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European Community Tax Law and Its Development in Light of the Recent Case Law of the European Court of Justice

Siegbert Alber*

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Abstract

Part I of this Essay addresses the Community's impact on national taxation in general. Part II examines Article 95 of the EC Treaty concerning the prohibition on discriminatory internal taxation. The aim is to show, based on a brief summary of the relevant legislation, to what extent the Court has developed its case law in specific areas of Community tax law. Emphasis will then be placed on the structure and various legal aspects of Article 95, which, although a rather complex provision, often tends to be neglected in favour of the harmonized taxes as well as the recent developments in the field of direct taxation.

ESSAYS

EUROPEAN COMMUNITY TAX LAW AND ITS DEVELOPMENT IN LIGHT OF THE RECENT CASE LAW OF THE EUROPEAN COURT OF JUSTICE

*Siegbert Alber**

INTRODUCTION

One of the issues that has long been and will remain in the front line of European Community ("EC" or "Community") disputes is the inherent tension between national taxation and the requirements of the Treaty establishing the European Community ("EC Treaty").¹ The Court of Justice (the "Court") has already decided a considerable number of cases in this regard.²

The bid for harmonization laid down in Article 99 of the EC Treaty³ has led to considerable developments towards market integration in the field of indirect taxes. Article 99, however, is inapplicable for direct taxes, which are dealt with by Articles 100 and 101. Tax equalization in this area is, therefore, restricted to the implementation and functioning of the common market. Additionally, the principle of subsidiarity⁴ has been invoked in

* Siegbert Alber is an Advocate General at the Court of Justice of the European Communities. The author expresses his gratitude to *Ass. Jur.* Tim Hendrik Sperling, who has helped with the preparation of this Essay.

1. Treaty establishing the European Community, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 573 [hereinafter EC Treaty], *incorporating changes made by Treaty on European Union*, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719 [hereinafter TEU]. The Treaty on European Union ("TEU") amended the Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty], *as amended by Single European Act*, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA].

2. In 1998, tax questions moved into first place with respect to preliminary rulings of the Court of Justice (the "Court"). *See* EC Treaty, *supra* note 1, art. 177, O.J. C 224/1, at 63, ¶ 3 (1992), [1992] 1 C.M.L.R. at 689. With the addition of customs cases, tax cases now make up the largest portion of all pending litigations.

3. *Id.* art. 9, O.J. C 224/1, at 11 (1992), [1992] 1 C.M.L.R. at 594-95.

4. The principle of subsidiarity is defined in Article 3b of the Treaty establishing the European Community ("EC Treaty"). It states that the European Community ("EC" or "Community") should only take action where given the power to do so, where an objective can be better attained at Community level than at national level, and where

this sphere.

Part I of this Essay addresses the Community's impact on national taxation in general.⁵ Part II examines Article 95 of the EC Treaty concerning the prohibition on discriminatory internal taxation. The aim is to show, based on a brief summary of the relevant legislation, to what extent the Court has developed its case law in specific areas of Community tax law. Emphasis will then be placed on the structure and various legal aspects of Article 95, which, although a rather complex provision, often tends to be neglected in favour of the harmonized taxes as well as the recent developments in the field of direct taxation.

I. TAXATION IN THE EUROPEAN COMMUNITY

A. Direct Taxation

There is no express provision for EC competence concerning direct taxes, as this function is reserved for the Member States, who are free to decide what activities to tax, who to tax, and at what rates. This reserved competence, however, is subject to two great principles of EC law, namely the principle of non-discrimination⁶ and the exercise of the four fundamental freedoms enshrined in the EC Treaty. These four concepts constitute the cornerstones of the edifice that is the single market.⁷ Both principles have jointly been incorporated in derivative EC law that has been enacted to give effect to the fundamental free-

such action is proportional to the objective pursued. *Id.* art. 3b, O.J. C 224/1, at 9 (1992), [1992] 1 C.M.L.R. at 590.

5. There are some situations, which cannot be covered here, in which the Community itself is directly or indirectly involved in tax gathering. For example, the Community is involved with the collection of the EC tax that all European employees pay, as well as agricultural levies on imports from non-EC countries and the proceeds from the common external tariff.

6. This principle, also known as the principle of equal treatment, means that Member States, acting within their own jurisdiction but in areas affected by the EC Treaty, may not in any way discriminate on the grounds of nationality between the nationals of Member States. The former President of the Court, Ole Due, is credited with having described the principle of equal treatment as the most important legal development in the latter half of the twentieth century.

