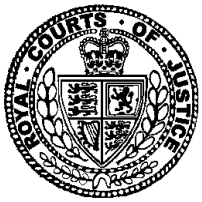

Neutral Citation Number: [2019] EWCA Civ 1357

Case No: CO/3626/2017

IN THE COURT OF APPEAL (CIVIL DIVISION)
SITTING AT FIRST INSTANCE
PREVIOUSLY ON APPEAL FROM THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION, (ADMINISTRATIVE COURT)
(MR JUSTICE HOLMAN)
[2017] EWHC 2583 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/07/2019

Before:

SIR GEOFFREY VOS, CHANCELLOR OF THE HIGH COURT
LORD JUSTICE SIMON
and
LORD JUSTICE HENDERSON

- -

Between:

THE QUEEN **on the application of** **SEABROOK WAREHOUSING LIMITED**	**Claimant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Defendants**

- -
- -

Mr Alistair Webster QC and Mr Michael Firth (instructed by **Morrisons Solicitors LLP**) for the **Claimant**
Mr Jonathan Kinnear QC and Ms Natasha Barnes (instructed by the **General Counsel and Solicitor to HMRC**) for the **Defendants**

Hearing dates: 21 & 22 May 2019

- -

Approved Judgment

Lord Justice Henderson :

Introduction

1. This is a claim for judicial review, brought with permission granted by Underhill LJ on 2 October 2018, following the oral hearing before him on 28 September 2018 of the claimant's application for permission to appeal from the order of Holman J dated 13 October 2017, which had refused permission for the claim to proceed. Underhill LJ's order was made pursuant to CPR rule 52.8(5), which provides that where such an application for permission to appeal is made to the Court of Appeal, this court may itself grant permission to apply for judicial review instead of giving permission to appeal. By a further order made on 19 October 2018, after consideration of written submissions from the parties, Underhill LJ directed that the application for judicial review would be retained in this court instead of proceeding in the High Court: see CPR rule 52.8(6). Thus it came about that the hearing before the full court, which took place on 21 and 22 May 2019, was not the hearing of an appeal, but rather the first-instance hearing (albeit at appellate level) of the claimant's application for judicial review.

2. The justification for this relatively unusual procedure is that the case is agreed to raise some important points of principle about the lawfulness of the domestic statutory regime in the United Kingdom relating to excise duty. More specifically, the application challenges the lawfulness of some key features of the legislation which governs the holding of excise goods in duty suspension (i.e. before an excise duty point has arisen, and therefore before duty has been paid), by an authorised warehousekeeper in an excise warehouse.

3. The domestic legislation which we have to consider is principally contained in the Warehousekeepers and Owners of Warehoused Goods Regulations 1999 (SI 1999 No 1278) ("WOWGR"), which were made by the Commissioners of Customs and Excise (now the Commissioners for Her Majesty's Revenue and Customs, "HMRC") in exercise of enabling powers in the Customs and Excise Management Act 1979 ("CEMA 1979") and which came into force on 1 October 1999. The statutory scheme is supplemented and fleshed out by the guidance and requirements contained in Excise Notice 196, entitled "excise goods – registration and approval of warehousekeepers, warehouse premises, owners of goods and registered consignors", issued by HMRC. The latest version of Excise Notice 196, which has gone through several iterations, is updated to 30 August 2018.

4. At the level of EU law, the principal governing legislation in this area is *Council Directive 2008/118/EC of 16 December 2008, concerning the general arrangements for excise duty and repealing Directive 92/12/EEC* ("the 2008 Directive"). The following recitals in the 2008 Directive give an indication of the broad purpose of the provisions with which we are mainly concerned:

> "(8) Since it remains necessary for the proper functioning of the internal market that the concept, and conditions for chargeability, of excise duty be the same in all Member States, it is necessary to make clear at Community level when excise

> goods are released for consumption and who the person liable to pay the excise duty is.
>
> …
>
> (10) Arrangements for the collection and reimbursement of duty have an impact on the proper functioning of the internal market and should therefore follow non-discriminatory criteria.
>
> …
>
> (15) Since checks need to be carried out in production and storage facilities in order to ensure that the tax debt is collected, it is necessary to retain a system of warehouses, subject to authorisation by the competent authorities, for the purpose of facilitating such checks.
>
> (16) It is also necessary to lay down requirements to be complied with by authorised warehousekeepers and traders without authorised warehousekeeper status.
>
> (17) It should be possible for excise goods, prior to their release for consumption, to move within the Community under suspension of excise duty. Such movement should be allowed from a tax warehouse to various destinations, in particular another tax warehouse but also to places equivalent for the purposes of this Directive."

5. In their skeleton argument in support of the application, counsel for the claimant have helpfully identified the issues of general importance to the excise duty regime which are said to be raised by this case:

> "(1) Whether the domestic law requirement for a non-UK established business to have a "duty representative" in order to own warehoused goods and the corresponding imposition of an excise duty point if there is no such duty representative have a basis in EU law or are contrary to EU law on excise duty.
>
> (2) Whether [*the same provisions*] are contrary to the EU law prohibition on discrimination and the principle of freedom of establishment.
>
> (3) Whether the due diligence requirements imposed on duty representatives and/or authorised warehousekeepers by HMRC, inter alia, through their interpretation of Excise Notice 196 are contrary to EU law."

In the course of argument, it became clear, and Mr Webster QC for the claimant accepted, that a more appropriate formulation of the third issue would be whether the due diligence requirements contained in Excise Notice 196 are, on their true construction, contrary to EU law. The question of how HMRC interpret those requirements in practice, and in the circumstances of a particular case, cannot

properly ground a lawfulness challenge to the terms of the Notice itself as being contrary to EU law.

6. The claimant, Seabrook Warehousing Limited ("Seabrook"), carries on a business that includes the warehousing of excise goods in duty suspension. Until the events which I am about to mention, Seabrook had been approved as both a warehousekeeper and a duty representative in accordance with the requirements of WOWGR with effect from 1 October 1999.

7. On 24 February 2017, HMRC wrote to Seabrook stating that they were minded to revoke its approval as a duty representative because HMRC were not satisfied that Seabrook was a "fit and proper" person to hold such approval. In particular, HMRC considered that, despite repeated warnings, Seabrook had failed to comply with the relevant requirements set out in Excise Notice 196, and also with its own internal due diligence policy. Since 1 November 2014, the former requirements have included the so-called "FITTED" criteria set out in section 10.2 of Excise Notice 196, an acronym which provides for checks to be undertaken into:

> "*F*inancial health of the company you intend trading with
>
> *I*dentity of the business you intend trading with
>
> *T*erms of any contracts, payment and credit agreements
>
> *T*ransport details of the movement of the goods involved whether or not you are directly involved in this
>
> *E*xistence/provenance of goods – where goods are said to be duty paid you should normally seek sufficient detail to satisfy yourself of the status of the goods
>
> The *D*eal, understanding the nature of the transaction itself, including:
>
> - how the cost of the goods is built up, for example, whether it includes appropriate taxes, transport etc
> - why is it being offered
> - whether it is too good to be true
> - how the deal compares to the market generally"

8. The reasons why HMRC said they were minded to revoke Seabrook's approval, as set out in the letter, included allegations of:

> (a) failure to provide satisfactory evidence of customers' VAT registration, company registration or registration under the European Operator Registration and Identification Scheme;

(b) failure to obtain evidence of customers' turnover/trading history;

(c) failure to obtain evidence of customers' financial accounts in 36 of the 39 accounts reviewed or critically assess negative indicators;

(d) failure to hold meetings with customers prior to entering a trading relationship;

(e) failure to sign contracts or payment/credit agreements with customers;

(f) failure to undertake updated customer checks every 12 months; and

(g) failure to undertake customer risk profiling in respect of 62% of the accounts reviewed.

9. On 6 March 2017, HMRC reissued the "minded-to revoke" letter with amended figures, but otherwise without any substantive changes.

10. Seabrook then made detailed representations in reply on 20 March 2017, but on 20 June 2017 HMRC notified Seabrook that its approval to act as a duty representative had been revoked with immediate effect. On 6 July 2017, Seabrook appealed to the First-tier Tribunal (Tax and Chancery Chamber) ("the FTT") against the decision to revoke its approval as a duty representative.

11. On 7 August 2017, Seabrook issued the present claim for judicial review.

12. About a year later, on 29 August 2018, Seabrook received a further letter saying that HMRC were minded to revoke all of its remaining excise approvals, including its approval as an authorised warehousekeeper. HMRC again relied upon Seabrook's alleged failure to comply with the relevant due diligence requirements contained in Excise Notice 196. Seabrook provided a detailed response, but on 17 December 2018 HMRC informed Seabrook that the relevant approvals would all be revoked with effect from 17 March 2019. A condition was also imposed prohibiting Seabrook from accepting new duty-suspended goods into its warehouse during the interim period before the revocations took effect.

13. These events led to an application to the High Court for injunctive relief by Seabrook, with the details of which we are not concerned. It is enough to say that, by the date of the hearing before Underhill LJ on 28 September 2018, the parties had negotiated an agreement which permits Seabrook to continue operating its business pending determination of (a) the judicial review proceedings, and (b) Seabrook's appeals to the FTT, which now include appeals brought against the second round of revocations of approval in December 2018. The hearing of those appeals has been expedited, and is now listed to take place from 20 to 30 September 2019 with a 7 day time estimate.

14. Leaving aside the question of interim relief, the remedies sought in the judicial review proceedings reflect the main issues which I have already identified, and it is unnecessary to set them out in any more detail at this stage.

15. As I have already said, Holman J refused Seabrook permission to apply for judicial review on 13 October 2017. His reason for so doing was that he regarded Seabrook's rights of appeal to the FTT as providing an adequate alternative remedy, on the basis

that the lawfulness of the underlying regulations and Excise Notice 196 could properly be considered and ruled upon by the FTT, even though it would not have power to make declarations to that effect. On Seabrook's application for permission to appeal against that ruling, Underhill LJ took a different view. He expressed his "strong provisional view" that the relevant appeal jurisdiction conferred by section 16 of the Finance Act 1994 was not broad enough to embrace Seabrook's challenges to the lawfulness of the underlying legislative regime, as opposed to the requirements of Excise Notice 196 which in his view the FTT would have jurisdiction to rule upon. He also rejected HMRC's argument that permission should be refused on grounds of delay, because WOWGR had been in place since 1999 and any challenge should have been made when they were first introduced. As Underhill LJ said, [2018] EWCA Civ 2408, at [6]:

> "I do not think it is realistic to say that the claimant should have put up or shut up as soon as the regulations came into force. It was not obliged to confront the question of their lawfulness unless or until the Commissioners took a decision which would result in the provisions now impugned having an adverse impact on its business."

16. In the light of Underhill LJ's clear conclusion on the question of delay, I do not think it is open to HMRC to re-open the issue before us. Nevertheless, counsel for HMRC purported to do so in their skeleton argument, arguing that Seabrook's challenge was "long out of time". In his oral submissions to us, however, Mr Kinnear QC said merely that he put the point forward as a "soft" one for the court to consider, and HMRC did not wish the application to be dismissed on grounds of delay because they too are anxious to have the substantive issues decided, so that they will know how to proceed in the future. Mr Kinnear also accepted that it was always open to HMRC to consent to an extension of time, although the question was ultimately one for the court. In these circumstances, even if (contrary to my view) the point were still open before us, and had not been conclusively determined by Underhill LJ, I would have no hesitation in saying that we should proceed to deal with the application on its merits. To do so would clearly accord with the overriding objective of dealing with cases justly (see CPR 1.1(1)), and would enable this court to rule on the important points of law raised by the application.

17. With this introduction, I will now describe in more detail the relevant legislation, both EU and domestic, and the main relevant provisions of Excise Notice 196.

Legislation

(1) EU legislation: the 2008 Directive

18. Article 4 includes the following material definitions:

> "1. "authorised warehousekeeper" means a natural or legal person authorised by the competent authorities of a Member State, in the course of his business, to produce, process, hold, receive or dispatch excise goods under a duty suspension arrangement in a tax warehouse;

> …
>
> 7. "duty suspension arrangements" means a tax arrangement applied to the production, processing, holding or movement of excise goods not covered by a customs suspensive procedure or arrangement, excise duty being suspended;
>
> …
>
> 11. "tax warehouse" means a place where excise goods are produced, processed, held, received or dispatched under duty suspension arrangements by an authorised warehousekeeper in the course of his business, subject to certain conditions laid down by the competent authorities of the Member State where the tax warehouse is located."

19. Under the sub-heading "Time and place of chargeability", Article 7 provides when excise duty is to become chargeable:

> "(1) Excise duty shall become chargeable at the time, and in the Member State, of release for consumption.
>
> (2) For the purposes of this Directive, "release for consumption" shall mean any of the following:
>
> (a) the departure of excise goods, including irregular departure, from a duty suspension arrangement;
>
> (b) the holding of excise goods outside a duty suspension arrangement where excise duty has not been levied pursuant to the applicable provisions of Community law and national legislation;
>
> (c) the production of excise goods, including irregular production, outside a duty suspension arrangement;
>
> (d) the importation of excise goods, including irregular importation, unless the excise goods are placed, immediately upon importation, under a duty suspension arrangement."

20. Articles 15 and 16, under the main heading "Production, processing and holding", confer a wide discretion on Member States in relation to the rules which they may impose concerning the holding of excise goods, provided that where excise duty has not been paid, the goods must be held in a tax warehouse opened and operated by an authorised warehousekeeper:

> *"Article 15*

(1) Each Member State shall determine its rules concerning the production, processing and holding of excise goods, subject to this Directive.

(2) The production, processing and holding of excise goods, where the excise duty has not been paid, shall take place in a tax warehouse.

Article 16

(1) The opening and the operation of a tax warehouse by an authorised warehousekeeper shall be subject to authorisation by the competent authorities of the Member State where the tax warehouse is situated.

Such authorisation shall be subject to the conditions that the authorities are entitled to lay down for the purposes of preventing any possible evasion or abuse.

(2) An authorised warehousekeeper shall be required to:

(a) provide, if necessary, a guarantee to cover the risk inherent in the production, processing and holding of excise goods;

(b) comply with the requirements laid down by the Member State within whose territory the tax warehouse is situated;

(c) keep, for each tax warehouse, accounts of stock and movements of excise goods;

(d) enter into his tax warehouse and enter in his accounts at the end of their movement all excise goods moving under a duty suspension arrangement, except where Article 17(2) applies;

(e) consent to all monitoring and stock checks.

The conditions for the guarantee referred to in point (a) shall be set by the competent authorities of the Member State in which the tax warehouse is authorised."

(2) Domestic UK legislation

21. Sections 100G and 100H of CEMA 1979 provide, in material part, as follows:

"**100G Registered excise dealers and shippers**.

