Discriminatory Internal Taxation in the European Union: The Power of the European Court of Justice to Limit the Tax Sovereignty of Member-States Under Article 110 of the TFEU

Jarrod Tudor, Kent State University - Kent Campus

ABSTRACT:

Protectionism can come in a variety of methods including the use of internal taxation policies that discriminate against imports making those imports more expensive on the domestic market and thus favoring domestically-produced goods. Discriminatory taxation policies have been developed by member-states to mask protectionism by distinguishing products based on import status, product similarity, product life cycle, consumption, tax collection practices, transportation charges, and state aid. The Framers of the Treaty on the Functioning of the European Union (TFEU) wrote Article 110 with the objective in mind to prohibit internal taxation policies from discriminating against goods in made in other member-states. Article 110 is just one TFEU provision that promotes the free movement of goods. This article extends the needed scholarship in the area of European Union law and examines the jurisprudence of the leading cases heard by the European Court of Justice (ECJ) on the issue of discriminatory internal taxation in an attempt to determine if the ECJ is meeting the intent of the Framers. The case law presented here shows an almost unyielding support for Framers’ wishes to remove discriminatory internal taxation practices within the member-states in order to promote the free movement of goods.

JARROD TUDOR
KENT STATE UNIVERSITY
# TABLE OF CONTENTS

Abstract ........................................................................................................... 1

I. Introduction .................................................................................................. 3
   A. The European Union and Tax Law ......................................................... 3
   B. The European Union and EU Law ......................................................... 5
   C. Tax Harmonization and the European Union ..................................... 7

II. Purpose of the Work ................................................................................. 14

III. The Case Law of the ECJ on Article 110 and Internal Taxation .......... 14
   A. The Taxation of Imported and Domestic Goods ................................ 15
   B. Taxation and Product Similarity .......................................................... 22
   C. Taxation During the Life of the Product ............................................. 31
   D. Consumption Taxes ............................................................................ 33
   E. Tax Collection Practices ..................................................................... 37
   F. Transportation Charges ....................................................................... 39
   G. Taxation and State Aid ....................................................................... 42

IV. Major Themes on the ECJ’s Jurisprudence on Internal Taxation And Article 110 ...................................................................................... 49

V. Analysis and the Promotion of the Common Market .......................... 53

VI. Conclusion ............................................................................................... 55
I. INTRODUCTION.

A. *The European Union and Tax Law.*

There is comment that academic work on European Union is lacking.\(^1\) Scholarship in the area of EU law could assist in the easing of the knowledge gap between Europeans and Americans.\(^2\) In fact, one 2009 poll found that only 44% of European respondents understood how the EU worked.\(^3\) EU law could become even more important as the group expands from a group of 28 to include possibly 16 more nations.\(^4\) EU law may also become more important in the arena of world trade as EU enlargement continues.\(^5\) There is argument that as more countries join the ranks of the EU, the EU’s presence becomes stronger in global trade.\(^6\)

Tax law is currently a hot topic in Europe. For example, there is renewed interest in the enforcement of European Union law in relation to tax law as the European Commission is now investigating whether lower tax rates on profits derived from domestically developed and registered patents violates EU law as a form of unfair competition.\(^7\) As well, very recently the European Commission has asked member-states to turn over information on their tax practices.\(^8\)

---


\(^3\) *Id.* at 294.

\(^4\) *Id.* at 156-157. Currently the European Union consists of Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. However, several additional countries have been mentioned as future members including Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Georgia, Iceland, Kosovo, Macedonia, Moldova, Norway, Serbia, Switzerland, Turkey, and Ukraine. *Id.*


\(^6\) *Id.* at 41.


Many of the member-states of the European Union and the European Commission have cracked down on the tax erosion due to the need for revenue after the financial crisis.\(^9\) Transfer pricing practices, as a means of avoiding income tax but being allowed to fester since due to the lack of tax harmonization within the EU, have also been the target of the European Commission over the last year.\(^10\) The European Commission has also spent time investigating deals between member-states and multinational corporations as a violation of state aid rules that are designed to make sure the 28 EU countries compete fairly.\(^11\) Three of these firms, Facebook, Apple, and Google, have been accused by the European Commission as having engaged in “base erosion and profit shifting.”\(^12\)

The European Commission has also defended the interests of private parties concerning unfair tax law treatment. The European Commission has recently argued that the use of “vignettes,” taxes on the use of roads paid by common carriers some of which are refunded to member-state nationals, are a violation of the TFEU’s requirement that there be free movement of goods, services, capital, and labor.\(^13\) There is comment that the use of vignettes could harm economic growth by increasing the price of goods.\(^14\) As well, the European Commission has

\(^9\) Id.
\(^12\) Sam Schechner, *What Europe’s Probe Into Tax Breaks Means for Tech – And Beyond.* WALL STREET JOURNAL (June 11, 2014, 7:22AM),
\(^14\) Id.
contended that Hungary has engaged in a violation of EU law by exempting a type of fruit spirit from tax if the alcoholic beverage is used for personal use.\textsuperscript{15}

\textit{B. The European Union and EU Law.}

There is some argument that the EU is best described as a political system.\textsuperscript{16} Tax policy was one of the major concerns of the Framers of the Treaty of Rome that gave birth to the European Economic Community, the forerunner to the European Union (\textquote{EU}).\textsuperscript{17} The political theory behind taxation practices separates the United States and much of Europe.\textsuperscript{18} The free movement of goods, as assisted by the principle of equal tax treatment afforded to those goods, adds to the concept of welfare promotion as citizens of member-states can enjoy lower prices on imports that will compete with domestically produced goods.\textsuperscript{19} The Treaty on the Functioning of the European Union (\textquote{TFEU}) requires equal tax treatment practices by the EU\textquotesingle s member-states.\textsuperscript{20} Sadly, this area of law, a part of competition policy, is one of the least understood areas of EU law.\textsuperscript{21}

The right of a member-state to tax has been labeled one of the fundamental functions of national sovereignty.\textsuperscript{22} Generally, pursuant to international law, residents can be taxed on all income regardless of where it is derived while the income of non-residents can only be taxed by

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{16}] Morten Rasmussen, \textit{Supranational Governance in the Making: Towards a European Political System} 34 (Wolfram Kaiser, Brigitte Leucht & Morten Rasmussen eds. 2009).
\item[\textsuperscript{17}] Paul Kubicek, \textit{European Politics} 70 (2012).
\item[\textsuperscript{18}] Id. at 284.
\item[\textsuperscript{19}] Larry Neal, \textit{The Economics of European and the European Union} 46 (2007).
\item[\textsuperscript{20}] Catherine Barnard, \textit{The Substantive Law of the European Union: The Four Freedoms} 344 (4\textsuperscript{th} ed. 2013).
\item[\textsuperscript{22}] Barnard, \textit{supra} note 20, at 284.
\end{itemize}
\end{footnotesize}
a host state if the income is earned in that host state.\textsuperscript{23} Thus, the reality of international tax law creates primacy for the host state (the country that serves as the source of the income) to tax and, in turn, forces the home state to negotiate a way to alleviate the tax burden of the person or firm living in the home state (the country that serves as the domicile of the person or firm).\textsuperscript{24}

There are many costs associated with membership in the EU including costs associated with implementing new regulations.\textsuperscript{25} Newly admitted EU members must engage in the rewriting of domestic law in order to comply with the TFEU mandates.\textsuperscript{26} The principle of supremacy of EU law places the TFEU at a constitutional level requiring the TFEU itself and decisions by the ECJ trump the national law of member-states where EU law has jurisdiction.\textsuperscript{27} The ECJ, has as one of its chief responsibilities, the interpretation of the TFEU.\textsuperscript{28} Professor Hartley has argued that the body of case law from the ECJ is as important to the development of the EU as case law from the English courts was to developing common law.\textsuperscript{29} There are some influences from American law, especially in the area of antitrust, found in EU law.\textsuperscript{30} However, it should be noted that unlike judges and justices in the American courts, the ECJ is not charged with the responsibility to determine the intent of the drafters of the TFEU.\textsuperscript{31} Perhaps difficult for the American-common law trained lawyer is that the ECJ does not have a strict rule of precedent and therefore it is possible that the ECJ can have two different holdings on the same facts.\textsuperscript{32}

\textsuperscript{23} Id. at 285.
\textsuperscript{24} Id.
\textsuperscript{25} RONALD LINDEN, ROLE OF INTERNATIONAL ACTORS 134 (Sharon Wolchik & Jane L. Curry eds. 2011).
\textsuperscript{26} Id. at 129.
\textsuperscript{27} MCCORMICK, supra note 2, at 222.
\textsuperscript{28} T.C. HARTLEY, THE FOUNDATIONS OF EUROPEAN UNION LAW 71 (7th ed. 2010).
\textsuperscript{29} Id. at 70.
\textsuperscript{31} HARTLEY, supra note 28, at 71.
\textsuperscript{32} Id. at 70.
some comfort is that the ECJ does try to follow its previous precedents but the American lawyer should be prepared for a range of possible outcomes.  

C. Tax Harmonization and the European Union.

Proposals for tax harmonization have ebbed and flowed between strict harmonization with established tax rates and mere coordination.  The EU government would prefer the integration of EU-wide tax policy which would promote the competitiveness and orderly operation of the single, common market whereby tax policy could not be used as a weapon.  Tax harmonization within the EU has been one of the more difficult challenges given that tax law has been, culturally and legally, an area of strong national control. However, member-states are free to vary their tax rates as they wish. Article 110 (ex 90, 95) of the TFEU gives member-states much lee-way to craft its tax program and recognizes the principle of fiscal sovereignty. There is some comment that harmonization may be too ambitious.

EU law does not require certainty in, nor does it regulate, domestic tax rates, taxable bases, taxable profits, or residency for taxation. Member-states can freely determine what unit to tax (residents, resident entities, and profits), the tax base, how to collect the taxes, and tax rates. This reality has created differing corporate tax rates that have long been seen as a barrier to efficient, cross-border investment. Where EU law applies is in how the member-state

33 Id.
34 CHRISTIANA PANAYI, EUROPEAN UNION CORPORATE TAX LAW 9 (2013).
35 PANAYI at 29-30.
36 BARNARD, supra note 20, at 284.
37 NEAL, supra note 19, at 137.
38 BARNARD, supra note 20, at 53.
39 PANAYI, supra note 34, at 29-30.
40 Id. at 171.
41 BARNARD, supra note 20, at 284.
42 PANAYI, supra note 34, at 19.
chooses to exercise that power. The jurisdiction of EU law (and thus the jurisdiction of the ECJ), including the TFEU, regulations, and directives, only apply when a member-state writes law that treats parties differently based on citizenship or restricts freedom of movement of goods, or distorts competition between member-states. The development of EU law has had a positive influence on the taxation practices of member-states in that there is greater movement of firms and investment across borders. However, a significant limitation on the efforts toward tax harmonization is the fact that the ECJ can only hear cases referred to it. The European Commission as well cannot take action against a member-state unless a TFEU provision is breached by a member-state. Meanwhile, tax residence continues to be a form of tax advantage in Europe.

