepers. To that end the conditions to be complied with should be laid down and a procedure established by each Member State to ensure the collection of relevant taxes and the movement of such goods under duty suspension. The recitals in the preamble to the Directive contemplate that provision should be made for each consignment to be easily identified; that the tax status of each consignment should be immediately identifiable; that excisable goods should be accompanied by a document capable of meeting these needs; and that the documentation must contain the essential elements to achieve effectively the collection of taxes on goods moved under duty suspension. It was also envisaged that the procedure would include a process by which the tax authorities of the Member States are informed by traders of deliveries dispatched or received by means of an accompanying document. It was clearly the intention of the Directive that a consignor of goods to another Member State should only be relieved of liability for duty on goods under duty suspension if it produced documentary evidence in the form prescribed endorsed where appropriate by the competent authority in the Member State of delivery. It is a strictly regulated system which imposes a heavy onus on authorised warehouse keepers to ensure compliance with the regulatory framework and is heavily reliant on strict documentary proofs.

88. The court is satisfied that the Oireachtas has provided a statutory regime which is entirely consistent with the terms, purpose and intention of the Directive. The problem identified by the appellants in these cases is that the Revenue Commissioners have failed to enact regulations in accordance with the regulatory regime contemplated by ss. 99(3) and 99(4) of the Finance Act 2001. The court is invited to rectify this failure by construing the words of the relevant sub-section of the primary legislation in a manner inconsistent with their ordinary and literal meaning notwithstanding that that construction is entirely consistent with the terms and purpose of the Directive and the statute. I do not consider that this is envisaged or required under the *Marleasing* or *OCS* decisions. It seems to me that any other interpretation would also be contrary to the principle of legal certainty which underpins the principles of the statutory provision, the Directive and European Union law.

**Citywest Issue (2) and Monaghan Appellants' Issues (2) and (3) and Respondent's Issues (ii) and (iii)**
89. The second issue in the Citywest case is said to arise only if the copy 3 AADs were found to be insufficient proof for the discharge of the appellant's liability to pay excise duties because they were not endorsed by the French or Spanish competent authorities. It was submitted in both cases that the principles of proportionality or legal certainty precluded the Revenue Commissioners from seeking to impose liability for these excise duties on the appellant. Though the court has made a finding in favour of the appellants I consider it appropriate in deference to the arguments advanced on a number of important issues to give a ruling on the outstanding matters raised in both cases. It was submitted that having regard to the case law of the CJEU the decisions in *Teleos C-409/04* and *Netto Supermarkt C-271/06* and the fact that the French and Spanish warehouses were listed on the SEED database as authorised warehouses at the material time, the refusal to discharge the appellant from liability to pay the duty would be contrary to the principles of proportionality and legal certainty. In addition it was submitted that the Appeal Commissioner was precluded by reason of the principle of legitimate expectation from holding that the AADs were invalid or that an excise amount could be demanded having regard to the provisions of Reg. 32(2) that a list of Member States to which Reg. 32(1)(b)(vi) applied shall be made available when on the facts proved it was not.

90. The same issues concerning legal certainty, proportionality and legal expectation were raised by the appellant in the Monaghan case as issues (b) and (c) and are said to arise by the respondents in their issues (ii), (iii) and (iv). These issues are said to address questions (b), (c) and (d), of the questions posed by the Appeal Commissioner in that case.

***Teleos* and *Netto Supermarkt***
91. The appellants in both cases submitted that there was a legal principle established and recognised in a number of VAT cases to the effect that an innocent trader should not be punished and made liable for duty because of irregularities or wrongdoing by others. In R (on the application of *Teleos Plc and Others) v. The Commissioners of Customs and Excise* Case C-409/04 it was submitted on behalf of *Teleos Plc* that it would be contrary to the principle of legal certainty if a Member State, though initially accepting a number of documents presented to the competent authorities as evidence establishing entitlement to the exemption, could subsequently require that supplier to account for the VAT on that supply where it transpires that, because of the purchaser's fraud, of which the supplier had and could have had no knowledge, the goods concerned did not actually leave the territory of the Member State of supply. It was also submitted that any sharing of the risk between the supplier and the tax authorities following a fraud committed by a third party must be compatible with the principle of proportionality.

92. The CJEU determined that any sharing of risk between the supplier and the tax authorities following fraud committed by a third party in a VAT case must be compatible with the principle of proportionality. A Member State was precluded from requiring a supplier, who acted in good faith and submitted evidence establishing at first sight its right to the exemption on an intra-community supply of goods, subsequently to account for VAT on those goods when that evidence is found to be false, without establishing the supplier's involvement in tax evasion. However, it must be established that the supplier took every reasonable measure in its power to ensure that the intra-community supply he was effecting did not lead to his participation in evasion.

