
The Personal Tax Planning Review

DIRECT TAXATION, THE STATE AND THE UNION: CAN THE EUROPEAN COURT OF JUSTICE BRING HARMONY?

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As the future course of the European Union is being mapped out at this year's Inter-Governmental Conference (IGC) it will be interesting to see what consideration, if any, is given to the harmonisation of direct taxation across the Member States. Attention has been focused on this area by a number of significant decisions from the European Court of Justice last year². In each case, the Court held that the provisions of the internal tax systems of the Member States in issue were unjustifiable infringements of individual rights under Community law. Furthermore, the Court insisted that where provisions of national law were incompatible with the EC Treaty, Member States must correct the position with binding domestic provisions for which mere administrative provisions were not an acceptable substitute³. The association of direct taxation and national sovereignty in the perception of the Governments and Parliaments of many Member States, not least the UK, renders any extension of EC law in this area inherently controversial. Given that the composition and jurisdiction of the Court may be subject to review at the IGC, the timing and content of future decisions could influence or be influenced by such external events.

Current Level of Harmonisation of Direct Taxation

Certainly, the political sensitivity of this area has been a factor in the remarkably limited impact of EC law to date. Numerous commentators have drawn attention to the stark contrast between the position of Community law at the heart of an ever

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² Case C-279/93 *Finanzamt Köln-Altstadt v Schumacker* [1995] ECR I-225, STC 306; Case C-80/94 *Wielockx v Inspecteur der Directe Belastingen* [1995] STC 876; Case C-151/94 *Commission v Luxembourg* [1995] STC 1047.

³ Case C-151/94 *Commission v Luxembourg* (above).

more harmonised VAT regime (which applies uniformly throughout the Community) and its almost peripheral relevance to the diversity of direct tax regimes peculiar to individual Member States. The present situation was considered by Advocate-General Leger in a recent case⁴ where he observed that "direct taxation is at a purely embryonic stage of harmonisation". Such harmonisation will become a necessity if distortions are to be avoided as the Single Market increasingly becomes a reality. Should the political will persist amongst sufficient of the major economic powers in the EU to introduce a single European currency according to the current timetable, there will be an urgent need for action to limit tax-driven distortions. Thus, almost four decades from the original signing of the Treaty of Rome there appears to be pressure for real progress in this area at last.

Mandate for Community Intervention

There are those who consider that the limited Community role in this realm is both unsurprising and perfectly proper. Those opposed to increased intervention have raised the traditional rallying cry of "no (direct) taxation without representation" and have pointed to a so-called "democratic deficit" in the EU.

Given that indirect taxation plays a prominent part in the provisions of the Treaty of Rome which established the European Economic Community, the virtual silence in relation to direct tax suggests that the original Member States did not envisage significant intervention at a Community level. In fact, direct taxation is only specifically referred to once in the EEC Treaty⁵, by Article 220, which simply urges Member States to enter into negotiations with each other to secure the abolition of double taxation within the Community on a bilateral basis⁶. The absence of a counterpart to the specific mandate for legislation concerning indirect taxation⁷ has necessitated the use of the general mandate in Article 100 for the

⁴ Case C-279/93 *Schumacker* [1995] ECR I-225, STC 306 at 311a.

⁵ Member States' direct tax regimes are now expressly referred to in Article 73 EC Treaty which governs the free movement of capital pursuant to the amendments introduced by the Maastricht Treaty.

⁶ This procedure has only been used once to date to conclude the Transfer Pricing Arbitration Convention [1990] OJ L 225/10 (signed in 1990 and ratified by the last of the signatories in 1994). It gives rise to international agreements which form part of the Community's legal order but do not create Community law. After ratification, the means of implementation will depend on the domestic constitutional law of each Member State.

⁷ Article 99 EC Treaty.

limited number of directives issued concerning direct tax⁸. As a result, legislation must be confined to measures directly concerned with the establishment and functioning of the common market and fiscal measures are expressly excluded⁹ from the majority voting procedures introduced by the Maastricht Treaty.

Direct taxation is an area in which the Member States may be quick to invoke the principle of subsidiarity¹⁰ in the face of increased intervention by the Community. However, it is not readily apparent why harmonisation is better achieved by individual action on the part of the Member States rather than at a Community level. Convincing arguments have been made for the converse view¹¹ and, at the very least, limited action by the Community may prompt Member States to greater individual efforts towards removal of the greatest areas of distortion.

