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PARTICULAR ASPECTS OF THE FUNDAMENTAL FREEDOMS

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What Are the Particular Aspects of the Tax Cases[2] in the Light of the General Jurisprudence of the ECJ and the Fundamental Freedoms

1. Introduction

A general prohibition of discrimination on grounds of nationality is laid down in Art. 12 (ex Art. 6). The fundamental freedoms give specific expression to the general prohibition. Since the Amsterdam Treaty the numbering has changed which is a good reason for recalling the fundamental freedoms:

- Free movement of goods — Art.28-30 (ex Art. 30-36)
- Free movement of persons — Art. 39-41 (ex Art. 48-51)
- Freedom of establishment — Art.43-48 (ex Art.52-58)
- Free movement of services — Art. 49-55 (ex Art. 59-66)
- Free movement of capital — Art. 56-60 (ex Art. 67-73)

Art. 28 on the free movement of goods has hardly any direct impact in the area of direct taxation since product related taxes are considered as indirect taxes to which Art. 90 (ex Art. 95) applies as *lex specialis*.[3] For an understanding of the case-law,

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2 Listed under section 4, p. 67. Most cases have been dealt with in this Journal and are presumed to be known to the readers

3 Since Art. 90 is concerned with discrimination, restriction based arguments fall under Art. 28, see such an example: Case 90/82, *Commission v France*, [1983] ECR 2011

Art. 28-30 remain of importance since the "restriction approach" to discrimination in the general case-law of the Court was developed under Art. 30 (now Art. 28). So far, free movement of persons, freedom of establishment and free movement of services have been the main fundamental freedoms with an impact on direct taxation which the table under section 4 clearly shows. Free movement of capital became directly applicable much later and consequently direct tax cases concerning it have surfaced only recently but this freedom will in future, surely, be of equal importance to the others. In spite of a general approach by the Court, the specific expressions of the general prohibition of discrimination given by each freedom maintain their importance and the Court also continues to scrutinise national measures for compliance with the respective freedoms (see table under 4).

1.1 Beyond national treatment

Originally the prohibition of discrimination was understood as a requirement of national treatment which is classical in international law. Discrimination against own nationals was originally not an issue. Two cases in which discrimination was not established, the *Daily Mail* case on companies and the *Werner* case on individuals, did not take the issue further in the context of taxation. In the *Werner* case, the Court evaded the question but in the *Asscher* case the Court stated that:

> Art. 52 nevertheless cannot be interpreted in such a way as to exclude a given Member State's own nationals from the benefit of Community law where by reason of their conduct they are, with regard to their Member State of origin, in a situation which may be regarded as equivalent to that of any other person enjoying rights and liberties guaranteed by the Treaty.[4]

As far as companies are concerned, the Court has repeatedly pointed out that the provisions concerning freedom of establishment, even though according to their wording, are mainly aimed at ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation which comes within the definition contained in Art. 48 (ex 58) ETC.[5]

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4 *Asscher*, para. 32.3

5 *Daily Mail*, para. 16, *ICI*, para 21, *X AB and Y AB*, para.26.

1.2 Negative integration

Laying down a prohibition of discrimination is a feature of negative integration whereas positive integration is to be achieved by way of legislation at Community level. It is the task of the Court to play the negative role of pointing to situations where Member States did not exercise their power consistently with Community law. Since we are dealing with situations where Member States exercise their power, the Court in order to establish discrimination looks to the choices made by the Member State in question. In the *Avoir Fiscal* case the Court stated that France placed companies whose registered office is in France and branches and agencies situated in France of companies whose registered office is abroad on the same footing for the purposes of taxing their profits, but treated them differently in regard to the grant of an advantage related to taxation, such as shareholders tax credits, so establishing discrimination.[6]

2. General Approach to Scrutiny of National Measures

The Court has developed a general approach to scrutiny of national measures for compliance with the fundamental freedoms of the Treaty. Tax cases, of course form part of a general jurisprudence on national measures. In the early tax cases this is particularly true. With a growing number of tax cases, however, particular issues relevant particularly to tax law appeared.[7]