(1) For the purpose of administering, collecting or protecting the revenues derived from duties of excise, the Commissioners may by regulations under this section (in this Act referred to as "registered excise dealers and shippers regulations") –

(a) confer or impose such powers, duties, privileges and liabilities as may be prescribed in the regulations upon any person who is or has been a registered excise dealer and shipper; and

(b) impose on persons other than registered excise dealers and shippers, or in respect of any goods of a class or description specified in the regulations, such requirements or restrictions as may by or under the regulations be prescribed with respect to registered excise dealers and shippers or any activities carried on by them.

(2) The Commissioners may approve, and enter in a register maintained by them for the purpose, any revenue trader who applies for registration under this section and who appears to them to satisfy such requirements for registration as they may think fit to impose.

(3) In the customs and excise Acts "registered excise dealer and shipper" means a revenue trader approved and registered by the Commissioners under this section.

(4) The Commissioners may approve and register a person under this section for such periods and subject to such conditions or restrictions as they may think fit or as they may by or under the regulations prescribe.

(5) The Commissioners may at any time for reasonable cause revoke or vary the terms of their approval or registration of any person under this section

…

100H Registered excise dealers and shippers regulations.

(1) Without prejudice to the generality of section 100G above, registered excise dealers and shippers regulations may, in particular, make provision –

(a) regulating the approval and registration of persons as registered excise dealers and shippers and the variation or revocation of any such approval or registration or of any condition or restriction to which such approval or registration is subject;

…"

22. The WOWGR, made in exercise of enabling powers contained in CEMA 1979, include the following regulations:

> "**Registered owners**
>
> 5(1) For the purposes of section 100G of the Act, the Commissioners may approve revenue traders who wish to deposit relevant goods that they own in an excise warehouse and register them as registered excise dealers and shippers in accordance with section 100G(2) of the Act.
>
> (2) A revenue trader who has been so approved and registered shall be known as a registered owner.
>
> **Duty representatives**
>
> 6(1) For the purposes of section 100G of the Act, and subject to paragraph (3) below, the Commissioners may approve revenue traders who wish to act as the agent of revenue traders who deposit relevant goods that they own in an excise warehouse and register them as registered excise dealers and shippers in accordance with section 100G(2) of the Act.
>
> (2) A revenue trader who has been so approved and registered shall be known as a duty representative.
>
> (3) The Commissioners shall not approve a revenue trader as a duty representative unless he –
>
> (a) has a business establishment or other fixed establishment in the United Kingdom, or
>
> (b) if he is an individual, has his usual place of residence in the United Kingdom.
>
> …
>
> **Holding dutiable goods**
>
> 9(1) Dutiable goods shall not be deposited in an excise warehouse or kept in an excise warehouse unless the occupier of that warehouse –
>
> (a) is an authorised warehousekeeper, and
>
> (b) is permitted by the terms of his approval to hold dutiable goods of that class or description.

(2) Relevant goods shall not be kept in an excise warehouse for more than the initial period beginning with their deposit in that warehouse unless the owner of those goods –

(a) is not a revenue trader, or

(b) is the authorised warehousekeeper, or

(c) is a registered owner who resides or has a business establishment or other fixed establishment in the United Kingdom, or

(d) has a duty representative acting as his agent in respect of those goods.

…

[*the "initial period" is defined in regulation 2 as (broadly) a period of 72 hours, excluding Saturdays, Sundays and specified public holidays*]

…

Excise duty points – ownership of goods

21(1) Subject to paragraph (2) below, if at any time after relevant goods are deposited in an excise warehouse either –

(a) those goods cease to be owned by a registered owner, or

(b) there is no duty representative acting as the owner's agent,

the time when those goods ceased to be owned by a registered owner or there ceased to be a duty representative acting as the owner's agent shall be the excise duty point for those goods.

…

(3) The persons jointly and severally liable to pay the duty at the excise duty point shall be –

(a) the authorised warehousekeeper for the excise warehouse in which the goods were kept,

(b) the owner of the goods immediately before the excise duty point,

(c) if different, the owner of the goods immediately after the excise duty point, and

> (d) the duty representative of the owner of the goods immediately before the excise duty point."

Excise Notice 196

23. The general purpose of Excise Notice 196, as stated in section 1.1, is to explain "the UK requirements for the warehousing of excise goods held in duty-suspension within the UK." Persons are told to read it if, for example, they would like to be authorised as an excise warehousekeeper (section 3); if they would like to be approved as a registered owner of excise goods in an excise warehouse (section 5); or if they "would like to be approved and registered as a duty representative, acting on behalf of an owner based in another Member State who wishes to hold goods in a UK excise warehouse (section 5)". Warning is given that authorisation gives rise to legal obligations, and failure to fulfil them or to observe any condition of authorisation and approval could result in the restriction, withdrawal or non-renewal of the relevant status, and the imposition of a financial penalty.

24. Section 2 explains, among other things, that "[o]nly persons who can demonstrate that they are fit and proper to carry out an excise business will be authorised or registered", and that from 1 November 2014 "registered excise businesses must make sure that they are carrying out appropriate due diligence checks on their suppliers, customers and supply chains", further details of which are contained in section 10.

25. Section 3.2 explains how an applicant for authorisation as an excise warehousekeeper can demonstrate that it is a fit and proper person to carry on an excise business, and sets out the criteria against which applications will be assessed by HMRC, while making it clear that the lists are "not exhaustive".

26. Section 5 deals with the registration of owners and duty representatives. All owners of duty-suspended excise goods are obliged to obtain approval and registration, unless certain specified exceptions apply, including if "you are a non-UK based owner and have appointed a duty representative to act on your behalf". In order to apply for approval to own excise goods in an excise warehouse, it is necessary to have a UK business address. If that requirement is not satisfied, the owner will be "unable to keep the goods in an excise warehouse for more than the initial period" of 72 hours, after which duty is due on the goods. If an overseas owner wishes to hold excise goods in duty-suspension beyond that time, a duty representative must be appointed. In considering applications for approval as an owner or appointment as a duty representative, HMRC will apply the same "fit and proper" test as in section 3.2.

27. Under the heading "Duty representatives", section 5.3 states that:

> "Duty representatives must have a business or other fixed establishment in the UK and may only represent non-UK based owners. HMRC refers to such owners as your "principals". Anyone wishing to act as a duty representative should apply on form EX 64…

> Duty representatives must, prior to acting for an owner, carry out checks to make sure that any owner that they represent does not have a business establishment or fixed address in the UK. A duty representative will be expected to retain evidence that they have carried out such checks on each principal before they act for them.
>
> Failure to complete these checks and hold the required evidence will result in the duty representative's registration being revoked and may also affect any other excise registrations or approvals they hold."

Section 5.5 then provides for the giving of guarantees, in a specified manner, as "the only form of financial security acceptable to HMRC." Various other specific obligations are also imposed, for example where owners and duty representatives receive cash payments exceeding £9,000 (or the equivalent in other currencies) for goods held in the warehouse under duty-suspension.

28. Section 10 is headed "The due diligence condition". As section 10.1 explains, under the sub-heading "General information":

> "Due diligence is the appropriate reasonable care a company exercises when entering into business relations or contracts with other companies, and how it responds in a deliberate reflexive manner to trading risks identified.
>
> Without effective safeguards in place, there are considerable risks to all businesses along alcohol supply chains of becoming implicated in illicit trading.
>
> This condition requires that all excise registered businesses operating in the alcohol sector consider the risk of excise duty evasion as well as any commercial and other risks when they are trading. Doing so will help to drive illicit trading out of alcohol supply chains, and reduce the risk to businesses of financial liabilities associated with goods on which duty has been evaded.
>
> From 1 November 2014 it becomes a condition of your approval as an excise warehousekeeper, registered owner, duty representative or registered consignor that you must:
>
> - objectively assess the risks of alcohol duty fraud within the supply chains in which you operate
> - put in place proportionate checks, in your day to day trading, to identify transactions that may lead to fraud or involve goods on which duty may have been evaded
> - have procedures in place to take timely and effective mitigating action where a risk of fraud is identified

- document the checks which you intend to carry out and have appropriate management governance in place to make sure that these are, and continue to be, carried out as intended."

29. Section 10.2 then provides:

"**Assessing risks and carrying out checks**

The fraud risks within a supply chain are unique to each business, and objective assessment of the likelihood of your trading activities contributing to fraud is an essential first step to developing effective due diligence procedures. You will need to consider the full range of trading relationships you have established and the potential for fraud in each.

The main risks within the alcohol sector include:

- involvement in the supply of goods for fraud
- receiving goods that have been smuggled or diverted into the UK
- inadvertently facilitating fraud by providing import or warehousing services

A key feature of the smuggling or diversion of alcohol to the UK market is the ability to source product either where the excise duty has been suspended or it has been refunded under drawback provisions. To assess your exposure to this risk you will need to objectively assess if there is potential for duty evasion resulting from your trading activity. You will need to know who you are selling to and where the goods are destined for and understand the market for these products. Without this, there is a risk of supplying goods directly or through a third party into illicit supply chains.

Import and warehousing procedures are often exploited to provide cover for the illicit movement of goods. Fraudsters will seek to distribute duty evaded goods as well as counterfeit alcohol into legitimate retail supply chains. To assess your exposure to this risk you will need to objectively consider whether the supply chain and trading activity is credible which includes knowing who you source goods from and provide a service to.

High level indicators of risk include goods being received from unusually complex or apparently uneconomic supply routes, for example, regular supplies of UK produced goods that have

> been shipped out to another Member State and then re-imported. If you are sourcing duty paid goods you will also need to consider the credibility of suppliers and the level of evidence you can obtain to demonstrate the provenance and duty status of goods.
>
> Section 10.5 of this notice provides further detail on risk indicators.
>
> Once you have established the main risks of fraud you may be exposed to, your regular checks during trading should be of a type and level sufficient to establish the integrity of the excise transactions and supply chains you are trading in. This level needs to be reasonable and proportionate to the risk.
>
> Depending on the nature of your business and complexity of your transactions, checks will need to be individually tailored. In particular, they must be sufficiently sensitive, yet robust enough, to pick up potential fraud risks. These checks should provide protection from the threat of fraud or you becoming inadvertently involved in fraudulent activity.
>
> As a general rule "FITTED" checks should normally focus on:
>
> [*see the passage which I have already quoted at [7] above*]
>
> Section 10.6 of this notice provides more examples."

30. Sections 10.3 and 10.4 then deal with (respectively) responses to identified risks, and review of due diligence procedures by HMRC. At the end of section 10.4, there is the following introduction to sections 10.5 and 10.6:

> "Section 10.5 and 10.6 of this notice provide further details on risk indicators and outline some of the checks that you may carry out to identify high risk transactions. Please note that these are not intended to be prescriptive or exhaustive. Once you have established the most appropriate due diligence tests for your business, these should be used to test both new and existing transactions and supply chains linked to your business. Some checks may be more appropriate to your business than others."

31. Section 10.5 is headed "Examples of due diligence risk indicators", and begins by reaffirming the non-exhaustive nature of the list which follows. The examples which are then set out are grouped under the sub-headings "Financial health of the company you intend trading with", "Identity of the business", "Terms of contract, payment and credit agreements", "Transport", "Existence or provenance of goods" and "The deal".

32. In a similar way, section 10.6 then gives "Examples of due diligence checks" under the sub-headings of financial health, identity, the terms of any contracts, payments and credit agreements, transport, existence or provenance, and the deal.

33. Finally, section 11 sets out the relevant review and appeal procedures; section 12 explains where the relevant legislation applicable to the contents of the Notice may be found; and section 13 contains a useful glossary.

The problem of excise duty fraud

34. The problems posed by excise duty fraud form a recurrent theme which runs through Excise Notice 196. The theme is reflected not only in the need for applicants for registration as authorised warehousekeepers, owners or duty representatives to demonstrate that they are fit and proper persons to fulfil those roles, but also in the extensive due diligence requirements which are imposed upon them. The nature of the problem, in general terms, is well known, and it is exacerbated by the fact that rates of excise duty are much higher in the UK than in most other Member States of the EU. Fuller information is provided in some of the evidence filed by HMRC in the present judicial review proceedings, by Ronda Agatha-Jones (who has 36 years' experience of working in HMRC and HM Customs and Excise, and is now the manager of the Excise Advisory and Litigation team) and Chris Mountford (who has over 40 years of similar experience, and was a member of the team responsible for the introduction of due diligence measures for excise businesses and the initial publication of Excise Notice 196 in October 2014). Mr Mountford exhibits a witness statement which he prepared, and upon which he was not required to give oral evidence or be cross-examined, in a case before the FTT in 2016, Whittalls Wines Ltd and European Food Brokers Ltd v HMRC, case numbers TC/2016/03839 and TC/2015/03840 ("Whittalls Wines").

35. As Ms Agatha-Jones explains, the illicit alcohol market in the UK results in lost tax of approximately £1.3 billion a year, including VAT. The latest available figures in the Measuring the Tax Gap Report for 2016-17, released by HMRC on 26 October 2017, show that in 2015-16 the tax gap in relation to beer, spirits and wine represented approximately 7.5% of theoretical liabilities, having varied between 11% and 5.4% in the period since 2007/08. The figure of £1.3 billion comprised some £0.8 billion in alcohol duties and a further £0.4 billion in VAT, with rounding of the figures.

36. Ms Agatha-Jones also helpfully explains how movements of duty-suspended alcohol take place within the EU under a computerised system called EMCS, which replaced the previous paper-based system and was adopted by the UK on 1 January 2011. Within the constraints of this system, organised crime groups often operate internationally with the aim of introducing goods on which duty has not been paid into otherwise legitimate retail and wholesale markets. In broad terms, the frauds can be divided into inward and outward diversion frauds, of which the former are particularly prevalent and difficult to detect. There are a number of variations of inward diversion fraud, but "the common factor is that the goods are actually transported around the EU before being "smuggled" back into the UK under the cover of an EMCS movement".

37. Ms Agatha-Jones gives this example (which I have slightly simplified) of how inward diversion fraud generally works:

(a) A movement of goods is arranged, moving goods to the UK under duty suspension for consignment to an account within a receiving excise warehouse in the UK.

(b) The movement is entered onto EMCS, and is known as "the cover load".

(c) The cover load will leave for the UK. If it reaches the UK, and passes through the frontier without being checked by UK Border Force, it will "park up" and not go direct to the warehouse.

(d) At this point, a number of identical "mirror loads" will be created, with the same Administrative Reference Code ("ARC") as the cover load. These mirror loads will then be transported into the UK, until one of them is intercepted or until the journey time stated on the original EMCS expires.

(e) If a mirror load is detected, it will use the details of the cover load to legitimise itself and will make its way to the UK warehouse. The ARC will then be discharged, and the cover load which has been "parked up" will probably be, in the jargon, "slaughtered" (i.e. broken up and distributed).

(f) If none of the mirror loads is intercepted, they can then all be "slaughtered" and enter the UK home market without payment of any excise duty or VAT.

