Reprinted from British Tax Review Issue 3, 2022

Sweet & Maxwell
5 Canada Square
Canary Wharf
London
E14 5AQ
(Law Publishers)

To subscribe, please go to
http://www.sweetandmaxwell.co.uk/catalogue/productdetails.aspx?recordid=338&productid=6614.

Full text articles from the British Tax Review are also available via subscription to *www.westlaw.co.uk*, or *https://www.checkpointworld.com*.

SWEET & MAXWELL

Re-visiting EU Discrimination on Grounds of Nationality, Direct Taxation and the Court of Justice

Timothy Lyons[*]

Abstract

The author revisits his article "Discrimination against individuals and enterprises on grounds of nationality: direct taxation and the European Court of Justice" [1994] B.T.R. 554. Three issues raised in that article are re-considered, namely, the preservation of fiscal sovereignty, the making of comparisons in determining an inconsistency with the fundamental freedoms and fiscal cohesion. Given the enormous growth in the number of cases before the court dealing with direct taxation, only a few of the many judgments in this area are considered. In conclusion, the author suggests that there has been a significant level of consistency in the approach of the CJEU in relation to direct taxation and that, on occasions, the court has taken care to avoid disrupting direct taxation. Disruption is being caused, however, by the EU Member States themselves and the international community generally.

Of necessity, lawyers routinely reflect on the past and judgments in past cases. Yet, humanity can never be sure it understands the past whether in relation to law or more general matters. One historian has spoken of aiming to understand what really happened or how things really were.[1] Lawyers may have the same aim when they consider past proceedings and judgments.

The value of re-considering CJEU judgments which have passed into history has recently been demonstrated in the contributions to a volume entitled *Cassis de Dijon 40 Years On* in which the judgment of the Court of Justice in *Cassis de Dijon*[2] was revisited after 40 years.[3] The

[*] QC, Barrister, 39 Essex Chambers.

[1] The famous phrase of Leopold von Ranke, the meaning of which has itself been the subject of debate, is "*wie es eigentlich gewesen*". See further Felix Gilbert, "What Ranke meant" (1987) 56 *The American Scholar* 393. Gilbert says that: "Showing the past as it had actually been meant not only establishing the facts as correctly as possible, but also placing them in their contemporary context in such a way that the past would come to life again" (at 394). Court judgments too need to be placed in their contemporary context to be accurately understood. Judges are rarely able to anticipate the future in which their decisions operate and those who live in that future often find it difficult to appreciate the past in which the decisions were made.

[2] *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (120/78) EU:C:1979:42; [1979] E.C.R. 649.

[3] Albertina Alblors-Llorens, Catherine Barnard and Brigitte Leucht (eds), *Cassis de Dijon 40 Years On* (Oxford: Hart Publishing, 2021). All the contributions are valuable but for present purposes, Stephen Weatherill, "Did Cassis de Dijon Make a Difference?" in Alblors-Llorens, Barnard and Leucht (eds), *Cassis de Dijon 40 Years On* (2021), Ch.6, is particularly significant. See also David Edward, "What was Keck really about?" in Fabian Amtenbrink et al (eds), *"The Internal Market and the Future of European Integration": Essays in Honour of Laurence W. Gormley* (Cambridge: CUP, 2019), pp.164–175. Re-evaluating past judgments may also be valuable in relation to domestic law: see John Snape, "WT Ramsay v Commissioners of Inland Revenue (1981) Ancient Values, Modern Problems" in John Snape and Dominic de Cogan (eds), *Landmark Cases in Revenue Law* (Oxford: Hart Publishing 2020), pp.223–244. The author acknowledges here that he has benefited from discussions with Professor Catherine Barnard in relation to some matters considered in this article. The author alone is responsible for its contents.

process of re-evaluation may well be appropriate in relation to some cases before the Court of Justice on direct taxation, one may mention cases such as *European Commission v France*[4] and *Bachmann v Belgium* (*Bachmann*)[5] both of which deserve consideration by lawyers and historians and fuller review than they can be given below.

Of course, it is not just court judgments which benefit from being re-visited. In 2006 Professor Kees van Raad wrote a contribution to this *Review* entitled "Revisiting a 1981 perspective on EC non-discrimination rules in income tax matters".[6] In the 1981 article[7] he had considered whether the EEC Treaty's general rule against nationality-based discrimination "can be of any use in income tax matters".[8] His answer in the affirmative richly justified revisiting past work.

In 1994, the present author contributed an article (the article of 1994) which also addressed the impact on direct taxation of the fundamental freedoms of what was then the European Community.[9] Some of the issues it addressed can usefully be re-considered in the light of contemporary developments. Not everyone expected in 1994 that a case on direct taxation in the CJEU could soberly be compared to, what one English judge called, "a thunderbolt from Luxembourg".[10] Now that the dust has long settled, the lasting damage to the house may be thought incommensurate with the noisy reaction of the inhabitants.[11]

The fact that the UK is no longer a Member State of the EU may add to, rather than diminish, the benefits of such reflection. It is particularly important to look at the past with clear eyes given the concern which has been generated by retained EU law.[12]

In some circles, retained EU law has come to be seen as "this foreign-derived body of law".[13] There is, however, nothing at all foreign about many of the complexities of retained EU law. It is very broad and covers a good deal of domestic activity. It frequently consists of UK legislation

[4] *Commission of the European Communities v France (Commission v France)* (270/83) EU:C:1986:37; [1986] E.C.R. 273.

[5] *Bachmann v Belgium (Bachmann)* (C-204/90) EU:C:1992:35; [1994] S.T.C. 855; *Commission of the European Communities v Belgium (Commission v Belgium)* (C-300/90) EU:C:1992:37; [1992] E.C.R. I-305.

[6] Kees van Raad, "Revisiting a 1981 perspective on EC non-discrimination rules in income tax matters" [2006] B.T.R. 318.

[7] C. van Raad, "Non-Discrimination" [1981] B.T.R. 43. (The reference to "C" is for "Cornelis". The author is correctly known as Kees van Raad in accordance with his and his parents' wishes as he made clear in fn.1 of the article of 2006.)

[8] van Raad, "Revisiting a 1981 perspective on EC non-discrimination rules in income tax matters" [2006] B.T.R. 318, 318.

[9] Timothy Lyons, "Discrimination against individuals and enterprises on grounds of nationality: direct taxation and the European Court of Justice" [1994] B.T.R. 554.

[10] The phrase is Lord Walker of Gestingthorpe's, used in *Pirelli Cable Holding NV v IRC* [2006] UKHL 4; [2006] S.T.C. 548 at [104].

[11] The thunderbolt referred to was the judgment in *Metallgesellschaft Ltd v IRC; Hoechst AG v IRC* (C-397/98 and C-410/98) EU:C:2001:134; [2001] S.T.C. 452.

[12] On EU retained law generally, see Graeme Cowie, *The status of "retained EU law"* (TSO, 2019), House of Commons Library Briefing Paper No.08375, *https://researchbriefings.files.parliament.uk/documents/CBP-8375/CBP-8375.pdf* [Accessed 30 June 2022]; Julian Ghosh, "EU Law in the United Kingdom Post-31 December 2020: The Statutory Regime" in Nicola Saccardo (ed.), *Tax Implications of Brexit* (London: Bloomsbury Professional, 2021).

[13] HM Government, *The Benefits of Brexit: How the UK is taking advantage of leaving the EU* (TSO, 2022), p.32, *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1054643/benefits-of-brexit.pdf* [Accessed 30 June 2022].

and judicial decisions.[14] So far as the legislation and cases do come from the institutions of the EU, they are institutions in which the UK has been ably represented. In the context of direct taxation, lawyers for UK tax authorities and taxpayers have played a substantial role in the development of the case law of the Court of Justice and UK judges have referred many cases to the court in Luxembourg. If it is true to say that thunderbolts have come from Luxembourg then they have rarely been made with materials which exclusively originate there.

The first main heading in the article of 1994 was "Preserving fiscal sovereignty".[15] That remains something of great importance and attracts attention in degrees which, on all sides, may correspond to subjective political belief rather than objective legal analysis. It is the first matter re-considered below and the one dealt with at most length here.