2.1 Prohibition of discrimination/restriction

The notion of discrimination is broadly construed in the case-law on the freedoms and encompasses not only overt discrimination on grounds of nationality but also covert discrimination, i.e. discrimination by virtue of application of criteria of differentiation, other than nationality.[8]

A restriction-based approach was introduced in 1974 by the Court in its case law on free movement of goods where it held that the prohibitions contained in Art. 30 (now Art 28) covered all trading rules enacted by Member States which are capable of

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6 *Avoir Fiscal* case, para 20.

7 See below under 3.

8 Case 152/73, *Sotgiu*, judgment of 12.2.1974, [1974] ECR 153

hindering directly or indirectly, actually or potentially, intra-Community trade.[9] The same approach was gradually transposed to other freedoms.[10]

2.2 Public interest defence: mandatory requirements

The Treaty itself recognises in specific cases an overriding general public interest defence which may be relied upon in order to justify unequal treatment that is in principle incompatible with a specific freedom. Art. 30 (ex Art. 36) on the free movement of goods is the most extensive example, but Art. 46 (ex Art. 56)[11]is also an example of Treaty-based exceptions.

Since on a broad interpretation Art. 28 (ex Art. 30) would catch all restrictions even those arising simply from disparities between national rules, case-law based justifications beyond the explicit exceptions in Art. 30 (ex Art. 36) were added. In the *Cassis de Dijon* ruling, the Court introduced the so-called rule of reason, adding that restrictions had to be accepted in so far as they were necessary to satisfy mandatory requirements relating, *inter alia*, to the effectiveness of fiscal supervision, public health, fair trading and consumer protection.[12]

The rule of reason can be seen as the reverse side of the coin of the wide basic principle in *Dassonville*.[13]

It should also be borne in mind that mandatory requirements are temporary in nature since they are the expression of the defence of a public interest on national level not yet replaced by community legislation or designed to prevent an abuse of opportunities created under the Treaty.

2.3 Proportionality test

Whereas the Court recognises the legitimate interests of Member States in maintaining or adopting measures in the absence of adequate measures of

9 Case 8/74, *Dassonville,* [1974] ECR 837.

10 Very clear in the *Säger* case C-76/90, [1991] I 4221, para 12.

11 Referred to but not applied in case C-264/96, *ICI*, judgment of 16.7.98 , [1998] ECR 4695, para 28 and case C-307/97, *St. Gobain*, judgment of 21.9.1999, para.50.

12 Case 120/78, *Cassis de Dijon*, [1979] ECR 649.

13 Kapteyn and VerLoren van Themaat: Introduction to the Law of the European Communities, 3rd ed.,p.675.

harmonisation at a Community level, such national measures must nevertheless meet the test of proportionality. Such national measures must be suitable for securing the attainment of the objective which they pursue and they must not go beyond what is necessary in order to attain it.[14] A proportionality test may even result in the laying down of conditions by the Court.[15]

3 Tax cases[16] and their particular aspects.

The ECJ has extended its general case law to the area of direct taxation. Since 1986 when judgment was given in the *Avoir Fiscal* case it has been clear that national rules on direct taxation which discriminate whether directly or indirectly, on grounds of nationality may infringe the Treaty articles on the freedoms.

It is now settled case law that although direct taxation falls within the competence of Member States they must nevertheless exercise their power consistently with Community law.[17]

Particular aspects of the tax cases in a mainly chronological order of their surfacing are, first of all, the justifications put forward by Member States (3.1), secondly, a cautious, preponderantly discrimination based approach and more recently a clear move to a restriction based approach (3.2), thirdly, the main issue, i.e. the relationship to the system of tax treaties (3.3) and finally the interaction with social security law (3.4).

3. 1 What mandatory requirements in the area of direct taxation?