7. The four freedoms are the free movement of goods, EC Treaty, *supra* note 1, arts. 9-37, O.J. C 224/1, at 11-17 (1992), [1992] 1 C.M.L.R. at 594-606, the free movement of persons, *id.* arts. 48-58, O.J. C 224/1, at 20-23 (1992), [1992] 1 C.M.L.R. at 612-16, the free movement of services, *id.* arts. 59-66, O.J. C 224/1, at 23-24 (1992), [1992] 1 C.M.L.R. at 616-18, and the free movement of capital, *id.* arts. 67-73h, O.J. C 224/1, at 24-26 (1992), [1992] 1 C.M.L.R. at 618-20.

doms. An example of this incorporation can be found in Article 7 of Regulation No. 1612/68,⁸ which provides that "workers who are nationals of a Member State are to enjoy, in the territory of another Member State, the same tax advantages as national workers."⁹ In a number of cases the Court has sought to reach balanced judgments ensuring the cohesion of the national tax system on the one hand, and the Treaty rights of the individual on the other.¹⁰

In its jurisprudence, which has principally concerned non-resident taxpayers, the Court has scrutinized whether non-residents and residents are treated equally under the EC tax law. In this process, it has also become necessary to take account of bilateral double-taxation conventions.¹¹ In a recent judgment of May 12, 1998, in the *Gilly* case,¹² the Court examined the compatibility of specific provisions of the France-Germany tax treaty with Article 48 of the EC Treaty. Mrs. Gilly, a French national working in Germany but living in France, was subject to German income tax. She failed to benefit from the splitting system, however, due to her limited tax liability. The Court reiterated that the abolition of double taxation is an objective of the EC Treaty. In view of the lack of harmonization of direct tax matters or other unifying measures such as multilateral treaties based on Article 220 of the EC Treaty, however, the Member States are competent to determine the criteria to eliminate such double taxation.

Turning towards the future, it can be observed that taxation

8. See Council Regulation No. 1612/68, 257 J.O. 2 (1968), O.J. Eng. Spec. Ed. 1968 (II), at 475 (concerning freedom of movement for workers within Community). Another example is Council Directive No. 77/799/EEC, O.J. L 336/15 (1977) (regarding mutual assistance by competent authorities of Member States in field of direct taxation).

9. Council Regulation No. 1612/68, *supra* note 8, art. 7, O.J. Eng. Spec. Ed. 1968 (II), at 477.

10. See, e.g., *Finanzamt Koeln-Alstadt v. Roland Schumacker*, Case C-279/93, [1995] E.C.R. I-225, [1996] 2 C.M.L.R. 450; *Wielockx v. Inspecteur der Directe Balastingen*, Case C-80/94, [1995] E.C.R. I-2493, [1995] 3 C.M.L.R. 85; *Asscher v. Staatssecretaris va Financien*, Case C-107/94, [1996] E.C.R. I-3089, [1996] 3 C.M.L.R. 61; *Imperial Chemical Industries v. Colmer*, Case C-264/96, [1998] E.C.R. I-4729, [1998] 3 C.M.L.R. 293.

11. For further reading on this specific area, see Paul Farmer, *EC Law and National Rules on Direct Taxation: A Phoney War?*, 1 EC TAX REV. 13-29 (1998).

12. *Gilly v. Directeur des Services Fiscaux du Bas-Rhin*, Case C-336/96, [1998] E.C.R. I-2793, [1998] 3 C.M.L.R. 607.

is increasingly recognized as being a crucial factor for growth and job creation in Europe. As a result, there have been calls for further coordination on taxation in order to counter harmful forms of tax competition and to maintain pressure on public expenditure. Consequently, the European Union's Finance Council, on December 1, 1997, agreed on a package to counter "harmful tax competition." The package, which was reviewed again a year later, is comprised of three elements: a proposal for a directive to ensure a minimum level of taxation of cross-border interest on savings, a code of conduct for business taxation, and a proposal for a directive to eliminate withholding taxes on interest and royalty payments between associated companies.¹³

B. *Indirect Taxation*

The states of the Community operate indirect taxation systems in a great variety of fields, differing according to national preference. Such tax discrepancies, apart from contributing to the attraction of smuggling, have a considerable impact on the markets, such as where a product will be produced and sold. Article 95 of the EC Treaty eliminates internal discrimination within a Member State. It does not, however, eliminate divergences between Member States and, therefore, does not go far enough to bring about full market integration. Given the heterogeneity of political ideologies in the Community, however, as well as different national traditions in tax policy, it has proved immensely difficult to make much progress in the area of harmonizing indirect taxation.

The Community has so far concentrated on three areas: value-added tax, excise duties, and corporation tax.

1. Value-Added Tax

The biggest achievement in the harmonization of indirect taxes concerns the Council directive on the harmonization of the laws of the Members States relating to turnover taxes.¹⁴ The

13. It is interesting to note that the Organization for Economic Co-operation and Development, following the example of the European Union ("EU" or "Union"), has agreed to a set of guidelines on harmful tax competition very similar to the Union's code. The European Commission ("Commission") has, subsequently, proposed to start exploratory talks with third countries, notably Switzerland, Monaco, San Marino, Liechtenstein, and Andorra.