In these circumstances, it is small wonder that the Commission appears to have decided to tread lightly in this legal and political minefield. Recently, the favoured approach has been to abandon a series of unsuccessful proposals for directives on harmonisation in preference for a policy of recommendations which encourage Member States to remove discriminatory provisions from their national legislation¹². These recommendations may not have been greeted with enthusiasm by the Member States but seem to have found a willing audience in the European Court of Justice.

Approach of the European Court of Justice

The ECJ has hitherto shown a rather cautious attitude to direct taxation, in marked contrast to the proactive stance taken to promote the establishment of the Community in other areas where the legislative process has suffered from

⁸ See Merger Directive 90/434/EC and Parent-Subsidiary Directive 90/435/EC (OJ 1990 L225).

⁹ By Article 100a(2).

¹⁰ Now enshrined in Article 3b of the EC Treaty which states: "In areas which do not fall within its exclusive competence the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community."

¹¹ See Derek Devgun's arguments on this point in support of an intra-community capital transfer tax multilateral tax agreement [1995] ELR 451 at 454.

¹² e.g. Recommendation of the Commission 94/79/EC dated 10th February 1994 concerning the taxation of certain items of income received by non-residents in a Member State other than that in which they are resident [1994] STI 201; and 94/3312/EC dated 7th December 1994 concerning the transference of small and medium sized enterprises.

paralysis. Clearly, the ability of the Court to intervene is restricted by the subject matter of the cases brought under the limits of its jurisdiction. Even within these parameters, the Court has proved ingenious in avoiding unwanted repercussions from the application of Community rules. In some cases this has been achieved by redefining the issues in such a way as to avoid reliance on Community rights¹³. Alternatively, it has accepted justification of such infringements where the public interest in the maintenance of a "coherent" internal taxation system is in real danger¹⁴.

In spite of these deviations, a clear line of authority has been developed which requires Member States to take account of Community rights in the operation of their internal tax systems. In the last year the Court has used this foundation to good effect through a series of decisions which indicate the importance of Community law in this area. The momentum created looks set to be maintained as both individuals and the Commission seek to ensure that Member States provide adequate enforcement of taxpayers' Community rights¹⁵.

A growing willingness to raise issues of EC law in disputes with the Inland Revenue can be observed in the UK. This trend is likely to continue as the Single Market becomes a reality for increasing numbers of UK taxpayers. The vast potential for applications of EC law to domestic direct tax legislation has been discussed by a variety of authors, some of whom have identified those sections of the UK Taxes Acts which appear susceptible to attack on EC grounds¹⁶. As with any area where the basic concepts are still in the process of development, it is important to take account of any problems which may limit the potential uses of EC law in practice. Such inherent limitations must be especially relevant in an area as complex as the interaction of the diverse tax regimes of the Member States, where often it is not possible to isolate the root of a problem, let alone expect a Court to judge the most appropriate solution.

¹³ e.g., in Case C-112/91 *Werner* [1993] ECR I-429 the ECJ held that mere residence in a Member State other than the one in which the taxpayer had qualified and now worked was not sufficient to involve the exercise of rights under Article 48; similarly, in Case 81/87 *R v HM Treasury ex parte Daily Mail and General Trust Plc* [1988] ECR 5500 the ECJ redefined the problem as arising from a lack of harmonisation of company law and not the exercise of rights under Article 52.

¹⁴ Case C-204/90 *Bachmann v Belgium* [1992] ECR I-249.

¹⁵ e.g., Case C-250/95 *Futura Participations SA v Administration des Contributions* concerning the requirements of Article 52 and national income tax legislation in Luxembourg which places restrictions on the circumstances in which non-resident taxpayers may carry forward losses.

¹⁶ See the table appended to a recent article by Elizabeth Keeling and Adrian Shipwright [1995] ELR 580.

A further layer of complexity arises from the interaction of the different types of taxes within each Member State, whose internal balance may be constantly adjusted. The areas in which the Revenue are facing arguments based on EC law range across the spectrum of direct taxes from a fundamental challenge to the income and corporation tax treatment of dividend payment and the operation of certain provisions of bilateral Double Tax Treaties, to the inheritance tax treatment of charitable bodies. The complexity of the subject matter becomes particularly relevant given the nature of the arguments which may be raised on the basis of EC law.