The article of 1994 also contained headings such as "Determining the existence of discrimination" and "Making the correct comparison".[16] The use of the comparisons to determine consistency with the fundamental freedoms is the second issue dealt with below. The debate over the use of comparisons has the appearance of a debate over the use of legal tools. No doubt it is that, but it may also be a debate over the preservation of fiscal sovereignty in disguise.

The third and final area worthy of re-consideration concerns the concept of fiscal cohesion. This was dealt with in the article of 1994 under the heading of "Acceptable justifications for discrimination".[17] How important it would turn out to be was unknown then. Looking back on its development we may learn something about the methodology of the CJEU amongst other things.

A full study of these three issues would require a thorough discussion of all of the cases decided in the area of direct tax and probably in other areas too. In 1994, only a few cases existed in relation to direct tax and the fundamental freedoms. Now there are too many to address in a short article. Consequently, what follows below makes no claim to be an exhaustive consideration of the cases and refers to only a few of them.

Preserving fiscal sovereignty

Short-lived classic formulas

One matter which was sensitive in 1986 when *Commission of the European Communities v France* (*Commission v France*)[18] was decided, when the article was written in 1994 and is still sensitive today, is the fiscal sovereignty of Member-States. The article of 1994 quoted the submission of the French Government in *Commission v France*[19] that

[14] See in particular the European Union (Withdrawal) Act 2018 s.2 and the definition of "retained case law" in s.6(7) which means "retained domestic case law" as well as "retained EU case law".
[15] See Lyons, "Discrimination against individuals and enterprises on grounds of nationality: direct taxation and the European Court of Justice" [1994] B.T.R. 554, 555.
[16] See Lyons, "Discrimination against individuals and enterprises on grounds of nationality: direct taxation and the European Court of Justice" [1994] B.T.R. 554, 559.
[17] See Lyons, "Discrimination against individuals and enterprises on grounds of nationality: direct taxation and the European Court of Justice" [1994] B.T.R. 554, 566–567.
[18] *Commission v France* EU:C:1986:37.
[19] *Commission v France* EU:C:1986:37.

> "… as the law now stands, direct taxation is within the jurisdiction of the Member States which may, subject to the provisions of the Treaty, organise their tax systems as they see fit".[20]

In its judgment in that case the court did not consider it necessary specifically to refer to the Member States' rights in respect of taxation. This was so, notwithstanding that the court was keen to point out the true scope of the case.[21]

As the number of cases on direct taxation increased, the court began to refer expressly to the taxing powers of Member States in its judgments. In 1995, the judgment in *Finanzamt Köln-Altstadt v Roland Schumacker* contained the following words, the substance of which was to appear in many subsequent judgments:

> "Although, as Community law stands at present, direct taxation does not as such fall within the purview of the Community, the powers retained by the Member States must nevertheless be exercised consistently with Community law".[22]

In the famous case *Marks & Spencer Plc v Halsey (Inspector of Taxes)* on corporate group losses the court used similar wording. By then it was not novel and it became, for a time, part of the established liturgy of direct taxation. It said that "although direct taxation falls within their competence, Member States must none the less exercise that competence consistently with Community law".[23]

Advocate General Geelhoed called these words "the classic formulation of the Court".[24] Such a form of words was still being included in the court's judgments on taxation and the fundamental freedoms in *European Commission v Spain* in 2012.[25]

It seems that classics can have a short shelf life. Now, the court considers cases dealing with taxation and the fundamental freedoms without such words. Indeed, it frequently considers such cases without the assistance of a written Opinion from an Advocate General. One recent example of such a case is *Lexel AB v Skatteverket*.[26] Perhaps one may say that this indicates that, at least so far as legal principle is concerned, the Court of Justice considers that the application of the

[20] *Commission v France* EU:C:1986:37 at 290–291. Quoted at Lyons, "Discrimination against individuals and enterprises on grounds of nationality: direct taxation and the European Court of Justice" [1994] B.T.R. 554, 555.

[21] The Commission said that it limited its action to the insurance sector because that was the sector in relation to which it had received complaints (see at [7]). The court said: "It may…be regretted that, by reason of the fact that it is restricted to insurance companies, this action raises the problems in terms which cover only part of the scope of the French legislative provisions in question" (at [9]).

[22] *Finanzamt Köln-Altstadt v Schumacker* (C-279/93) EU:C:1995:31; [1995] S.T.C. 306 at [21]. The court supported that statement with a reference to the judgment in *Commission of the European Communities v United Kingdom* (C-246/89) EU:C:1991:375; [1991] E.C.R. 1-4585 at [12], which concerned the Merchant Shipping Acts in the UK. They achieved fame in the *Factortame* litigation which ultimately resulted in *Brasserie du Pêcheur SA v Germany; R. v Secretary of State for Transport Ex p. Factortame Ltd* (Joined Cases C-46/93 and C-48/93) EU:C:1996:79; [1996] Q.B. 404.

[23] *Marks & Spencer Plc v Halsey (Inspector of Taxes)* (C-446/03) EU:C:2005:763; [2006] S.T.C. 237 at [29].

[24] *Test Claimants in Class IV of the ACT Group Litigation v IRC (ACT Group Litigation)* (C-374/04) EU:C:2006:139; [2007] S.T.C. 404 at [33].

[25] *European Commission v Spain* (C-269/09) EU:C:2012:439 at [47]. See for example *X Holding BV v Staatssecretaris van Financiën* (C-337/08) EU:C:2010:89; [2010] S.T.C. 941 at [16]. The judgment established the incompatibility with free movement of persons of certain Spanish tax rules. They required the inclusion in the tax base, for the year preceding that of transfer of residence to another EU or EEA Member State, of income not previously charged to tax.

[26] *Lexel AB v Skatteverket (Lexel)* (C-484/19) EU:C:2021:34.

fundamental freedoms to direct taxation has become entirely routine. If so, then that is surely a big change from the position in 1994.

Interestingly, although the court no longer includes the classic words in cases on taxation and the fundamental freedoms, the General Court has made a point of including them in its judgments on state aid and tax rulings. The three judgments which concern Ireland, Luxembourg and the Netherlands all refer back to *European Commission v Spain* in 2012.[27] The Member States may find some reassurance in the formulation. They would be unwise to do so. Having regard to the fact that the words are no longer found to be essential in cases on the fundamental freedoms, perhaps before long they will cease to be used in relation to tax rulings. It is possible that they serve not so much to provide reassurance to Member States as to protect the court itself when applying internal market rules in the sensitive area of direct taxation.

Formalities and practicalities

The formal structures within which fiscal sovereignty may be determined were clarified somewhat by the Treaty on European Union signed at Maastricht in 1992. It introduced a limitation on the Community's powers[28] upon which the Lisbon Treaty of 2007 built.[29] The provision that treaty introduced is now article 5.1 of the Treaty on European Union. As is well known, it states that:

> "The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality."[30]

It continues: "Competences not conferred upon the Union in the Treaties remain with the Member States."[31] In 1986, when France was litigating over the "*avoir fiscal*" these provisions articulating the principle of conferral were not available to the French Government. To that extent the Member States now have a more secure base from which to assert the existence of some form of fiscal autonomy.

Ireland, for example, relied upon this apparently more secure base in litigating before the General Court over the tax rulings given to Apple. The court noted that:

> "In essence, Ireland and [the Apple companies] argue that the contested decision constitutes a breach of the fundamental constitutional principles of the EU legal order governing the division of competences between the Union and the Member States as laid down in, inter

[27] See *Luxembourg v European Commission* (T-816/17 and T-318/1) EU:T:2021:252 at [112]; *Ireland v European Commission; Apple Sales International v European Commission (Ireland v Commission)* (T-778/16 and T-892/16) EU:T:2020:338; 22 I.T.L. Rep. 815 at [105]; *Netherlands v European Commission* (T-760/15 and T-636/1) EU:T:2019:669; [2019] S.T.C. 2323 at [142].

[28] The Treaty on European Union signed at Maastricht on 7 February 1992 said in art.3b which it inserted into the EEC Treaty with a view to establishing the European Community: "The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein." The consolidated version of the Treaty establishing the European Community as amended by the Maastricht Treaty is available at [1992] OJ C224/1 and art.3b is at C224/9. The provision was subsequently placed in the Treaty establishing the European Community art.5.

[29] See the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community art.1, inserting art.3b into the Treaty on European Union [2007] OJ C306/1 at C306/12. See in particular art.3b.1 and art.3b.2.

[30] Treaty on European Union art.5.1.

