[2018] UKUT 0422 (TCC)

Appeal number: UT/2017/0113

EXCISE DUTY – duration of duty suspended movement – whether deemed irregularity if goods do not arrive within four months – nature of evidence to be produced to satisfy HMRC that goods arrived – appeal allowed

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and -

LOGFRET (UK) LIMITED

Respondents

TRIBUNAL: MR JUSTICE MORGAN
JUDGE JONATHAN RICHARDS

Sitting in public at The Royal Courts of Justice, Rolls Building, Fetter Lane, London on 13-15 November 2018

Jessica Simor QC and Joanna Vicary, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Charlotte Brown, instructed by Freeths LLP, for the Respondents

DECISION

Introduction

1. The Appellants ("HMRC") appeal against the decision (the "Decision") of the First-tier Tribunal (Tax Chamber) (the "FTT") released on 7 June 2017. In the Decision, the FTT allowed the appeal of the Respondent ("Logfret") against two excise duty assessments that HMRC had made, on 6 October 2014 and 9 February 2015 respectively.

2. The appeal raises three issues of general application and importance as to the interpretation of the relevant EU and UK legislation.

The relevant facts

3. Logfret was the transporter and guarantor of four movements of excise goods in duty suspension. Those movements all started at a bonded warehouse in the UK ("Medway") and were due to end with delivery of the excise goods to bonded warehouses in Continental Europe. Logfret did not itself have access to the computerised Excise Management and Control System ("EMCS") which applies throughout Europe and enables, among others, consignors, consignees and tax authorities to monitor duty suspended movements of goods. HMRC therefore accept that Logfret could not itself have used EMCS to determine whether, and if so when, duty suspended movements it guarantees come to an end with successful delivery of goods to their destination.

4. The four relevant movements, which we will refer to as "Movements 1 to 4" are summarised in the following table:

Movement	Dispatch Date	UK duty suspended	Date of arrival per EMCS
1	4 August 2011	£37,950	None
2	19 October 2012	£56,896.98	None
3	10 June 2013	£40,749.43	None
4	10 June 2013	£40,749.44	16 May 2014

5. In early May 2014, Mr Cousins of HMRC became aware that a number of duty suspended movements from Medway (including Movements 1 to 3) had not been discharged by a report of receipt on EMCS. He discussed matters with Medway and prepared Excise Mutual Assistance ("EMA") requests to tax authorities in the EU countries in which the recipient bonded warehouses were located.

6. On 3 June 2014, Mr Cousins wrote to Logfret. In his letter, he stated that Movements 1, 2 and 3 had not arrived at a tax warehouse within 4 months from the date of dispatch. He further stated that HMRC considered that excise duty of £135,561.72 was payable by Logfret as movement guarantor. He gave Logfret an opportunity to comment on the matter before HMRC made an assessment of the excise duty due and

stated that any information or comment from Logfret should be received by HMRC by 3 July 2014. There were further discussions between Mr Cousins and Logfret in which Mr Cousins explained that, for intra-EU movements such as Movements 1 to 3, if Logfret wished to produce evidence that the goods arrived other than an entry on EMCS, that alternative evidence would have to include a letter from the relevant overseas tax authority confirming that the goods had arrived.

7. On 23 July 2014 Logfret provided HMRC with some information in relation to Movements 1 to 3 (including correspondence with Medway and CMRs) which it considered to be evidence of arrival of the goods but did not provide any letters or endorsements from overseas tax authorities confirming arrival. There is no suggestion from the Decision (and Logfret did not argue before us) that any of the information Logfret provided demonstrated that irregularities in Movements 1 to 3 took place outside the UK.

8. Since Logfret had not provided HMRC with any confirmations of arrival endorsed by overseas tax authorities, HMRC concluded that the material provided was inadequate and it did not satisfy them that Movements 1 to 3 had resulted in delivery to the relevant bonded warehouses on the Continent. On 6 October 2014, HMRC issued Logfret with an assessment (the "First Assessment") for £135,558 in respect of Movements 1 to 3.

9. HMRC's enquiries into Movement 4 proceeded in parallel with those into Movements 1 to 3. Mrs Howard of HMRC had been looking into movements involving DAB Di Aruzzoli Bruno ("Bruno"), a bonded warehouse in Italy. In March 2014, the Italian authorities told Mrs Howard that Bruno was suspected of fraud. As of 9 April 2014, Bruno was shown as the consignee for Movement 4 which, by then, had still not been recorded as received on EMCS and so she made enquiries of Medway, the consignor of Movement 4.

10. At some point after 30 April 2014, and without Logfret's knowledge, Bruno was replaced by Palmeri Giovanni, another Italian bonded warehouse, as the consignee of Movement 4. On 16 May 2014, fully 11 months after it had left Medway, Movement 4 was recorded on EMCS as received by Palmeri Giovanni. It can reasonably be supposed that Movement 4 did not really take 11 months to travel from the UK to Italy and that the record of receipt in EMCS was fraudulent. However, the FTT made no positive finding to this effect.

11. On 1 July 2014, which was after Movement 4 had been recorded as received by Palmeri Giovanni, Mrs Howard wrote to Logfret. In her letter, she stated that Movement 4 had not arrived at a tax warehouse within 4 months from the date of dispatch. She further stated that HMRC considered that excise duty of £40,749.44 was payable by Logfret as movement guarantor. She gave Logfret an opportunity to comment on the matter before HMRC made an assessment of the excise duty due and stated that any information or comment from Logfret should be received by HMRC by 31 July 2014. Logfret provided some material during July 2014 which, as with information provided in relation to Movements 1 to 3, focused on receipt of the goods and did not seek to establish that any irregularity in Movement 4 took place outside the UK. However, that

did not satisfy HMRC who issued a further assessment (the "Second Assessment") in respect of Movement 4 on 19 February 2015.

12. We should emphasise that although there is a clear suspicion that some fraud took place in the course of Movements 1 to 4, there is no suggestion that Logfret was involved in or aware of that fraud. Both before the FTT and before us, HMRC's position was that Logfret was liable to pay duty solely in its capacity as guarantor of the movements and not because of any failings or fraudulent activity on its part.

13. On 28 January 2015 and 25 June 2015 HMRC wrote to Logfret to set out the conclusions of their internal review of their decisions to make the First Assessment and the Second Assessment respectively. HMRC did not vary those decisions and Logfret appealed to the FTT.

The three principal issues

14. EU Directive 2018/118/EC (the "2008 Directive") sets out provisions relevant to the charging of excise duty in the European Union. The 2008 Directive has been transposed into UK law by, among other provisions, the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 ("the HMDP Regulations").

15. Both the 2008 Directive and the HMDP Regulations provide for an "irregularity" in a duty suspended movement to trigger a "release for consumption" and so a charge to excise duty. Article 10(4) of the 2008 Directive and Regulation 81(1)(d) of the HMDP Regulations provide for the non-arrival of duty-suspended goods into the bonded warehouse of destination to be deemed to be an irregularity. The issues arising in this appeal are best understood by reference to Article 10(4) of the 2008 Directive which provides for a "deemed irregularity" as follows:

> 4. Where excise goods moving under a duty suspension arrangement have not arrived at their destination and no irregularity giving rise to their release for consumption in accordance with Article 7(2)(a) has been detected during the movement, an irregularity shall be deemed to have occurred in the Member State of dispatch and at the time when the movement began, unless, within a period of four months from the start of the movement in accordance with Article 20(1), evidence is provided to the satisfaction of the competent authorities of the Member State of dispatch of the end of the movement in accordance with Article 20(2), or of the place where the irregularity occurred.
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> Where the person who guaranteed the payment in accordance with Article 18 has not been, or could not have been, informed that the goods have not arrived at their destination, a period of one month from the date of communication of this information by the competent authorities of the Member State of dispatch shall be granted to enable him to provide evidence of the end of the movement in accordance with Article 20(2), or of the place where the irregularity occurred.

16. The first issue ("Issue 1") is whether, in relation to a person within the second sub-paragraph of Article 10(4) who is given one month to provide evidence of the end of the movement within Article 20(2), the evidence must show that the end of the

movement was within four months of the start of the movement or whether it is sufficient to show that the end of the movement was before the expiry of the one month referred to above. The same issue arises in relation to Regulation 81(4).

17. The second issue ("Issue 2") relates to the period of time which is relevant when asking for the purposes of Article 10(4) whether "no irregularity … has been detected during the movement". The same issue arises in relation to Regulation 81(1)(d) which refers to a situation where "no irregularity is detected in the course of the movement".

18. The third issue ("Issue 3") is whether, in circumstances where the EMCS system is fully operational, the only material which is capable of being "evidence" for the purposes of Article 10(4) is the restricted type of material which amounts to "proof" within Article 28(2) (which includes electronic records from the EMCS system and endorsements from overseas tax authorities). The same issue arises in relation to Regulation 81(4) of the HMDP Regulations.

The Directive

19. The 2008 Directive repealed an earlier Directive, 92/12/EEC, as amended several times, which was in materially different terms. At the hearing, the 2008 Directive was the subject of close scrutiny in the submissions of both parties and we think it appropriate to review its terms in some detail before referring to the specific arguments in relation to the issues which we have to decide.

20. The 2008 Directive contains a number of recitals as to the purpose and intent of the Articles which follow. Recital (8) refers to the need to have clarity in a number of respects as to the operation of the relevant provisions. Recital (17) sets out the rationale for duty suspended movements of goods as follows:

> "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."