The driving force of the EU was, at its creation, a sense that there needed to be an economic link between member-states. A member-state’s tax law is heavily influenced by EU law, however, there is little in the way of tax harmonizing legislation. There exist references to indirect tax matters in EU law, but the EU has little jurisdiction on tax matters and there are no TFEU provisions that directly affect taxes. For example, Article 110 (ex 90, 95) applies to taxes on imports and exports as well as the use of those products and Article 30 (ex 25, 12)

---

43 BARNARD, supra note 20, at 284.
44 PANAYI, supra note 34, at 9.
45 Id. at 8.
46 Id. at 8.
47 Id. at 7.
49 LINDEN, supra note 24, at 133.
50 PANAYI, supra note 34, at 3.
51 Id. at 3-4.
applies to custom duties which comprise a form of taxation. More clearly, Article 110 applies to duties assessed internally while Article 30 applies to duties attached at the border.

Not all goods subject to a member-state’s taxation regime are manufactured or grown within the European Union. In addition to Article 110’s prohibition against discriminatory internal taxation practices which tax goods from other member-states differently from those domestically produced, there are other provisions within the TFEU that prohibit the use of taxation practices to restrict the free movement of goods. Article 28 (ex 23, 9), with the goal of creating the common market within Europe, expressly prohibits customs duties on imports and exports between the member-states and requires the adoption of a common tariff schedule for which member-states cannot deviate. Article 30 (ex 25, 12) prohibits the use of any charge assessed on imports and exports moving between member-states that might have the same effect as a customs duty. Article 28 incorporates a reference to Article 30 stating that the first paragraph of Article 28 and Article 30 apply to goods that originate outside of the European Union but are brought into a member-state and then might be moved to another member-state. This is the principle of free circulation whereby once goods are admitted into the European Union, they can move freely between member-states without incurring new duties or taxes.

---

52 Article 110 (ex 90, 95) states: “1. No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. 2. Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.” Consolidated Version of the Treaty on the Functioning of the European Union, art. 63, March 30, 2010 O.J. (C53) 1.61 [hereinafter TFEU].

53 BARNARD, supra note 20, at 46.

54 Article 28 (ex 23, 9) states: “1. The Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries. 2. The provisions of Article 30 and of Chapter 3 of this Title shall apply to products coming from third countries which are in free circulation in Member States.” TFEU art. 28.

55 TFEU art. 30, supra note 52.

56 Id. TFEU art. 28, supra note 54.
Union, even if the goods did not originate in the European Union, the free movement of these goods is protected as if the good did originate in the European Union. Article 29 (ex 24, 10) expressly provides for the protection of free circulation within the European Union of goods originating from outside the European Union once those goods have met the requisite qualifications.57

Corporations operating in more than one member-state in the EU have had trouble with corporate tax rules and although harmonization of tax law would be accompanied by several benefits for such firms, harmonization has yet to be realized despite the known benefits.58 The Single European Act was designed to further tax harmonization by removing the possibility of using differential tax rates as a tool for trade restriction.59 However, there is a fiscal veto that allows even one member-state to veto a direct tax-harmonizing regulation or directive by proposed by the larger EU government as all 28 EU member-states must agree to such legislation.60

The European Commission has also proposed the adoption of the Common Consolidated Corporate Tax Base (“CCCTB”) as a major step toward tax harmonization but at the time of this writing, the 28-member EU has not adopted it.61 The failure to adopt the CCCTB reminds us that not all barriers to market integration can be solved by the proffering of model tax codes.62 Model tax codes, despite their pro-harmonizing attraction, are not binding and thus the

57 Article 29 (ex 24, 10) reads: “Products coming from a third country shall be considered to be in free circulation in a Member State if the import formalities have been complied with an any customs duties or charges having equivalent effect which are payable have been levied in that Member State, and if they have not benefited from a total or partial drawback of such duties or charges.” TFEU art. 29.
58 NEAL, supra note 19, at 130.
59 KUBICEK, supra note 17, at 74.
60 PANAYI, supra note 34, at 4.
61 Id. at 81.
62 Id. at 6.
jurisprudence of the ECJ as it interprets the various provisions of the TFEU is crucial to any effort toward harmonization.\textsuperscript{63} As well, currently, the European Commission is proposing a financial transactions tax ("FTT") that would work much like a VAT tax but only on the sale of financial assets as these assets move through the stream of commerce.\textsuperscript{64} A key difference between the VAT and the FTT is that capital is much more mobile than goods and the FTT could, according to one comment, have a much more damaging effect on commerce.\textsuperscript{65} There has also been considerable backlash against a proposal by the EU to place a tax on digital transmissions in the form of a VAT tax in order to limit the ability of firms to engage in profit shifting.\textsuperscript{66} Recently, due to some of the above failures and ensuing backlash, the European Commission has issued several communications to the member-states on the topic of tax law in an attempt to rely more on soft law than hard law.\textsuperscript{67}

Tax reform is a key requirement for entry into the EU which generally requires the simplification of an older tax code.\textsuperscript{68} What was specifically challenging for new member-states was the requirement that they craft new, legislated, standardized tax codes to replace any existing negotiated deals between the member-state and a domestic firm.\textsuperscript{69} Entry into the EU has created other changes in tax law for new member-states including increases in personal income and consumption taxes, and lower corporate tax rates.\textsuperscript{70} However, newly-admitted member-states are

\begin{itemize}
\item \textsuperscript{63} Id. at 5.
\item \textsuperscript{65} Id.
\item \textsuperscript{67} PANAYI, supra note 34, at 26.
\item \textsuperscript{68} SHARON FISHER, RE-CREATING THE MARKET 75 (Sharon L. Wolchik and Jane L. Curry eds. 2011).
\item \textsuperscript{69} Id. at 60.
\item \textsuperscript{70} Id. at 59.
\end{itemize}
having an easier time engaging in tax reform in comparison to the Western member-states as the latter are often hamstrung by a more generous social model.\footnote{71}{Id. at 76.}

The disparity of tax rates among the member-states and, in turn, the freedom to set tax rates has created some advantages for corporations operating in the original member-states. For example, there is comment that tax policy competition has forced Western member-states to reduce their overall tax rates.\footnote{72}{Id. at 76.} Competitive tax rates have also lowered tax rates throughout the EU as member-states have tried to lure foreign direct investment despite the fact that EU law has reduced the number of different types of foreign direct investment-attracting incentives.\footnote{73}{Id. at 75.}

Although it does not seem as if the differences in tax rates as set by the various member-states impede the functioning of the EU, these differences can create distortions in the trading of goods across member-state boundaries.\footnote{74}{NEAL, supra note 19, at 136-7.} Fiscal barriers, such as those created by the tax policies of member-states can result in restraint of free trade.\footnote{75}{Id. at 132.} Further complicating the path toward tax harmonization in the European Union is the removal of Article 293 from the TFEU which required that member-states work toward removing the chance double taxation of its
citizens.\textsuperscript{76} However, double taxation, generally, can be relieved through bilateral and multilateral tax treaties of which the TFEU is not.\textsuperscript{77}

The establishment of the Value Added Tax ("VAT") across the EU was a reflection of the priority of tax harmonization in Europe.\textsuperscript{78} The VAT is an essential part of fiscal life in the European Union. Despite the territorial sovereignty that each member-state has with the EU, all member-states must have a VAT tax.\textsuperscript{79} Comparatively, VAT taxes on goods and services comprise a much greater overall portion of collected taxes than in the United States.\textsuperscript{80} Important to the 28-member EU is that the VAT tax creates an advantage to engage in honest reporting of the tax base since the incentives to overstate costs and understate revenues in each state of production offset each other.\textsuperscript{81} The VAT on consumers comprises 15\% of the EU government budget.\textsuperscript{82} Despite the EU requirement that all member-states maintain a VAT tax, member-states can and have set different rates for the VAT tax and other excise taxes.\textsuperscript{83}

Although there is a mandate upon entry into the EU to follow the international organization’s treaties, regulations, and directives, member-states can often differ in their

\begin{flushright}
\textsuperscript{76} Panayi, \textit{supra} note 34, at 157. Article 293 (ex 220) of the Treaty of Amsterdam stated: “Member States shall, so far as necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals: - the protection of persons and the enjoyment and protection of rights under the same conditions as those accorded by each State to its own nationals; - the abolition of double taxation within the Community; - the mutual recognition of companies or firms within the meaning of the second paragraph of Article 48, the retention of legal personality in the event of transfer of their seat from one country to another, and the possibility of mergers between companies or firms governed by the laws of different countries; - the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.”

\textsuperscript{77} Panayi, \textit{supra} note 34, at 6.

\textsuperscript{78} Kubicek, \textit{supra} note 17, at 117.

\textsuperscript{79} Neal, \textit{supra} note 19, at 132.

\textsuperscript{80} Kubicek, \textit{supra} note 17, \textit{at} 273.

\textsuperscript{81} Neal, \textit{supra} note 19, at 135.

\textsuperscript{82} Kubicek, \textit{supra} note 17, at 115.

\textsuperscript{83} Neal, \textit{supra} note 19, at 136.
\end{flushright}
Implementation practices. Implementation of EU law comes in two stages including the legal implementation of EU law by legislative practice and the effective implementation that requires rules to be set in ensure compliance. Non-compliance cases generally come in three forms including where a member-state has either failed to implement a law, failed to implement a law on time, or has implemented a law correctly but has failed to apply the law correctly. For example, a steady flow of cases have been brought to the ECJ whereby a party argues that state aid is being used by a member-state’s government in order to distort trade to alter the competitive economic environment in benefit that member-state. The European Commission has often found that state aid is used too often. In such cases, non-compliance of EU law threatens both the effectiveness and legitimacy of the EU.

II.) Purpose of this work.

The purpose of this work is three-fold. First, it is the intent of the author to enhance the reader’s understanding of EU law, generally, and the jurisprudence of the ECJ on the topic of tax law, specifically. Second, this work is intended to create a greater understanding of Article 110’s (of the TFEU) prohibition on discriminatory internal taxation. Third, and most importantly, the mission of this work is to determine whether the ECJ’s jurisprudence of Article 110 conforms with the intent of the TFEU.

III.) The Case Law of the ECJ on Article 110 and Internal Taxation.

---

85 Id. at 5.
86 Id.
87 Neal, supra note 19, at 165.
88 Neal, supra note 19, at 165.
89 Milio, supra note 84, at 5.
A. The Taxation of Imported and Domestic Goods.

One of the first cases to address the potential for discriminatory internal taxation practices to interfere with the free movement of goods under Article 110 TFEU (ex 90, 95) was *Firma Fink-Frucht GmbH v. Hauptzollamt-Munchen.* 90 In *Firma Fink,* the ECJ made several comments about the mechanical scope of Article 110. First, the court made it clear that the prohibitions in Article 110 TFEU are not the same as those found in Article 36 (ex 30, 36). 91 According to the ECJ, the intent of Article 34 is to prohibit an attempt by a member-state’s national law to limit quantities imported into that member-state. 92 Second, the ECJ stated that a member-state may levy an internal tax on goods imported from another member-state even if no similar good is produced in that home, taxing member-state. 93 Third, the ECJ commented that Article 110 was directly effective and thus no institutions within the European Union needed provide enabling legislation to make it effective. 94 Fourth, the second clause of Article 110 forbids any form of “indirect taxation” whereby a member-state attempts to use an internal taxation system that protects certain products. 95

There was also a subjective question in *Firma Fink* – specifically the definition of “similar domestic products” within the language of Article 110. 96 The ECJ defined similarity between products as products that “are normally to be considered as coming within the same fiscal, customs or statistical classification.” 97 The chief concern of the ECJ was that imported

91 Id. at 231.
92 Id.
93 Id.
94 Id. at 232.
95 Id.
96 Id.
97 Id.
products could not face a “specific fiscal charge” merely because the product was manufactured in another member-state and that such a charge would serve as a form of economic punishment. What the ECJ did make clear is that Article 110 has the responsibility of ensuring that any financial restrictions threatening the free movement of goods be removed within the common market.

