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ARTICLE 90 EC AND THE PRINCIPLE OF NON DISCRIMINATION

Scott Crosby[1] and Nicholas Bridgland[2]

Article 90

In the words of one commentator Article 90 EC[3] is, in practice, "by far the most important of the Treaty provisions relating to taxation".[4] It states the following:

> **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.**
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> **Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature *as to afford indirect protection* to other products.**

Purpose of Article 90 and the distinction between Article 90(1) and Article 90(2)

Article 90 EC applies to Member State taxation of products. It consists of two paragraphs with common elements. The first paragraph seeks to ensure that imported products will not be taxed more heavily than domestic products. This

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1 Scott Crosby, Solicitor, Scotland; Member, Nederlandse Orde van Advocaten, Brussels; Member, EU Committee of the Law Society of England and Wales; Partner, Stanbrook & Hooper, Rue du Taciturne 42, 1000 Brussels , Belgium. Tel: (+32 2) 230 50 59; Fax: (+32 2) 230 57 13.

2* Nicholas Bridgland Barrister (non practising), England and Wales; Associate, Stanbrook & Hooper, (who bore the brunt of the drafting of this paper) Rue du Taciturne 42, 1000 Brussels , Belgium. Tel: (+32 2) 230 50 59; Fax: (+32 2) 230 57 13.

3 Throughout this paper reference will be made to Article 90 EC and, where relevant in the case law ex Article 95 EC Treaty (pre Amsterdam Treaty amendments). These treaty articles are interchangeable.

4 A.J. Easson, *Taxation in the European Community* (1993) University Press, Cambridge at page 21. Other commentators may differ in their views of the relative importance of the Treaty articles relating to taxation. For example refer to the following article.

paragraph imposes an absolute prohibition on the discriminatory taxation of similar domestic and imported products. The second paragraph relates to domestic and imported products that, while not being similar, are in a competitive relationship. This seeks to ensure that imported products are not taxed in such a way as to afford protection to other domestic products to the disadvantage of imported products.

Article 90 EC exists in order to prevent measures taken under Article 23 EC to 25 EC, that prohibit customs charges and measures of equivalent effect, from being undermined by discriminatory internal taxation. The purpose of Article 90 EC is to put an end to the discriminatory taxation of imports. It is designed to prevent the prejudicial treatment of foreign products once inside a national frontier in order to end distortions of national markets that favour domestic products and producers and impede the free movement of goods.[5] The essence of the infringement under Article 90 EC is that a system of taxation can be considered compatible with the Treaty only if it is arranged to exclude any possibility of imported products being taxed more heavily than corresponding domestic products.[6] It does not impose a system of taxation on the Member States. Instead, it requires that the system Member States choose to adopt be applied without discrimination between similar products or without protective effects between competing domestic and imported products.

Article 90 EC applies to intra-Community trade. Its benefit can only be claimed in respect of products imported from other Member States.[7] The notion of products coming from other Member States has been broadly interpreted to include products

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5 See Case 252/86 *Gabriel Bergandi v Directeur Général des Impôts* [1988] ECR 1343, 1374 at paragraph 24: " [...] within the system of the EEC Treaty, Article 95 supplements the provisions on the abolition of customs duties and charges having equivalent effect. Its aim is to ensure free movement of goods between the Member States in normal conditions of competition by the elimination of all forms of protection which may result from the application of internal taxation that discriminates against products from other Member States. Thus Article 95 must guarantee the complete neutrality of internal taxation as regards competition between domestic products and imported products". See also Cases 2 and .3/62, *Commission v Belgium and Luxembourg* [1962] ECR 425, 431; Case 168/78 *Commission v France* [1980] ECR 347; Case 169/78 *Commission v Italy* [1980] ECR 385; Case 171/78 *Commission v Denmark* [1980] ECR 447 and most recently Case C-166/98 *Société critouridienne de distribution (Socridis) v Receveur principal des douanes* [1999] ECR I-3791 at paragraph 16.

6 Case C-68/96 *Grundig Spa v Ministero delle Finanze* [1998] ECR I-3775 at paragraph 12; see also Case C-152/89 Commission v Luxembourg [1991] ECR I-3141, at paragraph 21.

7 For example in Case 68/79 *Hans Just* [1980] ECR 501 the ECJ held a Danish tax contrary to ex Article 95 EEC. The Danish tax discriminated in favour of aquavit, which was almost exclusively domestically manufactured, and against other spirits, the majority of which were imported. However, the benefit of the obligation could only be claimed in respect of imported spirits and not those domestically manufactured.

only partially processed or manufactured in the EC[8] and products from non-member countries that are in free circulation in the Member States.[9] Imports coming directly from third countries are excluded from the scope of Article 90 EC.[10]

Since 1st January 1962 this treaty provision has been directly effective.[11] It may therefore be relied on in national courts to challenge discriminatory national taxation. In this respect national courts have made much use of the preliminary reference procedure under Article 234 EC (ex Article 177) to establish the parameters of this Article, in addition to those cases lodged by the Commission using Article 226 EC (ex Article 169) proceedings.

Application of Article 90 Ec - Direct and Indirect Discrimination

At the heart of Article 90 EC lies the principle of non-discrimination. Central to this principle is the duty to treat like alike and distinguish that which is unalike in order to ensure the equal treatment of two things, namely imports and domestic goods, which are in the same objective position. Article 90 EC thus operates to uphold a basic tenet of EC law rooting out discrimination where it exists, regardless

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8 Case 28/69 *Commission v Italy* [1970] ECR 187; Case 179/78 *Rivoira* [1979] ECR 1147.