[31] Treaty on European Union art.5.2, second sentence.

> alia, Articles 4 and 5 TEU, and of the principle of the fiscal autonomy of the Member States deriving therefrom. They argue that, under EU law as it currently stands, the field of direct taxation falls within the competence of the Member States."[32]

It is, of course, true to say, in the words of recital (14) of Directive 2018/822,[33] "direct taxation remains within the competence of Member States". No doubt Member States do have a competence over direct taxation, but that does not release them from the obligations of EU law. As Ireland must have anticipated, the new constitutional provisions which established the principle of conferral did not assist it at all. The true question was not whether or not Ireland as a Member State had competence over direct taxation but whether the Commission had properly exercised powers that it had clearly been given.[34]

In the context of this debate over fiscal sovereignty one is reminded of what Professor Jackson has said about sovereignty generally:

> "[W]hen one begins to analyze and disaggregate the concept of sovereignty, it quickly becomes apparent that it has many dimensions. Often, however, the term 'sovereignty' is invoked in a context or manner designed to avoid and prevent analysis, sometimes with an intent to fend off criticism or justifications for international 'infringements' on the activities of a nation-state or its internal stakeholders and power operators".[35]

Looking more specifically at the European Community, Judge Lenaerts has famously said:

> "The residual powers of the Member States have no reserved status…There simply is no nucleus of sovereignty that the Member States can invoke, as such, against the Community."[36]

The courts in Luxembourg have clearly not allowed Member States to use fiscal sovereignty as a shield against the consistent application of EU law. Indeed, they have identified some specific elements of the fiscal autonomy of Member States. The Court of Justice has noted, for example, that

> "as regards the obligations of the Member State of origin…the fiscal autonomy enjoyed by the Member States means that they are at liberty to determine the conditions and the level of taxation for different types of establishments chosen by national companies or partnerships operating abroad, on condition that those companies or partnerships are not treated in a manner that is discriminatory in comparison with comparable national establishments (*Columbus Container Services*, paragraphs 51 and 53)".[37]

[32] *Ireland v Commission* EU:T:2020:338 at [103].
[33] Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements [2018] OJ L139/1 (Directive 2018/822).
[34] See further Timothy Lyons, "Ireland and Apple v European Commission: the competent exercise of competences" [2020] B.T.R. 609.
[35] John H. Jackson, "Sovereignty-Modern: A New Approach to an Outdated Concept" (2003) 97 Am. J. Int'l Law 782, 782.
[36] Koen Lenaerts, "Constitutionalism and the Many Faces of Federalism" (1990) 38 Am. J. Comp. L. 205, 220.
[37] *Belgische Staat v KBC Bank NV; Beleggen, Risicokapitaal, Beheer NV v Belgische Staat* (Joined Cases C-439/07 and C-499/07) EU:C:2009:339; [2009] E.C.R. I-4409 at [80].

There are at least two observations that may be made on this formulation. First, and obviously, the case of *Columbus Container Services BVBA & Co v Finanzamt Bielefeld-Innenstadt* (*Columbus Container Services*) to which the court refers was decided in 2007.[38] The world of international tax has changed enormously since then. States have subsequently acknowledged their global interdependence in tax matters in an unprecedented manner. It is now clear that, in some important respects, the tax system created by one country and the tax rates it charges are the legitimate concern of other countries in the global community. If that is true in respect of countries which are not bound in union and in an internal market, it is likely to be even more true in respect of countries which are so connected in due course.

Secondly, the quotation from *Columbus Container Services* refers to treatment which is "discriminatory in comparison with comparable national establishments". In the context of a discussion over the extent of fiscal autonomy, that reminds us that the tool of comparison is necessarily as relevant to the definition of fiscal autonomy as to the existence of discrimination.[39] An example of that was shown in 2015 when Germany unsuccessfully relied upon a formulation of fiscal autonomy very similar to that articulated in *Columbus Container Services*, in a case concerning the taxation of gains on disposal of assets deferred until the sale of replacement assets.[40] The replaced assets had to form part of the assets of a permanent establishment in Germany for deferral to be granted. No deferral was permitted where the assets formed part of a permanent establishment in another Member State. That difference of treatment was held to be "a restriction" on the freedom of establishment.[41] The use of language referring to comparisons and restrictions is discussed further below. What is important here is to note that the concept of comparison is not relevant only to the nature of the legal analysis of tax provisions in the context of the fundamental freedoms. It is also about fiscal autonomy and any consideration of the debate over the use of comparisons should keep that in mind.

As a concluding comment in this section concerned with the formalities and practicalities relevant to fiscal sovereignty, attention should be paid to the attempt by Member States to defend their conduct not by reference to its legal merits but by the loss of revenue which may flow from finding it contrary to the fundamental freedom in question. In 1994, Member States had not been so bold as to rely bluntly on loss of tax as a justification for infringing the fundamental freedoms. They soon found the courage to do so. The court rightly resisted the pressure to permit loss of revenue to be a justification for discrimination. It has maintained over a long period of time that

[38] *Columbus Container Services BVBA & Co v Finanzamt Bielefeld-Innenstadt* (C-298/05) EU:C:2007:754; [2008] S.T.C. 2554.

[39] See further the discussion in Suzanne Kingston, "The Boundaries of Sovereignty: The ECJ's Controversial Role Applying Internal Market Law to Direct Tax Measures" in Catherine Barnard (ed.), *The Cambridge Yearbook of European Legal Studies*, Vol.9 (Cambridge: CUP, 2007), Ch.10, p.287, especially at p.303 onwards.

[40] See *European Commission v Germany (Commission v Germany)* (C-591/13) EU:C:2015:230; [2015] 3 C.M.L.R. 24 at [44].

[41] *Commission v Germany* EU:C:2015:230 at [61]. The court had earlier, at [56] of the judgment, confirmed that: "All measures which prohibit, impede or render less attractive the exercise of the freedom of establishment must be considered to be restrictions on that freedom".

> "the reduction in tax revenue cannot be regarded as an overriding reason in the public interest which may be relied on to justify a measure which is in principle contrary to a fundamental freedom".[42]

As is well known, the Netherlands attempted to frame its objection to loss of tax revenue as concerning "an erosion of the tax base going beyond mere diminution of tax revenue".[43] Now that we are in the third decade of this century and are looking back to the first decade when the submission was made, the contention has a suggestion of panic about it which the court was wise to disregard. When vague references to financial pragmatism are relied on in a courtroom to diminish the impact of legal principle, it is always to be hoped that legal principle proves the stronger concept. Fortunately for the rule of law in this context, it did. The court firmly rejected the contention.[44] Had it accepted the submission, the court would have transformed the rights provided by the fundamental freedoms into privileges to be afforded at the convenience of a Member State. That would not be "a community of law" at all.[45] In practice, to accept such a submission would have been to provide Member States with an incentive to create a tax system which contravenes the rules of the internal market to the greatest extent possible. They could then announce it would cost too much to change. The court's willingness consistently to state that loss of tax is itself no justification for inconsistency with the fundamental freedoms has preserved the EU legal order from considerable problems. It is noteworthy that the European Free Trade Association (EFTA) Court has recently confirmed that it takes the same view as the CJEU on this issue.[46]

The international context

Notwithstanding Member States' continuing concern to protect their tax sovereignty as against the EU, most of them have gone a long way toward surrendering tax sovereignty at the behest of international organisations, such as the World Trade Organisation (WTO) and the OECD,

[42] *Lexel* EU:C:2021:34 at [68]. The court refers to *Marks & Spencer Plc v Halsey* EU:C:2005:763 at [44] and the case law cited, i.e. *Proceedings Brought by Manninen (Manninen)* (C-319/02) EU:C:2004:484; [2004] S.T.C. 1444 at [49]. The principle goes back at least to *ICI Plc v Colmer (Inspector of Taxes) (ICI v Colmer)* (C-264/96) EU:C:1998:370; [1998] S.T.C. 874 at [28].

[43] *Bosal Holding BV v Staatssecretaris van Financiën (Bosal Holding)* (C-168/01) EU:C:2003:479; [2003] S.T.C. 1483 at [42].

[44] *Bosal Holding BV* EU:C:2003:479 at [42]. In doing so it referred to *ICI v Colmer* EU:C:1998:370 at [28].