Perhaps most importantly in *Firma Fink*, the ECJ addressed the difference in purpose of the two clauses that comprise Article 110. The ECJ stated that Article 110(1) prohibits internal taxation practices whereby a member-state would tax imports at higher rates that domestically produced goods while Article 110(2) prohibits member-states from using taxation practices that serve as a form of protection. However, the ECJ did leave open the possibility of national courts to exercise discretion to determine at what point an internal taxation practice by a member-state has a protective effect.

Another case involving the importation of cars and also addressing the separation between Article 110 (ex 90, 95) and Articles 30 (ex 25, 12) and 34 (ex 28, 30) is *Maciej Brzeziski v. Dyrektor Izby Celnej w Warszawie*. In *Maciej Brzeziski*, several questions were sent to the ECJ from Polish courts concerning provisions in Polish tax law that required an excise tax to be paid on a used car purchased in another member-state and imported into Poland before registration of the car could take place in Poland.

---

98 Id.
99 Id. at 233.
100 Id.
101 Id.
103 Id. at ¶¶ 2, 10.
The first question posed to the ECJ was whether the excise tax was a violation of Article 30’s prohibition against customs duties on imports and exports and/or any charge having the equivalent effect. The ECJ quickly answered the question negatively stating that Article 30’s scope did not include such an excise tax since it applied to all vehicles before registration in Poland regardless of where they are purchased and regardless of whether vehicles crossed a member-state border.

In its discussion of the second question, the ECJ stated that such a tax would be evaluated in the face of Article 110’s prohibition against discriminatory internal taxation. Once again, the ECJ stated that Article 110 is supplementary to other provisions of the Treaty that touch on the removal of barriers to the free movement of goods but specifically focuses on an internal tax policy that could lead to the penalization of goods from other member-states. The plaintiff, who sought a refund of the excise tax he had paid when he brought his car into Poland, argued that the excise tax was discriminatory because, although it only had to be paid once in Poland before any car was registered, an importer of a used car would perhaps have to pay such a tax once in the member-state where the car was initially registered and then again when seeking to take it to Poland and register it there. According to the plaintiff, the excise tax is discriminatory because a person who buys a used car in Poland already registered once does not have to pay the excise tax. As well, the plaintiff also alleged a violation of Article 110 since

---

104 Id. at ¶ 20.
105 Id. at ¶ 23.
106 Id. at ¶ 26.
107 Id. at ¶ 27.
108 Id. at ¶¶ 15, 30.
109 Id. at ¶¶ 30, 33.
the excise tax schedule created different tax assessments based on the age of the imported car whereby older cars were subject to higher excise taxes.110

The ECJ believed that the scope of Poland’s taxation practice only included the first paragraph of Article 110.111 First, the ECJ stated that there needed to be a comparison of two different categories of products (cars) which in this case included a first group made up of new cars and those used cars sold within the first two years of their existence and a second group made up of used cars sold after their first two years of their existence.112 The Polish tax law allowed for the same percentage rate to apply to the first group of cars while the second group of cars are assessed a percentage rate in the form of a schedule which, in application, makes the percentage increase with the age of the car.113

The Polish government provided three reasons as to why the difference in tax rates across the two categories of cars was not a violation Article 110 including that there are environmental concerns associated with older cars, the purchase price of the second category of cars declared to the Polish government is significantly less than the actual price paid, and that the excise tax had no effect on the sale of the second category of cars and that actually there was an increase in the sales of these cars.114 The ECJ found that the Polish excise tax violated Article 110 since this TFEU provision requires the abolishment of any possibility that imported goods could be taxed more heavily than their domestic counterparts.115

110 Id. at ¶ 37.
111 Id. at ¶ 31.
112 Id. at ¶ 34.
113 Id. at ¶ 37.
114 Id. at ¶ 39.
115 Id. at ¶¶ 40, 41.
The ECJ was also handed the question as to whether the Polish tax law’s requirement that the purchaser and importer of a used car submit a customs declaration to the Polish government within five days of the acquisition of the car violates Article 30 TFEU. The ECJ quickly stated that the submission of a customs declaration was merely a “corollary” associated with the responsibility to pay for the excise tax and was not prohibited by Article 30 since the submission requirement takes place only after the car has been brought into Poland and, thus, since the requirement was associated with the payment of an excise tax the requirement is fiscal and should be scrutinized by Articles 28, 30, and 110.

The ECJ has also held that Article 110 (ex 90, 95) can be violated by a member-state’s tax regime that taxes imported products at higher rates than domestic products but also taxes some domestic products higher than the imported products. In Outokumpu Oy, the ECJ was presented a case whereby the plaintiff was an importer of energy into Finland and faced a taxation system that taxed imported energy in a systematically different fashion in contrast to domestically produced energy. Domestically produced energy in Finland was subject to a taxation system based on the method of production, driven by environmental concerns, with varying rates including the highest rate set for nuclear power and no tax assessed for energy produced with an output of less than two megavolt-amperes. The excise tax levied against imported energy was higher than the lowest tax placed on domestically produced energy (that

---

116 Id. at ¶ 42.
117 Id. at ¶¶ 50-52.
119 Id. at ¶ 17.
120 Id.
which was produced with an output of less than two megavolt-amperes) but was actually lower than the rate for nuclear power.\footnote{Id. The ECJ’s evaluation of the legislative documents found that Finland had assessed different tax levies for various forms of energy production ingredients including coal, electricity, natural gas, milled peat, and sod peat. Id. at ¶ 11.}

The plaintiff, Outokumpu, argued that the excise tax on the energy it was importing into Finland from Sweden was prohibited by Articles 28 (ex 23, 9), 30 (ex 25, 12) and 110 (90, 95) and argued further that any excise tax on imported electricity by Finland should match that of the lowest rate assessed against domestically produced electricity.\footnote{Id. at ¶ 16.} The Finnish government countered that imported electricity should be treated differently in that it could not ascertain the origination of energy and its production method for environmental concerns coming from another member-state and thus had to maintain its excise tax on imported electricity since its differential rates for domestically produced electricity would not work.\footnote{Id. at ¶ 37.}

The ECJ began by stating that the TFEU provisions on the one hand commenting on charges having an equivalent effect and on the other hand commenting on an internal system of taxation that is discriminatory cannot by applied together by a reviewing court.\footnote{Id. at ¶ 19.} The ECJ then found that the excise tax assessed against the plaintiff’s imported energy amounted to a general system of taxation that is covered by Article 110 since the tax, although discriminatory, applied to various forms of energy including imported and domestic as part of the same legislation.\footnote{Id. at ¶¶ 21, 22, 41. The ECJ also made note that the tax was not solely designed to be imposed on imported products. Id. at ¶ 27.}

The ECJ’s opinion also removed several points of distinction which a member-state government could rely on in the future to defend an excise tax such as the one at bar. First, the
ECJ stated that Article 110 was violated despite the fact that the imported electricity was taxed at a different point in the stream of commerce as domestically produced electricity was taxed at the time of production and imported electricity was taxed at the time of importation.\footnote{Id. at ¶ 25.} Second, according to the ECJ, Article 110 was violated even if the highest tax rate assessed against electricity was domestically produced (in this case nuclear power).\footnote{Id. at ¶ 34.} The ECJ made it clear that Article 110 is infringed merely due to the fact that the tax rate levied against the imported electricity and the tax rate levied on the domestically produced energy were different even if only in certain cases was the imported electricity penalized.\footnote{Id.} What mattered most on this point was that the goods were similar (here, electricity) and the method of calculation was different.\footnote{Id.} Moreover, the ECJ stated that in any such case, the tax rated levied against the imported good would be compared to that of the lowest tax rate for a similar, domestically produced good.\footnote{Id. at ¶ 36.}

Third, on the issue of a member-state government’s difficulty in determining the source of production of electricity coming from another member-state, the ECJ held that “practical difficulties” could not justify disparate tax treatment between imported and domestically produced goods assuming that the goods are similar.\footnote{Id. at ¶ 38.} Here, although the ECJ recognized the member-state government’s problem associated with the blindness by which imported electricity is created, the Finnish tax regime did not give the electricity importer the opportunity to demonstrate how the imported electricity was produced to the point whereby, if shown, the
Finnish government could assess the same tax rate for both imported and domestically produced energy.\textsuperscript{132}

\textbf{B. Taxation and Product Similarity.}

In \textit{Tulliasiamies and Antti Siilin} the ECJ laid out one of the most comprehensive set of dictates concerning the potential for an internal taxation system to run afoul of Article 110 (ex 90, 95) in what was a very technical case involving, among other issues, the taxation of an imported used car and the method by which imported products are deemed similar by a member-state’s taxation regime.\textsuperscript{133} Mr. Siilin had purchased a used 1986 Mercedes Benz in Germany, equipped with automatic transmission and a sunroof and having 180,000km, and brought it into Finland.\textsuperscript{134} The Finnish government had two tax laws that applied to the importation of a used car including the Autoverolaki and the Arvonlisaverolaki.\textsuperscript{135} The Autoverolaki required that the tax paid on an imported used car would be the same as the tax paid on an “equivalent used vehicle” to be reduced by 0.5% for each month, through 150 months, of the car’s life which would begin at the time the car was purchased.\textsuperscript{136} Additionally under the Autoverolaki, if an equivalent new vehicle cannot be found, the tax on the imported car would be assessed using a new vehicle that most closely equates to the imported car while using technical characteristics as well as others to determine equality.\textsuperscript{137}

The Arvonlisaverolaki, however, allowed the importer of a car to deduct the value added tax levied and paid on the car under the Autoverolaki as a taxable business activity.\textsuperscript{138} The tax

\begin{itemize}
\item\textsuperscript{132} \textit{Id.} at ¶ 39.
\item\textsuperscript{133} Case C-101/00, Tulliasiamies and Antti Siilin, [2002] ECR I-7487.
\item\textsuperscript{134} \textit{Id.} at ¶¶ 16, 17.
\item\textsuperscript{135} \textit{Id.} at ¶ 3.
\item\textsuperscript{136} \textit{Id.} at ¶ 6.
\item\textsuperscript{137} \textit{Id.}
\item\textsuperscript{138} \textit{Id.} at ¶ 12.
\end{itemize}
deductions identified under the Arvonlisaverolaki were associated with the month in which the tax was paid.\footnote{Id. at ¶ 15.} The Finnish customs office, after Mr. Siilin declared the car following importation, calculated the tax on the basis of a comparison between the imported used car and one of a similar model with similar “technical characteristics” which happened to be a new car (using the new car price) found in Germany.\footnote{Id. at ¶ 19.} Additionally, the Finnish customs office added to the list price of the new car in Germany the cost of the automatic transmission and sunroof features (thus raising the taxable value by 9.4\%).\footnote{Id.}