The emphasis is ours and we will return to the significance of these words when we address the question of whether a duty suspended movement can continue after a release for consumption (which is relevant to Issue 2).

21. Recital (11) refers to the possibility of irregularities arising, recital (19) refers to a Member State requiring a guarantee to safeguard the payment of excise duty and recitals (20) to (24) refer to the provisions for monitoring movements of excise goods and the use of the EMCS computer system for that purpose.

22. The 2008 Directive is divided into Chapters. Chapter I (Articles 1 to 6) contains general provisions including Article 4 which contains definitions including that of "duty suspension arrangement" in Article 4(7) which provides as follows:

> "'duty suspension arrangement' 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*"

Again, the emphasis is ours and is relevant to the question of whether goods can be said to be in the course of a duty suspended movement after the point at which there has been a "release for consumption".

23. Chapter II (Articles 7 to 14) deals with Chargeability, Reimbursement and Exemption, Chapter III (Articles 15 to 16) deals with Production, Processing and Holding, Chapter IV (Articles 17 to 31) deals with Movement of Excise Goods under Suspension of Excise Duty, Chapter V (Articles 32 to 38) deals with Movement and Taxation of Excise Goods after Release for Consumption, Chapters VI, VII and VIII deal with other matters to which it is not necessary to refer. It is Chapters II and IV which are of principal relevance in the present case.

24. As explained above, Chapter II deals with the charge to excise duty. For this purpose, Chapter II sets out to identify the duty point in a way which makes it clear when duty is chargeable, in which Member State it is chargeable, who is liable to pay and what rate is applicable.

25. Article 7(1) provides that excise duty is chargeable at the time and in the Member State of "release for consumption". This phrase is defined by Article 7(2) to include the case of "the departure of excise goods, including irregular departure, from a duty suspension arrangement": see Article 7(2)(a). "Departure" is not defined. The concept of an "irregular departure" is to be understood in accordance with Article 10(6) to which we will refer.

26. Article 8 identifies the person liable to pay excise duty. Article 8(1)(a)(ii) provides:

> "1. The person liable to pay the excise duty that has become chargeable shall be:
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> (a) in relation to the departure of excise goods from a duty suspension arrangement as referred to in Article 7(2)(a):
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> (i) the authorised warehousekeeper, the registered consignee or any other person releasing the excise goods or on whose behalf the excise goods are released from the duty suspension arrangement and, in the case of irregular departure from the tax warehouse, any other person involved in that departure;
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> (ii) in the case of an irregularity during a movement of excise goods under a duty suspension arrangement as defined in Article 10(1), (2) and (4): the authorised warehousekeeper, the registered consignor or any other person who guaranteed the payment in accordance with Article 18(1) and (2) and any person who participated in the irregular departure and who was aware or who should reasonably have been aware of the irregular nature of the departure…"

27. We heard submissions as to the application of Article 8(1)(a)(ii). In this case, Logfret was not the authorised warehousekeeper nor the registered consignor but it was a guarantor under Article 18(2). Both parties submitted to us that the effect of Article

8(1)(a)(ii) is that, where a guarantee has been provided under Article 18 only the guarantor (and other persons participating in the irregular departure) could be liable for the resulting duty. In this appeal, the guarantee was provided by Logfret which is neither an authorised warehousekeeper nor a registered consignor, and it was submitted that Logfret alone was liable for the unpaid duty. That conclusion is not absolutely clear from the wording of Article 8(1)(a)(ii) since, if that provision was designed to make guarantors solely liable (together with anyone participating in the irregular departure) there would be no need to refer to authorised warehousekeepers or registered consignors. However, since the parties were agreed that this was the effect of Article 8(1)(a)(ii), we will proceed on that basis when we come to construe the other Articles, in particular Article 10(4).

28. The submissions also touched on the question whether it was possible to have "any person who participated in the irregular departure etc" for the purposes of Article 8(1)(a)(ii) in a case where there was not an actual irregular departure but instead there was a deemed irregular departure pursuant to Article 10(4). There are obvious difficulties in identifying such a person in the case of a deemed irregularity, but we do not need to decide whether there could be circumstances in which it would be possible to do so.

29. Article 8(2) provides that where several persons are liable for payment of one excise duty debt, they are jointly and severally liable for such debt. As will be seen, Article 18(2) specifically provides that two or more persons can together constitute the guarantor.

30. Article 9 identifies the applicable rate of duty; for that purpose, it is necessary to know the date on which the duty becomes payable and which is the relevant Member State.

31. Article 10 is of central importance in this case and we set it out in full:

> "**Article 10**
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> 1. Where an irregularity has occurred during a movement of excise goods under a duty suspension arrangement, giving rise to their release for consumption in accordance with Article 7(2)(a), the release for consumption shall take place in the Member State where the irregularity occurred.
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> 2. Where an irregularity has been detected during a movement of excise goods under a duty suspension arrangement, giving rise to their release for consumption in accordance with Article 7(2)(a), and it is not possible to determine where the irregularity occurred, it shall be deemed to have occurred in the Member State in which and at the time when the irregularity was detected.
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> 3. In the situations referred to in paragraphs 1 and 2, the competent authorities of the Member States where the goods have been or are deemed to have been released for consumption shall inform the competent authorities of the Member State of dispatch.

> 4. Where excise goods moving under a duty suspension arrangement have not arrived at their destination and no irregularity giving rise to their release for consumption in accordance with Article 7(2)(a) has been detected during the movement, an irregularity shall be deemed to have occurred in the Member State of dispatch and at the time when the movement began, unless, within a period of four months from the start of the movement in accordance with Article 20(1), evidence is provided to the satisfaction of the competent authorities of the Member State of dispatch of the end of the movement in accordance with Article 20(2), or of the place where the irregularity occurred.
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> Where the person who guaranteed the payment in accordance with Article 18 has not been, or could not have been, informed that the goods have not arrived at their destination, a period of one month from the date of communication of this information by the competent authorities of the Member State of dispatch shall be granted to enable him to provide evidence of the end of the movement in accordance with Article 20(2), or of the place where the irregularity occurred.
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> 5. However, in the situations referred to in paragraphs 2 and 4, if, before the expiry of a period of three years from the date on which the movement began, in accordance with Article 20(1), it is ascertained in which Member State the irregularity actually occurred, the provisions of paragraph 1 shall apply.
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> In these situations, the competent authorities of the Member State where the irregularity occurred shall inform the competent authorities of the Member State where the excise duty was levied, which shall reimburse or remit it as soon as evidence of the levying of the excise duty in the other Member State has been provided.
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> 6. For the purposes of this Article, 'irregularity' shall mean a situation occurring during a movement of excise goods under a duty suspension arrangement, other than the one referred to in Article 7(4), due to which a movement, or a part of a movement of excise goods, has not ended in accordance with Article 20(2)."

32. Some of the parties' submissions suggested that they regarded Articles 10(1), 10(2) and 10(4) as setting out three mutually exclusive situations in which irregularities arise, or are deemed to arise. However, we do not consider that is quite correct. Rather, Article 10(1) sets out a single relevant rule namely that, where there is an "irregularity" during a duty suspended movement, the resulting "release for consumption" (which arises pursuant to Article 7(2)(a)) takes place where the irregularity occurred. The requirement, in Article 10(1), that the irregularity occurs "during a movement" is not a limiting condition since, given the definition of "irregularity" in Article 10(6), all irregularities have to occur during a movement.

33. Articles 10(2) and 10(4) are not alternatives to Article 10(1). Rather, they supplement Article 10(1) and explain how it applies in particular situations (in part by identifying where and when irregularities are treated as occurring). Article 10(2) provides that, where an irregularity is detected during a movement and it is not possible to determine where the irregularity actually occurred, it is treated as occurring when the irregularity is detected, and in the Member State where it is detected. Where it applies,

therefore, Article 10(2) fixes the time and location of the irregularity and Article 10(1) then applies to that irregularity to fix the time and location of the release for consumption.

34. Article 10(4) applies in situations where no irregularity is detected during a movement and is, therefore, mutually exclusive with Article 10(2). Where Article 10(4) applies, it fixes an irregularity in the Member State of dispatch at the beginning of the movement. Article 10(1) then applies to that irregularity to fix the time and location of a release for consumption.

35. Understood in that way, Article 10(4) is not mutually exclusive with Article 10(1). In particular, Article 10(4) can still apply if an actual irregularity occurs during a movement outside the UK (though it cannot apply if the irregularity is detected during the movement and cannot apply if HMRC are satisfied within applicable time limits that an irregularity took place outside the UK). Article 10(5) deals with the situation where a tax authority has been proceeding on the basis of a deemed irregularity (in Article 10(2) or 10(4)) but within three years it is "ascertained" where the irregularity actually took place. In that case, the consequences of the deemed irregularity are unwound and replaced with the consequences of the actual irregularity.

36. Importantly for the purposes of this decision, Article 10(4) contains two potentially applicable time limits for a person to provide evidence of the end of the movement:

> (1) The time limit in the second paragraph of Article 10(4) (which we will refer to as the "extra one month limit") applies only to a guarantor of the movement. In order to benefit from the extra month limit, it must be the case that the movement guarantor has not been, or could not have been, informed of the non-arrival of the goods[1]. The extra one month limit only ends one month after the movement guarantor is informed by a tax authority that the goods have not arrived.
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> (2) The time limit (which we will refer to in this decision as the "four month limit"), set out in the first paragraph of Article 10(4) applies to any person, whether or not a guarantor of the movement. The four month limit ends four months from the beginning of the movement irrespective of whether, and if so when, the relevant person became aware that the goods did not arrive.