9 See Case C-68/96 *Grundig Spa v Ministero delle Finanze* [1998] ECR I-3775 at paragraph 11: " [...] it is settled case-law that the aim of Article 95 of the Treaty is to ensure free movement of goods between the Member States in normal conditions of competition by the elimination of all forms of protection which result from the application of internal taxation which discriminates against products from other Member States. That provision is intended to cover all products from Member States, including products originating in non-member countries which are in free circulation in the Member States (Case 193/85 *Co-Frutta v Amministrazione delle Finanze dello Stato* [1987] ECR 2085, at paragraphs 25, 26 and 29).

10 See Case 7/67 *Wöhrmann* [1968] ECR 261 and Case 20/67 *Firma Kunstmühle Tivoli v Hauptzollamt Würzburg* [1968] ECR 293. With regard to French Départements note the decision of the ECJ in Case 148/77 *Hansen and Balle* [1978] ECR 1787, [1979] 1 CMLR 604 where the Court ruled that the provisions on free movement of goods included ex Article 95. As the provisions on the free movement of goods applied automatically, so did ex Article 95. Therefore Article 90 applied to the taxation of rum imported from Guadelope.

11 Case 57/65 *Alfon Lütticke GmbH v Hauptzollamt Saarlouis* [1966] ECR 205; Case 28/67 *Mölkerei Zentrale Westfalen/lippe GmgH v Hauptzollamt Paderborn* [1968] ECR 143; Case 74/76 *Ianelli & Volpi v Meroni* [1977] ECR 557.

of whether discrimination is manifest in its direct, open and explicit[12] or indirect, closed and implicit forms.

Recognition of Discrimination - the Concepts of Identity and Similarity

The principle of non-discrimination is dynamic. It applies in concrete situations. Only then can its true significance in any case be determined. In order to recognise discrimination when it occurs, Article 90 EC operates by way of a comparative analysis vis-à-vis the qualities of the imported and domestic products and the internal taxation concerned. The comparison exercise involves selecting an import and a similar or competing domestic product and then comparing the tax burdens imposed respectively on the two. If the imported product is more heavily taxed, Article 90 EC is contravened.

Assessment of the Burden of Taxation

It is the effective incidence of relevant taxes upon the products under review that is important. Discrimination will often be the result when a Member State levies taxation according to differing criteria on imports and domestic products[13]. In this

12 See for example Case 148/77, *H. Hansen v Hauptzollamt Flensburg* (see above) where a German rule making tax relief available to spirits made from fruit by small businesses and collective farms had to be made equally applicable to spirits which were in the same category coming from elsewhere in the Community. In Case 55/79 *Commission v Ireland* [1980] ECR 481, [1980] 1 CMLR 734, Ireland applied tax rules in respect of the procedure for tax payments unequally. While the tax applied to all goods irrespective of origin, domestic goods were treated more leniently as regards payment. On the one hand, domestic goods were allowed a number of weeks before payment was actually demanded. On the other hand, importers had to pay duty directly on importation. (See also Case 196/85 *Commission v France* [1987] ECR 1597, [1988] 2 CMLR 851; Case C-327/90 *Commission v Greece* [1995] 2 CMLR 294.)

13 See Case 7/69 *Commission v Italy* [1970] ECR 111; Case 16/69 *Commission v* Italy [1969] ECR 377; Case 77/69 *Commission v Belgium* [1970] ECR 237; Case 55/79 *Commission v Ireland* [1980] ECR 481.

regard tax rates[14], the basis of assessment[15], the use to which the tax is put[16] and the conditions for payment[17] will all be considered.

Member States wishing to avoid the scrutiny of Article 90 EC might seek to establish that the levy itself should not be identified as "internal taxation" at all. For example in Case C-266/91 *Celulose Beira Industrial SA v Fazenda Pública* [1993] I-4337 the national court sought clarification of the concept of a charge having equivalent effect to a customs duty referred to in ex Article 12 et seq and ex Article 95. Previous case law had established that the provisions relating to charges having equivalent effect and those relating to discriminatory taxation cannot be applied together, so that under the system of the Treaty the same tax cannot belong to both categories at the same time. The Court stated:

> "13. The Court has held that a charge forming part of a general system of internal charges applying systematically to both domestic and imported products may nonetheless constitute a charge having an effect equivalent to a customs duty on imports if the revenue from it is exclusively intended to finance activities which specifically benefit domestic products and offset in full the burden on them. In such a case, that charge does indeed constitute a net financial burden for imported products, whereas, for domestic products, it represents only the consideration for advantages received.
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> 14. However, even if it is applicable without distinction, that charge will nonetheless constitute a breach of the prohibition of discrimination set out in Article 95 of the Treaty if the advantages resulting from the use to which the revenue from it is put, are specifically of benefit to the domestic

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14 If the higher rate of tax does no more than compensate for some other tax borne by the domestic product, or for some difference in the basis of assessment, it is not improper; see Case 28/67 *Mölkerei-Zentrale* [1968] ECR 211. In this case a German turnover equalisation tax that was designed to impose a tax on imports was judged to be equivalent to that borne by domestic products under a domestic turnover tax.