38. In his evidence in the Whittalls Wines case, Mr Mountford explained some of the background to the introduction of the due diligence requirements contained in section 10 of Excise Notice 196 with effect from 1 November 2014. Before their introduction, HMRC had concerns that some approved businesses were entering into high risk transactions, and this led to the placing of "specific and bespoke conditions" upon individual business approvals, whereby HMRC would vet the customer base and decide whether the business should be approved to trade with any particular customer. This process was onerous both for HMRC, who had to consider the circumstances of each individual customer, and for approved persons who conducted legitimate trade in duty-suspended goods. Accordingly, after a process of informal consultation with trade associations representing all sectors in the alcohol supply chain, it was decided "to make it a condition of *all* excise traders' approvals that they should conduct, and demonstrate to HMRC that they were capable of conducting, enhanced due diligence into all of their customers and their supply chains." The consultation was carried out through a body called the Joint Alcohol Anti-fraud Taskforce ("the JAAT"), which included the main trade associations in the warehouse sector. According to Mr Mountford's unchallenged evidence:

> "During the June 2014 meeting of the JAAT, it became apparent that most of the businesses represented in the group already had similar due diligence policies in place to those suggested in HMRC's draft guidance and that the terms of the then-draft Due Diligence Condition [*i.e. what became section 10 of Excise Notice 196*] were, in the main, acceptable to the attendees of this meeting."

39. Mr Mountford also confirms that his evidence in the Whittalls Wines case remains unaffected in any material respect by subsequent minor amendments to Excise Notice 196.

The excise duty point issue

40. Against this background, I turn to the first main issue raised by Seabrook in the judicial review proceedings. It focuses on regulation 21(1) of WOWGR, and specifically on the provision that "if at any time after relevant goods are deposited in an excise warehouse… (b) there is no duty representative acting as the owner's agent, the time when… there ceased to be a duty representative acting as the owner's agent shall be the excise duty point for those goods." Seabrook's argument is that the imposition of an excise duty point in those circumstances is contrary to EU law, because Article 7 of the 2008 Directive makes exhaustive provision for what constitutes a "release for consumption" of excise goods, thereby triggering the charge to excise duty. The time when there ceased to be a duty representative acting as the owner's agent, says Seabrook, does not fall within either paragraph (a) or paragraph (b) of Article 7(2), those being the only potentially relevant parts of the definition of "release for consumption".

41. For convenience, I will repeat the critical wording of Article 7(2):

> "For the purposes of this Directive, "release for consumption" shall mean any of the following:
>
> (a) the departure of excise goods, including irregular departure, from a duty suspension arrangement;
>
> (b) the holding of excise goods outside a duty suspension arrangement where excise duty has not been levied pursuant to the applicable provisions of Community law and national legislation;
>
> …"

42. It is common ground, as Mr Kinnear QC accepted for HMRC in his oral submissions, that the definition of "release for consumption" in Article 7(2) is indeed exhaustive, with the consequence that excise duty may only become chargeable under Article 7(1) at the time, and in the Member State, of the happening of one of the events specified in Article 7(2). HMRC's argument, simply stated, is that when excise goods have been deposited in an excise warehouse by a foreign owner who is required to have a duty representative acting as its agent, and there comes a time when the authorisation of the duty representative to act in that capacity is revoked, the excise goods are then held "outside a duty suspension arrangement" within the meaning of Article 7(2)(b). Accordingly, excise duty becomes chargeable at that point, if it has not already been levied at some earlier stage.

43. Seabrook resists this analysis, both on the footing that it represents an improper attempt by the UK to "side-step the scope of the excise duty points by seeking to

define when goods are or not held outside a duty suspension arrangement", to quote from paragraph 50 of Seabrook's skeleton argument in support of its judicial review claim, and as a matter of binding authority, based on the decision of the Court of Justice of the European Union ("the CJEU") in Case C-355/14, "Polihim-SS" EOOD v Nachalnik na Mitnitsa Svishtov ("Polihim"), in which judgment was delivered on 2 June 2016 on a reference for a preliminary ruling from the Administrative Court of Pleven in Bulgaria.

44. Polihim was an authorised warehousekeeper which managed a tax warehouse in Bulgaria, in which it was authorised to manufacture energy products and store them under a duty suspension arrangement. Under a tripartite contract, Polihim sold heavy fuel oils to an intermediate purchaser, which sold them on to an end user which was exempt from excise duty under the relevant Bulgarian legislation. The consignment was delivered directly by Polihim to the end user from its tax warehouse. Because the intermediate purchaser was not itself exempt from excise duty, the Bulgarian customs authorities took the view that the removal of the relevant goods from Polihim's tax warehouse had given rise to an excise debt owed by Polihim, and fines were imposed on Polihim accordingly.

45. For present purposes, nothing turns on the correct analysis of the contractual arrangements in Polihim, and the case is relevant only for the ruling of the CJEU on its reformulation of the first question of the national court, namely "whether Article 7(2) of Directive 2008/118 is to be interpreted as meaning that the sale of excise goods within a tax warehouse, without those goods having physically left that tax warehouse, constitutes a release for consumption of those goods": see paragraph 38 of the Court's judgment, which it delivered after hearing the Advocate General but without an opinion from him.

46. The decision of the Court on this issue was that excise duty cannot be chargeable under Article 7(2)(a) while the goods in question are still held by the authorised warehousekeeper in its tax warehouse, because the concept of "the departure of excise goods, including irregular departure, from a duty suspension arrangement" refers to "the physical departure of those goods from the tax warehouse and not their sale": see paragraphs 47 and 48 of the judgment.

47. The Court went on to note that this interpretation of Article 7(1) and (2)(a) corresponds to the objectives of the 2008 Directive:

> "51. Thus since excise duty is a tax levied on consumption and not on sale, the time at which it becomes chargeable must be very closely linked with the consumer.
>
> 52. Accordingly, so long as the goods in question remain in the tax warehouse of an authorised warehousekeeper, there can be no consumption, even if those goods have been sold by that authorised warehousekeeper."

48. The Court then considered what was meant by an "irregular departure" from a duty suspension arrangement, holding that it too contemplated the physical removal of the goods: see paragraphs 53 and 54 of the judgment.

49. In my judgment, it is abundantly clear that Polihim is an authority only on the meaning and application of Article 7(2)(a) and what is meant by the "departure" of excise goods from a duty suspension arrangement within the meaning of that provision. No separate question arose under Article 7(2)(b), because Polihim's status as an authorised warehousekeeper had not been revoked. It was in that context that the CJEU said, at paragraph 54:

> "It follows that excise duties are not chargeable so long as the goods concerned are held by the authorised warehousekeeper in its tax warehouse, since they cannot be regarded, in that situation, as having been removed from a duty suspension arrangement within the meaning of Article 7(2)(a) of Directive 2008/118."

It does not follow from this proposition, however, that if the authorised status of the warehousekeeper is revoked, Article 7(2)(b) is incapable of applying merely because the goods in question continued to be physically held in the tax warehouse.

50. I therefore conclude, in agreement with HMRC's submissions, that Polihim provides no assistance to Seabrook in the situation with which we are concerned. Furthermore, if it be assumed (as for the purposes of this issue, it must be) that the duty representative requirements in WOWGR are otherwise compliant with EU law, I see no reason to doubt that they constitute part of a "duty suspension arrangement" within the meaning of Article 4(7) of the 2008 Directive, or that the effect of the revocation of Seabrook's registration as a duty representative was that the goods which it held in that capacity were thereupon held "outside a duty suspension arrangement" within the meaning of Article 7(2)(b), thus triggering an excise duty point under that paragraph. As HMRC submit, the words "pursuant to the applicable provisions of… national legislation" in Article 7(2)(b) are broad, as is the definition of "duty suspension arrangement". Furthermore, Article 15(1) of the 2008 Directive gives each Member State the discretion to determine its own rules concerning the holding of excise goods in duty suspension.

51. For these reasons, I would dismiss Seabrook's challenge to the lawfulness of regulation 21(1) in so far as it imposes an excise duty point when there ceased to be a duty representative acting as the owner's agent.

Do the duty representative requirements of WOWGR infringe the EU law principle of non-discrimination and/or any of the fundamental freedoms, and (if so) does the infringement satisfy the test of proportionality?

52. I now come to the issues which seem to me to lie at the heart of the case. Seabrook contends that the requirements relating to duty representatives in WOWGR are discriminatory and contrary to EU law, because they apply only to owners of excise goods who do not reside or have a business establishment or other fixed establishment in the UK. I will call these owners "foreign owners" for short, while emphasising that their crucial distinguishing feature for present purposes lies not in their foreign

nationality or place or residence as such, but rather (if they are corporate entities) in the fact that they have no business establishment or other fixed establishment in the UK.

53. The absence of a fixed establishment or place of business in the UK has at least two important consequences. First, it prevents a foreign owner from applying for approval as a registered owner under section 5.2 of Excise Notice 196 (where the requirement is to have "a UK business address"). This requirement is not directly imposed by regulation 5 of WOWGR, but is clearly authorised by regulation 18(1) which states that:

> "The approval and registration of every registered owner shall be subject to the conditions and restrictions prescribed in a notice published by the Commissioners and not withdrawn by a further notice."

Secondly, it means that (subject to immaterial exceptions) a foreign owner cannot keep goods in an excise warehouse for longer than the initial period of 72 hours, unless it has a duty representative acting as its agent in respect of those goods: see regulation 9(2)(c) and (d) of WOWGR.

54. Seabrook submits that these requirements clearly discriminate against foreign owners on the basis of their nationality, because the requirement to have a place of business in the UK is far more easily satisfied by a corporate owner which is established and resident in the UK, and because such an owner may apply for approval as a registered owner, which carries with it the ability to keep goods in an excise warehouse for more than the initial period without the need for a duty representative to act as its agent. Furthermore, Seabrook submits that the restrictions thus imposed on foreign owners are not only discriminatory in their effect, but they also infringe the foreign owners' freedom of establishment, as well as (more generally) the free movement of goods and services within the EU, and in each case without any proper or adequate justification.

55. For their part, HMRC maintain that the impugned requirements do not involve any discrimination on grounds of nationality, nor do they infringe any of the fundamental freedoms, and (in any event) the measures are proportionate and fully justified by the need to combat excise duty fraud and evasion.

56. More specifically, HMRC advance a number of reasons why the impugned requirements are not discriminatory and do not infringe any of the fundamental freedoms under EU law:

> (a) the right to trade in duty-suspended goods is a privilege, not a right, with the consequence that no rights protected by EU law are engaged;
>
> (b) it is open to any overseas trader to operate on a temporary basis under the "72 hour rule", to make use of a duty representative or to set up a fixed establishment within the UK. Should it choose to do so, it can then trade in duty suspended goods provided it either obtains approval as a registered owner or continues to appoint a duty representative; and

(c) to the extent that any fundamental freedoms are engaged, foreign owners are not treated less favourably that UK traders. Rather, the domestic legislation provides different and parallel routes by which UK and foreign businesses may trade in duty-suspended goods within the UK. Each route involves the satisfaction of "fit and proper" tests before approval is granted by HMRC, whether as a registered owner (in the case of a UK-based trader) or as a duty representative (in the case of a foreign owner, which is not itself required to go through any approval process and is not subject to direct oversight by HMRC).

57. Two of the points outlined above may be rapidly disposed of.

58. First, the suggestion that the ability to trade in excise goods under duty suspension is a "privilege" rather than a right, and as such engages no protection under EU law, is in my judgment fanciful. The supposed distinction is not recognised as significant in any EU legislation or decisions of the CJEU to which we were referred. The most that can be said is that the use of the term "privileges" in excise duty law has some recognition in domestic statutes (see section 100G(1)(a) of CEMA 1979) and domestic case law: see Greenalls Management Ltd v Customs and Excise Commissioners [2005] UKHL 34, [2005] 1 WLR 1754, where Lord Hoffmann said at [17] that "No one is obliged to run an excise warehouse. It is a privilege which carries obligations." But the issue in Greenalls did not require any consideration of a possible distinction to be drawn in this context between privileges and rights, and as a matter of simple English I find the supposed distinction an elusive one, particularly if it is asserted that a privilege is somehow less entitled to protection than a right. If anything, it seems to me that the word "privilege" is often used to describe a right of particular value or importance to the person who has it (such as legal professional privilege, or the privilege against self-incrimination), or one which has to be earned by satisfying potentially onerous or difficult conditions. None of these features suggests to me that a "privilege" is entitled to less protection than other legal rights, and to be fair to him Mr Kinnear QC did not spend long pursuing this particular line of argument.

59. Secondly, reliance on the "72 hour rule" seems to me equally misplaced. It provides a very short-term facility, of which a foreign trader is free to take advantage on an ad hoc basis, but it can obviously be no substitute for the kind of long-term trading in goods held under duty suspension which is available either to a registered owner or to a foreign owner with a duty representative.

60. HMRC's remaining arguments, however, require a fuller analysis of the alleged incompatibility of the duty representative requirements with EU law. In particular, it is in my judgment necessary to address the following questions:

(1) What specific aspects of the requirements are challenged by Seabrook as being contrary to EU law?

(2) What interests protected by EU law are said to be engaged?

(3) As part of the second question, which (if any) of the fundamental freedoms are engaged, and who are the persons whose freedoms are allegedly restricted?

(4) In so far as Seabrook's complaint is one of discrimination, what is the nature of the alleged discrimination as a matter of EU law?

(5) In considering these questions, what is the role of the EU law principle of proportionality, and with what degree of intensity should it be applied?

(6) To the extent that any interests protected by EU law are restricted or infringed, can the restriction or infringement be justified?

61. To begin with the first question, Seabrook seeks a declaration that the requirement in regulation 9(2) of WOWGR for the owner of goods held in an authorised warehouse either (a) to be a registered owner who resides or has a business establishment or other fixed establishment in the UK, or (b) to have a duty representative acting as his agent in respect of those goods, is contrary to EU law and thus of no effect. This formulation of the relief sought immediately prompts the question: what is the precise aspect of regulation 9(2) which is said to infringe EU law? Is it the requirement for a registered owner to be established in the UK, or the requirement for a foreign owner to have a duty representative acting as his agent in the UK, or is it the fact that an owner of excise goods may only hold them in an authorised warehouse if he satisfies one or other of those conditions, with no further alternatives available? Some (but not much) light is thrown on these questions by paragraph 37 of Seabrook's statement of facts and grounds in support of its application for judicial review, which focuses on the requirement for a foreign owner to have a duty representative in order to own warehoused goods in the UK, and the corresponding imposition of a duty point if there is no such duty representative. This focus is repeated in paragraphs 39 and 40 of the grounds, where it is asserted that "the only legal relevance of the duty representative is that it prevents a duty point arising whilst goods are deposited in an excise warehouse" by a foreign owner. Similar points are also made in Seabrook's skeleton argument, but without further elaboration.

62. I therefore take it that the essential thrust of Seabrook's challenge to regulation 9(2) is the requirement which it imposes on a foreign owner to have a duty representative if it wishes to hold excise goods in an authorised warehouse in the UK. I think Seabrook's challenge may also reasonably be regarded as extending to the binary choice which regulation 9(2) presents to a foreign owner, when it is read together with the requirement in section 5.2 of Excise Notice 196 for a registered owner to have a UK business address. It follows from this that a foreign owner does not have the option of becoming a registered owner itself, unless it establishes itself with a business address in the UK, whether by setting up a branch of its own business in the UK or through a UK-based subsidiary. Without taking such steps, the only option available to the foreign owner is to appoint a UK-based duty representative.