Since mandatory requirements are temporary in nature the recognised justifications are part of an ever moving process which is governed not only by developments in the case-law but still more by harmonised measures at a Community level which reduce the need for national justifications.

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14 See Case 55/94, *Gebhard,* [1995] ECR I 4165, para. 37.

15 The Court did so in case C-19/92, *Kraus*, [1993] ECR I 1663, para. 37-41.

16 Quoted cases are listed in the table under 4.

17 *Wielockx*, para 16; Case C-264/96, *ICJ,* judgment cf 16.7.98 [1998] ECR I 4695, para 19; *Safir* case, para 19, *Asscher* case, para 36, *St Gobain*, para 57, *Eurowings*, para 32; *Vestergaard*, para 25.

18 See *Futra* para 31.

(a) Justifications recognised by the ECJ

Effectiveness of fiscal supervision and mutual assistance directive

As far back as the *Casssis de Dijon* ruling the Court mentioned effectiveness of fiscal supervision as a possible mandatory requirement. It is settled case law that effectiveness of fiscal supervision counts among the rule of reason exceptions.[18] However, in cases where Member States have invoked fiscal supervision the Court has discovered the mutual assistance directive. The *Bachmann* case is such an example. The Court said:

> As regards the effectiveness of fiscal controls, it should be observed that Council Directive 77/799 EEC of 19 December 1977 concerning mutual assistance by competent authorities in the field of direct taxation (O J 1977 L 336, p.15) may be invoked by a Member State in order to check whether payments made in another Member State where it is necessary, as in the main proceedings in this case, for those payments to be taken into account in order correctly to assess the income tax payable (Art. 1 (1)).[19]

In the *Halliburton* case, the Member State contended that the restriction of the exemption to companies constituted under national law was necessary because the competent tax authority was unable to check whether the legal forms of entities, constituted in other Member States, are equivalent to those of public and private limited companies within the meaning of the relevant national legislation. The argument was rejected by the Court. The Court argued that information pertaining to the characteristics of the forms in which companies may be constituted in other Member States can be obtained, for the purpose of applying tax on legal transactions, as a result of the system provided for by the mutual assistance directive.[20]

In the *Futura* case the Court recognised that a Member State may apply measures which enable the amount of both the income taxable in that State, and of the losses which can be carried forward there, to be ascertained clearly and precisely,[21] and referred to the mutual assistance directive.[22]

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19 Case C-204/90, *Bachmann*, [1992] I 249, para 18.

20 *Haliburton* case, para 21-22.

21 Case C-250/95, *Futura*, judgment of 15.5.1997 , [1997] ECR I 2471, para 31.

22 *Ibid.* para 41..

In future Member States should not invoke effectiveness of fiscal supervision without having exhausted the possibilities of utilising the mutual assistance directive.

Fiscal cohesion - but what direct link?

In the *Bachmann* case the Court recognised, as a justification of discrimination the cohesion of a tax system the formulation of which is a matter for each Member State.[23] The Court saw a direct link between the deductibility of contributions from taxable income and the taxation of sums payable by insurers under old-age and life-assurances and the necessity of maintaining that link in order to preserve the cohesion of the tax system in question. In the *Wielockx* case the Court did not see fiscal cohesion established in relation to one and the same person by a strict correlation between the deductibility of contributions and the taxation of pensions.[24] In the *ICI* case the Court saw no such link between the consortium relief granted for losses incurred by a resident subsidiary and the taxation of profits made by non-resident subsidiaries.[25]

In the *Asscher* case the Court saw no direct link between the application of a higher rate of income tax and social security protection and consequently rejected the cohesion justification[26] The *Eurowings* case offers yet another example of non-applicability of the cohesion justification: not surprisingly compensatory tax arrangements were not seen as a need for coherency of taxation.[27]

The direct link which the Court requires seems to apply to the individual person or enterprise and the requirement of a direct link cannot be met by a general logic of tax rules.