15 For example see Case 16/69 *Commission v Italy* (see above): Italy taxed imported alcoholic beverages according to a notional alcoholic content and domestic alcoholic beverages according to actual alcoholic content. This was held improper.

16 See Case 73/79 *Commission v Italy* [1980] ECR 1533; Article 90 EC is concerned with the total burden of taxation. It is necessary therefore to take into account 'indirect refunds', for example where the revenue gained from taxing the import is used to the benefit of the domestic product only. Case C-266/91 *Celulose Beira Industrial SA v Fazenda Pública* [1993] I-4337, at paragraph 14 (below).

17 See Case 55/79 *Commission v Ireland* (see above) .

products on which it was levied, by offsetting part of the burden on them and thereby placing imported products at a disadvantage." [18]

Assessment of Products

The assessment of products will be specific to their qualities. This assessment requires categorisation; therefore, prior to conducting a comparison, it is necessary to ascribe identity to the products to ascertain exactly what is under review. In ascribing the true identity of the products concerned, subtle determinations are made in accordance with EC law. Relevant factors are distinguished from that which is irrelevant in order that the principle at the core of Article 90 EC can be effectively implemented. Often it is the conduct of comparative analysis as to the characteristics of the product that will be key to the determination of whether discrimination exists.

Member States wishing to avoid the scrutiny of Article 90 EC will often seek to make distinctions as to the identity or the lack of similarity of the products under review that might take them outside the scope of Article 90. For example in Case 168/78, *Commission v France* [1980] ECR 347, [1981] 2 CMLR 631 the Commission challenged the French government imposition of higher tax rates on non-fruit based spirits such as whisky, rum, gin, and vodka in comparison to the tax rates imposed on fruit based spirits, such as cognac, calvados, and armagnac. France was a major producer of fruit based spirits but not of non-fruit based spirits. In its deliberations, the ECJ was willing to consider all manner of factors in order to determine whether fruit based spirits could be considered similar to or in competition with non-fruit based spirits. France responded to the Commission's assertion that all spirits constituted a single market by contending that the spirits market was in fact a number of more specific markets. In other words the French

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[18] Case C-266/91 *Celulose Beira Industrial SA v Fazenda Pública* [1993] I-4337 at paragraph 8 - 15.

See also Case C-347/95 *Fazenda Pública v União das Cooperativas Abastecedoras de Leite de Lisboa, UCRL (UCAL);*[1997] ECR I-4911. In this case a charge on the marketing of dairy products was levied without distinction on domestic and imported products. The Court found that such a charge constituted 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 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 90 EC. Joined Cases C-149/91 and C-150/91 *Sanders Adour and Guyomarc' h Orthez Nutrition Animale v Directeur des Services Fiscaux des Pyrénées-Atlantiques* [1992] ECR I-3899, at paragraph 14.

sought to assert difference. According to the French, these specific markets depended on their composition, physical characteristics and consumer usages. Consequently the arguments submitted by France were designed to substantiate and illustrate the distinctions between fruit based and non-fruit based spirits, *inter alia,* in terms of taste and use.

Nevertheless the Court decided that fruit and non-fruit based spirits possessed certain generic features that rendered them similar, despite the fact that these are made from differing materials and consumed in different ways. The Court stated:

> "40 [...] spirits obtained from cereals, including genevas, have, as products obtained from distillation, sufficient characteristics in common with other spirits to constitute at least in certain circumstances an alternative choice for consumers. Because of their characteristics, spirits obtained from cereals and genevas may be consumed in very varied circumstances and at the same time compete with beverages described as "aperitifs" and "digestives" according to French tax practice whilst, moreover, serving purposes which do not come within either of those two categories."

Thus, after determining the characteristics of the beverages in question, the Court determined that the consumption patterns were such that the two beverages were in competition.

Determination of Similarity under Article 90(1)

Article 90(1) bites once the products in question are judged similar. The Court has recognised that it is necessary to determine the scope of the first paragraph of Article 90 EC on the basis not of the criterion of the strictly identical nature of the products, but on that of their "similar and comparable use".[19] The approach of the Court in Case 302/00 *Commission v France* [2002] ECR (unreported) provides a good illustration of the assessment to be made in this regard. The Court was called on to assess whether light and dark tobacco cigarettes could be considered similar products. The Court noted that the two products were manufactured from different types of the same base product, tobacco, using comparable processes. While the

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[19] Similarity obtains, if the products are found to "have similar characteristics and meet the same needs from the point of view of consumers" see Case 45/75 *Rewe* [1976] ECR 181; Case 168/78, *Commission v France* [1980] ECR 347, [1981] 2 CMLR 631 at paragraph 5; Joined Cases C-367/93 to C-377/93 *Roders and Others* [1995] ECR I-2229, paragraph 27. In Case 27/67, *Firma Fink-Frucht GmbH v Hauptzollamt Munchen Landsbergerstrasse* [1978] ECR 223, the ECJ held that products would be regarded as similar if they came within the same combined nomenclature classification.

organoleptic characteristics of the two products, such as their taste and smell, were not identical, the Court nevertheless considered them similar. The Court also referred to the uniform tax treatment for all cigarettes in Community legislation.[20] It also stated that both dark and light cigarettes fall within the same sub-heading of the Combined Nomenclature contained in Annex I to Council Regulation (EEC) No 2658/87 on the Common Customs Tariff. On the basis of the above analysis, the Court found that for the purposes of the first paragraph of ex Article 95 there was similar and comparable use, and therefore similarity had been established.[21]

Competitive Relationships Under Article 90(2)

The objective of Article 90(2) EC is different from Article 90(1) EC. The second paragraph applies to national tax provisions that impose unequal internal taxation on products which may not be strictly similar but which may be in competition with each other. The assessment of the Court is more general than that under Article 90(1) EC and the extent of competition between domestic and imported products need only be partial, indirect or potential.[22]

Is the Distinction Important?