93. The court accepted at para. 53:-

> "… whilst it is legitimate for the measures adopted by the Member States to seek to preserve the rights of the public exchequer as effectively as possible, such measures must go no further than necessary for that purpose (see *Molenheide and Others*, para. 47, and *Federation of Technological Industries and Others*, para. 30)."

It should be noted that the court also addressed an argument by the United Kingdom and Italian governments at para. 54, which relied upon its case law in respect of customs duty. It had been determined that it was neither disproportionate nor contrary to the general principles of law which the courts were required to uphold to require an importer who has acted in good faith to pay customs duties payable on the importation of goods in respect of which the exporter has committed a customs offence where the importer has played no part in that offence. The court in *Teleos* specifically rejected the submission that these decisions were relevant to VAT cases. It held that the cases relied upon concerned the application of customs duties to imports and were not comparable transactions to the imposition of VAT of intra-community acquisitions to which a different legal regime applied.

94. In *Netto Supermarkt GmbH & Co. OHG v Finanzamt Malchin. C-271/06,* the CJEU considered the same issue in respect of the VAT regime with the same result.

95. The appellants submit that in their cases they furnished copy 3 AADs in the prescribed format which were accepted initially as legitimate by the Revenue Commissioners. The evidence was that both appellants were innocent parties to what appeared to be diversion frauds committed by others. By analogy with the *Teleos* and *Netto Supermarkt* cases, the appellants submit that it is contrary to the principle of proportionality to impose liability and determine that the appellants were not entitled to a discharge thereof simply on the basis of an assertion that diversion frauds had been committed when they were found to be innocent parties in

these transactions

96. The respondent submits that the *Teleos* decision was predicated firstly on the assumption that the appellant had in fact *prima facie* complied with the documentary requirements to discharge his excise liability. More importantly the respondent relied upon the determination by the CJEU that the VAT and customs regimes were legally distinct and to be examined in their own terms and that the principles applicable under a VAT regime did not apply to the regime applicable to customs duties. In those circumstances it is submitted that the *Teleos* and *Netto Supermarkt* cases had no application to the Directive.

97. This appellants' argument was rejected in a number of English decisions including *Greenalls Management Limited v. Customs and Excise Commissioners* [2005] 4 All ER 274 and *Re Arena Corp Limited* [2004] EWCA Civ 371. Theses cases were further considered in *Butlers Ship Stores v. Revenue and Customs Commissioners* [2014] STC 732. In that case the tax payer had been assessed for excise duty in respect of consignments of alcohol which because of a fraud in which the tax payer was not implicated, disappeared from the tax payer's warehouse. It was submitted that to make an innocent party liable for the whole duty without establishing fault in any way was a disproportionate response to the need to ensure that chargeable duty was paid and infringed the principles of proportionality and legal certainty. Lord Glennie delivered the judgment of the Upper Tribunal. In respect of the argument concerning proportionality he stated:-

> "[51] In summary, therefore, I consider that, in seeking to ensure the payment of excise duty while permitting movement of goods under duty suspension arrangements, it is neither unreasonable nor disproportionate to stipulate that, except in a case where goods are lost due to some *force majeure* event (in which case no liability attaches), a person involved in the movement of the goods should be liable for the duty which is unpaid as a result of the goods being stolen in transit or otherwise removed from the duty suspension arrangement as a result of an irregularity. Such a measure is in my view necessary to achieve that purpose. The alternative of fault based liability would be difficult to enforce and would, in all likelihood, result in the non-recoverability of significant amount of duty. That, at any rate, appears to be the thinking behind the approach taken in the Directive and I can see no basis for saying that that is an unreasonable approach. Nor is it either unreasonable or disproportionate for that liability to be laid in the first instance at the door of the warehouse keeper, since the tax warehouse is at the heart of the system of storage and movement of goods under duty suspension arrangements – the warehouse keeper profits from the tax warehouse duty suspension arrangements, and he is in as good a position as anyone to make appropriate arrangements for the transport to another tax warehouse. But it is open to the warehouse keeper to avoid such liability. He can attempt to reach a commercial agreement with others, viz the owner of the goods or the transporter, so that they provide the guarantee and thereby assume liability in his place. He can refuse to take duty suspended goods except on these terms. If he cannot do this, or prefers not to do it, he can spread the risk by negotiating to obtain a bond or guarantee from the owner or transporter covering all or some of his potential liability. He can obtain insurance cover. Ultimately, if he considers that the risk is too great, or the price of entering into appropriate arrangements with the owner or transporter is too high, he can opt out of handling goods under duty suspension arrangements. The imposition of liability on the warehouse keeper in such circumstances does not, in my view, go further than is necessary to achieve the purpose I have mentioned."