[45] The phrase "community of law" has a long history. The first President of the European Commission, Walter Hallstein said: "In place of power and its manipulation, the balance of powers, the striving for hegemony and the play of alliances we have for the first time the rule of law. The European Economic Community is a community of law…because it serves to realize the idea of law." The quotation is taken from Thomas von Danwitz, "The Rule of Law in the Recent Jurisprudence of the ECJ" (2014) 37 Fordham Int'l L.J. 1311, 1312–1313 who uses his own translation of Walter Hallstein's work: "Die EWG—Eine Rechtsgemeinschaft. Rede anlässlich der Ehrenpromotion (Universität Padua, 12. März 1962)" [1979] *Europäische Reden* 341, 343–344. President von der Leyen has also used the phrase "a community of law": See Ursula von der Leyen "A Union that strives for more. My agenda for Europe", p.14, *https://www.europarl.europa.eu/resources/library/media/20190716RES57231/20190716RES57231.pdf* [Accessed 30 June 2022].

[46] See *PRA Group Europe As v Staten v/Skatteetaten (PRA Group)* (E3/21) 1 June 2022 EFTA Court. At [49] it said: "With respect to the fight against tax avoidance and evasion, the Court recalls that the need to prevent a loss of tax revenue is not a matter of overriding general interest that would justify a restriction on a freedom guaranteed by the EEA Agreement."

most of them apparently quite willingly. It may be that it is easier for a state to diminish its tax sovereignty in a large group where the possibility of the diminution being taken advantage of is reduced, than in a small one like the EU. Whatever the reasoning of their political leaders, the nature and extent of Member States' tax sovereignty or fiscal autonomy, in an international context, is markedly different now from what it was when the article of 1994 appeared.

So far as concerns tax sovereignty in the context of international trade law, the General Agreement on Tariffs and Trade (GATT) 1948 had some considerable time ago generated some conflict between multilateral trade law and national tax law.[47] Writing in 1994, the extent of the challenge which the WTO agreements would present to the fiscal sovereignty of nation states had yet to be seen. The EC as it then was and its internal market presented, for many observers, the only serious institutional challenge to Member States' fiscal sovereignty. Clearly, that is no longer the case. Now we know that the WTO agreements have the capacity to restrain the fiscal sovereignty of states in some significant ways.

Interestingly, despite its general concern to preserve its sovereignty, the UK appears not to have found the potential impact of WTO agreements on fiscal autonomy troubling. Its position may be contrasted with that of the US where the issue of tax sovereignty in the context of trade law has received more attention.[48] Perhaps the different experience of the two countries may explain that.

As a result of Panel rulings, the US replaced its legislation on foreign sales corporations in sections 921 to 927 of the US Internal Revenue Code by the FSC Repeal and Extraterritorial Income Exclusion Act of 2000 (Act of 2000). Certain provisions of the Act of 2000 were, in turn, repealed by the American Jobs Creation Act of 2004. The relevant legislation was held still to be inconsistent with the recommendations and rulings of the WTO's Disputes Settlements Body.[49]

A potential clash between trade law and tax sovereignty may arise as a result of bilateral or plurilateral agreements as well as multilateral agreements. In 2005, the late and much lamented Professor Arthur Cockfield addressed the issue of tax sovereignty in the context of the North American Free Trade Agreement (NAFTA), as it then was, into which the US, Canada and Mexico had entered on 1 January 1994.[50] Once one begins to consider bilateral agreements the

[47] Panel Report, Tax Legislation—United States Tax Legislation (DISC), L/4422, adopted 7–8 December 1981, BISD 23S/98; Panel Report, Tax Legislation—Income Tax Practices Maintained By France, L/4423, adopted 7–8 December 1981, BISD 23S/114. Reports were also delivered in respect of Belgium and The Netherlands. For further references see Timothy Lyons, "Tax and the UK/Japan Comprehensive Economic Partnership Agreement" [2020] B.T.R. 605 and the references in that note at fn.3.

[48] See, e.g. Reuven S. Avi-Yonah and Joel Slemrod, "(How) Should Trade Agreements Deal with Income Tax Issues?" (2002) 55(4) Tax L. Rev. 533. For further references to the literature see Lyons, "Tax and the UK/Japan Comprehensive Economic Partnership Agreement" [2020] B.T.R. 605 and the references in that note at fn.5.

[49] See the World Trade Organisation, Report of the Appellate Body, *United States—Tax Treatment for "Foreign Sales Corporations" Second Recourse to Article 21.5 of the DSU by the European Communities* (13 February 2006), WT/DS108/AB/RW2. The history of the matter is briefly summarised in paras 1–11. The US has, of course, expressed its dissatisfaction with the Appellate Body of the WTO by refusing to nominate new members to it, so halting its activities.

[50] Arthur J. Cockfield, *NAFTA Tax Law and Policy: Resolving the Clash between Economic and Sovereignty Interests* (Toronto: University of Toronto Press, 2006). See especially Pt III, "Sovereignty Concerns" (Chs 7 and 8).

possible effect on tax law of bilateral investment protection treaties must also be taken into account.[51]

Turning from trade law and its institutions to the OECD, even before its now famous Action Plan on BEPS of 2013, Professor Cockfield had noted that:

> "The OECD's general success with e-commerce tax reform demonstrates the OECD's ability to act as a kind of informal (lower case) world tax organisation…the OECD's success suggests that calls for a more formal (upper case) World Tax Organisation which could impose binding tax rules on participating nations, may be misplaced."[52]

In the light of subsequent events, the notion that the OECD is an "upper case" World Tax Organisation is now, perhaps, more sustainable.

It is clear that the contemporary OECD has the ability as an institution to set the agenda in international taxation. Once labelled "a classic sunset organisation"[53] by one commentator on international policy, the OECD has acquired new vitality and a new role on the international stage. No longer is its work in tax defined by activity in relation to model double taxation treaties. Now it is concerned with the international implications of domestic tax law and policy. The 15 Actions set out pursuant to the BEPS initiative covered many troublesome issues including the treatment of controlled foreign companies, limitation of interest deduction, abuse, permanent establishments and transfer pricing. In Action number 15, it recommended a powerful multilateral instrument to address deficiencies in double tax treaties which has now come into being.[54]

Then in October 2021, there was an agreement on the OECD/G20 Inclusive Framework which encompassed agreement even on applicable tax rates. The impact on rates has been achieved as part of the so-called "two pillar solution"[55] which has been designed to address the challenges arising from the digitalisation of the economy. As is well known, Pillar One deals with the partial reallocation of taxing rights between jurisdictions. Pillar Two seeks to impose a minimum effective tax rate of 15 per cent on multi-national groups having a turnover of in excess of €750 million pursuant to global anti-base erosion rules.[56] Ireland with a corporation tax rate of 12.5 per cent was one of the EU countries significantly affected by the establishment of the minimum

[51] See Timothy Lyons, "Treaty Arbitration: the limited role of tax carve-outs in BITs", *Global Arbitration Review*, 30 July 2015, *https://globalarbitrationreview.com/treaty-arbitration-the-limited-role-of-tax-carve-outs-in-bits* [Accessed 30 June 2022].

[52] Arthur J. Cockfield, "The Rise of the OECD as Informal 'World Tax Organisation' through National Responses to E-Commerce Challenges" (2005–2006) 8 Yale J. L. & Tech. 136, abstract.

[53] See Kishore Mahbubani, "The OECD: A Classic Sunset Organisation" (2012) 3(1) *Global Policy* 117. Mabhubani commented: "When I served as ambassador to the UN, western officials complained frequently that many UN bodies were set up without any 'sunset' provisions. Since the OECD is clearly a sunset organisation, the west could lead by example by shutting it down" (at 118).

[54] The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting 2016 entered into force on 1 July 2018. See also the BEPS Actions at *https://www.oecd.org/tax/beps/beps-actions/* [Accessed 30 June 2022].

[55] For a consideration of the two pillar solution see John Vella, "The OECD/G20 Inclusive Framework's Two-Pillar Solution" [2021] B.T.R. 515.

[56] OECD, *Statement on a two pillar solution to address the tax challenges arising from the digitalisation of the economy, OECD/G20 Base Erosion and Profit Shifting Project* (Paris: OECD Publishing, 2021), *https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf* [Accessed 30 June 2022].

rate. The Irish Government made clear that it had succeeded in changing the agreed minimum rate from "at least 15%" to 15 per cent.[57] That may not be insignificant, although it hardly counts as a dramatic achievement. The more important point is that it is now clearly accepted by a very large number of states that a country's tax system and rates are matters of legitimate interest to other states and may be governed by international rules.[58] How EU states react to that new reality amongst themselves will tell the world something about the nature of the EU.