Applicable Principles of EC Law

All challenges to both EC and domestic direct tax legislation must rely on the terms of the EC Treaty and/or the superior principles of EC law¹⁷. Amongst the most significant of these principles in this context is the principle of equal treatment or non-discrimination. The crux of the problem for potential litigants is to establish what constitutes discrimination under EC law and in which circumstances such discrimination may be justified in a direct tax context.

The term "to discriminate" is capable of several interpretations. The traditional approach, often associated with the US/Canadian tax commentators, is to argue that discrimination implies treatment which distinguishes between taxpayers in ways or for reasons which are unreasonable, arbitrary or irrelevant. Implicit in this approach is the notion that a government has a right to treat taxpayers in different ways on the basis of its choice but that the manner in which this right is exercised may become objectionable in certain circumstances.

As a general approach, the ECJ has given a much less restricted meaning to the concept of discrimination. Discrimination arises through the application of different rules to comparable situations or the application of the same rule to different situations¹⁸. Specific manifestations of this general principle are to be found throughout the EC Treaty, for example Article 6 (discrimination on the grounds of nationality), Article 40(3) (discrimination between producers/consumers in the Agricultural sector) and Article 119 (discrimination on the grounds of gender).

This European approach presumes that Member States do not have a right to distinguish between persons on the basis of certain criteria, such as nationality.

¹⁷ e.g., proportionality, legitimate expectation, legal certainty, non-retroactivity, acquired rights, presumption of validity, equality, procedural rights and fundamental human rights such as those set out in the European Convention on Human Rights.

¹⁸ Case C-279/93 *Schumacker* (above) at para 30.

Such inequality of treatment may then be brought back within the law by specific factors which may justify different treatment in those limited circumstances. Even where these factors are present, the measure adopted by a Member State must still satisfy the general requirements of EC law, such as proportionality and legal certainty.

These requirements are echoed by Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms which states:

"The enjoyment of the rights and freedoms set forth in this Convention — and in Protocol No. 1 (Article 5 thereof) — shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinions, national or social origin, association with a national minority, property, birth, or other social status."

Article 1 of Protocol No. 1, concerning the entitlement of every natural or legal person to the peaceful enjoyment of his possessions, establishes that the duty to pay tax falls within its field of application. Accordingly, the European Court of Human Rights (ECHR) has held that the different tax treatment of residents and non-residents constituted a violation of Article 14 of the Convention in conjunction with Article 1 of Protocol No.1 if it "has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" and if there is no "reasonable relationship of proportionality between the means employed and the aim sought to be realised".¹⁹

Case Law on Discrimination

In the realms of direct tax, the focus of attention has been concerned with discrimination on grounds of nationality. A general prohibition of discrimination of this kind within the scope of the EC Treaty is laid down by Article 6. It is well established that Article 6 may apply independently where there is a Community context²⁰ but it is more common for taxpayers to rely on those Articles of the EC Treaty which codify this principle and govern its application to the relevant area (these comprise the so-called "four freedoms" which guarantee the free movement of goods, services, workers, and capital and payments²¹). Infringements on all four of these freedoms have been considered by the ECJ in the direct tax context.

¹⁹ Judgment of 23rd October 1990 in *Darby* (reported in publications of ECHR, Series A, 1991, 11).

²⁰ Case 305/87 *Commission v Greece* [1989] ECR 1461.

²¹ Articles 9-37 (goods); Articles 48-58 (free movement of workers and right of establishment); Articles 59-66 (free movement of services) and Articles 67-73H (free movement of capital and payments).

The authorities indicate that discrimination on the grounds of nationality covers not just overt forms of discrimination but all covert forms of discrimination which, "by the application of other criteria of differentiation", lead to the same result²². However, a problem arises in the application of this principle to direct tax as the income and corporation tax laws of the majority of Member States are founded on the concept of residence, not nationality as such.

The ECJ has circumvented this difficulty by declaring that different treatment on the grounds of residence may amount to covert discrimination on the grounds of nationality, on the basis that most non-residents are likely to be foreigners²³. This approach contrasts with stance taken on non-discrimination by Article 24 of the OECD Model from which the terms of many of the Double Tax Treaties presently in force are derived. The Model prohibits discrimination on the basis of nationality (which is defined) but, pursuant to the clarification made in 1992, the person being compared with the taxpayer must be in the same situation with regard to residence.