Lord Gleenie stated that there was nothing disproportionate in imposing strict liability and doing so by identifying the warehouse keeper as the person who would be held liable if he cannot take the steps necessary to shift that liability on to others.

98. Lord Gleenie also rejected the argument based on legal certainty. While accepting that a person should be able to assess with some degree of certainty the legal and financial consequences of his acts he did not consider that the principle was breached in respect of the strict liability imposed on a warehouse keeper under the relevant legislation or indeed the Directive. He stated:

> "[53] … A warehousekeeper of a tax warehouse, a significant part of whose business depends upon chargeable goods being held "in bond" under duty suspension arrangements and being transported between warehouses under such arrangements, knows that the duty suspension arrangements have or involve the following characteristics:
>
> (i) that in the event that goods go missing whilst in transit – other than through *force majeure* events – strict liability will be imposed for the excise duty which, as a consequence, is not recovered from the person primarily chargeable with the duty;
>
> (ii) that the person liable under that strict liability regime will be the guarantor, i.e. the person who has put up the guarantee in terms of Articles 13(a) and 15.3;
>
> (iii) that that person will be the warehousekeeper of the tax warehouse from which the goods are dispatched, unless he can arrange with the owner of the goods or the transporter that they put up a guarantee in his place;
>
> (iv) that the warehouse keeper will not be liable for the duty if he can procure that the owner or the transporter put up a guarantee in his place; but
>
> (v) if he cannot procure that they put up a guarantee in his place, he will be liable despite having taken all reasonable care about the transit arrangements.
>
> In such circumstances the warehouse keeper knows precisely what is the extent of his potential liability. He may not be able to prevent the loss of the goods through fraud or theft, and therefore may not be able to avoid becoming liable for the duty. But that is a price that he has to pay for his involvement in what, presumably, is a lucrative or at least adequately rewarded occupation. It can perhaps be inferred that unless there was a regime of strict liability the availability of in transit movement of duty suspended goods might have to be reconsidered. On the basis that he knows that, unless he procures that the owner of the goods or the transporter provides a guarantee in his stead, he will be held liable for the duty where the goods are stolen despite his having taken reasonable care over the transit arrangements. The warehouse keeper can do or attempt to do a number of things…. But whether that is so or not, that does not alter the fact that the warehouse keeper can be absolutely clear as to the legal position if, having given the guarantee, the goods are removed from the duty suspension arrangements by an irregularity occurring in transit."

99. The applicant submitted that the decisions in *Telios* and *Netto* were not limited to the VAT regime and were extended to a legal regime in respect of liability for excise duty in respect of goods, the subject of duties suspension in the decision of the CJEU in *Karelia v. Oikonomikon Case* C-81/15. *Karelia*, a Greek company which manufactured tobacco products and held the status of authorised warehouse keeper received an order for cigarettes from a Bulgarian company. Although the goods left the warehouse an investigation

carried out by the customs service revealed that the lorry in which the cargo was to be transported went to Bulgaria empty. The cargo had been transferred to another lorry. Karelia's export manager had received a sum corresponding to the value of the goods in question which he had lodged in a Karelia bank account in Greece. Karelia did not know whether the Bulgarian company actually existed since attempts to identify it in Bulgaria proved unsuccessful. There was no evidence as to the whereabouts of the departure goods and the bank guarantee which Karelia had provided to cover the amount of excise duty was retained. However, the customs authority issued a further measure attributing liability for payment in respect of the smuggling of the cigarettes in question pursuant to which they declared the joint perpetrators of the smuggling were those persons who placed the order for the cigarettes on behalf of the Bulgarian company with Karelia's export manager. Increased tax amounts and an increased excise duty were levied on the perpetrators of the smuggling. Karelia was declared jointly and severally liable in civil law for payment of those sums. These were financial penalties imposed on the perpetrators of smuggling offences over and above the payment of the excise duties due under the Directive. It was held by the Greek court that the imposition of this additional liability was not contrary to the principle of proportionality having regard to the opportunity for the authorised warehouse keeper to avoid it by proving that he acted in good faith and took all appropriate measures possible demonstrating diligence required of an informed trader. The court noted that it was common case that an authorised warehouse keeper such as *Karelia* carried strict liability in respect of the payment of the excise duties on the goods under duty suspension. The question to be determined was whether the increased liability was in conformity with the principles of legal certainty and proportionality.