Effectiveness of fiscal control and fiscal cohesion in the proportionality test

Effectiveness of fiscal control is a justification which can obviously be submitted to a proportionality test, whereas the justification of fiscal cohesion seems more difficult to submit to the test. In the *Bachmann* case the proportionality test was satisfied,

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23 *Bachmann*, para. 21-23.

24 *Wielockx* case, para.24.

25 Case C-264/96, *ICI,* judgment of 16.7.1998, 1998] ECR 4695, para 29.

26 *Asscher* case, para. 59-60

27 *Eurowings*, para. 41.

since the Court argued as follows: it is not possible to ensure the cohesion of such a tax system by means of measures which are less restrictive than those at issue.[28]

In the *Futura* case the Court rejected the requirement, addressed to non-residents, of keeping accounts in compliance with national rules and refers to the principle of proportionality when demanding that such a condition would have to be of such a nature as to ensure achievement of the aim in question and not go beyond what was necessary for that purpose. [29]

(b) Justifications rejected by the ECJ

Compensation

Member States tend to have a global view of advantages and disadvantages for foreign companies in their fiscal system. Unlike this "compensation approach" on a global level the Court looks at the situation of the individual and rejects the justification of global compensation. In the *Avoir Fiscal* case in 1986 the Court rejected the French argument that difference in treatment was justified by advantages which branches and agencies might enjoy vis-a-vis companies which balance out the disadvantages resulting from the failure to grant the benefit of a shareholders tax credit.[30] In the *St. Gobain* case last year the Court referred to this case and observed that the difference in tax treatment between resident companies and branches cannot be justified by other advantages which branches enjoy in comparison with resident companies which would compensate for the disadvantages of not being allowed the tax concessions in question.[31]

Loss of tax receipts

Loss of tax revenue is obviously a concern of Member States. The Court is however very suspicious about such a justification and has rejected it in several cases.[32] In the *Gilly* case, however, the Court did acknowledge that Member States were not

28 *Bachmann* case, para. 27

29 *Futura* case, para. 26

30 *Avoir Fiscal* case , para 21.

31 *St. Gobain*, para 53.

32 Case C-264/96, *ICI*, judgment of 16.7.1998, [1998] ECR 4695, para 28, case C-307/97, *St. Gobain*, judgment of 21.9.1999, para 50.

expected to grant a tax credit greater than the fraction of its national tax corresponding to the income from abroad.[33]

Risk of tax evasion

Under the freedom of establishment, risk of tax evasion is not a Treaty based exception and the Court has rejected the justification.[34]

The justifications rejected by the Court seem to indicate that although they reflect a legitimate public interest *carte blanche* justifications of general tax policy are not acceptable.

3. 2 From a discrimination to a restriction approach

Since in the field of direct taxation the well-established system of bilateral tax treaties based on the OECD Model Convention contains a non- discrimination clause (Art. 24 OECD Model Convention) discrimination on grounds of nationality has not been an issue except for foreign establishments and their legal form. However, under Community law, the notion of discrimination is broadly construed and encompasses, as we have seen, not only overt discrimination on grounds of nationality but also covert discrimination i.e. forms of discrimination which by application of criteria of differentiation other than nationality, lead in fact to discrimination on grounds of nationality.[35] The criterion of distinction in international tax law, i.e. resident/non-resident was not considered explicitly until the *Schumacker* case (see below). Until recently tax cases were concerned with discrimination which resulted in financial disadvantages such as repayment supplement on overpaid tax.[36]

The very early tax jurisprudence provides an example[37] of the restriction approach but at the time Art. 30 (now Art. 28) was considered applicable. The tax provision challenged concerned certain advantages granted to newspaper publishers, the benefit of which was refused in respect of publications printed in other Member States. In spite of the fact that printing work was considered on the basis of Art. 30 (now Art.

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33 *Gilly*, para. 48.

34 *Avoir Fiscal*, para. 25

35 *Biehl I,* para.13, *Commerzbank* case, para. 14.