37. Apart from the length of time involved, there is a difference between the four month limit and the extra one month limit. For the four month limit to operate, there is no requirement for the competent authority to communicate with anyone or to call upon that person to produce evidence that the goods have arrived or evidence of the place where an irregularity has occurred. Where the four month limit applies, one simply asks if evidence has been provided to the satisfaction of the competent authority. By way of

[1] It seems slightly surprising that the conditions are disjunctive (joined by the word "or"). In context, it might be thought they would be conjunctive (joined by the word "and"). Indeed, it might be appropriate to interpret the word "or" so that it means "and". However, nothing turns on this point for the purposes of this appeal.

contrast, in the case of the extra one month limit, the relevant one month is measured from the date of a communication from the competent authority to the relevant person.

38. Chapter IV deals with Movement of Excise Goods under Suspension of Excise Duty. Section 1 of this Chapter contains general provisions and Section 2 of this Chapter sets out the procedure to be followed on a movement of excise goods under suspension of excise duty. The detail of the procedure is of importance as to the operation of the regime created by the 2008 Directive. We will not set out the full text of Section 2 but we will attempt to summarise the provisions, save for those which ought to be set out in full.

39. Starting with the general provisions in Section 1 of Chapter IV, Article 17 provides that excise goods may be moved under a duty suspension arrangement within the territory of the Community in certain circumstances. The permitted circumstances include those stated in Article 17(1)(a)(ii) which refer to a movement from a tax warehouse to a registered consignee.

40. Article 18 permits a Member State to require a guarantee of the payment of excise duty and Article 18(1) and (2) are in these terms:

> "1. The competent authorities of the Member State of dispatch, under the conditions fixed by them, shall require that the risks inherent in the movement under suspension of excise duty be covered by a guarantee provided by the authorised warehousekeeper of dispatch or the registered consignor.
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> 2. By way of derogation from paragraph 1, the competent authorities of the Member State of dispatch, under the conditions fixed by them, may allow the guarantee referred to in paragraph 1 to be provided by the transporter or carrier, the owner of the excise goods, the consignee, or jointly by two or more of these persons and the persons mentioned in paragraph 1."

41. In the present case, as we stated above, the guarantee given by Logfret was given as a transporter in accordance with Article 18(2).

42. Article 20 defines when a movement begins and ends, in these terms:

> "**Article 20**
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> 1. The movement of excise goods under a duty suspension arrangement shall begin, in the cases referred to in Article 17(1)(a) of this Directive, when the excise goods leave the tax warehouse of dispatch, and in the cases referred to in its Article 17(1)(b) upon their release for free circulation in accordance with Article 79 of Regulation (EEC) No 2913/92.
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> 2. The movement of excise goods under a duty suspension arrangement shall end, in the cases referred to in Article 17(1)(a)(i), (ii) and (iv) and Article 17(1)(b), when the consignee has taken delivery of the excise goods and, in the cases referred to in Article 17(1)(a)(iii), when the goods have left the territory of the Community."

43. As was seen above, Article 10 uses the phrase "during a movement of excise goods under a duty suspension arrangement". We heard submissions as to the duration of a movement. It is clear that where goods are travelling under a duty suspension arrangement, the position is provided for by Article 20. Article 20(1) identifies the start of a movement and Article 20(2) identifies the end of a movement. Where goods are travelling under a duty suspension arrangement, the period between the start and the end of the movement is the duration of the duty suspended movement and an event during that period is an event "during the movement".

44. However, Article 20(1) and Article 20(2) apply only where goods are travelling under a duty suspension arrangement. Given Recital (17) of the 2008 Directive and the definition in Article 4(7) of the 2008 Directive, there can only be a duty suspended movement for so long as duty is suspended. Since a "release for consumption" triggers the charge to excise duty pursuant to Article 7(1), it follows that as soon as goods are released for consumption, they can no longer be said to be travelling "under a duty suspension arrangement". Therefore, a release for consumption means that a duty suspended movement ceases, not because of Article 20(1) or Article 20(2), but because the arrangement no longer answers to the definition of a "duty suspension arrangement". A contrary interpretation would mean that, if goods moving under a duty suspended movement are irregularly diverted and so never arrive at their stated destination, the "duty suspended movement" would remain in progress indefinitely. It strikes us as unlikely that the 2008 Directive intended duty suspended movements to remain open indefinitely particularly given that, pursuant to Article 21(8) of the 2008 Directive, "during the movement under a duty suspension arrangement", a consignor may amend the stated destination of the goods on EMCS. If a duty suspended movement remained in progress long after there was any real prospect of the goods being delivered, a fraudulent consignor could endlessly amend the stated destination of goods in EMCS leading to the odd situation of goods that have no prospect of ever arriving still being recorded as being in transit, on duty suspended terms.

45. The basic procedure which must be used in a case of a movement under a duty suspension arrangement is spelt out in Article 21 in these terms:

> "**Article 21**
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> 1. A movement of excise goods shall be considered to take place under a duty suspension arrangement only if it takes place under cover of an electronic administrative document processed in accordance with paragraphs 2 and 3.
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> 2. For the purposes of paragraph 1 of this Article, the consignor shall submit a draft electronic administrative document to the competent authorities of the Member State of dispatch using the computerised system referred to in Article 1 of Decision No 1152/2003/EC (hereinafter 'the computerised system').
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> 3. The competent authorities of the Member State of dispatch shall carry out an electronic verification of the data in the draft electronic administrative document.

> Where these data are not valid, the consignor shall be informed thereof without delay.
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> Where these data are valid, the competent authorities of the Member State of dispatch shall assign to the document a unique administrative reference code and shall communicate it to the consignor.
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> 4. In the cases referred to in Article 17(1)(a)(i), (ii) and (iv), Article 17(1)(b) and Article 17(2), the competent authorities of the Member State of dispatch shall forward the electronic administrative document without delay to the competent authorities of the Member State of destination, which shall forward it to the consignee where the consignee is an authorised warehousekeeper or a registered consignee.
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> Where the excise goods are intended for an authorised warehousekeeper in the Member State of dispatch, the competent authorities of that Member State shall forward the electronic administrative document directly to him.
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> 5. In the case referred to in Article 17(1)(a)(iii) of this Directive, the competent authorities of the Member State of dispatch shall forward the electronic administrative document to the competent authorities of the Member State where the export declaration is lodged in application of Article 161(5) of Regulation (EEC) No 2913/92 (hereinafter the 'Member State of export'), if that Member State is different from the Member State of dispatch.
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> 6. The consignor shall provide the person accompanying the excise goods with a printed version of the electronic administrative document or any other commercial document mentioning, in a clearly identifiable manner, the unique administrative reference code. It must be possible for that document to be presented to the competent authorities upon request throughout the movement under an excise duty suspension arrangement.
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> 7. The consignor may cancel the electronic administrative document as long as the movement has not begun under Article 20(1).
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> 8. During the movement under a duty suspension arrangement, the consignor may, using the computerised system, amend the destination to show a new destination which must be one of the destinations referred to in Article 17(1)(a)(i), (ii) or (iii) or, where applicable, in Article 17(2)."

46. As can be seen, Article 21 provides for an electronic administrative document (an "eAD") with a unique administrative reference code (an "ARC"). Article 21 spells out the involvement of the competent authorities of the Member State of dispatch and the Member State of destination in these respects and the participation of the consignor, the consignee and the warehousekeeper. Article 21(6) provides that the consignor must provide to the person accompanying the excise goods a printed version of the eAD.

47. Article 24(1) requires the consignee to submit a "report of receipt", using the EMCS, without delay following the end of the movement, in these terms:

> "1. On receipt of excise goods at any of the destinations referred to in Article 17(1)(a)(i), (ii) or (iv) or in Article 17(2), the consignee shall, without delay and no later than five working days after the end of the movement, except in cases duly justified to the satisfaction of the competent authorities, submit a report of their receipt (hereinafter the 'report of receipt'), using the computerised system."

48. The procedures laid down in Section 2 of Chapter IV primarily rely on the availability of the EMCS. However, it was considered to be necessary to have fallback provisions which would apply in a case where the system was unavailable either in the Member State of dispatch (dealt with in Article 26) or the Member State of destination (Article 27). Article 26 and 27 contain detailed provisions which depend upon the creation of a paper document containing the same data as an eAD. These Articles also provide for the relevant movement to be appropriately entered on the EMCS when the computerised system is restored: see Article 26(2) and Article 27(2).

49. The EMCS is an EU-wide electronic system. EMCS is not publicly available. Authorised warehouse keepers, registered consignors and registered consignees must register and enrol to use EMCS and only those persons (and tax authorities) can access EMCS. A guarantor, such as Logfret, who is not a warehousekeeper, registered consignor or registered consignee, does not have access to the system.