14. See Sixth Council Directive No. 77/388/EEC, O.J. L 145/1 (1977). For further

system of turnover tax was replaced by the common system of value-added tax ("VAT") and numerous provisions concerning the structure of and the procedure for applying this system, including a uniform basis of assessment. The directive also led to the replacement of financial contributions to the European Community from Member States in favor of using the Community's own resources.¹⁵

Equalization of the VAT rates themselves has not occurred. Instead, a minimum standard rate of fifteen percent, with no fixed upper limit, has been set. In view of the introduction of the single currency, the Commission has now proposed to introduce a fifteen to twenty-five percent band for the standard rate of VAT as soon as possible to prevent a widening of the existing *de facto* range in the Community.¹⁶

There have been numerous cases brought before the Court that have concerned primarily the interpretation of individual clauses of the VAT directives, in the form of preliminary rulings. The Court's most important recent decisions deal with three things. The first one is the acquired right of VAT deduction, which is applicable when the taxable person could never, by reasons beyond his control, carry out the intended taxable transactions.¹⁷ The second one, also known as equal treatment, is the right of a taxpayer not established in the country concerned to annex a duplicate where the original has been lost.¹⁸ The third one is the recovery of sums paid but not due and the appropriate procedural time limits under national law.¹⁹

This mostly technical case law serves as a good demonstration of how far Community law has come in influencing national taxation systems. At the same time, this case law makes clear how increasingly difficult it has become to strike a balance be-

reading on the case law, see DR. BEN J.M. TERRA & JULIE KAJUS, INTRODUCTION TO VALUE-ADDED TAX IN THE EC (1993).

15. These resources, according to a decision of April 21, 1970, are to include those accruing from value-added tax ("VAT") and obtained by applying a common rate of tax on a basis of assessment determined in a uniform manner according to Community rules.

16. Commission Press Release, IP/98/1175 (Dec. 23, 1998).

17. *Belgian State v. Ghent Coal Terminal NV*, Case C-37/95, [1998] E.C.R. I-1.

18. *Société générale des grandes sources d'eaux minérales françaises v. Bundesamt für Finanzen*, Case C-361/96, [1998] E.C.R. I-3495.

19. *In.co.ge. Srl*, Joined Cases C-280-81/96, & C-10/97 (ECJ Oct. 22, 1998) (not yet reported).

tween equal application of EC provisions on the one hand and leaving the Member States to deal with matters primarily unaffected by such provisions on the other.

Noteworthy are also two recent judgments of the Court concerning the applicability of the Community VAT system. In this context, the Court has established the principle of fiscal neutrality.²⁰

The principle of fiscal neutrality precludes differentiation between lawful and unlawful transactions in the application of VAT, except where, because of the special characteristics of certain products, all competition between a lawful economic sector and an unlawful sector is precluded. That is not the case where there is no absolute prohibition. Such a [lack of an absolute prohibition] cannot, therefore, be sufficient to remove exports of those products from the scope of the directive.

Subsequently, there have been a number of cases where the Court was called upon to decide whether the litigated situation fell under the principle of fiscal neutrality or not. In two preliminary rulings concerning trade of counterfeit currency²¹ and narcotics,²² the Court held this principle, and thus the VAT directives, to be inapplicable because the Court considered any competition between a legal and an illegal economic sector impossible. In two later judgments, the Court held that the activities of unlawful games of chance²³ and the selling of counterfeit perfume products,²⁴ although contrary to certain protection rights, did not warrant an absolute prohibition and that there could quite possibly exist a competitive market for these products. Therefore, the VAT directives were applicable, with the consequence of tax exemption for the litigants.

20. *See, e.g.,* Lange v. Finanzamt Fuerstenfeldbruck, Case C-111/92, [1993] E.C.R. I-4677, [1994] 1 C.M.L.R. 573.

21. Witzemann v. Hauptzollamt Munchen Mitte, Case C-343/89, [1990] E.C.R. I-4492.

22. *See* Einberger v. Hauptzollamt Freiburg, Case 294/82, [1984] E.C.R. 1177, [1985] 1 C.M.L.R. 765; Mol v. Inspecteur der Inroerrechten, Case 269/86, [1988] E.C.R. 3627, [1989] 3 C.M.L.R. 729; Verreniging Happy Family v. Inspecteur der Omzetbelasting, Case 289/86, [1988] E.C.R. 3669, [1989] 3 C.M.L.R. 743.

23. Karl-Heinz Fischer v. Finanzamt Donaueschingen, Case C-283/95, [1998] E.C.R. I-3369, [1998] 3 C.M.L.R. 1055.

24. R. v. John Goodwin & Edward Thomas Unstead, Case C-3/97, [1998] E.C.R. I-3257, [1998] 3 C.M.L.R. 861.

Although the Court has, in all of these cases, applied one definition, it may be unclear exactly how the Court determines whether there is *per definitorem*. This lack of clarity arises because of the definition's absolute prohibitive nature, and because there are no competing markets in the trade with counterfeit currency and narcotics as opposed to that with unlawful games of chance and counterfeit perfume products.