36 *Commerzbank* case.

37 *The French press* case, [1985] ECR 1339.

28) since it led directly to the manufacture of a physical article,[38] the argument ran that the provision encouraged undertakings to have printing work done in France rather than in other Member States. The Court ruled that since it encouraged newspaper publishers to have publications printed in France rather than other Member States the tax provision was likely to restrict imports of publications printed in such states and must therefore be regarded as a measure having an effect equivalent to a quantitative restriction prohibited by Art. 30 (now Art. 28).

A proper restriction based approach was seen in the *Safir* case. In this case the Court considered a number of elements as restrictive of the freedom to provide services in as far as they were liable to dissuade individuals from taking out capital life insurance with companies not established in Sweden and liable to dissuade insurance companies from offering their services on the Swedish market.[39]

3. 3 Discrimination in spite of compliance with tax treaties?

The main issue which has remained an underlying issue for a long time is the compatibility of the system of bilateral tax treaties based on the OECD Model Convention with the fundamental freedoms.[40] Since non-discrimination is also part of this system (Art. 24 OECD Model Convention) the question is whether compliance with the well established system in international tax law was enough. The whole system is based on the distinction resident/non-resident. Under Community law, however, such a distinction was at risk of being considered discriminatory.

Recognition of the distinction resident/non-resident of the tax treaties

In the *Schumacker* case the Court recognised that in relation to direct taxes, the situations of residents and of non-residents are not, as a rule, comparable and that consequently, the fact that a Member State does not grant to a non-resident certain tax benefits which it grants to a resident is not, as a rule, discriminatory since those two categories of taxpayer are not in a comparable situation.[41]

38 *Ibid.* para. 12.

39 *Safir* case, para. 30.

40 Further details by Paul Farmer: EC Law and Double Taxation Agreements, ECTJ,3/4 [1999] 137 ECR 1299.

41 Case C-279/93, *Schumacker*, Judgment of 14.2.95,[1995] ECR I 225, paras 31 and 34.

In the *Futura* case the Court recognised the requirement of an economic link with a Member State for allowing non-resident taxpayers to carry forward losses so that only losses arising from the non-resident taxpayers activities in that State can be carried forward.

(b) Issues of discrimination

However, even if the application of the criterion resident/non-resident for differentiation is now recognised as not being discriminatory in itself, national legislation may still provide instances of discrimination. Such situations have surfaced concerning tax deductions from income of natural persons (*Schumacker* case) and concerning permanent establishments.

The system of double tax agreements is based on the presumption that a taxpayer receives full personal reliefs in his State of residence. Where this presumption does not apply, in cases where the non-resident's state of residence cannot take account of personal and family circumstances because the taxpayer's pays insufficient tax there, the Community principle of equal treatment nevertheless requires the state of employment to take account of the personal and family circumstances of a non-resident in the same way as those of resident nationals. That was the *Schumacker* ruling, where the tax-payer had no significant income in his State of residence. In the later *Gschwind* case the Court considered that the State of residence was in a position to take personal and family circumstances into account, since the tax base (42 % of the total income) was considered to be sufficient.[42]

Under the tax treaties only subsidiaries, but not permanent establishments, profit from the host states tax regime. This possible shortcoming in eliminating double taxation is due to the bilateral character of tax treaties.

Under Community law there is an underlying conflict relevant to this area of discussion. According to established case-law, the freedom of establishment which Art. 43 (ex Art. 52) grants to nationals of the Member States entails the right for them to take up and pursue activities as self-employed persons under the conditions laid down for its own nationals by the law of the Member State where such establishment is effected. The freedom includes pursuant to Art.48 (ex Art. 58), the right of companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community, to pursue their activities in the Member States concerned through a branch or agency. With regard to companies it is their corporate

42 *Gschwind*, para. 29.

seat that serves as the connecting factor with the legal system of a particular State, like nationality in the case of natural persons.[43] In the *St. Gobain* case the Court ruled that the difference in treatment to which branches of non-resident companies are subject in comparison with resident companies, as well as the restriction of the freedom to choose the form of secondary establishment, must be regarded as constituting a single composite infringement of Articles 52 and 58 of the Treaty.[44] Consequently the Court ruled that, concerning certain tax rules, permanent establishments of companies having their seat in another Member State must enjoy the same tax advantages as companies having their seat in that Member State.