50. Article 28 is of central importance in this case and we set it out in full:

> "**Article 28**
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> 1. Notwithstanding Article 27, the report of receipt provided for in Article 24(1) or the report of export provided for in Article 25(1) shall constitute proof that a movement of excise goods has ended, in accordance with Article 20(2).
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> 2. By way of derogation from paragraph 1, in the absence of the report of receipt or the report of export for reasons other than those mentioned in Article 27, alternative proof of the end of a movement of excise goods under a duty suspension arrangement may be provided, in the cases referred to in Article 17(1)(a)(i), (ii) and (iv), Article 17(1)(b) and Article 17(2), through an endorsement by the competent authorities of the Member State of destination, based on appropriate evidence, that the excise goods dispatched have reached their stated destination or, in the case referred to in Article 17(1)(a)(iii), through an endorsement by the competent authorities of the Member State in which the customs office of exit is located, certifying that the excise goods have left the territory of the Community.
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> A document submitted by the consignee containing the same data as the report of receipt or the report of export shall constitute appropriate evidence for the purposes of the first subparagraph.
>
> Where appropriate evidence has been accepted by the competent authorities of the Member State of dispatch, it shall end the movement in the computerised system."

51. One of the issues which we have to decide is the part, if any, which Article 28 plays in relation to the requirement for "evidence" in Article 10(4). We will consider that

issue later in this decision. However, it is convenient at this point to comment on Article 28 and to address other points which were raised in the course of submissions as to this Article.

52. Article 28(1) lays down the general rule from which Article 28(2) is a derogation. The general rule in Article 28(1) is that the report of receipt in accordance with Article 24(1) is proof of the end of a movement for the purposes of Article 20(2). This rule emphasises the importance of the use of the EMCS and the significance of compliance with Article 24(1) by submitting a report of receipt to EMCS.

53. Ms Simor QC pointed out that Article 28 (2) only applies "in the absence of the report of receipt … for reasons other than those mentioned in Article 27". There are two reasons given in Article 27(1) for the absence of a report of receipt in accordance with Article 24(1). The first reason was that the EMCS was unavailable in the Member State of destination. The second reason was that the EMCS had been unavailable in the Member State of dispatch and although the EMCS in that Member State had been restored, the consignor had not yet submitted a draft eAD. Accordingly, Article 28(2) applies where the consignor has submitted an eAD and the EMCS is working in the Member State of destination. She pointed out that in such a case there was no obvious reason why, if the consignee had taken delivery of the goods, there would be no record of receipt for the purposes of Article 24(1) to satisfy the general rule in Article 28(1). Accordingly, the derogation in Article 28(2) would appear to be designed to cover somewhat abnormal or exceptional cases although it is right to observe that Article 28(2) is not expressly limited to specific cases.

54. Article 28(2) refers to "an endorsement by the competent authorities of the Member State of destination, based on appropriate evidence, that the excise goods dispatched have reached their stated destination". That phrase contemplates the existence of two things. The first is the appropriate evidence of the relevant fact and the second is the endorsement of that fact by the relevant competent authority (which must be based on the appropriate evidence). The second sub-paragraph of Article 28(2) defines what is appropriate evidence. For evidence to be appropriate evidence, it must come from the consignee and contain the same data as is required for the report of receipt under Article 24(1). The second sub-paragraph of Article 28(2) expressly states that this document is appropriate evidence "for the purposes of the first sub-paragraph"; this indicates that there is no intention to state that such a document will be evidence for any other purpose.

55. We heard submissions as to the third sub-paragraph of Article 28(2). This refers to appropriate evidence being accepted by the Member State of dispatch. This sub-paragraph imposes a specific obligation on the Member State of dispatch to end the movement on the EMCS. This sub-paragraph does not seem to us to confer on the Member State of dispatch a power to treat the appropriate evidence as evidence for some other purpose. When this sub-paragraph refers to the Member State of dispatch "accepting" the appropriate evidence, we consider that the Member State of dispatch can only accept the appropriate evidence if it has been endorsed by the Member State of destination. The reference to "accepting" the evidence would seem to give the

Member State of dispatch the ability to not accept the evidence if it considered that it did not satisfy the first sub-paragraph of Article 28(2).

The Commission Regulations

56. Commission Regulation (EC) No 684/2009 ("the 2009 Regulation") is expressed to implement the 2008 Directive as regards the computerised procedures for the movement of excise goods under suspension of excise duty. Article 3 of the 2009 Regulation requires the eAD which is used for the purposes of the 2008 Directive to contain specified information on the journey time of the goods. At the times material to this appeal, this Regulation provided for the eAD to state "the normal period of time necessary for the journey taking into account the means of transport and the distance involved". The period of time if expressed in days, rather than hours, had to be less or equal to 92 days. In other words, the eAD could not state that the normal period of time necessary for the journey would be longer than 92 days. The Regulation did not require the consignor to make an actual prediction as to the amount of time which would be taken in the specific case in question although what had to be specified comes close to such a requirement. Neither the Regulation nor the 2008 Directive imposed a requirement that the movement be ended within the time specified as the normal time in the eAD.

57. After the events which are relevant in this case, Commission Implementing Regulation (EU) 2018/503 ("the 2018 Regulation") amended Council Regulation (EC) No 684/2009. The 2018 Regulation contains the following recital:

> "(2) The journey time estimate is performed by the consignor when submitting a draft electronic administrative document. The current journey time estimate with a maximum possible value of 92 days is not adapted to real journey times in Europe and presents a risk of fraud. In order to improve the accuracy of data submitted by traders in a draft electronic administrative document and to reduce the risk of fraud, the journey time limits established in Tables 1, 3 and 5 of Annex I and in Annex II to Regulation (EC) No 684/2009 should be reduced while taking account of the mode of transport used."

58. As before, the 2018 Regulation requires a statement to be made as to the normal period of time necessary for the journey and provides that the maximum period which can be stated is period of between 15 and 45 days, depending upon the mode of transport and related matters. We note that recital (2) to the 2018 Regulation refers to "the journey time estimate".

The UK Regulations

59. Chapters I to V of the 2008 Directive were implemented in the United Kingdom by the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 ("the HMDP Regulations"). It was not submitted that the HMDP Regulations had failed to implement the 2008 Directive. Although the drafting style of the HMDP Regulations differs from that of the 2008 Directive and the HMDP Regulations are expressed in more detailed terms, it was accepted that it is the duty of the Upper Tribunal to construe the HMDP Regulations consistently with the 2008 Directive. We were reminded of the

principles which apply when a court or tribunal seeks to find a conforming interpretation of domestic legislation as stated in *Vodafone 2 v Revenue and Customs Comrs* [2010] Ch 77 at [37]-[38]. It is not necessary to examine these principles further as the obligation is well known and there is no difficulty in the present case in giving effect to it.

60. We will not set out or even refer to all of the potentially relevant provisions of the HMDP Regulations which implement the 2008 Directive. Instead, we will identify the regulations of the HMDP Regulations which specifically implement Articles 10 and 28 of the 2008 Directive. Article 10 is implemented by regulations 79, 80, 81 and 82. Article 28 is implemented by parts of regulations 46 and 49. We do not need to refer to regulation 46.

61. Regulation 49 of the HMDP Regulations provides:

> "49.—
>
> (1) This regulation applies where excise goods have been dispatched to—
>
> (a) a tax warehouse;
>
> (b) a registered consignee;
>
> (c) an exempt consignee; or
>
> (d) a place of direct delivery,
>
> in another Member State.
>
> (2) When the Commissioners receive a report of receipt they must send it to the consignor using the computerised system.
>
> (3) A report of receipt shall constitute proof that the movement of the excise goods referred to in the report has ended.
>
> (4) Without prejudice to paragraph (3), an endorsement by the competent authorities of the Member State to which the excise goods have been dispatched that the goods have reached their stated destination shall constitute proof that the movement of those goods has ended.
>
> (5) If the Commissioners receive a fallback report of receipt they must send it to the consignor or keep it available for the consignor.
>
> (6) In paragraph (4), *"stated destination"* means the destination stated in the electronic administrative document or, as the case may be, fallback accompanying document."

62. Regulations 79, 80, 81 and 82 of the HMDP Regulations are in these terms:

> "**79. Interpretation of Part 13**
>
> In this Part *"irregularity"* has the meaning given by Article 10(6) of the Directive.
>
> **80.— Irregularity occurring or detected in the United Kingdom**
>
> (1) This regulation applies where—

(a) excise goods are moved under a duty suspension arrangement; and

(b) in relation to those goods and that movement, there is an irregularity which occurs or is detected in the United Kingdom.

(2) Where an irregularity occurs in the United Kingdom, the excise goods are released for consumption in the United Kingdom at the time of the irregularity or, where it is not possible to establish when the irregularity occurred, the time when the irregularity is detected or first comes to the attention of the Commissioners.

(3) Where an irregularity is detected in the United Kingdom but it is not possible to establish in which Member State the irregularity occurred, it shall be deemed to have occurred in the United Kingdom and at the time it is detected or first comes to the attention of the Commissioners.

(4) Where the circumstances mentioned in paragraphs (2) or (3) apply, and the goods were dispatched from another Member State, the Commissioners must inform the competent authorities of that State.

81.— Failure of excise goods to arrive at their destination

(1) This regulation applies where—

(a) there is a movement of excise goods under a duty suspension arrangement;

(b) the movement starts in the United Kingdom;

(c) the movement is not discharged by the arrival of the goods at their stated destination; and

(d) no irregularity is detected in the course of the movement.