100. The court previously held in the decisions taken under the VAT legal regime in *Netto*, that a measure for the sharing of a risk of fraud committed by a third party would not be compatible with the principle of proportionality if the tax regime imposes the entire responsibility for payment on suppliers regardless of whether they were involved in the fraud committed by the purchaser. The court also held that imposing responsibility for paying Value Added Tax on a person other than the person liable to pay it even where that person is an authorised tax warehouse keeper bound by the specific obligations under Directive 92/12 without allowing it to escape liability by providing proof that he had nothing whatsoever to do with the alleged fraud of the person liable to pay the tax, was contrary to the principle of proportionality. It was clearly disproportionate to hold that a person was unconditionally liable for a short fall in tax caused by the acts of a third party over which he had no influence. The court, therefore, found that it was appropriate to take the view that compliance with those same requirements "is necessary with regard to a measure such as the attribution to the authorised warehouse keeper of liability for the financial consequences of smuggling offences".

> "53. It follows…that a system of increased liability, such as that at issue in the main proceedings will be capable of satisfying the requirements resulting from the principles of legal certainty and proportionality only on condition that it is clearly and expressly provided for by national legislation and that it leaves the authorised warehouse keeper, a genuine possibility of avoiding liability."

The court, therefore, found that Directive 92/12 when read in light of the principles of legal certainty and proportionality must be interpreted as precluding national legislation such as that at issue in *Karelia* which permitted the owners of products moving under excise duty suspension to be declared jointly and severally liable for payments of sums corresponding to financial penalties imposed because of the commission of an offence during the movement of those products where those owners are linked to the perpetrators of the offence by contractual relationship making them their agents and under which the authorised warehouse keeper is declared jointly and severally liable for payment of those sums with no possibility for him to escape that liability by providing proof that he had nothing whatsoever to do with the acts of the perpetrators of the offence.

101. The court is not satisfied that the *Karelia* decision extends the principles applicable to the VAT regime to the excise duty chargeable in respect of goods under duty suspension. The case concerns the imposition of an additional financial penalty on the basis of joint and several liabilities for the criminal offences involved in the irregularity. This liability is over and above the amount of excise duty payable pursuant to the Directive and national legislation. Thus, the Karelia decision is of limited application and is not relevant to the facts of these cases.

102. I am satisfied that the decisions in *Teleos* and *Netto* insofar as they apply to that VAT regime and not to customs and excise duty regimes as acknowledged in both cases by the CJEU are not in point and that the Appeals Commissioners were correct in rejecting their application to these cases. Furthermore I find the decision in *Butlers Ship Stores Limited* and the authorities relied upon therein to be persuasive on the issues of legal certainty and proportionality. I accept the submission made by the respondents in both cases. I reject the submission that the imposition of liability and failure to acknowledge it as discharged even if the warehouse keeper took all reasonable steps to ensure his compliance with the documentary and other requirements and to avoid any fraudulent diversion of the goods was in breach of the principles of legal certainty or proportionality.

**The SEED Issue**

103. A database is available upon which all authorised warehouse keepers in the European Union are registered. The French and Spanish consignees appear on this database known as SEED. The respondents at the request of the appellants checked the entries on the SEED database for each of the relevant destination warehouses prior to the dispatch of the consignments. The Appeals Commissioners accepted that the entries on the SEED database for each of the destination warehouses were checked by the respondents at the request of the appellant prior to the dispatch of the consignments. It was submitted that for reasons of legal certainty and legitimate expectation the appellants were entitled to rely on the SEED register as a badge of legitimacy in respect of the consignees. The Appeals Commissioner found that the database was simply a record of authorised warehouses and did not offer any guarantees or representations to an inquirer in relation to those warehouses.

104. The SEED database is a compendium of all authorised warehouse keepers in the European Union. The French and Spanish consignees insofar as they were included on the database are thereby simply identified as authorised warehouse keepers. It facilitates the online checking of the validity of the registration number of authorised warehouse keepers and the proper categories for which it is valid. The Revenue Commissioners did not purport to represent or give any undertaking that by reason of their inclusion upon the SEED Register the entities in France and Spain to which the goods were dispatched were legitimate or safe or would act in all circumstances in accordance with law. The appellants submit that inclusion on the register meant that these companies complied with the requirements of the Revenue Commissioners and those of relevant competent authorities in the Member States and constituted an assurance of their legitimacy, integrity and *bona fides*. In addition it was submitted that the Revenue had a duty to monitor and inform themselves as to the status and behaviour of companies included on the register and for example, if they were under investigation by their respective national authorities. The court does not consider that this is so.