In the same context, the Court will again have to decide on the principle of fiscal neutrality, regarding the request of a preliminary ruling from the Dutch Hoge Raad.²⁵ This case concerns the question of whether the VAT directives are applicable where a coffee shop table is rented out for the purpose of the illegal but tolerated trade of narcotics.

Finally, the Court's jurisprudence on the deduction of VAT according to the Sixth Council Directive deserves some attention. In its *INZO* and *Ghent Coal Terminal NV* judgments,²⁶ the Court, in applying the "principle of fiscal neutrality," found that the right of a taxable person to deduct the VAT payable by him remains acquired where, by reason of circumstances beyond his control, the taxable person has never made use of the goods or services for the purpose of carrying out taxable transactions. Shortly afterwards, in *Belgocodex*,²⁷ the Court interpreted Article 2 of the First VAT-Directive²⁸ as not precluding a Member State that granted its taxpayers the right to opt for taxation of certain turnovers from abolishing that right retroactively.

The *Belgocodex* case concerned the Member States' right to grant and to withdraw from its taxpayers the right of tax deduction, whereas *Ghent Coal Terminal NV* dealt with the objective persistence of an existing deduction right. It remains to be seen, however, how the Court will deal with a case in which both features are involved. Such an opportunity might arise in the recent request for a preliminary ruling from the German

25. Staatssecretaris van Financiën v. Coffeeshop "Siberië" Vof, Case C-158/98 (pending case).

26. *INZO v. Belgian State*, Case C-110/94, [1996] E.C.R. I-857, [1996] C.E.C. (CCH) 490; *Belgian State v. Ghent Coal Terminal NV*, Case C-37/95, [1998] E.C.R. I-1.

27. *Belgocodex SA v. Belgium*, Case C-381/97 (ECJ Dec. 3, 1998) (not yet reported).

28. First Council Directive No. 67/227/EEC, 71 J.O. 1301 (1967), O.J. Eng. Spec. Ed. 1967, at 14.

Bundesfinanzhof.²⁹ The request concerned whether the right to deduct remains acquired where the taxable person has made use of certain goods or services, but, by reasons of circumstances beyond his control such as a change in the law, is prevented from carrying out taxable transactions.

2. Excise Duties

Excise duties, widely imposed on alcohol, tobacco, and petrol, have long caused problems in the pursuit of market integration because of the large variations in rates between the Member States. As a first step, Directive 92/12/EEC³⁰ and Directive 92/108/EEC³¹ established general arrangements for products subject to excise duty as well as on the holding, movement, and monitoring of such products. They draw a sharp distinction between the treatment of commercial cross-border trade, which is subject to regulations and checks, and the activities of private consumers, which are unrestricted. Furthermore, minimum duties on tobacco products, petroleum products, and alcoholic beverages have been set,³² thereby reducing the risks of fraud and distortions in consumer buying patterns.

Nevertheless, there are still considerable differences in the rate of excise duty levied on certain products, notably on alcoholic beverages.³³ To this end, the Commission, in its 1985 white paper,³⁴ stressed the need for a closer approximation of excise duty rates and has since, on various occasions, proposed common minimum as well as maximum rates. Both the Euro-

29. Bundesfinanzhof, Case C-396/98 (pending case) (notice regarding case is at O.J. C 1 (1999)).

30. Council Directive No. 92/12/EEC, O.J. L 76/1 (1992).

31. Council Directive No. 92/108/EEC, O.J. L 390/124 (1992).

32. Council Directive No. 92/79/EEC, O.J. L 316/8 (1992), *amended by* O.J. L 316/12 (1992) (Council Directive No. 92/81/EEC), *amended by* O.J. L 316/19 (1992) (Council Directive No. 92/82/EEC), *amended by* O.J. L 316/21 (1992) (Council Directive No. 92/83/EEC), *amended by* O.J. L 316/39 (1992) (Council Directive No. 92/84/EEC). The minimum figure chosen for excise rates levied on still and sparkling wine, however, is zero.

33. The rate of excise duty levied on alcoholic beverages is five times higher than the minimum laid down in Council Directive No. 92/79/EEC in Sweden, Finland, Denmark, Ireland, and the United Kingdom, whereas wine is rated zero in Italy, Germany, Greece, Spain, Luxembourg, Austria, and Portugal (all wine-producing Member States).

34. Commission of the European Communities, *Completing the Internal Market: White Paper from the Commission to the European Council*, COM (85) 310 Final (June 1985).

pean Parliament and the Council have so far rejected this approach, and any change in the existing rates is subject to unanimous agreement of the Council.

3. Corporation Tax

The most notable harmonization development in this area has been Directive 69/335/EEC on corporation tax dealing with indirect taxes on the raising of capital.³⁵ There has been one major series of judgments recently concerning whether EC law prohibits the recovery of sums paid but not due.³⁶

In the current political discussion, it is widely believed that lower tax levels may encourage companies to relocate, making any further harmonization a most sensitive issue. The European Parliament has, in this context, tried to indicate that decisions on relocations are often based on a great variety of reasons, such as easy access to the market, lower production costs, currency exchange risks, availability of skilled labor, and infrastructure.³⁷

II. *PROHIBITION ON DISCRIMINATORY INTERNAL TAXATION: ARTICLE 95 OF THE EC TREATY*

A. *The Structure of Article 95*

Article 95 states:

(1) No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.