(2) Where this regulation applies an irregularity shall be deemed to have occurred, and the goods accordingly released for consumption, in the United Kingdom at the time when the movement started.

(3) Paragraph (2) does not apply if, within four months of the start of the movement, the person ("P")—

(a) who guaranteed payment of the duty in accordance with regulation 39; or

(b) where no guarantee was required, the consignor of the goods,

satisfies the Commissioners that—

(a) the goods have arrived at their stated destination; or

(b) there has been an irregularity in another Member State.

(4) If, at the time P is informed by the Commissioners that the excise goods have not arrived at their stated destination, P does not know, or could not reasonably have known, that the goods have not so arrived, P may, no later than one month after that time, provide evidence to satisfy the Commissioners that—

(a) the goods have arrived at their stated destination; or

(b) there has been an irregularity in another Member State.

(5) Where the Commissioners are satisfied with any evidence provided in accordance with paragraph (4), paragraph (2) does not apply.

(6) In this regulation *"stated destination"* means the destination stated in—

(i) the electronic administrative document or, as the case may be, fallback electronic administrative document;

(ii) the document that is required by regulation 62 (simplified procedures for certain movements of alcoholic liquors) to accompany the goods (in the case of a movement that takes place in accordance with that regulation);

(iii) the document that is required by regulation 63 (simplified procedures for certain movements of tobacco products) to accompany the goods (in the case of a movement that takes place in accordance with that regulation); or

(iv) the accompanying administrative document (in the case of a movement that takes place under cover of such a document).

(7) In paragraph (6) *"accompanying administrative document"* means—

(i) the accompanying administrative document specified in Annex I to Commission Regulation (EEC) No 2719/92 or any document that in accordance with Article 2 of that Regulations replaces that document; or

(ii) a document specified by Commission Regulation (EEC) No 436/2009.

82.— Repayment of excise duty

(1) This regulation applies where—

(a) an irregularity is deemed to have occurred in the United Kingdom in accordance with regulation 80(3) or 81(2);

(b) within three years of the start of the movement the Commissioners ascertain that the irregularity actually occurred in another Member State; and

(c) either duty in relation to that irregularity has been paid in the Member State where the irregularity actually occurred or no duty was due under the laws of that Member State.

(2) Where this regulation applies, the person who paid the duty at the excise duty point is entitled to claim a repayment of that duty from the Commissioners.

(3) Such a claim must be made in writing to the Commissioners and include full particulars, including evidence to satisfy the Commissioners that either the duty has been paid in the Member State in which the irregularity actually occurred or that no duty was due under the laws of that Member State.

(4) For the purposes of paragraph (2), section 137A(1) of CEMA 1979 [1] shall be modified so as to apply to any amounts paid by way of duty and not be limited to duty which is not due to the Commissioners."

The decision of the FTT

63. The FTT made no findings as to whether there was any actual irregularity during the course of Movements 1 or 2 and so made no finding as to when, or where, any such actual irregularity occurred or was detected. This was no doubt because, as appears from [86] and [87] of the Decision, Logfret was not advancing any positive case that any irregularity on Movements 1 and 2 took place outside the UK as a defence to the assessments that HMRC made.

64. In relation to Movement 3, at [155] of the Decision, the FTT found that there was an actual irregularity in the course of that movement. The FTT referred to the fact that the Belgian tax authorities established that some of the signatures and stamps affixed to documents used in Movement 3 were forgeries. The FTT concluded that it was possible to determine where the irregularity occurred and that the irregularity took place in France[2]. On that basis, the FTT concluded that Movement 3 came within Article 10(1) of the Directive.

65. In addition, at [155(2)] of the Decision, the FTT concluded that, since there was no reliable evidence that the goods transported during Movement 3 ever reached their destination, Movement 3 remained open at all material times. From that, the FTT concluded that the irregularity in Movement 3 was necessarily detected during the movement (but did not make a finding as to precisely when the detection took place). Having made those findings, the FTT concluded (at [155(6)] of the Decision) that, for Movement 3, the release for consumption took place in France and Article 10(4) did not apply.

66. We have commented that the FTT did not determine when the irregularity in relation to Movement 3 was detected. In particular, the FTT did not make a finding whether it had been detected within 4 months from the start of the movement, no doubt because such a finding was not relevant to the way in which the FTT analysed the case. However, if there had been a finding that the irregularity had been detected within 4 months of the start of the movement that might be material to the way in which we analyse the case later in this decision. It was not submitted to us that we should find that the irregularity had been detected in that 4-month period[3]. Indeed, it seems inherently unlikely that the irregularity would have been detected within that period. HMRC only made its EMA requests to overseas tax authorities long after the 4-month deadline expired and so HMRC could not have known of any irregularity within four months of the start of the movement. Moreover, since HMRC felt it necessary to make

[2] The FTT did not conclude that Logfret's evidence referred to at [7] above should have satisfied HMRC that the irregularity was in France since, as noted, that evidence was directed at establishing that the goods had arrived at their destination.

[3] In written submissions following the hearing, HMRC said that it was both parties' case that an irregularity in Movement 3 was detected more than 4 months after the start of the movement and Logfret did not argue otherwise in its reply to those submissions.

EMA requests, that suggests no-one had told them about the irregularity prior to those requests. That in turn suggests that no overseas authority had detected the irregularity before then (because, had an overseas authority detected an irregularity in Movement 3, it would have been obliged to inform HMRC pursuant to Article 10(3) of the 2008 Directive). Therefore, for the purposes of this appeal, we will proceed on the basis that the irregularity in Movement 3 was detected more than 4 months after the start of the movement and indeed we understand that to be common ground.

67. The FTT concluded at [156(2)] that Movement 4 came to an end on 16 May 2014 (when it was recorded as received by Palmeri Giovanni in EMCS). The FTT did, however, conclude that there was an actual irregularity during Movement 4 and that the irregularity occurred in France[4]. On that basis, the FTT seems to have decided that the Movement came within Article 10(1) of the Directive. The FTT held that Article 10(2) did not apply because the irregularity was detected after 16 May 2014 and so it was not detected during the movement, as required by Article 10(2). If the FTT had not been able to determine where the irregularity occurred and if Article 10(2) were relevant, then the FTT would have held that the irregularity was detected in France.

68. In addition, in relation to Movement 4, the FTT concluded that Article 10(4) was not applicable because the goods had "arrived at their destination" and it did not matter that they did not arrive within four months of the start of the movement (see 156(4) of the Decision).

69. In addition to the specific findings referred to above, the FTT considered HMRC acted unreasonably in refusing to consider the alternative evidence of arrival that Logfret had provided in relation to Movements 1 to 3 because that evidence did not include an endorsement from overseas tax authorities. The FTT concluded (at [183] of the Decision) that this made the decision to issue the First Assessment flawed and this, of itself, was a sufficient reason to allow the appeal against that assessment.

70. The FTT also seemed to suggest (at [173] of the Decision) that HMRC behaved unreasonably in considering the evidence that Logfret provided in relation to Movement 4. However, read in context, the FTT's conclusion in that paragraph was that HMRC made an error of law in concluding that Article 10(4) of the 2008 Directive applied to Movement 4 (because the goods did not arrive within four months). Therefore, the FTT's conclusion in this regard was simply another facet of the conclusion set out at [68].

HMRC's grounds of appeal and the application for permission to amend those grounds

71. HMRC appeals against the Decision on the following grounds:

[4] As with the similar finding in relation to Movement 3, this was not a conclusion that Logfret's evidence provided in connection with Movement 4 should have satisfied HMRC that an irregularity took place in France.

(1) That the FTT was wrong to conclude, in relation to Movement 4, that receipt of the goods recorded in EMCS 11 months after the start of that movement prevented an excise duty liability arising under Article 10(4) of the 2008 Directive and Regulation 81 of the HMDP Regulations (HMRC's Grounds 1 and 2).

(2) That the FTT was wrong to conclude that HMRC's approach to the evidence that Logfret provided in respect of Movements 1 to 4 was flawed whether by being unreasonable in a public law sense or containing an error of law (HMRC's Grounds 3 and 4).

(3) That the FTT was wrong, in the sense set out in *Edwards v Bairstow*, to conclude, in relation to Movements 3 and 4, that an actual irregularity took place in France (HMRC's Ground 5).

72. Grounds 3 and 4 are simply challenges to the FTT's finding that HMRC's approach was flawed. HMRC have not sought to argue that, having reached that conclusion, the FTT was wrong to quash the assessments. For example, HMRC do not argue that the FTT should have conducted its own analysis of the evidence that Logfret had provided, or that the FTT's power was limited to remitting the matter back to HMRC to consider that evidence afresh. We are not, therefore, being asked to decide the nature of the FTT's jurisdiction on assessments made under Article 10(4) or Regulation 81 and we will, therefore, limit our consideration to the question whether HMRC's approach was flawed or not.

73. As noted at [65], the FTT's conclusion that an irregularity in Movement 3 was detected "during a movement" was central to its conclusion that Article 10(4) of the 2008 Directive did not apply. HMRC's Grounds of Appeal did not expressly include a complaint about the FTT's finding that the irregularity was detected "during a movement". During the hearing, therefore, the question arose whether, to succeed in their appeal on Movement 3, HMRC needed permission to amend their Grounds of Appeal.