The full implications of the international developments briefly referred to above will, no doubt, take some time to become clear. They ensure, however, that a consideration of the impact of the fundamental freedoms on direct taxation must take place in a context quite different from that which existed in 1994. Furthermore, they have resulted in significant developments in the EU's direct tax policy.

EU response to international developments

One of the responses of the EU to international developments in recent years was to formulate the Action Plan for Fair and Efficient Corporate Taxation in the EU.[59] The first of the five Actions it contained was the relaunch of the proposal to establish a Common Consolidated Corporate Tax Base including the enabling of the offset of cross-border losses. A directive laying down rules against tax avoidance practices followed in 2016.[60] Another initiative has been to seek transparency in relation to taxation. This has led to the directive providing for automatic exchange of information in relation to reportable cross-border arrangements.[61]

The EU followed the international agreement of October 2021 with the proposal for a directive to implement Pillar Two.[62] One of its elements is the imposition of a top-up tax where the effective tax rate imposed is below a minimum tax rate of 15 per cent.[63] Had the European Commission proposed in earlier times to place controls on the rate of corporation tax it would have been met with widespread resistance among Member States. When it implements an international consensus, however, the European Commission is on firmer ground. Its ground is so firm that it is able to act without engaging in prior public consultation.[64]

[57] See the Government of Ireland, Department of Finance, press release, *Ireland joins OECD International Tax agreement* (last updated 30 November 2021), *https://www.gov.ie/en/press-release/59812-ireland-joins-oecd-international-tax-agreement/#:~:text="The%20agreement%20provides%20that%20the,at%20least'%20in%20the%20text* [Accessed 30 June 2022].The press release also states that: "This 15% rate will apply to 56 Irish multinationals employing approximately 100,000 people, and 1500 foreign owned MNEs based in Ireland employed approximately 400,000 people." The rate remains at 12.5% for a large number of businesses.
[58] As of 4 November 2021, 137 countries had agreed to it.
[59] Communication from the Commission to the European Parliament and the Council, "A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action" COM(2015) 302 final.
[60] Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market [2016] OJ L193/1.
[61] Directive 2018/822.
[62] Proposal for a Council Directive on ensuring a global minimum level of taxation for multinational groups in the Union COM(2021) 823 final.
[63] See art.26 of the Proposed Directive. Article 3(12) of the Proposed Directive defines "minimum tax rate" at 15%.
[64] Proposal for a Council Directive on ensuring a global minimum level of taxation COM(2021) 823 final, p.4, para.3. Poland has so far refused to agree to the proposal on the grounds that EU proposals in relation to Pillar One (taxation of so-called "digital giants") and Pillar Two (minimum rate of tax) are inter-related. It considers that there is insufficient certainty over the effectiveness of the proposals under Pillar One to permit agreement to a minimum rate of tax under Pillar Two. The dispute, however, must be understood in the context of the "rule of law" dispute between the EU and

It is not only proposals in respect of Pillar Two that have profound implications for the integration of the EU and the position of Member States in relation to it. Proposals in relation to Pillar One are also important. The European Commission has proposed that sums which are reallocated under Pillar One of the reforms to corporate taxation should form an element of the EU's own resources for 2026 to 2030. These sums will be one of three new sources of own resources which are to be strengthened with a view to repaying the borrowing of the European Commission undertaken to respond to the COVID-19 crisis.[65] The significance of direct taxation falling within the own resources regime of the EU, and the disciplines that would impose, should not be underestimated.

There is more proposed legislation to take into account, for example, the proposal for the misuse of shell entities.[66] In addition, at the time of writing, the European Commission is consulting on a new EU system of withholding taxation.[67]

The developments outlined above were almost unimaginable when the article of 1994 was written. Then, the European Community still regarded the directives on the taxation of parents and subsidiaries,[68] and of mergers[69] as probably its most substantial achievement in direct tax legislation. The broad context within which the CJEU now decides cases affecting direct taxation has changed completely. It has already been noted that, in the international community, one state's tax system is a matter of legitimate concern to other states. That must be even more the case within the EU in which the Member States owe each other a duty of sincere cooperation in pursuit of their common objectives.[70] No doubt Member States will want to continue to contend before the CJEU that they can formulate their tax policy without taking into account the tax systems of other Member States.[71] The area within which that contention is valid may well diminish significantly unless current trends are reversed.

Poland. A political solution to that larger dispute may well result in a resolution of the difficulties over tax. Since this article was submitted for publication there have been other developments in relation to the two pillar solution involving, for example, Hungary, which cannot be referred to here.

[65] See the Proposal for a Council Decision amending Decision (EU, Euratom) 2020/2053 on the system of own resources of the European Union COM(2021) 570 final. See art.1(1)(c) which applies "a uniform call rate of 15% to the share of residual profit of multinational enterprises reallocated to Member States pursuant to [the Directive on implementation of the global agreement on re-allocation of taxing rights.]"

[66] Proposal for a Council Directive laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU COM(2021) 565 final.

[67] The consultation document, "Withholding taxes—new EU system to avoid double taxation" is available at *https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13031-Withholding-taxes-new-EU-system-to-avoid-double-taxation/public-consultation_en* [Accessed 30 June 2022]

[68] Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States [1990] OJ L225/6.

[69] Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States [1990] OJ L225/1.

[70] Treaty on European Union art.4.3.

[71] See, for example, the contention in *Commission v Germany* EU:C:2015:230 at [44]: "In the current state of the harmonisation of tax law at EU level, the Member States benefit from a degree of autonomy in tax matters. They are in no way obliged to adapt their own tax systems to the different tax systems of other Member States in order to ensure that a company which has chosen to become established in a given Member State is taxed, in that Member State, in the same way as a company which has chosen to become established in another Member State."

EU integration externally driven

The changes which have taken place in the nature of Member States' fiscal autonomy appear to have been influenced, to a very significant extent at least, by external factors such as the initiatives in the OECD and G20. These, in turn, have been driven by significant pressure from an international public aware of, for example, the Paradise Papers.[72]

The fact that EU integration in the field of direct taxation, is a response to developments, action or pressure, outside the EU is no surprise. European Union integration is often a response to external as much as internal matters. The first of three brief examples of that is provided by the creation of the EU's customs union. It was established in July 1968, well before the deadline imposed by the treaty, because rates of duty worldwide had been reduced within the framework of GATT. Member States were, therefore, able more readily to dispense with their ability to impose customs duties between themselves and accept some loss of control and revenue. In a comparable way, today it seems Member States are now prepared to accept, in relation to direct taxation, some loss of control and revenue.

The second example is the effect of the COVID-19 pandemic on the EU. Recovery from the pandemic has led to some money raised by the European Commission being used in loans of up to €385.8 billion, repayable by recipient states. More significantly, "non-repayable support" to Member States of up to €338 billion is to be repayable out of the EU budget.[73] The resulting debt mutualisation is an important step in the financial integration of the EU.[74]

The third example is provided by current events in Ukraine which has led to Denmark voting to join the EU's Common Security and Defence Policy and to a plan to reduce dependence upon Russian fossil fuels and develop the transition to "green" energy.[75]

Direct taxation is then an area of law and policy within the EU which develops no differently from other areas of EU law and policy. It is considerably influenced by external developments. It is not sui generis as a matter of politics. Some have suggested that direct taxation should be treated as sui generis as a matter of law, particularly when it comes to the nature of the conceptual tools used to determine infringements of the fundamental freedoms. This is a matter which is considered next.

[72] International Consortium of Investigative Journalists (ICIJ), "An ICIJ Investigation. Paradise Papers: Secrets of the Global Elite", *https://www.icij.org/investigations/paradise-papers/* [Accessed 30 June 2022].

[73] See Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis [2020] OJ LI433/23. For information generally on NextGenerationEU, see *https://ec.europa.eu/info/strategy/eu-budget/eu-borrower-investor-relations/nextgenerationeu_en* [Accessed 14 June 2022].