(2) Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a

35. Council Directive No. 69/335/EEC, 249 J.O. 25 (1969), O.J. Eng. Spec. Ed. 1969 (II), at 412.

36. *Fantask a/s v. Industriministeriet*, Case C-188/95, [1997] E.C.R. I-6783, [1998] 1 C.M.L.R. 473; *Edilizia Industriale Siderurgica Srl (Edis) v. Ministero delle Finanze*, Case C-231/96 (ECJ Sept. 15, 1998) (not yet reported); *Ministero delle Finanze v. Spac SpA*, Case C-260/96 (ECJ Sept. 15, 1998) (not yet reported); *Ansaldo Energia SpA v. Amministrazione delle Finanze dello Stato*, Case C-279/96 (ECJ Sept. 15, 1998) (not yet reported). For the latest developments in this area, see Avery Jones, *Flows of Capital Between the EU and Third Countries and the Consequences of Disharmony in the European International Tax Law*, 2 EC TAX REV. 95, 106 (1998).

37. Council Resolution, O.J. C 200/38 (1997) (concerning coordination of fiscal and taxation policy in monetary union).

nature as to afford indirect protection to other products.³⁸

In contrast to Article 12 of the EC Treaty, the importance of which has diminished with the widespread elimination of duties between Member States, Article 95 remains an important tool for ensuring that the internal market continues to function. The former provision is different because, in the case of Article 95, a charge is levied on the product for the crossing of a tax border instead of that of a state. Legally, Articles 12 and 95 are complementary yet mutually exclusive, meaning that a fiscal charge may fall under one or the other provision with no room for overlap. The demarcation, however, between a customs duty and a charge forming part of a general system of internal taxation is not always simple to locate.³⁹

The first paragraph of Article 95 outlaws discrimination where similar products are in issue. The second paragraphs forbids indirect protection of products from competing imports. Common to both paragraphs is a distinction between direct and indirect discrimination, the latter being susceptible to justification by the taxing state.

For the purpose of Article 95(1), the Court has had the opportunity to develop its jurisprudence in a large number of cases concerning issues that arise when two products are similar. More recently, the Court also considered the meaning of domestic products. These cases, together with the usually indispensable analysis under Article 95(2), represent a complex and often confusing area of EC law.

1. Direct Discrimination

Examples of national taxation overtly discriminating against imported products are relatively rare given the unequivocal wording of Article 95. There have been cases, however, concerning a national taxation system effectively benefiting imported products⁴⁰ that were nonetheless declared unlawful by the Court, when there existed only a possibility of discrimination

38. EC Treaty, *supra* note 1, art. 95, O.J. C 224/1, at 31 (1992), [1992] 1 C.M.L.R. at 632.

39. For further reading, see PAUL FARMER & RICHARD LYAL, EC TAX LAW 38-42 (1994).

40. So-called "reverse discrimination" rules, which place national products at a disadvantage compared to imports, are not objectionable from the perspective of Community law.

against the imported product.⁴¹ This early example demonstrates the Court's determination to eliminate fiscal discrimination by means of applying strict standards and rejecting the notion still invoked by Member States in litigations today that an overall view should consider the effect of a taxation system.

When assessing whether or not a system is discriminatory, it is necessary to consider not only the rate of tax, but also the basis of its assessment and the rules for levying the various duties.⁴² The Court has reiterated this reasoning in its recent *Grundig Italiana SpA*⁴³ judgment, which concerned an Italian consumption tax on audiovisual and photo-optical products. The system, *inter alia*, did not include transport or distribution costs for products manufactured in Italy. It also provided for a flat-rate deduction for the purpose of calculating the taxable amount for domestic producers only. Article 95 of the EC Treaty was thus found to have been infringed by this legislation because it represented criteria that were likely to increase the value of the imported product *vis-à-vis* the corresponding domestic product.

There have also been cases where the Court had to determine whether such a discriminative measure belonged to the internal taxation system or whether it was more characteristic of general technical rules. For example, a technical rule might concern the form of payment or its due date. This distinction is important for the purpose of Community law because non-fiscal trade barriers are subject to the separate regime of Article 30 of the EC Treaty, entitled Elimination of the Quantitative Restrictions between Member States.⁴⁴

In some cases, however, such a distinction has not always been easy to make. In a judgment of March 22, 1977, the Court stated:

However wide the field of application of Article 30 may be, it nevertheless does not include obstacles to trade covered by other provisions of the treaty. Thus obstacles which are of a

41. *Bobie Getränkevertrieb GmbH v. Hauptzollamt Aachen-Nord*, Case 127/75, [1976] E.C.R. 1079 (concerning German tax on beer (*Biersteuergesetz*)).