In spite of the growing body of authority in this area, the German Court in *Schumacker* considered it necessary to question the fundamental justification for the application of the EC Treaty to restrict the freedom of a Member State to subject a national of another Member State to income taxation. The Bundesfinanzhof stated in its reference that:

"The judgments do not, however, contain any convincing statement of reasons why Article 48 et seq. of the EC Treaty should relate to tax."²⁴

In response, the ECJ accepted that in the present state of development of Community law, direct taxation fell within the competence of the Member States but was adamant that they

"must nevertheless exercise that competence consistently with Community law and therefore avoid any overt or covert discrimination on the grounds of nationality".²⁵

The Court was at pains to point out, however, that different treatment of residents and non-residents did not automatically constitute illegal discrimination. This was

²² Case C-3/88 *Commission v Italy* [1989] ECR 4035 para 8; Case 152/73 *Sotigu* [1974] ECR 153.

²³ Case 175/88 *Biehl* [1990] ECR I-1779, [1991] STC 575 at 583; Case C-330/91 *Commerzbank* [1993] ECR I-4017, [1993] STC 605 at 622.

²⁴ Bundesfinanzhof of 14th April 1993 *Bundessteuerblatt II* 1994, 27.

²⁵ Case C-279/93 *Schumacker* (above) at paras 21 and 26.

because the position of residents and non-residents of a particular Member State would not usually be in comparable situations.

In my view, this requirement to establish a comparable position for resident and non-resident taxpayers will present a real obstacle to potential litigants and should reassure those who fear the opening of a floodgate of litigation against the interest of the Member States. Whilst it is relatively straightforward to identify those sections of the UK Taxes Act which differentiate between the treatment of residents and non-residents, it is far more difficult to establish that they are in comparable positions and suffer discrimination as a result of those sections.

The taxpayers concerned in the two most recent cases²⁶ which concerned cross-border workers represent exceptions rather than the rule. In both cases the non-resident taxpayers and the residents of the Member State (which was the source of all, or almost all, of their income from employment or self-employment) were in comparable positions. The "source" Member State taxed the income in the same way for residents and non-residents but refused to give reliefs which were available to residents²⁷. The Member State of residence²⁸ dealt with the problem of double taxation by exemption. However, as the taxpayers earned the vast majority of their income in another state, the Member State of residence was not in a position to grant the benefits which flow from the personal and family circumstances of the taxpayer. The exemption of such income enabled the ECJ to consider the position from the single point of view of the source Member State and isolate the cause of the discrimination.

The judgment is limited, therefore, to cases where the overwhelming majority of the income arises in one Member State. As soon as a significant proportion of income arises in the Member State of residence the position of the resident and non-resident taxpayer in the source Member States can no longer be said to be comparable. It had been hoped that the ECJ would take the opportunity presented by *Wielockx* to clarify what proportion of the income would be regarded as significant for these purposes. Unfortunately no indication was given, although no criticism was made of the 90% of worldwide income threshold used by the Netherlands in other cases (to determine whether non-residents qualified for the same treatment as residents for the purposes of certain deductions other than pension deductions). It is interesting to note that the Commission adopt a much lower threshold in their recommendation on the taxation of income received by non-residents. The preamble states that it may be assumed that a person receives

²⁶ Case C-279/93 *Schumacker* (above); Case C-80/94 *Wielockx* [1995] STC 876.

²⁷ Allowances based on marriage in Germany and deductions for pension contributions in the Netherlands, respectively.

²⁸ Belgium in both instances.

the preponderant part of his income in the country of activity where such income constitutes at least 75 % of his total taxable income²⁹

Similarly, it would be more difficult to apply the non-discrimination concept where the Member State of residence dealt with double taxation by giving credits for tax paid overseas. The lack of harmonisation in the rates of taxes levied across the Community would almost inevitably hamper attempts to establish that the resident and non-resident taxpayers are in a truly comparable position and that non-residents suffered discrimination as a result of the actions of the source Member State.