63. It is convenient to take the next three questions together. Leaving aside the fundamental freedoms, Seabrook relies on the EU law principles of equal treatment and non-discrimination on grounds on nationality. According to paragraphs 51 and 52 of the grounds of review, WOWGR are manifestly discriminatory, because businesses established in the UK do not need to have a duty representative to own goods in a warehouse, whereas businesses established elsewhere in the EU must have a duty representative. This is said to be explicit discrimination based on the place where the business is established. Although this is not spelled out, I take it that Seabrook wishes to rely on the principles of equal treatment and non-discrimination as fundamental

principles of EU law which should be applied when testing the lawfulness of the domestic measures taken by the UK to implement the 2008 Directive, including the requirements relating to duty representatives. On that footing, this is a separate ground of challenge from any alleged infringement of fundamental freedoms, although if any fundamental freedoms are engaged, the same discriminatory effect may of course be relied on to show the existence of a restriction which requires justification if it is not to infringe the relevant freedom.

64. With regard to the fundamental freedoms, Seabrook's primary argument is that the difference of treatment of foreign owners and owners established in the UK engages the freedom of establishment of foreign owners of excise goods who wish to hold them under suspension of duty in a UK tax warehouse. Indeed, Seabrook's written grounds and submissions appear to proceed on the basis that this proposition is virtually self-evident. I must say, however, that I have the greatest difficulty in understanding how the requirements in regulation 9(2) of WOWGR can plausibly be said to engage, let alone breach, the rights of establishment of foreign owners in the UK.

65. On behalf of HMRC, Mr Kinnear QC referred us in this connection to the decision of the Grand Chamber of the CJEU in Case C-97/09, Ingrid Schmelz v Finanzant Waldviertel ECR I-10499, where the Court gave this explanation of the concept of establishment within the meaning of what is now Article 49 TFEU:

> "37. According to the case-law of the Court, the concept of establishment within the meaning of the Treaty is a very broad one, allowing an EU national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social inter-penetration within the European Union in the sphere of activities as self-employed persons (*Centro di Musicologia Walter Stauffer*, paragraph 18 and case-law cited).
>
> 38. However, in order for the provisions relating to freedom of establishment to apply, it is generally necessary to have secured a permanent presence in the host Member State… It must be possible to establish the existence of that permanent presence on the basis of objective factors which are ascertainable…"

66. That explanation was given in relation to the freedom of establishment of an individual trader, but the underlying concept must be the same where the freedom is asserted by a corporate entity. How, then, can it be said that the freedom of establishment of a foreign owner is affected, when the foreign owner is most unlikely to have any permanent presence in the UK, and the burden of its complaint is that it is prevented from holding goods in a UK tax warehouse without appointing a UK-resident duty representative? In my view, Seabrook had no satisfactory answer to this question, and I would therefore hold that the freedom of establishment of foreign owners in the UK is not engaged in any meaningful way by the duty representative requirements.

67. That is not to say, however, that no fundamental freedoms are relevant when considering the lawfulness of those requirements. At a more general level, a major purpose of the 2008 Directive is to impose restrictions on the free movement of excise goods, and I would accept that the duty representative requirements do place a significant restriction on the freedom of foreign owners to move excise goods into and out of the UK. Furthermore, Seabrook does rely upon the freedom of movement of goods, albeit submitting that it "adds little" to what I consider to be Seabrook's misconceived reliance on freedom of establishment. Similarly, although this does not form part of Seabrook's explicit case, I can see scope for an argument that the UK legislation restricts the freedom to provide services (a) of warehousekeepers to foreign owners, and/or (b) of duty representatives to UK-based owners.

68. Pausing at this point, I am prepared to proceed on the basis that Seabrook has established a prima facie case that regulation 9(2) of WOWGR may be unlawful as a matter of EU law because:

> (a) it infringes the principles of equal treatment and non-discrimination, by requiring foreign owners (but not UK-based owners) of excise goods to appoint a duty representative, and precludes foreign owners from themselves seeking approval and registration by HMRC as registered owners; and/or
>
> (b) it imposes restrictions on the free movement of goods, as well as the freedom to provide services of warehousekeepers and duty representatives.

69. I now come on to the important issue of proportionality, and the degree of intensity with which the principle is to be applied. The leading authorities on this topic, in the UK, are two decisions of the Supreme Court, the second of which is very recent and was only delivered on 19 June 2019, about a month after the conclusion of the hearing before us on 22 May 2019. The earlier case is R (Lumsdon) v Legal Services Board [2015] UKSC 41, [2016] AC 697 ("Lumsdon"). The very recent decision is Secretary of State for Work and Pensions v Gubeladze [2019] UKSC 31 ("Gubeladze (SC)"), on appeal from the decision of this court at [2017] EWCA Civ 1751, [2018] 1 WLR 3324 ("Gubeladze (CA)"). We gave the parties the opportunity to make written submissions on Gubeladze (SC), of which they both took advantage.

70. I should also make it clear at this point that we are not concerned with any issue of standing on the part of Seabrook to advance arguments based on the alleged discriminatory effect of the duty representative requirements, or their impact on any of the fundamental freedoms. Obviously, Seabrook is not itself a foreign owner, as I have defined that term. Seabrook is an English company, which operates its warehouse business at premises in the UK. However, it is open to Seabrook to contest the lawfulness of the relevant provisions under EU law by reference to the impact which they might have on its actual or prospective customers, as well as on its own right to provide services as a warehousekeeper, and HMRC do not suggest the contrary.

The principle of proportionality in EU law

71. The particular issue which the Supreme Court had to consider in Lumsdon was whether a quality assessment scheme for advocates, the objective of which was to

ensure that practitioners who appeared in criminal courts had the necessary competence, complied with requirements in domestic regulations which themselves repeated, with immaterial variations, conditions imposed by Directive 2006/123/EC on services in the internal market ("the Services Directive"), namely that "the need for an authorisation scheme is justified by a an overriding reason relating to the public interest" and that "the objective pursued cannot be attained by means of a less restrictive measure": see the judgment of Lord Reed and Lord Toulson at [20]. In order to consider that question, the court thought it "desirable to consider more widely the EU principle of proportionality", which the second of the above requirements reflected. The discussion, all of which repays careful reading, but from which I must be selective in my citations, then runs from [23] to [81].

72. After stating, at [23], that the aim of the following summary was "to attempt to clarify the principle of proportionality as it applies in EU law", the court gave an important warning:

> "It should however be said at the outset that the only authoritative interpreter of that principle is the Court of Justice… It has also to be said that any attempt to identify general principles risks conveying the impression that the court's approach is less nuanced and fact-sensitive than is actually the case. As is the case of other principles of public law, the way in which the principle of proportionality is applied in EU law depends to a significant extent on the context. This summary will range beyond the type of case with which this appeal is concerned, in order to demonstrate the different ways in which the principle of proportionality is applied in different contexts. It will provide a number of examples from the case law of the court, in order to illustrate how the principle is applied in practice."

73. Other important preliminary points, at [24] to [26], include:

> (a) proportionality is a general principle of EU law, enshrined in article 5(4) of the Treaty on European Union, but it has been "primarily and most fully developed by the Court of Justice in its jurisprudence, drawing on the administrative law of a number of member states";
>
> (b) the principle "applies generally to legislative and administrative measures adopted by EU institutions", and "also applies to national measures falling within the scope of EU law";
>
> (c) the principle "only applies to measures interfering with protected interests", which include "the fundamental freedoms guaranteed by the EU Treaties"; and
>
> (d) the principle is "neither expressed nor applied in the same way as the principle of proportionality under the European Convention on Human Rights".

74. The need to find an interference with protected interests before the principle of proportionality comes into play has been reemphasised by the Supreme Court in Gubeladze (SC) at [31], where Lord Lloyd-Jones and Lord Sales (with whom the other five members of the court agreed) approved the submission of Martin Chamberlain QC for the Secretary of State "that the principle of proportionality necessarily involves, as an essential component, an assessment of the degree to which the impugned measure interferes with a protected interest", referring to the judgment of the CJEU in R (British Sugar PLC) v Intervention Board for Agricultural Produce (Case C-329/01) [2004] ECR I-01899, at paragraph 59. After referring to the citation of the British Sugar case by Lord Reed and Lord Toulson in Lumsdon at [25], Lord Lloyd-Jones and Lord Sales continued:

> "The point is also well made by Professor Tridimas in *The General Principles of EU Law* (2nd ed, OUP: 2006) where he states (at p 139):
>
> "The court assesses the adverse consequences that the measure has on an interest worthy of legal protection and determines whether those consequences are justified in view of the importance of the objective pursued."
>
> Similarly, Professors Craig and De Búrca in *EU Law: Text, Cases, and Materials* (6th ed, OUP: 2015) state (at p 551):
>
> "In any proportionality enquiry the relevant interests must be identified, and there will be some ascription of weight or value to those interests, since this is a necessary condition precedent to any balancing operation.""

75. Returning to Lumsdon, the court next considered the division of responsibility between the CJEU and national courts, at [27] to [32]. If "the validity of a national measure is challenged before a national court on the ground that it infringes the EU principle of proportionality, it is in principle for the national court to reach its own conclusion", although it may refer a question of interpretation of EU law to the Court of Justice, in which case "it is then for the national court to apply the court's ruling to the facts of the case before it". In so doing, "the national judge is also a European judge": in other words, EU law requires the proportionality principle to be applied in a manner which is consistent with the jurisprudence of the CJEU. That jurisprudence is "not without complexity", because "the principle has been expressed and applied by the court in different ways in different contexts". It is therefore necessary for national judges "to understand the nature and rationale of these differences, and to identify the body of case law which is truly relevant."

76. The court then described the "nature of the test of proportionality", in a passage which merits extensive quotation:

> "33. Proportionality as a general principle of EU law involves a consideration of two questions: first, whether the measure in question is suitable or appropriate to achieve the objective

pursued; and secondly, whether the measure is necessary to achieve that objective, or whether it could be attained by a less onerous method. There is some debate as to whether there is a third question, sometimes referred to as proportionality stricto sensu: namely, whether the burden imposed by the measure is disproportionate to the benefits secured. In practice, the court usually omits this question from its formulation of the proportionality principle. Where the question has been argued, however, the court has often included it in its formulation and addressed it separately…

34. Apart from the questions which need to be addressed, the other critical aspect of the principle of proportionality is the intensity with which it is applied. In that regard, the court has been influenced by a wide range of factors, and the intensity with which the principle has been applied has varied accordingly. It is possible to distinguish certain broad categories of case. It is however important to avoid an excessively schematic approach, since the jurisprudence indicates that the principle of proportionality is flexible in its application. The court's case law applying the principle in one context cannot necessarily be treated as a reliable guide to how the principle will be applied in another context: it is necessary to examine how in practice the court has applied the principle in the particular context in question.

35. Subject to that caveat, however, it may be helpful to describe the court's general approach in relation to three types of case: the review of EU measures, the review of national measures relying on derogations from general EU rights, and the review of national measures implementing EU law.

…

37. Proportionality as a ground of review of national measures… has been applied most frequently to measures interfering with the fundamental freedoms guaranteed by the EU Treaties. Although private interests may be engaged, the court is there concerned first and foremost with the question whether a member state can justify an interference with a freedom guaranteed in the interests of promoting the integration of the internal market, and the related social values, which lie at the heart of the EU project. In circumstances of that kind, the principle of proportionality generally functions as a means of preventing disguised discrimination and unnecessary barriers to market integration. In that context, the court, seeing itself as the guardian of the Treaties and of the uniform application of EU law, generally applies the principle more strictly. Where, however, a national measure does not threaten the integration of the internal market, for example because the subject-matter

> lies within an area of national rather than EU competence, a less strict approach is generally adopted…
>
> 38. Where member states adopt measures implementing EU legislation, they are generally contributing towards the integration of the internal market, rather than seeking to limit it in their national interests. In general, therefore, proportionality functions in that context as a conventional public law principle. On the other hand, where member states rely on reservations or derogations in EU legislation in order to introduce measures restricting fundamental freedoms, proportionality is generally applied more strictly, subject to the qualifications which we have mentioned."

77. With regard to the "third question" mentioned in the above quotation at [33], Gubeladze (SC) has now emphasised that proportionality in the strict sense (i.e. whether the burden imposed by the measure is disproportionate to the benefits secured) "does indeed constitute an aspect of the EU law principle of proportionality", and it is "identified as such by the Court of Justice whenever it is necessary for it to do so": see Gubeladze (SC) at [59].

78. The court's discussion of national measures which derogate from fundamental freedoms runs from [50] to [72], beginning with this introduction:

> "50. It is necessary to turn next to measures adopted by the member states within the sphere of application of EU law. In that context, issues of proportionality have arisen most often in relation to national measures taken in reliance on provisions in the Treaties or other EU legislation recognising permissible limitations to the "fundamental freedoms": the free movement of goods, the free movement of workers, freedom of establishment, freedom to provide services, and the free movement of capital. Compliance with the principle of proportionality is also a requirement of the justification of other national measures falling within the scope of EU law, including those which derogate from other rights protected by the Treaties, such as the right to equal treatment or non-discrimination…"

79. The general approach of the CJEU in this type of case was explained in Case C-55/94, Gebhard v Consiglio dell' Ordine degli Avvocati e Procuratori di Milano, EU:C:1995:411, [1995] ECR I-4165, at paragraph 37 (in the context of the provision of legal services):

> "national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for

> securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it."

The last two of those requirements, as Lord Reed and Lord Toulson commented at [53], "correspond to the two limbs of the proportionality principle".

80. In relation to the last two *Gebhard* requirements, the task of the court is to "determine whether the measure is suitable to achieve the legitimate aim in question, and… whether it is no more onerous than is required to achieve that aim, if there is a choice of equally effective measures": see [55], referring to the opinion of Advocate General Sharpston in Case C-400/08, Commission of the European Communities v Kingdom of Spain [2011] ECR I-1915, at paragraph 89.

81. Lord Reed and Lord Toulson continued:

> "56. The justification for the restriction tends to be examined in detail, although much may depend on the nature of the justification, and the extent to which it requires evidence to support it. For example, justifications based on moral or political considerations may not be capable of being established by evidence. The same may be true of justifications based on intuitive common sense. An economic or social justification, on the other hand, may well be expected to be supported by evidence."