Mr. Siilin put forth two grounds as to why the Finnish tax on imported goods was discriminatory and thus violated Article 110 of the Treaty. First, he argued that the tax assessed by the Finnish government on his 12-year-old car was greater than the amount of tax that would be paid on a domestically purchased car with “similar age, characteristics, and condition.”\footnote{Id. at ¶ 21.} Second, Mr. Siilin contended that by charging the value added tax as part of the overall tax paid on the imported car, the Finnish customs office was violating European Union Council Directive 92/111/EEC (a.k.a., “the Sixth Directive”).\footnote{Id. at ¶ 22.} As a remedy, Mr. Siilin sought to both void the value added tax on his car and require the Finnish Customs office to reassess the tax on the car so as to not exceed the tax that would be paid on a similar domestically purchased car.\footnote{Id. at ¶ 23.}

The Finnish courts, after having found fault with the Finnish customs office’s assessment of taxes, sought a preliminary ruling from the ECJ.\footnote{Id. at ¶¶ 29, 31, 33.} According to the ECJ, the first issue to be...
resolved was whether the first paragraph of Article 110 allows for a member-state to assess a tax on an imported, used car from another member-state whereby the taxable value varies depending on the marketing stage by which the importer is operating. One of the chief arguments made by Mr. Siilin was that his act should not be treated any differently than an official importer of cars, say a dealership that wishes to sell new cars in the Finnish marketplace. But since the Finnish government was effectively treating official importers differently than a person who purchases a car in one member-state and brings it back into another member-state, the distribution stage amounts to a higher tax paid by the non-official importer since the Finnish taxation regime includes the margins added in other, prior distribution stages. As well, Mr. Siilin argued that used cars suffer from differential treatment as the tax on a used car already in Finland is lower than that of a used car purchased in another member-state and later brought into Finland. Fundamentally, according to Mr. Siilin, the tax assessed on a used car imported from another member-state by an individual buyer is overstated since the imported used car is measured against the taxable value of a new car.

The Finnish government rebutted by arguing that its taxation system did not violate Article 110 since Article 29 of the Customs Code (i.e., European Union Community law) merely requires that the taxable value of a new car is assessed using the actual transaction value of the good purchased. The Finnish government conceded that this practice could lead to “different taxable values” based on the distribution stage at which the transaction takes place and the price.

\[^{146}\text{Id. at ¶ 34.}\]  
\[^{147}\text{Id. at ¶ 35.}\]  
\[^{148}\text{Id.}\]  
\[^{149}\text{Id. at ¶ 36.}\]  
\[^{150}\text{Id. at ¶ 38.}\]  
\[^{151}\text{Id. at ¶ 41.}\]
paid for the imported goods. The Finnish government also stated that Article 31 of the Customs Code, which applies to the taxation of used cars, is not violated since the provision makes the individual consumer liable for tax assessed at a the lowest price paid by a consumer of a similar new car in either the Finnish market or the market of another member-state.

The ECJ answered its first question by stating that the first paragraph of Article 110 is not violated if member-states maintain a taxation system that in some cases may provide for unequal tax assessments on used cars so long as the taxation system is determined by using the Customs Code within European Union law, including cases whereby the tax paid on an imported used car is higher than that on a domestically purchased, similar car already registered in the taxing member-state. However, the ECJ did make it clear that any taxation regime cannot allow for variations in the tax assessed based on the marketing stage.

The second question that faced the ECJ was much more mechanical. The Finnish courts sought an answer on the question of whether a member-state’s tax law can assess the tax value of an imported used car based on a new car. The ECJ saw this question as another opportunity to explain the concept of similar goods in regard to Article 110’s prohibition against discriminatory tax regimes and reminded readers that any car used by a member-state to assess tax must be one that is similar calling this rule “settled case-law.” However, the ECJ went further than merely defining what it is meant by similar goods are provided a pathway for member-states to determine similarity in cars which must include consideration of what it takes for the two

---

152 Id.
153 Id.
154 Id. at ¶¶ 60, 61.
155 Id. at ¶ 61.
156 Id. at ¶ 73.
157 Id. at ¶ 74.
compared cars to be in competition with each other based on “price, size, comfort, performance, fuel consumption, durability, reliability, and other matters.”\textsuperscript{158}

The ECJ held that, functionally, it would be impossible for the Finnish government to use a similar new car as the basis of a tax assessed against the importation of a used car purchased in another member-state because Finland’s system of depreciation did not guarantee the actual amount of depreciation for the imported car and thus did not guarantee that the domestic tax would be the same as the tax assessed against an imported used car.\textsuperscript{159}

A third question was posed to the ECJ which was very much related to the second question, above. This question concerned whether a member-state, when developing its taxation practices, must set forth the actual criteria for a depreciation system for cars to which the actual individual characteristics and features of those cars so that each is examined so that the domestic tax applied on an imported used car never exceeds that of a similar used car already registered in the taxing member-state.\textsuperscript{160} The ECJ answered affirmatively and held that the tax regime of a member-state needs to state the criteria clearly so that a person who believes that the tax regime violates Article 110 has the ability to challenge it.\textsuperscript{161}

The ECJ provided another in-depth, product-specific definition of product similarity in relation to Article 110 (ex 95, 90), here on the topic of spirits, in \textit{John Walker & Sons v. Ministeriet for Skatter og Afgifter}.\textsuperscript{162} The ECJ explained, generally, that product similarity required an analysis of similar characteristics and whether consumers believe the compared

\textsuperscript{158} ld. at ¶ 75.
\textsuperscript{159} ld. at ¶ 80.
\textsuperscript{160} ld. at ¶ 81.
\textsuperscript{161} ld. at ¶¶ 88, 89.
\textsuperscript{162} Case C-243/84, John Walker & Sons Ltd v. Ministeriet for Skatter og Afgifter, [1986] ECR 875.
products meet similar needs, in regard to origin, taste, alcohol content, manufacturing methods and “organoleptic properties.” As well, these concepts of similarity should be given significant breadth in regard to interpretation and two products need not be strictly identical to be similar within the definition of Article 110.

At issue was the Danish government’s system of taxation of alcoholic beverages. Under Danish law, scotch whiskey and fruit wine were taxed using different methods in that scotch whiskey was subject to a tax that included a provision for alcohol content and an provision for price whereby the tax on fruit wine was levy solely on the basis of volume resulting in a lower tax on fruit wine. Although the Danish law did not assess taxation based on the country of origin, it was clear that scotch whiskey production did not exist in Denmark while 99% of the fruit wine consumed in Denmark was the result of domestic production.

The plaintiff, John Walker & Sons, contended that Article 110 of the Treaty was violated since scotch whiskey and fruit wine were similar products and should be adjudged so because the chief criterion for similarity should be the possible degree of substitution instead of the raw materials used to make the products as well as the method of manufacture. The plaintiff also went as far as arguing that fruit wine could actually be made with distilled alcohol as an additive making fruit wine even more similar to scotch whiskey. The Danish government defended its tax regime that differentiated fruit wine and scotch whiskey through different headings in its customs tariff schedule by arguing that the two beverages significantly differed on the basis of

---

163 Id. at ¶ 11.
164 Id.
165 Id. at ¶ 5.
166 Id.
167 Id.
168 Id. at ¶ 8.
169 Id.
both raw ingredients and the method by which scotch whiskey (distillation) and wine (fermentation) are produced.170

The ECJ made short shrift of the question as to whether scotch whiskey and fruit wine were similar products holding that they were not since the products were produced in different ways, maintained different raw materials (cereal-based products for scotch whiskey and fruit-based products for fruit wine), and possessed different organoleptic properties.171 The ECJ also stated that the mere fact that the two products possessed alcohol did not make them similar for the purposes of Article 110.172 Likewise, the fact that one of the products could be altered in a way to make it more similar in use was not enough to make the products more similar for the purposes of Article 110.173 Interestingly, however, the ECJ did note that a differentiating factor was that the products had different alcohol levels by volume.174

A second question, focusing on the second paragraph of Article 110, was raised as to whether competing products could be taxed differently by a member-state without infringing this provision of the TFEU.175 The plaintiff argued that Article 110 required, for competing products, an analysis of the competitive relationship between two products focusing on the potential for market development and the potential for product substitution whereby the existing, higher tax on scotch whiskey could limit the substitutability of, and the market development of,

170 Id. at ¶ 9. The European Commission also believed that scotch whiskey and fruit wine were different products since the products had “different uses.” Id. at ¶10.
171 Id. at ¶¶ 12, 13.
172 Id. at ¶ 12.
173 Id. at ¶ 13. The fact that scotch whiskey could be diluted and served as an aperitif did not make it more similar to fruit wine. Id.
174 Id. at ¶ 12. Scotch whiskey possesses 40% alcohol by volume while fruit wine is less than 20% alcohol by volume. Id.
175 Id. at ¶ 15.
scotch whiskey in Denmark. Relatively, stated the plaintiff, scotch whiskey is overtaxed based on both the volume of the product and the alcohol content. In turn, the Danish government contended that a member-state has the right to tax spirits at a different rate as wine so long as the tax regime is not designed to protect a specific category of alcoholic beverages and that the existing regime has not had the effect of limiting the importation of scotch whiskey.

The European Commission weighed in and remarked that it was important to determine whether the Danish taxation system did in fact favor domestically produced goods. The Commission stated that it is possible to not infringe the second paragraph of Article 110 if a member-state taxes spirits based on one system (alcohol by volume and price) and wine based on another metric (quantitative volume) but only if a significant amount of domestic production is found for both spirits and wine.

The ECJ found that there was no need to determine whether a competitive relationship existed between the two products and held that the Danish tax regime was not an infringement of Article 110 given the current stage of development of European Union law so long as the tax regime differentiates between different products based on objective criteria, there exists no direct or indirect discrimination, and if the tax regime pursues economic objectives also compatible with the Treaty. However, the ECJ did leave it open to the Danish courts to find that the tax regime was a violation of Article 110 and secondary European legislation.