[74] Regulation 2020/2094 art.5 makes clear that it does not apply to or in the UK. Nevertheless, UK investors have proved important to the NextGenerationEU programme. The European Commission's first NextGenerationEU transaction raised €20 billion and 24% of the investors were located in the UK—the largest national group of investors. The second largest group of 15% was located in the Benelux countries: European Commission, press release, *NextGenerationEU: European Commission raises €20 billion in first transaction to support Europe's recovery* (15 June 2021), *https://ec.europa.eu/commission/presscorner/detail/en/IP_21_2982* [Accessed 30 June 2022]. UK investors have continued to be important in subsequent transactions. Perhaps, in this context, the departure of the UK from the EU has not been unhelpful to the cause of EU integration. The EU is able to access funding from the UK to facilitate integration without having to face the UK's objection to the process.

[75] See the Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: REPowerEU Plan COM(2022) 230 final.

Making the correct comparison, prohibiting restrictions

The article of 1994 referred to indirect and direct, or overt and covert, discrimination and the making of comparisons. These were inevitably significant in the early cases that the article considered. In its short judgment in *R. v IRC Ex p. Commerzbank AG*, for example, the Court of Justice made use of the concept of covert discrimination and compared the position of companies which were UK resident and non-UK resident.[76] The judgment in *Biehl v Administration des contributions du grand-duché de Luxembourg* displayed a similar concern with indirect discrimination on grounds of nationality and equal treatment between workers who were residents of Luxembourg and those who were temporary residents there.[77]

Plainly, the concepts of direct and indirect discrimination and the need to establish them by choosing the correct comparison was and is very important in EU law. The concept of indirect discrimination was referred to, for example, in a recent case referred to the CJEU from the High Court in England and Wales. It concerned the exclusion of pension rights from the assets passing to the trustee in bankruptcy where a pension scheme was registered with the UK tax authorities and, therefore, approved. The court found the indistinctly applicable requirement of registration was intrinsically likely to affect a higher proportion of non-national workers than national ones and was, therefore, indirectly discriminatory on grounds of nationality.[78]

In the context of corporate taxation in 2020, the court considered in *AURES Holdings a.s v Odvolací financní reditelství* (*AURES*), the tax affairs of a company which had its seat and tax residence in the Netherlands. It had moved its place of effective management and tax residence to the Czech Republic. The company then sought to deduct a loss which had arisen when it was resident in the Netherlands, and which could not be deducted there, from its tax liability as a company resident in the Czech Republic. Had the company been at all times resident in the Czech Republic it would have been allowed the deduction. A difference in the treatment therefore arose. That different treatment did not, however, infringe the freedom of establishment because, in the words of the court

> "resident companies which suffered a loss in that Member State, on the one hand, and companies which transferred their tax residence to that Member State and had incurred a loss in another Member State in respect of a tax year during which they were tax residents in the latter Member State, on the other, *are not in a comparable situation*".[79]

The willingness of the court to use the concept of comparison in *AURES* is notable because Advocate General Kokott had indicated that she found the comparability exercise in relation to direct taxation and freedom of establishment unhelpful. She said:

> "In any case, the criterion of comparability is vague. Given that all situations are comparable in some respect, if they are not identical, this test should therefore be abandoned."[80]

[76] See *R. v IRC Ex p. Commerzbank AG* (C-330/91) EU:C:1993:303; [1993] S.T.C. 605 at [14]–[15] and [18]–[19].
[77] *Biehl v Administration des Contributions du Grand-Duché de Luxembourg* (C-175/88) EU:C:1990:186; [1991] S.T.C. 575 at [12]–[14] and [16].
[78] *BJ v M* (C-168/20) EU:C:2021:907; [2022] 2 C.M.L.R. 11 at [81]–[87] in particular.
[79] *AURES Holdings as v Odvolací Finanční Reditelství* (C-405/18) EU:C:2020:127; [2020] S.T.C. 1695 at [53], emphasis added.
[80] *AURES Holdings as v Odvolací Finanční Reditelství* (C-405/18) EU:C:2019:879 at [30], footnotes omitted.

So far as concerns the making of comparisons the Advocate General referred to a German saying that one cannot compare apples with pears but noted apples and pears have things in common, both being pomes for example.

The Advocate General had raised the undesirability of making comparisons in three earlier cases.[81] The most detailed reasoning in support of her position is provided in the very thoughtful opinion handed down in *Nordea Bank Danmark A/S v Skatteministeriet* (*Nordea*) in which she had concluded that

> "if there is no need to examine the objective comparability of the situations and such an examination does not produce appropriate results, the Court should in future dispense with it. The merits of a difference in treatment should be assessed solely by reference to whether there is a ground capable of providing a proportionate justification for that difference in treatment".[82]

It is not proposed to review the Advocate General's reasoning in *Nordea* in detail, but the issues she raises are important and deserve some attention.

In the first place, so far as concerns the objection that all situations are comparable if not identical, the fact that articles or situations share commonalities does not render the making of comparisons impossible or undesirable. It does mean that courts must use judgment in making comparisons. That in itself should not be troublesome. The function of judges is, after all, to use judgment. Tradition often says that we owe to Aristotle the maxim that like cases should be treated alike.[83] No doubt its application can present problems. Some legal theorists have questioned it.[84] It is, however, clearly not impossible to make comparisons in the context in question, as the Advocate General herself acknowledged when saying that she had carried out comparability exercises in the past.[85]

It is true that engaging in a comparability exercise may be difficult in some cases, that the criteria to be used in a comparability analysis are not fixed or identified in advance,[86] that comparisons were made by the CJEU as the foundation of discrimination when there were more limited justifications available for infringements of the fundamental freedoms[87] and that the court's reasoning may be open to criticism on occasions.[88] These are arguably not reasons for dispensing with a comparability analysis so much as reasons to improve it.

[81] See the opinions of the Advocate General in *Nordea Bank Danmark A/S v Skatteministeriet (Nordea Bank)* (C-48/13) EU:C:2014:153 at [21]–[28]; *Skatteverket v Memira Holding AB* (C-607/17) EU:C:2019:8 at [46]; and *Skatteverket v Holmen AB* (C-608/17) EU:C:2019:9 at [38].
[82] See *Nordea Bank* EU:C:2014:153 at [28].
[83] See, for example, Aristotle's *Nicomachean Ethics*, Translation by Robert C. Bartlett and Susan D. Collins (Chicago: University of Chicago Press, 2011), Book V, Ch.3, para.1131a.10: "If, then, the unjust is unequal, the just is equal, which is in fact what is held to be the case by everyone, even without argument" (available at *https://library.uoh.edu.iq/admin/ebooks/47596-aristotle,-robert-c.-bartlett-trans.,-susan-d.-collins-trans.-aristotles-nicomachean-ethics----2011-(1)_compressed.pdf* [Accessed 30 June 2022]).
[84] See, for example, Benjamin Johnson and Richard Jordan, "Why should like cases be decided alike? A formal model of Aristotelian justice", *https://scholar.princeton.edu/sites/default/files/benjohnson/files/like_cases.pdf* [Accessed 30 June 2022].
[85] The opinion in *Nordea Bank* EU:C:2014:153 at [22].
[86] See the comment in the opinion in *Nordea Bank* EU:C:2014:153 at [22].
[87] The opinion in *Nordea Bank* EU:C:2014:153 at [25].
[88] The opinion in *Nordea Bank* EU:C:2014:153 at [25].

The Advocate General's approach would seem likely to diminish the significance of an analysis of the freedom of establishment and its breach and to enhance the significance of an analysis of the justification for a breach. That is arguably undesirable in principle. Populist politicians have always encouraged their electorates to concentrate not on the rules that they have broken but on the justifications for their actions. That is likely to maximise their freedom of action. Member States may take the same approach in relation to the internal market and direct taxation. Nevertheless, the strict rule, pursuant to which even minor breaches of all the fundamental freedoms are prohibited, is an important protection for the internal market and is consistent with the wording of the freedoms in the Treaty on the Functioning of the European Union (TFEU)[89] and the Agreement on the European Economic Area (EEA).[90]

The wording of the fundamental freedoms and the provisions of the Agreement on the EEA require that "restrictions" of the fundamental freedoms "shall be prohibited".[91] The CJEU has recently affirmed, in November 2021, in a case arising in the context of direct taxation, that

> "according to the settled case law of the Court, the articles of the Treaty relating to the free movement of goods, persons, services and capital are fundamental provisions of EU law and any restriction of that freedom, however minor, is prohibited".[92]

That position was also affirmed in a case concerning the imposition by a tax authority of a financial penalty on a company.[93] As the court says, it is settled law. It was articulated long ago in *Corsica Ferries (France) v Direction Générale des Douanes Françaises* (*Corsica Ferries*)[94] in 1989 when the Court of Justice, even then, was able to say that the court had decided that proposition "on various occasions".[95]

Having protected the internal market with that strict approach, the court can then consider whether there is any justification for the provision in question. As the analysis proceeds, as we all know, it may be that a variety of justifications can be relied upon and that proportionality comes to be considered. To dispense with the strict rule in the first place, however, is a radical move which at the very least goes against the CJEU's intention, in the quotation above, to provide a general analytical framework for the internal market.