42. See *Commission v. Ireland*, Case 55/79, [1980] E.C.R. 481, 488, [1980] 1 C.M.L.R. 734, 737 (regarding collection of duty on alcoholic drinks).

43. *Grundig Italiana SpA v. Ministero delle Finanze*, Case C-68/96, [1998] E.C.R. I-3775.

44. EC Treaty, *supra* note 1, art. 30, O.J. C 224/1, at 15 (1992), [1992] 1 C.M.L.R. at 602.

fiscal nature or have equivalent effect and are covered by Articles 9 to 16 and 95 of the Treaty do not fall within the prohibition in Article 30.⁴⁵

This reasoning seems to suggest that the relationship between Articles 30 and 95 is *lex specialis* over the other. The second sentence must be interpreted as implying the existence of a demarcation line between obstacles of a fiscal nature and those of a non-fiscal nature.

In the *Drexel* case, the Court purportedly missed an opportunity for a more precise comment on this demarcation line. *Drexel*, a German national, was prosecuted in Italy for importing a Volkswagen without paying the sum due under VAT. Subsequently, he had his car confiscated as a penalty, although this sanction would not have been applied to a comparable misdemeanor within Italy. In its decision, the Court did not mention Article 30 at all. Similarly, in the *Grundig Italiana SpA* judgment, the Court held that "a charge such as the national consumption tax at issue . . . must be regarded as an integral part of a general system of internal taxation within the meaning of Article 95 of the Treaty."⁴⁶

One of the reasons for the Court's reserve in commenting on the demarcation between Articles 30 and 95 may have been that the result of the litigation was unaffected by the choice of one article rather than the other, for the discriminatory practice plainly violated Community law.

2. Indirect Discrimination

Article 95 of the EC Treaty also covers national systems that, on their face, discriminate on the basis of factors other than origin, but nonetheless produce an effect that prejudices the imported product. Article 95 concerns national taxation that is seemingly based on non-discriminatory factors, such as the cubic capacity of a car or the production methods of liqueur wines, but intends to protect or favor the domestic production. The best known example for such a system is the French road tax that applied a bigger levy on vehicles above 16-CV horsepower. Incidentally, no French cars are manufactured above 16-CV horse-

45. *Iannelli & Volpi v. Meroni*, Case 74/76, [1977] E.C.R. 557, 559, [1977] 2 C.M.L.R. 688, 692.

46. *Grundig Italiana*, [1998] E.C.R. at 3801-10.

power. The Court held this system of taxation incompatible with the Treaty.⁴⁷

An important difference between cases of direct and indirect discrimination is the possibility of objective justification, similar to Articles 30 and 119 of the EC Treaty. This possibility means that an objectively justifiable reason that is unconnected to nationality is capable of explaining the selection of the factor that operates indirectly to discriminate on grounds of nationality. This model is commonly referred to as the indirect-discrimination/objective-justification model. The Court accepts a national justification under three conditions. The state concerned must invoke a lawful objective, must be apt to achieve it, and must observe the principle of proportionality. Examples of such objectives have been high taxes on particular car types in order to encourage the use of more environmentally-friendly models⁴⁸ and certain concessions on products in order to support economically weak areas.⁴⁹

This model, however, naturally encourages the Court to play a potentially intrusive role in judging whether Member States' policy choices fall within the sphere of action permitted under Community law. This encouragement can happen particularly when the first of the said conditions, the lawful objective, is met. One might ask whether French car production is so different an objective than certain economically underdeveloped areas. In fact, it has been argued that there have been inconsistencies in the Court's rulings in this context.⁵⁰

It is indeed not always a simple task for the Court to intrude into a Member State's own taxation system for the purpose of applying Article 95 of the EC Treaty. The French road tax again serves as a good example. The Court originally held that the tax violated Article 95 on two subsequent occasions, but, in a later

47. See *Michel Humblot v. Directeur des Services Fiscaux*, Case 112/84, [1985] E.C.R. 1367, [1986] 2 C.M.L.R. 338; see also *Feldain v. Services Fiscaux du Departement du Haut-Rhin*, Case 433/85, [1987] E.C.R. 3536.

48. *Commission v. Italy*, Case 200/85, [1986] E.C.R. 3953, [1988] 1 C.M.L.R. 97 (regarding value-added tax on diesel cars).

49. *Commission v. France*, Case 196/85, [1987] E.C.R. 1597, [1988] 2 C.M.L.R. 851 (regarding natural sweet wines).