Differences between national tax systems are the consequence of the absence of Community legislation and individuals do not have a choice between the more favourable rules. In the *Gilly* case the Court examined the tax credit mechanism set up by the bilateral convention and found it satisfactory.

3. 4. Interaction between Tax and Social Security

The relevance of social security issues to tax matters is due to the fundamental differences in financing social security in Member States. The contribution based Bismarckian model for working persons in the founding Member States contrasts with tax-financed models i.e. the Beveridge model in the UK, and the universal model in the Scandinavian countries covering all residents without link to contributions paid. Supplementary measures blur clear distinctions in the development of social security schemes but in all Member States there is a main stream towards at least a basic level for everybody.

A first phase of social policy at Community level addressed the achievement of the free movement of workers and Regulation 1408/71 on the coordination of national social security schemes was a result of the attention paid to these issues. Later the scope of the Regulation was extended to self-employed persons.[45]

Regulation 1408/71 does not harmonise social security schemes but co-ordinates (which is the terminology in this field of law) conflicting rules of competence so that employed and self employed persons moving within the Community are subject to the social security scheme of only one single Member State. This is an important achievement by way of regulation in the field of social security law compared to the

43 Case C-264/96, *ICI*, judgment of 16.7.98, [1998] ECR I 4695, para 20.

44 *St. Gobain case*, para. 43

45 Regulation 1390/81.

field of tax law. In international tax law we have the system of bilateral treaties based on the OECD Model Convention. Due to the differences in the financing of social security schemes a clash of systems is inevitable.

When contribution based Member States move in the direction of tax financing the question arises, "what is tax and what is social security"? France introduced a contribution, first the CSG[46] and then the CRDS[47] which it claims to be of fiscal character. A case is pending before the Court on the question.[48]

The rule of conflict for applicable social security legislation is the *lex loci laboris* and under the OECD Model Convention income from dependent work is taxed in the State of employment. Therefore, double payments, either by taxes or by contribution is not permitted. However, in certain cases problems arise.

The clash of two systems becomes clear in the *Asscher* Case,[49] where the Court ruled as follows:

> Art 52 of the Treaty is to be interpreted as precluding a Member State from taking account, by means of a higher rate of income tax, of the fact that, by virtue of the relevant provisions of Council regulation (EEC) no. 1408/71 of 14th June 1971 on the application of social security schemes to employed persons and their families moving within the Community, concerning the determination of the applicable legislation, the taxpayer is not obliged to pay contributions to its national insurance scheme.

4. Chronological list of tax cases

The case-law of the Court of Justice on the fundamental freedoms of movement of the Treaty