The approach of the Court in Case 168/78, *Commission v France* [1980] ECR 347, [1981] 2 CMLR 631, and many other early "spirits" cases was to avoid too detailed an analysis of whether the tax fell within the scope of the first or second paragraph of Article 90 EC. This approach was predicated on the assertion that unequal

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20 Directive 95/59/EC and 92/79/EC; it is clear that the Court views tax treatment in EC law as of evidentiary value.

21 Case 302/00 *Commission v France* [2002] ECR (unreported) at paragraphs 23 to 29. The Court found that since the similarity had been established and a system imposing a different rate of tax for dark and light-tobacco cigarettes, to the detriment of the latter, which is primarily an imported product, France had failed to fulfil its obligations under, *inter alia,* ex Article 95.

22 See Case C-166/98 *Société critouridienne de distribution (Socridis) v Receveur principal des douanes* [1999] ECR I-3791 at paragraph 17: "the second paragraph of Article 95 of the Treaty is intended, more specifically, to prevent any form of indirect fiscal protectionism affecting imported products which, although not similar, within the meaning of the first paragraph of Article 95, to domestic products, nevertheless compete with some of them, even if only partially, indirectly or potentially (Case 356/85 Commission v Belgium [1987] ECR 3299, paragraphs 6 and 7)". See also Case 168/78, *Commission v France* [1980] ECR 347, [1981] 2 CMLR 631 at paragraph 6.

taxation found to be in contravention of Article 90 EC would always have protective effects whether under Article 90(1) or 90(2). The following passage from the Court's judgment in *Commission v France* is indicative of the Court's approach:

> "12. First, there is, in the case of spirits considered as a whole, an indeterminate number of beverages which must be classified as "similar products" within the meaning of the first paragraph of Article 95, although it may be difficult to decide this in specific cases, in view of the nature of the factors implied by distinguishing criteria such as flavour and consumer habits. Secondly, even in cases in which it is impossible to recognise a sufficient degree of similarity between the products concerned, there are nevertheless, in the case of all spirits, common characteristics which are sufficiently pronounced to accept that in all cases there is at least partial or potential competition. It follows that the application of the second paragraph of Article 95 may come into consideration in cases in which the relationship of similarity between the specific varieties of spirits remains doubtful or contested.
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> 13. It appears from the foregoing that Article 95, taken as a whole, may apply without distinction to all the products concerned. It is sufficient therefore to examine whether the application of a given national tax system is discriminatory or, as the case may be, protective ...
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> 39. After considering all these factors, the Court deems it unnecessary for the purposes of solving this dispute to give a ruling on the question whether or not the spirituous beverages concerned are wholly or partly similar products within the meaning of the first paragraph of Article 95 when it is impossible reasonably to contest that without exception they are in at least partial competition with the domestic products [it] is impossible to deny the protective nature of the French tax system within the second paragraph of Article 95."

The Court's approach in this case was that if the nature of the products renders classification difficult (paragraph 12) and the Court feels that the tax in question should be condemned, whether the goods are classified as similar or not, because they are in competition to some degree is not important if the tax is protective (paragraph 39).

Article 90(1) obligation to equalise the taxes that are imposed on domestic and imported products as distinct from the Article 90(2) obligation to remove the protective effect.

This blurring of the distinction between similar and competing products is unhelpful. The general obligation under Article 90 EC is to remove the discrimination, but the two paragraphs operate in different ways. A finding of a breach of Article 90(1) EC will impose an obligation on the offending state to equalise the taxes that are imposed on domestic and imported products. The obligation under Article 90(2) EC is only to remove the protective effects of the tax in question, which does not necessarily mean an equalisation of the tax burdens on the respective goods. Moreover, while discriminatory tax differentials between a domestic and imported product might not always suffice to establish protectionism for the purposes of Article 90(2) EC,[23] there would always be the obligation to remove the same tax differential on similar products under Article 90(1) EC according to that article's absolute duty to equalise taxes.

Later Cases

In later cases the Court has sought to indicate whether its analysis was based upon a similar or a competitive relationship. For example in Case 243/84 *John Walker v Ministeriet for Skatter* [1986] ECR 875 the issue was whether liqueur fruit wine was similar to whisky for the purposes of Article 90(1) EC. The ECJ analysed the objective characteristics of the products including their respective alcoholic contents and methods of manufacture as well as consumer perceptions of the product. On this analysis the Court decided the distinctions between the whisky and liqueur fruit wine were too great for the products to be considered similar under Article 90(1)

[23] For example in Case 365/85, *Commission v Belgium* [1987] ECR 3299, [1988] 3 CMLR 277, the tax differential was small, and the cost of the two products was substantially different. In light of this, no breach of Article 90(2) was found.