105. The Appeals Commissioner in Citywest concluded that the SEED database was simply a record of authorised warehouses and did not offer any guarantees or representation to an Inquirer in respect of that warehouse.

106. In the Monaghan Bottlers case, the appellants submitted that in advance of dispatching the goods the appellants confirmed with the respondents that Lauvie and Mariscal were on the SEED database. The respondents submitted that the existence of the SEED

register did not alter the nature of the duties which the law required of the appellant in its capacity as an authorised warehouse keeper. It was merely a facility whereby undertakings could check the validity of the registration number of the companies and the product categories for which it was valid as was also submitted in the Citywest case. Therefore the respondents submitted that the presence of the entities in respect of specific products or the checking of a number on the SEED register did not discharge the appellant from the legal duties and responsibilities which it had consented to undertake.

107. The SEED database was created by Council Regulation (EC) 2073/2004 which provides under Article 22 for the maintenance in each Member State of an electronic data base which contains a register which includes the identification number issued by the competent authority for an authorised warehouse keeper, the name and address of same, the category and description of the products that may be held by that entity, the identification of the central liaison office or excise office from which further information may be obtained and the period of authorisation. The national register must be made available for excise duty purposes only to the competent authorities of the other Member States under Article 22(3). Article 22(4) permits the central liaison office of each Member State to ensure that persons involved in the intra-community movement of products subject to excise duty are allowed to obtain confirmation of the information held under the Article. The Regulation is intended to enhance cooperation between the competent authorities of the Member States and to exchange any information that may help them to effect a correct assessment of excise duties. It is of very limited effect and application in the context of the issues arising in these cases.

108. The court is not satisfied that any legitimate expectation could arise from the inclusion upon the SEED database of Lauvie or Mariscal. The Revenue Commissioners did not make a representation in respect of the *bona fides* or legitimacy or in any way guarantee the conduct of the entities included on the registry. In *Glencar v. Mayo County Council* [2002] 1 I.R. 84 it was held that in order to establish a claim of legitimate expectation it would have to be demonstrated that a public authority made an express or implied representation as to how it would act addressed to a person such as the appellants as a result of which that person acted on foot of the representation in taking a particular course of action or entering a transaction. It must also be established that the representation created a reasonable expectation by that person that the public body would abide by the representation insofar as it would be unjust to permit it to resile from it. In addition, such a representation could not prevail against or undermine a legislative or regulatory provision. There is nothing in either of these cases to indicate that the Revenue Commissioners as a public authority made any representation as to how it would act or that it implied or conveyed any such representation to the appellants. The reference to the SEED database for the purpose of asserting whether the entities concerned appeared on it was a purely administrative matter which did not involve any representation on the part of the Revenue Commissioners of the type envisaged in *Glencar*.

109. Furthermore, I am not satisfied that the issue of legitimate expectation as a public law issue could properly be considered on these appeals. In *Revenue and Customs Commissioners v. Noor* [2013] STC 998 the Upper Tribunal in England rejected the proposition that the equivalent of an Appeals Commissioner in the United Kingdom could properly entertain an argument based on legitimate expectation on the basis that he had been told he would be entitled to claim certain credits. The court held that it was not open to the Tribunal to consider the taxpayer's claim based on the public law concept of legitimate expectation. It held that the Tribunal in question was a creature of statute exercising a jurisdiction defined thereunder. It was not intended to have a jurisdiction in the nature of judicial review. The crediting of the amount of tax was a matter of statute. Warren J. and Bishopp J. delivering the judgment of the court stated at para. 87:-

> "In our view, the FTT does not have jurisdiction to give effect to any legitimate expectation which Mr. Noor may be able to establish in relation to any credit for input tax. We are of the view that … the right of appeal … is an appeal in respect of a person's right to credit for input tax under the VAT legislation. Within the rubric [of] VAT legislation it may be right to include any provision which, directly or indirectly has an impact on the amount of credit due …. In contrast, a person may claim a right based on legitimate expectation which goes behind his entitlement ascertained in accordance with the VAT legislation … in such a case, the legitimate expectation is a matter for revenue by judicial review in the Administrative Court; the FTT has no jurisdiction to determine the disputed issue in the context of an appeal under s. 83".

I find this decision persuasive and conclude that the form of legitimate expectation raised cannot be pursued in the circumstances of these cases in these appeals.

110. Furthermore, the court is not satisfied either that the liability must be deemed to be discharged or the respondents are estopped from pursuing it because the documentation was initially received and no objection was taken to it by the respondents. I accept the submissions made on behalf of the respondents on this issue.