74. At our request the parties made written submissions on this issue following the hearing. HMRC maintained that permission to amend was not required but, in case they were wrong in that argument, applied for permission. Logfret argued that permission to amend was needed and that it should be refused. For the reasons set out at [75] to [77] below, we have concluded that HMRC do not require permission to amend their Grounds of Appeal in order to succeed in their appeal relating to Movement 3.

75. Logfret is correct to observe that HMRC did not specifically seek permission to appeal against the FTT's conclusion that an irregularity in Movement 3 was detected "during the movement" so as to render Article 10(4) of the 2008 Directive inapplicable. However, as we have noted, the FTT reached its conclusion not by making a pure finding of fact that the irregularity was detected on a specific date, but by concluding that, since Movement 3 never came to an end under Article 20(2) of the 2008 Directive (as the relevant goods were never received by the consignee), it remained open indefinitely such that any detection of an irregularity necessarily took place during the movement. Accordingly, the FTT's conclusion was essentially one of law and involved an analysis of when a duty suspended movement ends.

76. HMRC put the possible duration of duty suspended movements at the heart of Ground 1 of their Grounds of Appeal. At paragraphs 7 to 9 of their Grounds of Appeal served on 2 August 2017, HMRC expressly argued that it was not possible for a duty suspended movement to remain open indefinitely and that Article 10(4) of the 2008 Directive effectively imposes a maximum duration of four months. If that argument is correct, then Movement 3 must have ended by 10 October 2013 at the latest. Therefore, since as noted at [66], it is not suggested that the irregularity in Movement 3 was detected before then, if HMRC's arguments under Ground 1 are correct, it must follow that the FTT's conclusion that an irregularity was detected "during the movement" is wrong as a matter of law.

77. Understood in those terms, HMRC's argument, that an irregularity in Movement 3 was not detected "during the movement" so as to oust Article 10(4) of the 2008 Directive, was a necessary corollary of Ground 1 of their Grounds of Appeal. HMRC do not, therefore, need to seek leave to amend their Grounds of Appeal to advance that argument.

Issue 1: discussion and conclusions

78. Issue 1 is best understood by reference to the facts of Movement 4. Movement 4 started on 10 June 2013 and was recorded, on the EMCS system, as received by Palmeri Giovanni on 16 May 2014, over 11 months later. HMRC argue that, properly interpreted, Article 10(4) of the 2008 Directive and Regulation 81 of the HMDP Regulations required Logfret to demonstrate that the goods were received by 10 October 2013 (i.e. within 4 months of the start of the movement) and since Logfret did not, and could not, do so both Article 10(4) and Regulation 81 deem an irregularity to have occurred in the UK on 10 June 2013, at the start of the movement. Logfret argues that neither Article 10(4) nor Regulation 81 applies since the goods did eventually arrive at their destination (albeit after 11 months) and, moreover, Logfret can demonstrate this by reference to EMCS entries.

79. Clearly, the record of receipt of the goods in EMCS is suspicious. Common sense suggests that it is highly unlikely that the goods took 11 months to travel from the UK to Italy. It must be possible that the record of receipt was made fraudulently. However, both parties accept that the record of receipt has to be taken at face value given the requirements of Article 28(1) of the 2008 Directive and Regulation 49(3) of the HMDP Regulations and therefore both parties accept that the goods did indeed arrive on 16 May 2014 at Palmeri Giovanni as the EMCS records state.

80. The first question to be determined is whether, as Ms Brown submitted, it is a precondition to the application of Article 10(4) and Regulation 81 that the goods have not arrived at their stated destination so that the fact that Movement 4 did ultimately arrive is an absolute bar to the application of both Article 10(4) and Regulation 81.

81. There is clear support for Ms Brown's interpretation on a literal reading of both provisions. Article 10(4) begins with the words "Where excise goods moving under a duty suspension arrangement have not arrived at their destination…" which is suggestive of this requirement operating as a condition to the application of Article

10(4). Regulation 81(1)(c) also refers to the non-arrival of goods in setting out the circumstances in which Regulation 81 applies.

82. However, although Article 10(4) begins with the words "[w]here excise goods have not arrived at their destination", the Article goes on to provide for the possibility that evidence will be produced that the goods have indeed arrived at their destination. That indicates to us that it is necessary to read Article 10(4) so that it can be relied upon in a case where it appears that excise goods have not arrived at their destination. Therefore, read as a whole, Article 10(4) and Regulation 81 are both predominantly concerned not with the question whether goods have actually arrived, but rather with whether a person can prove that they arrived within specified time limits.

83. Ms Brown's interpretation of Article 10(4) and Regulation 81 would remove much of the force of the requirement that the relevant person provides the proof of arrival within the specified time limit. For example, a registered consignor might give the movement guarantee. After two months, HMRC might become concerned that the goods have not arrived and contact the consignor to say that they are considering claiming under the movement guarantee. The registered consignor would be subject to the four month limit and would therefore have four months from the start of the movement to prove that the goods have arrived. If, within this period the goods have not arrived, the registered consignor would not be able to prove arrival and so would be subject to a claim on the guarantee. On Ms Brown's interpretation, if the goods arrived a year later, the registered consignor could say that the conditions for a claim on the guarantee were never met and require the claim to be set aside and the four month limit would be deprived of effect.

84. There are other, related, problems with Logfret's argument. A person facing an assessment under Article 10(4) or Regulation 81 could argue that, even if the goods have not yet arrived, they might do so at some time in the future and that accordingly, HMRC can never establish non-arrival of the goods. Such an argument could, in theory be made indefinitely. We regard that as contrary to the clear purpose of Article 10 and Regulation 81 which is to ensure that, in situations where no irregularity is detected during a movement, there should be a release for consumption if it cannot be demonstrated that goods arrive in a specified fixed period.

85. We therefore reject Logfret's argument that, provided goods arrive at some point, neither Article 10(4) nor Regulation 81 can apply. The next logical question is: what must a person such as Logfret be able to demonstrate as to the time of arrival of the goods in order to satisfy the requirements of Article 10(4)?

86. Ms Simor QC urged us to accept that the 2009 Regulation referred to at [56] demonstrated that the maximum duration of a duty suspended movement at the relevant time was 92 days and that, for this reason alone, Article 10(4) should be interpreted as requiring that to satisfy either the four month limit or the extra one month limit, evidence of receipt of the goods within four months of the start of the movement would be required. We do not accept that submission. The 2009 Regulation does not specify that 92 days is the absolute limit of the duration of a duty suspended movement. Rather, it requires only that, when submitting a draft eAD a consignor had to specify the

"normal period of time" for the journey with that period not being permitted to exceed 92 days. Neither the 2009 Regulation nor the 2008 Directive imposes any sanction if the actual journey time exceeds the estimate set out in the eAD. The evident purpose of the requirement to specify an estimated journey time is so that the authorities can be alerted to the possibility of irregularities (if, for example, actual journey times exceed estimates or if the estimates of journey times are unrealistically long). Therefore, while the 2009 Regulation doubtless gives the authorities useful information on expected journey times we do not consider that it imposes a maximum duration of a duty suspended movement. We note in passing that, in 2012, the European Commission issued a "reasoned opinion" requesting Spain to modify provisions of Spanish domestic law that imposed penalties where the actual journey time exceeded that specified in an eAD. The views of the European Commission are not binding on us, but their conclusions on the issue are similar to those we have expressed.

87. It follows that the relevant time limit (if any) within which receipt of goods must be demonstrated cannot be derived from the 2009 Regulation alone. Instead, it is necessary to consider the purpose and effect of the 2008 Directive itself.

88. Where the four month limit referred to at [36(2)] applies, the position is straightforward. In such a case, under both Article 10(4) and Regulation 81, HMRC would need to receive evidence that the goods have arrived within four months of the start of the movement. Such evidence could only be given if the goods have actually arrived within that period. Therefore, although the four month limit does not expressly set a deadline for the arrival of the goods (and only sets a deadline for the provision of evidence), a person will not be able to meet the four month limit unless the goods have actually arrived within four months of the start of the movement.

89. It was common ground, however, that on the facts of this particular case Logfret benefits from the extra one month limit. Like the four month limit, the extra one month limit does not expressly specify any date by which the goods must arrive. Rather, in the context of Movement 4, the extra one month limit gave Logfret one month from 1 July 2014 (when HMRC contacted them) to provide evidence of arrival of the goods. Logfret's position in essence is that by 1 August 2014, the goods had arrived (and indeed they arrived on 16 May 2014 before HMRC even contacted Logfret) so they have satisfied the requirements of the extra one month limit in relation to Movement 4.