EC.[24] Therefore the Court would have to proceed under Article 90(2).[25]

Greater Distinctions Between Imports and Domestic Products

The more dissimilar imports and domestic products are, the more problematic the comparison becomes. For example, beer and wine can be seen to have a more distant competitive relationship than the relationship between whisky and cognac. In Case 170/78, *Commission v United Kingdom* [1983] ECR 2265, [1983] 3 CMLR 512 the ECJ had to grapple with this distinction. The UK levied an excise duty on certain types of wine, which was approximately five times more than that imposed on beer. The tax on wine represented approximately 38% of the price of the product. The tax on beer represented 25% of the product price. The UK produces a great deal of beer and very little wine. For these reasons, the Commission brought an action claiming that the UK excise tax on wine was in breach of Article 90.

The Court considered that, to a certain extent at least, wine and beer were capable of meeting identical needs. The Court acknowledged that there was a degree of substitution between the products. However, the Court also noted the multitude of differing wines of various strengths, quality and price, from the cheapest to the most expensive. Beer, on the other hand, while having much variety, does not have the same depth and range of characteristics within the product range. The Court

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24 Arguably the Court took a very narrow view of the concept of similarity in this case. The Plaintiff had submitted, in the main proceedings that liqueur fruit wine was essentially a distilled spirit to which aromatic extracts or substances had been added (see Case 243/84, *John Walker v Ministeriet for Skatter* [1986] ECR 875 at paragraph 8). The Court ignored this argument.

25 The Court eventually found that the Danish system did not favour domestic production. Whisky fell into a tax category of spirits with a high alcoholic content that included other products, the vast majority of which were Danish. As the majority of products in this tax category were Danish, the high levels of taxation applicable to this category could not be considered protective of Danish products (see Case 243/84, *John Walker v Ministeriet for Skatter* [1986] ECR 875 at paragraphs 18 to 23). See also *Case 184/85, Commission v Italy* [1987] ECR 2013. In this case the Commission claimed an Italian tax on fruit was discriminatory under ex Article 95. Italy produced large amounts of various fruits but virtually no bananas. Most bananas consumed in Italy were imported from France. Italy imposed a consumption tax on bananas which amounted to nearly half the import price. Other mainly domestically produced fruit was not subject to the tax. The Court began its analysis considering whether bananas and other fruit were similar for the purposes of Article 90(1). It took into account the objective characteristics of the products including their organoleptic properties and whether they met the same consumer demand. Pursuant to this analysis, the Court found that any further examination of the Italian tax should proceed under Article 90(2), and not under Article 90(1).

recognised that in view of the substantial differences between wine and beer, it was difficult to compare the manufacturing processes and the natural properties of beer and wine until it was in possession of the complete facts as to the nature of the competitive relationship between the two products.

Later, once in a position to rule, the Court decided that:

> "11. [...] In view of the substantial differences in the quality and, therefore, in the price of wines, the decisive competitive relationship between beer, a popular and widely consumed beverage, and wine must be established by reference to those wines which are the most accessible to the public at large, that is to say, generally speaking, the lightest and cheapest varieties. Accordingly, that is the appropriate basis for making fiscal comparisons by reference to the alcoholic strength or to the price of the two beverages in question."[26]

Therefore, the link between expensive quality wine and beer was effectively excluded from the Court's consideration. These were not similar to beer while the "lightest and cheapest wines" were.

Determination of Protective Effect

But this was only one step in the analysis. A competitive relationship does not of itself determine the protective effect, and therefore the illegality of the internal taxation in question. A further enquiry was required in order to decide *Case 170/78*. So, after establishing a competitive relationship, thereby rendering Article 90(2) EC applicable, the Court went on to determine whether the UK system of taxation was *in fact* protective of beer.[27]

In considering the protective aspects of the tax, the Court was prepared to consider the varying criteria suggested by the parties in order to determine whether the tax system had protective effects. In particular the parties submitted three methods of assessing the true extent of the tax burden in order to determine the protective

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[26] Case 170/78 at paragraphs 11 and 12 .

[27] See also Case 184/85 *Commission v Italy (above)*. Here the ECJ noted that dried bananas were not in competition with table fruit, but that fresh bananas were in a competitive relationship with fresh fruit. Thereafter the Court moved on to consider whether the Italian fruit tax had a protective effect. The Court found that the imposition of a consumption tax which was equivalent to half the import price of bananas, while no such tax applied at all to most Italian table fruit, was clear evidence of protectionism.

effects of the system.[28] First the Court considered a comparison of the taxation of beer and wine by reference to volume. It found that, during the period under review, the taxation of wine was on average five times higher than the taxation of beer, wine being subject to "an additional tax burden of 400% in round figures".[29] The Court also considered a comparison based on alcoholic strength, even though this "is only a secondary factor in the consumer's choice between the two beverages in question".[30] The Court found the taxation "by reference to alcoholic strength, was more than twice as heavy as that borne by beer, that is to say an additional tax burden of at least 100%".[31] With regard to the final criterion of the incidence of taxation on the price net of tax, the Court found, despite experiencing difficulties in forming an opinion, that all cheaper wines marketed in the UK "are taxed, by reference to price, more heavily in relative terms than beer".[32]

This analysis shows that it is possible to get the result one seeks by using the appropriate criterion. However, in this case the Court was not minded to prefer one criterion to another. Therefore, following the detailed inquiry conducted by the Court, it stated:

> "27. [...] whatever criterion for comparison is used, there being no need to express a preference for one or the other - that the United Kingdom's tax system has the effect of subjecting wine imported from other Member States to an additional tax burden so as to afford protection to domestic beer production, inasmuch as beer production constitutes the most relevant reference criterion from the point of view of competition. Since such protection is most marked in the case of the most popular wines, [...]"[33]

What can be seen from the foregoing analysis is that when determining whether a tax affords a measure of indirect protection to a domestic product, the basic criterion

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28 The criteria used by the Court may or may not be relevant in the comparisons to be made in other cases with other products.