**Regulation 33(2)**

111. The list created under reg.33(2) set out all Member States of the European Union. It was retained in the possession of the Commissioners. It identified France and Spain as countries which required an endorsement of the copy 3 AAD. The list was not made generally available. Had France and Spain been lawfully specified the issues concerning the availability of a list would not have a central importance to the discharge of liability since France and Spain would have been identified individually by law in the regulation as countries which required endorsement. As a result the appellant would thereby have had or be presumed to have had knowledge of that fact. In those circumstances the court is satisfied that the fact that the list was not made available directly to the appellant by widespread publication, either directly to the appellant as an authorised warehouse-keeper as a matter of course and would not have been furnished without a request would not have affected the liability to discharge the duty. If France and Spain had been lawfully promulgated by specific designation under the regulation the making available of a list would simply operate as an administrative device for the dissemination of that information more widely.

**The Irregularities**

112. This refers to the third issue raised in Citywest as to whether it was appropriate for the respondents to raise an excise demand in Ireland having regard to the provisions of Article 20(3) of the Directive and a determination made by the Appeal Commissioner that it was not possible to determine where the offence or irregularity was committed on the evidence adduced. The issue is also said to arise under Applicants issue (c) and the respondent's issue (v) in the Monaghan Bottlers case and is said to be related to question (i).

113. In Citywest, the Appeal Commissioner considered the terms of Article 20(3) of the Directive:-

> "When products subject to excise duty do not arrive at their destination and it is not possible to determine where the offence or irregularity was committed, that offence or irregularity shall be deemed to have been committed in the Member State of departure, which shall collect the excise duties …".

The Appeal Commissioner was satisfied that enquiries carried out by the appellants and the respondents failed to disclose where the consignments under appeal went following their exit from the appellant's warehouse. He concluded *inter alia* at para. 8.18 that:-

> "None of the witnesses and none of the investigations have shown to my satisfaction, on the balance of probabilities, where the offence or irregularity was committed or detected and I have concluded that it is not possible to determine where the offence or irregularity was committed from the evidence adduced".

Consequently, the Appeal Commissioner determined that the demand was properly raised in Ireland and was payable by the appellant as it had not complied with provisions for discharge.

114. In Monaghan Bottlers the Appeal Commissioner concluded that the witnesses from the Irish, Spanish and French authorities and the appellant were not aware of where the goods went following their dispatch from the appellant's premises. In this case also it had not been possible from the investigations carried out by both parties to determine where the offence or irregularity was committed. The Appeal Commissioner therefore concluded that it was appropriate to raise the excise demand in Ireland. Question (i) raised the issue as to whether having made that finding of fact the Appeal Commissioner was entitled to find that it was appropriate to raise the excise duty in this State.

115. The court is not satisfied that either finding could be regarded as erroneous in law or that any basis has been advanced upon which the court might conclude that they are otherwise wrong or unsustainable in the circumstances as outlined in the case stated and proved and found on the evidence. Accordingly, the appellant's submissions on this issue are rejected.

**Equality of Treatment**
116. This issue is said to arise from question (d) in the Monaghan Bottlers case and is based upon the appearance before the Oireachtas Public Accounts Committee on 17th January, 2008 of the then Chairman of the Revenue Commissioners Mr. Daly who is said to have outlined the treatment by the Commissioners of two cases involving fraudulent deliveries which left innocent Irish warehouse keepers with potential excise liability.

117. The Appeal Commissioner did not accept that the comments of a former Chairman of the Revenue Commissioners in relation to certain warehouse keepers who were connected unwittingly to two diversion frauds identified in Ireland permitted him or required him to set aside the provisions of the Directive or other legislation where he was otherwise satisfied that the appellant was not directly implicated in a fraud. The appellant submitted that the Appeal Commissioner erred in this conclusion because the respondents did not in relieving other tax payers of their liabilities set aside the provisions of the Directive and other legislation but exercised their own statutory powers of care and management to limit the consequences of the application of those provisions. The appellants submitted that the principle of equal treatment required that comparable situations must not be treated differently unless such treatment is objectively justified (*Marks & Spencer* Case C-309/06). It was also submitted that a public body which follows a general practice may be bound by that practice. In *Rank v HMRC* Joined Cases C-259/10 and C-260/10 the Court of Justice held that a taxable person could not demand that a supplier be given the same tax treatment as another supplier where such treatment does not comply with the relevant national legislation but there were circumstances in which the principle of equal treatment may arise from a general practice carried out by an administrative official.