---

176 Id. at ¶ 16.
177 Id.
178 Id. at ¶ 17.
179 Id. at ¶ 18.
180 Id.
181 Id. at ¶¶ 22, 23.
182 Id. at ¶ 22.
In *Commission v. France*, the European Commission brought an action against the French government for failing to meet the requirements of Article 110 (ex 90, 95) by placing a higher tax on light-tobacco cigarettes in contrast to dark-tobacco cigarettes.\(^\text{183}\) The European Commission had previously contacted the French government letting the latter know that the disparity in tax rates between light- and dark-tobacco products infringed upon not only Article 110 of the TFEU, but also two directives.\(^\text{184}\) Specific to Article 110, the French government argued that the difference in tax rates for the two types of cigarettes was in breach of the first paragraph of Article 110 since the French tax law did not provide a discriminatory effect on light-tobacco cigarettes and did not infringe the second paragraph of Article 110 since there was no protective effect on dark-tobacco cigarettes.\(^\text{185}\)

The ECJ stated, again, that any taxation system is compatible with Article 110 only if the tax system excludes any possibility of imported products being taxed at higher rates than domestic, similar products.\(^\text{186}\) The ECJ then evaluated the similarity of light- and dark-tobacco cigarette products and found that the two types of cigarettes were similar in regard to the requirements of Article 110 despite the fact that the cigarettes were manufactured from different types of tobacco and have different organoleptic properties.\(^\text{187}\) According to the ECJ, the two products need not be strictly identical but must only meet the same needs of the consumer and in the case of the facts at bar, the two types of cigarettes were intended for tobacco consumption in

\(^\text{184}\) Id. at ¶¶ 11, 12. The European Commission believed that the two Directives, 95/59 which requires that the excise tax applied to cigarettes does not raise the overall tax of all cigarettes to more than 90% of the total tax and 92/79 which set a minimum excise tax of 57% on the retail selling price of all cigarettes, were infringed by French law. Id. at ¶¶ 5, 6, 11.
\(^\text{185}\) Id. at ¶ 19.
\(^\text{186}\) Id. at ¶ 21.
\(^\text{187}\) Id. at ¶¶ 24, 29.
the usual, physical form that cigarettes take.\textsuperscript{188} The ECJ stated that it did not matter that the average age of those consuming dark-tobacco cigarettes is higher than the population of those who typically smoke light-tobacco cigarettes nor did it matter that the difference between light- and dark-tobacco cigarettes is the type of tobacco used in their manufacture.\textsuperscript{189}

What was most important the ECJ, was the fact that the tax system clearly favored the dark-tobacco cigarette which, in the French marketplace, was almost exclusively produced in France while the light-tobacco cigarette in the French marketplace was exclusively imported.\textsuperscript{190} Thus, according to the ECJ, the French tax law was clearly designed to benefit the domestically produced product to the detriment of the imported, similar product.\textsuperscript{191}

There was a twist to this case. The French government attempted to further defend its higher taxation of light-tobacco cigarettes through Article 36 (ex 30, 36) which allows for exceptions to Article 34’s prohibition of quantitative restrictions on imports on the grounds of protection of health and life of humans.\textsuperscript{192} In short shrift, the ECJ stated that Article 36 cannot serve as a valid defense of the French tax law.\textsuperscript{193}

\textbf{C. Taxation During the Life of the Product.}

\textsuperscript{188} \textit{id.} at ¶ 26.  
\textsuperscript{189} \textit{id.} at ¶ 25, 26.  
\textsuperscript{190} \textit{id.} at ¶ 30.  
\textsuperscript{191} \textit{id.} at ¶ 30.  
\textsuperscript{192} \textit{id.} at ¶ 32. Article 36 (ex 30, 36) states: “The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals, or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States. TFEU art. 36.  
\textsuperscript{193} \textit{id.} at ¶ 33.
In *Firma Molkerei-Zentrale Westfalen/Lippe GmbH v. Hauptzollamt Paderborn*, a case decided earlier than *Firma Fink*, the ECJ attempted to clarify the scope of power held by the national courts when interpreting Article 110 (ex 90, 95).\(^{194}\) The beginning language of the ECJ in *Firma Molkerei* reminded readers of the intent of the TFEU. The ECJ made it clear that the TFEU was not merely an agreement that created some obligations between and among the member-states, but instead created a “new legal order” that would benefit the member-states despite the fact that the member-states had forfeited some of their national power.\(^{195}\)

Furthermore, the ECJ commented that the TFEU provided for individual rights as well as rights for the member-states and European Union institutions and that these rights are not subject to qualification by actions taken by the latter two groups.\(^{196}\)

It is the next point that the ECJ makes in *Firma Molkerei* that dictates the balance for national courts. According to the ECJ, Article 110 is directly effective and the prohibition against discriminatory taxation is not subject to domestic enabling legislation.\(^{197}\) However, the ECJ contended that the national courts could play a role in the evaluation of whether Article 110 had been breached by a member-state in that a national court can decide, after a finding that the internal taxation is incompatible with Article 110, whether the level of illegality amounts to either an illegality of the entire taxation system or if only the excessive amount is illegal.\(^{198}\)

---


\(^{195}\) *Id.* at 152.

\(^{196}\) *Id.*

\(^{197}\) *Id.* It should be noted that Article 110 (ex 90, 95) included a third paragraph when it was part of the 1957 Treaty of Rome that stated: Member States shall, not later than at the beginning of second stage, repeal or amend any provisions existing when this Treaty enters into force which conflict with the preceding rules. In *Alfons Lutticke GmbH v. Hauptzollamt Sarrelouis*, Case C-57-65, [1966] ECR 0205, the ECJ stated that the third paragraph mandated that member-states, without any discretion afforded them, remove all discriminatory internal taxation rules by January 1, 1962. *Id.* at 210. However, the ECJ also gave national courts some discretion in determining whether national law violated the Treaty. *Id.*

\(^{198}\) *Firma Molkerei*, at ¶ 154.
The ECJ went one step further and explained where the potentially discriminatory taxation system applies in the taxed product’s life cycle. The ECJ contended that the taxation system could be defined as a violation of Article 110 in all stages of the manufacturing process as well as the marketing process.\(^{199}\) However, the ECJ conceded that the taxation policy’s effect becomes less likely to offend Article 110 as the stages of manufacture and marketing become more remote.\(^{200}\)

**D. Consumption Taxes.**

The best articulation of the balance and scope of Articles 28 and 30 on the one hand and Article 110 on the other hand is found in *Cooperativa Co-Frutta Srl v. Amministrazione delle finanze dello Stato.*\(^{201}\) In *Co-Frutta*, the ECJ was served several questions from the Italian courts in a case involving an Italian state consumer tax that applied to both imported and domestic products, specifically here a tax on the consumption of fresh bananas, but overwhelmingly by volume was applied to bananas originating from Colombia since the great majority of bananas (over 99%) consumed in Italy were imported.\(^{202}\)

The first two questions posed to the ECJ were joined so that the application of the various TFEU provisions could be distinguished.\(^{203}\) According to the ECJ, Articles 28 and 30 of the TFEU apply to any charges that are assessed on goods as the goods are imported into a member-state from another member-state and the former member-state does not assess the same charges to goods that are domestically produced whereby the cost of the imported good becomes greater

\(^{199}\) *Id.* at ¶ 155.

\(^{200}\) *Id.*


\(^{202}\) *Id.* at ¶¶ 3, 4.

\(^{203}\) *Id.* at ¶ 7.
than the domestically produced good.\textsuperscript{204} In contrast, Article 110 applies to an internal tax that would be assessed against both imported goods from another member-state and domestically produced goods.\textsuperscript{205} However, if a charge is assessed against an imported good whereby no similar domestically produced good exists, that charge is considered an internal tax and is prohibited by Article 110 if the charge is part of a general system of taxation.

When addressing the facts at hand, the ECJ held that a tax on consumption, specifically here on the consumption of bananas, would be considered part of a general system of taxation and thus would be judged by Article 110 and not Articles 28 and 30.\textsuperscript{206} The ECJ stated that the Italian consumption taxes are governed by common tax rules without origin designations (domestic or import) and based on general categories to which the goods may fall and also the consumption tax rules provide general revenues which are not earmarked.\textsuperscript{207} The ECJ then provided a more general rule that would benefit any practitioner of European Union law on the subject of consumption taxes and Article 110. The ECJ stated that a consumption tax that is assessed against both imported and domestic products is not a charge having an equivalent effect under Articles 28 and 30 but is instead an internal tax under Article 110 even if in practice the tax is applied nearly exclusively to imported goods since domestic production of those goods does not exist.\textsuperscript{208}

After having determined that the Italian consumption tax would be governed by Article 110, the ECJ next sought to answer the question of whether the consumption tax is

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{204} Id. at ¶ 8.
\item \textsuperscript{205} Id. at ¶ 9.
\item \textsuperscript{206} Id. at ¶¶ 12, 13.
\item \textsuperscript{207} Id. at ¶ 12.
\item \textsuperscript{208} Id. at ¶ 14.
\end{itemize}
\end{footnotesize}
discriminatory in that it was designed to protect other fruit produced and/or consumed in Italy.\textsuperscript{209} When addressing the facts at bar, the ECJ found that bananas were taxed while the consumer tax did not apply to “the most typical Italian-produced fruit” and that the difference in tax policy influences the market for fruit, generally, and can reduce the potential consumption of bananas.\textsuperscript{210} The ECJ made it clear that the second paragraph of Article 110 was designed to prohibit discriminatory internal tax practices that limit competition among goods partially, directly, or indirectly even if the two goods are not similar as defined by the first paragraph of Article 110.\textsuperscript{211}

The fourth question concerned taxation and trade practices between the member-states of the European Union and the rest of the world. Specifically, the question was whether Article 110 applies to products originating from outside the member-states of the European Union yet have been introduced into the European Union as a step prior to goods importation into another member-state to which the ECJ answered affirmatively.\textsuperscript{212} Although the ECJ conceded that only Article 28 mentions goods coming from countries outside the European Union and that Article 110 only discusses goods from other member-states, the ECJ drew on its prior case law and held that its precedents were consistent that Article 110 supplements the language in Article 28 and that any other reading of Article 110 would be contrary to the general spirit of the Treaty and Articles 28 and 29 specifically.\textsuperscript{213}

In \textit{Gabriel Bergandi v. Director general des impots}, the ECJ provided the balance between Article 110 (ex 95, 90) and Article 34 (ex 28, 30) which prohibits the use of quantitative

\begin{flushright}
\footnotesize
\begin{tabular}{ll}
\textsuperscript{209} & \textit{id.} at ¶ 15. \\
\textsuperscript{210} & \textit{id.} at ¶ 22. \\
\textsuperscript{211} & \textit{id.} at ¶ 19. \\
\textsuperscript{212} & \textit{id.} at ¶¶ 24, 28. \\
\textsuperscript{213} & \textit{id.} at ¶ 25. \\
\end{tabular}
\end{flushright}
restrictions by a member-state on goods imported from one member-state to another member-state. Specifically, the ECJ stated that Article 34 applies to all barriers to the free movement of goods that are not addressed elsewhere in the TFEU and does, specifically, not apply to barriers which are of a fiscal nature. As well, according to the ECJ, as soon as Article 110 applies in cases involving the taxation of products originating in other member-states, Article 34 should be excluded from the analysis as to whether an illegal barrier exists.

The facts of Bergandi are less than exciting. The plaintiff was an owner of audio and video gaming machines that were subject to a state tax by the French government assessed against the revenues generated by the machines, based on the category of machine, and ranged considerably. The tax assessment could be reduced upon proof that the machine was brought into service at least three years earlier than the applicable tax year. However, since the machines were subject to a new value-added tax in 1985, the plaintiff sought a reduction in the tax owed from the prior year. The plaintiff’s argument, in relation to Article 110, was that the machines he used were principally imported into France from another member-state and there was no manufacturing of these machines in France and thus tax assessed against the revenues of the machines was a violation of Article 110’s prohibition against discriminatory taxation practices.

---

214 Case C-252/86, Gabriel Bergandi v. Directeur general des impots, [1988] ECR 1343. Article 34 (ex 28, 30) states: “Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.” TFEU art. 34.