46 *Contribution sociale généralisée.*

47 *Contribution pour le remboursement de la dette sociale.*

48 Cases C-34/98 and C-169/98, *Commission v France*, conclusions of the Advocate General La Pergola of 7.9.1999.

49 Case C-107/94, *Asscher*, [1996] ECR I-3089.

Case	ECR or Date of Judgment	Art.	Tax Law Incompatible with EC Treaty Yes(+) No(-)
18/84 *'Press'*	85. 1339	28 (ex 30)	+
270/83 *'Avoir Fiscal'*	86. 273	43 (ex 52)	+
267/86 *Von Eycke*	88. 4769	49 (ex 59)	-
81/87 *'Daiy Mail'*	88. 5483	43 (ex 52)	-
C-175-88 *'Biehl' I*	90. 1779	39 (ex 48)	+
C-204/90 *'Bachmann' I*	92. 249	49 (ex 59)	-
C-300/90 *'Bachmann' II*	92. 1 305	43 (ex 52)	-
C-112/91 *'Werner'*	93. 1 429	43 (ex 52)	-
C-112/91 *'Commerzbank'*	93. 4017	43 (ex 52)	+
C-1/93 *'Halliburton'*	94. 1137	43 (ex 52)	+
C- 279/93 *'Schumacker'*	95. 1 225	39 (ex 48)	+
C-80/94 *'Wielockx'*	95. 1 2508	43 (ex 52)	+
C- 151/94 *'Biehl II'*	95. 1 3699	39 (ex 48)	+
C- 484 /93 *Svensson*	95. 1 3955	56 (ex 59, 67)	+
C- 107/94 *'Asscher'*	96. 1 3089	43 (ex 52)	+
C-250/95 *'Futura'*	97. 1 2471	43 (ex 52)	+
C-118/96 *Safir*	98. 1 1897	49 (ex 59)	+
C-390/96 *Lease Plan*	98. 1 2553	49 (ex 59)	+
C- 336/96 *Gilly*	98. 1 2823	39 (ex 48)	-
C-264/96 *Imperial Chemical (ICI)*	98. 1 4695	43 (ex 52)	+
C-222/97 *Trummer, Mayer*	99. 1 1661	56 (ex 73B)	+
C-331/97 *Royal Bank of Scotland*	29.4.99	43,49 (ex 52, 58)	+

C-39/97, *Gschwind*	14.9.99	39 (ex 48)	-
C-307/97 *St Gobain*	21.9.999	43,48 (ex 52, 58)	+
C-294/97 *Eurowings*	26.10.99	49 (ex 59)	+
C-55/98 *Vestergaard*	28 10 99	49 (ex 59)	+
C-200/98 *X AB, Y AB*	18.11.99	43,48 (ex 52,58)	+

5. Concluding remarks

The role of the Court in the process of negative integration is to keep Member States awake and put them on the right track when they do not exercise their retained power with due respect to fundamental issues of Community law such as non-discrimination. Individuals and individual undertakings help cases of discrimination to come to the surface by submitting their cases to national courts with a view to a preliminary ruling. It is not the role of the Court to substitute itself for the legislator with a view to establishing a positive integration.

As a result of a growing number of tax cases (see table above) particular tax aspects have materialised in the law relating to the fundamental freedoms. It may now be considered established case law that the distinction between resident and non-resident does not constitute discrimination in itself. Settled case law had construed the notion of discrimination broadly encompassing also covert discrimination i.e. forms of discrimination which by the application of other criteria of differentiation lead in fact to the same result.

Compliance with tax treaties is not enough but it may be an adequate way of exercising the power remaining with Member States since tax treaties are set up to eliminate double taxation. In the *Gilly* case it was enough.

A particular aspect of tax cases seemed to be a new justification for discrimination: fiscal cohesion. The Court has not given it up and still refers to it. The core of fiscal cohesion is the link between taxation and tax advantages. However, the baby was not born in the *Bachmann* case, it was only baptised. It was born as a requirement that Member States be fiscally coherent. It was present already in the *Avoir Fiscal* case. Again in the *St. Gobain* case the Court pointed to the discrimination arising from the fact that residence was no criterion of differentiation at the level of taxation but only at the level of advantages. Thus lack of fiscal cohesion is considered

discrimination. Whether there are cases where Member States may justify discrimination with fiscal cohesion remains an open question.

Tax cases remain part of a general jurisprudence on the freedoms . Developments under another freedom or in a different field of law have an impact on tax cases as well. Whoever would consider the enumeration of tax cases as a body of cases is in for surprises coming from developments in other parts. For example, the restriction approach in the *French Press* case, referred to above, then under Art. 30 (now Art. 28) and the restriction approach in the *Safir* case the Court had extended its restriction approach to other freedoms. This was not, however, noticeable in tax cases until *Safir*.