90. Ms Brown was quite right to submit that, read literally, there is nothing in the extra one month limit that expressly requires the goods to have arrived within four months of the start of the movement. Nor, as we have noted, is there any provision that expressly limits the length of a duty suspended movement to less than four months. Those are powerful points in favour of Ms Brown's argument. Ms Brown submitted that the text of the HMDP Regulations makes the argument even stronger. The predecessor provision to Regulation 81 of the HMDP Regulations was Regulation 4 of the Excise Duty Points (Duty Suspended Movements of Excise Goods) Regulations 2001 (the "Former HMDP Regulations") which specifically imported a four-month time limit for movements of duty suspended goods as follows:

"4 Failure of excise goods to arrive at their destination

> (1) This regulation applies where:
>
> > (a) there is a duty suspended movement that started in the United Kingdom; and
> >
> > (b) *within four months of the date of removal*, the duty suspended movement is not discharged by the arrival of the excise goods at their destination; and
> >
> > (c) there is no excise duty point as prescribed by regulation 3 above; and
> >
> > (d) there has been an irregularity.
>
> (2) Where this regulation applies and subject to paragraph (3) below, the excise duty point shall be the time when the goods were removed from the tax warehouse in the United Kingdom.
>
> (3) The excise duty point as prescribed by paragraph (2) above shall not apply where, within four months of the date of removal, the authorized warehousekeeper accounts for the excise goods to the satisfaction of the Commissioners." (our emphasis)

91. Ms Brown submitted that given that the Former HMDP Regulations expressly required that the goods did not arrive within four months, the removal of the requirement in the HMDP Regulations demonstrated that Parliament cannot have intended the requirement to survive. There is some force in that point. However, the force of it is diminished by the fact that Regulation 4 of the Former HMDP Regulations had very different effect from Regulation 81 of the HMDP Regulations. First, Regulation 4 required an actual irregularity to occur: it was not providing that mere expiry of a time limit could deem an irregularity. Second, the four month period in Regulation 4(3) was not given for the purpose of enabling a taxpayer to prove arrival to the satisfaction of HMRC; it was a more general opportunity to "account" for the excise goods.

92. We consider a more reliable indication of the meaning of Article 10(4) and Regulation 81 is to be found by considering the predecessor to Article 10(4) in the light of the decision of the Court of Justice of the European Union ("CJEU") in *Cipriani* (Case 395-00). That predecessor provision was set out in Article 20(3) of the (now repealed) Directive 92/12/EEC (the "Predecessor Directive") that provided as follows:

> 3. Without prejudice to the provision of Article 6 (2), when products subject to excise duty do not arrive at their destination and it is not possible to determine where the offence of irregularity was committed, that offence or irregularity shall be deemed to have been committed in the Member State of departure, which shall collect the excise duties at the rate in force on the date when the products were dispatched unless within a period of four months evidence is produced to the satisfaction of the competent authorities of the correctness of the transaction or of the place where the offence or irregularity was actually committed.

93. Therefore, Article 20(3) of the Predecessor Directive was of similar effect to Article 10(4) of the 2008 Directive except that, while it contained the four month limit,

it did not also contain the extra one month limit. In *Cipriani*, the CJEU was asked to consider:

> "… whether the period of four months allowed…for evidence to be provided of the correctness of the transaction or of the place where the irregularity or offence was actually committed may be relied on against a trader who has guaranteed the payment of excise duties but was not in a position to know, at the appropriate time, that the duty-suspension arrangements had not been discharged."

The CJEU's conclusion was that the four month limit did not provide sufficient protection for the rights of the defence insofar as it was relied upon in circumstances where the limit had expired when the consignor learns or could have learned that an irregularity or offence had been committed.

94. In our judgment, the decision in *Cipriani* indicates that the purpose of the extra one month limit is to provide a movement guarantor who does not know and/or could not know of the non-arrival with extra time in which to demonstrate the same facts that are the subject of the four month limit. As we have noted at [88], a taxpayer will not be able to rely on arrival of the goods in the context of the four month limit unless the goods have actually arrived within four months. That suggests that arrival of the goods can similarly only be relevant to the extra one month limit if the goods have actually arrived within four months of the start of the movement.

95. Moreover, there would be risks of distortions if a person seeking to benefit from the extra one month limit had the opportunity to demonstrate different facts from someone seeking to benefit from the four month limit. For example, if the movement guarantee in Movement 4 was given by a registered consignor, with access to the EMCS system, in order to rely on arrival of the goods to protect it from a claim under the guarantee, it would need to establish that the goods arrived by 10 October 2013, four months after the start of the movement. Although the resigned consignor, as guarantor, could potentially rely on the one month limit, in most (if not all cases) it would not be able to do so because it would not be able to demonstrate that it had not been or could not have been informed that the goods had not arrived at their destination. However, on Logfret's interpretation, Logfret could escape a claim under the guarantee by establishing that the goods arrived by 1 August 2014. Logfret's interpretation means that movement guarantors without access to the EMCS system and who are thus able to claim the benefit of the extra one month limit would enjoy an advantage over movement guarantors who have access to the EMCS system. We see no objective justification for such a difference in treatment.

96. The point at [95] is emphasised by the fact that Article 18(2) of the 2008 Directive envisages that a movement guarantee can be provided jointly. If one co-guarantor could benefit from the extra one month limit but the other co-guarantor could not, two persons who are ostensibly jointly liable under the same guarantee would have materially different conditions attached to their liability.

97. Overall, therefore, our conclusion is that properly construed, a movement guarantor can only rely on the arrival of the goods in the context of the extra one month limit set

out in the 2008 Directive if it proves that the goods arrived within four months from the start of the movement. The HMDP Regulations must be construed, so far as possible, so as to give effect to the 2008 Directive that they implement. It is possible to read Regulation 81(4) as requiring a movement guarantor to provide the same proof as would satisfy Regulation 81(3) and given our conclusions on the meaning of the 2008 Directive, we consider Regulation 81(4) should be construed in that way.

Issue 2: discussion and conclusions

98. Article 10(4) of the 2008 Directive does not apply if an irregularity giving rise to a release for consumption is detected during the duty suspended movement. Regulation 81(1)(d) of the HMDP Regulations includes a similar requirement.

99. That gives rise to a question of timing. We refer to the facts in relation to Movement 3. The four month period provided by Article 10(4) expired on 10 October 2013. The extra one month referred to in Article 10(4) expired on 3 July 2014. By 10 October 2013 and still by 3 July 2014, neither HMRC nor an overseas tax authority had detected any irregularity in relation to Movement 3. Movement 3 has not, to date, been recorded as received in EMCS and therefore Article 20(2) has not, to date, applied to Movement 3. The issue, therefore, is whether Movement 3 remains open so that any "detection" of an irregularity (whether before, or after, any deadline for the provision of proof to HMRC under Article 10(4)) was necessarily "during the movement" so as to prevent Article 10(4) from applying.

100. Given our conclusion on Issue 1, if the goods that were the subject of Movement 3 did not actually arrive at their destination within four months of the start of the movement, then there would be a deemed irregularity under Article 10(4) (unless Article 10(2) applied with an irregularity being detected during the duty suspended movement)[5]. Moreover, any such deemed irregularity (and the resulting release for consumption) would take place at the beginning of the movement and would trigger a "release for consumption". That in turn, given our reasoning at [44] would mean that the goods were no longer subject to a duty suspension arrangement. Conversely, if the goods arrived at their destination within four months of the start of the movement, the duty suspended movement would end under Article 20(2).

101. It follows from the reasoning at [100] that the goods could be subject to a duty suspension arrangement for a maximum of four months from the start of the movement. The goods would either arrive within four months (in which case the movement would end under Article 20(2)) or they would not arrive in four months (in which case the movement would no longer answer to the description of a duty suspension arrangement because of the deemed irregularity triggering a release for consumption). The effect of the extra one month limit is simply to defer the point at which the duration of the duty suspended movement is ascertained. It does not affect the duration of that movement.

[5] The extra one month limit would mean that a movement guarantor such as Logfret would have longer than four months from the start of the movement to prove arrival (within 4 months from the start of the movement) to HMRC's satisfaction.

102.From that it follows that, in order for Article 10(2) of the 2008 Directive (or Regulation 80 of the HMDP Regulations) to apply and Article 10(4) of the 2008 Directive (or Regulation 81 of the HMDP Regulations) not to apply, any "detection" of an irregularity during a duty suspended movement must necessarily take place within four months of the start of the movement.

Issue 3: discussion and conclusions

103.Issue 3 is concerned with the nature of the "evidence" which can be supplied pursuant to Article 10(4) in order to persuade HMRC that goods have arrived at their destination. Logfret submits that HMRC had an obligation to turn their minds to any evidence that Logfret provided. HMRC submit that they had no such duty and only the narrow type of evidence referred to in Article 28 of the 2008 Directive would suffice[6].

104.Ms Brown drew our attention to the fact that Article 10(4) of the 2008 Directive does not require any particular type of "evidence" that a taxpayer must provide in order to demonstrate the "end of the movement in accordance with Article 20(2)". Nor does Article 10(4) contain any cross-reference to Article 28. In the absence of any such prescription or cross-reference, she submitted that the 2008 Directive indicated that any kind of evidence is potentially acceptable, including oral evidence, and that when such evidence is presented, HMRC needed to turn their mind to it and consider whether, on a balance of probabilities, it demonstrated that the movement ended in accordance with Article 20(2).

105.We do not, however, accept that simply because Article 10(4) does not prescribe the form of evidence, it necessarily follows that any evidence is acceptable. Rather, the 2008 Directive needs to be read as a whole, in accordance with its purpose, in order to determine the type of evidence that can be tendered. Even though Article 10(4) does not expressly cross-refer to Article 28, Article 28 is plainly relevant since it deals with the question of what constitutes evidence that a duty suspended movement of excise goods has ended, which is the very question. Indeed, the word "evidence" appears nine times in the 2008 Directive with six of those occurrences occurring in Article 10 or Article 28[7] and, having reviewed the context in which the 2008 Directive refers to "evidence" in other provisions, we are in no doubt that Article 28 is intended to apply for the purposes of Article 10(4).