Potential Defences of Discriminating Legislation

Even where discrimination can be linked to the tax legislation or administrative practice in issue, it may be justified on the basis of the public interest in the coherence of the tax system of the Member State. The practical importance of this defence has so far failed to meet the expectations raised by its success in *Bachmann*. A contributory factor has been the emphasis of the ECJ in recent decisions on the necessity for the measure in question to satisfy the proportionality test³⁰. It is notable that these cases concerned measures whose relatively minor nature meant that the Court was sceptical of the assertion that they were essential to protect the coherence of the internal tax system in the relevant Member State. This defence would be far more creditable in the context of an assault on a fundamental part of the tax system, like the taxation of dividends.

Other defences, such as the lack of harmonisation of the direct tax system and administrative difficulties, have never been considered adequate justification for discriminatory measures. The ECJ has pointed to the fact that national tax authorities may collect all the relevant information from other Member States under the Mutual Assistance Directive³¹ and there is no reason to suppose that such arguments will be viewed more favourably in the future.

²⁹ Recommendation on the taxation of certain items of income received by non-residents in a Member State other than that in which they are resident (94/79/EC), dated 10th February 1994, reported at [1994] STI 201.

³⁰ See Case C-80/94 *Wielockx* p 882, at para 38 of the Opinion of the Advocate-General.

³¹ EC Council Directive 77/799 concerning mutual assistance by the competent authorities of Member States in the field of direct taxation; OJ L336 27.12.77 p 15.

Relevance to Personal Taxation

The most obvious application of EC law to personal taxation has been the income tax treatment of cross-border workers. Similarly, the right to freedom of establishment is relevant to individuals who receive trading income in Member States other than that of residence. For geographical reasons this area may be of less interest to UK residents than their counterparts on the Continent, but it will become more important if working patterns reflect an increasing integration of the UK economy within Europe.

In my view, there may be considerable potential for the application of to personal taxation the hitherto neglected principle of free movement of capital and payments to personal taxation. The development of this freedom must be considered distinctly from the other three freedoms, as the application of the principle of non-discrimination has been modified by the legislative provisions governing this area. The new provisions are yet to be considered by the ECJ³² and it would be unwise to reach any definitive conclusions in relation to their application,³³ but there are some indications of the likely approach.

Recent decisions of the ECJ (albeit concerning the old provisions) do appear to indicate that the new provisions will not be hampered by the difficulties concerning direct effect which limited the scope of Article 67. Initially, the ECJ had taken a very restrictive view of Article 67 influenced by its particular wording³⁴ and did not consider that it was capable of conferring directly effective rights on individuals.³⁵ (Article 106 governing the free movement of payments was generally considered to be directly effective). However, this uncertainty was eliminated by the harmonising measures of the Council, including the 1988 Directive,³⁶ which required Member states to abolish restrictions on movements of capital taking place between persons resident in Member States. The ECJ has

³² Although a number of reference are currently pending including 5 references from the Spanish Audiencia Nacional, C-163/94 Sanz de Lera and C-165/94 Diaz Jimenez [1994] OJ C218/14; C-250/94 Kapanoglu [1994] OJ C304/11; C-294/94 Quintanilha [1994] OJ C351/10; C-20/95 Weg [1995] OJ C74/6.

³³ The new provisions set out in Article 73 apply from 1st January 1994 pursuant to the Maastricht Treaty amendments.

³⁴ "Abolish between themselves all restrictions... *to the extent necessary* to ensure the proper functioning of the common market".

³⁵ See Case 203/80 *Casati* [1981] ECR 2614 and Case 267/86 *van Eycke* [1988] ECR 4769.

³⁶ Directive of 24th June 1988 reported in OJ 1988 No. L 178/5.

now decided that this Directive, upon which the new provisions are based, does have direct effect³⁷.

The new provisions in Article 73 B prohibit all restrictions on the movement of capital and payments (within the framework of the chapter). This prohibition is expressly subject to the right of Member States to distinguish between taxpayers in the same situation with regard to the place of residence or place where capital is invested, although this right is itself qualified and must not constitute a means of arbitrary discrimination. In the event that Article 73 is capable of conferring directly effective rights on taxpayers, its impact on personal taxation will be determined by the scope of the provision itself and its interaction with the other three freedoms.

The scope of the right to free movement of capital and payments depends on the meaning of "capital" for these purposes. No exhaustive definition is possible but there is some guidance in the case law concerning Article 67.³⁸ The ECJ considered that these provisions were essentially concerned with the investment of funds rather than the remuneration for services. Thus, the new provisions may apply to direct investment, investment in property, operations in securities and personal capital investment which will involve wealth taxation and inheritance taxes.

