

Questionnaire for the 2004 EATLP Paris Congress

Fundamental freedoms and national sovereignty in the EU

General Reporter: Frans Vanistendael

1. The prohibitions of discrimination and of restriction have both been intended to achieve a fully integrated internal market in the European Union.

topic reporter: Axel Cordewener (München)

- a. Is there in your view a difference in the way in which the principle of non-discrimination operates and the way in which the principle of non-restriction operates?
- b. Is there in your view a difference in the way in which the basic economic freedoms should be tested: (i) some freedoms are tested on the basis of the non-discrimination principle and other freedoms on the basis of the non-restriction principle, or (ii) all freedoms are tested in the same way on the basis of both principles? If both principles apply, is there any order of priority in their application?
- c. Should there be a distinction in the application of the non-discrimination and the non-restriction principles between inbound and outbound transactions? If so, is this distinction compatible with the concept of a fully integrated market?

2. For the application of the non-restriction principle in areas other than taxation, the ECJ has made a distinction between (i) restrictions which block effective access to the market and/or are discriminatory, and (ii) 'internal selling arrangements' which do not discriminate (see, e.g., *Keck and Mithouard, Cases 267 & 268/91 [1993] ECR I-6097*)

topic reporter: Moris Lehner (München)

- a. Would it be possible for tax purposes to make a distinction in the application of the non-restriction principle between (i) rules that merely intend to regulate purely internal domestic tax situations, (ii) rules intended to regulate both internal domestic and cross-border tax situations and, finally, (iii) rules intended exclusively to regulate cross-border tax situations. Which approach is in your view necessary to establish a fully integrated market?
- b. Would it be possible for the application of the basic freedoms to make a distinction between the application to non-tax issues and the application to tax issues thereby setting the tax system apart, or should in your view the basic freedoms as a matter of principle apply without any distinction related to the subject matter? Would a distinction be compatible with a fully integrated market?

3. Justifications

topic reporter: Luc Hinnekens (Brussel)

- a. Which are the justifications that can be admitted under the non-discrimination rules? Are such justifications compatible with the concept of a fully integrated internal market?
- b. Which are justifications that can be admitted in the non-restriction approach? Are such justifications compatible with the concepts in a fully integrated market?
- c. In the non-restriction approach two categories of justification are accepted: specifically named items of public policy and limitations set by the rule of reason. In tax matters the need for adequate "fiscal supervision" has been mentioned as a ground for justification. What could be the impact of this suggested justification as an instrument to safeguard national tax systems?

4. Compatibility of "national tax principles of the Member States" with a fully integrated market

topic reporter: Malcolm Gammie (London)

- a. What are in your opinion with respect to market access and the conditions of free and non-discriminatory competition the standards of a fully integrated market as prescribed by the Treaties of the European Union?

- b. What is the exact extent of the territoriality principle that was briefly mentioned in the Futura Participation case as being compatible with the fully integrated market? In your view is this principle indeed compatible with such market?
- c. What is the exact impact of the holding of the ECJ that resident and non-resident taxpayers are not in a comparable situation on both non-discrimination and non-restriction principles? How does this holding of the ECJ compare with its decisions in similar situations in non-tax cases and is this compatible with the idea of a fully integrated market?
- d. Do you think that it would make a difference in the application of the basic economic freedom by the ECJ if the European legislature would be more successful in establishing European tax rules or if the national legislatures would respond to the challenges by the ECJ in a more coordinated way?
- e. Would in your opinion a wider application of qualified majority voting in tax matters help in establishing a balance between the fully integrated market and the legitimate national fiscal interests of the Member States?

5. Through the European Economic Area Treaty and bilateral treaties, the prohibition of discrimination and restriction also apply to several non-EU states such as Switzerland and Norway.
topic reporter: Xavier Oberson (Geneva)

To what extent have the freedoms of movement, as granted under the EC treaty and interpreted by the EC Court of Justice, and extended to third countries under the European Economic Area Treaty (e.g., Norway) or under bilateral agreements (such as Switzerland) influenced the domestic (tax) law of such third countries.

6. The accession of ten new EU member states as of 1 May 2004 means that the EU Treaty's freedom of movement provisions will from that date on also apply to these countries.
topic reporter: Daniel Deák (Budapest)

- a. To what extent are these new member states aware of the meaning and scope of these provisions with regard to taxation, as interpreted by the EC Court in a long range of decisions.
- b. To what extent are these new member states actively engaged in adjusting their tax laws to these provisions?