82. On the question whether other equally effective but less restrictive measures could have been adopted, reference was made to the case of Criminal Proceedings against Bordessa (Joined Cases C-358/93 and C-416/93) [1995] ECR I-361, which concerned a Spanish law requiring that exports of coins, bank notes or bearer cheques should be the subject of a prior declaration if the amount was below a specified limit, and of prior authorisation if the amount was above that limit. Lord Reed and Lord Toulson said, at [61]:

> "This interference with the free movement of capital was argued to be necessary in order to prevent tax evasion, money laundering and other offences. The court noted that the requirement of a prior declaration was less restrictive than that of prior authorisation, since it did not entail suspension of the transaction in question. It nevertheless enabled the national authorities to exercise effective supervision. The Spanish Government contended that it was only by means of a system of prior authorisation that non-compliance could be classified as criminal and hence criminal penalties imposed. That contention was however rejected by the court, on the basis that the Spanish Government had failed to provide sufficient proof that it was impossible to attach criminal penalties to the failure to make a prior declaration. It was therefore held that EU law precluded [*the relevant rules*]."

83. Nevertheless, as Lord Reed and Lord Toulson went on to explain, the "less restrictive alternative" test is "not… applied mechanically". First, the burden of proof placed on the Member State to establish that a measure is necessary "does not require it to exclude hypothetical alternatives", in the sense of requiring positive proof that no other conceivable measure could enable the same objective to be attained under the same conditions: see Case C-518/06, Commission of the European Communities v Italian Republic [2009] ECR I-3491, at paragraph 84. Secondly, where a relevant public interest is engaged in an area where EU law has not imposed complete harmonisation, the Member State possesses a "margin of appreciation", or "discretion", not only in choosing an appropriate measure but also in deciding on the level of protection to be given to the public interest in question: see [64]. Having exercised its discretion, however, the Member State must then "act proportionately within the confines of its choice": see [66].

84. Lord Reed and Lord Toulson dealt much more briefly with national measures implementing EU measures, at [73] to [74]. Omitting the citations, those paragraphs read as follows:

> "73. Member states must also comply with the requirement of proportionality, and with other aspects of EU law, when applying EU measures such as Directives. As when assessing the proportionality of EU measures, to the extent that the Directive requires the national authority to exercise a discretion involving political, economic or social choices, especially where a complex assessment is required, the court will in general be slow to interfere with that evaluation. In applying the proportionality test in circumstances of that nature, the court has applied a "manifestly disproportionate" test… The court may nevertheless examine the underlying facts and reasoning…
>
> 74. Where, on the other hand, the member state relies on a reservation or derogation in a Directive in order to introduce a measure which is restrictive of one of the fundamental freedoms guaranteed by the Treaties, the measure is likely to be scrutinised in the same way as other national measures which are restrictive of those freedoms…"

What is the appropriate intensity of review?

85. As the discussion in Lumsdon makes clear, there is no uniform standard of intensity of review which always has to be applied when the CJEU or a national court is testing the proportionality of national measures. As a broad generalisation, however, it may be said that a strict standard of review involving the four *Gebhard* conditions normally falls to be applied when the national measures in question derogate from fundamental freedoms, whereas the much less stringent test of "manifest disproportionality" usually applies when a Member State is implementing an EU measure such as a Directive. The *Gebhard* criteria of proportionality (i.e. the third and fourth conditions) are often referred to as "the less restrictive alternative test",

reflecting the key point that no other measures could have been equally effective to achieve the legitimate aim in question, but less restrictive of the relevant freedom: see Lumsdon at [55].

86. Experience has already shown, however, that there may be a considerable degree of overlap between the second and third categories of case identified in Lumsdon. Indeed, the Supreme Court clearly had this possibility well in mind, because at [74] it said that where a Member State "relies on a reservation or derogation in a Directive in order to introduce a measure which is restrictive of one of the fundamental freedoms", the measure is likely to attract the same scrutiny as cases in the second category, that is to say application of the less restrictive alternative test. The example given by the Supreme Court of a case of that kind is Commission of the European Communities v Grand Duchy of Luxembourg EU:C:2008:350 [2008] ECR I-4323, which concerned legislation imposing the mandatory requirements of Luxembourg's employment law on providers of services in Luxembourg who were based in other Member States. In that context, the CJEU addressed an argument that the legislation ensured good labour relations in Luxembourg, and said (in a passage quoted in Lumsdon at [56]):

> "51. It has to be remembered that the reasons which may be invoked by a member state in order to justify a derogation from the principle of freedom to provide services must be accompanied by appropriate evidence or by an analysis of the expediency and proportionality of the restrictive measure adopted by that state, and precise evidence enabling its arguments to be substantiated …
>
> 52. Therefore, in order to enable the court to determine whether the measures at issue are necessary and proportionate to the objective of safeguarding public policy, the Grand Duchy of Luxembourg should have submitted evidence to establish whether and to what extent the [*contested measure*] is capable of contributing to the achievement of that objective."

87. It is not suggested in the present case that the duty representative requirements in WOWGR reflect any express reservation or derogation in the 2008 Directive, but there is clearly force in the argument that similar principles should apply, because the requirements are discriminatory in their effect and they also restrict the freedoms of movement of goods and the provision of services in the ways I have mentioned.

88. A recent example of a case which has been held to fall somewhere between the second and third Lumsdon categories is Gubeladze. The relevant part of the case concerned a challenge to the proportionality under EU law of the two-year extension to the Worker Registration Scheme ("WRS"), which had originally been introduced for a term of five years in order to monitor the impact on the UK market of workers from Latvia and certain other states which acceded to the European Union in 2004. The extension was made in 2009. The claimant was a Latvian national, who came to the UK in 2008 at the age of 57. She then worked for various employers in the UK for a number of years, but was not registered under the WRS before August 2010. The issue was whether she was entitled to claim state pension credit in 2012, on the

footing that she had been resident in the UK for the last three years. The Upper Tribunal held that the claimant satisfied this condition, because (in outline) article 17 of the Citizens Directive (Directive 2004/38/EC) required only actual rather than legal residence in the host member state, and the two-year extension to the WRS was in any event unlawful.

89. The leading judgment in this court was delivered by (Rupert) Jackson LJ, with whom Lindblom and Peter Jackson LJJ agreed. The court disagreed with the Upper Tribunal on the first issue, holding that article 17 required legal rather than actual residence, but the Secretary of State's appeal was nevertheless dismissed on the ground that the extension of the scheme was disproportionate and therefore contrary to EU law. After describing the three Lumsdon categories, and commenting that the Upper Tribunal appeared to have put the case into the second category, Jackson LJ continued:

> "59. Mr Blundell [*counsel for the Secretary of State*] submits that in fact this case falls between categories 2 and 3, but is closer to category 3. Paragraph 53 of the Secretary of State's skeleton argument states:
>
> > "The basis upon which the member states agreed to Latvia (and other Accession states) joining the European Union was a matter of political choice of the highest order, the precise terms of which involved a considerable amount of economic, social and political judgment."
>
> 60. That paragraph is a perfectly valid comment about Annex VIII of the Accession Treaty. But this court is not reviewing the proportionality of that Annex. We are looking at measures taken by the UK Government pursuant to paragraph 5 of that Annex.
>
> 61. Mr Blundell submits that the decision to extend the WRS was a highly political decision. It involved the interpretation of an international treaty. It may affect the reciprocal rights of any UK citizens working in Latvia. The extension of the WRS was a high level political compromise on a very sensitive issue.
>
> 62. In my view, Mr Blundell puts his submissions rather too high. The decision to extend the WRS involved consideration of economic, social and political factors. But it is an overstatement to say that this was a high level political decision. I accept that by reference to *Lumsdon's* case, para 35, the decision falls between categories 2 and 3, but I do not accept that it is closer to category 3.
>
> 63. It is not a consequence of *Lumsdon*'s case that every case must be put into one of three boxes, each with its own label affixed. Decisions which the court may be called upon to review are infinitely varied. The intensity of review depends upon the nature of the decision. *Lumsdon's* case provides helpful guidance in determining the extent of that scrutiny. In the present case the degree of scrutiny should not be intense, but I would not go so far as to say that the "manifestly disproportionate" test applies."

90. It seems clear, therefore, that this court applied a standard of review somewhere between the "manifestly disproportionate" test and the "less restrictive alternative" test which would normally apply to a second category case. The precise nature of this intermediate test was not further explored, no doubt because on the court's analysis of the facts it made no difference which test was applied, and the court concluded that there had been no error of law in the Upper Tribunal's conclusion. The key passage in this court's reasoning is at [77] to [79]. The evidence before the Upper Tribunal showed that the two-year extension would yield little additional information of value, nor would it make any substantial contribution to alleviating the problem of disturbance of the UK labour market, although it was possible that extending the scheme could have a small effect at the margin. Jackson LJ continued:

> "79. When that small benefit is weighed against the profound consequences for individuals such as the respondent in this case, it is hardly surprising that the Upper Tribunal found the extension to be disproportionate, whether applying a moderate degree of scrutiny or the "manifestly disproportionate" test most favourable to the Secretary of State."

91. In Gubeladze (SC), the Supreme Court upheld the conclusion reached by the Upper Tribunal and this court. For present purposes, it is sufficient to quote the judgment of Lord Lloyd-Jones and Lord Sales at [70] to [72]:

> "However, we cannot accept Mr Chamberlain's wider submission that Judge Ward and the Court of Appeal erred in their assessment regarding the third stage of the proportionality analysis (proportionality stricto sensu). The position was stark. The extension of the WRS would have only a small and rather speculative mitigating effect in relation to the serious disturbances in the UK's labour market, as found by the MAC, whereas the burdens and detriments it would impose on employers and A8 nationals working in the UK were substantial and serious.
>
> We should say that we have some reservations about whether Rupert Jackson LJ was right to criticise the level at which Judge Ward pitched the intensity of review which he considered to be appropriate in this case. Although, obviously, Judge Ward did not have the benefit of the analysis by this court in *Lumsdon* when he made his assessment, we think that in broad terms the level of intensity he judged to be appropriate in this case is compatible with the guidance given in *Lumsdon*. In particular, the extension of the WRS was rightly regarded by Judge Ward as a national measure which was restrictive of the fundamental freedom of movement for A8 nationals as protected by the Treaties, taken in reliance on a reservation or derogation in an EU instrument, in relation to which a

> relatively demanding intensity of review is appropriate: see *Lumsdon* at para 74.
>
> However, this is not a case which turns on the precise calibration of the intensity of review to be applied in relation to the decision to extend the WRS in 2009. Both Judge Ward and the Court of Appeal considered that this measure failed to pass muster even if the markedly more generous "manifestly inappropriate" test was applied. In our view, they were plainly entitled to come to that conclusion in the circumstances of this case, particularly in the absence of any attempt by the Secretary of State to explain why the very limited and rather speculative benefits associated with the extension of the WRS in addressing labour market disturbances outweighed the considerable detriments for employers and workers from A8 States associated with the scheme. We agree with their conclusion."

92. The example which the Supreme Court gave in Lumsdon of application of a "manifestly disproportionate" test to national measures implementing EU measures, in [73], was R v Minister of Agriculture, Fisheries and Food, ex parte National Federation of Fishermen's Organisations (Case C-44/94) [1995] ECR I-3115. That case was a reference for a preliminary ruling by the English Divisional Court, in judicial review proceedings challenging the validity under EU law of an Order made under section 4 of the Sea Fish (Conservation) Act 1967, regulating the number of days a year that UK fishing vessels over 10 metres in length could spend at sea. The claimant Federation alleged that the Order was contrary to various EU measures, as well as to the EU principles of equal treatment, proportionality and respect for the right to property and the right to pursue a trade or profession: see the judgment of the CJEU at paragraph 12. The challenge based on the principle of equal treatment was rejected by the Court at paragraphs 44 to 50 of the judgment. The proportionality challenge was also rejected, the court holding at paragraph 58 that:

> "The national measures at issue do not appear to be manifestly disproportionate to the objective pursued. That conclusion cannot be invalidated by the mere fact that the United Kingdom chose those measures in preference to others, as it was entitled to do by virtue of the discretion conferred on it by the Commission decision."

93. It does not appear to have been argued that the Order infringed any of the fundamental freedoms, but it may be noted that the CJEU applied a "manifestly disproportionate" test even though the principles of equal treatment and proportionality had been in issue. The standard applied might have been different, however, had the court found that there was a prima facie breach of those principles which required justification by the UK.

94. I now come to a case of particular relevance to the present dispute, where the CJEU applied the "less restrictive alternative" test in relation to the right to provide services, where the restriction in question consisted of an obligation to appoint a tax representative in the Member State where the services were provided, and the Member State sought to justify the restriction on grounds of fiscal efficiency and the prevention of tax evasion. The case is European Commission v Kingdom of Spain (Case C-400/08) [2011] ECR I-1915, judgment in which was delivered on 11 December 2014 by the Fifth Chamber of the CJEU. The relevant Spanish legislation required the appointment of a tax representative, resident in Spain, by pension funds or insurance companies established in other Member States which wished to provide their services in Spain. It was common ground that this obligation restricted the freedom to provide services, but the Kingdom of Spain sought to justify the restriction by the need for effective fiscal supervision and the prevention of tax evasion. It also argued that the restriction went no further than was necessary to attain those objectives.

95. The CJEU began by analysing the nature of the restriction of the freedom to provide services, in paragraph 41 of the judgment:

> "As the Commission rightly states, the obligation to appoint a tax representative in Spain is likely to involve additional costs for pension funds established in Member States, other than the Kingdom of Spain, offering occupational pension schemes in that Member State, and for insurance companies operating in Spain under the freedom to provide services. Consequently, that obligation makes the provision of services by those entities to persons residing in Spain more difficult and less attractive than the provision of similar services to the same persons by entities established in Spain which are not subject to that obligation. Furthermore, the fact that that representative must reside in Spain impedes the freedom to provide services for persons and undertakings established in Member States other than the Kingdom of Spain and wishing to provide tax representation services to entities or natural persons operating in Spain."

Thus the persons whose freedom to provide services was impeded included foreign-based tax representatives, as well as the foreign pension funds and insurance companies.

96. The court went on, at [42], to state its approach to national measures capable of hindering the exercise of fundamental freedoms:

> "42. However, according to the Court's well-established case-law, national measures, capable of hindering the exercise of fundamental freedoms guaranteed by the FEU Treaty or of making it less attractive, may nonetheless be allowed provided that they pursue a legitimate objective in the public interest, are appropriate to ensuring the attainment of that objective, and do not go beyond what is necessary to attain the objective pursued…

> 43. It is for the national authorities, where they adopt a measure derogating from a principle affirmed in EU law, to show in each individual case that that condition is satisfied. The reasons which may be invoked by a Member State by way of justification must be accompanied by an analysis of the appropriateness and proportionality of the measure adopted by that State and by specific evidence substantiating its arguments (see judgment in *Commission v Belgium* EU:C:2014:24, paragraph 33 and the case-law cited.)"