29 Case 170/78 at paragraph 19.

30 Case 170/78 at paragraph 20.

31 Case 170/78 at paragraph 21.

32 The Commission's calculations put the additional tax burden at around 58% and 77%, whereas the Italian Government's calculations relating to the cheapest wine showed that wine is subject to an additional tax burden of up to 286%.

33 Note the comparison made was in relation to the lightest and cheapest varieties of wine, which were most accessible to the public at large (see paragraph 11 of the judgment).

to be applied is product substitutability from the point of view of the consumer, or in other words cross-elasticity of demand. The idea is that as the price of the imported product rises in relation to the domestic product, consumers will to some extent switch their consumption from the imported product to the domestic product, as it is the domestic product that retains the lower price[34]. The extent to which consumer demand will switch to the lower-priced domestic goods will depend on a number of factors that go to determine how high or low the cross-elasticity of demand is between the two products. Where there is a less dramatic disparity in the tax rates of two competing products, a higher substitutability is required in order to establish the protective effect of internal taxation. Conversely where the substitutability between the two products is low, only a large difference in tax burdens will have a protective tendency.[35]

The Court has emphasised that when measuring substitutability, attention may not necessarily be confined to consumer habits in a Member State or in a given region. The Court considers those habits as essentially variable in time and space and not as immutable. The Court has also made it clear that consumer perceptions of what can be considered a substitute product will not be regarded as fixed for all time. Consumer preferences will not be considered as set in stone, partly because those perceptions and preferences will themselves be guided by price, which in turn will be affected, *inter alia*, by the tax rates of the two products. The tax rates themselves may serve to place the two products in separate categories with a corresponding change in consumer treatment.

This was the case of the UK tax policy in *Case 170/78* which, according to the Court, sought to treat wine as a luxury product and beer as a product used every day and thereby exclude wine from being considered a genuine alternative to domestically produced beer in the eyes of the UK consumer. The effect of this tax policy was to crystallise UK consumer habits so as to consolidate an advantage gained by domestic products over imports.[36]

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34 Cf Case 243/84, *John Walker v Ministeriet for Skatter* [1986] ECR 875 at paragraph 23, and footnote 23 above. In this case the ECJ found that no protection was afforded to domestic products.

35 Easson (above) at 539.

36 Case 170/78 paragraph 27.

What If There Are No Similar or Competing Domestic Products?

It is an open question whether, in the absence of a similar or competing domestic product, the tax on the import may be set freely under the terms of the Treaty. The Court has stated that Article 90 EC cannot be invoked against internal taxation imposed on imported products where there is no similar or competing domestic production.[37] Nevertheless, in practice it is very rare that there will be no competing domestic product.

For example, in Case C-47/88 *Commission v Denmark* [1990] ECR I-4509 the Court had to consider the Danish registration duty charged on new and used cars. Denmark does not manufacture cars domestically. Therefore the Danish government claimed that ex Article 95 could not apply to new or used cars, as there was no similar or competing domestic production in the importing Member State[38]. The Court agreed with the Danish government in respect of the duty paid on new cars. As there was no similar or competing product, the Court found that the Danish registration duty on new cars did not infringe the prohibitions laid down under ex Article 95. However, the Court observed that the fact of no Danish production of motor vehicles did not signify that Denmark had no used-vehicle market. The Court stated that a product becomes assimilated into a domestic product as soon as it has been imported and placed on the market. Imported used cars and those bought locally constituted similar or competing products. Ex Article 95 therefore applied to the registration duty charged on the importation of used cars[39].

Moreover, should excessive internal taxation not fall under the scope of Article 90 EC, it is likely that such taxation would fall under the scope of some other Treaty Article such as Article 28 et seq. Indeed in Case 31/67, *August Stier* [1968] ECR 241 (referred to in Case C47/88, *Commission v Denmark* at paragraphs 12 and 13), the Court recognised that:

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37 Case C-47/88 *Commission v Denmark* [1990] ECR I-4509 at paragraph 10 (see below).

38 Case C-47/88 at paragraph 6.

39 Case C-47/88 at paragraph 17. The Court eventually found there was a manifest over-taxation of imported used cars vis-à-vis domestic used cars (paragraphs 19-22). See also Case C-288/98 *Charalampos Dounias v Ypourgio Oikonomikon* [2000] ECR I-577 at paragraph 42: "[...] it should be recalled that the goods in question in the main proceedings are second-hand photocopiers. As the Advocate General noted in point 28 of his Opinion, even if there is no production of photocopiers in Greece, that does not mean that there is no market there for used photocopiers. As the Court has already ruled, imported used goods and those bought locally constitute similar or competing products".

> "Although Article 95 ... does not prohibit Member States from imposing taxation on imported products, nevertheless it would not be permissible for them to impose on products which, in the absence of comparable domestic production, would escape from the application of the prohibitions contained in Article 95, charges of such an amount that the free movement of goods within the Common Market would be impeded as far as those products were concerned."

Can Member States Never Favour Their Domestic Products?