50. See, e.g., Alex Easson, *Fiscal Discrimination: New Perspectives on Article 95 of the EEC Treaty*, 18 COMMON MKT. L. REV. 521 (1981); Massimiliano Danusso & Ross Denton, *Does the European Court of Justice Look for a Protectionist Motive Under Article 95?*, 1990/1 LEGAL ISSUES OF EUR. INTEGRATION 67.

judgment of November 30, 1995, the Court found that a different road tax was justifiable. In a decision of December 21, 1998, however, the Commission expressed the view that the amended French road tax system was again in violation of Article 95, and it has since filed infringement proceedings against France.⁵¹

3. Applicability on Exports

Although Article 95 of the EC Treaty makes no reference to exports, there are two possible discriminatory practices, namely taxing exports at a lower rate than domestic products and taxing exports at a higher rate. Only in the latter case has the Court taken the view that the explicit terms of Article 95 should be extended to cover fiscal discrimination against exports,⁵² whereas the lower taxing of exports favors the export over the domestic product and is therefore a case of permissible "reverse discrimination."⁵³

4. Problems with Exotic Imports

A particular issue in the context of Article 95 arises where a state does not itself produce a particular item and therefore has no tax applicable to the domestic product. On the one hand, it is obvious that the Member States must nevertheless be allowed to put a levy on such products. On the other hand, the prohibition on discriminatory internal taxation may still apply, for otherwise such imported products would not be afforded the same protection under the EC Treaty as products that are domestically produced.

In various judgments, the Court has defined the scope of Article 95 in this regard. First of all, Article 95 does not apply to imports where there is no similar or competing national product. Taxation of such products may, of course, be susceptible to control under Articles 12 and 30 regarding the free movement

51. Commission Press Release, IP/98/1157 (1998). It may be interesting to note that this French system is also the object of a request for a preliminary ruling by the French Tribunal de Grande Instance Epinal, in the pending cases *Lamboley SA v. Administration des impôts*, Case C-231/98, and *René Bouctot v. Administration des impôts*, Case C-232/98.

52. *Statens Kontrol Med Aedle Mettdler* (Natural Precious Metals Control Authority) v. Preben Larsen, Case 142/77, [1978] E.C.R. 1543, [1979] 2 C.M.L.R. 680.

53. See *supra* note 40.

of goods and the elimination of customs duties.⁵⁴ Once it is established that the charge relates "to a general system of internal dues applied systematically to categories of products in accordance with objective criteria irrespective of the products,"⁵⁵ such a tax should then be considered in the light of Article 95.

Again, the requirements of Article 95(1) and (2) have to be met, which the Court very plainly demonstrated in the case of the Italian tax on bananas.⁵⁶ Banana production in Italy is confined to Sicily and is so insignificant that the tax was primarily applicable to imported goods. As regards Article 95(1), bananas were found to be dissimilar to table fruit typical of Italian production. The Court, however, held that bananas competed with other fruit for the purposes of Article 95(2) and considered the tax too high, exerting a prohibited protective effect.

5. Tax Refunds

In some cases, the Court has had to examine the use to which the proceeds of a tax are put in order to uncover a discriminatory effect. If a domestic product is refunded the tax in full, then it has to be considered as not levied at all. In comparison, the imported product makes Article 12 of the EC Treaty applicable. If the refund is partial, then Article 95 remains the legal basis. In cases where a domestic product gets other benefits than the original tax, such as where there is no direct link between the money raised and the money refunded, Article 95 is inapplicable. In those cases, Article 92, governing aids granted by states, may be violated.⁵⁷

In a recent judgment concerning charges on the marketing of meat and offal in Portugal, the Court reiterated these principles, stating:

A charge levied on domestic and imported products alike constitutes a charge having an effect equivalent to a customs duty, prohibited by Articles 9 and 12 of the Treaty, if the revenue from it is intended to finance activities benefiting

54. *See, e.g.*, *Commission v. Denmark*, Case C-47/88, [1990] E.C.R. I-4509.

55. *Commission v. France*, Case 90/79, [1981] E.C.R. 283, [1981] 3 C.M.L.R. 1 (regarding French law imposing levies on reprographic equipment that was to large extent imported).

56. *Cooperativa Co-Frutta v. Amministrazione delle Finanze dello Stato*, Case 193/85, [1987] E.C.R. 2085.

57. *See* STEPHEN WEATHERILL & PAUL BEAUMONT, *EC LAW* 404 (1995).

only the taxed domestic products and if the resultant advantages fully offset the burden which the latter products bear; if those advantages only partly offset the burden borne by the domestic products, the charge constitutes discriminatory internal taxation prohibited by Article 95 of the Treaty and must be reduced proportionally.⁵⁸

B. *The Spirits Cases*

As explained above, the Court's jurisprudence on the fiscal treatment of alcoholic beverages has produced a number of judgments that have covered nearly all aspects of Article 95. There have been regular disputes about how to tax the vast range of alcoholic drinks that share certain common features, yet also display differences such as flavor.