216 Id. at ¶ 34.

217 Id. at ¶ 3.

218 Id.

219 Id.

220 Id. at ¶ 4. Much of the case centered on the application of Article 33 of Directive 77/388/EEC which prohibits the use of turnover taxes on the supply of goods and the provision of services. The ECJ stated that although a member-state can continue to use taxes, duties, and charges, member-states cannot use turnover taxes. Id. at ¶¶ 4, 10, 11. The ECJ also held that the tax assessed on the entertainment machines was not a turnover tax since the
The ECJ provided additional statements about the general applicability of Article 110. First, the ECJ stated that has the same mission as Article 34 which is to ensure the free movement of goods in order to maintain normal conditions of competition through the elimination of barriers found in tax practices that, when internally applied, discriminate against products of other member-states. Second, Article 110 must guarantee equality between domestically produced goods and imported goods from another member-state and that whenever a fiscal levy exists that discourages imports to the benefit of domestic production, the levy likely violates Article 110.\textsuperscript{221}

However, the ECJ left room for member-states to have a discriminatory taxation policy that disfavors imported goods from a member-state if the tax system is based on categories of goods and any tax benefits granted support “legitimate economic or social purposes.”\textsuperscript{222} According to the ECJ, and applicable to the facts at bar, a legitimate social purpose could be a member-state government’s intention to get citizens to use or not use certain machines or frequent or not frequent certain places so long as the criteria set for the incentive or discouragement is objective, and free from any discriminatory effects or protective effects.\textsuperscript{223}

\textit{E. Tax Collection Practices.}

Perhaps one of the clearest set of rules regarding a discriminatory tax policy by a member-state and Article 110 (ex 90, 95) was provided by the ECJ in \textit{Grundig Italiana SpA v. Ministero delle Finanze}.\textsuperscript{224} In \textit{Grundig Italiana}, the Italian government faced a claim by an

\textsuperscript{221} Id. at ¶ 24-27.
\textsuperscript{222} Id. at ¶ 29.
\textsuperscript{223} Id. at ¶¶ 30, 31.
importer of audiovisual and photo-optical goods that both the method of tax assessment and the
method of tax collection was different for domestically produced and imported goods and thus
these methods violated Article 110.\textsuperscript{225} Specifically, although there was a 16% consumption tax
on audiovisual and photo-optical goods that applied regardless of whether these goods were
domestically produced or imported, the tax on domestically produced goods was assessed based
on an ex-works value and the tax on imported goods was assessed based on the customs value of
the goods at the border which, under the Italian tax law, was labeled the “free at national frontier
value.”\textsuperscript{226} Therefore, for domestically produced audiovisual and photo-optical goods, no
transportation or distribution costs were included in the taxable amount but imported goods were
taxed on a basis that included costs associated with getting the goods (transportation and
delivery) to Italy.\textsuperscript{227} The Italian government defended the tax regime by arguing that
discrimination did not exist under Article 110 since the tax represented the value of the goods at
the time the goods were made available to Italian consumers.\textsuperscript{228} As well, the Italian government
contended that domestic producers of such goods are afforded a flat-rate deduction of 35% on
the price of the goods, while importers were not afforded the benefit,

Importers of audiovisual and photo-optical goods into Italy were assessed the
consumption tax at the time the goods crossed into Italy while domestic producers of similar
goods were required to file a tax return with the Italian government the month after the relevant
quarter representing the volume of sales for that quarter.\textsuperscript{229} The Italian government submitted
that this tax collection practice did not violate Article 110 since it placed domestic producers and

\textsuperscript{225} Id. at ¶¶ 3-5.
\textsuperscript{226} Id. at ¶ 3.
\textsuperscript{227} Id. at ¶ 14. It should be noted that importers of audiovisual and photo-optical goods were allowed to deduct
from the tax any transportation costs within Italy. Id.
\textsuperscript{228} Id. at ¶ 15.
\textsuperscript{229} Id. at ¶ 5.
importers in the same position as it is more difficult for domestic producers to determine the ex-
works value of their goods in contrast to importers who must make the formal declarations, and
thus have this knowledge, at the time the goods are to clear customs at the border.\textsuperscript{230}

The ECJ found fault with the tax policy as it applies to domestically produced
audiovisual and photo-optical goods and their imported counterparts.\textsuperscript{231} The ECJ began by
reminding readers that Article 110 is designed to ensure the free movement of goods between
member-states regardless of where they are produced so long as the goods have been introduced
into the European Union and thus the protections of Article 110 apply to goods produced inside
the European Union and also to those outside the European Union after they have been imported
once.\textsuperscript{232} Next, the ECJ put forth a very bold, seemingly all-encompassing statement that the
provisions of Article 110 prohibit any form of tax practice whereby there is a possibility that
imported goods are taxed at higher levels than their domestically produced counterparts.\textsuperscript{233} More
pointedly, the ECJ remarked that Article 110 is violated if tax assessment criteria is used to
determine values that would make the imported product more expensive in relation to the
domestic product and here Article 110 is violated since the domestic products could be made
available to the Italian consumer less expensively than the imported equivalent since the latter’s
price will have to incorporate the marketing and delivery costs (i.e., “distribution costs”) while
the former’s price does not.\textsuperscript{234}

\textbf{F.} \textit{Transportation Charges.}

\textsuperscript{230} \textit{Id. at ¶ 20.}
\textsuperscript{231} \textit{Id. at ¶¶ 25, 26.}
\textsuperscript{232} \textit{Id. at ¶ 11.}
\textsuperscript{233} \textit{Id. at ¶ 12.}
\textsuperscript{234} \textit{Id. at ¶¶ 16, 17, 25.} The ECJ language probably states this principle best: “Thus, unlike domestic producers, importers of the products in question cannot deduct from the basis of assessment of the tax the entire cost of release for consumption on the Italian market.” \textit{Id. at ¶ 18.}
The ECJ clarified the separation of scope between Article 110 (ex 90, 95) and Articles 102 (ex 82, 86) and 106 (ex 86, 90) in the combined cases of *Texaco A/S v. Middelfart Havn*[^235] and *Olieselskabet Danmark v. Trafimisteriet.*[^236] The taxation policy at issue in *Texaco A/S* was an import surcharge levied by the Danish government which was in addition to the traditional duties assessed on goods which were loaded, unloaded, or in another way taken on board or landed within commercial ports or deep-water approach channels in Denmark.[^237] The traditional duties were assessed based on deadweight tonnage or gross registered tonnage with the smallest cargoes, those under 100 tonnes of deadweight or gross registered tonnage, exempt.[^238] Although the ports could be commercially owned (i.e., not owned by the Danish government), the Danish government was responsible for setting the rates associated with water transportation of imported goods which included the government-enacted 40% surcharge placed on imported goods.[^239] In 1990, the surcharge was abolished, however, the plaintiffs argued that the surcharge, when it was in effect, was a violation of several Articles of the Treaty including 110, 106, 102, and, collectively, Articles 28 (ex 23, 9), 29 (ex 24, 10), and 30 (ex 25, 12).[^240] The plaintiffs, which imported a variety of petroleum products from non-EU-member countries, some of which the EU had established free trade agreements and some of which the EU had not established free trade agreements, alleged violations of Articles 11 and 13 of the Treaty of Rome which have since been repealed and were not part of the Treaty of Amsterdam or the Treaty of the Functioning of the European Union.

[^237]: *Id.* at ¶ 2.
[^238]: *Id.* at ¶ 7.
[^239]: *Id.* at ¶ 3, 9. The Danish government imposed the 40% surcharge on imported goods believing that the rate could help sustain the operation of the ports but also not divert water traffic to other ports or methods of transportation. *Id.* at ¶10.
[^240]: *Id.* at ¶¶ 1, 11. The plaintiffs also alleged violations of Articles 11 and 13 of the Treaty of Rome which have since been repealed and were not part of the Treaty of Amsterdam or the Treaty of the Functioning of the European Union.
agreements, argued that since the surcharge was a violation of the TFEU, they were entitled to a refund of the surcharges paid over the years it was effective.  

In its opinion, the ECJ quickly stated that the surcharge placed on imported goods coming into the Danish ports, as set by the Danish government, was a violation of Article 110 as a form of internal discriminatory taxation.  

As important, the ECJ stated that once a tax policy has been found to violate Article 110, there is no need to evaluate the tax policy in the face of Articles 102 and 106.  

The ECJ also found that the Danish tax regime violated Article 18 of the EEC/Sweden Agreement which, at the time, was a free trade agreement between the European Union (then the European Economic Community) and a non-member-state.  

In doing so, the ECJ relied heavily on the prior case law of the ECJ holding that the tax regime was a general system of internal dues that applied to imported goods without distinction based on country of origin and thus was an internal fiscal measure and that Article 18 of the EEC/Sweden Agreement was designed, like Article 110 of the TFEU, to prohibit discriminatory direct or indirect effects on products from trade partners.  

However, the ECJ did state that there was no application of Article 110 to goods coming from non-member-states with which the European Union did not have a trade agreement and thus no remedy could be afforded to the plaintiffs that imported products from these countries into the European Union.  

As one might imagine, the monetary issue was most likely the most important issue for the plaintiffs who sought a refund for the surcharges they had paid over the years.  

---

241 Id. at ¶ 12, 13.  
242 Id. at ¶ 21.  
243 Id. at ¶ 22.  
244 Id. at ¶ 33.  
245 Id. at ¶¶ 30, 31.  
246 Id. at ¶¶ 35-37.
the ECJ, the plaintiffs were, as a matter of right, entitled to a refund of the surcharges since their rights had been violated under Article 110 and this right was afforded the plaintiff regardless of whether the government, or another body empowered by the government, actually collected the surcharge.\textsuperscript{247} The ECJ stated quite clearly that when a member-state has engaged in a tax policy that violates the Treaty, that member-state is required to repay the plaintiff for its losses as a remedy.\textsuperscript{248}

However, the ECJ did recognize two rights associated with this right to recovery for a tax regime that violates European Union law. First, each member-state has the right to determine under what circumstances repayment for a breach of EU law should be afforded so long as those circumstances are equivalent to other, domestic circumstances and it would not otherwise be difficult or impossible to exercise rights under EU law.\textsuperscript{249} Second, and related, each member-state has the power to set reasonable time limitations on the pursuit of repayment relative to a breach of EU law.\textsuperscript{250}

G. Taxation and State Aid.

There is also a potential relationship between Articles 107 (ex 87, 92) and 110 (ex 90, 95). Article 107 of the TFEU prohibits any measure consisting of state financial assistance that distorts trade in goods or competition among goods producers so long as that measure is found to be incompatible with the common market.\textsuperscript{251} In Enirisorse SpA v. Ministero delle Finanze, the

\begin{itemize}
\item\textsuperscript{247} Id. at ¶¶ 39, 43.
\item\textsuperscript{248} Id. at ¶ 43.
\item\textsuperscript{249} Id. at ¶ 45.
\item\textsuperscript{250} Id. at ¶ 46.
\item\textsuperscript{251} Article 107 (ex 87, 92) states: “1. Save as otherwise provided in this Treaty, any aid granted by a Member State or though State resources in any form whatsoever which distorts or threatens to distort competition by favouring [sic] certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market. 2. The following shall be compatible with the common market: (a) aid having a social character, granted to individual consumers, provided that such aid is granted without
\end{itemize}
ECJ determined that state financial assistance comprising of a significant amount of charges assessed against importers of goods, moving from one member-state to another member-state, going to a public undertaking whereby the state aid is not linked to the need to perform services nor is established in advance to be objective and transparent, should be considered state aid under Article 107 and not compatible with the common market.\textsuperscript{252}

In \textit{Enirisorse}, the Italian government attempted to defend a policy of contributing public funds to a group of public economic entities, called “Aziende,” that were charged with the oversight of mechanical loading, unloading, and storage of goods (as well as other “commercial port services”) in several Italian ports and could utilize both publicly- and privately-owned equipment in fulfilling their duties.\textsuperscript{253} The Italian government set the charges for those activities, which varied by port, but two-thirds of the charges would be paid to the Aziende with the remaining one-third returned to the Italian treasury.\textsuperscript{254} The plaintiff, Enirisorse, used its own human resources and physical equipment to load and unload goods yet was charged the traditional fees assessed at the port of Cagliari and then filed an action claiming that the Italian discrimination related to the origin of the products concerned; (b) aid to make good the damage caused by natural disasters or exceptional circumstances; (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, insofar as such aid is required in order to compensate for the economic disadvantages caused by that division. 3. The following may be considered to be compatible with the common market: (a) aid to promote the economic development of areas where the standard of living is abnormally or where there is serious underemployment; (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State; (c) aid to facilitate the development of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest; (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest; (e) such other categories of aid as may be specified by decision of the Council acting by a qualified majority on a proposal from the Commission.” TFEU art. 107.