118. There is very little information available in the case stated as to the basis upon which or the context in which the Chairman of the Revenue Commissioners made submissions to the Public Accounts Committee. I am not satisfied on the evidence set out as proved or agreed in the case stated that there was any basis upon which to find an absence of equal treatment sufficient to invoke the principle in this case. The Appeal Commissioner considered that the reference by the Chairman to two other cases could not result in the setting aside of the provisions of the Directive and other legislation. The cases were not comparable. In those two cases the authorities had doubts about the suitability of two tenant warehousemen who perpetrated a fraud but legal advice was given to the effect that there were insufficient grounds to refuse them warehouse approval. The landlord warehouse keeper was not informed of these reservations and assumed the tenants *bona fides* on the basis of the Revenue approval. The landlords bond was then not estreated. The finding at para. 8.11 refers to this scenario and the Appeal Commissioner concluded that there was no basis upon which to set aside the onerous conditions required for discharge of liability. I am satisfied that the Appeal Commissioner was correct in his determination. There was no evidence proved or admitted in the case stated suggesting that such an administrative practice applied generally in discharging all innocent consignors from liability as a matter of course. I do not accept the appellant's submissions on this issue.

**Citywest – The Answer**
119. The court has considered the three issues which the parties are agreed arise from the single question posed in the case stated in the Citywest case. On the first issue the court is satisfied that the Appeal Commissioner was incorrect to conclude that the absence of the national endorsement by the French and Spanish authorities was sufficient to result in non-compliance with the provisions for discharge and is not satisfied that France and Spain were lawfully specified in the 2001 regulations within the meaning of s.99(4)(a)(ii) of the 2001 Act which defined the evidence required to secure such discharge. This conclusion disposes of the main issue in the case.

120. On the second issue , for the reasons already set out the court is satisfied that had the AADs been insufficient to result in the discharge of the Appellant's liability it could not accept the appellant's submissions that the principles of proportionality, legal certainty or legal expectation whether based on the *Teleos* and *Netto* cases, the presence of the French and Spanish authorised warehouses on the SEED database, or the issue as to the availability of the list under reg.33(2) would have precluded the Commissioners from imposing liability for the excise duties.

121. On the third issue the court is satisfied that it was appropriate to raise the demand in Ireland having regard to the provisions of Article 20(3) of the Directive if the duty was otherwise lawfully due.

122. The court is therefore satisfied to answer the single question posed in this case stated as to whether, having regard to the evidence given and the facts as found by the Appeal Commissioner he was correct in holding that the assessment should stand and that the appellant should discharge the tax as sought, in the negative for the reasons outlined.

**Monaghan Bottlers – The Answers**
123. The court's conclusions on the issues framed by the appellant in its written submissions arising from the questions set out in the case stated may for the reasons set out in the judgment be stated in short form as follows:-

> (a) Having due regard to the principle of legal certainty, were France and Spain at the material time, specified in regulations by the Revenue Commissioners within the meaning of s. 99(4)(a)(ii) of the 2001 Act as Member States in which endorsement of the copy 3 of the AAD was required by the authorities, this being the relevant condition for discharge which the Appeal Commissioner held had not been satisfied? Answer: France and Spain were not lawfully specified in regulations for the reasons set out above.

(b) If France and Spain were at the material time so specified in Regulations made by the Revenue Commissioners within the meaning of s. 99(4)(a)(ii) of the 2001 Act, did the Revenue Commissioners make the list available, as required by Regulation 33 of the control of exercisable products Regulations 2001 (the 2001 Regulations) and if not, what are the consequences of the failure so to do? Answer: The Commissioners did not make the list available to the appellant. The list set out all Member States of the European Union. It was retained in the possession of the Commissioners. It identified France and Spain as countries which required an endorsement of the copy 3 AAD. The list was not made generally available. Had France and Spain been lawfully specified the issues concerning the availability of a list would not have a central importance to the discharge of liability since France and Spain would have been identified individually by law in the regulation as countries which required endorsement. As a result the appellant would thereby have had or be presumed to have had knowledge of that fact. In those circumstances the court is satisfied that the fact that the list was not made available directly to the appellant by widespread publication, either directly to the appellant as an authorised warehouse-keeper as a matter of course and would not have been furnished without a request would not have affected the liability to discharge the duty. If France and Spain had been lawfully promulgated by specific designation under the regulation the making available of a list would simply operate as an administrative device for the dissemination of that information more widely.

(c) If France and Spain were so specified in Regulations made by the Revenue Commissioners within the meaning of s. 99(4)(a)(ii) of the 2001 Act is it nevertheless a breach of the principle of equal treatment, legal certainty, legitimate expectations and or proportionality to seek to recover the excise duty from the Appellant in the circumstances of this case? Answer: No for the reasons set out in the judgment.