1. Cases Concerning France,⁵⁹ Denmark,⁶⁰ Italy,⁶¹ and Greece⁶²

The issue in these cases concerned tax systems that set different tax levels for different drinks, but tended to offer particularly favorable rates to the traditional domestic products. France favored cognac over whisky, Italy, grappa over rum, Greece, ouzo and brandy over other spirits, and Denmark granted tax advantages to aquavit compared with competing imported spirits. In these cases, however, the Court chose not to specify whether the beverages were similar for the purposes of Article 95(1), or competing for the purpose of Article 95(2). The Court was satisfied that the taxation system was, in any case, discriminatory. The implied argument seemed to have been, that if not similar, the products were at least competing. If not discriminatory, the regime was at least protective.

France's system of taxation in this regard has again been brought before the Court, in a request for a preliminary ruling

58. *Fazenda Pública v. Fricarnes SA*, Case C-28/96, [1997] E.C.R. I-4939.

59. *Commission v. France*, Case 168/78, [1980] E.C.R. 347, [1981] 2 C.M.L.R. 631.

60. *Commission v. Denmark*, Case 171/78, [1980] E.C.R. 447, [1981] 2 C.M.L.R. 688.

61. *Commission v. Italy*, Case 169/78, [1980] E.C.R. 385, [1981] 2 C.M.L.R. 673; *Commission v. Italy*, Case 323/87, [1989] E.C.R. 2275.

62. *Commission v. Greece*, Case C-230/89, [1991] E.C.R. I-1909.

by the French *Tribunal de Grande Instance Epinal*.⁶³ It concerns the compatibility, with Article 95, of the minimum levy on beer of ECU1,87 per hl/degree alc., compared with that of zero percent on wine.

2. The Case Concerning the United Kingdom⁶⁴

For tax purposes, the United Kingdom was alleged, for obvious reasons, to favor beer over wine. The Court analyzed more deeply than it had in the previous cases, in which it utilized a globalized approach. After it had been supplied with detailed information about the actual nature of the competitive relationship between the two products in the United Kingdom, it held that, although beer and wine were not similar, there was an element of interchangeability between beer and wines at the cheap end of the market. As a consequence, the heavier tax on wine afforded indirect protection to beer contrary to Article 95(2).

C. *Recent Developments in the Court's Jurisprudence*

In an important judgment of August 11, 1995,⁶⁵ concerning the Benelux system on the unification of certain rates of excise duty,⁶⁶ the Court took up the opportunity to comment on the expressions "similar products," "domestic products," and "indirect protection." Certain Dutch wine importers, who had been unable to obtain tax exemptions for fruit wines, claimed that the Dutch legislation was incompatible with Article 95, in so far as it taxed wines differently according to whether they had been made from grapes or from other fruit. These wine importers made their argument because of the preferential treatment afforded grape wines produced in Luxembourg. The disputed products were certain kinds of grape wine, still fruit wines, as well as champagne and sparkling fruit wines.

The Court held that all fruit wines or grape wines produced

63. See *Société critouridienne de distribution (Socridis) v. M. le Receveur principal des douanes*, Case C-166/98 (pending case).

64. *Commission v. United Kingdom*, Case 170/78, [1980] E.C.R. 417, [1980] 1 C.M.L.R. 816; *Commission v. United Kingdom*, Case 170/78, [1983] E.C.R. 2265, [1983] 3 C.M.L.R. 512.

65. *F.G. Roders BV and Others v. Inspecteur der Inroerrechten en Accijnzen*, Joined Cases C-367-377/93, [1995] E.C.R. I-2229.

66. *Convention Relating to the Unification of Excise Duties and of Fees for Warrant of Articles of Precious Metals*, Feb. 18, 1950 (concerning fermented fruit beverages and sparkling fermented beverages).

in the Benelux countries are to be regarded as domestic products for the purpose of Article 95(1). More importantly, though, was the assumption by the Court regarding both clause one and clause two of Article 95, that it is for the national court to assess whether the products in question were similar and whether the national charge would have a discriminatory effect on competing imported products. One of those criteria indicated by the Court was the impact of a charge on the competitive relationships between the products concerned. It is exactly this notion that was already invoked in *Commission v. United Kingdom*.⁶⁷ The Court is obviously putting emphasis on consumer habits, but entrusts the national courts with the factual evaluation of this relationship in order to conclude whether the national system is or is not in compliance with Article 95 of the EC Treaty. The judgment has also contributed to the clarity between Article 95(1) and (2) for future litigations.

CONCLUSION

Raising revenue is a cherished aspect of national sovereignty and therefore remains jealously guarded by the Member States. Fiscal integration in the Community has, nonetheless, come a considerable way, considering the state of unification, harmonization, and the impact that the Court's case law has had on national tax systems.

This Essay showed to what extent the Court has, for the sake of common policies and to abolish discrimination, reached into the realm of national competence, while trying to leave enough room for "national maneuver." The Court has managed this task very well, although some argue that the Court's success comes at the cost of legal clarity.

Pending further harmonization, which in light of the discussion on the Community's own resources as well as on Agenda 2000, will remain a lively issue, the Court's guidance through Article 95 of the EC Treaty and its various elements will be a precious asset and support for the further development of EC law.

67. See *supra* note 64.