In the abstract, the notion of the principle of non-discrimination does not prohibit discrimination in any situation at all costs. It is far more subtle than that. The principle does not prohibit exceptions from the basic rule of equality of treatment. In certain circumstances, differential treatment can be accorded to two things that are alike, but only for the right reasons.

National taxation policies that favour domestic products in their operation can be saved but only where the application of taxation policy is equally applicable to imports and domestic products, and can be objectively justified as according with Community objectives and imposed with rational and neutral criteria. Indeed the objective justification principle runs throughout Community law in areas where the issue of discrimination is brought before the Court. The key here is for one to cast aside national prejudices and look at the justification for internal taxation policy from the point of view of the Community.

In Case 140/79, *Chemial Farmaceutici v DAF SpA* [1981] ECR 1, [1981] 3 CMLR 350, the objective underlying an Italian tax policy was to favour the manufacture of ethyl alcohol from agricultural products, and to restrain the processing into alcohol of ethylene, a petroleum derivative, in order to reserve that raw material for economic uses deemed more important.

The Court observed:

> "14. As the Court has stated on many occasions [...] in its present stage of development Community law does not restrict the freedom of each Member State to lay down tax arrangements which differentiate between certain products on the basis of objective criteria, such as the nature of the raw materials used or the production processes employed. Such differentiation is compatible with Community law if it pursues economic policy objectives which are themselves compatible with the requirements of the Treaty and its secondary law, and if the detailed rules are such as to

> avoid any form of discrimination, direct or indirect, in regard to imports from other Member States or any form of protection of competing domestic products.
>
> 15. Differential taxation such as that which exists in Italy for denatured synthetic alcohol on the one hand and denatured alcohol obtained by fermentation on the other satisfies these requirements. It appears in fact that that system of taxation pursues an objective of legitimate industrial policy in that it is such as to promote the distillation of agricultural products as against the manufacture of alcohol from petroleum derivatives. That choice does not conflict with the rules of Community law or the requirements of a policy decided within the framework of the Community.
>
> 16. The detailed provisions of the legislation at issue before the national court cannot be considered as discriminatory since, on the one hand, it is not disputed that imports from other Member States of alcohol obtained by fermentation qualify for the same tax treatment as Italian alcohol produced by fermentation and, on the other hand, although the rate of tax prescribed for synthetic alcohol results in restraining the importation of synthetic alcohol originating in other Member States, it has an equivalent economic effect in the national territory in that it also hampers the establishment of profitable production of the same product by Italian industry."

In light of the above dicta it seems clear that certain policies in the levying of taxation, for example to promote the use of certain raw materials in the Community, are permitted and encouraged by Community law. Internal taxation that promotes such policy objectives is permitted on the basis that the Community as a whole benefits from the taxation policy and all community products complying with the objective criteria set down by the policy will gain from the advantages the Member State seeks to bestow.

In this respect the Court does not consider that such policies do not lead to a discriminatory result. However, such policies, even though formally promoting Community objectives, can nonetheless be seen to aid certain regions or producers more than others and thus produce a form of discrimination. Often the overwhelming majority of these products or regions to benefit from the taxation policy will be domestic to the Member State levying the preferential internal taxation. Therefore, it is undeniable that the support the Court has given to such taxation policies enables a blind eye to be turned to the fact that a significant proportion of the benefit of such a taxation policy goes to domestic producers. For example, in Case 196/85, *Commission v France* [1987] ECR 1597, [1988] 2 CMLR 851 France taxed sweet wines at a rate lower than liqueur wines. The Commission

challenged this policy. The ECJ found no direct discrimination on grounds of origin or nationality. The rationale for the French policy was to provide some fiscal incentives for production in these areas. The sweet wines to which the tax rate applied were made in the natural manner and produced in areas where the growing conditions were less than optimal (poor soil and low rainfall). The Court therefore permitted this type of regional aid. The Court decided that the aid pursued a legitimate objective and was justified under Article 90 EC. This was despite the fact that the majority of the disadvantaged rural regions of the Community where sweet wine was produced were in France. The Court stated:

> "14. As the Court has consistently held (see judgment of 7 May 1981 in Case 153/80 *Hansen v Hauptzollamt Flensburg* [1981] ECR 1165), a Member State may not deny a tax advantage to products from another Member State on the basis of conditions laid down by its legislation which the imported products cannot fulfil by reason of their geographical situation or of the legislation of the state of production. That principle cannot, however, prevent a Member State from making the availability of a tax advantage, whether for imported products or domestic ones, subject to proof that the conditions for granting it have been fulfilled, with the proviso that the evidentiary requirements may not be stricter in respect of imported products than they are for similar national products or disproportionate to the goal pursued, namely to eliminate the risk of fraud."

Summary

Over the years the principle of non-discrimination in its many forms has been applied in many areas of Community competence in pursuance of the fundamental freedoms protected under the EC Treaty.

As can be seen from the above analysis, the ECJ through the application of the principle of non-discrimination in the context of Article 90 EC seeks to prevent illegitimate discriminatory treatment vis-à-vis domestic and imported Community products. Through the use of objective, neutral and rational evidentiary devices, the Court establishes identity, similarity and difference. Thereafter the burden of taxation and the nature of products are themselves determined. It is only once that these judgments are made that the Court is in a position to judge what is acceptable and what is unacceptable in the levying of internal taxation.