124. The court therefore for the reasons set out in the judgment and reflected in the answers to the above issues answers the questions posed in the Monaghan Bottlers case stated as follows :-

(a) Was there sufficient evidence before me entitling me to conclude that at the material time the French and Spanish authorities undertook to carry out the endorsement within the meaning of s. 99(3) of the Finance Act, 2001? Answer: Yes. These facts were established.

(b) Was I correct in concluding that the decision of the Court of Justice of the European Communities in *R (Teleos and Ors) v. Commissioners of Customs and Excise* (Case C-409/04) was inapplicable and did the raising of assessments in these circumstances infringe principle of legal certainty? Answer: The case of *Teleos* was inapplicable and the raising of the assessments and the decision not to regard the liability as discharged would not have infringed the principle of legal certainty.

(c) Did the appellants have a legitimate expectation in the circumstances:-

(i) That the Revenue Commissioners would draw to its attention in advance of dispatch of the consignments that AADs in respect of consignments destined for France or Spain had to be endorsed by the authorities in those countries; Answer: No

(ii) That it had complied with s. 99 of the Finance Act, 2001 when it delivered AADs to the Respondent, complete on their face, and when those AADs were not rejected at the time or immediately thereafter; and if so, did the Revenue infringe those legitimate expectations by raising these assessments and are they thereby estopped or precluded from (a) contesting this appeal or (b) arguing in particular that the requirements of s. 99(3) of the Finance Act, 2001 had not been complied with? Answer: No

(d) Did the Revenue Commissioners infringe the principle of equal treatment in circumstances where:-

(i) In his appearance before the Oireachtas Public Accounts Committee on 17th January, 2008 the then Chairman of the Revenue Commissioners Frank Daly outlined the treatment by the Commissioners of similar cases involving fraudulent deliveries which left innocent Irish warehouse keepers with a potential excise liability; Answer: No

(ii) The Chairman indicated to the Committee that although the landlord warehouse keepers were technically liable to Irish excise duty on the consignments, on the grounds of natural justice, no liability was sought from them by the Revenue Commissioners as they were innocent of any knowledge or the involvement of any frauds and derived no financial benefit there from and to seek the duty could have put them out of business; Answer; No

(iii) The agreed evidence before me was that if a fraud had been committed in respect of this consignment (and there was no admissible evidence of such fraud before me) the appellant was innocent of any knowledge or involvement in such fraud and derived no financial benefit therefrom; furthermore, the appellant adduced evidence which was not challenged the imposition of this duty could put them out of business; and if so, are the Revenue Commissioners thereby estopped or precluded from contesting this appeal? Answer: No

(e) Did the procedure leading to my decision on 9th August, 2012 infringe Article 6 of the European Convention on Human Rights on the basis of delay on the part of the Revenue Commissioners and as a result ought I to have refused to uphold the assessment? [This issue was not pursued at the hearing before the Court]

(f) Was I correct in holding that the requirement of s. 99(3) of the Finance Act, 2001 had not been complied with in particular, having regard to s. 99(4) of the Finance Act and Regulation 33(2) of the Control of Excisable Products Regulations, 2001 (S.I. No. 443/2001)? Answer: No

(g) Was I entitled to conclude on the evidence that information was available on request from the respondent concerning the identity of countries requiring the endorsement of their national authorities to be affixed to the copy AAD returned to the consignee? Answer: This is not a question that raises an issue of law appropriate to the case-stated but the court was not satisfied that the identity of those countries including France and Spain had been promulgated under regulations in accordance with the 2001 Act.

(h) Was I entitled to conclude that the existence of a list of countries requiring endorsement of their national authorities and the availability, on request of information from the respondent concerning the identity of countries requiring such endorsements was sufficient compliance with s. 99(4) of the Finance Act, 2001 and Regulation 33(2) of the Regulations?

Answer: No

(i) In circumstances where I found as a fact that it has not been possible from the investigations carried out by the appellant and the respondent to determine on the balance of probabilities where the offence or irregularity was committed, was I entitled to find that it was appropriate as a matter of law to raise the excise demand in this Member State?

Answer: Yes, if the excise duty was otherwise lawfully payable by the appellant.

(j) In circumstances where I found that the evidence from the French and Spanish customs authorities and personnel relating to the Lauvie and Mariscal stamps and signatures was not admissible, was I entitled to conclude that the appellant had failed to comply with s. 99 of the Finance Act, 2001 and Regulation 33 of the Regulations? Answer: This question relates to findings of fact which are not relevant to the central issues in the determination.

(k) On the evidence that I held to be admissible, and having regard to the burden of proof, was I correct in upholding the assessments?"

Answer: No.