\textsuperscript{252} \textit{Case C-34/01, Enirisorse SpA v. Ministero delle Finanze}, [2003] ECR I-14243, at ¶ 47.
\textsuperscript{253} \textit{Id.} at ¶¶ 3-5, 10.
\textsuperscript{254} \textit{Id.} at ¶¶ 9, 11.
government's port charges violated Articles 18 (ex 12), 19 (ex 13), 36 (ex 30), 106 (ex 86), 110 (ex 90), 112 (ex 92), 113 (ex 93), and 114 (ex 95) of the TFEU.\textsuperscript{255}

Specific to Article 107, the plaintiff as well as the European Commission argued that the state aid afforded to the Aziende distorted trade because these public undertakings are in direct competition with private firms, such as the plaintiff, that engage in the same services.\textsuperscript{256} In rebuttal, the Italian government put forth several arguments. First, the government contended that the state aid does not affect trade between member-states because the volume of trade in goods moving through the Italian ports was limited.\textsuperscript{257} Second, Italy stated that the state aid was necessary, with an economic and social purpose, in order to keep the ports operating and if the users of the ports were to assume the full costs of moving goods through the ports, the costs would be simply too high given the limited volume of the ports.\textsuperscript{258} Third, the Italian government argued that even if the financial assistance to the Aziende was deemed to be state aid under Article 107, the aid would be compatible under Article 107(3)(c) in that it promoted the development of an activity that did not adversely affect trading conditions.\textsuperscript{259}

The ECJ court defined state aid pursuant to Article 107(1) as that which would either directly or indirectly favor some undertakings over others or serve as an economic advantage that such undertakings would not have earned during normal market conditions.\textsuperscript{260} However, the ECJ asserted, any aid that serves as mere compensation for the services provided and also does not provide for a more competitive position in the market, is not prohibited by Article 107(1).\textsuperscript{261}

\begin{footnotes}
\footnote{\textit{Id.} at ¶¶ 15, 17, 18.}
\footnote{\textit{Id.} at ¶ 23.}
\footnote{\textit{Id.} at ¶ 24.}
\footnote{\textit{Id.}}
\footnote{\textit{Id.}}
\footnote{\textit{Id.} at ¶ 30.}
\footnote{\textit{Id.}}
\end{footnotes}
Regardless, according to the ECJ, any state aid, to be permissible, must meet three requirements including that the benefitting public undertaking possess actual public-service obligations where are clearly defined, the parameters of the charges assessed must be calculated ahead of time in an objective and transparent manner to avoid the conferring of an economic advantage, and the fees charged cannot exceed the costs associated with the delivery of public services.\textsuperscript{262}

On these points, the ECJ first found that the mere operation of a commercial port does not make such activities those within the scope of public service.\textsuperscript{263} As well, the ECJ found that since the fees charged by the Italian government were not clear to the importer of goods using the port, it was not clear that the fees charged were actually covering the specific activities of the importer and thus there was no way in which to determine if the fees were higher than what it would take to actually deliver those services.\textsuperscript{264} The ECJ also stated that not only would the “excessive charges,” those charges above what would be necessary to cover the expenses associated with a public service, violate Article 107, but also that Article 107 prohibits all of the fees associated with the Italian government’s policy.\textsuperscript{265}

Following the robust discussion on Article 107, there remained lingering questions concerning Articles 30, 34, and 110. First, the ECJ quickly dismissed the plaintiff’s argument that the Italian government’s policy violated Article 34 since that article does not apply to charges possessing characteristics equivalent to customs duties and instead such charges are to be evaluated in the face of Articles 30 and 110.\textsuperscript{266} However, the ECJ next stated that the charges in question here were not within the ambit of Article 30, since the charges were not assessed

\textsuperscript{262} \textit{id.} at ¶32, 35.
\textsuperscript{263} \textit{id.} at ¶ 31.
\textsuperscript{264} \textit{id.} at ¶¶ 38, 39, 40.
\textsuperscript{265} \textit{id.} at ¶¶ 43, 45.
\textsuperscript{266} \textit{id.} at ¶¶ 56, 58.
against the imported goods which would provide a benefit to domestic goods. Likewise, since the charges applied to the loading and unloading of all goods but do not create inequality of treatment that would harm the imported goods, the charges and the collection of the charges were not in violation of Article 110.

The ECJ was clearer about the separation between Article 110 (ex 90, 95) and Article 30 (ex 25, 12) on the one hand and Article 107 (ex 87, 92) in Essent Netwerk v. Aluminium Delfzijl BV on the other hand, albeit with a much more difficult set of facts. According to the ECJ, the purpose of Articles 110 and 30 is to preserve the free movement of goods between member-states and preserve competition between domestic goods and imported goods while the purpose of Article 107 is to preserve competition between undertakings that might be distorted by state aid from a member-state government.

Pursuant to Dutch law, all electricity, both imported and domestically generated, would be managed by a statutorily-designed firm (“SEP”) which in turn pooled fees paid to it by four domestic generators of electricity. An agreement among SEP, the four energy producers, and the 23 distribution firms asserted that the distribution firms would pay SEP an annual amount to cover “non-market-compatible costs,” essentially costs that were associated with various investments made by SEP and the energy generators, to be financed through an increase in the price of electricity charged to all types of consumers. Some of the fees paid to SEP would stay with SEP with remaining being paid to the Dutch government. Net operators, or their

267 Id. at ¶ 60.
268 Id.
270 Id. at ¶ 60.
271 Id. at ¶ 7, 8.
272 Id. at ¶¶ 10-13.
273 Id. at ¶ 67.
licensees, would charge the consumers and the key net operator in this case, Essent Netwerk, was wholly owned by either municipalities or provinces of The Netherlands.\textsuperscript{274} The agreement was eventually given legal force by the Dutch government.\textsuperscript{275}

In a blunt manner, the ECJ stated that electricity is a product for the purposes of the TFEU.\textsuperscript{276} The ECJ found that the Dutch legal framework governing the fees assessed against the transmission of electricity to cover non-market-compatible costs (“the Dutch law”) to violate Article 110 since the charges levied against the transmitted electricity were only partly used to pay for those same costs.\textsuperscript{277} According to the ECJ, if the revenue generated from the fees levied against the electricity were partly used to offset the costs associated with domestic production of electricity, the practice would constitute a discriminatory tax under Article 110.\textsuperscript{278} As well, the ECJ stated that if the charges were designed to completely offset the non-market-compatible charges facing domestic producers of electricity, the charges would be an infringement of Article 30.\textsuperscript{279} Although the Dutch government argued that the charges assessed against domestic purchasers did not favor the domestic production of electricity since non-market-compatible costs consist of investments in the past, the ECJ disagreed by remarking that non-market-compatible costs are always considerations that domestic energy producers must account for when determining its selling prices and thus the charges, either partially or completely offsetting, benefit domestic producers to the detriment of producers in other member-states.\textsuperscript{280}

\begin{itemize}
\item \textsuperscript{274} \textit{id.} at ¶ 68.
\item \textsuperscript{275} \textit{id.} at ¶¶ 16, 17.
\item \textsuperscript{276} \textit{id.} at ¶ 43.
\item \textsuperscript{277} \textit{id.} at ¶ 57.
\item \textsuperscript{278} \textit{id.} at ¶ 53.
\item \textsuperscript{279} \textit{id.}
\item \textsuperscript{280} \textit{id.} at ¶¶ 54, 55.
\end{itemize}
On the topic of whether the Dutch law infringed upon Article 107, the ECJ restated that state aid is such when financial assistance is the result of state intervention either by the state proper or its resources, the intervention affects trade between member-states, the intervention creates an advantage, and the intervention distorts or threatens to distort trade between member-states. The ECJ found that state intervention existed largely because SEP, although owned wholly by the four, domestic energy undertakings, was not free to spend the revenues generated by the charges as it desired and it did not matter that SEP was not a government entity, since the funds were under public control by statute. The ECJ also kept the bar low in regard to the impact or the potential for impact on trade between member-states through state aid stating that there was no minimum threshold test for state aid and its potential to infringe upon Article 107.

The ECJ next provided a pathway for a marriage between Articles 110 and 107. According to the ECJ, a tax, such as the one at bar on electricity transmission, does not constitute an infringement of Article 107’s prohibition on illegal state aid unless that tax is designed to fund the illegal state aid. Although the ECJ presumed this was the case in regard to the Dutch law in question, it left the ultimate finding of whether the tax was designed to fund a form of illegal state aid to the Dutch national courts. What made this part of the decision seemingly difficult for the ECJ was that there existed a factual dispute as to whether the Dutch government fulfilled

---

281 Id. at ¶ 64.
282 Id. at ¶¶ 68, 70, 75.
283 Id. at ¶ 76.
284 Id. at ¶¶ 89, 90.
285 Id. at ¶¶ 86, 91.
its obligations under Article 108 (ex 88, 93) requiring member-states to provide the European Commission with notice that the member-state intends to alter an existing form of state aid.\textsuperscript{286}

IV.) MAJOR THEMES OF THE ECJ’S JURISPRUDENCE ON INTERNAL TAXATION AND ARTICLE 110.

It was stated in the introductory portion of this work that tax law was one of the major concerns of the Framers of the European Union, case law plays an important role in the harmonization of tax law across the European Union, and that the benefit to a harmonized system of tax law across the European Union is an increase in cross-border investment that is not restrained by protectionist measures.