One may also question precisely what is meant by the indication that the examination of comparability does not produce "appropriate results". Earlier the Advocate General had referred to it being impossible to "strike an appropriate balance between the fundamental freedom and the reason for the difference in treatment in the case concerned".[96] One may ask again, however, what precisely are "appropriate results" or an "appropriate balance".

[89] Consolidated version of the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/47.
[90] Consolidated version of the Agreement on the European Economic Area [1994] OJ L1/3.
[91] See, in particular, TFEU arts 34 and 35 (goods), art.49, first paragraph (establishment), art.56, first paragraph (services), art.63.1 and 63.2 (capital) and the Agreement on the European Economic Area arts 11 and 12 (goods). Art.31 (establishment), art.36 (services), art.40 (capital) refer to "no restrictions".
[92] *BJ v M* EU:C:2021:907 at [105].
[93] *Ecotex Bulgaria Ltd v Teritorialna direktsia na Natsionalnata agentsia za prihodite (Ecotex)* (C-544/19) EU:C:2021:803 at [65].
[94] *Corsica Ferries (France) v Direction Générale des Douanes Françaises (Corsica Ferries)* (C-49/89) EU:C:1989:649; [1989] E.C.R. 4441 at [8].
[95] *Corsica Ferries* EU:C:1989:649 at [8].
[96] The opinion in *Nordea Bank* EU:C:2014:153 at [22].

There are, perhaps, practical as well as conceptual problems with making the suggested change. Even if the court were to accept Kokott AG's invitation, it would assess

> "[t]he merits of a difference in treatment…by reference to whether there is a ground capable of providing a proportionate justification for that difference in treatment".[97]

Consequently, it would still have to identify "a difference in treatment" which would then have to be assessed by reference to "a proportionate justification". Some sort of comparative reasoning, therefore, would still have to be exercised before the consideration of justification. It seems that if one of the aims of the change would be to avoid the need to make a comparative assessment it would not entirely succeed.

At this point it is worth remembering that the late Advocate General Geelhoed referred to comparisons and restrictions in the context of direct taxation. He came to the conclusion that, "essentially all 'truly' restrictive national direct tax measures will also, in practice, qualify as directly or indirectly discriminatory measures".[98] At the present time in direct tax cases, the court uses the concept of restriction found in the TFEU but frequently identifies the existence of a restriction, in practice, by use of a comparison.[99] That methodology does not imply, or require, a change in the principles applicable to the fundamental freedoms so that the term used in the TFEU, "restriction", is no longer relevant. It simply means that, in practice at the present time, a restriction in direct tax cases is identified by use of a comparison or what the EFTA Court has called a "comparability assessment".[100] Direct taxation is a field which is developing fast under international influences. It would be perhaps unwise and certainly unnecessary to suppose that what Advocate General Geelhoed found to be true in the entirely different world of 2006 will always inevitably remain so.

More recently, Advocate General Hogan has added to the debate over restrictions. Whereas Advocate General Geelhoed identified a prevalence of discrimination in direct taxation, Advocate General Hogan looks at the concept of restrictions in direct taxation. He said

> "most taxation measures consist (in one sense at least) of restrictions on establishment since by definition the existence of even a generally applicable taxation measure impacts on the capacity of an undertaking to do business in that Member State. To that extent, therefore,

[97] The opinion in *Nordea Bank* EU:C:2014:153 at [28].

[98] See the Opinion of Advocate General Geelhoed in *ACT Group Litigation* EU:C:2006:139 at [40].

[99] See, for example, *Lexel* EU:C:2021:34, in which the court reiterated the importance of the concept of restriction but went on to say: "However, a difference in treatment stemming from a Member State's legislation to the detriment of companies exercising their freedom of establishment does not constitute an obstacle to that freedom if it relates to situations which are not objectively comparable or if it is justified by an overriding reason in the public interest and proportionate to that objective" (at [34]). See also, for example, *Real Vida Seguros SA v Autoridade Tributária e Aduaneira* (C-449/20) EU:C:2021:721 in which the court used the concepts of comparison and restriction (see, e.g. at [15], [30] and [34]), *Société Générale SA v Ministre de l'Action and des Comptes publics* (C-403/19) EU:C:2021:136; [2021] B.T.C. 11 at [40], and *Airbnb Ireland UC v Région de Bruxelles-Capitale (Airbnb Ireland)* (C-674/20) EU:C:2022:303 at [41]. In the latter case, the court was dealing with a request for information by tax authorities. It noted that the requirement could be a restriction but was not discriminatory and was acceptable.

[100] The phrase is used by the EFTA Court in *PRA Group* (E3/21) 1 June 2022 at [33] and [34]. In its judgment the court applies the basic concept of restriction and uses a comparison to identify the existence of an obstacle: see, e.g. at [31].

> the taxation cases may be regarded as *sui generis* so far as freedom of establishment is concerned”.[101]

The court noted that “by their very nature, tax obligations entail additional burdens for service providers”.[102] That is no doubt true. It does not, however, justify the Advocate General’s contention that tax may be regarded as sui generis and the court did not say it did. Many other obligations also entail additional burdens for service providers who have to deal with various kinds of authority, for example, obligations in relation to social security, the regulation of corporations, and the protection of the environment or workers. It cannot be said that each of these fields is sui generis. None of them is, any more than is direct taxation. The CJEU has consistently advanced its formulation of the settled law, quoted above, which treats all four freedoms together, as is appropriate in a single internal market.

If nothing else, this brief discussion of comparability and restrictions shows that the court has maintained a reasonably consistent approach in this area of law over a long period of time and, as the reference to *Corsica Ferries* has shown, since before the article of 1994. That consistency has not been universally approved. Nevertheless, consistency is generally a virtue in a court. The creation of inconsistencies is best left to elected legislatures or the elected representatives of Member States. The virtue of consistency is, at least to a significant extent, also apparent in relation to fiscal cohesion which is considered next.

Justifications and fiscal cohesion

The enormous number of cases dealing with direct taxation and the fundamental freedoms before the Court of Justice since 1994[103] has enabled the court to consider not only circumstances in which the fundamental freedoms are restricted but also what may count as a justification for a restriction. That consideration has benefited from an increasingly sophisticated approach to the existence of justifications in the field of direct tax. To take a few examples, defeating tax avoidance, balancing the allocation of taxing rights and preventing double enjoyment of losses have all proved to be important.

This growth in the number of considerations that may be relied upon to justify a restriction has led to a reduction in the pressure on the concept of fiscal cohesion. In the article of 1994 this author referred to *Bachmann* and commented that the court had given to the Member States “a new weapon with which to defend their fiscal regimes”.[104] Looking back, it is clear that it has not been easy to use it. The number of occasions Member States have relied upon it far exceeds the number of occasions on which they have done so successfully.[105] Many of the attempts to

[101] Opinion of Advocate General Hogan in *Anklagemyndigheden v VAS Shipping ApS (formerly Sirius Shipping ApS) (Anklagemyndigheden)* (C-71/20) EU:C:2021:474 at [51].

[102] *Airbnb Ireland* EU:C:2022:303 at [45].

[103] A list of cases up to 25 November 2021 has been published on LinkedIn by Adam Zalasiński. It is not publicly available.

[104] Lyons, “Discrimination against individuals and enterprises on grounds of nationality: direct taxation and the European Court of Justice” [1994] B.T.R. 554, 555.