The aim of Article 90 EC is to ensure the complete neutrality of internal taxation as regards competition between domestic and imported products. Eliminating all forms of protection resulting from discriminatory internal taxation pursues that aim and

this is calculated to promote and enhance the fundamental Community freedom of the free movement of goods between the Member States. Ultimately, the principle of non-discrimination in the context of Article 90 EC can be seen as the embodiment of one of the 'fundamental truths' that EC law seeks to establish and promote – namely the 'universality' of EC products.

List of Judgments Relating to Article 90 EC (ex Article 95 EEC Treaty)

Joined cases 2/62 and 3/62

Commission of the European Communities v Grand Duchy of Luxembourg and Kingdom of Belgium

Case 57-65
Alfons Lütticke GmbH v Hauptzollant Sarrelouis

Case 7/67
Firma Milchwerke H. Wöhrmann & Sohn KG v Hauptzollamt Bad Reichenhall

Case 20/67
Firma Kunstmühle Tivoli v Hauptzollamt Würzburg

Case 27-67
Firma Fink-Frucht GmbH v Hauptzollant München-Landsbergerstrasse

Case 28-67
Firma Molkerei-Zentrale Westfalen/Lippe GmbH v Hauptzollamt Paderborn

Case 24-68
Commission of the European Communities v Italian Republic

Case 7/69
Commission of the European Communities v Italian Republic

Case 16/69
Commission of the European Communities v Italian Republic

Case 28/69
Commission of the European Communities v Italian Republic

Case 47-69
Government of the French Republic v Commission of the European Communities

Case 77/69
Commission of the European Communities v Kingdom of Belgium

Case 45/75
Rewe-Zentrale des Lebensmittel-Großhandels GmbH v Hauptzollamt Landau/Pfalz

Case 46/76
W.J.G. Bauhuis v The Netherlands

Case 74/76
Iannelli & Volpi S.p.A. v Ditta Paolo Meroni

Case 148/77
H. Hansen jun. & O.C. Balle GmbH & Co v Hauptzollamt de Flensburg

Case 168/78
Commission of the European Communities v French Republic

Case 169/78
Commission of the European Communities v Italian Republic

Case 170/78
Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland

Case 171/78
Commission of the European Communities v Kingdom of Denmark

Case 179/78
Procureur de la République v Michelangelo Rivoira and others

Case 21/79
Commission of the European Communities v Italian Republic

Case 55/79
Commission of the European Communities v Ireland

Case 68/79
Hans Just I/S v Danish Ministry for Fiscal Affairs

Case 73/79
Commission of the European Communities v Italian Communities

Case 46/80
S.p.A. Vinal v S.p.A. Orbat

Case 17/81
Pabst & Richarz KG v Hauptzollant Oldenburg

Case 112/84
Michel Humblot v Directeur des services fiscaux

Case 243/84
John Walker & Sons Ltd v Ministeriet for Skatter og Afgifter

Case 184/85
Commission of the European Communities v Italian Republic

Case 193/85
Co-Frutta v Amministrazione della finanze dello strato

Case 196/85
Commission of the European Communities v French Republic

Case 356/85
Commission of the European Communities v Kingdom of Belgium

Case 365/85
Commission of the European Communities v Belgium

Case 386/85
Commission of the European Communities v Italian Republic

Case 433/85
Jacques Feldain v Directeur des services fiscaux du département du Haut-Rhin

Case 252/86
Gabriel Bergandi v Directeur général des impôts

Case C-47/88
Commission of the European Communities v Kingdom of Denmark

Case C-132/88
Commission of the European Communities v Hellenic Republic

Case C-152/89
Commission of the European Communities v Grand Duchy of Luxembourg

Joined Case C-78/90, C-79/90, C-80/90, C-81/90, C-82/90 and C-83/90
Compagnie Commerciale de l'Ouest and others v Receveur Principal des Douanes de la Pallice Port

Case C-327/90
Commission of the European Communities v Hellenic Republic

Joined Case C-149/91 and C-150/91
Sanders Adour SNC and Guyomarc'h Orthez Nutrition Animale SA v Directeur des Services Fiscaux des Pyrénées-Atlantiques

Case C-266/91
Celulose Beira Industrial SA v Fazenda Pública

Joined Cases C-367/93 – C-377/93
G. Roders BV, Amsterdam, v Inspecteur der Invoerrechten en Accijnzen, Amsterdam

Case C-90/94
Haahr Petroleum Ltd v Åbenrå Havn and others

Case C-347/95
Fazenda Pública v União das Cooperativas Abastecedoras de Leite de Lisboa, UCRL (UCAL)

Case C-375/95
Commission of the European Communities v Hellenic Republic

Case C-68/96
Grundig Italiana SpA v Ministero delle Finanze

Case C-204/97
Portuguese Republic v Commission of the European Communities

Case C-421/97
Yves Tarantik v Direction des services fiscaux de Seine-et-Marne

Case C-166/98
Société critouridienne de distribution (Socridis) v Receveur principal des douanes

Case C-228/98
Charalampos Dounias v Ypourgio Oikonomikon

Case C-393/98
Misnistério Público and António Gomes Valente v Fazenda Pública

Case C-234/99
Niels Nygård v Svineafgitsfonden, and Ministeriet for Fødevarer, Landbrug og Fiskeri

Case C-265/99
Commission of the European Communities v French Republic

Case C-302/00
Commission of the European Communities v French Republic