97. The Court then noted, at paragraph 45, that it had "held on numerous occasions that the prevention of tax avoidance and the need for effective fiscal supervision may be relied on to justify restrictions of the exercise of the fundamental freedoms guaranteed by the Treaty". It also held, at paragraph 47, that the obligations imposed on the tax representatives by the national legislation were "an appropriate means of ensuring the effective collection of the tax due". Nevertheless, after considering the evidence on the issue of proportionality, the Court concluded that the Kingdom of Spain had not discharged the burden on it of showing that the same objective could not be achieved by less prejudicial means: see paragraphs 56 to 62. Three points in the Court's discussion seem to me particularly worthy of note. First, the Court accepted the Commission's submission that the relevant tax obligations could be fulfilled by the non-resident pension funds and insurance companies themselves, without having to incur the necessary costs involved in designating a tax representative resident in Spain (paragraph 56). Secondly, the Court also agreed with the Commission that legislation offering the choice of either appointing a tax representative or doing the relevant tasks themselves would have been less prejudicial to the freedom to provide services than the general obligation in issue (paragraph 58). Thirdly, the Court was unimpressed by arguments of administrative convenience, saying at paragraph 61:

> "However, it is clear from the case-law of the Court that administrative difficulties do not constitute a ground that can justify a restriction on a fundamental freedom guaranteed by EU law…"

98. Seabrook naturally relies on the judgment in Commission v Spain, and the fact that the case involved an obligation to appoint tax representatives resident in the host Member State, in support of its argument that the appropriate standard of review in the present case is the "less restrictive alternative" test. There are, however, some important differences from the present case, which must not be overlooked. In the first place, the national legislation at issue in Commission v Spain was not intended to implement any EU measures. Secondly, there was nothing remotely comparable to the background of tax evasion on a massive scale with which HMRC have long had to contend in relation to excise goods before duty has been paid on them. Thirdly, the tax-related functions which the Spanish representatives had to perform seem to have been relatively straightforward, and the facts bore no resemblance to the often complex supply chains of excise goods in which warehousekeepers are liable to

become involved, albeit in the secondary role of providing storage facilities for the goods.

99. For these and similar reasons, HMRC submit that the appropriate standard of review in the present case is the "manifestly disproportionate" test applicable to national measures which implement EU measures. Mr Kinnear made it clear in oral argument that this was his primary position. His fall-back argument, if we concluded that the circumstances of the present case fell somewhere between the second and third Lumsdon categories, was that they are much closer to category 3 and we should therefore still apply a similar test.

Discussion

100. In the light of the principles discussed above, I must now decide what is the appropriate standard of review to apply when considering whether the duty representative requirements in regulation 9(2) of WOWGR are contrary to EU law. The central challenge to the lawfulness of the requirements, as I have explained, lies in the discrimination between owners of dutiable goods who wish to keep them in an excise warehouse in the UK for more than the initial period, depending on whether the owner is a registered owner based in the UK or a foreign owner. Regard must also be had to the restrictive effect of regulation 9(2), both on the free movement of relevant goods and on the freedom of warehousekeepers and duty representatives to provide their respective services.

101. The general purpose of WOWGR, in the words of the Explanatory Note which accompanied them, is to "provide for the approval and registration of (i) excise warehousekeepers, (ii) owners of goods held in excise warehouses and (iii) duty representatives of owners of goods held in excise warehouses". The Regulations were said to implement Articles 11, 12 and 13 of Council Directive 92/12/EEC, which was later repealed and replaced by the 2008 Directive. Article 11 of the 1992 Directive corresponded to what is now Article 15 of the 2008 Directive, while Article 12 corresponded to the first part of the present Article 16(1). Article 13 of the 1992 Directive set out various requirements for authorised warehousekeepers, which are now reflected in Article 16(2). They included a requirement to "(b) comply with the requirements laid down by the Member State within whose territory the tax warehouse is situated", and there was a general provision that "The requirements must respect the principle of non-discrimination between national and intra-Community transactions". That particular general provision does not appear to be replicated in the 2008 Directive, perhaps on the basis that it goes without saying, but the second part of Article 16(1) now expressly provides that:

> "Such authorisation shall be subject to the conditions that the authorities are entitled to lay down for the purposes of preventing any possible evasion or abuse."

102. Against this background, I start from the position that regulation 9(2) forms an integral part of the regulatory scheme introduced by the UK in implementation of what are now Articles 15 and 16 of the 2008 Directive.

103. It is also material to note, in my judgment, that the concept of a "tax representative" had a part to play in both the 1992 and the 2008 Directives. In the 1992 Directive, Articles 15 to 20 (Title III) dealt with the movement of goods. The basic rule, in Article 15(1), was that "the movement of products subject to excise duty under suspension arrangements must take place between tax warehouses". There were various exceptions to this general rule in Article 16, which in specified circumstances enabled the consignee to be a professional trader without authorised warehousekeeper status. Article 17 then provided as follows:

> "A tax representative may be appointed by the authorised warehousekeeper of dispatch. This tax representative must be established in the Member State of destination and authorised by the tax authorities of that State. He must, instead of and in the place of the consignee without authorised warehousekeeper status, comply with the following requirements…"

The requirements were, in short, to guarantee the payment of duty in the Member State of destination and to keep an account of deliveries of products, informing the tax authorities of the place of delivery.

104. Article 17 of the 1992 Directive had no direct equivalent in the 2008 Directive, but the "Distance selling" provisions contained in Article 36 of the 2008 Directive include a similar provision in paragraph (3):

> "The person liable to pay the excise duty in the Member State of destination shall be the vendor.
>
> However, the Member State of destination may provide that the liable person shall be a tax representative established in the Member State of destination and approved by the competent authorities of that Member State…"

The important point, which I draw from both Article 36(3) of the 2008 Directive and Article 17 of the 1992 Directive, is that the concept of a duty representative has at all material times had a part to play in the relevant governing framework of EU law, and such a representative must be (a) established in the Member State of destination, and (b) approved by the tax authorities of that State.

105. Two of the factors which I have so far mentioned (namely the general purpose of WOWGR, and the fact that they implement EU legislation pursuant to a broad discretion conferred on Member States) may at first sight appear to provide grounds for concluding that the present case falls within the third Lumsdon category, with the result that the appropriate standard of review to apply would be the "manifestly disproportionate" test. For the reasons which follow, however, I consider that this would be the wrong conclusion, and that the appropriate standard of review is instead the significantly more exacting test applied to cases in the second Lumsdon category, i.e. the "less restrictive alternative" test.

106. In the first place, it is important to remember that the Lumsdon categories, helpful and valuable though they are as tools of analysis, have never been formulated as guiding principles by the CJEU itself. Rather, as Lord Reed and Lord Toulson emphasised in

Lumsdon at [34], the EU law principle of proportionality is a flexible one, and it is necessary to examine the case law of the Court to understand how it is in practice applied in different contexts.

107. Secondly, as Lord Reed and Lord Toulson also explained at [37], proportionality as a ground of review of national measures has generally been applied more strictly by the CJEU where the measures interfere with the fundamental freedoms guaranteed by the EU Treaties. The question, in such circumstances, is normally "whether a member state can justify an interference with a freedom guaranteed in the interests of promoting the integration of the internal market and the related social values, which lie at the heart of the EU project." In such a context, the function of the principle of proportionality is generally "as a means of preventing disguised discrimination and unnecessary barriers to market integration."

108. The reference to "disguised discrimination" is important, and brings me on to the third point. The principle of non-discrimination on grounds of nationality is a fundamental principle of EU law. It is both reflected and embodied in Article 18 TFEU, which states in emphatic terms that:

> "Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.
>
> The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination."

As I have explained, regulation 9(2) of WOWGR, which lies at the heart of the present dispute, is prima facie discriminatory in its effect, and it forms an integral part of the legislative scheme adopted by the UK to implement Articles 15 and 16 of the 2008 Directive (and their predecessors in the 1992 Directive). Given the central importance in EU law of equal treatment and the prevention of discrimination, it would in my judgment need clear and explicit guidance by the CJEU if the proportionality of regulation 9(2), and the legislative scheme of which it forms part, were to be reviewed by reference to any standard falling short of the "less restrictive alternative" test. But no suggestion of such a relaxation is to be found in any of the decisions of the CJEU to which we were referred.

109. Fourthly, the correctness of this approach is to my mind reinforced by the fact that the relevant provisions of WOWGR also involve restrictions of two of the fundamental freedoms (movement of goods, and the provision of services) in the ways I have outlined. Taken together with the discriminatory effect of regulation 9(2), these features of the present case in my judgment decisively outweigh the mere fact that WOWGR were promulgated in order to implement provisions in the relevant Directives. Indeed, precisely because Member States are given a broad discretion as to how to implement those Articles, it must in my view have been intended by the EU legislature that the discretion should be exercised in accordance with the underlying principles of EU law, including the fundamental freedoms which underpin the integration of the internal market and the principles of equal treatment and non-discrimination. In such circumstances, both principle and authority indicate that the

four *Gebhard* criteria should apply, and a correspondingly heavy burden of justification has to be discharged by the UK.

110. I now turn to the evidence adduced by HMRC to justify the alleged discrimination. It is mainly contained within the witness statement of Ms Agatha-Jones, to which I have already referred for her explanation of the problem of tax fraud in the illicit alcohol market in the UK. In the relevant part of her statement, she begins by emphasising the cash flow benefits for a business in suspending the payment of excise duty and VAT until the goods are released to the UK market. Because the sums involved are so substantial, any business which wishes to take advantage of this procedure must be able to demonstrate that it has processes in place to protect HMRC, and that it can satisfy HMRC's "fit and proper" test as outlined in section 3.2 of Excise Notice 196. This test is applied to all applications for approved status, whether as warehousekeepers, warehouse premises, owners, duty representatives or registered consignors. Once an application is received, HMRC will carry out necessary verification and pre-approval checks, which normally include a visit to the place of business. Such pre-approval visits not only help HMRC decide whether the business is "fit and proper" for approval, but also provide an opportunity to inform the business of its legal obligations.

111. With particular reference to the duty representative regime, Ms Agatha-Jones gives the following explanation:

> "30. The introduction of the duty representative regime enabled overseas businesses to appoint a UK based company to act as their representative. Where an overseas business appoints a duty representative, then it is able to trade in duty-suspended excise goods in the same way as a UK business that has been approved as fit and proper by HMRC. HMRC require that the level of assurance provided by overseas businesses and individuals who wish to trade in excise duty suspended goods needs to at least mirror that of a UK business.
>
> 31. In order to be WOWGR approved/registered in the UK HMRC undertake a number of risk based checks. This includes a visit to the premises and interviews with key personnel to establish if they are fit and proper. Consideration is also given as to whether the business is financially viable and can credibly protect the revenue…
>
> 32. HMRC would face significant difficulty in establishing whether a business based overseas is fit and proper for the purposes of the regime due to multiple factors including legal restraints and the physical location of the business. For example, it would not be practical or cost effective for HMRC to undertake a pre-approval visit to the business to assess whether it is fit and proper to trade in duty-suspended good in the UK and inform that trader on its legal obligations whilst dealing in duty-suspended good. It would remain difficult for HMRC to provide ongoing assurance and support to an overseas business for the same reasons.

> 33. The duty representative[s] therefore takes on the roles and responsibilities of the overseas business, including the requirement to undertake appropriate due diligence. This means the duty representative must comply with the due diligence conditions and be satisfied that any information provided by the overseas owner meets the requirements of the due diligence condition. The duty representative must:
>
> - objectively assess the risks of alcohol duty fraud within the supply chains in which it operates
> - put in place reasonable and proportionate checks, in its day to day trading, to identify transactions that may lead to fraud or involve goods on which duty may have been evaded
> - have procedures in place to take timely and effective mitigating action where a risk of fraud is identified
> - document the checks it intends to carry out and have appropriate management governance in place to ensure that these are, and continue to be, carried out as intended.
>
> 34. A duty representative must be satisfied that any information provided by the overseas owner meets the requirements of the due diligence condition that applies to them as duty representative; it is for the duty representative to decide how this is achieved. For example, the duty representative may obtain what would be recognised as (but not necessary labelled as such) "due diligence information" from the overseas owner; it may decide it needs to test that information; it may decide it needs to fill gaps in information it receives from the overseas owner. Like all due diligence, HMRC will not be prescriptive on what the checks consist of/need to be performed to meet the "satisfactory due diligence procedures" that is in the Notice 196. What is required is dictated not by HMRC but by the situation, by the need to operate responsibly and ensure that it is minimising the risks to the revenue posed by the transactions it enters into.
>
> 35. Where a duty representative fails to meet the requirements of the regime, they place UK revenue at risk. As such, HMRC may impose further sanctions on the duty representative such as financial penalties, additional conditions on their approval or even revocation."

112. Ms Agatha-Jones also refers to a memorandum from HM Customs and Excise, entitled "Holding and moving alcohol and tobacco in the single market", which was dated December 2000 and presented to the House of Commons Treasury Sub-committee on 8 February 2001. A Supplementary Memorandum to this document

referred to the recently introduced WOWGR, explained that the initial impetus for them was the perceived need to provide for the approval and registration of warehousekeepers, and continued (with my emphasis):

> "Operational colleagues had cited their inability to identify the actual owners of goods held in excise warehouses as a barrier to implementing effective anti-fraud measures.
>
> Many of those perpetrating outward diversion fraud were shadowy figures who were buying and selling warehoused goods without the warehousekeepers' knowledge. When irregularities occurred after the goods were removed from warehouse and enquiries were made to establish the ownership of the goods (and thereby the person liable to pay excise duty), the audit trail invariably led to missing traders.
>
> The [*WOWGR*] provide for the authorisation of warehousekeepers. They also require UK revenue traders (the owners of the warehoused goods) to be registered with Customs if they wish to deposit duty suspended goods in an excise warehouse or deal in warehoused goods. *To prevent fraudsters from avoiding the need to be registered by moving their operations overseas (nominally at least) the Regulations require UK duty representative[s] to be appointed to act on behalf of non-UK owners*. The benefits of [*WOWGR*] are:
>
> - Customs can identify those persons dealing in warehoused goods.
>
>   Credibility checks are carried out on owners and warehouse keepers by Customs prior to authorising them. We have an opportunity to reject applications for registration;
>
> - A UK based person is always liable to pay the duty whenever the [*WOWGR*] requirements are not met."

113. HMRC also rely, in relation to this part of the case, on the statement of Megan MacDonald, who is a front line manager at the Excise Liaison Office ("the ELO"). She explains that the ELO (formerly known as the National Verification Centre) is the team responsible for liaison with other Member States on matters relating to excise duties. The team currently consists of about ten members of staff. In relation to "outward" requests, she outlines the process whereby requests for information are made in English, on a specified form, before being forwarded to the relevant Member State; when a reply is received, it may require translation which generally takes between 7 and 10 days. Article 11 of the relevant EU Regulation governing administrative cooperation between Member States in excise matters (Council Regulation 389/2012 of 2 May 2012) provides for a response to a request to be provided within three months, and if that is not possible, requires a reason to be given for the delay, with an indication of when a response will be available. Member States are also entitled to refuse a request under Article 25, if (in short) the requesting authority has failed to exhaust the usual sources of information which it could have

used, or if the number and nature of the requests made within a specific period impose a disproportionate administrative burden on the requested authority. A record is kept by the EU Commission of response times to requests, which shows that delays can and do occur, and that average response times have fluctuated over the years.