The interaction of the free movement of capital with the other freedoms has remained unclear. On the occasions that Article 67 has been raised in conjunction with another freedom it has received little detailed consideration. For example, in *Bachmann* the ECJ held that where the restrictions on capital movements are a direct result of restrictions on other free movements they should not be analysed under the rules of free movement of capital. It may be significant that this judgment was given ten days before the Maastricht negotiations and doubt has been cast on the willingness of the ECJ to adhere to this decision when considering the new provisions. This is an area in which clarification is required, whether by legislative or judicial means.

Judicial Intervention vs Legislation

There is general agreement that the present lack of harmonisation of direct tax imposes real economic costs and impedes the proper functioning of the Single Market. Whilst most of the attention has focused on the position of companies,

³⁷ See Case C-416/93 *Aldo Bordessa and others* [1995] ECR where it was held that Articles 1-4 of the Directive were directly effective.

³⁸ Case 203/80 *Casati* (above) and Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377.

it may have important application to discrimination concerning individuals. The double taxation of individuals was recognised by the Committee of the OECD on Fiscal Affairs as being capable of having a serious effect on cross-border capital flows³⁹. Despite the recommendation by the Ruding Committee that this problem may be dealt with by the conclusion of bilateral double tax treaties, it would seem there is a convincing case for multilateral action⁴⁰. Aside from the specific issues relating to the free movement of capital, disagreement arises as to the most appropriate means of promoting harmonisation overall.

The problems of double taxation and discrimination are difficult to separate, as the burden of multiple taxation gives rise to discriminatory treatment. As discussed above, possible solutions include action by the Member States on an individual, bilateral or multilateral basis to eliminate double taxation. Alternatively, action may be taken at a Community level to pass comprehensive legislation under Article 100 to promote the harmonisation of direct taxation. Finally, harmonisation could be progressed through the active intervention of the ECJ in a rigorous application of the principle of non-discrimination on a case by case basis.

The latter option has appealed to some commentators, who have concluded that

"the principle of non-discrimination combined with judicial authority empowered to implement it is sufficient to satisfy the tax needs of the Single Market"⁴¹.

It is argued that the sheer flexibility of the principle naturally lends itself to judicial rather than legislative implementation.

Others fear that continued intervention by the ECJ will result in a "fiscal patchwork quilt"⁴² which will not even guarantee the elimination of discrimination against non-residents.

Certain respected tax experts in the UK have doubted whether the ECJ is in a position to deal with this inherently complex and difficult area. One solution advocated is to adopt the approach to non-discrimination provided by Article 24

³⁹ OECD Convention p 12.

⁴⁰ See the recent consideration of this by Derek Devgun [1995] ELR 451.

⁴¹ Michel de Wolf, 'The power of taxation in the EU and the US' *EC Tax Review* 1995/3 p. 124 at para 27.

⁴² Dirk E Witteveen, Director-General for Tax and Customs Policy and Legislation, Ministry of Finance, The Netherlands, 'Taxation of Non-Residents in the European Union: Tax Equality or Patchwork Quilt?' *EC Tax Review* 1995/3 p 122.

of the OECD Model and utilise the available Court procedure to permit the OECD to provide an expert opinion to the ECJ⁴³ in appropriate cases.

Conclusion

If there is an optimum means of progressing the harmonisation of direct taxation in theory, the reality is that both a legislative and judicial solution are beset by problems. The legislative processes of the Community and the negotiation of treaties on a bilateral or multilateral basis by the Member States necessarily involves compromise if a concerted approach is to be agreed. This need may give rise to measures which are flawed and difficult to work in practice.

On the other hand, a judicial solution must take account of the practical limitations of litigation. For example, tactical considerations may prevent the parties from attacking the real source of the discrimination, in favour of lesser provisions which merely augment pre-existing discrimination but offer a more realistic prospects of a successful challenge. In spite of the limitations inherent in a judicial solution, I consider that this will prove the most potent means of progressing harmonisation. The history of EC law shows that action by individuals to enforce Community rights can have profound effects. In any event, the increasing number of cases being brought before the ECJ concerning direct taxation will ensure that this subject should be high on the agenda of discussions concerning the future of the European Union.

⁴³ Under Article 22 of the Statute of the Court of Justice.