There are several themes reflected in the case law examined in this work. First, the reach of Article 110’s prohibition against discriminatory taxation practices extends to several points in the stream of commerce including the manufacturing process, the marketing process, and the distribution stage.\textsuperscript{287} Therefore, given the extent to which the ECJ will apply Article 110, it is

\textsuperscript{286} id. at ¶¶ 92, 94. Article 108 (ex 88, 93) states: “1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter an appropriate measures required by the progressive development or by the functioning of the common market. 2. If, after giving notice to the parties concerned to subject their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission. If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 258 and 259, refer the matter to the Court of Justice direct. On application by a Member State, the Council may, acting unanimously, decide that aid with that State is granting or intends to grant shall be considered to be compatible with the common market, in derogation from the provisions of Article 107 or from the regulations provided for in Article 89, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known. If, however, the council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the case. 3. The commission shall be informed in sufficient time to enable it to submit its comments, of any plans to grant to alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.” TFEU art. 108.

very difficult for a member-state to levy taxes in a manner that makes protectionism a reality
despite the many incentives for member-states to do so. Remarkably, however, the ECJ did state
that Article 110’s reach does not extend to levies associated with the loading and unloading of
goods.\footnote{[2003] ECR I-14243, at ¶¶56, 58, 60.} Instead, such discriminatory levies could be a violation of Article 107.\footnote{\textit{Id}. at ¶¶ 43, 45.}

The second prevailing theme revealed in this body of case law is that member-states for
taxation purposes cannot treat domestically-produced goods differently than similar, imported
to favor its domestic industry over imports by merely stating that the domestically-produced
good is “different” than the imported good. However, the ECJ has gone a long way to make sure
that such a maneuver is quite difficult. In \textit{Commission v. France}, the ECJ stated that tobacco
products, despite one set being made of light tobacco and another set being made of dark
tobacco, are similar products for taxation purposes.\footnote{[2002] ECR I-2005, at ¶¶ 25, 26.} France could not claim that the products
were dissimilar based on either the color of the tobacco or based on the demographics of the
consumer groups that use the products.\footnote{\textit{Id}., at ¶ 26.} It certainly didn’t help that the French tax law in
question clearly helped the dark variety tobacco products which were produced in France.\footnote{\textit{Id}.} A
member-state is also not at liberty to use discriminatory tax practices to treat imported goods
differently in cases whereby the discriminating member-state cannot monitor the production
process implemented in another member-state.\footnote{[1998] ECR I-1777, at ¶ 38.} Instead, the ECJ commands that Article 110
requires the member-state to allow the importer to show that a production process and/or the raw
materials used to make the imported good are similar to those used to make the domestically-produced good.  

Relatedly, facially-neutral classifications of goods are equally likely to violate Article 110. The Cooperativa Co-Frutta case is perhaps a classic example of a member-state’s attempt to use a facially-neutral classification with the masked intent to discriminate against a product that was almost completely imported (here, bananas from Colombia). In addition to stating that Article 110 was violated by Italy, the ECJ also proclaimed that Article 110’s reach extended to consumption taxes. Although the Italian statute did not specify that only imported bananas would be subject to the consumption tax, the effect, had the ECJ decided to uphold the Italian law in the face of Article 110, would have been to lure Italians into eating other fruits, probably grown in Italy, that would not be subject to the consumption tax.

As well, according to the ECJ, any set of factors found within a member-state’s tax law that a merchant of either domestically-produced goods or imports can rely on for guidance in taxation should be clear. These factors are those that a merchant can use to determine whether the domestically-produced good is similar to the imported good for the purposes of Article 110.

Regardless of whether the member-state’s law is facially neutral, the ECJ is likely to find any such tax law that makes a domestic product more expensive than a similar import a violation of Article 110. Perhaps the Outokumpu Oy case best exemplifies this. Here, according to the ECJ, Article 110 is still violated when a member-state engages in a tax practice resulting in a condition where some imports are priced higher than the domestic equivalent and some imports

\[295 Id. at ¶ 39.\]
\[296 [1987] ECR 2085, at ¶ 19.\]
\[297 Id. at ¶¶ 12, 13.\]
\[298 [2002] ECR I-7487, at ¶¶ 88, 89.\]
\[299 [1998] ECR 3375, at ¶ 12.\]
are priced lower than the domestic equivalent. This concept extends to import surcharges levied against imported goods even while traditional duties are assessed against both imported and domestic goods.

Third, the reach of Article 110 does not apply to only cases whereby a member-state’s tax law treats domestic and imported goods differently either implicitly or explicitly. In *Texaco Danmark*, the ECJ made clear that member-states cannot engage in tax practices that discriminate against goods from non-member-states whereby the European Union has a trade agreement with that non-member-state. However, the ECJ also commented that member-states may use discriminatory tax provisions that negatively affect goods from non-member-states whereby a trade agreement does not exist.

The last dominant theme identified in this body of case law is that Article 110 tends to stand alone in regard to discriminatory tax practices in that the ECJ does not find that it holds illegal activities that would be barred by other tax provisions such as Article 34, Article 107, and Article 30. The ECJ has made it clear that state aid practices cannot be used to reduce the costs of a domestic producer that could result in cost savings passed onto the consumer in the form of a lower price thus making the domestic good more attractive than the imported good. Similarly, the ECJ held that Article 34 only applies to discriminatory tax practices at the border and is not to be confused with customs duties. Article 30, according to the ECJ, only applies to customs duties and not internal taxation practices involving differences between similar

---

302 *Id.* at ¶¶ 30, 31.
303 *Id.* at 35, 37.
305 *Id.* at ¶¶ 56, 58.
domestic and imported goods.\footnote{[2007] ECR I-513, at ¶ 23.} Indeed, once the ECJ has found a violation of Article 110, the ECJ either does not find a need to examine the application of other provisions of the TFEU that address taxation and/or will likely find that the other provisions do not apply to the situation.\footnote{[1997] ECR I-4263, at ¶ 22, [1987] ECR 2085, at ¶¶ 12, 13, 25.}

V.) Analysis and the Promotion of the Common Market.

So long as the political incentive exists to promote the domestic economy to the detriment of the competitiveness of imports, member-states will continue to craft discriminatory tax practices. It is the mission of the ECJ to use its authority to make sure that the intent of the TFEU, specifically to promote the common market and to increase cross-border investment in a way that makes the 28-member European Union more competitive, is achieved. A survey of the case law covering the main issues that arise in the face of Article 110’s prohibition against discriminatory internal tax practices reflects success on the part of the ECJ.

The almost blanket ban approach by the ECJ on the topic of discriminatory internal taxation practices assists the efficiency of the European Union and benefits its citizens as a whole. Simply stated, if member-states are not permitted to use discriminatory internal taxation practices, firms are required to create their own efficiencies to remain competitive as they are required to compete against like-producing firms in 28 different member-states. Discriminatory taxation practices can lead to distortions in trade. These distortions can lead to consumers suffering from an inability to access quality products, period, or products that are of better quality than those produced domestically in their home member-state. These quality or better
quality products could potentially come from another member-state or a non-member-state whereby the EU has a trade agreement with that non-member-state.

The EU common market is built on the premise that competition will lead to efficiencies among firms that engage in competitive practices that promote better quality products for consumers. True enough, some firms within the member-state may fail as they are unable to compete, but that member-state should be able to perform well within another economic sector. Discriminatory internal taxation practices, pursuant to the conditions listed in Article 110 of the TFEU, are prohibited in virtually every phase of the stream of commerce so even the craftiest of member-states should not be able to provide distortionary, protectionist advantages for its domestic firms. However, despite the black letter law found in the ECJ’s jurisprudence, member-states will likely continue to use tax policy in a way to provide advantages to domestic firms that test the limits of Article 110 and the ECJ.

This is not to say that a member-state cannot engage in any protectionism. The outlier case in the otherwise “blanket ban” approach by the ECJ is *Gabriel Bergandi* whereby the ECJ found an additional, internal tax levied against imported video game machines to stand pursuant to a “legitimate economic or social purposes” exception allowing the French government to make the use of the machines financially unattractive. In *Gabriel Bergandi*, the plaintiff’s chief argument that Article 110’s prohibition on discriminatory taxation rested on the fact that the video game machines were all imported. On the surface, it does not seem as if the French law provides a discriminatory effect since the tax was assessed based on the use of the machines.

The *Gabriel Bergandi* case, however, poses a contradiction in light of the *Cooperativa*

---
Co-Frutta case. In Cooperative Co-Frutta, the ECJ’s concern was that Italy’s consumption tax on bananas, which were almost entirely imported, would push Italian consumers toward other, comparable fruits which most likely would not be subject to a consumption tax and also likely to be grown in Italy.\footnote{309 \cite{1987} ECR 2085, at ¶ 22.} However, the ECJ, in Gabriel Bergandi, was not concerned that the French tax law would force consumers into other forms of gaming activities that might support the French economy despite the fact that the French government’s chief argument for supporting the tax law was to deter consumers from using such machines on social grounds.\footnote{310 \cite{1988} ECR 1343, at ¶¶ 30, 31.} Given the force of the ECJ’s jurisprudential direction supporting a blanket ban on discriminatory internal taxation practices, it is likely that if the same facts were to find their way on the ECJ’s docket, the case would be decided differently despite the ECJ’s lack to duty to follow precedent. The danger to the common market lies in the possibility that the ECJ will allow member-states to push the limits of the economic and social purpose exception to Article 110 to disguise ways to use tax law to promote activities and products that support the member-state’s economy.

VI. CONCLUSION.

It is the great hope of the author that this work has provided assistance for readers who wish to know more about the European Union, generally, and learn more about Article 110’s bar against the use of internal taxation regimes to promote domestic products over non-domestic rivals. Although this work explored the general question of whether the ECJ is meeting the Framers’ intent to remove discriminatory taxation policies among member-states that might interfere with trade, it is just as important to look at the facts of each case to discern what member-states “can and can’t do” in regard to domestic law in the face of the TFEU.
Tension has long existed between the European Union and its member-state governments over the power to write tax policy.\(^\text{311}\) This work engaged in an in-depth examination of the pertinent cases that focused on Article 110’s prohibition on discriminatory internal taxation practices, along with other, related provisions of the TFEU, in an attempt to make clear the various issues that may arise when an aggrieved party challenges an act of a member-state alleging the member-state’s taxation system illegally discriminates against a foreign-produced product otherwise protected by the TFEU. Clearly, Article 110 of the TFEU as it limits the ability of a member-state to engage in discriminatory taxation practices, restrains a member-state’s autonomy for the sake of economic integration.\(^\text{312}\) However, if the goal of the Framers of the TFEU was to create a common market whereby member-states could not engage in domestic legal practices that interfere with the free movement of goods, the survey of this case law reflects a successful endeavor. The 28 member-states of the European Union are not able to discriminate against goods coming from other member-states by using internal taxation practices. With the exception of one case surveyed in this work, the ECJ steadfastly defended the Framers’ intent to promote the free movement of goods without interference from domestic protectionist-based law.

In order to attract foreign direct investment on a competitive basis, member-states are free to lower their corporate and individual tax rates but simply cannot engage in taxation practices that result in unequal treatment between domestically-produced goods and goods made elsewhere in the European Union. In theory, the member-states will attempt to drop tax rates to attract foreign direct investment until some point at which the member-state government suffers


a decline in overall revenue despite possible increases in revenue paid by firms enjoying high levels of production and sales. Perhaps an exception to this would be complete harmonization of tax law by the EU in statutory (i.e., regulations) form or by a later version of the TFEU. Such an exception would remove, at least in part, the ability of individual member-states to control their tax policies much akin to the forfeiture of monetary policy by the member-states that make up the Eurozone.\textsuperscript{313}

The reach of the ECJ is limited to the provisions of the TFEU. However, the power of interpretation of the TFEU should not be understated. Without the ECJ’s interpretation of Article 110 and related articles of the TFEU, the TFEU would remain stale and would not be able to further advance the cause of the EU’s common market philosophy mandating the free movement of goods without restrictions based on domestic law. The ECJ’s power of interpretation is likely to be the chief means of both harmonization and development of EU law, generally, and of tax law, specifically.

\textsuperscript{313} See generally, Harold James, Making the European Monetary Union (2012).