114. Presumably for reasons of geographical proximity and cross-Channel trade, by far the largest number of ELO requests are made to the French authorities. Ms MacDonald explains how this has led to a backlog, with approximately 200 requests made by the UK between April 2016 and January 2018 that are still outstanding and are likely to be cancelled, and a further 181 UK requests made between January 2018 and January 2019 that are yet to be addressed. Ms MacDonald expects the waiting time on all these requests to be at least 2 to 3 months.

115. HMRC's evidence on the issue of justification is severely criticised by Seabrook. First, Seabrook submits that the practical and administrative difficulties advanced by HMRC in establishing whether a business based overseas is fit and proper "do not constitute a ground that can justify a restriction on a fundamental freedom guaranteed by EU law": see the Kingdom of Spain case, at paragraph 61. The same must be true, says Seabrook, where the restriction in question is of the equally fundamental EU law principle of non-discrimination. Secondly, even if such a justification were in principle admissible, the evidence adduced by HMRC is too vague and unsubstantiated to discharge the burden on the UK. There is no detailed analysis of the appropriateness and proportionality of regulation 9(2), and the generalities advanced by HMRC do not begin to constitute "specific evidence substantiating its arguments": see again the Kingdom of Spain case, at paragraph 43. Thirdly, there is in any event no justification for the blanket nature of the restriction. The requirement for a foreign owner to have a duty representative as its agent is absolute, and no facility is provided for a foreign owner to apply to satisfy the fit and proper criteria itself and thus obtain approval as a registered owner. Fourthly, HMRC do not explain why, if it is too difficult for them to carry out the task of assessing the fit and proper status of a business established outside the UK, it is an effective or acceptable solution to shift the burden on to the duty representative. Fifthly, in so far as HMRC rely on the delays and problems encountered in liaising with the revenue authorities of other Member States, as set out in the evidence of Ms MacDonald, it is not clear what relevance this has to the present claim, and in any event administrative difficulties of this nature cannot justify a restriction on fundamental freedoms or principles of EU law.

116. These submissions of Seabrook are accompanied by the detailed factual evidence filed in support of its application for judicial review. It is unnecessary for me to summarise this evidence, as it is now agreed that most of it goes to the issues which will be determined by the FTT. It is enough to say that Seabrook strenuously denies the alleged defaults which led to the revocation of its approved status by HMRC, and asserts that the compliance burdens placed upon it by HMRC are unreasonable and impractical. To give just one example, Mr Stuart Seabrook, who is a director of the company and the son of its founder, describes in his second statement how it took him over a month to investigate a single supply chain in the manner suggested by HMRC. Mr Seabrook concludes, at paragraph 57:

> "The fact that it took me so long, with difficulty, to examine one supply chain demonstrates with clarity how unreasonable and disproportionate HMRC's approach to due diligence is. It

> is completely disproportionate to the fees which we charge and the role which a warehousekeeper plays. If we did what is demanded, it would be completely uncommercial and business would grind to a halt."

117. Standing back and looking at the question in the round, with the benefit of the evidence and submissions which I have summarised, I must now state my conclusions on the proportionality of the duty representative requirements.

118. The first question in a proportionality review is "whether the measure in question is suitable or appropriate to achieve the objective pursued": see Lumsdon, at paragraph 33. In my judgment, regulation 9(2) of WOWGR, and the regulatory scheme of which it forms part, fall comfortably within the wide margin of appreciation afforded to Member States by Articles 15 and 16 of the 2008 Directive (and their predecessors in the 1992 Directive). It is not for this court to attempt to second-guess the considerations of policy and practical experience which led HMRC and the UK Government to conclude that there should in principle be a requirement for foreign owners of excise goods held in a duty warehouse to have an approved duty representative with a place of business in the UK. Such a requirement seems to me to fall squarely within the general ambit of Article 15(1) of the 2008 Directive, and to be both suitable and appropriate as part of a scheme intended to achieve the legitimate purpose of enabling effective supervision and control to be exercised by HMRC, in a field of commerce where (as the evidence establishes, and is not in dispute) fraud and tax evasion are regrettably prevalent, leading to an annual loss to the Exchequer of the order of £1.3 billion.

119. The next question, reflecting the second limb of the proportionality principle, is "whether the measure is necessary to achieve that objective, or whether it could be achieved by a less onerous method": see again Lumsdon, at paragraph 37. In answering this question, as I have explained at [105] to [109] above, I consider that the more stringent "less restrictive alternative" standard of review must be applied.

120. I would accept that there is force in some of Seabrook's criticisms of the evidence and arguments put forward by HMRC in support of the duty representative requirements in WOWGR. For example, much of Ms Agatha-Jones' evidence is pitched at a fairly high level of generality, and there is little in the way of detailed factual analysis or consideration of possible alternatives to enable the question to be investigated in any depth. Furthermore, to the extent that she seeks to rely on arguments of administrative convenience, the CJEU has repeatedly ruled that such difficulties cannot justify a restriction on fundamental freedoms, and the same must in my judgment be true of interference with a principle of EU law as fundamental as non-discrimination on grounds of nationality.

121. On the other hand, it is essential not to overlook or downplay the very real problems posed by excise duty and VAT fraud, and as far as possible to respect the legislative choices made by the UK in deciding how to combat them. It cannot sensibly be denied that there is a real and pressing need to have effective measures in place for that purpose, and the principle of proportionality will only be infringed, even when applying the stricter standard of review, if and to the extent that there is truly a "less

restrictive alternative" available. Moreover, the need to protect public tax revenues, and to combat tax evasion, is not only obvious as a matter of common sense, but has explicit recognition in Article 16 of the 2008 Directive. It has also long been recognised in the case law of the CJEU that the prevention of tax avoidance and the need for effective fiscal supervision may be relied on to justify restrictions on the exercise of any of the fundamental freedoms: see the Kingdom of Spain case, at paragraph 45, and the cases there cited.

122. From that perspective, I find it helpful to consider, first, whether the requirement for a foreign owner of excise goods to have a duty representative if it wishes to hold goods for longer than 72 hours in a UK tax warehouse is inherently objectionable on proportionality grounds; and secondly, if it is not, whether the UK could have achieved the same objective by giving a foreign owner the choice of either appointing a duty representative or applying for approval as a registered owner itself. If the answer to the second question is yes, the conclusion might well follow that the "less restrictive alternative" test was not satisfied. If, however, the answer to the second question is negative, I would be disposed to hold that the test of proportionality is satisfied, because no other less restrictive alternative to the duty representative regime can plausibly be found on a fair reading of the evidence before the court.

123. With regard to the first question, I am satisfied that there is nothing objectionable in principle about the requirement for a foreign owner of excise goods to appoint a duty representative. The concept of a duty representative, including the requirement for it to be resident in the host State, has explicit recognition in both the 1992 and the 2008 Directives. It therefore provides an obvious model for a Member State to follow when exercising the discretion conferred by Articles 15 and 16, and strongly suggests that the element of indirect discrimination on grounds of nationality likely to be inherent in such a system will not be a fatal objection, so long as it can be justified on grounds of effective supervision and the prevention of tax evasion. Ms Agatha-Jones has provided good practical reasons why such a system is in general likely to be preferable to a system of registration of foreign owners, and I am satisfied that the basic legislative choice made by the UK to adopt this solution is not open to objection on proportionality grounds. Nor do I think it is fair to characterise HMRC's reasons for adopting the system as mere matters of administrative convenience. Rather, it is a substantive matter of putting in place an effective system that will enable HMRC to fulfil their basic function of supervising trade in goods under duty suspension and countering tax evasion.

124. I now turn to the second question. The argument that foreign owners should have been given the choice of applying to HMRC for registration as owners in their own right, instead of having to appoint a duty representative, is in my view Seabrook's strongest submission, and it merits careful consideration. From one point of view, it may be said that in a properly functioning internal market foreign owners should not be treated differently from UK-based owners of excise goods, and the only way to achieve equal treatment would be to give foreign owners the right to apply for approval as registered owners themselves. The argument has some theoretical attraction, but in my judgment it must be rejected. As a practical matter, I do not think that HMRC can sensibly be required to offer the facility of registration as an owner to persons who may be resident anywhere in the EU, as an alternative to appointing a duty representative. It would be wrong to underestimate the grave difficulties for

HMRC in having to satisfy themselves about the suitability of traders resident outside the jurisdiction, and in exercising appropriate supervision over them. Again, this is not just a matter of administrative convenience, but a reflection of practical realities.

125. The evidence adduced by HMRC may be criticised as rather thin, but it is sufficient to satisfy me that the duty representative system cannot sensibly be broken down into component parts but must be viewed and assessed as a whole. On such an appraisal, foreign owners are in essence given the choice whether (a) to appoint a duty representative, without having to establish themselves in the UK or obtain approval as registered owners themselves; or (b) to establish themselves in the UK, through a branch or subsidiary, and then go to the considerable trouble and expense of obtaining approval for the branch or subsidiary as a registered owner. That is a rational system, which in my view the UK was fully entitled to adopt. It would be wrong to conclude that it fails to satisfy the test of proportionality, merely because it fails to provide a foreign owner with the further possibility of seeking approval as a registered owner in its own right, while remaining resident and established outside the UK and thus outside the immediate control and supervision of HMRC.

126. In conclusion, therefore, I would hold that regulation 9(2) of WOWGR is lawful because it satisfies the EU test of proportionality, applying for that purpose the stricter approach which asks whether the same result could have been achieved by less restrictive means rather that the test of manifest disproportionality. If my conclusion about regulation 9(2) is correct, it must then also follow that the corresponding imposition of a duty point under regulation 21(1)(b) is likewise not open to objection. Accordingly, I would dismiss Seabrook's challenge to the lawfulness under EU law of regulations 9 and 21.

Are the due diligence requirements imposed on duty representatives and/or authorised warehousekeepers by Excise Notice 196 contrary to EU law?

127. I now come to Seabrook's challenge to the lawfulness under EU law of the due diligence requirements which are imposed by Excise Notice 196 on duty representatives and authorised warehousekeepers. It will be recalled that Seabrook was approved by HMRC in both capacities, before the revocations of those approvals which led to the present proceedings. The relevant grounds of review, as set out in Seabrook's claim for judicial review, are that the requirements, as interpreted by HMRC, are unlawful in that they:

> "(i) impermissibly seek to shift the burden of monitoring duty suspended traders away from themselves and onto the duty representative or authorised warehousekeeper;
>
> (ii) are discriminatory: for UK-established businesses, HMRC will assess for themselves the credibility and viability of the business seeking to own goods in a warehouse. For non-UK established businesses, this burden is shifted to the duty representative; [*and*]
>
> (iii) are disproportionate: a duty representative or authorised warehousekeeper does not have sufficient knowledge and awareness to be able to carry out the checks and reviews

> demanded of them. It is, accordingly, not appropriate to impose the burden on them nor proportionate to the roles of either a duty representative or an authorised warehousekeeper. The due diligence requirements fundamentally fail to recognise that the warehousekeeper is not a party to the trade transactions and has no contractual relationship other than with those using its services."

128. As I have already pointed out, at [5] above, Seabrook now accepts that the issue of lawfulness turns on the true construction of the relevant due diligence requirements in Excise Notice 196, rather than how they are applied in practice by HMRC. The relevant due diligence requirements are contained in section 10 of Excise Notice 196: see [28] to [32] above. I have also explained how these requirements were introduced with effect from 1 November 2014, following the process of informal consultation through the JAAT described by Mr Mountford in his evidence.

The true construction of the due diligence requirements

129. The passages which I have already quoted from section 10 of Excise Notice 196 make it clear that the "due diligence condition" is intended to operate in a flexible, reasonable and proportionate manner. In the extracts which follow, I have emphasised some of the wording which brings this out. At the very beginning of section 10.1, "due diligence" is described as "*the appropriate reasonable care* a company exercises when entering into business relations or contracts with other companies…", and the four obligations listed at the end of section 10.1 (compliance with which is now a condition of approval as an excise warehousekeeper or duty representative) are not framed in absolute terms. Rather, the obligations are:

> (a) to carry out an objective assessment of the risks of alcohol duty fraud "*within the supply chains in which you operate*";
>
> (b) to put in place "*reasonable and proportionate checks*" to identify suspicious transactions;
>
> (c) to have procedures in place "*to take timely and effective mitigating action*" where a risk of fraud is identified; and
>
> (d) to document the checks intended to be carried out "*and have appropriate management governance in place*" to make sure these operate as intended.

These requirements are stated at a high level of generality, not least because they apply to widely differing types of business (registered owners and registered consignors, as well as excise warehousekeepers and duty representatives).

130. The need for an individual assessment, tailored to the particular trading relationships of the business in question and the main risks of fraud to which it may be exposed, is then emphasised throughout section 10.2. Once the main risks of fraud have been established, the level of regular checks "*to establish the integrity of the excise transactions and supply chains you are trading in… needs to be reasonable and proportionate to the risks*". Depending on the nature and complexity of the business transactions involved, checks will need to be "*individually tailored*". The so-called

"FITTED" checks are then put forward as "a *general* rule", listing matters upon which the checks "should *normally* focus".

131. Section 10.4, dealing with the review by HMRC of due diligence procedures, states that:

> "We will aim to establish whether you have objectively assessed the risks in your supply chain, and you must be able to demonstrate that you have put in place *reasonable and proportionate checks and effective procedures to respond to fraud risks when they arise*".

If the due diligence procedures are considered insufficient, HMRC "*will carefully consider the facts of the case before taking further action, but where appropriate we will seek to support you to strengthen your procedures*". In more serious cases, HMRC "*will apply appropriate and proportionate sanctions*", and in cases of serious non-compliance "such as ignoring warnings or knowingly entering into high risk transactions, we may revoke excise approvals and licences".

132. I have already quoted, at [30] above, the introduction to sections 10.5 and 10.6, at the end of section of 10.4, which emphasises that the guidance in those sections is "*not intended to be prescriptive or exhaustive*". The examples set out in sections 10.5 and 10.6 extend over four pages, under the sub-headings which I have set out at [31] and [32] above. The matters listed, bearing in mind that they are neither prescriptive or exhaustive, seem to me generally helpful and to reflect ordinary considerations of commercial common sense. Nevertheless, the examples of due diligence checks given in section 10.6 are extensive, and I accept that in some instances they could be difficult or onerous to comply with. For example, the checks listed under the sub-heading "Identity" include:

> - "check company details provided to you against other sources, e.g. website, letterheads, telephone directories etc.
>
> …
>
> - obtain copies of certificates of incorporation, VAT registration certificates and excise registration certificates where appropriate and where a trade class is quoted on these check whether or not it relates to the type of trade you are engaging in
>
> …
>
> - obtain signed letters of introduction on headed letter paper and references from other customers or suppliers
>
> - insist on personal contact with a senior official of the prospective supplier and where necessary, make an initial visit to their premises. You should use this opportunity to confirm the identity of the person you

> intend doing business with and keep a record of your meeting.
>
> - establish what your customer's or supplier's history in the trade is. Can this be evidenced?
> - obtain the prospective customer's or supplier's bank details. In the case of an import or export, does the supplier or recipient share the same country of residence as their bank?
> - establish who you will be paying. Is this the same company as the one you are directly dealing with?
> - if you are providing a service who will be paying for it?"