[105] For an example of a case in which the justification of fiscal coherence succeeded see *A/S Bevola v Skatteministeriet* (C-650/16) EU:C:2018:424; [2018] S.T.C. 1415. For examples of cases in which fiscal cohesion failed to justify legislation see, e.g. *Manninen* EU:C:2004:484 at [43]–[48]; *Test Claimants in the Thin Cap Group Litigation v Inland Revenue Commissioners* (C-524/04) EU:C:2007:161; [2007] S.T.C. 906 at [66]–[70]; *Test Claimants in the FII Group*

rely on fiscal cohesion required the concept of cohesion to be understood more broadly than the court was prepared to accept.

In December 2021 the court repeated what it had said many times before, namely that

> "it should be recalled that the Court has recognised that the need to preserve the coherence of a tax system may justify a restriction on the exercise of the freedoms of movement guaranteed by the Treaty. However, for such a justification to be accepted, a direct link must be established between the granting of the tax advantage concerned and the offsetting of that advantage by a particular tax, the direct nature of that link falling to be examined in the light of the objective pursued by the legislation at issue".[106]

The judgment supports that statement with an exhibition of judicial consistency referring to a case in 2013[107] which refers in turn to a judgment in 2009,[108] which in turn refers to *Bachmann*.[109]

In relation to fiscal cohesion, some debate arose over the direct nature of the link between the advantage and its offsetting which the judgments in the *Bachmann* litigation required.[110] The court frequently articulated a requirement that there be a single tax and a single taxpayer.[111] That was questioned in some quarters and indeed apparently departed from, for example, in *Feilen v Finanzamt Fulda*.[112] Even in that case, the denial in Germany of an inheritance tax deduction linked to Austrian inheritance tax was due to rules which confined the deduction to the same asset, the same tax and close relatives of the same family. The justification of the refusal of the deduction was, therefore, not a dramatic departure from the requirement that a direct link should exist in relation to one tax and one taxpayer.[113]

The degree of uncertainty which the court permitted to exist over the nature of the concept of fiscal cohesion was noted in the article of 1994.[114] Later on others also noted the uncertainty.[115] Looking back over a longer period of time, this author should now be more inclined to emphasise

Litigation v Inland Revenue Commissioners (C-446/04) EU:C:2006:774; [2007] S.T.C. 326; *Test Claimants in the FII Group Litigation v Inland Revenue Commissioners* (C-35/11) EU:C:2012:707; [2013] S.T.C. 612; *Trustees of the BT Pension Scheme v Revenue and Customs Commissioners* (C-628/15) EU:C:2017:687; [2017] S.T.C. 2075 at [43]; and the Opinion of Advocate General Wathelet EU:C:2016:1002 at [66] and [67] in that case.

[106] *XY v Finanzamt V* (C-394/20) EU:C:2021:1044 at [46]. See also *A SCPI v Veronsaajien oikeudenvalvontayksikkö (A SCPI)* (C-342/20) EU:C:2022:276 at [92].

[107] *Welte v Finanzamt Velbert* (C-181/12) EU:C:2013:662; [2014] 2 C.M.L.R. 11 at [59].

[108] *Glaxo Welcome GmbH & Co KG v Finanzamt München II (Glaxo)* (C-182/08) EU:C:2009:559; [2010] S.T.C. 244.

[109] See *Glaxo* EU:C:2009:559 at [77] which includes a reference to *Bachmann* EU:C:1992:35 at [28]. Reference should also be made to [21] of the judgment and to *Commission v Belgium* EU:C:1992:37.

[110] See for some discussion of this D. Weber, "An analysis of the past, current and future of the coherence of the tax system as justification" (2015) 24(1) EC T.R. 43, 51–52, section 6.1.

[111] See, e.g. *K v Korkein hallinto-oikeus* (C-322/11) EU:C:2013:716; [2013] B.T.C. 847 at [69]. For another example of the requirement articulated 10 years earlier see *Bosal Holding* EU:C:2003:479 at [30].

[112] *Feilen v Finanzamt Fulda (Feilen)* (C-123/15) EU:C:2016:496; [2017] S.T.C. 480.

[113] *Feilen* EU:C:2016:496 at [37].

[114] See Lyons, "Discrimination against individuals and enterprises on grounds of nationality: direct taxation and the European Court of Justice" [1994] B.T.R. 554, 567.

[115] See, for example, Suzanne Kingston who remarked, in 2007, in relation to fiscal cohesion: "Although this justification has, strictly speaking, only ever been accepted by the Court once (in one of its earliest direct tax judgments, *Bachmann*), Member States continue to plead it in most direct tax cases before the Court. It is fair to say that the reason for this is essentially that no-one is quite sure what is required in order for a measure to fall under the justification" (Suzanne Kingston, "A light in the darkness: Recent developments in the ECJ's direct tax jurisprudence" (2007) 44(5) C.M.L. Rev. 1321, 1348.

the degree to which the court's approach has been consistent.[116] Although the consistency has not been absolute, such consistency as has been achieved has been maintained under considerable pressure from Member States. They have not only wanted to develop fiscal cohesion, they have tried to advance the broader proposition that a breach of the fundamental freedoms in direct tax matters may be justified by reference to the existence of other tax advantages. It was rejected in 1986,[117] was referred to in the article of 1994[118] and has been rejected as recently as 7 April 2022.[119]

Conclusion

The Court of Justice has in some quarters been considered an activist court. Yet in relation to direct tax, what the court has not done has been as important as what it has done. Two examples have already been noted. The first is the rejection by the court of the suggestion that it should no longer use the tool of comparison in direct taxation. The second is the refusal to extend fiscal cohesion to the extent requested by Member States but instead to permit the development of more specific justifications.

There are two other examples of judicial restraint which should be mentioned. First, there is the case of *D v Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*[120] in which the court refused to extend the effect of double tax treaties beyond the parties to them. A German resident could not be treated, therefore, like a Belgian resident under a double tax treaty between the Netherlands and Belgium. Secondly, as Advocate General Hogan has noted,[121] there has been no judgment in the field of direct taxation comparable to *Keck and Mithouard*[122] in free movement of goods in which the CJEU considered it "necessary to re-examine and clarify its case-law".[123]

At the same time as avoiding some of the more adventurous possibilities for judicial activism, the court has also maintained the contours of the jurisprudence established by the cases considered in the article of 1994. They remain clearly recognisable today even if there has been inevitable development. Of considerable significance is the court's recent reiteration, in the context of direct taxation, of what it calls its "settled case law" to the effect that the articles of the Treaty relating to the four freedoms of the internal market are fundamental provisions of EU law and that "any restriction…however minor, is prohibited".[124] That approach is the more significant given that powerful voices sometimes suggest that direct tax is to be treated differently from other vital areas of public policy.

[116] For some consideration of the issue of consistency more generally see further Timothy Lyons, "Direct Taxation and the Court of Justice: the Virtues of Consistency" (2004) 5(2) *ERA Forum* 174.
[117] *Commission v France* EU:C:1986:37 at [20].
[118] See Lyons, "Discrimination against individuals and enterprises on grounds of nationality: direct taxation and the European Court of Justice" [1994] B.T.R. 554, 565, under "(iv) There are advantages enjoyed by the person suffering discrimination".
[119] *A SCPI* EU:C:2022:276 at [87].
[120] *D v Inspecteur van de Belastingdienst/Particulieren/Ondernemingen Buitenland te Heerlen* (C-376/03) EU:C:2005:424; [2005] S.T.C. 1211.
[121] *Anklagemyndigheden* EU:C:2021:474 at [52].
[122] *Criminal Proceedings against Keck and Mithouard (Keck and Mithouard)* (Joined Cases C-267/91 and C-268/91) EU:C:1993:905; [1993] E.C.R. I-6097.
[123] *Keck and Mithouard* EU:C:1993:905 at [8].
[124] *BJ v M* EU:C:2021:907 at [105]; *Ecotex* EU:C:2021:803 at [65].

Clearly, the direct tax cases which have come before the court over the years have increased in number and concern many more aspects of direct taxation than had been considered in 1994. That is, of course, not attributable to activity by the court but to the willingness of lawyers and their clients to bring cases before it.

The challenge for the court in the future is to maintain the stance it has established. Although some judgments of the court have attracted considerable attention, the court has very largely turned down any chance it may have had to hurl thunderbolts at Member States' tax systems and the system of international double tax treaties. That largely undramatic approach has, nevertheless, proved highly significant for EU law and for Member States' direct tax systems. It is the Member States, acting with other states on the international stage, that have engaged in dramatic action.