106.Ms Brown submitted that Article 28(2) should be read as dealing with situations where EMCS is (generally) working in the Member State of destination but a problem specific to a particular participant in the movement (for example a power cut at the bonded warehouse of destination) makes it impossible to produce electronic receipts

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[6] There was no suggestion in the circumstances of this appeal that EMCS was unavailable in any Member State so as to make evidence of the kind set out in Article 26 or Article 27 of the Directive relevant. Therefore, the difference between the parties in this appeal was simply whether acceptable evidence was confined to that referred to in Article 28.

[7] The other three occurrences relate to "evidence" of destruction of excise goods in Recital 31 and Article 39, and in Article 32 in the context of guide levels of excise goods which are indicative evidence that an individual is holding them for personal use.

through EMCS. We reject that restrictive interpretation of Article 28(2). As we pointed out earlier, Article 28(2) is a derogation from Article 28(1) but it does not seek to define the cases in which it can be relied upon. In view of the detailed provisions in the Directive as to the use of EMCS and the obvious purpose of those provisions, we consider that Article 28(2) was only intended to be available in somewhat abnormal or exceptional cases which it was not necessary or appropriate to define. Article 28(2) does not set out specific preconditions for its application: it simply specifies types of alternative proof that may be given.

107. Article 28 specifies only what does constitute proof of an end of a duty suspended movement in accordance with Article 20(2). As a matter of pure logic, this does not exclude the possibility of other types of proof being given. We therefore need to construe Article 28 purposively to see if it is merely permissive in providing that certain types of evidence are to be conclusive while not excluding the possibility of other types of evidence being adequate. In our judgment, a purposive construction points clearly in favour of the conclusion that Article 28 sets out an exhaustive set of acceptable evidence of proof of the end of a duty suspended movement in accordance with Article 20(2). It is significant that the 2008 Directive, by contrast with the Predecessor Directive, made use of EMCS mandatory in the context of duty suspended movements. Recitals (20) and (22) of the 2008 Directive refer to the benefits of the computerised system in the following terms:

> (20) It is necessary, in order to ensure the collection of taxes at the rates laid down by Member States, for the competent authorities to be in a position to follow the movements of excise goods and provision should therefore be made for a monitoring system for such goods.
>
> (21) For that purpose, it is appropriate to use the computerised system established by Decision No 1152/2003/EC of the European Parliament and of the Council of 16 June 2003 on computerising the movement and surveillance of excisable products 11. Use of that system, as opposed to a paper-based system, accelerates the necessary formalities and facilitates the monitoring of movement of excise goods under suspension of excise duty.

108. Having made use of the computerised EMCS system mandatory in order to achieve efficiency benefits, we cannot accept Ms Brown's submission that the 2008 Directive envisages that taxpayers could present commercial receipts or oral evidence to tax authorities as evidence of the arrival of goods and require tax authorities to evaluate whether, on a balance of probabilities, that material did demonstrate receipt. Such an approach would effectively undo the benefits of the computerised system.

109. Ms Brown submitted that, if an EMCS report cannot be produced, it would be virtually impossible for a taxpayer to obtain the endorsement of appropriate evidence pursuant to Article 28(2) in any reasonable timescale. Strictly, she did not refer us to any evidence in support of that proposition, but we are prepared to accept that a haulier based in the UK would face formidable difficulties in persuading overseas tax authorities to provide the requisite endorsement of appropriate evidence. However, understood in the context of the 2008 Directive as a whole, it is not surprising that the requirements for "alternative proof" in Article 28(2) are exacting since the 2008

Directive clearly envisages that proof should generally be given in the form of EMCS computer entries.

110.Therefore, a purposive reading of the 2008 Directive leads us to the clear conclusion that, in order to demonstrate the end of a duty suspended movement for the purposes of Article 10(4) a taxpayer must, unless Article 27 applies, provide a tax authority with evidence falling within Article 28. In particular, if a taxpayer cannot produce a computerised report of receipt through EMCS, it must provide appropriate evidence that has been endorsed by a relevant tax authority in a Member State.

111.That leads to the separate but related question of how the HMDP Regulations should be construed. Regulation 81(3) and Regulation 81(4) of the HMDP Regulations do not explain what is needed to satisfy the Commissioners that goods have arrived at their destination, nor do they contain a cross reference to Regulation 49 that implements Article 28 of the 2008 Directive and deals with proof of receipt. However, as we have explained in connection with the 2008 Directive, we do not consider that determines the matter.

112.The conclusion that only a narrow type of evidence is sufficient for the purposes of Regulation 81(3) and 81(4) of the Regulations is less obviously apparent from the Regulations than it is from the 2008 Directive. Partly, this is because Regulations 81(3) and 81(4) provide for the exception to apply where a person "satisfies the Commissioners" that goods have arrived at their stated destination rather than using the concepts of "proof" and "evidence" that are set out in Regulation 49. Partly, it is because the alternative "proof" referred to in Regulation 49(4) is not clearly expressed to be by way of exceptional derogation from the general rule that evidence is to be provided in the form of receipts in the EMCS system. However, Regulations 49 and 81 were clearly intended to implement provisions of the 2008 Directive. They can be construed as implementing the provisions of the 2008 Directive explained above and should therefore be construed consistently with the 2008 Directive. It follows that our conclusion is that the HMDP Regulations, like the 2008 Directive, prescribe a narrow category of evidence that is capable of amounting to proof that the goods have reached their destination for the purposes of Regulation 81(3) and 81(4).

113.Finally, we note that both parties in their submissions referred us to HMRC's Excise Notice 197. Logfret submitted that the Notice suggested that HMRC would look at a wide category of evidence for the purposes of Regulations 81(3) and 81(4) and HMRC disputed Logfret's interpretation. Logfret are not, however, seeking to argue that they had a "legitimate expectation" that HMRC would accept evidence different from that specified by the 2008 Directive and the HMDP Regulations and indeed there would be doubt as to this Tribunal's jurisdiction to entertain such an argument in Logfret's appeal against assessment, as opposed to judicial review proceedings. Since the Notice does not have the force of law, and given our conclusions as to the requirements of law set out in the HMDP Regulations implementing the 2008 Directive, we see no need to make a decision on how the Notice should be construed.

The result

114.Our conclusions in relation to the above three issues are:

(1) As to Issue 1, where the extra one month limit applies, in order to qualify as evidence "of the end of the movement in accordance with Article 20(2)" for the purposes of Article 10(4), the evidence must be that the movement ended within a period of 4 months from the start of the movement;

(2) As to Issue 2, the period of time which is relevant when asking for the purposes of Article 10(4) whether "no irregularity has been detected during the movement" is the period of 4 months from the start of the movement;

(3) As to Issue 3, the only material which is capable of being "evidence" for the purposes of Article 10(4) is the type of material which amounts to proof within Article 28.

115.The result in relation to Movements 1 and 2 is that Logfret did not produce evidence in accordance with Article 28 that the movements had ended within 4 months of the start of the movements. Accordingly, Article 10(4) applied and there was a deemed irregularity in the UK at the time of the start of the movements.

116.The result in relation to Movement 3 is that Logfret did not produce evidence in accordance with Article 28 that the movement had ended within 4 months of the start of the movement. Logfret has not argued that it provided, or was in a position to provide, evidence to HMRC of where the irregularity in Movement 3 occurred. Accordingly, Article 10(4) applied and there was a deemed irregularity in the UK at the time of the start of the movement.

117.The result in relation to Movement 4 is that Logfret did not produce evidence in accordance with Article 28 that the movement had ended within 4 months of the start of the movement. Logfret did not provide (and was not in a position to provide) evidence of where the irregularity in Movement 4 took place. Accordingly, Article 10(4) applied and there was a deemed irregularity in the UK at the time of the start of the movement.

118.Our conclusion on the above three issues means that Grounds 1 to 4 of HMRC's Grounds of Appeal are established.

119.It is not necessary to consider Ground 5 because, even if there were actual irregularities in Movements 3 and 4 that took place in France, that could not preclude HMRC from making assessments under Regulation 81 of the HMDP Regulations (implementing Article 10(4) of the 2008 Directive). As we have noted at [35], while detection of an irregularity in France during the movement would prevent Article 10(4) or Regulation 81 from applying, the fact that with hindsight, it might be seen that the irregularity occurred in France does not vitiate an assessment under Article 10(4) or Regulation 81. The evidence that Logfret provided HMRC in connection with Movements 3 and 4 did not seek to persuade HMRC that the irregularity took place outside the UK. Of course, if, within three years of the start of Movements 3 and 4, it was "ascertained" that an actual irregularity took place in France, Article 10(5) would require the consequences of assessments based on Article 10(4) to be unwound. However, the FTT's findings of fact do not suggest that Article 10(5) applies and the

FTT's own conclusion (that there was an actual irregularity in France in the course of Movements 1 to 3) cannot itself cause Article 10(5) to apply since the Decision was released on 7 June 2017, more than three years after the start of Movements 3 and 4.

120. Having identified the above errors of law, we remake the Decision on the basis that both Article 10(4) and Regulation 81 apply to all of Movements 1 to 4 and the assessments that HMRC made were not vitiated by any flawed failure to consider the evidence that Logfret provided. It follows that both the First Assessment and the Second Assessment should stand as valid assessments and the appeal of HMRC in relation to all four movements is allowed.

MR JUSTICE MORGAN
JUDGE JONATHAN RICHARDS

RELEASE DATE: 2 January 2019