133. One of the difficulties with the practical application of the due diligence condition in section 10 is that it applies to businesses of widely differing size and type, and does not normally differentiate between (for example) the requirements which apply to a warehousekeeper and those which apply to a duty representative. The guidance also uses imprecise phrases like "the supply chains in which you operate", without explaining in what sense (if any) a warehousekeeper is considered to form part of, or operate within, the supply chains of its customers. There was some debate about these issues before us, but in the context of the lawfulness challenge with which we are concerned, and without a clear focus on the specific facts of a disputed case, I do not consider that we are in a position to resolve questions of this nature. We can do little more than point to the explicit recognition running throughout section 10 of the widely differing factual situations in which it will need to be applied, and to emphasise the need for a sensible, selective and proportionate approach to be taken by HMRC when seeking to apply and enforce its provisions.

134. As I understood Mr Kinnear's submissions, HMRC do not dissent from the guiding principles to the interpretation of the due diligence condition which I have just mentioned, and they also accept (as we put to Mr Kinnear in argument) that section 10 is not intended to provide a uniform set of conditions with which all businesses within its scope must comply, but rather to lay down a non-exhaustive and non-prescriptive list of checks and requirements, which will apply in different combinations to different traders, depending on their particular circumstances. Mr Kinnear also warned us (rightly, in my opinion) of the dangers of our seeking to give specific guidance on questions of interpretation of specific requirements, divorced from a particular factual context. The relief sought by Seabrook by way of judicial review is confined to the three grounds of alleged incompatibility with EU law set out at [127] above, to which I will now turn.

Ground 1: is there an unlawful transfer of monitoring duties?

135. Seabrook's argument starts from the uncontroversial proposition that it is the responsibility of HMRC to supervise and monitor the operation of the excise duty

system. The next step in the argument is that, as a matter of EU law, HMRC may not in practice transfer their own tasks of monitoring and investigation to other persons by obliging them to undertake complex and far-reaching checks. This principle is said to have been established by the CJEU in the context of VAT, particularly in the cases of Mahagében and Dávid, C-80/11 and C-142/11, EU:C:2012:372 ("Mahagében") and SC Paper Consult SRL, C-101/16 ("Paper Consult").

136. Mahagében concerned the right of a trader to deduct input VAT on the basis of invoices issued by its supplier, and the question whether that right could be denied by the tax authority when (having inspected the supplier's premises) it considered the invoices to be inauthentic. The Third Chamber of the CJEU reformulated the relevant questions from the national court in Hungary as asking, in essence, whether the relevant provisions of the 2006 Principal VAT Directive:

> "must be interpreted at precluding a national practice whereby the tax authority refuses the right to deduct on the ground that the taxable person did not satisfy himself that the issuer of the invoice relating to the goods in respect of which the exercise of the right to deduct is sought had the status of a taxable person, that he was in possession of the goods in question and was in a position to supply them, and that he had satisfied his obligations as regards declaration and payment of VAT, or on the ground that that taxable person is not in possession of, in addition to that invoice, other documents capable of demonstrating that those conditions were fulfilled."

(See paragraph 51 of the judgment of the Court).

137. The CJEU began its discussion of the question by noting that the substantive and formal conditions in the 2006 Directive for the exercise of the right to deduct had been fulfilled, with the result that the right to deduct could be refused "only where it is established, on the basis of objective evidence, that the taxable person concerned knew, or ought to have known, that the transaction relied on as a basis for the right to deduct was connected with fraud committed by the issuer of the invoice or by another trader acting earlier in the chain of supply": paragraph 52.

138. The Court continued (omitting citations of authority):

> "53. According to the Court's case-law, traders who take every precaution which could reasonably be required of them to ensure that their transactions are not connected with fraud, be it the fraudulent evasion of VAT or other fraud, must be able to rely on the legality of those transactions without the risk of losing their right to deduct the input VAT…
>
> 54. On the other hand, it is not contrary to European Union law to require a trader to take every step which could reasonably be required of him to satisfy himself that the transaction which he is effecting does not result in his participation in tax evasion…

> 55. Moreover, in accordance with the first paragraph of Article 273 of Directive 2006/112, Member States may impose obligations, other than those provided for by that directive, if they consider such obligations necessary to ensure the correct levying and collection of VAT and to prevent evasion."

139. The Court then held that the measures that Member States are entitled to adopt under Article 273 of the 2006 Directive must not go further than is necessary to attain the specified objectives, with the result that they cannot be used in a way which would "have the effect of systematically undermining the right to deduct VAT and, consequently, the neutrality of VAT, which is a fundamental principle of the common system of VAT": see paragraph 57.

140. The Court continued, in a passage upon which Seabrook relies:

> "59. In those circumstances, it follows from the case-law referred to in paragraph 53 and 54 of the present judgment that determination of the measures which may, in a particular case, reasonably be required of a taxable person wishing to exercise the right to deduct VAT in order to satisfy himself that his transactions are not connected with fraud committed by a trader at an earlier stage of a transaction depends essentially on the circumstances of that particular case.
>
> 60. It is true that, when there are indications pointing to an infringement or fraud, a reasonable trader could, depending on the circumstances of the case, be obliged to make enquiries about another trader from whom he intends to purchase goods or services in order to ascertain the latter's trustworthiness.
>
> 61. However, the tax authority cannot, as a general rule, require the taxable person wishing to exercise the right to deduct VAT, first, to ensure that the issuer of the invoice relating to the goods and services in respect of which the exercise of that right to deduct is sought has the capacity of a taxable person, that he was in possession of the goods at issue and was in a position to supply them and that he has satisfied his obligations as regards declaration and payment of VAT, in order to be satisfied that there are no irregularities or fraud at the level of the traders operating at an earlier stage of the transaction or, second, to be in possession of documents in that regard.
>
> 62. It is, in principle, for the tax authorities to carry out the necessary inspections of taxable persons in order to detect VAT irregularities and fraud as well as to impose penalties on the taxable person who has committed those irregularities or fraud."

141. Paper Consult was another case involving the right to deduct input tax for VAT purposes, in circumstances where the trader which had supplied the relevant services and issued a corresponding invoice had later been "declared inactive" by the tax authorities, such declaration of inactivity being public and accessible on the internet to any taxable person in the relevant Member State. As the Second Chamber of the CJEU noted, in paragraph 34 of its judgment:

> "Those questions concern, in essence, the balancing, on the one hand, of the right to deduct, which is an essential component of the VAT scheme, and, on the other hand, of the fight against tax evasion, which is an objective recognised and encouraged by Directive 2006/112."

142. After referring to the limited circumstances in which the right to deduct input tax may be refused, and pointing out that measures adopted to ensure the correct collection of VAT and to prevent evasion "must not go beyond what is necessary to achieve the objectives pursued", the Court continued:

> "51. On several occasions, the Court has held that the authorities may not oblige a taxable person to undertake complex and far-reaching checks as to that person's supplier, thereby de facto transferring their own investigative tasks to that person (see, to that effect, judgments of 21 June 2012, *Mahagében and Dávid*, C-80/11 and C-142/11, EU:C:2012:373, paragraph 65, and of 31 January 2013, *Stroy trans*, C-642/11, EU:C:2013:54, paragraph 50).
>
> 52. By contrast, it is not contrary to EU law to require a trader to take every step which could reasonably be required of him to satisfy himself that the transaction which he is carrying out does not result in his participation in tax evasion (see, to that effect, judgments of 27 September 2007, *Teleos and Others*, C-409/04, EU:C:2007:548, paragraphs 65 and 68, and of 21 June 2012, *Mahagében and Dávid*, C-80/11 and C-142/11, EU:C:2012:373, paragraph 54).
>
> 53. In this regard, it must be noted that the national rules at issue in the main proceedings do not transfer to the taxable person the monitoring tasks devolving on the authorities, but inform him of the outcome of an administrative investigation from which it is apparent that the taxpayer declared inactive can no longer be monitored by the competent authority, either because that taxpayer no longer met the statutory reporting obligations, or because it has declared information identifying its registered office that does not enable the tax authority concerned to identify it, or because it does not carry on its activity at the registered office or declared tax domicile.

> 54. The only obligation imposed on the taxable person is, in fact, to consult the list of taxpayers declared inactive displayed at the NAFA's headquarters and published on its website, such a verification being, in addition, straightforward to carry out.
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> 55. It thus appears that, by obliging the taxable person to carry out that verification, the national legislation pursues an objective that is legitimate and even imposed by EU law, namely that of ensuring the proper collection of VAT and the prevention of VAT evasion, and that such a verification can reasonably be required of an economic operator. It is, however, necessary to determine whether that legislation does not go beyond what is necessary to achieve the objective pursued."

143. The Court went on to hold that the relevant national legislation did, in fact, go further than was necessary to achieve the stated objective, but for present purposes nothing turns on that part of the Court's decision.

144. In my judgment, it is important to read the principles stated by the CJEU in Mahagében and Paper Consult in the context of the legislative scheme of VAT. In that context, the right to deduct input tax is "an essential component of the VAT scheme" (Paper Consult, at paragraph 34), and central to "the neutrality of VAT, which is a fundamental principle of the common system of VAT" (Mahagében, at paragraph 57). Further, in each case the substantive and formal conditions for exercise of the right to deduct had been fulfilled, so any refusal of the right had to satisfy strict requirements of necessity and proportionality if it was not to infringe EU law. Even in those circumstances, however, the CJEU expressly recognised that it is not contrary to EU law "to require a trader to take every step which could reasonably be required of him to satisfy himself that the transactions which he is effecting does not result in his participation in tax evasion": see Mahagében at paragraph 54, and Paper Consult at paragraph 52. Similarly, where there are indications pointing to an infringement or fraud by an "upstream" trader, a reasonable trader could (depending on the circumstances of the case) be obliged to make enquiries about the person from whom he intends to purchase goods or services "in order to ascertain the latter's trustworthiness": see Mahagében, at paragraph 60.

145. In the present case, fundamental principles of EU law are also to some extent engaged, because the due diligence condition obviously imposes restrictions on the free movement of excise goods, as well as on the freedom to provide services of (among others) warehousekeepers and duty representatives. But, as I have already stressed, the due diligence condition forms part of a regulatory scheme which the UK is expressly authorised by Articles 15 and 16 of the 2008 Directive to put in place to control (among other matters) the holding of excise goods and the operation of a tax warehouse by an authorised warehousekeeper. Furthermore, the authorisation of a warehousekeeper (such as Seabrook) may expressly be made subject to conditions "for the purposes of preventing any possible evasion or abuse": see Article 16(1).

146. Against that background, it seems to me unrealistic to contend that the due diligence condition involves an unlawful transfer of HMRC's duty to monitor the operation of

the excise duty system. On the contrary, the condition forms part of the machinery which, pursuant to the broad discretion conferred on them by the 2008 Directive, HMRC have chosen to adopt for that very purpose. It is true that obligations to make reasonable enquiries and conduct reasonable due diligence are thereby imposed on traders such as Seabrook, but the lawfulness in principle of such requirements is recognised by the CJEU in the passages which I have already quoted from the judgments in Mahagében and Paper Consult. Provided that section 10 of Excise Notice 196 is interpreted in the flexible and proportionate manner which I consider appropriate, I remain wholly unpersuaded that it involves any unlawful transfer or delegation by HMRC of their own supervisory and monitoring duties.

Ground 2: Are the due diligence requirements discriminatory?

147. This aspect of Seabrook's challenge to the due diligence requirements is founded on the difference of treatment of a business seeking to own goods in a warehouse, depending on whether the business is established in the UK. Since I have now held that this difference of treatment does not offend the EU principles of equal treatment and non-discrimination, it seems to me that this separate ground of challenge to the due diligence requirements falls away. In principle, the due diligence requirements imposed on approved warehousekeepers and duty representatives are lawful for the reasons I have already given, and any element of discrimination on the basis of the place of establishment of an owner of excise goods is also justified because it forms an integral part of a reasonable and proportionate legislative scheme adopted by the UK to combat excise duty and tax evasion.

Ground 3: Are the due diligence requirements proportionate?

148. It is common ground that the due diligence requirements need to satisfy the EU law principle of proportionality. In the light of my detailed discussion of this issue in relation to Seabrook's challenge to the duty representative requirements, I can deal with the question in the present context relatively briefly.

149. As to the appropriate intensity of review, it seems to me that the due diligence requirements must also satisfy the "less restrictive alternative" test, in view of their impact on the freedoms of movement of goods and provision of services. But they form an integral part of the measures taken by the UK to implement Articles 15 and 16 of the 2008 Directive, and their specific purpose is the prevention of evasion. If section 10 of Excise Notice 196 is assessed by reference to that standard, and if the due diligence requirements are construed in the way I have outlined, the answer seems to me to be clear. The provisions fall well within the margin of appreciation afforded to the UK, and to the extent that they may interfere with the free movement of excise goods, or with the right to provide services of warehousekeepers and duty representatives, they are readily justified as a reasonable response to the very grave problems of fraud and tax evasion with which HMRC have to contend.

150. The measures are thus not disproportionate, because they are suitable or appropriate to achieve the objective pursued, and on the evidence before the court there is no less restrictive alternative method of achieving the same result. I find support for this conclusion in the fact that the due diligence requirements were introduced following the process of informal consultation described by Mr Mountford, and no challenge to

the lawfulness of the due diligence regime was brought by any interested party either before or after its introduction in November 2014.

151. Seabrook's main complaints in relation to this part of the case seem to me to relate to the way in which the due diligence requirements are in practice applied and interpreted by HMRC, and the alleged failure of HMRC to make sufficient allowance for the nature of the businesses carried on by warehousekeepers and duty representatives, who are essentially supplying ancillary services and operating on relatively low margins, when compared with the owners of excise goods, who are the primary participants in the relevant supply chains, and whose profit margins are correspondingly greater. There may, or may not, be force in at least some of these complaints, but in my opinion the appropriate forum for their resolution is the FTT. We are concerned only with the proportionality of the due diligence requirements viewed as a whole, and construed in the way I have indicated. Approaching the matter in that way, I am satisfied that the proportionality challenge to the due diligence requirements must fail.

Overall conclusion

152. For the reasons which I have given, I would dismiss all Seabrook's challenges to the lawfulness under EU law of regulations 9 and 21 of WOWGR, and to the imposition of an excise duty point when there ceases to be a duty representative acting as the owner's agent. I would also dismiss Seabrook's challenge to the lawfulness under EU law of the due diligence requirements set out in section 10 of Excise Notice 196.

153. It follows, if the other members of the court agree, that Seabrook's judicial review claim fails.

Lord Justice Simon:

154. I agree.

Sir Geoffrey Vos, Chancellor of the High Court:

155. I also agree.